

ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 10-1392

WOLF RUN MINING COMPANY,

Petitioner,

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

and

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

Respondents.

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

BRIEF FOR THE SECRETARY OF LABOR

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CERTIFICATE AS TO PARTIES, RULINGS,
AND RELATED CASE

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

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

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

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GLOSSARY OF ABBREVIATIONS AND ACRONYMS

Br.	Brief for Wolf Run
Commission	Federal Mine Safety and Health Review Commission
J.A.	Joint Appendix
Judge	Administrative Law Judge
Mine Act or Act	Federal Mine Safety and Health Act of 1977
MSHA	Mine Safety and Health Administration
Secretary	Secretary of Labor
S&S	"Significant and substantial"
Wolf Run	Wolf Run Mining Company

STATEMENT OF JURISDICTION

The Secretary of Labor ("Secretary") is satisfied with the jurisdictional statement set forth in Wolf Run's brief relating to (1) the jurisdiction of the Federal Mine Safety and Health Review Commission ("Commission") and its administrative law judge below, and (2) the jurisdiction of this Court on appeal. Br. 1-2.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Court should treat the violation in this case as a violation of Section 314(b) of the Mine Act.
2. Whether a violation of Section 314(b) of the Mine Act is a violation of a mandatory standard and so can be designated "significant and substantial" ("S&S").

PERTINENT STATUTES AND REGULATIONS

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

STATEMENT OF THE CASE

A. Statutory and Regulatory Framework

The Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act") was enacted to improve and promote safety and health in the Nation's mines. 30 U.S.C. § 801. In enacting the Mine Act, Congress stated that "there is an urgent need to provide more effective means and measures for improving the working

conditions and practices in the Nation's * * * mines * * * in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines." 30 U.S.C. § 801(c). Titles II and III of the Act establish interim mandatory health and safety standards. In addition, Section 101(a) of the Act authorizes the Secretary to promulgate improved mandatory health and safety standards for the protection of life and prevention of injuries in coal and other mines. 30 U.S.C. § 811(a).

Under Section 103(a) of the Mine Act, inspectors from the Mine Safety and Health Administration ("MSHA"), acting on behalf of the Secretary, regularly inspect mines to assure compliance with the Act and with standards. 30 U.S.C. § 813(a). Section 104 of the Act provides for the issuance of citations and orders for violations of the Act or of standards. 30 U.S.C. § 814. Under Section 105(d) of the Act, a mine operator may contest a citation, order, or proposed civil penalty before the Commission, an independent adjudicatory agency established under the Act to provide trial-type administrative hearings and appellate review in cases arising under the Act. 30 U.S.C. § 815(d). See Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 204 (1994); Secretary of Labor v. National Cement Co. of California, Inc., 573 F.3d 788, 789 (D.C. Cir. 2009).

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

Designation of a violation as S&S is a precondition for certain enhanced enforcement actions under the Mine Act. For instance, those violations that are both S&S and caused by an "unwarrantable failure"¹ to comply will result in issuance of a Section 104(d)(1) citation, and subsequent unwarrantable failure violations will result in issuance of a Section 104(d)(1)

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

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

Under the Mine Act, only violations of "mandatory health or safety standards" may be designated S&S. 30 U.S.C. § 814(d); Cyprus Emerald Resources Corp. v. FMSHRC, 195 F.3d 42, 45-46 (D.C. Cir. 1999). Section 3(1) of the Act, 30 U.S.C. § 802(1), defines "mandatory health or safety standard" to mean both the interim mandatory health and safety standards established by Titles II and III of the Act and the improved health and safety standards promulgated pursuant to the notice-and-comment rulemaking requirements of Section 101 of the Act, 30 U.S.C. § 811. By the terms of Sections 201(a) and 301(a) of the Act, the interim mandatory health and safety standards set forth in

Titles II and III are applicable to all underground coal mines and are enforceable in the same manner and to the same extent as any mandatory safety standard promulgated under Section 101 until superseded by standards promulgated pursuant to Section 101. 30 U.S.C. §§ 841(a) and 861(a). More specifically, Section 301(a) of the Act states:

The provisions of sections 302 through 318 of this title shall be interim mandatory standards applicable to all underground coal mines until superseded in whole or in part by improved mandatory safety standards promulgated by the Secretary under the provisions of section 101 of th[e] Act, and shall be enforced in the same manner and to the same extent as any mandatory safety standard promulgated under section 101 of th[e] Act.

30 U.S.C. § 861(a). Compare 30 U.S.C. § 841(a) (parallel provision pertaining to interim mandatory health standards).

Section 314 of the Mine Act, 30 U.S.C. § 874, establishes interim mandatory safety standards governing underground coal mine transportation. Subsections (a) and (c) through (f) of Section 314 establish standards of general applicability related to transportation safety, such as standards governing hoists that transport men and equipment, locomotives, and haulage cars. 30 U.S.C. § 874. Subsection (b) of Section 314, the provision involved in this appeal, requires an operator to provide other safeguards that are, in the judgment of an authorized

representative of the Secretary, adequate to minimize transportation hazards at a mine. 30 U.S.C. § 874(b).

Subpart O of 30 C.F.R. Part 75 (30 C.F.R. §§ 75.1400 through 75.1438) sets forth the Secretary's mandatory standards pertaining to underground coal mine transportation. Most of Subpart O consists of mandatory standards of general applicability to all underground coal mines. See 30 C.F.R. §§ 75.1400 through 75.1402-2; 75.1404 through 75.1438.

Section 75.1403 of 30 C.F.R restates verbatim Section 314(b) of the Act, i.e., the requirement that an operator provide those other transportation safeguards that have been deemed adequate in the judgment of the Secretary's representative. Section 75.1403-1(b) further states:

The authorized representative of the Secretary shall in writing advise the operator of a specific safeguard which is required pursuant to § 75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided within the time fixed and if it is not maintained thereafter, a notice shall be issued to the operator pursuant to section 104 of the Act.

30 C.F.R. § 75.1403-1(b).

Sections 75.1403-2 through 75.1403-11 of 30 C.F.R. establish the "criteria by which an authorized representative of the Secretary will be guided in requiring other safeguards on a mine-by-mine basis under 75.1403." 30 C.F.R. § 75.1403-1(a).

These criteria are not exhaustive, and "[o]ther safeguards may be required." Ibid.

B. Facts and Procedural History

The Secretary issued the citation involved in this appeal, Citation No. 6606199, on January 23, 2008, pursuant to Section 104(a) of the Mine Act, 30 U.S.C. § 814(a). The citation alleged an S&S violation of 30 C.F.R. § 75.1403-5(j),² one of the safeguard criteria set forth in 30 C.F.R. §§ 75.1403-2 through 75.1403-11. J.A. 5. The citation alleged that Wolf Run failed to provide a suitable crossing facility where miners were required to cross a conveyor belt, as required in a previously-issued notice to provide a safeguard. J.A. 5.³ The inspector who issued the citation stated that the bottom of the conveyor belt was twenty-four inches above the mine floor and that there was evidence that miners had been crossing under the moving conveyor belt at the cited location. Ibid.⁴

2 The criterion states: "Persons should not cross moving belt conveyors, except where suitable crossing facilities are provided." 30 C.F.R. § 75.1403-5(j).

3 The safeguard notice, Safeguard No. 7095089, was issued on June 27, 2000, and required that all conveyor belts at the mine "be provided with suitable crossing facilities where persons are required to cross over or under moving conveyor belts." J.A. 7.

4 The citation was terminated when Wolf Run installed an aluminum crossover at the cited location. J.A. 6; 31 FMSHRC 306, 308 (2009), J.A. 29; Joint Motion for Final Decision at 3, Addendum at A-18.

On October 30, 2008, the Secretary filed a motion to modify and amend the citation to allege a violation of Section 314(b) of the Mine Act and its verbatim restatement at 30 C.F.R. § 75.1403, rather than a violation of the safeguard criterion at 75.1403-5(j), on the ground that those provisions are the actual requirements violated when an operator fails to provide a safeguard specified in a safeguard notice. J.A. 8-9. See J.A. 5. On November 24, 2008, Wolf Run filed both an opposition to the Secretary's motion to amend and a motion for partial summary decision with respect to S&S findings. J.A. 11-17. In its motion for partial summary decision, Wolf Run argued that neither 30 C.F.R. § 75.1403-5(j) nor the underlying safeguard notice constituted a "standard" within the meaning of Section 104(d)(1) of the Act and that, as a result, the cited violation could not be designated S&S. On December 12, 2008, the Secretary filed a response to Wolf Run's motion for partial summary decision.

C. The Decision of the Administrative Law Judge

On December 18, 2008, the judge denied Wolf Run's motion for partial summary decision. 30 FMSHRC 1198-1205, J.A. 18-25.⁵ Noting that a violation of a "mandatory standard" is "a

⁵ The judge also denied the Secretary's motion to amend as "moot." 30 FMSHRC 1198; J.A. 18.

condition precedent for the assignment of an S&S designation," the judge held that the violation in this case could be designated S&S because Section 314(b) of the Act is a "mandatory safety standard" within the meaning of Section 104(d)(1) of the Act. 30 FMSHRC 1200, 1204, J.A. 20, 24. The judge observed that Section 3(1) of the Act, 30 U.S.C. § 802(1), defines "mandatory health or safety standard" as "the interim mandatory health or safety standards established by titles II and III of [the] Act, and the standards promulgated pursuant to title I of [the] Act." 30 FMSHRC 1201, J.A. 21. He then observed that Section 301(a) of the Act, 30 U.S.C. § 861(a), states:

The provisions of sections 302 through 318 of [title III] shall be interim mandatory safety standards applicable to all underground coal mines until superseded in whole or in part by improved mandatory safety standards promulgated by the Secretary under the provisions of title I of th[e] Act, and shall be enforced in the same manner and to the same extent as any mandatory safety standard promulgated under section 101 of th[e] Act.

30 FMSHRC 1202, J.A. 22 (emphases by the judge). The judge found that the language of Section 301(a) is "unambiguous" and includes Section 314(b) as an "interim mandatory safety standard." Ibid. The judge found that there was no basis, either in the Act or in the case law, to support Wolf Run's

argument that Section 314(b) is not an "interim mandatory safety standard." 30 FMSHRC 1203-04, J.A. 23-24.

On February 18, 2009, the parties filed a joint motion for a final decision in order to obtain an appealable final order. Joint Motion for Final Decision, Addendum at A-15. With respect to the citation at issue, the parties stipulated that "a violation of 30 C.F.R. [§] 75.1403 occurred" and that the facts were sufficient to establish that the violation was S&S. More specifically, the parties stipulated that the violation was reasonably likely to contribute to a "lost work days or restricted duty" injury to a miner. Joint Motion for Final Decision at 3, Addendum at A-18; 32 FMSHRC 1228, 1230 (2010), J.A. 35. On February 26, 2009, the judge granted the joint motion for a final decision and found that the violation was S&S. 31 FMSHRC 306-10, J.A. 27-31. The judge reiterated that "it is appropriate to designate safeguard violations as significant and substantial" and found that "it is reasonably likely that the hazard posed by crawling under, or climbing over, a moving beltline will result in an accident causing serious injury." Id. at 309, J.A. 30. On March 25, 2009, Wolf Run appealed the judge's final decision to the Commission.

D. The Decision of the Commission

On October 21, 2010, by a two-to-one majority, the Commission affirmed the judge's holding that a violation of Section 314(b) of the Mine Act is a violation of a mandatory safety standard and so can be designated S&S. 32 FMSHRC 1228, 1231-36, J.A. 36-41. Starting with the principle that "a violation can be designated as S&S only if it is a violation of a 'mandatory health or safety standard,'" the majority found that the plain meaning of the relevant provisions of the Act unambiguously establish that violations of safeguard notices are violations of mandatory standards and so can be designated S&S. 32 FMSHRC 1232-33, J.A. 37-38.

The Commission majority looked to Sections 3(1) and 301(a) of the Mine Act to determine what constitutes a "mandatory standard." First, the majority observed that Section 3(1) defines "mandatory health or safety standard" as "the interim mandatory health or safety standards[] established by titles II and III of th[e] Act, and the standards promulgated pursuant to title I of th[e] Act." 32 FMSHRC 1232 (quoting 30 U.S.C. § 802(1)), J.A. 37. Second, the majority observed that Section 301(a) provides in pertinent part:

The provisions of sections 302 through 318 of [title III] shall be interim mandatory safety standards applicable to all underground coal mines until superseded in whole

or in part by improved mandatory safety standards promulgated by the Secretary under the provisions of title I of th[e] Act, and shall be enforced in the same manner and to the same extent as any mandatory safety standard promulgated under section 101 of th[e] Act.

Ibid. (quoting 30 U.S.C. § 861(a)). From these provisions, the majority deduced that Sections 302 through 318 of Title III must be "enforced as mandatory standards." 32 FMSHRC 1232, J.A. 37. Because Section 314(b) falls squarely within Sections 302 through 318 of Title III, the majority concluded that it is a mandatory standard, the violation of which can be designated S&S. 32 FMSHRC 1233, J.A. 38.⁶

The Commission majority then addressed the question of whether the violation of a safeguard notice issued by an MSHA inspector "constitutes a violation of Section 314(b) and thus is a violation of a mandatory safety standard." 32 FMSHRC 1233, J.A. 38. The majority held that a safeguard notice -- such as the one issued in this case -- is merely the mechanism by which the Secretary notifies an operator of what she has determined to

⁶ In light of this conclusion, the Commission majority rejected Wolf Run's argument that safeguard notices do not qualify as mandatory standards because they are not promulgated through notice-and-comment rulemaking pursuant to Section 101 of the Mine Act. The majority held that "the Act does not require mandatory standards to be promulgated pursuant to notice-and-comment rulemaking but only to fall within the statutory definition set forth in section 3(1)." 32 FMSHRC 1235-36, J.A. 40-41.

be the minimum requirement necessary to constitute "an 'adequate' safeguard for the particular situation involved." Ibid., J.A. 38. Because Section 314(b) sets forth the requirement that an operator provide those other transportation safeguards that have been deemed adequate in the judgment of the Secretary's representative, the majority concluded that an operator's failure to comply with a safeguard notice issued by an MSHA inspector "is necessarily a failure to comply with section 314(b) and therefore a violation of a mandatory standard." Ibid., J.A. 38.⁷

In support of its holding, the Commission majority analogized mine-specific safeguard notices to mine-specific provisions of a mine's roof control and ventilation plans, both of which are enforceable as mandatory standards under prior decisions of this Court. 32 FMSHRC 1233, J.A. 38 (citing UMWA, Intern. Union v. Dole, 870 F.2d 662, 667 n.7 (D.C. Cir. 1989), and Zeigler Coal Co. v. Kleppe, 536 F.2d 398, 409 (D.C. Cir. 1976)). The majority noted that both compliance with safeguard

⁷ In light of this holding, the Commission majority found it unnecessary to address the Secretary's renewed motion to amend the citation. 32 FMSHRC at 1233 n.7; J.A. 38 n.7. The majority stated: "[I]t is irrelevant whether the citation in a given case alleges the violation of the safeguard notice itself or a violation of section 314(b) and 30 C.F.R. § 75.1403. In either event, the basic allegation is that the operator has failed to comply with its obligation under section 314(b) to provide an adequate safeguard." 32 FMSHRC at 1233, J.A. 38.

notices and compliance with mine plan provisions are mandated by provisions that are designated "mandatory standards" under the Mine Act. 32 FMSHRC 1234, J.A. 39.

The Commission majority distinguished the primary case upon which Wolf Run relied, Cyprus Emerald, 195 F.3d 42, from this case by observing that, unlike the safeguard provision at issue here, the provision at issue in that case was neither a standard promulgated pursuant to Section 101 of the Act nor an interim mandatory standard established by Titles II or III of the Act, and so did not meet the statutory definition of "mandatory health or safety standard." 32 FMSHRC 1235, J.A. 40. The majority also repudiated as both dicta and incorrect a statement from the Commission's subsequently-reversed majority decision in Cyprus Emerald Resources Corp., 20 FMSHRC 790, 808-09 (1998), which suggested that safeguard notices do not meet the statutory definition of "mandatory health and safety standard." 32 FMSHRC 1235, J.A. 40.

The Commission majority rejected Wolf Run's argument that Section 314(b) is merely a "general grant of authority" to the Secretary and "places no specific obligations upon an operator." The majority noted that the passive voice language of Section 314(b) was similar to the language of all of the subsequent subsections of Section 314, i.e., Sections 314(c)-314(f), in

that respect. The majority concluded that the language of all of the subsections of Section 314 "clearly imposes a requirement upon operators." 32 FMSHRC 1234-35, J.A. 39-40. The majority stated:

The fact that Congress chose to give MSHA inspectors an express role in ensuring that section 314(b) is implemented does not in any way change the overall requirement set forth in section 314(b) that operators must provide "adequate" safeguards regarding the "transportation of men and materials."

32 FMSHRC 1235, n.9, J.A. 40, n.9 (emphasis in original).

Finally, the Commission majority held in the alternative that even if the language of the provisions of the Mine Act did not plainly resolve the legal issue presented, and instead created ambiguity regarding the issue, the Secretary's interpretation of those provisions was a reasonable interpretation entitled to deference. 32 FMSHRC 1236-37, J.A. 41-42 (citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984); National Cement, 573 F.3d at 792-97).

One Commissioner dissented, setting forth the view that Section 314(b) is not a mandatory standard because, under his characterization of that provision, it merely delegates authority to individual mine inspectors to issue notices to provide safeguards and provides neither "binding norms nor

adequate notice to mine operators as to what conduct is expected of them." 32 FMSHRC 1239, J.A. 44. The dissenter distinguished safeguard notices from mine plan provisions, finding that the safeguard procedures create a higher "potential for arbitrariness." Id. at 1240-41, J.A. 45-46. Finally, the dissenter opined that, because many safeguards seem to apply to the conditions found at multiple mines and "read suspiciously like actual mandatory safety standards set forth in 30 C.F.R. Parts 77, 56, and 57," the Secretary should have gone through notice-and-comment rulemaking to promulgate additional mandatory standards of general applicability pertaining to underground coal mine transportation instead of relying on mine-specific safeguard notices. Id. at 1242, J.A. 47.

SUMMARY OF ARGUMENT

This case involves an MSHA citation alleging an S&S violation consisting of Wolf Run's failure to provide a safeguard by failing to provide a suitable crossing facility where miners were required to cross a conveyor belt. MSHA had previously issued Wolf Run a safeguard notice requiring the operator to provide such facilities where miners were required to cross conveyor belts. The primary issue before the Court on appeal is whether a a violation consisting of failure to provide

a required safeguard can be designated S&S, a matter of statutory construction.

As a preliminary matter, the Court should hold, as did the Commission majority below, that an operator's failure to provide a safeguard specified in a safeguard notice is a violation of Section 314(b) of the Mine Act, regardless of how the violation is referenced in the citation. The essence of a citation alleging a safeguard violation is an allegation that the operator failed to provide a safeguard as mandated by Section 314(b) of the Act, an interim mandatory safety standard enacted by Congress.

If the Court declines to adopt such an approach, the Court should amend the citation to allege a violation of Section 314(b) of the Mine Act, something the Secretary requested of the judge and the Commission. Such amendment will not prejudice Wolf Run in any manner.

The Court should then hold that Section 314(b) is a mandatory safety standard, the violation of which can be designated S&S. Sections 3(1) and 301(a) of the Mine Act plainly state Congress' intent that the provisions set forth in Titles II and III of the Act are interim mandatory health and safety standards and are to be enforced in the same manner and to the same extent as mandatory health and safety standards

promulgated by the Secretary pursuant to Section 101 of the Act. Section 314(b) is a provision set forth in Title III of the Act.

Holding Section 314(b) to be a mandatory standard is fully consistent with the Court's previous holding in Cyprus Emerald, 195 F.3d 42. That case merely establishes that only a violation of a mandatory standard can be designated S&S. Section 314(b) is a mandatory standard because it is found among the interim mandatory safety standards established in Title III of the Act.

Holding Section 314(b) to be a mandatory standard is also fully consistent with the case law holding that violations of mine-specific roof control and ventilation plans required by mandatory standards can be designated S&S; like such plans, safeguard notices are mine-specific. This is especially so because, unlike with mine-specific plans, the Commission has determined that safeguard notices must be narrowly construed in favor of the operator, and that the operator may contest both the citation and the underlying safeguard notice after being cited for failure to provide the safeguard specified in the safeguard notice.

ARGUMENT

I

THE COURT SHOULD TREAT THE VIOLATION IN THIS CASE AS A VIOLATION OF SECTION 314(b) OF THE MINE ACT

A. Standard of Review and Applicable Legal Principles

This case presents a question of statutory interpretation in the administrative context. The Court decides legal questions under a de novo standard of review. Secretary of Labor v. Keystone Coal Mining Corp., 151 F.3d 1096, 1099 (D.C. Cir. 1998).

If the meaning of the statute is plain and unambiguous, the Court must "'give effect to the unambiguously expressed intent of Congress.'" Secretary of Labor v. Excel Mining, LLC, 334 F.3d 1, 6 (D.C. Cir. 2003); Secretary of Labor on behalf of Bushnell v. Cannelton Industries, Inc., 867 F.2d 1432, 1435 (D.C. Cir. 1989) (quoting Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984)). If the statute is silent or ambiguous with respect to the question presented, the Secretary's interpretation of the provision is owed full deference and is entitled to affirmance as long as it is reasonable. Cannelton, 867 F.2d at 1435. Accord National Cement, 573 F.3d at 792; Excel Mining, 334 F.3d at 5. When the Commission agrees with and has ratified the Secretary's interpretation of a statutory provision, that interpretation

should be emphatically deferred to. Indeed, the Commission's interpretations of the Mine Act are generally upheld when they accord with the Secretary's interpretations. RAG Cumberland Resources v. FMSHRC, 272 F.3d 590, 596 (D.C. Cir. 2001); Energy West Mining Co. v. FMSHRC, 111 F.3d 900, 903 (D.C. Cir. 1997); Simpson v. FMSHRC, 842 F.2d 453, 458 (D.C. Cir. 1988). "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 Co., 573 F.3d at 792.

In determining whether the meaning of a statutory provision is plain and unambiguous, courts use all the traditional tools of statutory construction. Arizona Public Service Co. v. EPA, 211 F.3d 1280, 1288 (D.C. Cir. 2000), cert. denied, 532 U.S. 970 (2001); Bell Atlantic Telephone Cos. v. FCC, 131 F.3d 1044, 1047 (D.C. Cir. 1997). Those tools include the statutory text, the legislative history, the overall structure and design of the statute, and the purpose of the provision in question. Arizona Public Service, 211 F.3d at 1288; Bell Atlantic, 131 F.3d

at 1047. See also City of Tacoma, Washington v. FERC, 331 F.3d 106, 114 (D.C. Cir. 2003), and Halverson v. Slater, 129 F.3d 180, 184 (D.C. Cir. 1997). "[I]t is beyond cavil that the first step in any statutory analysis, and [the Court's] primary interpretive tool, is the language of the statute itself." American Civil Liberties Union v. FCC, 823 F.2d 1554, 1568 (D.C. Cir. 1987). See also Cyprus Emerald, 195 F.3d at 45.

B. A Failure to Provide a Safeguard Specified In a Safeguard Notice Is a Violation of Section 314(b) of the Mine Act

Before the judge and the Commission, the Secretary requested that the citation alleging a violation consisting of Wolf Run's failure to provide the safeguard specified in the safeguard notice in this case (J.A. 5) be amended to allege a violation of Section 314(b) of the Mine Act and its verbatim restatement at 30 C.F.R. § 75.1403, rather than a violation of the safeguard criterion at 30 C.F.R. § 75.1403-5(j). J.A. 8. See 30 FMSHRC 3099, J.A. 19; 32 FMSHRC 1233 n.7, J.A. 38 n.7. The judge and the Commission majority found it unnecessary to do so. 30 FMSHRC 1199, J.A. 19; 32 FMSHRC 1233, J.A. 38. The Commission majority reasoned:

The Secretary, in implementing section 314(b), chose to use the mechanism of a safeguard notice to inform the operator what she determined constitutes an "adequate" safeguard for the particular situation involved. 30 C.F.R. § 75.1403-1.

Accordingly, an operator's failure to comply with a safeguard notice by an MSHA inspector is necessarily a failure to comply with section 314(b) and therefore is a violation of a mandatory safety standard. As a result, it is irrelevant whether the citation in a given case alleges the violation of the safeguard notice itself or a violation of section 314(b) and 30 C.F.R. § 75.1403. In either event, the basic allegation is that the operator failed to comply with its obligation under section 314(b) to provide an adequate safeguard.

32 FMSHRC 1233 (footnote omitted), J.A. 38. This Court should adopt the Commission majority's common-sense approach and treat the violation in this case as a violation of Section 314(b) of the Mine Act.

On appeal, Wolf Run raises no objection to treating its cited failure to provide the safeguard as a violation of Section 314(b) or its verbatim restatement at 30 C.F.R. § 75.1403. Indeed, in its opposition to the Secretary's request to amend the citation, Wolf Run acknowledged: "Whether the citation lists Section 75.1403-5(j) or Section 75.1403 is immaterial." Opposition at 3, J.A. 13. In addition, in the parties' joint motion for a final decision, Wolf Run stipulated that "a violation of 75.1403 occurred[.]" Joint Motion for Final Decision at 3, Addendum at A-18.

If the Court declines to adopt the Commission majority's approach, it should amend the citation to allege a violation of

Section 314(b). One of the grounds for amending pleadings is that amendment is necessary to cite the most appropriate statutory or regulatory provision. See, e.g., Bowman v. City of Middletown, 91 F.Supp.2d 644, 663 (S.D.N.Y. 2000); Agugliaro v. Brooks Bros., Inc., 802 F.Supp. 956, 961 (S.D. N.Y. 1992); Faith Coal Co., 19 FMSHRC 1357, 1361-62 (1997); Wyoming Fuel Co., 14 FMSHRC 1282, 1289-90 (1992). In this case, it is most appropriate to cite Section 314(b) of the Mine Act. Section 104(a) of the Act, 30 U.S.C. § 814(a), states that an authorized representative of the Secretary is to issue a citation when he believes that an operator "has violated [the] Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to [the] Act[]" (emphasis supplied). Citing a safeguard violation as a violation of Section 314(b) of the Act is most appropriate for two reasons: (1) because Section 314(b) is part of "[the] Act," and (2) because an operator who fails to provide a safeguard specified in a safeguard notice "violate[s]" Section 314(b).

Wolf Run will suffer no prejudice if the citation is amended to allege a violation of Section 314(b); Wolf Run has acknowledged that: "[w]hether the citation lists Section 75.1403-5(j) or Section 75.1403 is immaterial," (Opposition

at 3, J.A. 13), and has stipulated that "a violation of 75.1403 occurred[.]" Joint Motion for Final Decision at 3, Addendum at A-18. On the contrary, amending the citation to allege a violation of Section 314(b) may facilitate resolution of the important legal question both parties seek to have resolved: whether a violation of Section 314(b) is a violation of a mandatory standard and so can be designated S&S.

II

A VIOLATION OF SECTION 314(b) OF THE MINE ACT
IS A VIOLATION OF A MANDATORY STANDARD
AND SO CAN BE DESIGNATED S&S

Section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), states that a violation of "any mandatory health or safety standard" shall be designated S&S if it is of such nature as could significantly and substantially contribute to the cause and effect of a health or safety hazard. In Cyprus Emerald, 195 F.3d at 45-46, this Court held that the meaning of Section 104(d)(1) is plain: a violation can be designated S&S only if it is a violation of a "mandatory health or safety standard." Accordingly, the question in this case is whether Section 314(b) of the Mine Act constitutes a "mandatory safety standard."

Section 3(1) of the Mine Act, 30 U.S.C. § 802(1), defines "mandatory health or safety standard" as "the interim mandatory health or safety standards established by titles II and III of

[the] Act, and the standards promulgated pursuant to title I of [the] Act." Section 301(a) of the Act, 30 U.S.C. § 861(a), states:

The provisions of sections 302 through 318 of [title III] shall be interim mandatory safety standards applicable to all underground coal mines until superseded in whole or in part by improved mandatory safety standards promulgated by the Secretary under the provisions of title I of th[e] Act, and shall be enforced in the same manner and to the same extent as any mandatory safety standard promulgated under section 101 of th[e] Act.

(Emphases supplied). The language of Section 301(a) is "'inescapable'" (Cyprus Emerald, 195 F.3d at 45 (quoting 20 FMSHRC 790, 826-27 n.1 (1998) (Commissioners Riley and Verheggen, dissenting)): Section 314(b) is, and is to be enforced as, a "mandatory safety standard." See NMA v. Secretary of Labor, 153 F.3d 1264, 1267-68 (11th Cir. 1998) (reading Section 201(a) of the Act, 30 U.S.C. § 841(a), which relates to mandatory health standards and the language of which is in all relevant respects identical to the language of Section 301(a), to mean that Section 202(f), 30 U.S.C. § 842(f), is a "mandatory health standard"); Dole, 870 F.2d at 668-69 (stressing that Section 302(a) of the Act, 30 U.S.C. § 862(a), is an "interim mandatory standard").

The plain meaning of Section 301(a)'s language, which is sufficient by itself to resolve the question presented, is underscored by the fact that Section 314(b) appears under the heading "Title III -- Interim Mandatory Safety Standards for Underground Coal Mines" and is placed in the midst of provisions that are self-evidently "mandatory safety standards." United States v. Locke, 529 U.S. 89, 105-06 (2000) (relying on title and placement as aid in determining meaning).

Seeking to side-step Section 301(a)'s "inescapable" command that Section 302 through 318 of Title III are mandatory standards and are enforceable as such, Wolf Run asserts that "Section 301(a) * * * has no application in this case." Br. 23. This is so, Wolf Run asserts, because Section 314(b) does not specify in its text the exact safeguards that are required to be provided by an operator; rather, those safeguards are specified through issuance of mine-specific notices to provide safeguards based on the conditions at a particular mine. See Br. 22-23. In other words, the gist of Wolf Run's argument is that the specific safeguards to be provided at a particular mine are not set forth in Section 314(b). From that fact, Wolf Run leaps to the conclusion that "citations involving safeguards allege violations of the underlying safeguard [notice] and not any statutory or regulatory provision." Br. 23.

Wolf Run's leap of logic fails. Although it is true that Section 314(b) is implemented when a safeguard notice is issued to an operator based on the conditions found at a particular mine, it does not follow that it is the safeguard notice, and only the safeguard notice (see Br. 16-18), that is violated when the safeguard specified in the notice is not provided. To the contrary, when a mine operator fails to provide a safeguard required by the Secretary's representative, it violates Section 314(b) under the plain terms of that provision:

Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.

30 U.S.C. § 874(b) (emphases supplied). As the Commission majority explained, "an operator's failure to comply with a safeguard notice issued by an MSHA inspector is necessarily a failure to comply with Section 314(b) and therefore is a violation of a mandatory standard." 32 FMSHRC 1233, J.A. 38. Section 314(b) places the affirmative duty on an operator to provide all required safeguards, and violations of that duty may be designated S&S because Section 314(b) is a mandatory standard.

Enforcing Section 314(b) as a mandatory standard is also consistent with the prior decisions of this Court in Dole,

870 F.2d 662, and Zeigler Coal, 536 F.2d 398. Those decisions involved the question of whether mine-specific provisions contained in roof control and ventilation plans were enforceable as mandatory standards where adoption of those plans was required by the interim mandatory standards found in Title III. See Section 302(a), 30 U.S.C. § 862(a) (roof control); Section 303(o), 30 U.S.C. § 863(o) (ventilation).⁸ Those mine-specific provisions are not set forth anywhere in Title III; nor could they be, because, like mine-specific safeguard notices, they are based on and responsive to specific conditions at particular mines. Even so, this Court concluded that the term "'mandatory standard' can reasonably be read to include provisions of plans whose adoption is explicitly required under an existing mandatory standard." Zeigler, 536 F.2d at 409. See also Dole, 870 F.2d at 667 (confirming that mine-specific plan provisions are "'enforceable as if they were mandatory standards'").

Wolf Run fails to even mention either Dole or Zeigler on appeal, even though the Commission majority relied on both Court decisions (see 32 FMSHRC 1233-34, J.A. 38-39) and both Court

⁸ The Zeigler decision arose under the 1969 Federal Coal Mine Safety Act, but interpreted provisions that are identical to their counterparts in the 1977 Mine Act. Compare 30 U.S.C. § 802(1) (1970) (definition of "mandatory safety and health standard") with 30 U.S.C. § 802(1) (1977) and 30 U.S.C. § 863(o) (1970) (roof plan requirement) with 30 U.S.C. § 863(o) (1977).

decisions directly undermine Wolf Run's argument that Section 314(b) may not be enforced as a mandatory standard simply because the mine-specific transportation safeguards are not set forth in the text of Section 314(b). Instead, Wolf Run repeatedly invokes this Court's decision in Cyprus Emerald. Br. 24-30. Although that decision holds that only violations of mandatory standards may be designated S&S, it otherwise has no bearing here. The question in Cyprus Emerald was whether the Secretary's regulation at 30 C.F.R. § 50.11 was a "mandatory safety standard." 195 F.3d at 43-46. Because that regulation was promulgated under the Mine Act's general rulemaking provision, Section 508 of the Act, 30 U.S.C. § 957, rather than under the notice-and-comment procedures of Section 101, the Court concluded that it was not a mandatory standard. 195 F.3d at 44. Because 30 C.F.R. § 50.11 was also not found in Titles II or III of the Act, it was neither a promulgated mandatory standard nor an interim mandatory standard. By contrast, Section 314(b) is an "interim mandatory standard" found in Title III. That conclusion, like the Court's conclusion in Cyprus Emerald, inexorably flows from the "inescapable" language of the statute. Cyprus Emerald, 195 F.3d at 45.

Wolf Run's extensive reliance on a statement in the Commission's subsequently-overturned decision in Cyprus Emerald

is similarly misguided. Br. 15, 17 n.6, 21, 22, 27 n.10, 29. In a footnote in that decision, the Commission majority in that case opined that "a safeguard, because it is not issued pursuant to the procedures set forth in Section 101(a) of the Mine Act, does not meet the statutory definition of a mandatory health or safety standard." 20 FMSHRC 790, 808 n.22 (1998). That statement has no precedential value because, as the Commission majority in the present case recognized, the Commission majority's statement in Cyprus Emerald was both dicta and incorrect. 32 FMSHRC 1235, J.A. at 40 ("The precise issue of whether a safeguard notice is a mandatory safety standard was not before the Commission, was not fully briefed by the parties, and has never been squarely addressed by the Commission"); 32 FMSHRC 1235 n.10, J.A. 40 n.10 ("The majority did not address the possibility that a safeguard notice could be a mandatory health or safety standard because it is established by Title III of the Act"). Contrary to Wolf Run's assertion that the Commission in the present case "ignored the majority statement in Cyprus Emerald" (Br. 27 n. 10), the Commission here expressly revisited the language on which Wolf Run relies and properly repudiated it as incorrect dicta. 32 FMSHRC 1235, J.A. 40.⁹

9 Wolf Run's assertion that the Commission majority "rejected" this Court's holding in Cyprus Emerald or somehow treated it as dicta is also incorrect. Br. 9, 27, 29. To the

Finally, Wolf Run argues that safeguards cannot be enforced as mandatory standards because safeguard notices are issued by representatives of the Secretary without operators being afforded the type of pre-enforcement opportunity for notice-and-comment provided in the context of the promulgation of improved mandatory safety standards under Section 101 of the Mine Act. Br. 18-21. This argument fails for two reasons.

First, as discussed above, Congress made the legislative choice to provide for mine-specific regulation of underground coal mine transportation, just as it did with roof control and ventilation. Dole, 870 F.2d 667 n.7 (citing S. Rep. No. 95-181, 95th Cong., 1st Sess. 25 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 613 (1978)); Southern Ohio Coal Co. ("SOCCO II"), 14 FMSHRC 1, 9 (1992) (finding the "flexible" use of mine-specific safeguard notices to "maximize transportation safety" to be "well founded in the statute"). By using the phrase "in the judgment of an authorized representative of the

contrary, the majority gave full effect to this Court's holding that only violations of mandatory standards can be designated S&S. The majority then went on to find that this Court's plain language approach in Cyprus Emerald "compels the conclusion" that violations of Section 314(b) may be designated as S&S because Section 314(b) is among the interim mandatory standards of Title III. 32 FMSHRC at 1235, J.A. 40.

Secretary" in Section 314(b), Congress indicated its intent that transportation safeguards be based on a mine inspector's knowledge of the specific hazards at a particular mine.

30 U.S.C. § 874(b); SOCCO II, 14 FMSHRC 9. Requiring notice-and-comment rulemaking each time the Secretary determines the need for a specific safeguard at a particular mine exists -- as Wolf Run suggests would be necessary before Section 314(b) violations could be designated S&S -- would frustrate Congress' express intent that the interim mandatory safety standards be enforceable "in the same manner and to the same extent" as formally promulgated standards of general application.

30 U.S.C. § 861(a).

Wolf Run points to no indication, and there is no indication, that Congress thought notice-and-comment rulemaking was required to make a requirement a standard or to make a violation of a requirement S&S. Wolf Run simply fails to accept that the Mine Act does not require all mandatory standards to be promulgated pursuant to Section 101; interim mandatory standards in Title II and III also are mandatory standards under the statutory definition of the term in Section 3(1), 30 U.S.C. § 802(1). Whether a requirement went through rulemaking is not, and never has been, the complete test of whether it is a mandatory standard.

Second, and in any event, in light of the unique nature of safeguard notices, the Commission long ago established special rules governing how safeguard notices may be issued and interpreted. Those rules eliminate the notice and arbitrariness concerns raised by Wolf Run because they cabin the Secretary's authority and ensure adequate notice to the operator of its obligations when a safeguard notice is issued. Thus, to be enforceable, a safeguard notice "must identify with specificity the nature of the hazard at which it is directed and the conduct required of the operator to remedy such hazard." Southern Ohio Coal Co. ("SOCCO I"), 7 FMSHRC 509, 512 (1985). Similarly, the intended reach of a safeguard notice must be "narrowly construed" in favor of the operator. Ibid. Finally, in order to prevent the Secretary from circumventing rulemaking by uniformly imposing safeguard notices on every operator, an inspector may only issue a safeguard notice "based on his evaluation of the specific conditions at a particular mine and on his determination that such conditions create a transportation hazard in need of correction." SOCCO II, 14 FMSHRC 11-12 (emphases in original).

In short, after being cited for failure to provide a specified safeguard, an operator may challenge the underlying safeguard notice as violative of the special rules regarding

safeguard notices established by the Commission and/or challenge the applicability of the safeguard notice to the facts that precipitated the issuance of the citation. Wolf Run's concerns are appropriately addressed by applying the foregoing rules -- not by carving out an exception to the statutory language that "nowhere appears in the words Congress chose and that, in fact, directly contradicts the unrestricted character of those words." Hercules Inc. v. EPA, 938 F.2d 276, 280 (D.C. Cir. 1991). See Beverly Health & Rehabilitation Services, Inc. v. NLRB, 317 F.3d 316, 321 (D.C. Cir. 2003) (the meaning of the statutory language "could not be plainer or the Congress' intent in enacting it clearer").

For the reasons set forth above, the Court should affirm the Secretary's plain meaning reading of the statute without regard to deference because it conforms to the "'unambiguously expressed intent'" of Congress that Section 314(b) is a mandatory standard. Excel Mining, LLC, 334 F.3d at 6; Cannelton, 867 F.2d at 1435. If the Court finds that the statute is ambiguous on the question presented, the Secretary's interpretation should be affirmed because, as the Commission majority held (32 FMSHRC 1236-37, J.A. 41-42), it is eminently "reasonable." See National Cement, 573 F.3d at 792; Excel

Mining, 334 F.3d at 5; RAG Cumberland, 272 F.3d at 596; Energy West, 111 F.3d at 903.

CONCLUSION

For the reasons set forth above, the Court should (1) treat the violation in this case as a violation of Section 314(b) of the Mine Act, (2) hold that, under the unambiguous terms of Sections 3(1) and 301(a) of the Mine Act, Section 314(b) is a mandatory safety standard and violations of Section 314(b) can be designated S&S, and (3) affirm the Commission majority's decision below.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B), (C), D.C. Cir. Rules 28(c) and 32(a)(1), I certify that this Brief for the Secretary of Labor contains 7,589 words as determined by Word, the processing system used to prepare the brief.

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ADDENDUM

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Section 3(1), 30 U.S.C. § 802(1)

Title 30. Mineral Lands and Mining
Chapter 22. Mine Safety and Health (Refs & Annos)
→ § 802. Definitions

For the purpose of this chapter, the term--

(1) “mandatory health or safety standard” means the interim mandatory health or safety standards established by subchapters II and III of this chapter, and the standards promulgated pursuant to subchapter I of this chapter;

Section 104, 30 U.S.C. § 814

Title 30. Mineral Lands and Mining
Chapter 22. Mine Safety and Health (Refs & Annos)
Subchapter I. General (Refs & Annos)
→ § 814. Citations and orders

(a) Issuance and form of citations; prompt issuance

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this chapter has violated this chapter, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this chapter, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the chapter, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this chapter.

(b) Follow-up inspections; findings

If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) of this section has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(c) Exempt persons

The following persons shall not be required to be withdrawn from, or prohibited from entering, any area of the coal or other mine subject to an order issued under this section:

- (1) any person whose presence in such area is necessary, in the judgment of the operator or an authorized representative of the Secretary, to eliminate the condition described in the order;
- (2) any public official whose official duties require him to enter such area;

(3) any representative of the miners in such mine who is, in the judgment of the operator or an authorized representative of the Secretary, qualified to make such mine examinations or who is accompanied by such a person and whose presence in such area is necessary for the investigation of the conditions described in the order; and

(4) any consultant to any of the foregoing.

(d) Findings of violations; withdrawal order

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

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

(e) Pattern of violations; abatement; termination of pattern

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

persons referred to in subsection (c) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

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

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

(4) The Secretary shall make such rules as he deems necessary to establish criteria for determining when a pattern of violations of mandatory health or safety standards exists.

(f) Respirable dust concentrations; dust control person or team

If, based upon samples taken, analyzed, and recorded pursuant to section 842(a) of this title, or samples taken during an inspection by an authorized representative of the Secretary, the applicable limit on the concentration of respirable dust required to be maintained under this chapter is exceeded and thereby violated, the Secretary or his authorized representative shall issue a citation fixing a reasonable time for the abatement of the violation. During such time, the operator of the mine shall cause samples described in section 842(a) of this title to be taken of the affected area during each production shift. If, upon the expiration of the period of time as originally fixed or subsequently extended, the Secretary or his authorized representative finds that the period of time should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to cause immediately all persons, except those referred to in subsection (c) of this section, to be withdrawn from, and to be prohibited from entering, such area until the Secretary or his authorized representative has reason to believe, based on actions taken by the operator, that such limit will be complied with upon the resumption of production in such mine. As soon as possible after an order is issued, the Secretary, upon request of the operator, shall dispatch to the mine involved a person, or team of persons, to the extent such persons are available, who are knowledgeable in the methods and means of controlling and reducing respirable dust. Such

person or team of persons shall remain at the mine involved for such time as they shall deem appropriate to assist the operator in reducing respirable dust concentrations. While at the mine, such persons may require the operator to take such actions as they deem appropriate to insure the health of any person in the coal or other mine.

(g) Untrained miners

(1) If, upon any inspection or investigation pursuant to section 813 of this title, the Secretary or an authorized representative shall find employed at a coal or other mine a miner who has not received the requisite safety training as determined under section 825 of this title, the Secretary or an authorized representative shall issue an order under this section which declares such miner to be a hazard to himself and to others, and requiring that such miner be immediately withdrawn from the coal or other mine, and be prohibited from entering such mine until an authorized representative of the Secretary determines that such miner has received the training required by section 825 of this title.

(2) No miner who is ordered withdrawn from a coal or other mine under paragraph (1) shall be discharged or otherwise discriminated against because of such order; and no miner who is ordered withdrawn from a coal or other mine under paragraph (1) shall suffer a loss of compensation during the period necessary for such miner to receive such training and for an authorized representative of the Secretary to determine that such miner has received the requisite training.

(h) Duration of citations and orders

Any citation or order issued under this section shall remain in effect until modified, terminated or vacated by the Secretary or his authorized representative, or modified, terminated or vacated by the Commission or the courts pursuant to section 815 or 816 of this title.

Section 201(a), 30 U.S.C. § 841(a)

Title 30. Mineral Lands and Mining

Chapter 22. Mine Safety and Health (Refs & Annos)

Subchapter II. Interim Mandatory Health Standards (Refs & Annos)

→ § 841. Mandatory health standards for underground mines; enforcement; review; purpose

(a) The provisions of sections 842 through 846 of this title and the applicable provisions of section 878 of this title shall be interim mandatory health standards applicable to all underground coal mines until superseded in whole or in part by improved mandatory health standards promulgated by the Secretary under the provisions of section 811 of this title, and shall be enforced in the same manner and to the same extent as any mandatory health standard promulgated under the provisions of section 811 of this title. Any orders issued in the enforcement of the interim standards set forth in this subchapter shall be subject to review as provided in subchapter I of this chapter.

Section 301(a), 30 U.S.C. § 861(a)

Title 30. Mineral Lands and Mining

☞ Chapter 22. Mine Safety and Health (Refs & Annos)

☞ Subchapter III. Interim Mandatory Safety Standards for Underground Coal Mines (Refs & Annos)

➔ **§ 861. Mandatory safety standards for underground mines**

(a) Coverage; enforcement; review

The provisions of sections 862 through 878 of this title shall be interim mandatory safety standards applicable to all underground coal mines until superseded in whole or in part by improved mandatory safety standards promulgated by the Secretary under the provisions of section 811 of this title, and shall be enforced in the same manner and to the same extent as any mandatory safety standard promulgated under section 811 of this title. Any orders issued in the enforcement of the interim standards set forth in this subchapter shall be subject to review as provided in subchapter I of this chapter.

Section 302(a), 30 U.S.C. § 862(a)

Title 30. Mineral Lands and Mining

Chapter 22. Mine Safety and Health (Refs & Annos)

Subchapter III. Interim Mandatory Safety Standards for Underground Coal Mines (Refs & Annos)

→ § 862. Roof support

(a) Roof control plan; contents; review; availability

Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form within sixty days after the operative date of this subchapter. The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every six months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished the Secretary or his authorized representative and shall be available to the miners and their representatives.

Section 303(o), 30 U.S.C. § 863(o)

Title 30. Mineral Lands and Mining

▣ Chapter 22. Mine Safety and Health (Refs & Annos)

▣ Subchapter III. Interim Mandatory Safety Standards for Underground Coal Mines (Refs & Annos)

→ § 863. Ventilation

(o) Methane and dust control plans; contents

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

Section 314, 30 U.S.C. § 874

Title 30. Mineral Lands and Mining

Chapter 22. Mine Safety and Health (Refs & Annos)

Subchapter III. Interim Mandatory Safety Standards for Underground Coal Mines (Refs & Annos)

→ § 874. Hoisting and mantrips

(a) Transporting of persons; required equipment and capabilities; safety catches; daily examinations; operators

Every hoist used to transport persons at a coal mine shall be equipped with overspeed, overwind, and automatic stop controls. Every hoist handling platforms, cages, or other devices used to transport persons shall be equipped with brakes capable of stopping the fully loaded platform, cage, or other device; with hoisting cable adequately strong to sustain the fully loaded platform, cage, or other device; and have a proper margin of safety. Cages, platforms, or other devices which are used to transport persons in shafts and slopes shall be equipped with safety catches or other no less effective devices approved by the Secretary that act quickly and effectively in an emergency, and such catches shall be tested at least once every two months. Hoisting equipment, including automatic elevators, that is used to transport persons shall be examined daily. Where persons are transported into, or out of, a coal mine by hoists, a qualified hoisting engineer shall be on duty while any person is underground, except that no such engineer shall be required for automatically operated cages, platforms, or elevators.

(b) Promulgation of other safeguards

Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.

(c) Rated capacities; indicator for position of cage

Hoists shall have rated capacities consistent with the loads handled and the recommended safety factors of the ropes used. An accurate and reliable indicator of the position of the cage, platform, skip, bucket, or cars shall be provided.

(d) Methods for signaling between shaft stations and hoist rooms

There shall be at least two effective methods approved by the Secretary of signaling between each of the shaft stations and the hoist room, one of which shall be a telephone or speaking tube.

(e) Braking equipment for haulage cars used in underground mines

Each locomotive and haulage car used in an underground coal mine shall be equipped with automatic brakes, where space permits. Where space does not permit automatic brakes, locomotives and haulage cars shall be subject to speed reduction gear, or other similar devices approved by the Secretary which are designed to stop the locomotives and haulage cars with the proper margin of safety.

(f) Automatic couplers for haulage equipment

All haulage equipment acquired by an operator of a coal mine on or after one year after the operative date of this subchapter shall be equipped with automatic couplers which couple by impact and uncouple without the necessity of persons going between the ends of such equipment. All haulage equipment without automatic couplers in use in a mine on the operative date of this subchapter shall also be so equipped within four years after the operative date of this subchapter.

30 C.F.R. § 75.1403

Title 30. Mineral Resources

Chapter I. Mine Safety and Health Administration, Department of Labor

Subchapter O. Coal Mine Safety and Health

Part 75. Mandatory Safety Standards--Underground Coal Mines (Refs & Annos)

Subpart O. Hoisting and Mantrips

→ **§ 75.1403 Other safeguards.**

[Statutory Provisions]

Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.

30 C.F.R. §75.1403-1

Title 30. Mineral Resources

Chapter I. Mine Safety and Health Administration, Department of Labor

Subchapter O. Coal Mine Safety and Health

▣ Part 75. Mandatory Safety Standards--Underground Coal Mines (Refs & Annos)

▣ Subpart O. Hoisting and Mantrips

→ **§ 75.1403-1 General criteria.**

(a) Sections 75.1403-2 through 75.1403-11 set out the criteria by which an authorized representative of the Secretary will be guided in requiring other safeguards on a mine-by-mine basis under § 75.1403. Other safeguards may be required.

(b) The authorized representative of the Secretary shall in writing advise the operator of a specific safeguard which is required pursuant to § 75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided within the time fixed and if it is not maintained thereafter, a notice shall be issued to the operator pursuant to section 104 of the Act.

(c) Nothing in the sections in the § 75.1403 series in this Subpart O precludes the issuance of a withdrawal order because of imminent danger.

30 C.F.R. § 75.1403-5(j)

Title 30. Mineral Resources

Chapter I. Mine Safety and Health Administration, Department of Labor

Subchapter O. Coal Mine Safety and Health

Part 75. Mandatory Safety Standards--Underground Coal Mines (Refs & Annos)

Subpart O. Hoisting and Mantrips

→ **§ 75.1403-5 Criteria--Belt conveyors.**

(j) Persons should not cross moving belt conveyors, except where suitable crossing facilities are provided.

February 18, 2009

**VIA FACSIMILE
& OVERNIGHT COURIER**

The Honorable Jerold Feldman
Federal Mine Safety &
Health Review Commission
601 New Jersey Avenue, NW, Suite 9500
Washington, DC 20001

Re: Secretary of Labor (MSHA) v. Wolf Run Mining Company
Docket No.: WEVA 2008-804

Dear Judge Feldman:

Enclosed for filing please find the original and two (2) copies of the parties' Joint Motion for Final Decision regarding the above-referenced matter.

Thank you for your courtesy and cooperation.

Very truly yours,

/s/

R. Henry Moore

RHM/dab

Enclosures

cc: Susan M. Jordan, Esq.
April Min, Esq.

V0003649

A-15

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
Office of Administrative Law Judges**

SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, MSHA,)	CIVIL PENALTY PROCEEDINGS
)	
)	Docket No. WEVA 2008-804
)	
Petitioner,)	
)	ALJ Feldman
v.)	
)	A.C. No.: 000142950
WOLF RUN MINING COMPANY,)	
)	Mine: Sentinel
Respondent.)	Mine ID No. 46-04168

JOINT MOTION FOR FINAL DECISION

AND NOW, come the Secretary of Labor, by her undersigned Solicitor, and Respondent Wolf Run Mining Company (“Wolf Run”), by and through counsel, and moves for final decision in the above-referenced matter in order to facilitate the seeking of review by Wolf Run of the issue of whether a violation of a safeguard notice can be designated significant and substantial, and to otherwise resolve this matter when the review process is final. In support of its motion, the parties state as follows:

1. Citation No. 6606199 was served on Wolf Run on January 23, 2008 pursuant to Section 104(a) of the Federal Mine Safety and Health Act of 1977 (“the Act”), 30 U.S.C. § 814(a). It alleged a violation of 30 C.F.R. § 75.1403-5(j).

The violation also referenced the existence of safeguard no. 7095089 issued on date June 27, 2000 based upon criteria contained in § 75.1403-5(j).

2. The Citation also alleged that the condition was “significant and substantial” (“S&S”). It alleged that the condition resulted from “moderate” negligence, that the condition was “reasonably likely” to result in an injury, that any injury would involve permanent disability, and that one person was affected. A penalty of \$1,304 was assessed.

3. Wolf Run moved for partial summary decision with respect to the S&S allegation in Citation No. 6606199 on the basis that a safeguard notice was not a mandatory safety and health standard subject to S&S findings.

4. The Secretary opposed such motion and moved to amend the citation to allege a violation of 30 C.F.R. § 75.1403.

5. On December 18, 2008, the Administrative Law Judge (“ALJ”) denied partial summary decision with respect to the issue of S&S and denied the Secretary’s motion to amend as moot.

6. The ALJ held that the language of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.* (“the Act”), authorizes S&S findings for citations based on safeguard notices.

7. Wolf Run intends to seek review of such decision because the issue is one that occurs frequently and is an issue in other litigation. The parties enter into

this stipulation and motion in order to facilitate Wolf Run's petition for review.

The decision of December 18, 2008 is interlocutory and Wolf Run cannot readily seek review of such decision without entry of an order imposing a penalty.

8. The parties stipulate to the following for purposes of facilitating review of the ALJ's decision: while inspecting along the #5 coal conveyor belt on January 23, 2008, MSHA Inspector Jeffrey Maxwell observed what he believed was evidence that someone had crossed under the belt; the bottom of the return belt was 24 inches off the mine floor; there was no belt crossover provided on this belt; the operator installed an aluminum crossover at the cited location to terminate Citation No. 660619; Wolf Run is a large operator; and the violation history is 230 violations on 304 inspection days.

9. The parties further agree for the purpose of facilitating review of the ALJ's decision on partial summary decision that: a violation of 75.1403 occurred; the gravity level was "reasonably likely" to result in "lost work days or restricted duty" injury for one miner; the negligence level was "moderate"; a penalty of \$1,304 is appropriate; and the proposed penalty would not affect the ability of the operator to continue in business.

10. The parties agree that the ALJ may impose on the operator a penalty for the violation cited in Citation No. 6606199 in order to facilitate review of the ALJ's decision on the issue of S&S.

11. Once the issue of whether an S&S finding is appropriate for violations of safeguards is determined on review, it is not anticipated by the parties that any remand to the Administrative Law Judge would be necessary given the stipulations contained in this motion.

12. Each party hereby agrees to bear its/his own attorney's fees, costs and other expenses incurred by such party in connection with any stage of the above-referenced proceeding including, but not limited to, attorney's fees which may be available under the Equal Access to Justice Act, as amended.

Wherefore, the parties request that this motion be granted and that an Order be issued requiring the operator to pay the civil penalty as indicated above and incorporating the Order issued on December 18, 2008, denying Wolf Run's motion for partial summary decision.

Respectfully submitted,

By: _____/s/_____
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