ON APPEAL TO THE COMMISSION

FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. HECLA LIMITED, Respondent.	)	Docket Nos. WEST 2012-760-M, WEST 2012-986-M
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. DOUG BAYER, employed by HECLA LIMITED, Respondent.	)	Docket No. WEST 2014-591-M

PETITION FOR DISCRETIONARY REVIEW

The Secretary of Labor (the Secretary) hereby petitions the Federal Mine Safety and Health Review Commission (the Commission) to review the decision of a Commission administrative law judge issued on April 28, 2015, in the above-captioned case. The Secretary seeks review pursuant to Section 113(d)(2)(A)(ii) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 823(d)(2)(A)(ii). The Secretary seeks review of the part of the

judge's decision vacating Order No. 8559607, a Section 104(d)(l) order issued to Hecla Limited (Hecla) for an alleged violation of 30 C.F.R. § 57.3401 consisting of Hecla's failure to properly examine and test the ground conditions at its mine – a failure that resulted in a massive and fatal rock fall. The Secretary proposed a penalty of $159,100 for the violation.

The Secretary also seeks review of the judge's related action in vacating the Secretary's petition, filed under Section 11O(c) of the Act, 30 U.S.C. § 820(c), proposing that a personal civil penalty be assessed against then-mine superintendent Doug Bayer for knowingly engaging in aggravated conduct in connection with the alleged violation of Section 57.3401. The Secretary's 11O(c) petition proposed a personal penalty of $4,500.

The Secretary seeks review of the judge's decision on the grounds that the judge's interpretation of Section 57.3401 is erroneous as a matter oflaw and is inconsistent both with Commission case law interpreting Section 57.3401 and with the Secretary's own interpretation of the standard. The judge's erroneous legal analysis involves a significant question of law and improperly restricts Section 57.3401 's examination and testing requirements. Finally, to the extent the judge's action regarding the Section 57.3401 violation is supported by a factual finding regarding the efficacy of additional examination or testing, such a finding is not supported by substantial evidence and is inconsistent with the judge's other findings of fact.

ASSIGNMENT OF ERROR

The judge erred by rejecting the Secretary's position that Section 57.3401 required Hecla to conduct sufficient ground control examination and testing as would be necessary to pinpoint the problems with Heda's ground control plan. Specifically, the judge erred in concluding that, under the unique circumstances present at the mine, the standard did not require Hecla to designate someone with geomechanical training to perform an examination and to test the

conditions by conducting an engineering or geomechanical analysis. The judge reached his conclusion despite finding that Hecla's actions-undercutting an unsupported waste rock pillar- "obvious[ly] . . . endangered miners," Dec. at 12, were "reckless," Dec. at 18, and were undertaken without any effort "to analyze the risks posed by removing a pillar," Dec. at 12. *See also* Dec. at 12-13 n.15; Dec. at 17, 18.

Additionally, although it is not clear that the judge did so, to the extent the judge relied on a factual finding that no examination or testing could have determined in advance the hazards that led to the fatal rock fall, the Secretary contends that such a finding is not supported by substantial evidence and is contradicted by the judge's fact-finding in the other parts of his decision in which he affirmed three violations of Section 57.3360 consisting of Hecla's failure to maintain an adequate ground control plan.[1]

STATEMENT OF THE CASE

The Secretary accepts the judge's findings of material fact in this case with one possible exception. To the extent it constitutes a relevant finding of fact-and for the reasons stated below, the Secretary does not believe that it does-the Secretary challenges the judge's statement that "[t]here is no test or examination technique that could allow Hecla's employees to determine that rock was starting to fracture and separate 25 feet above the back." Dec. at 14.

On April 15, 201 1, a large rock fall in stope 15, cut 3-west, located at a depth of 6150 feet below the shaft (stope 615-15-3-west), fatally crushed miner Larry Marek at Hecla's Lucky Friday Mine. Dec. at 2. The rock fall was 25 feet wide, 25 feet deep, and 75 feet long. Dec. at 12. Multiple witnesses described it as the largest fall they had ever seen. Dec. at 12.

[1] The Secretary does not, of course, challenge those other parts of the judge's decision, or challenge the judge's finding that the Section 57.3360 violation was unwarrantable and flagrant.

The mine is located in Idaho and produces silver, lead, and zinc. Dec. at 2. Like other mines in the same district, the mine is subject to "intense horizontal pressure." Dec. at 2. To explain the cause of the rock fall, the judge first described the stoping technique Hecla invented and uses in response to these pressures. Dec. at 2. "The mining process consists of five stages: drilling, ramping, slotting, stoping, and backfilling." Dec. at 2. Mining of the ore "takes place in the stope, which extends to the right and to the left of a slot. . . . Each slot is used to access 50 vertical feet of ore in five separate cuts in the stope. These five cuts make up a sublevel. Each cut is ten feet high." Dec. at 2.

Mining in each sub-level proceeds according to a similar procedure: miners "muck out rock from the previous shift, bolt the area, drill the next round, and blast the next round at the end of the shift" in cuts on both sides of the stope. Dec. at 2. This process creates stopes that are ten feet high, twenty feet wide, and up to several hundred feet deep. Dec. at 2. When mining in a stope is finished, the stope is backfilled with "pastefill" or "sandfill" and bolts are installed to add stability and strength. Dec. at 2. Once the backfill hardens, mining begins on the next stope down. Dec. at 3. The horizontal pressures of the mine hold the backfill in place. Dec. at 3. When carried out according to Hecla's normal practices, this technique is known in the industry and considered safe. Dec. at 3, 11 n.11.

At stope 615-15-3-west and the two stopes above it, mining proceeded in the shape of a barbeque fork: the stope began as a single opening approximately 20 feet wide and, after 50 feet of mining, branched out into two tines to follow the shape of the vein. Dec. at 3-4. This process left a continuous solid pillar of waste rock between the two tines that ran down through all three stopes. Dec. at 4.

However, in stope 615-15-3-west, Hecla elected to excavate 75 feet of the waste rock pillar in order to mine another vein that intersected the stope, thus undercutting the pillar. Dec. at 4, 7-8. Hecla did not provide any ground support under the pillar as it was being undercut, despite requests by multiple miners that it do so. *See* Dec. at 7-10. Dan McGillis, the most senior miner working in stope 615-15-3-west, testified that he and other miners worried that nothing was holding up the waste rock pillar above their heads. Dec. at 8. McGillis testified that while bolting the back of the stope, another miner witnessed the "whole back just start[] dribbling" rock. Dec. at 8. McGillis spoke to then-superintendent Bayer (the subject of the Section 11O(c) petition) about the issue, and Bayer responded, "[m]aybe next cut we can do something different." Dec. at 8 (alteration in original). Mike Marek, the brother of the miner who was killed, asked his shift boss whether the crew could install 10 by 10 timbers against the back to support the waste rock pillar, and was told that it could not. Dec. at 9. Tim Ruff, a mine geologist employed by Hecla at the time of the rock fall, testified that he too raised concerns with Bayer that the waste rock pillar could fall because it was inadequately supported. Dec. at 9. Bayer responded that the miners would take only one more cut around the pillar. Dec. at 9. When Bayer's statement proved untrue, Ruff confronted Bayer; Bayer responded, "[w]ell, let me think about it." Dec. at 9 (alteration in original).

Hecla's justification for undercutting the waste rock pillar was its belief that the horizontal pressures at the mine would hold the pillar in place above stope 615-15-3-west in much the same way that an arch holds a keystone in place. Dec. at 10. Hecla reached this conclusion without conducting any tests or engineering analysis. Dec. at 10, 12 & nn.15, 17, 18. Hecla's chief mining engineer, Ron Krusemark, was not consulted. Dec. at 9. Krusemark

testified that Heda's actions were "way out of the norm," and that he would not have approved them without further ground support had he been consulted. Dec. at 9.

Paul Tyma, an MSHA geologist, gathered technical information, spoke to miners, and reviewed cut and projection maps as well as other documents to determine whether Heda's mining methods were sound. Dec. at 9. Tyma determined that the rock fall resulted from the failure to support the waste rock pillar and a fault cutting across the pillar. Dec. at 10. Other witnesses estimated that the fracture was somewhere between 25 to 50 feet above the back of stope 615-15-3-west. Dec. at 10.

The parties introduced conflicting evidence as to whether Hecla knew about the faults or fractures running through the waste rock pillar. Dec. at 12 n.14. In particular, Ruff, whose other testimony was expressly relied on by the judge, Dec. at 9 & n.8, testified that he had mapped the mine's faults and fractures and noted north-dipping reverse faults that cut across the pillar. Tr. at 349-51, 355, 382-83. However, the judge elected not to resolve whether Ruff had actually identified the fault that caused the fatal rock fall. The judge did not believe it was necessary to do so because "a reasonably prudent person would have recognized that faults and fractures were a common occurrence" at the mine anyway. Dec. at 12 n.14.

The judge found that Heda's management employees and miners regularly examined the back and ribs of stope 615-15-3-west, and that the miners were trained to examine the angle of bolts and look at the plates around them to make sure they were not being sucked into the backfill of the stope above. Dec. at 13. Miners were also trained to use a scaling bar to scale and sound the back. Dec. at 13. There was no loose ground "as that term is generally used" found in the stope in the days leading up to the rock fall. Dec. at 13. Rather, the rock fall was "a sudden and catastrophic failure of the entire ground support system" in stope 615-15-3-west. Dec. at 13.

However, as noted above, the judge repeatedly found that Hecla did not perform any type of engineering or geomechanical examination or testing to determine whether undercutting the waste rock pillar presented a ground control hazard. Dec. at 10-11 ("Hecla did not present any data, evidence, or test results to demonstrate that the horizontal pressures were sufficient to support the ground under these conditions."), 12-13 n.15 ("Hecla had not performed an analysis of the risks posed by undermining the pillar."), 17 ("[N]o engineering study or any other study had been undertaken to determine whether [Heda's] ground support plan would adequately support the roof under such conditions."), 18 ("Hecla could have either mined cut 3 without removing a substantial portion of the pillar or conducted an engineering study to develop a method to support the pillar as mining progressed.", *id.* ("Management did not ask its own engineering group at the mine to analyze the matter.").

LEGAL FINDINGS OF THE ADMINISTRATIVE LAW JUDGE

The judge found that the foregoing facts established a violation of Section 57.3360 consisting of Hecla's failure to provide adequate ground support. Dec. at 7-11. He also affirmed the Secretary's designation of that violation as significant and substantial (S&S) and unwarrantable, Dec. at 11-13, and affirmed the Secretary's proposal that the violation be classified as flagrant, Dec. at 17-19. He assessed a penalty of $180,000-more than the $159,100 penalty proposed by the Secretary-because of the particularly high negligence Hecla demonstrated by undercutting the waste rock pillar without conducting any studies or analysis. Dec. at 18-19. The judge also affirmed two other violations of Section 57.3360 consisting of similarly inadequate ground support in other parts of the mine where Hecla was undercutting waste rock pillars, Dec. at 14-16, and found both violations to be S&S and unwarrantable, Dec.

at 16. The judge assessed a penalty of $50,000 for each of these violations–more than doubling MSHA's proposed penalty of $20,900 for each. Dec. at 17.

However, the judge concluded that the Secretary did not establish a violation of Section 57.3401. Dec. at 13-14. The judge found that Hecla satisfied the standard by performing routine examinations of the back and ribs of stope 615-15-3-west. Dec. at 13.

The judge rejected the argument that, in light of Hecla's extremely hazardous decision to undercut the waste rock pillar, Section 57.3401 required that an engineering or geomechanical analysis be conducted: "The standard requires observation and careful examination of ground conditions not an engineering analysis. There is no test or examination technique that could allow Hecla's employees to determine that rock was starting to fracture and separate 25 feet above the back . . . . Although Hecla failed to design adequate ground support, it carefully examined the back and ribs in the cited area with sufficient thoroughness to comply with section 57.3401." Dec. at 13-14. In a footnote, the judge also rejected lead Inspector Rodric Breland's testimony that examinations should have been conducted by someone with geomechanical training. According to the judge, "[s]uch an examination is not required by the safety standard." Dec. at 14 n.17. Finally, the judge found the fact that miners had previously observed the back "dribbling" loose rock to be irrelevant both because the dribbling did not prove that an inadequate examination occurred and because extra bolts and mesh were installed after the dribbling. Dec. at 13 n.16. In other words, in the judge's opinion, Section 57.3401 *never* requires more than the type of routine examination and ground testing that can be conducted on the ground by non-specialist miners, regardless of how hazardous the ground conditions that the operator encounters or creates are.

Finally, because the judge vacated the Section 57.3401 citation, he necessarily vacated the Section l lO(c) petition regarding Doug Bayer. That petition was predicated entirely on Bayer's role in the Section 57.3401 violation. Dec. at 14

The Secretary submits that the judge's interpretation of Section 57.3401 is legally erroneous. It is contrary both to the Commission's precedent and to the Secretary's own interpretation of the standard. In addition, to the extent the judge's statement that "[t]here is no test or examination technique that could allow Hecla's employees to determine that rock was starting to fracture and separate 25 feet above the back" was intended to mean that engineering or geomechanical analysis would not have pinpointed the ground control problems in the mine, the Secretary submits that this statement is not supported by substantial evidence and is contrary to the judge's own fact-finding throughout the rest of his decision.

ARGUMENT

I. The Judge's Legal Conclusions Are Erroneous And Inconsistent With Commission Precedent Holding That Section 57.3401 Requires Testing And Examination Sufficient To "Pinpoint" Reasonably Knowable Ground Control Hazards.

Section 57.3401 is entitled "Examination of ground conditions" and states: "Persons experienced in examining and testing for loose ground shall be designated by the mine operator. *Appropriate* supervisors or other designated persons shall examine and, *where applicable,* test ground conditions in areas where work is to be performed, prior to work commencing, after blasting, and *as ground conditions warrant* during the work shift. Underground haulageways and travelways and surface area highwalls and banks adjoining travel ways shall be examined weekly or more often if changing ground conditions warrant." 30 C.F.R. § 57.3401 (emphasis added).

The Commission has held that the standard "contains two important requirements. First, areas where work is to be performed must be examined for loose ground before work is started, after blasting, and as conditions otherwise warrant during the workshift. Second, where applicable, ground conditions in work areas must also be tested." *Asarco, Inc.*, 14 FMSHRC 941, 945 (June 1992). The mere fact that a roof fall has occurred does not demonstrate that a violation of Section 57.3401 has occurred; "it is the Secretary's burden to prove that a proper examination was not conducted." *Id.* at 947.

The Commission has held that Section 57.3401 in effect creates a sliding-scale requirement, i.e., it requires the amount of ground examination and testing that is necessary in light of the particular ground conditions in the particular mine. As the Commission has explained, the "purpose of section 57.3401 is to ensure that ground and ground support do not pose a hazard to miners." *Dynatec Mining Corp.*, 23 FMSHRC 4, 22 (Jan. 2001). The standard is written in broad terms, and the Secretary has not provided further clarification as to what specific examination and testing must be performed because the standard "was drafted to be 'flexible enough to accommodate the variety of situations which may arise while assuring the safety of persons working in the mines.'" *Asarco*, 14 FMSHRC at 947 (quoting Section 57.3401's preamble, 51 Fed. Reg. 36192, 36192-93 (1986)). Thus, "the adequacy of [an operator's] examinations must be judged in light of the purpose of the standard, *which means that the examinations should be . . . designed to pinpoint the [ground support] problems so that they can befixed before miners are exposed to the hazards." Dynatec*, 23 FMSHRC at 23 (emphasis added) (internal quotation marks omitted). This test requires an operator to conduct examinations and tests consistent with what a "'reasonably prudent person familiar with the mining industry and the protective purposes of the standard'" would recognize as being called

for. *Asarco*, 14 FMSHRC at 948 (quoting *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990)).

Here, Hecla violated the standard by not conducting an engineering or geomechanical analysis and by not appointing a geomechanically trained examiner to carefully examine the ground control hazards created by its action in undercutting the waste rock pillar in stope 615-15-3-west. The judge credited Hecla's chief mining engineer Krusemark's testimony that Hecla's undercutting of the pillar was "way out of the norm." Dec. at 9 & n.8. Krusemark would not have permitted mining to proceed without further ground support had he known what was happening. Dec. at 9. The judge found Hecla's assumption that its actions were safe to be "foolhardy," Dec. at 10, and "misplaced," Dec. at 17. "It should have been obvious that a large, unsupported rock mass could endanger[] miners, yet Hecla did not ascertain whether the waste pillar in 15 stope was adequately supported." Dec. at 12. Furthermore, a reasonably prudent person in Hecla's position would have recognized that faults and fractures were common and that the ground support system should be designed to account for them. Dec. at 12 n.14. Yet Hecla did not conduct a single test, risk analysis, or engineering study to verify its "foolhardy" theory. Dec. at 10, 12-13 n.15, 17, 18. Because Hecla adopted a uniquely dangerous and untested mining technique, Section 57.3401 imposed on Hecla a heightened burden to conduct examination and testing beyond what would be required under normal mining conditions. Hecla's failure to do so plainly-and fatally-breached its duty to perform examinations and tests sufficient to "pinpoint the [ground control] problems so that they can be fixed before miners are exposed to the hazards." *Dynatec*, 23 FMSHRC at 23.

The proper application of Section 57.3401's sliding scale test is nicely illustrated by comparing the facts here with those in *Asarco* and *Dynatec*, both of which involved rock falls in

which the Commission found the operator *not* to have violated Section 57.3401. In *Asarco*, the Commission found that a reasonably prudent person could not have foreseen the rock fall. *Id.* at 950-53. The Commission rejected the judge's theory that the mere fact that a rock fall had occurred created a presumption that the examination was inadequate. *Id.* at 946-47. The Commission also rejected the Secretary's suggestion that the examiners should have used different techniques; the operator had been performing similar examinations "for a number of years," *id.* at 947-48, and the Secretary presented "[n]o objective evidence, such as rest results," to demonstrate that the examination methods in question were unsound, *id.* at 948.

The opposite is true here. Far from being unpredictable, the hazard of a rock fall here was "obvious." Dec. at 12. It is true that, like Asarco, Hecla was performing examinations and testing using the same techniques it had used in the past; but unlike Asarco, Heda's mining techniques were anything but ordinary. Thus, unlike Asarco, Hecla had no right to rely on its ordinary examination and testing techniques. And unlike in *Asarco,* where "[t]he language of the citation ma[de] clear that the inspectors based their determination that the roof had not been examined primarily on the fact that a roof fall had occurred, rather than on evidence that an examination had not been conducted," the citation here was based on Heda's failure to conduct the kind of engineering and geomechanical examination and testing that was necessary to pinpoint the specific hazard posed by Heda's unusually hazardous practices.

Dynatec is similarly illuminating. Dynatec was a contractor for Magma Copper Company, and was hired to construct a raise structure at the mine. *Dynatec*, 23 FMSHRC at 4. Shortly after blasting occurred near the raise, Dynatec inspected the raise, noted problems with it, and recommended repairs that were not fully implemented before production resumed. *Id.* at 6, 23. Although Dynatec was found to have violated 30 C.F.R. § 57.3360 by failing to

implement all of its recommended repairs, the Commission found that it had not violated Section 57.3401 precisely because Dynatec *had* identified the ground control flaws after a thorough examination. "Had Dynatec's recommendations been implemented before production resumed, it is undisputed that those repairs would have restored the stability of the raise structure." *Id.* at 23. In other words, Dynatec *had* "pinpointed the problems that needed to be fixed to insure that miners would not be exposed to hazards." *Id.*

Again, the opposite is true here. In *Dynatec,* the operator conducted a thorough examination in response to an abnormally risky situation, thereby satisfying Section 57.3401's sliding-scale standard, even though Dynatec's recommendations were not fully implemented. In stark contrast, Hecla treated as business as usual its decision to engage in mining techniques that were "way outside the norm." Dec. at 9. Unlike Dynatec, who identified the relevant ground control problems but failed to follow through, Hecla did not even *try* to identify the hazards that its unprecedented mining techniques posed to its miners. Section 57.3401 requires more.

The judge's conclusion to the contrary relies primarily on the fact that miners and a few managers examined stope 615-15-3-west using routine techniques to test for loose ground. Dec. at 13. This conclusion is inconsistent with the sliding-scale test applied in *Asarco* and *Dynatec.* Moreover, nothing in the text of Section 57.3401 limits the required examination and testing to ordinary visual examination and scaling by non-specialist miners as the judge's decision does. *See Thunder Basin Coal Co. v. FMSHRC,* 56 F.3d 1275, 1280 (10th Cir. 1995) (rejecting an operator's narrowing interpretation of the Mine Act that "'would have us read a limitation into the statute that has no basis in the statutory language"' (quoting *Utah Power & Light Co. v. Sec'Y of Labor,* 897 F.2d 447, 451 (10th Cir. 1990)); *see also Hercules Inc. v. EPA,* 938 F.2d 276, 280 (D.C. Cir. 1991) (refusing to "read[] into the statute a drastic limitation that nowhere appear[ed]"

in the text). To the contrary, the text of Section 57.3401 permits, and the purpose of Section 57.3401 supports, an interpretation that when extraordinary conditions are encountered-or, as in this case, *created-by* an operator, extraordinary methods of examination and testing may be required. *See* 30 C.F.R. § 57.3401 (requiring examination by "appropriate" supervisors or other designated persons and testing "as ground conditions warrant"); *see also, e.g., The Doe Run Co.,* 21 FMSHRC 805, 809 (ALJ, July 1999) (although visual inspection of the roof area revealed no evidence of defects, conditions in the mine were such that "testing of the subject area was warranted"); *Barrick Bullfrog, Inc.,* 18 FMSHRC 933, 943 (ALJ, June 1996) (concluding that "[w]hile a visual examination may have been sufficient if conditions . . . had not changed, in this case they changed significantly," so additional testing was required). Where, as here, the foreseeable ground control hazard is the possibility of a massive rock fall due to mining techniques that are "way out of the norm," Dec. at 9, Section 57.3401 requires engineering or geomechanical analysis and careful examination by someone with geomechanical training because that is what is required to "pinpoint[] the problem." *Dynatec,* 23 FMSHRC at 23.

II. The Secretary Interprets Section 57.3401 To Require Examination And Testing Sufficient To Pinpoint Reasonably Foreseeable Ground Control Problems, And That Interpretation Is Entitled To Deference.

This case is easily resolved by applying the principles the Commission announced in *Dynatec* and *Asarco* to the facts found by the judge here. However, to the extent the Commission does not agree, the Secretary independently interprets Section 57.3401 to require engineering and geomechanical examination and testing when an operator adopts a new and unusually hazardous mining technique such as Hecla's decision to undercut the waste rock pillar in stope 615-15-3. The Secretary's interpretation of his own standard is reasonable and therefore entitled to deference. *See Newmont USA Ltd.,* WEST 2010-652-RM, 2015 WL 1632704, at *3

(Mar. 31, 2015); *see also Auer v. Robbins,* 519 U.S. 452, 461 (1997); *Martin v. Occupational Safety & Health Rev. Comm 'n,*499 U.S. 144, 157 (1991); *Azko Nobel Salt, Inc. v. FMSHRC,* 212 F.3d 1301, 1304 (D.C. Cir. 2000); *Energy West Mining Co. v. FMSHRC,* 40 F.3d 457, 462 (D.C. Cir. 1994).

The Secretary acknowledges that Section 57.3401 does not explicitly require an operator using uniquely hazardous mining methods to undertake an engineering or geomechanical analysis of the ground conditions or have a geomechanically trained individual examine the ground. However, the standard is certainly susceptible of such a reading. It requires *"[a}ppropriate* supervisors or other designated persons" to conduct ground examinations and also requires testing *"as ground conditions warrant."* 30 C.F.R. § 57.3401 (emphasis added). The italicized language is conspicuously conditional in nature, i.e., its meaning is necessarily determined with reference to the nature of the particular conditions in the particular mine in question. Thus, the Secretary's interpretation that Section 57.3401 can require engineering or geomechanical analysis and examination by geomechanically trained examiners under conditions like the ones presented here is consistent with the regulatory text.

The Secretary's interpretation is also consistent with Section 57.3401's purpose. As the Commssion observed in *Asarco,* the Secretary drafted Section 57.3401 to be "flexible" so as "to accommodate the variety of situations which may arise while assuring the safety of persons working in the mine." 51 Fed. Reg. 36192, 36192-93 (1986). By imposing a rigid limit on what can be required by this flexible standard, the judge's interpretation of the standard undermines its purpose. Under the judge's interpretation, an operator is not required to undertake additional examination or testing even when the operator knows or should know that it has created grave ground control hazards far in excess of the risks inherent in normal mining. Put another way: the

judge's interpretation of the standard protects miners against lesser ground control hazards but provides no protection against the most grave or hazardous ground control hazards, even when those hazards are foreseen or foreseeable-as was the case here.

The judge's interpretation runs afoul of multiple rules of thumb that guide courts when interpreting mandatory safety and health stanards or determining whether the Secretary's interpretation is reasonable. For example, *Walker Stone Co. v. Sec '.Y of Labor,* 156 F.3d 1076 (10th Cir. 1998), closely mirrors this case. There, the Tenth Circuit rejected as "anomalous" an interpretation of a safety standard that would "protect[] workers who conduct regularly scheduled maintenance . . . but leav[e] unprotected workers performing more dangerous tasks" that were performed more rarely. *Id.* at 1082. So too here. The judge's interpretation would protect miners engaged in routine mining that poses only normal risks of ground fall hazards, but does nothing to protect miners who are exposed to an obvious but abnormal ground fall hazard such as a massive rock pillar being undercut directly above their heads. The Secretary's interpretation avoids this anomaly and protects *all* miners.

Similarly, the Commission "has repeatedly recognized that a regulation must be interpreted so as to harmonize and not to conflict with the objective of the statute it implements." *RAG Cumberland Resources LP,* 26 FMSHRC 639, 647 (Aug. 2004), *aff'd,* 171 Fed. App'x 852 (D.C. Cir. 2005) (unpublished). And interpretations that yield absurd results must be rejected. *See Consolidation Coal Co.,* 15 FMSHRC 1555, 1557 (Aug. 1993); *see also Mainline Rock & Ballast, Inc. v. Sec '.Y of Labor,* 693 F.3d 1181, 1185 (10th Cir. 2012); *Sec '.Y of Labor v. Twentymile Coal Co.,* 41 1 F.3d 256, 260 (D.C. Cir. 2005). Thus, even if Section 57.3401's text did not include language permitting it to be interpreted in the way the Secretary does, it would be permissible to read a requirement that the examination be effective into the regulation. *See, e.g.,*

Western Fuels-Utah, Inc., 19 FMSHRC 994, 997-99, 1002 (June 1997) (reading into standards requiring belt slippage and sequence switches and fire sensing devices a requirement that the switches and the devices be "functional," i.e., "perform their intended function"); *Fluor Daniel, Inc.*, 18 FMSHRC 1143, 1145-46 (July 1996) (rejecting the operator's contention that a standard requiring service brakes did not also require that the brakes "be maintained in functional condition"); *Mettiki Coal Corp.*, 13 FMSHRC 760, 768-69 (May 1991) (reading into a standard requiring electrical switches a requirement that the lockout devices on the switches be "functioning lockout devices"). In sum, all of the standard tools used to interpret mandatory safety and health standards support the Secretary's interpretation of Section 57.3401. Thus, the Secretary's interpretation-which merits deference so long as it is "'logically consistent with the language of the regulation[]'" and serves a "'permissible function,'" *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1679 (Dec. 2010) (quoting *General Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995))-must prevail here in light of Section 57.3401's purpose and textual ambiguity.

At trial, Hecla argued that the Secretary's interpretation would violate Hecla's right to due process because Hecla lacked notice of the requirements of Section 57.3401 and because MSHA had never cited Hecla for conducting only routine examinations in the past. *See* Hecla Posthearing Br. at 37 (citing *Asarco*, 14 FMSHRC at 950). The judge did not endorse this argument, but it lacks merit in any event. In *Asarco*, the Commission applied its longstanding rule that when a mandatory safety standard states a broad and flexible standard, due process requires that the Secretary's interpretation of the standard be consistent with what a "'reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard"' to have required. *Asarco*, 14 FMSHRC at 948 (quoting *Ideal Cement*, 12 FMSHRC at 2416) (applying *Ideal*

Cement's fair notice principles when interpreting Section 57.3401); *see, e.g., Walker Stone*, 156 F.3d at 1083-84 (applying the same due process principles). Here, as the judge's discussion of the Section 57.3360 violations and the associated unwarrantability and flagrancy findings makes abundantly clear, Hecla was on notice that it should have analyzed the ground conditions in stope 615-15-3-west. And in light of the fact that the Commission has long interpreted Section 57.3401 as requiring examination and testing sufficient to "pinpoint" ground control problems, Hecla was also on notice that Section 57.3401 required such testing. *See, e.g., Island Creek Coal Co.*, 20 FMSHRC 14, 25 (Jan. 1998) (in considering whether an operator has fair notice, the operator "is charged with knowledge" of the protective purpose of mandatory safety standards, and when the operator has constructive notice that it faces non-routine conditions, such notice should alert the operator that its conduct is potentially violative of safety standard).

Hecla's suggestion that it lacked notice because MSHA had not issued citations for its having conducted only routine examinations in the past is doubly flawed. First, MSHA would not have had any reason to cite Hecla for failing to conduct additional examinations or testing on prior occasions because MSHA was unaware of Hecla having ever undercut a waste rock pillar before. Second, even if MSHA had failed to issue a citation under similar conditions in the past, "MSHA cannot be estopped from enforcing its regulations simply because it did not previously cite the mine operator." *Mainline Rock & Ballast, Inc. v. Sec'Y of Labor*, 693 F.3d at 1187 (10th Cir. 2012); *see US. Steel Mining Co.*, 15 FMSHRC 1541, 1547 ("An inconsistent enforcement pattern does not estop MSHA from proceeding under the interpretation of the standard that it concludes is correct."); *see also Fluor Daniel v. Occupational Safety & Health Rev. Comm'n*, 295 F.3d 1232, 1238 (IIth Cir. 2002) ("Fluor Daniel makes no claim that any OSHA officials expressly said that respirators were unnecessary, and mere silence by OSHA inspectors is not

enough to support a company's claim that it was lulled into violating a regulation."). Thus, there is no merit to Hecla's argument that it lacked notice of its obligation under Section 57.3401 to thoroughly examine and test the ground conditions in stope 615-15-3-west.

III. To The Extent The Judge Suggested That An Engineering Or Geomechanical Analysis And Examination Would Not Have Detected The Ground Control Hazards That Caused The Rock Fall, That Finding Is Inconsistent With The Rest Of The Judge's Decision And Unsupported By Substantial Evidence.

In vacating the Section 57.3401 citation, the judge stated, "There is no test or examination technique that could allow Hecla's employees to determine that rock was starting to fracture and separate 25 feet above the back." Dec. at 14. The quoted statement appears immediately after the judge concluded that Section 57.3401 does not require an engineering or geomechanical analysis. Thus, the best interpretation of the quoted statement is that the judge meant that no testing *other than engineering or geomechnical analysis and examination* could have detected the ground control problems in stope 615-15-3-west. If that is what the judge meant, the Secretary does not dispute the judge's factual finding, and merely disagrees with the judge's interpretation of Section 57.3401 for the reasons stated above. Assuming the Commission agrees with the Secretary's reading of the quoted statement, the Commission need not consider whether the statement is supported by substantial evidence. However, if the Commission believes the statement constitutes an alternative finding that *even* an engineering or geomechanical analysis and examination could not have detected the ground control hazards in stope 615-15-3-west, then it would be necessary to consider whether such a finding is supported by substantial evidence.

It is not. First, and most obviously, a finding that an engineering or geomechanical analysis and examination could not have identified the hazards in stope 615-15-3-west would be flatly inconsistent with the rest of the judge's decision. *See Jim Walters Res., Inc.*, 14 FMSHRC

1549, 1557 (Sept. 1992) (finding that a judge's conclusions were not supported by substantial evidence where they were inconsistent with the judge's other findings); *see also Lucy v. Chater*, 113 F.3d 905, 908 (8th Cir. 1997) ("internally inconsistent" findings not supported by substantial evidence); *General Chem. Corp. v. United States*, 817 F.2d 844, 846 (D.C. Cir. 1987) (per curiam) (same); *NLRB v. Samurai, Inc.*, 609 F.2d 864, 866 (6th Cir. 1979) (per curiam order) (same). The judge's decision is replete with findings that Hecla did not conduct an engineering or geomechanical analysis, *but that if it had done so, it would have recognized the risks of undercutting the waste rock pillar.* In concluding that a Section 57.3360 violation occurred, the judge expressly held that a reasonably prudent person familiar with the facts and the mining industry would have (1) recognized the dangers of undercutting the waste rock pillar, Dec. at 8, and (2) known that faults and fractures were common in the mine, Dec. at 12 n.14. Hecla's theory that the waste rock pillar would be held in place by the horizontal pressures at the mine was "foolhardy," Dec. at 10, and unsupported by "any data, evidence or test results," *id.; see also* Dec. at 10 n.10. In finding the violation unwarranted, the judge further found it "obvious" that the unsupported pillar could endanger miners and expressly faulted Hecla for doing nothing to "ascertain whether the waste pillar in 15 stope was adequately supported." Dec. at 12. Accordingly, the judge concluded, "[t]he failure to analyze the risks posed by removing a pillar for a distance of 75 feet demonstrates aggravated conduct because it shows Hecla made no effort to properly design its ground support in this situation." Dec. at 12. Similarly, in finding the violation flagrant, the judge stated that Hecla "could have either mined cut 3 without removing a substantial portion of the pillar *or conducted an engineering study to develop a method to support the pillar as mining progressed."* Dec. at 18 (emphasis added). Thus, if the judge's statement that there is no test or examination Hecla could have conducted to detect the ground

control hazards in stope 615-15-3-west is read to include engineering and geomechanical analysis and examination, it is inconsistent with the judge's extensive fact-finding and unsupported by substantial evidence.

Any suggestion that engineering or geomechanical examination and testing could not have identified the ground control hazards is also unsupported by the record. The judge expressly credited the testimony of Ruff (Hecla's mine geologist) and Krusemark (Hecla's chief mine engineer), both of whom testified that Hecla's mining strategy was dangerous precisely because of the risk of the waste rock pillar falling. Ruff told Bayer that undercutting the waste rock pillar was dangerous, and Krusemark would have said the same thing had he been consulted. Dec. at 9. Ruff s and Krusemark's testimony is consistent with Inspector Breland's testimony that a proper examination of the geological conditions by an individual with geomechanical training would have led to a recommendation that Hecla stop undercutting the waste rock pillar. Tr. at 118. Thus, the record unambiguously proves that examination and testing by "appropriate" individuals-i.e., engineers or individuals with proper geomechnical training-would have "pinpointed" the ground control hazards in stope 615-15-3-west. *Dynatec,* 23 FMSHRC at 23.

Furthermore, Ruff testified that he mapped the mine's faults and identified a specific reverse fault cutting through the waste rock pillar somewhere above stope 615-15-3-west. Tr. at 349-51, 355, 382-83. In affirming the Section 57.3360 violations, the judge noted Ruff s testimony to this effect, but declined to resolve the parties' factual dispute regarding its accuracy because the judge found it unnecessary to do so to resolve the Section 57.3360 violations.[2] Dec.

[2] As noted above, the judge reached this conclusion because he found that, regardless of whether Ruff did know about the fault, any reasonably prudent person "would have recognized that faults

at 12 n.14. However, if the Commission believes the judge's analysis of the Section 57.3401 violation to be premised on whether engineering and geomechanical analysis and examination could have pinpointed the risk that the waste rock pillar would fall, it would certainly be relevant if Hecla's own geologist did know about the fault that contributed to the rock fall. The Secretary believes that the evidence unambiguously demonstrates that an engineering or geomechanical analysis and examination would have detected the ground control hazards in stope 615-15-3-west, but if the Commission is unconvinced and finds this issue to be dispositive, remand would be required for further fact-finding. *See, e.g., Wyoming Fuel Co.,* 16 FMSHRC 1618, 1627 (Aug. 1994) (majority opinion of Backley, C.) (remanding where judge failed to analyze evidence regarding dispositive factual issue).

Additionally, the judge credited Dan McGillis' testimony that another miner had observed dribbling rock fall in the back, but treated that testimony as irrelevant because Hecla installed extra bolts and mesh in response to the dribbling. Dec. at 13 n.16. On the contrary, the fact that the back was dribbling while Hecla was engaged in perilously undercutting the waste rock pillar further suggests that additional examination and testing by "appropriate" engineering or geomechanically trained individuals would have resulted in Hecla's pinpointing the ground control hazards in stope 651-15-3.

In its post-trial briefing, Hecla cited page 513 of the trial transcript in support of the contention that an engineer could not have done anything more than what Hecla did. *See* Hecla Post-Trial Br. at 38. The judge did not cite this portion of the transcript, and properly so inasmuch as Hecla's claim does not stand up to even cursory scrutiny. Hecla relied on Bayer's

---

and fractures were a common occurrence in the Gold Hunter section of the mine and that the ground support system had to be designed to account for fractures, faults, and other geologic structures, known and unknown, when undermining a pillar." Dec. at 12 n.14.

testimony that he was "unaware" of any way to examine ground conditions beyond what Hecla did. Tr. at 513. However, before asking the question that elicited that answer, counsel for Hecla acknowledged that Bayer was "not a rock mechanics engineer," and the judge found that there was no foundation for Bayer to opine as to whether an individual with engineering training could have performed further examination or testing. Tr. at 513. In fact, Bayer testified that the only type of examination or testing he knew of was to "look at the ground conditions." Tr. at 513. Furthermore, on cross-examination, Bayer admitted that if he had "thought the pillar was going to fail," he could have "went *[sic]* to engineering and said 'Let's design something to keep it up.'" Thus, Bayer's testimony provides no support for a finding that engineering or geomechanical analysis and examination would have been futile.[3]

Finally, at trial, Hecla suggested in passing that it did in fact conduct examinations by individuals with geomechanical training. *See* Hecla Post-Trial Br. at 36, 38 (citing Tr. at 470-71, 51 1-12, 618-19, 720-21, 737). For two reasons, this suggestion is meritless.

First, the judge did not base his decision on the ground that Hecla conducted an engineering and geomechanical analysis. Instead, the judge concluded that such analysis is not required by Section 57.3401. Thus, even if there were a legitimate dispute of fact regarding this question (and there is not), the proper remedy would be to remand to the trial judge for further fact-finding if the Commission otherwise agrees with the Secretary's interpretation of Section 57.3401.

---

[3] Furthermore, Bayer's testimony conflicted on various points with the testimony of Ruff and McGillis. *Compare* Tr. at 325-26, 342-43 (McGillis) (testifying that he raised his concerns about the ground control plan with Bayer), 356-58 (Ruff) (similar), *with* Tr. at 548-49 (Bayer) (denying these conversation occurred). The judge expressly credited McGillis' and Ruff s testimony, Dec. at 8-9, thus implicitly finding that Bayer lacked credibility.

Second, Hecla's argument is without merit in any event. The testimony Hecla relied on establishes only that supervisors, some of whom had geological training, occasionally passed through stope 615-15-3-west and conducted the same kind of routine examinations that were conducted by Hecla's miners. There was no testimony whatsoever that these individuals conducted an engineering or geomechanical analysis.[4] Under the circumstances in this case, the mere *presence* of a supervisor with geological training does not constitute testing "as ground conditions warrant," 30 C.F.R. § 57.3401, so as "to pinpoint the problems so that they can be fixed before miners are exposed to the hazards." *Dynatec,* 23 FMSHRC at 23. Thus, there is no evidence that Hecla conducted the type of engineering or geomechanical testing required by Section 57.3401 under the circumstances.

CONCLUSION

There is no question that Hecla acted with disregard for its miners' safety by undercutting the waste rock pillar in stope 615-15-3-west without conducting an engineering or geomechanical analysis and a proper geomechanical examination. And there is no question that a miner died as the sadly predictable result of Hecla's conduct. The only question is whether Section 57.3401-a flexible standard the purpose of which is to require ground control testing

---

[4] *See* Tr. at 511-12 (testifying that in addition to inspection by ordinary miners the "stope was also examined and looked over by myself and by [mine foreman] John Lund" and that "I had safety people in there, management people, foremen, you know, shift bosses and the miners, as well as, geology every day."); Tr. at 618-19 (testimony from a Hecla geologist: "A. Yes. But each face, each stope was *visited* daily. [] Q: By a geologist? [A: Yes, to the best of our ability." (emphasis added)); Tr. at 720-21 (Hecla foreman John Lund testifying that on a visit to the stope he "h[ad] the opportunity *to observe* the ground conditions and support throughout that west side of the stope" (emphasis added)); Tr. at 737 (Lund inspected that back at the stope by "looking for any kind of signs of cracking or the plate pulling into the wood"-i.e., the same steps an ordinary miner was instructed to take when examining the back); *see also* Tr. at 470-71 (Bayer testifying about the same incident in which Lund conducted a standard examination of the back).

and examination sufficient to pinpoint ground control problems required Hecla to perform the type of examination and testing that would have pinpointed the foreseeable hazards presented here. The judge's answer to this question is erroneous because it holds in effect that an operator is *never* required to conduct more than ordinary examination and testing -even when the operator knowingly encounters, or as in this case *creates,* extraordinary hazards.

For these reasons, and the reasons discussed above, the Secretary respectfully requests that the Commission grant review. The Secretary also requests that the Commission reverse the judge's decision vacating the Section 57.3401 citation and hold that the standard requires engineering or geomechanical analysis under circumstances such as the ones presented here. Such a holding is the only conclusion consistent with the purpose of the standard.

The Secretary further requests that the Commission reverse the judge's decision to vacate the Section l lO(c) petition regarding then-superintendent Doug Bayer. The judge's decision regarding the Section 110(c) petition was based entirely on his resolution of the Section 57.3401

issue. Thus, if the Commission agrees with the Secretary's interpretation of Section 57.3401, the Section l lO(c) petition issue should be remanded for further proceedings.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

HEIDI W. STRASSLER
Associate Solicitor

W. CHRISTIAN SCHUMANN
Counsel, Appellate Litigation

Ph.".l.p f"l 1on. (bT WC5)
PHILIP MAY R
Attorney
U.S. Department of Labor
Office of the Solicitor
1100 Wilson Blvd., 22nd Fl.
Arlington, VA 22209-2296
(202) 693-9333
(202) 693-9361 (fax)

Attorneys for the
Secretary of Labor, MSHA

Date: May 28, 2015

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the Secretary's petition for discretionary review was served on May 28, 2015, by facsimile and U.S. mail on:

Laura E. Beverage
Karen L. Johnston
Jackson Kelly PLLC
1099 18th Street, Suite 2150
Denver, CO 80202

Philip Mayor (by WCS)
Philip Mayor