MARCH 1998

COMMISSION DECISIONS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

MARCH 1998

Review was granted in the following case during the month of March:

Secretary of Labor, MSHA on behalf of Ronald Maxey v. Leeco, Inc., Docket No. KENT 97-257-D. (Judge Melick, February 19, 1998)

Review was denied in the following case during the month of March:

Rock of Ages Corporation v. Secretary of Labor, MSHA, Docket No. YORK 94-76-RM, etc. (Judge Feldman, March 4, 1998)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

March 16, 1998

SECRETARY OF LABOR,	:		
MINE SAFETY AND HEALTH	:	Docket Nos.	LAKE 95-180-RM
ADMINISTRATION (MSHA)	:	through	LAKE 95-183-RM
	:		
v.	:	and	
	:		
DAANEN & JANSSEN, INC.	:		LAKE 95-290-M
	:		LAKE 95-313-M
	:		LAKE 95-352-M

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

DECISION

BY THE COMMISSION:

These consolidated contest and civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). At issue is whether Administrative Law Judge David Barbour properly determined that Daanen & Janssen, Inc. ("D&J"), violated 30 C.F.R. § 56.14101(a)(3),[1] by failing to maintain in functional condition a component of the service braking system of a front-end loader, and 30 C.F.R. § 56.9101,[2] when a D&J employee operating the loader traveled through a berm and was fatally injured. 18 FMSHRC 1796, 1798-800, 1804-08, 1812-14 (October 1996) (ALJ). The Commission granted D&J's petition for discretionary review ("PDR") challenging the judge's determinations. For the reasons that follow, we affirm.

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[1] 30 C.F.R. § 56.14101(a) provides in pertinent part: "(1) Self-propelled mobile equipment shall be equipped with a service braking system capable of stopping and holding the equipment . . . . (3) All braking systems installed on the equipment shall be maintained in functional condition."

[2] 30 C.F.R. § 56.9101 provides that, "[o]perators of self-propelled mobile equipment shall maintain control of the equipment while it is in motion."

I.

Factual and Procedural Background

D&J operates the Bay Settlement Mine, a limestone quarry in Scott, Wisconsin. *Id.* at 1797-98. At the quarry, limestone is extracted and stockpiled on the quarry floor, where it is later loaded into haulage trucks by front-end loaders. *Id.* at 1799. All such mobile equipment reaches the quarry floor via an access road, which has an overall grade of approximately 10 percent and has berms on both sides. *Id.*

On the morning of October 6, 1994, a front-end loader operated by D&J employee Richard Van Vonderen descended towards the bottom of the quarry via the access road. *Id.* Van Vonderen traveled down approximately one-third of the road when the loader drifted far left, twice hitting the left berm. *Id.* The loader traveled forward approximately another 34 feet, ran through the berm, and fell 40 feet to the quarry floor. *Id.* Van Vonderen was then taken to a local hospital, where he was pronounced dead. *Id.* at 1800.

Later that day, Thomas Pavlat, an investigator with the Department of Labor's Mine Safety and Health Administration ("MSHA"), was assigned to investigate the accident. *Id.* Pavlat did not inspect the loader's brakes, based on his determination that the damage to the loader was too extensive to ascertain the pre-accident condition of the brakes. Jt. Ex. 1B at 2. During his investigation, Pavlat discovered that Van Vonderen repeatedly had reported that rear "slack adjusters" or "adjusting bolts" on the front-end loader were "frozen" and would not turn.[3] 18 FMSHRC at 1805; Tr. 96.

On August 20, 1994, approximately seven weeks before the accident, Richard Sobieck, D&J's assistant mechanic, had inspected the loader because Van Vonderen had informed him that the loader was pulling to the left. 18 FMSHRC at 1806. Sobieck moved the adjusting bolts, thereby adjusting the brakes. *Id.* After he made those adjustments, however, he could not again turn the bolts; they were frozen. *Id.* Sobieck stated that he informed D&J's production supervisor, Aaron Kinney, about the bolts, and that Kinney had planned to fix or replace the bolts in October, when space would become available in the repair shop. *Id.*

As a result of his investigation, Pavlat served D&J with four citations. *Id.* at 1797. Pavlat issued D&J a citation alleging that the frozen rear adjusting bolts on the loader's service braking system constituted a violation of section 56.14101(a)(3), and a citation that Van Vonderen failed to maintain control of the loader in violation of section 56.9101. *Id.* at 1800.

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[3] Adjusting bolts serve to move the brake shoes closer to the brake drum to exert the maximum amount of stopping power for the service brake system. 18 FMSHRC at 1805; *see* Tr. 111, 390. When they are frozen, the adjusting bolts cannot be turned any further to alter the clearance between each brake shoe and brake drum. 18 FMSHRC at 1805.

The inspector also issued two other citations, alleging violations of the seatbelt standard in 30 C.F.R. § 56.14130(h) and the berm standard in 30 C.F.R. § 56.9300(a). *Id.* D&J challenged the citations and the matter proceeded to hearing before Judge Barbour. *Id.* at 1797.

The judge determined that D&J violated the braking and failure to control standards.[4] *Id.* at 1808, 1813. The judge affirmed the braking violation, concluding that the rear adjusting bolts, "integral component[s]" of the loader's service braking system, were frozen and inoperative. *Id.* at 1808. He reasoned that the plain language of section 56.14101(a)(3) requires that all components of a braking system be able to perform their intended function, and that the standard does not require that the brakes meet specific performance requirements. *Id.* at 1806-07. The judge concluded, however, that the violation was neither "significant and substantial" ("S&S") nor caused by D&J's unwarrantable failure, and assessed a penalty of $300 rather than the proposed penalty of $1000. *Id.* at 1810-12. In addition, the judge found a violation of section 56.9101, reasoning that the "record allows for no other plausible explanation for the accident than that Van Vonderen failed to control the moving loader." *Id.* at 1813. The judge determined that the violation was S&S but that D&J was not negligent. *Id.* at 1814. Accordingly, he assessed a civil penalty of $400 rather than the proposed penalty of $5000. *Id.* at 1815.

The Commission subsequently granted D&J's PDR, challenging the judge's determination that it violated sections 56.14101(a)(3) and 56.9101.[5]

II.

Disposition

A. Braking Violation

1. Interpretation of Section 56.14101(a)(3)

D&J argues that plain language of the braking standard does not support the judge's finding of violation. PDR at 7-8.[6] It explains that the standard's plain language requires a

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[4] In addition, the judge affirmed the seatbelt citation (Docket Nos. LAKE 95-180-RM and LAKE 95-290-M), and vacated the citation alleging a berm violation (Docket Nos. LAKE 95-183-RM and LAKE 95-352-M). *Id.* at 1802, 1804, 1818. Neither party petitioned for review of these determinations. PDR at 2 n.1; *see* S. Br. at 1.

[5] D&J did not petition for review of the judge's determination that its violation of section 56.9101 was S&S.

[6] Pursuant to Commission Procedural Rule 75(a), 29 C.F.R. § 2700.75(a), D&J designated its PDR as its brief.

finding of violation only when the braking system fails to serve its primary purpose of stopping and holding the vehicle, and that no such evidence exists in the record. *Id.* at 6, 8. The Secretary responds that the judge's finding that D&J violated the braking regulation is supported by the plain language of the standard. S. Br. at 6. The Secretary submits that the plain language of the standard mandates a finding of violation when a component of the braking system is not maintained in functional condition, regardless of whether the braking system is capable of stopping and holding the vehicle. *Id.* Alternatively, the Secretary contends that her interpretation of the standard, outlined in MSHA's *Program Policy Manual* ("*PPM*"), is reasonable and entitled to deference. *Id.* at 5-10.

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *see also Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (October 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (August 1993). If, however, a regulation is ambiguous, courts have deferred to the Secretary's reasonable interpretation of it. *See Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); *accord Secretary of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) ("agency's interpretation is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation'") (quoting *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 414 (1945)). The Secretary's interpretation of a regulation is reasonable where it is "logically consistent with the language of the regulation[s] and . . . serves a permissible regulatory function." *General Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (alteration in original) (quoting *Rollins Environmental Servs., Inc. v. EPA*, 937 F.2d 649, 652 (D.C. Cir. 1991)). The Commission's review, like the courts', involves an examination of whether the Secretary's interpretation is reasonable. *Energy West*, 40 F.3d at 463 (citing *Secretary of Labor on behalf of Bushnell v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1439 (D.C. Cir. 1989)); *see also Consolidation Coal Co.*, 14 FMSHRC 956, 969 (June 1992).

Both parties advance plain language interpretations of the standard to support their respective positions. As evident from the parties' interpretations, the standard supports at least two plausible and divergent interpretations.[7] We conclude, therefore, that the standard is

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[7] Commission administrative law judges have differed in their interpretations of the standard. In several decisions, judges found violations of section 56.14101(a)(3) where brakes of the vehicle in question failed to stop it. *See, e.g., Elmer James Nicholson, emp. by A-Rock Inc.*, 16 FMSHRC 1967, 1968-69 (September 1994) (ALJ); *Morris Sand & Gravel*, 16 FMSHRC 624, 628-29 (March 1994) (ALJ); *Herba Sand & Gravel*, 13 FMSHRC 219, 220 (February 1991) (ALJ). In other decisions, judges found violations of the standard where a component of the braking system was not maintained, despite evidence that the braking system could stop and hold the vehicle. *See, e.g., Acme Brick Co.*, 17 FMSHRC 1459, 1461-62 (August 1995) (ALJ); *New Point Stone Co.*, 16 FMSHRC 2466, 2468 (December 1994) (ALJ); *Barrett Paving Materials,*

ambiguous rather than plain.[8] *See* 2A Norman J. Singer, *Sutherland Statutory Construction* § 45.02, at 6 (5th ed. 1992) ("Ambiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses."); *Ehlert v. United States*, 402 U.S. 99, 105 (1971). Accordingly, we must consider whether the Secretary's interpretation of section 56.14101(a)(3) is reasonable.

We hold that the Secretary's interpretation is reasonable. First, the Secretary's interpretation is consistent with the language of the regulation. In the absence of an express regulatory definition or an indication that the drafters intended a technical usage, the Commission has relied on the ordinary meaning of the word construed. *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *rev. denied*, 111 F.3d 963 (D.C. Cir. 1997) (mem.). The common usage of the term "system" contemplates "a complex unity formed of many often diverse parts subject to a common plan or serving a common purpose," and "an aggregation or assemblage of objects joined in regular interaction or interdependence." *Webster's Third International Dictionary (Unabridged)* 2322 (1986). Because the definition of the term "system" entails an interrelationship of component parts, it follows that for the system to be considered functional, each of its component parts must be functional.

Second, the Secretary's interpretation advances the Mine Act's goal of protecting the safety of miners. *Dolese Bros. Co.*, 16 FMSHRC 689, 693 (April 1994) ("A safety standard 'must be interpreted so as to harmonize with and further . . . the objectives of' the Mine Act.") (quoting *Emery Mining Co. v. Secretary of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984)). By allowing a citation to issue before the entire braking system fails, the Secretary's interpretation is preventive and seeks to cure equipment defects before serious accidents occur. This interpretation, therefore, promotes the Mine Act's primary objective of miner safety. *See Ace Drilling Coal Co.*, 2 FMSHRC 790, 791 (April 1980), *aff'd*, 642 F.2d 440 (3d Cir. 1981)

Inc., 15 FMSHRC 1999, 2015 (September 1993) (ALJ).

[8] Commissioners Marks and Riley agree with the judge that, under the plain meaning of section 56.14101(a)(3), D&J violated the braking standard. They find that the judge correctly determined the standard clearly requires all components of a braking system to be able to perform their intended function. In support of this proposition, they believe the frozen and inoperable rear adjusting bolts were an "integral component" of the loader's service braking system. The cited standard provides that "braking *systems* installed on the equipment shall be maintained in functional condition." 30 C.F.R. § 56.14101(a)(3) (emphasis added). Components such as adjusting bolts compensate for inevitable wear and deterioration caused by normal use and operate solely to ensure that the entire braking system functions properly at all times. Inoperable adjusting bolts are a weak link in a chain of vital components that make up a braking system, and are clearly prohibited by the cited standard. Commissioners Marks and Riley thus do not reach the question of whether the Secretary's interpretation of section 56.14101(a)(3) is reasonable.

(unpublished table decision); *cf. Ideal Basic Indus., Cement Div.*, 3 FMSHRC 843, 844 (April 1981) (holding that interpretation similar to one advanced in instant case "is more likely to prevent accidents, a primary goal of the Act"). In contrast, under D&J's interpretation, MSHA could not issue a citation until the braking system was completely unable to stop the vehicle.

Third, the Secretary has consistently applied the interpretation embodied in the citation.[9] The *PPM*, which the Commission long has recognized as evidence of MSHA's policies and practices (*Dolese Bros.*, 16 FMSHRC at 693 n.4), succinctly states the interpretation of the braking standard advanced here by the Secretary. The *PPM* provides: "Standard [56].14101(a)(3) should be cited if a component or portion of any braking system on the equipment is not maintained in functional condition even though the braking system is in compliance with (1) and (2) above." IV *PPM*, Parts 56/57, at 55-55a (1991); *see* S. Br. at 6-13.

Finally, the Secretary's interpretation of the braking standard gives meaning to all subsections of the standard. "[A] fundamental rule of construction is that effect must be given to every part of a statute or regulation, so that no part will be meaningless." *Sekula v. FDIC*, 39 F.3d 448, 454 (3d Cir. 1994). Under the Secretary's interpretation, subsection (1) of the braking standard is cited if the service braking system is not capable of stopping and holding equipment, while subsection (3) is cited if a component of the braking system is not maintained in functional condition. This interpretation gives independent meaning to each part: subsection (1) is a performance standard, while subsection (3) is a maintenance standard. D&J's interpretation suggests that a citation under subsection (3) is proper only when the system as a whole fails to stop and hold equipment, essentially equating subsections (1) and (3). While D&J asserts that its position renders neither subsection (1) nor subsection (3) superfluous, it does not make clear how a violation of (3) could occur without also violating (1). *See* PDR at 8. Therefore, we conclude that the Secretary's interpretation of section 56.14101(a)(3) is reasonable.

2. Substantial Evidence

D&J argues that, even if the judge correctly concluded that a non-functioning component of a braking system constitutes a violation of section 56.14101(a)(3), substantial evidence does not support his conclusion that the adjusting bolts were not functioning. PDR at 12-15. D&J submits that, although the adjusting bolts were frozen, there is no evidence establishing that the bolts failed to maintain proper clearance between the brake drums and linings. *Id.* at 13-14. The

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[9] D&J asserts that "[n]o conscientious mine operator reading the Standard possibly could find in its terms a requirement that each 'component' of a braking system, as opposed to the entire system, be maintained in functional condition." PDR at 7. To the extent that D&J argues that it received inadequate notice of the standard's requirements, we find that the *PPM* provided D&J with sufficient notice that each component of a braking system must be maintained in functional condition. *See Dolese Bros.*, 16 FMSHRC at 694 (holding that MSHA Program Policy Letter provided operator with sufficient notice of standard's requirements).

Secretary asserts that substantial evidence supports the judge's finding that the adjusting bolts were not maintained in functional condition. S. Br. at 11-13.

When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (January 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

Even if the adjusting bolts were frozen in a position that maintained adequate clearance between the brake drums and linings on the day of the accident, substantial evidence supports the judge's decision that the bolts were inoperative. Adjusting bolts are adjustment mechanisms; that is, they are designed to adjust the service brakes. Tr. 390, 434. The evidence is undisputed that the bolts could no longer perform their designated function. The rear adjusting bolts had been frozen since their last adjustment on August 20. *See* 18 FMSHRC at 1806; Tr. 203-04, 241. Sobieck testified that he intended to either "free up" or replace the bolts in October when the loader was to be brought to the repair shop. Tr. 247, 256. As stated by the Secretary's expert witness, Joseph Judeikis:

> If [an adjusting bolt] is not able to be manipulated or [to] perform either manually or automatically the function it is intended to perform, that being to provide an adjustment mechanism within the brak[e] system, then it . . . is not functioning, and as part of the brake system, the brake system should not be considered maintained in functional condition. Tr. 434.

Because adjusting bolts are a component of a loader's service braking system, we affirm the judge's determination that the loader's braking system was not maintained in functional condition in violation of section 56.14101(a)(3).

B. Failure to Maintain Control Violation

D&J argues that the judge erred as a matter of law in finding that "[t]he accident itself speaks to the violation" of section 56.9101 (18 FMSHRC at 1813), and that, excluding consideration of the accident, there is not substantial evidence in the record to support a finding of violation. PDR at 15. The Secretary responds that the judge did not err in finding a violation of the standard because, as the judge stated, "[t]he record allows for no other plausible explanation for the accident" than that Van Vonderen failed to maintain control of the loader. S. Br. at 14 (quoting 18 FMSHRC at 1813).

We conclude that the judge did not err in relying upon the accident to find a violation. As D&J argues, the Commission has recognized that an accident by its occurrence does not necessarily prove that a violation occurred. *See-Lone Star Indus., Inc.*, 3 FMSHRC 2526, 2529 (November 1981); *Old Ben Coal Co.*, 4 FMSHRC 1800, 1804 n.4 (October 1982). The rationale underlying *Lone Star* and its progeny, however, is distinguishable from the present case. We explained in *Lone Star* that an accident does not necessitate a finding of violation because "the reasons for an accident may have nothing to do with the substance of the standard allegedly violated." *Lone Star*, 3 FMSHRC at 2529. Here, by contrast, the circumstances surrounding the accident illustrate Van Vonderen's loss of control over the loader, and are closely connected with the substance of section 56.9101, which requires that equipment operators "maintain control of the equipment while it is in motion." 30 C.F.R. § 56.9101.

In addition, substantial evidence supports the judge's finding of violation. We have held that "the substantial evidence standard may be met by reasonable inferences drawn from indirect evidence." *Mid-Continent Resources, Inc.*, 6 FMSHRC 1132, 1138 (May 1984). The "possibility of drawing either of the two inconsistent inferences from the evidence [does] not prevent [the judge] from drawing one of them." *NLRB v. Nevada Consol. Copper Corp.*, 316 U.S. 105, 106 (1942) (per curiam). The Commission also has emphasized that inferences drawn by the judge are "permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred." *Mid-Continent*, 6 FMSHRC at 1138.

The record reveals that the loader driven by Van Vonderen veered to the left side of the access road, hit the berm twice, and soon thereafter, drove through the berm, plummeting 40 feet. 18 FMSHRC at 1799; Tr. 62, 67, 89. There is no evidence that Van Vonderen intentionally drove through the berm. 18 FMSHRC at 1813; Tr. 69. Therefore, the judge's inference that the accident "would not have happened if Van Vonderen had maintained control while the loader was in motion" (18 FMSHRC at 1813) is inherently reasonable, and there is a rational connection between the evidence and the inference that Van Vonderen lost control of the moving loader.

Moreover, the judge correctly dismissed other explanations for the accident, such as that Van Vonderen might have looked over his shoulder, driven at excess speed, or been distracted by wasps. 18 FMSHRC at 1813. The reasons for a loss of control are irrelevant to consideration of whether control over moving equipment was maintained. In any event, the proffered explanations for Van Vonderen's failure to control the loader are speculative and unsupported in the record. *Id.*; *see* Tr. 69-70, 135, 317-19. Accordingly, we affirm the judge's determination that D&J violated section 56.9101.

III.

Conclusion

For the foregoing reasons, we affirm the judge's determination that D&J violated sections 56.14101(a)(3) and 56.9101.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

March 25, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	CIVIL PENALTY PROCEEDING
v.	:	Docket No. KENT 98-129
	:	A.C. No. 15-17741-03517
KENAMERICAN RESOURCES, INC.	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On March 10, 1998, the Commission received from Kenamerican Resources, Inc. ("Kenamerican") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). It has been administratively determined that the Secretary of Labor does not oppose the motion for relief filed by Kenamerican.

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

In its request, Kenamerican asserts that its failure to file a hearing request to contest the proposed penalty for the violation alleged in Citation No. 4278199 was due to an internal processing error made by its accounting department. According to Kenamerican, its safety director, Bobby Gibson, who normally handles challenges to citations issued by the Department of Labor's Mine Safety and Health Administration ("MSHA"), was home recovering from

surgery when the hearing request was due. Mot. at 2. Kenamerican asserts that Gibson provided instructions to the company's treasurer for processing the forms to contest the citation, but the accounting department inadvertently failed to process the hearing request. *Id.* at 2-3. Kenamerican alleges that Gibson discovered the processing error when he received a copy of MSHA's February 27, 1998, letter to Kenamerican's General Manager, notifying the company that the case became a final order of the Commission on December 31, 1997. *Id.* at 3.

We have held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b), we possess jurisdiction to reopen uncontested assessments that have become final by operation of section 105(a). *See, e.g., Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (September 1994); *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Servs., Inc.*, 17 FMSHRC 1529, 1530 (September 1995). In accordance with Rule 60(b)(1), we have previously afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (October 1997); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (September 1996); *General Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996).

Here, the record indicates that Kenamerican intended to contest Citation No. 4278199 and that, but for the illness of its safety director and an apparent lack of coordination between the safety director and the company's accounting department, it would have timely submitted the hearing request and contested the proposed penalty assessment. In these circumstances, Kenamerican's failure to timely file a hearing request properly may be found to qualify as "inadvertence" or "mistake" within the meaning of Rule 60(b)(1). *See Peabody*, 19 FMSHRC at 1614-15 (granting operator's motion to reopen when operator failed to submit request for hearing to contest proposed penalty due to lack of coordination between counsel and personnel at mine); *Stillwater*, 19 FMSHRC at 1022-23 (granting operator's motion to reopen when operator failed to submit request for hearing to contest proposed penalty due to lack of coordination between recipient of assessment at mine and operator's attorneys).

Accordingly, in the interest of justice, we grant Kenamerican's unopposed request for relief and reopen this penalty assessment that became a final order with respect to Citation No. 4278199. This case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET, NW, 6TH FLOOR
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March 30, 1998

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. CENT 95-29-M
	:	CENT 95-30-M
v.	:	CENT 95-239-M
	:	CENT 95-240-M
REB ENTERPRISES, INC., and	:	
HAROLD MILLER and RICHARD BERRY	:	

BEFORE: Jordan, Chairman; Marks, Riley, and Verheggen. Commissioners[1]

DECISION

BY: Jordan, Chairman; Riley and Verheggen, Commissioners

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). At issue is whether a violation of 30 C.F.R. § 57.14131(a), involving the failure of a haul truck driver to wear a seat belt while driving a truck on the mine roadway, was the result of unwarrantable failure by REB Enterprises, Inc. ("REB"); whether REB's violations of 30 C.F.R. § 56.14130(g), involving the failure of bulldozer drivers to wear seat belts while operating that equipment, were the result of unwarrantable failure; whether civil penalties should be assessed against Quarry Supervisor Harold Miller and REB President Richard Berry for alleged knowing violations of section 56.14130(g); whether REB violated 30 C.F.R. § 56.14130(a)(3) by failing to equip with a seat belt a piece of Case mechanized equipment identified as a backhoe that was also equipped as a loader and used primarily for that purpose; whether an order alleging that a loader operator was not wearing a seat belt was properly dismissed on the ground that it alleged a violation of the wrong standard; and whether REB's violation of 30 C.F.R. § 56.14107(a), involving the lack of a guard on the tail pulley of a radial stacker conveyor belt, was the result of unwarrantable failure. Administrative Law Judge Avram Weisberger concluded that the Secretary of Labor had failed to

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[1] Commissioner Beatty assumed office after this case had been considered at a Commission decisional meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Beatty has elected not to participate in this matter.

establish that the violations of sections 57.14131(a), 56.14130(g), and 56.14107(a) were the result of REB's unwarrantable failure; that the Secretary had not proved the alleged violation of section 56.14130(a)(3); and that the citation alleging that a loader operator was not wearing a seat belt should be dismissed on the ground that it alleged a violation of the wrong standard. 18 FMSHRC 1603, 1607-11, 1612-16, 1620-21, 1624-25 (September 1996) (ALJ). The judge also concluded that Secretary had failed to establish that Miller and Berry violated section 110(c) of the Mine Act, and accordingly dismissed the actions brought against them. *Id.* at 1618-19, 1622, 1626-27. The Commission granted a petition for discretionary review filed by the Secretary ("PDR") challenging these determinations. For the reasons that follow, we affirm in part, reverse in part, vacate in part, and remand.

I.

Citation No. 4327776

A. Facts and Procedural Background

On August 16, 1994, while conducting an inspection at REB's limestone quarry, Inspector James Enochs from the Department of Labor's Mine Safety and Health Administration ("MSHA"), accompanied by REB foreman Ray King, walked over to an R-20 Euclid haul truck to introduce himself to the driver. 18 FMSHRC at 1607. When he climbed up on the running board of the truck, Enochs noticed that the driver, Ron Alexander, did not have on his seat belt. *Id.* Enochs issued a citation alleging a significant and substantial ("S&S")[2] and unwarrantable violation of section 57.14131(a).[3] *Id.*; Gov't. Ex. 4.

At trial, Inspector Enochs testified that he considered this violation to be unwarrantable based in part on a conversation he had with Alexander. Enochs testified that when he asked Alexander why he was not wearing a seat belt, Alexander said that "nobody made a big deal about [wearing seat belts]." 18 FMSHRC at 1610. In addition, Enochs testified that after he issued the citation, King did not say anything or instruct the driver to wear his seat belt. *Id.* Enochs opined that King seemed "somewhat indifferent to the whole situation." *Id.* Enochs also testified that he considered this violation to involve unwarrantable failure because of the seriousness and danger involved in operating equipment without a seat belt. Tr. 37, 42. Finally, Enochs testified that in making his unwarrantable failure finding, he considered second-hand information he received from an MSHA Inspector Hermstein (who did not testify at the hearing)

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[2] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

[3] Section 57.14131(a) provides: "Seat belts shall be provided and worn in haulage trucks." 30 C.F.R. § 57.14131(a).

regarding an industrial assistance session MSHA had with REB management at which the importance of seat belt use was purportedly discussed. 18 FMSHRC at 1610; Tr. 15, 18, 33.[4]

The judge concluded that REB violated section 57.14131(a), relying on the uncontradicted testimony of Inspector Enochs that Alexander was not wearing his seat belt while operating the haul truck. 18 FMSHRC at 1607. The judge also concluded that the Secretary had failed to establish that this violation was the result of REB's unwarrantable failure, stating that the only evidence offered by the Secretary to establish the violation as unwarrantable was the uncorroborated hearsay testimony of Enochs. *Id.* at 1611. The judge noted that neither King nor Hermstein were called as witnesses for the Secretary. 18 FMSHRC at 1611. He concluded that Enochs' hearsay testimony concerning statements allegedly made by Alexander was "inherently unreliable" and not entitled to any probative value, noting that the Secretary also failed to call Alexander as a witness. *Id.* The judge also concluded that Enochs' testimony concerning King's reaction to the issuance of the citation was too subjective to be accorded any probative weight. *Id.* In addition, he credited the testimony of REB's witnesses that the company posted information on its premises advising employees of the need to wear seat belts. *Id.* at 1610-11.[5]

B. Disposition

The Secretary asserts that the judge erred by refusing to accord any probative weight to the evidence submitted to establish that this violation was unwarrantable, and rejecting it as inherently unreliable, solely because of its hearsay nature. S. Br. at 16-20. The Secretary argues that the judge in effect applied a per se rule that hearsay evidence may not be considered, in contravention of Commission precedent which permits consideration of material and relevant hearsay evidence based upon its reliability and probative value. *Id.* The Secretary contends that the hearsay evidence relied upon to establish that this violation was unwarrantable was reliable and entitled to consideration, particularly since REB could have cross-examined Inspector Enochs concerning his hearsay testimony or called mine officials to rebut that testimony. *Id.* at 18-19. The Secretary also contends, in the alternative, that the statements attributed to Alexander and other miners by Enochs do not constitute hearsay because they fall within an exception for admissions by a party-opponent under Rule 801(d)(2)(D) of the Federal Rules of Evidence. *Id.* at 19 n.7.

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[4] Commissioners Riley and Verheggen note that the Secretary failed to introduce any corroborating evidence concerning the details of the industrial assistance session, such as its date, location, attendees, or even specific content. *Cf. AMAX Coal Co.*, 19 FMSHRC 846, 851 (May 1997) (finding fact that "MSHA had repeatedly met with mine management to discuss section 75.400 compliance problems" based on testimony that was voluminous in comparison to that adduced here).

[5] The judge also concluded that this violation was not S&S. *Id.* at 1610. The Secretary does not challenge this finding. *See* PDR at 3-5.

REB contends that the judge did not err in finding Enochs' hearsay testimony to be inherently unreliable, and refusing to give that testimony any probative weight, in determining that the section 57.14131(a) violation was not the result of unwarrantable failure. R. Br. at 5-8. REB argues that the weight to be afforded to hearsay testimony is within the sound discretion of the trial judge, and that the judge properly exercised his discretion in refusing to give any probative weight to this hearsay testimony because it was not verified and the declarants to whom the statements were attributed were not called as witnesses. *Id.* at 6-8. REB also argues that there was substantial evidence, including the credited testimony of REB witnesses, to support the judge's determination that this violation was not unwarrantable. *Id.* at 7-8.

Hearsay evidence is admissible in Commission proceedings so long as it is material and relevant. *Mid-Continent Resources, Inc.*, 6 FMSHRC 1132, 1135 (May 1984); *Ideal Cement Co.*, 13 FMSHRC 1346, 1350 n.1 (September 1991). The Commission's procedural rules expressly provide for the admissibility of "[r]elevant evidence, including hearsay evidence." 29 C.F.R. § 2700.63(a). Here, the judge stated that much of Enoch's testimony was "inherently unreliable due to its [hear]say nature, and cannot be relied upon." 18 FMSHRC at 1611. In effect, he applied a per se rule precluding any consideration of this hearsay evidence, contrary to established Commission precedent. Instead, he should have evaluated the evidence to determine whether it was reliable and entitled to any probative weight. *See Mid-Continent*, 6 FMSHRC at 1139 ("[i]t is, of course, the judge's duty to draw conclusions from the record"); *see also Grizzle v. Picklands Mather & Co.*, 994 F.2d 1093, 1096 (4th Cir. 1993) (ALJs have "sole power to make credibility determinations and resolve inconsistencies in the evidence"). We thus vacate the judge's determination that this violation was not the result of unwarrantable failure, and remand this matter for him to evaluate the Secretary's hearsay evidence in accordance with Commission precedent. We specifically do not reach the issue of whether any of the Secretary's hearsay evidence was reliable or probative because this task is reserved to the judge's discretion in the first instance.

II.

Order Nos. 4327622 and 4327625

A. Facts and Procedural Background

1. Order No. 4327622

During the inspection conducted on August 16, Inspector Enochs, in the presence of foreman King, observed a Case bulldozer operating near the top of the highwall. 18 FMSHRC at 1612. Enochs was about 30 to 40 feet away from the bulldozer, which was approaching him at an angle of about 45 degrees, when he noticed that the operator, Bill Jacobs, was not wearing a

seat belt. *Id.* Enochs issued Order No. 4327622, which alleged an S&S and unwarrantable violation of section 56.14130(g).[6] 18 FMSHRC at 1612.

At trial, Enochs testified that he considered this violation to be the result of unwarrantable failure based, in part, on statements made to him by Jacobs that he sometimes wore a seat belt, and other times did not. *Id.* at 1614.[7] Enochs also testified that Jacobs' supervisor, Harold Miller, was nearby observing and monitoring the work but took no action to ensure that the bulldozer operator wore a seat belt. Tr. 131-32. According to Enochs, he was told by Inspector Hermstein that he (Hermstein) had warned REB supervisory personnel, including foreman King, in an industrial assistance session of the importance of seat belt use. Tr. 131-32.[8] Dale St. Laurent, who previously served as a special investigator for MSHA, testified that Jacobs told him in an interview that REB did not have a seat belt policy and that no one ever made him wear a seat belt. 18 FMSHRC at 1614. St. Laurent also testified that he was told by REB serviceman Yates that, in the year prior to the inspection, he never saw either of the two bulldozer operators wear a seat belt, and that no one at REB ever told them to wear seat belts. *Id.* at 1614, 1621. In addition, St. Laurent testified that Yates told him that there was no company policy regarding seat belts, that he did not recall anyone at REB telling anyone else to wear a seat belt, and that Jacobs told Yates that neither Miller nor REB President Berry ever told Jacobs to wear a seat belt. *Id.*

The judge found that the Secretary had established a violation of section 56.14130(g), but concluded that the Secretary had failed to establish that this violation was the result of REB's unwarrantable failure because the only evidence offered by the Secretary on that issue was hearsay testimony that was unreliable and not entitled to any probative weight. *Id.* at 1612-13, 1616. The judge found that there was no evidence that either foreman King or Miller, then a lead man in charge of the stripping operation, was aware that Jacobs was not wearing a seat belt. *Id.* at 1615-16. The judge refused to assign any probative weight to the testimony of Inspector Enochs that King had been previously warned by MSHA regarding the need to ensure compliance with the seat belt standard because of "the inherently unreliable nature" of that hearsay testimony. *Id.* at 1616. For the same reason, the judge declined to give any weight to the testimony of Enochs and St. Laurent concerning the statements allegedly made by Jacobs and Yates regarding the lack of any company policy requiring the wearing of seat belts and the failure of REB management to remind employees to wear seat belts. *Id.* The judge also relied on

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[6] Section 56.14130(g) provides, in relevant part, that "[s]eat belts shall be worn by the . . . operator" of equipment covered by that section, which includes bulldozers. 30 C.F.R. § 56.14130(g). *See* discussion *infra* at 13 n.15.

[7] Enochs' contemporaneous notes of this conversation indicated that Jacobs also stated that at REB "no one makes a big deal about" wearing seat belts. *Id.*

[8] *See supra* note 4.

evidence that REB had posted information in its office regarding the need to wear seat belts while on the job. *Id.*

2. Order No. 4327625

Also on August 16, Inspector Enochs observed another REB employee, Jim Farrish, operating a John Deere bulldozer without wearing a seat belt. *Id.* at 1620. Enochs issued Order No. 4327625, which alleged an S&S and unwarrantable violation of section 56.14130(g). *Id.* at 1619-20.

At trial, Enochs testified that he determined this violation involved high negligence and unwarrantable failure because the violation was obvious, it was the fourth citation or order he had issued that day involving the failure to wear seat belts, and REB management had not taken any corrective action. *Id.* at 1621. In addition, former Special Investigator St. Laurent testified that when he asked Mr. Cunningham, an employee who operated equipment for REB, about the use of seat belts by employees, Cunningham told him that "the normal posture was . . . that if a guy wanted to wear them, fine, and if he didn't then that was okay, too." *Id.* St. Laurent also testified that, when asked why the bulldozer operators were not wearing their seat belts, foreman Harold Miller told him that he had only recently been promoted to supervisor and therefore felt uncomfortable telling employees what to do and so just let them do what they wanted to do. Tr. 167. According to St. Laurent, Miller also stated that he usually did not wear a seat belt when he operated equipment. Tr. 167.

The judge found that REB had committed a second violation of section 56.14130(g), but concluded that the Secretary had failed to establish that this violation was the result of unwarrantable failure. 18 FMSHRC at 1620, 1621.[9] The judge also found that the Secretary had failed to adduce evidence that King had any opportunity to check whether other employees were wearing their seat belts following issuance of the prior citation and orders alleging seat belt violations, or regarding King's activities following issuance of the first seat belt citation. 18 FMSHRC at 1621. The judge also refused to assign any weight to the testimony of St. Laurent concerning statements made to him by Yates and Cunningham, noting that neither Yates nor Cunningham was called by the Secretary to verify the statements attributed to them, and characterizing this hearsay testimony as "inherently unreliable." *Id.*

B. Disposition

The parties make essentially the same arguments with respect to the judge's findings that these violations were not the result of unwarrantable failure that they make in connection with the alleged unwarrantable violation of section 57.14131(a), discussed in Part I.B, above.

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[9] The judge also concluded that both of the section 56.14130(g) violations were not S&S. *Id.* at 1613-14, 1620. The Secretary does not challenge these findings. *See* PDR at 5-9.

We vacate the judge's determination that these violations were not the result of unwarrantable failure, and remand this matter to the judge, for the reasons discussed in Part I.B. As indicated above, we believe that the judge's blanket failure to evaluate the reliability and probative value of this hearsay testimony is inconsistent with Commission precedent.

III.

Liability of Harold Miller and Richard Berry Under Section 110(c)

A. Factual and Procedural Background

The Secretary charged Quarry Supervisor Harold Miller and Richard Berry — the owner, principal stockholder and president of REB— with knowingly authorizing, ordering, or carrying out the violations of section 56.14130(g) alleged in Order Nos. 4327622 and 4327625. 18 FMSHRC 1604, 1616-19, 1622. The Secretary proposed penalties totaling $1200 against Miller and $1600 against Berry. S. Pets. for Assessment of Penalty, Docket Nos. CENT-239-M and CENT-240-M (Sept. 1, 1995).

The judge concluded that the Secretary had not established that either Miller or Berry had violated section 110(c) of the Act, and accordingly dismissed the actions brought against them. 18 FMSHRC at 1618-19, 1622. The judge concluded the Secretary failed to establish that Miller was an agent of REB at the time these violations occurred because she "failed to adduce sufficient evidence to establish that Miller had any significant responsibility for the operation of the highwall, or that he supervised the other miners working at that site." *Id.* at 1618. The judge noted that the Secretary failed to provide any evidence regarding whether Miller was paid as an hourly employee or as part of management, or his official duties and responsibilities. *Id.* He found that the Secretary failed to establish that Miller had direct responsibility for controlling the acts of miners on the highwall or for their performance or duties, the authority to assign them work or discipline them, or responsibility for the safety of miners and for insuring compliance with mandatory safety standards. *Id.* The judge credited Miller's testimony that he was only a "lead man" at the time of the August 1994 inspection and was not promoted to foreman until September 1995. *Id.* In addition, the judge found that the Secretary failed to rebut Miller's testimony that in August 1994 he did not have the authority to hire or fire employees, was not given instructions regarding the discipline of employees, and did not assign equipment to employees. *Id.*

While finding that Berry was an officer of REB, and therefore within the purview of section 110(c), the judge found that the Secretary did not establish that Berry had any information that gave him knowledge or reason to know that the bulldozer operators were not wearing seat belts when cited, or adduce any other evidence to show that Berry engaged in aggravated conduct. *Id.* at 1618-19, 1622. With respect to the violation alleged in Order No. 4327622, the judge found that there was no evidence that Berry had information that gave him knowledge or reason to know that Jacobs was not wearing a seat belt. *Id.* at 1619. The judge found that, as the

president of REB, Berry's policy regarding the wearing of seat belts was demonstrated by the posting of materials informing employees of the responsibility to wear seat belts. *Id.*[10] The judge also credited Berry's testimony that although he personally feels an individual has the right not to wear a seat belt, he did not condone the failure of employees to wear seat belts and that, on five or six occasions, he told employees he observed not wearing seat belts to put them on and warned them that they would be sent home the next time they were found not wearing a seat belt. *Id.* at 1619. With respect to the other section 56.14130(g) violation, the judge found that hearsay testimony of former Special Investigator St. Laurent regarding statements made by employees Yates and Cunningham was insufficient to establish Berry's liability under section 110(c). *Id.* at 1622.

B. Disposition

The Secretary contends that the judge erred in dismissing the section 110(c) allegations because he failed to accord any probative weight to the testimony of Inspector Enochs and former Special Investigator St. Laurent concerning statements made by employees indicating that REB management had an indifferent attitude regarding the wearing of seat belts, and that Miller and Berry had ample notice of the failure of bulldozer operators to wear seat belts on these occasions. S. Br. at 19. The Secretary argues that the judge failed to evaluate factors bearing on the reliability or probative weight of these statements, and instead improperly applied a per se rule that this evidence could not be considered because it was hearsay. *Id.*

REB argues that the judge properly exercised his discretion in refusing to give any probative weight to the hearsay testimony relied upon to establish the section 110(c) liability of Miller and Berry. R. Br. at 6-8. REB also argues that there was substantial evidence, including the credited testimony of REB witnesses, to support the judge's determination that Miller and Berry were not liable under section 110(c). *Id.* at 7-8.

1. Applicable Principles

Section 110(c) of the Mine Act provides that, whenever a corporate operator violates a mandatory safety or health standard, an agent of the corporate operator who knowingly authorized, ordered, or carried out such violation shall be subject to an individual civil penalty. 30 U.S.C. § 820(c). The proper legal inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (January 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983). *Accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997). To establish section 110(c) liability, the Secretary must prove only that an individual knowingly acted, not that the individual knowingly

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[10] The judge credited Berry's uncontradicted testimony that REB has new employees sign its safety policy, which requires that seat belts "be worn at all times of vehicle operation." *Id.* at 1619 n.3.

violated the law. *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)). An individual acts knowingly where he is "in a position to protect employee safety and health [and] fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Kenny Richardson*, 3 FMSHRC at 16. Section 110(c) liability is predicated on aggravated conduct constituting more than ordinary negligence. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (August 1992).

2. Harold Miller

We affirm the judge's determination that the Secretary failed to establish that Miller was liable for the section 56.14130(g) violations under section 110(c) of the Mine Act. In our view, the judge correctly concluded that the Secretary failed to meet her burden of establishing that Miller was an "agent" of REB within the meaning of section 3(e) of the Act, 30 U.S.C. § 802(e),[11] at the time these violations occurred.[12]

While Miller testified that he was a "lead man" at the time of the August 1994 inspection, and was not promoted to quarry supervisor until September 1995 (Tr. 174-75), this testimony by itself is not dispositive of whether he was an agent of REB at the time these violations occurred. "In considering whether an employee is an operator's agent, the Commission has 'relied, not upon the job title or the qualifications of the miner, but upon his function, [and whether it] was crucial to the mine's operation and involved a level of responsibility normally delegated to management personnel.'" *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1560 (September 1996) (quoting *U.S. Coal, Inc.*, 17 FMSHRC 1684, 1688 (October 1995) (alteration in original). As the judge noted, Miller testified without contradiction that at this time he did not have the authority to hire and fire employees, did not assign equipment to employees, and was not given any instructions regarding the discipline of employees. 18 FMSHRC at 1618. Miller testified that he never attempted to take any formal disciplinary actions against miners working on the highwall. *Id.*; Tr. 178. In addition, while Miller testified that he transmitted to other employees directions received from his supervisor (King) regarding tasks to be performed at the site (Tr. 178), there was no evidence that he then had the authority to directly initiate the assignment of work to employees. Moreover, as the judge noted, the Secretary failed to adduce evidence that

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[11] Section 3(e) of the Mine Act defines an "agent" as "any person charged with responsibility for the operation of all or a part of a . . . mine or the supervision of the miners in a . . . mine[.]" 30 U.S.C. § 802(e).

[12] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

Miller was directly responsible for controlling the acts of miners on the highwall, that he was responsible for their performance and duties, or that he was responsible for the safety of miners and for ensuring their compliance with mandatory safety standards. 18 FMSHRC at 1618. Given the lack of record evidence indicating that Miller exercised supervisory responsibilities in August 1994, when these violations occurred, substantial evidence supports the judge's conclusion that the Secretary failed to establish that Miller was then an agent of REB within the meaning of section 3(e). Accordingly, we affirm the judge's finding that Miller is not liable for these section 56.14130(g) violations under section 110(c).

3. Richard Berry

We also affirm the judge's conclusion that the Secretary failed to establish a basis for holding REB President Richard Berry liable for the section 56.14130(g) violations under section 110(c). The judge correctly concluded that there was not sufficient evidence to show that Berry knew or reasonably should have known that Jacobs was not wearing a seat belt when cited, or that Berry engaged in any type of aggravated conduct. As the judge explained, there was no evidence adduced that Berry had any specific information that would give him knowledge or reason to know that Jacobs was not wearing a seat belt. 18 FMSHRC at 1619. In addition, the judge credited Berry's testimony that he did not condone the conduct of REB employees in not wearing seat belts, and that he issued verbal warnings to employees on five or six occasions when he observed them not wearing seat belts. *Id.* While these verbal warnings by Berry were not entirely consistent with REB's official policy, which is to send employees home for the rest of the day without pay for a first-time seat belt violation (*see id.* at 1619 n.4), we agree with the judge that, without something more, these statements do not provide a basis for section 110(c) liability. On review, the Secretary does not point us to any specific evidence which would serve as a basis for holding Berry personally liable under section 110(c) for this violation. Therefore, we affirm the judge on substantial evidence grounds.

We also agree with the judge's conclusion that the Secretary did not establish a basis for holding Berry liable for the other section 56.14130(g) violation under section 110(c). *Id.* at 1622. The only evidence offered to establish the section 110(c) liability of Berry for this violation was the hearsay testimony of Inspector Enochs and St. Laurent concerning statements attributed to employees Yates and Cunningham concerning the alleged failure of REB management to require employees to wear seat belts. *Id.* at 1621-22. While we disagree with the judge's blanket failure to accord any probative weight to this evidence, for reasons discussed in Part I.B above, in our view, this evidence, even if accorded full probative value, is not sufficiently particularized as to what Berry knew or had reason to know concerning the failure of Farrish to wear a seat belt to provide a basis for the assessment of section 110(c) liability. Accordingly, we affirm the judge's conclusion that Berry is not liable under section 110(c).

IV.

Order No. 4327626

A. Facts and Procedural Background

During the August 16, 1994 inspection, Inspector Enochs observed a Case backhoe with a loader bucket in front being operated as a loader. 18 FMSHRC at 1622-23. Enochs noticed that the vehicle was not equipped with a seat belt, and therefore issued Order No. 4327626 alleging a violation of section 56.14130(a)(3).[13] *Id.* at 1623.

The judge concluded that the Secretary failed to meet her burden of establishing that the vehicle at issue was a "wheel loader" or "wheel tractor" within the meaning of section 56.14130(a)(3), and accordingly dismissed the order. *Id.* He declined to accord significant weight to Enochs' opinion that the vehicle was a combination loader/backhoe because, in his view, Enochs did not provide a detailed explanation of the basis for his opinion. *Id.* The judge also relied on the Secretary's failure to offer any evidence how the terms "wheel loader" and "wheel tractor" are commonly understood in the mining industry. *Id.*

B. Disposition

The Secretary argues that the judge erred in dismissing this order because he misconstrued the evidence and failed to properly interpret the applicable standard. S. Br. at 20-22. The Secretary contends that section 56.14130(a)(3) must be broadly construed to include this type of mobile equipment, and that this vehicle came within the meaning of the terms "wheel loader" or "wheel tractor" as used in that standard because it was mounted on wheels, was self-propelled, and had a bucket on the front that was being used to load materials. *Id.* at 21-22.

REB contends that the judge properly concluded that the Secretary failed to establish that this vehicle fell within the coverage of section 56.14130(a)(3), and that therefore there was insufficient evidence to support a finding of a violation. R. Br. at 9-10.

Our review of the judge's conclusion that the Secretary failed to establish a violation of section 56.14130(a)(3) involves interpretation of the terms "[w]heel loaders" and "wheel tractors" used in that standard.[14] In the absence of a statutory or regulatory definition of a term,

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[13] Section 56.14130(a) requires that seat belts be installed on various types of mobile equipment, including "[w]heel loaders and wheel tractors." 30 C.F.R. § 56.14130(a)(3).

[14] This standard, which was issued in 1988, was "derived from" a preexisting standard, 30 C.F.R. § 56.9088 (1988). 53 Fed. Reg. 32,496, 32,511 (1988). While the regulatory history indicates that section 56.14130 was intended to retain the scope of the prior standard, it contains no specific discussion of the meaning of the terms "wheel loaders" and "wheel tractors." *Id.* at

or a technical usage, we look for the ordinary meaning of the terms used in a regulation. *See Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997); *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff'd*, 111 F.3d 963 (D.C. Cir. 1997) (mem.). A "loader" is defined as "[a] mechanical shovel or other machine for loading coal, ore, mineral, or rock." American Geological Institute, *Dictionary of Mining, Mineral and Related Terms* 316 (2d ed. 1997) ("*DMMRT*"). A "tractor" is defined as "a self-propelled vehicle — which may be mounted on crawler tracks, on wheels with large pneumatic tires, or on a mixture of both — intended for moving itself and other vehicles." *Id.* at 582. A "backhoe" is defined as "[t]he most versatile rig used for trenching. The basic action involves extending its bucket forward with its teeth-armed lip pointing downward and then pulling it back toward the source of power." *Id.* at 34. A comparison of these definitions indicates that a backhoe is distinguished from a loader or tractor primarily on the basis of the different function it is used to perform — dragging its downward-pointed bucket in a backward direction to perform trenching work. Thus, the plain meaning of the language of section 56.14130(a)(3) indicates that it applies to vehicles equipped and utilized as a loader.

The root of confusion with respect to this citation stems at least in part from the inspector's unfortunate characterization of the equipment in the first place. One might say it is like the apocryphal story of a group of blind persons who encounter an elephant, each one pronouncing very different descriptions of the creature depending on what part of the beast they are nearest to and able to touch. The equipment in question, a J.I. Case construction tractor mounted on pneumatic tires or wheels, is equipped with a loader attachment on the front and a backhoe attachment on the rear. We can only surmise that the inspector too, identified this mechanized equipment by the part nearest to him. Faced with three choices — (wheel) tractor, loader, or backhoe — two of which are specifically included in the regulation, the inspector selected the third choice which opened the door to the legal defense the operator is now asserting.

Nevertheless, the testimony of Inspector Enochs establishes that the Case mechanized equipment at issue here was equipped as a loader and used to perform functions more typically performed by a loader, rather than the trenching function associated with a backhoe. Enochs testified that what he identified as a backhoe had a loader bucket on the front and that he was told by foreman King that it was used primarily to clean up spilled material in the plant area. 18 FMSHRC at 1623; Tr. 256, 258. Enochs also testified that he considered this vehicle to be a "combination loader backhoe" because it had "a loader bucket on the front, and a backhoe bucket on the back." 18 FMSHRC at 1623; Tr. 261. In our view, Enochs' testimony concerning the function performed by this Case equipment, and the manner in which it was equipped, supports

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32,511-12. A comparison table listing equipment covered by the new and old standards indicates that the term "[w]heel loaders and wheel tractors" in the new regulation was intended to have the same meaning as the term "[f]ront-end loaders and tractors" in the prior regulation. *Id.* at 32,511.

no determination other than that it was within the coverage of section 56.14130(a)(3). *See Ford Constr. Co.*, 14 FMSHRC 1975, 1978-79 (December 1992).[15]

Accordingly, we find that substantial evidence does not support the judge's conclusion that the Secretary failed to meet her burden of showing that the Case machine identified by the inspector as a backhoe fell within the coverage of that standard, and therefore reverse the judge's decision to vacate this order. Moreover, because it is undisputed that this equipment did not have a seat belt, we find that the record compels a conclusion that REB violated section 56.14130(a)(3), and remand the matter for a determination whether the violation was unwarrantable and assessment of an appropriate civil penalty.

V.

Order No. 4327628

A. Factual and Procedural Background

During the August 16 inspection, from a walkway located about 10 feet above, Inspector Enochs observed REB employee Ron Alexander using a loader to load material from a stockpile. 18 FMSHRC at 1623. Enochs then observed Alexander turn off and climb out of the loader, without unbuckling his seat belt. *Id.* Enochs issued Order No. 4327628, alleging an unwarrantable violation of section 56.14130(a)(3). *Id.*; Gov't Ex. 10.

On February 23, 1995, the Secretary moved to amend this order to allege a violation of section 56.14130(g), to conform with the description of the violation contained in the order.[16] *See* Mot. to Amend Citations (Feb. 23, 1995). The judge granted this motion on March 14, 1995, well in advance of the June 11, 1996 hearing. Stay Order and Order Granting Mot. (Mar. 14, 1995).

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[15] In *Ford*, we reversed a judge's determinations that a scraper and a bulldozer were not within the coverage of this standard, relying, in part, upon the testimony of an MSHA inspector concerning the size and function of that equipment. *Id.* at 1977-79. We concluded that a bulldozer fell within the coverage of section 56.14130(a), even though "the language of the standard itself does not include the specific term 'dozer' or 'bulldozer' in the six categories of equipment requiring the installation of seat belts," based upon our determination that bulldozers come within the meaning of the term "crawler tractors" in subparagraph (1) of that standard. *Id.* at 1979.

[16] Order No. 4327628 alleged that on August 16, 1994, "[t]he operator of the 1989 Michigan L 140 loader . . . was observed operating the end loader without his seat belt fastened." Gov't Ex. 10 at 1.

The judge credited Enochs' uncontradicted testimony that Alexander was not wearing a seat belt when cited. 18 FMSHRC at 1624. He further found, however, that the Secretary had failed to establish a violation of section 56.14130(a)(3), the standard referred to in the order, which requires that seat belts be *installed* on wheel loaders, because there was no evidence in the record that a seat belt had not been installed on this vehicle. *Id.* Accordingly, the judge dismissed Order No. 4327628. *Id.*

B. Disposition

The Secretary argues that the judge erred in dismissing this order on the ground that it cited the wrong standard, because the record indicates that in March 1995 he granted the Secretary's motion to amend the order to cite section 56.14130(g), the standard applicable to the violation alleged in Order No. 4327628. S. Br. at 22.

REB contends that the judge did not err in vacating Order No. 4327628 because that order cited the wrong standard, and no evidence was offered by the Secretary to establish a violation of section 56.14130(a)(3), the cited standard. R. Br. at 10-11. In response to the argument that the citation was later amended to cite section 56.14130(g), REB argues that the Secretary has failed to offer any exhibit or evidence to establish that the order had been so amended. *Id.* at 11.

We conclude that the judge erred in dismissing Order No. 4327628 on the ground that it cited an inapplicable standard. The record indicates that the judge granted the Secretary's motion to amend this order to allege a violation of the correct standard, section 56.14130(g), well in advance of the June 11, 1996 hearing. This was clearly sufficient to put REB on notice of the correct standard allegedly violated, and the record demonstrates that REB knowingly litigated the alleged violation on that basis. *See* Tr. 262-74.

Based on the foregoing, we vacate the judge's dismissal of Order No. 4327628. Moreover, because the judge expressly found that the loader operator was not wearing a seat belt when cited by Inspector Enochs (18 FMSHRC at 1624), and there is no dispute that the loader in question was covered by this standard, we also conclude that the record compels a conclusion that REB violated section 56.14130(g). *See American Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (September 1993) (where evidence supports only one conclusion, remand on that issue unnecessary). We remand the matter for a determination whether this violation was the result of unwarrantable failure on the part of REB and assessment of an appropriate civil penalty.

VI.

Order No. 4327631

A. Factual and Procedural Background

During the August 16 inspection, Inspector Enochs observed that there was no guard on the tail pulley of the radial stacker conveyor belt at REB's facility. 18 FMSHRC at 1624. The belt was in operation at the time, and there was nothing to restrict access to the unguarded tail pulley, which was approximately 2 feet off the ground. *Id.* Enochs issued an order alleging an S&S and unwarrantable violation of section 56.14107(a).[17] *Id.*; Gov't Ex. 11.

Enochs testified that he considered this violation to be unwarrantable and indicative of high negligence because, in his view, King knew that he was creating a violative condition when he removed the guard from the tail pulley; because of the seriousness of the danger of exposure to a wing tail pulley; and because there was a lot of traffic in the area. Tr. 278-79. Enochs testified that he also based his unwarrantable failure finding on second-hand information he received from Inspector Hermstein regarding an industrial assistance session MSHA had with REB management at which King was purportedly given an MSHA handbook on guarding. 18 FMSHRC at 1625; Tr. 278-79.[18]

The judge found that REB violated section 56.14107(a), but concluded that the Secretary had failed to establish that this violation was the result of REB's unwarrantable failure. 18 FMSHRC at 1624-25. In reaching this conclusion, he declined to assign any probative weight to the hearsay testimony of Enochs concerning the guarding handbook given to King by MSHA. *Id.* at 1625.[19]

B. Disposition

The parties make essentially the same arguments with respect to the judge's finding that this violation was not the result of unwarrantable failure that they make in connection with the

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[17] Section 56.14107(a) provides that "[m]oving machine parts shall be guarded to protect persons from contacting gears, . . . chains, drive, head, tail, and takeup pulleys, . . . and similar moving parts that can cause injury." 30 C.F.R. § 56.14107(a).

[18] Commissioners Riley and Verheggen note that the Secretary did not introduce a copy of the handbook into evidence, nor any details concerning the industrial assistance session at which she alleged the handbook was given to REB management (*see supra* note 4).

[19] The judge also concluded that this violation was not S&S. *Id.* at 1625. The Secretary does not challenge this finding. *See* PDR at 12.

alleged unwarrantable violations of sections 57.14131(a) and 56.14130(g), discussed in Parts I and II, above.

We vacate the judge's determination that this violation was not the result of unwarrantable failure, and remand this matter to the judge, for the reasons discussed in Part I.B. Since the judge failed to properly evaluate the Secretary's hearsay evidence in accordance with Commission precedent, we vacate the judge's determination that this violation was not the result of unwarrantable failure, and remand this matter for further analysis of the unwarrantability issue in accordance with the principles discussed above.

VII.

Conclusion

For the foregoing reasons, we vacate the judge's determination that the section 57.14131(a) violation described in Citation No. 4327776, the section 56.14130(g) violations described in Order Nos. 4327622 and 4327625, and the section 56.14107(a) violation described in Order No. 4327631 were not the result of unwarrantable failure on the part of REB. We remand these issues for further consideration consistent with this opinion. We affirm the judge's conclusion that the Secretary failed to establish that Harold Miller or Richard Berry were liable under section 110(c) for the violations of section 56.14130(g) described in Order Nos. 4327622 and 4327625. Finally, we reverse the judge's conclusion that the Secretary failed to establish that the Case equipment described in Order No. 4327626 fell within the coverage of section 56.14130(a)(3), and vacate his dismissal of Order No. 4327628 because it alleged a violation of the wrong standard. We conclude that REB violated sections 56.14130(a)(3) and 56.14130(g) as

alleged in those orders, and remand for a determination whether these violations were the result of unwarrantable failure on the part of REB and assessment of appropriate civil penalties.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Commissioner Marks, concurring in part and dissenting in part:

I concur in my colleagues' opinion that the Secretary failed to adduce sufficient evidence that would warrant imposition of personal liability under Mine Act section 110(c) against Harold Miller and Richard Berry. I also agree with my colleagues that the judge was incorrect in appreciating the significance of the hearsay testimony when evaluating the unwarrantable determinations before him. However, I part company from my colleagues because, after considering this testimony in conjunction with the entire record, I believe that the record supports only one conclusion — that the violations were unwarrantable. Therefore, I dissent and would reverse the judge's determinations that Citation No. 4327776 and Order Nos. 4327622, 4327625, and 4327631 were not a result of REB's unwarrantable failure.[1]

Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Emery Mining Corp.*, 9 FMSHRC 1997, 2003-04 (December 1987); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991) ("*R&P*"). The Commission has examined various factors to determine whether a violation is unwarrantable, including the extent of a violative condition, the length of time that it has existed, whether the violation is obvious, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's efforts in abating the violative condition. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (February 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (August 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 708-09 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984). Consideration of these factors with respect to the four violations listed above leads to the conclusion that they were unwarrantable. I first discuss the three seat belt violations — Citation No. 4327776 and Order Nos. 4327622 and 4327625 — and then turn to the guarding violation, Order No. 4327631.

I.

Seat Belt Violations

On August 16, 1994, MSHA Inspector James Enochs discovered that REB employee Ron Alexander, the operator of the R-20 Euclid haul truck, did not have a seat belt on. 18 FMSHRC 1603, 1607 (September 1996) (ALJ). During the same inspection, Enochs observed another REB employee, Bill Jacobs, not wearing a seat belt while operating a bulldozer. *Id.* at 1612.

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[1] I concur in the majority disposition with respect to the two seat belt violations contained in Order Nos. 4327626 and 4327628. Because the judge did not address the issue of whether these violations were a result of REB's unwarrantable failure, a remand for evaluation of that question is appropriate. Nonetheless, many of the factors that compel a conclusion that the above three seat belt violations are unwarrantable — such as extensiveness of the violations, prior warning and danger — apply to these two violations on remand and should be considered by the judge.

Approximately an hour later, the inspector observed yet another employee, Jim Farrish, not wearing a seat belt while operating a bulldozer. *Id.* at 1620. On that same day, Inspector Enochs later observed REB employee Alexander operating a loader, again without wearing a seat belt. *Id.* at 1623-24. Enochs also observed that a backhoe loader at the quarry was not equipped with a seat belt. *Id.* at 1622-23. In total, the inspector cited REB for five seat belt violations in the course of one day and, according to REB President Berry, only seven vehicles were operating that day. Tr. 252. Inspector Enochs testified that he checked all personnel in the quarry that day and found that not one individual was wearing a seat belt. Tr. 119-20. The sheer number of violations indicates that the operator's policy towards seat belt use was one of serious indifference to compliance with MSHA's regulations. Thus, the extent of the violations, which is one of the factors in the unwarrantable analysis, leads to only one conclusion — that these seat belt violations were a result of unwarrantable failure. *See Jim Walter Resources, Inc.*, 19 FMSHRC 480, 486 (March 1997) (extent of violations supported reversal of judge's negative unwarrantable failure determination).

REB's indifference to seat belt use was also reflected in the statements that REB employees gave to MSHA inspectors. As the majority recognizes, the judge improperly discounted these statements as hearsay without evaluating their probative nature. The judge failed to consider that these statements were consistent in their view that REB took a lackadaisical attitude toward seat belt use. Two of REB's equipment operators, haul truck driver Ron Alexander and bulldozer driver Bill Jacobs, *both* told Inspector Enochs that "nobody made a big deal about [wearing seat belts]." 18 FMSHRC at 1610, 1614; Tr. 34; R. Ex. 32. In addition, Inspector Enochs' contemporaneous notes corroborated the statement of Jacobs that "no one makes a big deal about [seat belts]." R. Ex. 32. The notes also reported that Jacobs stated that he "sometimes wears [a seat belt and] sometimes doesn't." R. Ex. 32. Jacobs also told former MSHA Special Investigator Dale St. Laurent that "nobody ever told him to wear seat belts." Tr. 164. St. Laurent also testified that he was told by REB serviceman Yates that, in the year prior to the inspection, he never saw either of the two bulldozer operators wear a seat belt, and that no one at REB ever told them or him to wear seat belts. Tr. 245. St. Laurent also interviewed plant operator Cunningham, who reported that the "normal posture was . . . that if a guy wanted to wear them fine, and if he didn't want to wear them, then that was okay too." Tr. 245-46. In addition, St. Laurent testified that, when asked why the bulldozer operators were not wearing their seat belts, foreman Miller told him that he had only recently been promoted to supervisor and therefore felt uncomfortable telling employees what to do and so just let them do what they wanted to do. Tr. 167. According to St. Laurent, Miller also stated that he usually did not wear a seat belt when he operated equipment. Tr. 167. These statements are consistent in the view that REB made little or no effort to adhere to MSHA's seat belt regulation. Under *Mid-Continent Resources Inc.*, 6 FMSHRC 1132, 1135-39 (May 1984), these statements have high probative value because they rested upon personal knowledge of the MSHA inspectors; there was consistency between the statements; Inspector Enoch's contemporaneous notes corroborated the

statements; and REB did not introduce any evidence to establish that the statements of these REB employees to the inspectors did not in fact occur.[2]

Other factors of the unwarrantable analysis are present that compel the conclusion that these violations were a result of aggravated behavior. The record shows that REB had been placed on notice that greater efforts were necessary for compliance with MSHA's seat belt regulations. *See Enlow Fork Mining Co.*, 19 FMSHRC 5, 11-12 (January 1997) (inspector's discussions with management regarding need for greater compliance efforts were relevant to unwarrantable failure determination).[3] Inspector Enochs testified that, prior to inspecting the REB quarry, in accordance with customary agency procedure, he discussed the REB mine with the previous MSHA inspector, Mr. Hermstein, who reported that, at the last inspection, he had conducted an industrial assistance session with management employees of REB, foreman Ray King and shift supervisor Goody, where the importance of seat belt use was discussed. Tr. 14-18. The judge improperly discounted this testimony, without considering that this information had a high indicia of trustworthiness and reliability as it was reported from one MSHA inspector to another as part of standard agency operating procedure. The Supreme Court in *Richardson v. Perales*, 402 U.S. 389 (1971), identified several factors, in addition to those outlined in *Mid-Continent*, to be considered in evaluating the reliability and probative value of hearsay evidence, including the *identity of the declarant*, the credibility of the declarant or the witness testifying to the hearsay, and *the nature and structure of the administrative system in which the statements were generated. Id.* at 402-06. *See also* n.2, *supra*.

With respect to Citation No. 4327776, Inspector Enochs testified that REB foreman King's attitude was "somewhat indifferent to the whole situation" and that he did not correct the condition or tell the driver that he had to wear the seat belt. 18 FMSHRC at 1610; Tr. 34. The judge erroneously failed to consider that King did not correct the condition, tell the driver that he had to wear a seat belt, or say anything else. The inspector's observation of foreman King's attitude of indifference is also probative. *See Buffalo Crushed Stone, Inc.*, 16 FMSHRC 2043,

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[2] In *Mid-Continent*, 6 FMSHRC at 1136-37, the Commission discussed various factors that may be used to determine the probative value of hearsay evidence, such as whether the out-of-court statement rests upon personal knowledge gained from first-hand experience; the consistency among statements, if there is more than one statement; whether the making of the statement was denied or its contents were declared untrue; and any contradictory or corroborating evidence.

[3] Two Commissioners only, Commissioners Riley and Verheggen, seem to be critical of the quantity of evidence of prior warning introduced by the Secretary on this record. Slip op. at 3 n.4, 5 n.8, 15 n.18. The Commission however has not quantified the type of evidence sufficient to establish prior warning. Instead, the Commission has stated: "[T]o the extent that the inspectors' discussions with management placed [the operator] on notice of its need for greater compliance efforts . . . , those discussions were relevant to the unwarrantable failure evaluation and should have been considered by the judge." *Enlow*, 19 FMSHRC at 12.

2046-47 (October 1994) (inspector's observations have probative value). In addition, the fact that King was a foreman greatly supports the unwarrantability of the violation. In *Lion Mining Co.*, 19 FMSHRC 1774, 1778 (November 1997), the Commission held that because a foreman, who is held to a higher standard of care than rank and file miners, witnessed a violation and did not act to immediately stop it, the foreman's conduct was "a factor tending to establish an unwarrantable failure." In addition, the judge failed to recognize that truck driver Ron Alexander, cited in Citation No. 4327776, was later cited on the same day for failing to wear a seat belt (Order No. 4327628), even after having earlier received a citation for failure to do so that morning. *See* 18 FMSHRC at 1607, 1623-24. This evidence indicates that REB failed to take efforts to come into compliance with MSHA's seat belt regulations, even after it received its first citation. An operator's efforts in abating the violative condition is a factor in the unwarrantable failure analysis. *Enlow*, 19 FMSHRC at 11-12.

Finally, Enochs testified, without contradiction, that he considered these violations to involve an unwarrantable failure because of the seriousness and danger involved in operating equipment without a seat belt. Tr. 37, 42. The judge erroneously failed to address the degree of danger involved in failing to operate heavy equipment without wearing seat belts. MSHA's Program Policy Letter No. P90-IV-3 ("PPL"), that was sent to all metal and nonmetal mine operators, states that the failure to wear seat belt is a serious safety hazard, which may be considered highly negligent and serve as the basis for a section 104(d) citation/order. Gov't Ex. 5 at 1; Tr. 34-36.[4] It is beyond dispute that failure to wear seat belts is a highly dangerous

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[4] The PPL illustrates what MSHA considers highly negligent behavior with respect to seat belt use:

> Negligence for failure to wear seat belts should be determined by the extent of the mine operator's efforts to enforce the seat belt requirement. Examples of such efforts may include:
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> 1. evidence that the equipment operators are instructed on the mandatory use of seat belts;
>
> 2. regular observation by supervisors to determine whether seat belts are being worn;
>
> 3. corrective action taken by supervisors when seat belts are not being worn; and
>
> 4. the development and implementation of a job safety analysis program to reinforce task training for equipment operators.
>
> If the mine operator does not make any effort to ensure that seat belts are worn,

violation and that this degree of danger also supports the unwarrantable failure determination.[5] *See BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (August 1992) (finding unwarrantable failure where unsaddled beams "presented a danger" to miners entering area).

In determining that the Secretary failed to establish that these seat belt violations were not a result of REB's unwarrantable failure, the judge relied solely on REB's evidence that two signs are posted at the quarry advising employees of the need to wear seat belts. 18 FMSHRC at 1610-11, 1616. However, the evidence relied upon by the judge is insignificant compared to the body of record evidence, and does not establish that the three seat belt violations were not a result of unwarrantable failure. On the contrary, the overwhelming weight of the evidence — on the cumulative extensiveness of the violations, on prior notice, on REB's efforts to come into compliance with the seat belt regulations, even when a foreman observed the violation, and the danger of the violations — detracts from the judge's finding of no unwarrantability. Therefore, I would reverse the judge on the grounds that his findings were not supported by substantial evidence and conclude that this record can support no other conclusion than that the seat belt violations contained in Citation No. 4327776 and Order Nos. 4327622 and 4327625 were a result of REB's unwarrantable failure. *See Buffalo Crushed Stone,* 16 FMSHRC at 2045-47 (where overwhelming weight of evidence detracts from judge's finding, reversal is appropriate). Accordingly, I would reinstate the subject section 104(d)(1) citation and orders and remand for reassessment of civil penalties!

II.

Guarding Violation

With respect to the violation of 30 C.F.R. § 56.14107(a), which requires that "[m]oving machine parts shall be guarded to protect persons from contacting gears, . . . chains, drive, head, tail, and takeup pulleys, . . . and similar moving parts that can cause injury," the overwhelming weight of the evidence detracts from the judge's decision that this violation was not a result of REB's unwarrantable failure. In particular, the record discloses that foreman King authorized the

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the negligence would be high and a 104(d) citation/order would be appropriate.

Gov't Ex. 5 at 1-2. Although not determinative of my decision, this criterion is instructive because, after applying this criterion to the case at bar, it is very obvious that REB showed no diligence in ensuring that seat belts were to be worn by all operators at all times and that the unwarrantable failure allegations were appropriate.

[5] With respect to the high danger of these violations, it is significant that in 1997, fatalities in the metal and nonmetal mining industry increased at an alarming rate to 60 deaths, the highest total since 1987. In 1996, there were 47 deaths in metal and nonmetal mining. Of the 60 metal and nonmetal fatalities, 24 resulted from powered haulage accidents. MSHA News Release USDL 97-470 (Dec. 31, 1997).

removal of this guard and knew that it was off. Tr. 278-79. Inspector Enochs testified that no barricades or warning signs had been placed around the tail pulley at issue to alert miners to the danger. Tr. 277. This evidence was not contradicted by REB. In *R&P*, 13 FMSHRC at 194, the Commission held that "[i]ntentional misconduct, whether by commission or omission," qualifies as aggravated conduct and constitutes an unwarrantable failure under the Mine Act. There is no dispute that King engaged in intentional misconduct when he authorized the removal of the guard and never replaced it. Further, as discussed above, the fact that this violation was committed by a foreman, who is held to a higher standard of care, also supports an unwarrantable failure determination. *Lion Mining*, 19 FMSHRC at 1778.

In addition, REB, and foreman King in particular, had been put on notice of the need to guard the tail pulley. This prior notice buttresses my conclusion that the violation was a result of REB's unwarrantable failure. *See Enlow Fork*, 19 FMSHRC at 11-12. During his preparation for the August 16, 1994 inspection of the REB quarry, Inspector Enochs learned that King had attended an industrial assistance session with the previous MSHA inspector where a handbook on the importance of guarding had been given to him. Tr. 14-18, 278-79. On this record, as discussed above, I can only conclude that this testimony has a high level of reliability and trustworthiness because it related to the discussion of two MSHA inspectors, as part of their customary agency procedure. *See Richardson*, 402 U.S. at 402-04; *Mid-Continent*, 6 FMSHRC at 1136. In addition, the danger of exposure to a wing-type tail pulley, which was approximately 2 feet off the ground, also supports a finding of unwarrantable failure and was completely overlooked by the judge. *See* 18 FMSHRC at 1624; Tr. 278-79; *see also BethEnergy*, 14 FMSHRC at 1243-44.

In conclusion, a review of the evidence on the record compels the conclusion that this guarding violation was a result of REB's unwarrantable failure. Accordingly, I would reverse the judge and reinstate Order No. 4327631 as a section 104(d)(1) order and remand for reassessment of a civil penalty.

Marc Lincoln Marks, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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March 30, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. WEVA 94-377
	:	WEVA 94-379
CONSOLIDATION COAL COMPANY, ROBERT G. WYATT, and DANNY E. CRUTCHFIELD	:	WEVA 94-380

BEFORE: Jordan, Chairman; Marks, Riley and Verheggen, Commissioners[1]

DECISION

BY: Jordan, Chairman; Riley and Verheggen, Commissioners

In these consolidated civil penalty proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"), the Secretary of Labor has sought review of Administrative Law Judge George Koutras' decision in which he found that Consolidation Coal Company ("Consol") did not violate 30 C.F.R. §§ 75.334(b)(1)[2] and 75.364(a)(2) and that Consol employees Robert Wyatt and Danny Crutchfield were not individually liable under section 110(c) of the Mine Act for knowing violations of section 75.334(b)(1). 17 FMSHRC 1982 (November 1995) (ALJ). The Commission granted the Secretary's petition for discretionary review. For the reasons that follow, the Secretary's request

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[1] Commissioner Beatty recused himself in this matter and took no part in its consideration.

[2] Section 75.334(b)(1) provides:

> During pillar recovery a bleeder system shall be used to control the air passing through the area and to continuously dilute and move methane-air mixtures and other gases, dusts, and fumes from the worked-out area away from active workings and into a return air course or to the surface of the mine.

for remand of the judge's section 75.364(a)(2)[3] determination is denied and the judge's conclusion that the Secretary failed to establish a violation of section 75.334(b)(1) stands as if affirmed.

I.

Factual and Procedural Background

On December 29, 1992, a methane ignition or explosion[4] occurred during retreat mining on the back part of the 2-1/2 section of Consol's Amonate No. 31 Mine, an underground coal mine in McDowell County, West Virginia. 17 FMSHRC at 1986; Gov't Ex. 1. Five miners suffered serious burns as a result of the accident and had not yet returned to work as of the time of the June, 1995, hearing below. 17 FMSHRC at 1986.

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[3] Section 75.364(a)(2) provides:

> At least every 7 days, a certified person shall evaluate the effectiveness of bleeder systems required by § 75.334 as follows:
> (i) Measurements of methane and oxygen concentrations and air quantity and a test to determine if the air is moving in its proper direction shall be made where air enters the worked-out area.
> (ii) Measurements of methane and oxygen concentrations and air quantity and a test to determine if the air is moving in the proper direction shall be made immediately before the air enters a return split of air.
> (iii) At least one entry of each set of bleeder entries used as part of a bleeder system under § 75.334 shall be traveled in its entirety. Measurements of methane and oxygen concentrations and air quantities and a test to determine if the air is moving in the proper direction shall be made at the measurement point locations specified in the mine ventilation plan to determine the effectiveness of the bleeder system.
> (iv) In lieu of the requirements of paragraphs (a)(2)(i) and (iii) of this section, an alternative method of evaluation may be specified in the ventilation plan provided the alternative method results in proper evaluation of the effectiveness of the bleeder system.

[4] The Secretary contended below that the incident was an "explosion," while Consol argued that it was an "ignition." 17 FMSHRC at 1986. The judge did not make a finding on the issue, and it is not determinative of any issue on appeal.

A. Events Leading to the Accident

Following a period of inactivity, Consol resumed mining of the 2-1/2 section in 1992 after approval by the Department of Labor's Mine Safety and Health Administration ("MSHA") of a supplement to Consol's ventilation plan for the mine. *Id.* at 1993. The supplement, approved by MSHA on April 21, 1992 ("the April supplement"), showed how Consol intended to ventilate the back part of the 2-1/2 section, first as it drove five entries using advance mining to the absolute back of the section, and then as it went back over the same area pulling pillars during retreat mining ("pillaring"). 17 FMSHRC at 1993; Tr. VI 64; Gov't Ex. 40.

Before mining towards the back of the 2-1/2 section progressed very far, Consol submitted another ventilation plan supplement for the section, which was approved by MSHA on September 30, 1992 ("the September supplement"). Tr. VI 65-73; Gov't Ex. 42. The September supplement showed how Consol intended to ventilate the left side of the section during advance and retreat mining. 17 FMSHRC at 1996-98, 2022.

With approval of the September supplement, Consol changed directions and began to mine the left side of the 2-1/2 section. *Id.* at 2022. Before it began retreat mining on that side, and consistent with the September supplement, Consol installed two regulators on the left side ("the left side regulators"). *Id.* [5] Those regulators were part of the bleeder system for the 2-1/2 section,[6] serving as the points by which air leaving the gob created by the retreat mining on the left side of the section was routed to a return aircourse.

Upon completion of retreat mining on the left side, Consol resumed advance mining on the back part of the 2-1/2 section. *Id.* at 1999. Beyond the back of the 2-1/2 section was a worked-out area of the mine which already was being used as part of the return air course, connected by the left side regulators to the 2-1/2 section. *Id.* at 1994. After Consol had driven one of the back entries to within about 10 feet of that return aircourse, mine superintendent Robert Wyatt ordered a series of holes drilled through the remaining barrier of coal separating the back of the 2-1/2 section from the return aircourse. *Id.* at 1986-87, 1999, 2027-28. The holes, drilled at the location specified in the April supplement (*see* Gov't Ex. 40), constituted the "back

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[5] A regulator is "[a] ventilating device, such as an opening in a wall or door; [it is] usually placed at the return of a split of air to govern the amount of air entering that portion of a mine." American Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 451 (2d ed. 1997) ("*DMMRT*").

[6] While the *DMMRT* does not include a definition of "bleeder system," it states that "bleeder entries" are "[w]idely used for draining methane in coal mines . . . where the room-and-pillar method is employed," and defines them as "panel entries driven on a perimeter of a block of coal being mined and maintained as exhaust airways to remove methane promptly from the working faces to prevent buildup of high concentrations either at the face or in the main intake airways." *DMMRT* at 55.

regulator" or "drilled hole regulator." Consol originally had intended to construct a regulator, consistent with the normal practice, out of cinder block or other material. *Id.* at 1993-94, 1998-99. The alternate method utilized to install the back regulator was not, standing alone, deemed by the Secretary to be violative of the ventilation plan.

Assistant mine superintendent Mark Hrovatic supervised the drilling. *Id.* at 1998-99. Consol planned to drill approximately 25 holes, each 1-1/2 inches in diameter, in the hope that a total of at least 10,000 cubic feet of air per minute (cfm) would flow through the holes. *Id.* at 1999, 2027. After 20 holes had been drilled to a diameter of 1-1/2 inches each, Hrovatic used an anemometer that, by his calculations, showed approximately 6,000 cfm of air exiting the holes. *Id.* at 1999. Wyatt and Hrovatic then decided that the drilled holes would be expanded to a diameter of 3 inches to ensure that more than 10,000 cfm of air would pass through the holes. *Id.*

After only five holes had been expanded, Hrovatic took another measurement with his anemometer which he interpreted as showing that total airflow through the holes had increased to between 6,000 and 7,000 cfm. *Id.* Believing that the goal of more than 10,000 cfm would be accomplished by expanding all of the holes to 3 inches, Hrovatic instructed the evening shift crew to do so. *Id.* at 1999-2000. The next night he was told that his instructions had been carried out. Tr. III 82-83. By the time Hrovatic next visited the section, however, pillaring had commenced and the area between the pillar line and the holes was gob. Tr. III 83. Consequently, Hrovatic could get to within no closer than 150 feet of the area where the holes had been drilled, too far away for him to see them or measure the amount of air flowing through them. Tr. III 83-85. Hrovatic learned the evening after the accident that the holes had never been enlarged as he had instructed. 17 FMSHRC at 2000.

Airflow through the back regulator could not be measured from the return side because Consol used that worked-out area as part of the return air course and it was not generally accessible. *Id.* at 1999, 2020. As a result, and in order to comply with the bleeder system effectiveness evaluation requirements of section 75.364(a)(2), as part of the April supplement approval process Consol requested and received permission from MSHA to calculate airflow through the drilled holes by a "cross-sectional" method. *Id.* at 1995-96. Under the cross-sectional method, instead of traveling to and taking air quantity measurements at the back regulator, Consol would determine the amount of air exiting through the back regulator by deducting from the amount of air entering the gob the amount of air that was exiting the 2-1/2 section at other points. *Id.* at 1995. A handwritten notation on the April supplement provided that "upon retreat mining the bleeder system will be evaluated by the difference in the intake and return readings on the section." Gov't Ex. 40. In addition, methane measurements were taken not as the air was exiting through the back regulator, but on a daily basis at Bleeder Evaluation Point ("BEP") 10, where the air had already mixed with air from other parts of the mine. 17 FMSHRC at 1997, 2025-27, 2061.

Retreat mining on the back part of the 2-1/2 section began sometime in the two weeks preceding the accident, resulting in an area of gob extending approximately 2-1/2 acres. *Id.* at

1989, 2017; Tr. IV 216. On the morning of the accident, mining of the pillar between the Nos. 3 and 4 entries was taking place in and around the No. 4 entry when the remote control continuous miner shut down or "gassed-off" several times. 17 FMSHRC at 1986, 1989; Resp. Ex. 25. The first gas-offs were thought by the miners to be due to a malfunctioning methane monitor on the continuous miner. 17 FMSHRC at 1989, 1991. Upon the final gas-off, however, Bill Bandy, the section shift foreman, was alerted, as it was unusual to have methane problems on the 2-1/2 section. *Id.* at 1988, 1991, 1993, 2000-01, 2023. The continuous miner was programmed to shut down at 1.5% methane. *Id.* at 1988. Miner Jackie Whittaker saw a reading above 2% on the methane monitor at the time of the final gas-off. Tr. I 147. Also around that time foreman Bandy detected 1% methane coming out of the gob into the area of the No. 5 entry, which, at that stage, was being used as a right return. 17 FMSHRC at 2001.

Methane readings taken around the miner and in the No. 5 entry minutes later revealed no further methane accumulations and the miner automatically restarted. *Id.* at 1988; Tr. III 112-13. An electrician summoned to test the methane monitor on the miner soon thereafter determined that it was in proper working order. 17 FMSHRC at 1988. When further methane readings showed any methane to have dissipated, mining of the pillar resumed and was quickly completed. Tr. I 152-53.

Before mining subsequently began from the No. 5 entry, Consol made ventilation changes to direct intake air into the entry. 17 FMSHRC at 2001. Bandy measured 17,000 cfm going over the miner, into the gob. *Id.* at 2002. Meanwhile, mine foreman Danny Crutchfield, who had been notified by Bandy of the earlier elevated methane readings, arrived and confirmed with his own measurements that methane in the area had dissipated. *Id.* at 2002, 2023.

While Whittaker, who operated the continuous miner in the No. 5 entry, was mining a rib of the No. 5 entry, he observed the roof cracking and shifting, and saw it drop 2 to 3 inches in one location. *Id.* at 1988; Tr. I 159-60, IV 62; Resp. Ex. 26. Whittaker ceased mining until the roof seemed to settle, and then resumed within five to ten minutes. Tr. I 160. Shortly thereafter he heard loud noises from the roof in the gob and, fearing that the roof would fall on him, he tried to run out of the entry. Tr. I 160-62. He testified that the had gone 5 to 10 feet when he looked over his shoulder and saw a large fireball coming out of the middle of the gob. Tr. I 162-63. Whittaker and four miners closest to the working face suffered serious burns. Tr. I 168-70, II 29, 107-08, 169, V 35.

B. Post-Accident Investigation, Enforcement, and Analysis

Following an investigation, MSHA concluded that the accident was caused by: (1) an inadequate bleeder system, which allowed methane to accumulate in the gob in the explosive range; and (2) Consol's failure to properly examine the bleeder system to determine its effectiveness. Gov't Ex. 1 at 37. Consequently, on March 3, 1993, MSHA cited Consol for a

significant and substantial ("S&S") and unwarrantable violation[7] of section 75.334(b)(1), alleging that "[a]n adequate bleeder system was not provided to control the air passing through the worked-out area of the 2-1/2 section . . . to continuously dilute and move away methane-air mixtures from the active workings and into a return aircourse." 17 FMSHRC at 1987. MSHA also cited Consol for an S&S and unwarrantable violation of section 75.364(a)(2), based on MSHA's allegation that "adequate weekly examinations were not being made to determine the effectiveness of the 2-1/2 section bleeder system." *Id.* Wyatt and Crutchfield were each charged under section 110(c) with knowingly authorizing, ordering or carrying out the section 75.334(b)(1) violation. *Id.* at 1983-84.

MSHA asserted at trial that the body of methane was ignited in the gob area during a roof fall by either frictional heating, such as that resulting from rock rubbing against rock, or by "piezoelectric" discharges, which are discharges of electrical energy that can result when crystalline structures, such as quartz, fracture and break apart. *Id.* at 2035; Tr. III 199-200. MSHA's primary witness on how the bleeder system was functioning on the day of the accident was Gary Wirth, an MSHA mining engineer who was accepted as a mine ventilation expert. 17 FMSHRC at 2004-05. Wirth conducted a post-accident ventilation survey of the 2-1/2 section that included calculations of airflow amounts, directions, and pressure differentials. *Id.* at 2005. He concluded that only 2,037 cfm of air was exiting the drilled hole regulator following the accident, and that no more than 2,828 cfm of air could have been going through the holes prior to the accident. *Id.*; Gov't Ex. 1 at 35. He took issue with Hrovatic's earlier measurements on the ground that Hrovatic had used an improper measurement methodology. Tr. IV 37-39. Wirth opined that the remaining volume of air in the gob was exiting through the left side regulators, but he was unable to calculate the amounts that had been flowing through each because they remained inaccessible after the accident. 17 FMSHRC at 2005-06; Tr. IV 41-42.

Wirth testified that the Consol bleeder system, with only 2,000 to 3,000 cfm of air flowing through the back regulator, was inadequate under the circumstances. Tr. IV 85-88. He described the gob area near the back regulator as higher than the other side of the 2-1/2 section, and opined that lighter-than-air methane would tend to migrate to that area. 17 FMSHRC at 2006. He theorized that, because there was limited airflow through the drilled holes, there was insufficient airflow to dilute and render harmless the methane that was accumulating in the area of gob that had resulted up to that point from pillaring in the back part of the section. *Id.*; Tr. IV 216-17.

Wirth assumed that, when the continuous miner was shutting down in the No. 4 entry, the location of the miner and the timbers that had been set were such that the intake air, after it went

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[7] The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." The unwarrantable terminology is also taken from section 104(d) of the Act and refers to more serious conduct by an operator in connection with a violation.

over the miner, instead of penetrating the gob area, was taking "path[s] of least resistance." Tr. IV 58-59. He described paths of very low resistance as being to the left of the No. 4 entry and eventually through the other regulators on the section, as well as towards the right of the miner on the way to the No. 5 return entry. Tr. IV 60. Wirth further claimed that such airflows and the restricted airflow through the drilled holes allowed a body of methane to accumulate in the gob area, and that the continuous miner shut down because that body of methane migrated down to the working section. 17 FMSHRC at 2006-07; Tr. IV 60. Wirth theorized that Bandy's 1% methane measurement at the time of the final gas-off, which was a level higher than normally found on the section but lower than that which caused the miner to shut down, was an indication that the airflow to the right of the miner had swept the methane that had migrated from the gob into the right return. 17 FMSHRC at 2006-07.

Wirth went on to explain that, before the continuous miner moved to the No. 5 entry, Consol made ventilation changes, including directing 17,000 cfm of intake air into the No. 5 entry and eliminating the No. 5 entry as a right return. Tr. IV 62. Wirth indicated he believed such an airflow pushed back into the gob area the body of methane that had previously migrated down to the working area, which prevented the methane from being detected. Tr. IV 62-63. He theorized that, while 2,000 to 3,000 cfm of air was passing through one side of the gob area and taking some of the methane with it as it exited the drilled hole regulator, the remaining intake air continued to skirt the fringe of the gob as it took a path of least resistance to the other regulators. Tr. IV 86-88.

MSHA Inspector William Uhl, the lead coordinator in the accident investigation, testified that it was "common sense" that, the way the bleeder system was set up, the air directed into the gob, regardless of its amount, was going to skirt its edges and leave a dead air space in which methane would accumulate. 17 FMSHRC at 2012; Tr. IV 280-81. It was the Secretary's contention at trial that MSHA did not understand from the ventilation plan supplement approval process that Consol would mine the left side of the 2-1/2 section, and thus in the process install the left side regulators, before it finished mining the back part of the section. 17 FMSHRC at 2013-14. According to the Secretary, the addition of the left side regulators provided additional airflow exit points when mining of the back part of the section eventually occurred. *Id.* at 2007-08. The Secretary maintained at trial that the left-side regulators, which were generally inaccessible, prevented Consol from knowing from its cross-sectional readings the amount of air that was flowing through the gob and out the back regulator. *Id.*

Consol's primary witness was Donald Mitchell, who also conducted a post-accident investigation of how the 2-1/2 section was ventilated and was also accepted as a ventilation expert at trial. *Id.* at 2029-30. Mitchell agreed with MSHA that the ignition source was frictional heating during a roof fall. *Id.* at 2032. However, Mitchell concluded that the methane that burned came not from any accumulation in the gob area, but rather was methane that was occluded in overlying sandstone strata and released upon the breaking of that strata during that roof fall. *Id.* at 2032. He opined that there was no ventilation or bleeder system in the United States that could be designed to handle such a sudden release of methane. *Id.*

Mitchell also testified that the measurement of air passing through the back regulator was not dispositive of the adequacy of the bleeder system because there were other regulators through which air directed into the section could exit. *Id.* He stated his belief that, at the time of the accident, in addition to the air that was flowing through the drilled holes, the remaining air was going though the back gob area, keeping any methane away from the working face and diluting that methane on its way to exiting through the other regulators. *Id.*; Tr. 241. Mitchell claimed that his theory of the airflows, in contrast to MSHA's theory, took into account additional air entering the gob through the gob curtains, the positive pressure observed on those curtains, and the air pressure differential readings between the active face and the various bleeder system entries. 17 FMSHRC at 2033.

Mitchell also ascribed the earlier gas-offs to outflows of methane from cracks in the overlying sandstone strata. Tr. VI 246-48. He testified that his airflow theory explained why the methane that caused the gas-offs dissipated, and that if MSHA's theory regarding the gas-offs was correct, there would have been no such dissipation, and Bandy's methane reading in the No. 5 entry would have been higher than 1% percent, consistent with the higher level that caused the gas-offs. Tr. VI 243-44, 246-48. He opined that the 1% reading was instead consistent with a properly functioning bleeder system as well as with his airflow theory that, while mining was taking place at the time of the gas-offs, the great majority of air was heading to the right return entry, after having provided "great dilution" to any methane in the gob. Tr. VI 244-45.

C. Judge's Decision

Discussing only the evidence presented by the Secretary, the judge concluded that the Secretary had not satisfied her burden of proving that Consol violated section 75.334(b)(1). 17 FMSHRC at 2047-57.[8] Addressing the testimony of MSHA's ventilation expert, Wirth, the judge stated that "[a]fter careful scrutiny of Mr. Wirth's testimony, I have serious reservations and doubts concerning the accuracy, consistency, and credibility of the information he relied on in support of his opinions and conclusions concerning the inadequacy of the bleeder." *Id.* at 2051. The judge cited a number of instances in which he believed that Wirth's testimony was internally contradictory or conflicted with the testimony of other witnesses presented by the Secretary. *Id.* at 2051-54. The judge asserted that Wirth's "inconsistent and contradictory testimony" could neither be reconciled nor accepted "as reasonable evidentiary support for any conclusion that there was in fact a lack of sufficient air in the gob to dilute and carry away methane through the return. Indeed, the evidence, including Mr. Wirth's testimony, establishes otherwise." *Id.* at 2054.

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[8] The judge also concluded that "[i]n my view, both parties presented speculative causation theories based on after-the-fact 'best guesstimates,' assumptions, and opinions based on information that I find conjectural, contradictory, or unreliable. Under the circumstances, I can only conclude that the cause of the accident remains unknown." 17 FMSHRC at 2048. That conclusion is not a subject of the Secretary's appeal.

In concluding that the Secretary had failed to establish a violation of section 75.334(b)(1), the judge described what he found to be the most persuasive testimony as follows:

> Mr. Uhl believed that with only 2,000 cfm of air passing through the regulator, a methane-air mixture was exiting through the regulator holes and into the return air course. Mr. Wirth believed that methane was exiting the gob through the regulator, and, as noted earlier, he acknowledged that the air flow pattern was sweeping the gob gas and reducing it to one percent and diluting it with the air leaving the mine, and that the air sweeping the gob was diluting and dissipating the methane that caused the miner machine to gas-off. This is precisely what a bleeder system is designed to do, as required by cited section 75.334(b)(1). Under all of these circumstances, I remain unconvinced that the amount of air that MSHA assumed was passing through the regulator, a factor that is but one component of the total bleeder system, supports a conclusion that the bleeder was inadequate and failed to provide a means for controlling the air passing through the cited gob area to continuously dilute and move away methane-air mixtures from the active workings and into a return air course.

Id. at 2057.

Based on his conclusion that Consol did not violate section 75.334(b)(1), the judge also dismissed the citations issued to Wyatt and Crutchfield under section 110(c). *Id.* at 2063. He stated that "even if I were to find a violation of the cited standard, I would not conclude that the evidence adduced by MSHA established a 'knowing' violation by Mr. Crutchfield or Mr. Wyatt, within the intent and meaning of section 110(c) of the Act." *Id.*

The judge was also not swayed by the Secretary's case in support of her allegation that Consol violated the bleeder system effectiveness evaluation regulation, section 75.364(a)(2). He found that the Secretary had failed to satisfy the burden of proving that Consol's weekly examinations of its 2-1/2 section bleeder system using cross-sectional readings were inadequate. *Id.* at 2062-63.

II.

Disposition

A. Section 75.364(a)(2) Citation

The Secretary's original theory of Consol's violation of section 75.364(a)(2) was that Consol's cross-sectional readings were not an adequate substitute for traveling the bleeder system

on a weekly basis to examine its effectiveness, as that regulation requires in the absence of an effective alternate method of evaluation. S. Br. at 40-41. The Secretary has chosen to not appeal the judge's determination that the Secretary did not establish such a violation. *Id.* at 41. Instead, the Secretary claims remand is necessary because the judge failed to address whether a violation of section 75.364(a)(2) was established by evidence adduced at trial allegedly showing that the last weekly cross-sectional reading taken before the accident was incomplete, in that it included measurements of intake and belt air, but not return air. *Id.* at 41-43. The Secretary also requests that remand include the issues of whether the alleged violation was S&S and unwarrantable. S. Pet. at 25 n.7; S. Br. at 43-47. Consol objects to what it characterizes as the Secretary's reformulation on appeal of the issue of the section 75.364(a)(2) violation. C. Br. at 15. Consol argues in the alternative that, because there was evidence of only one incomplete reading, the judge's conclusion that Consol was in "substantial compliance" with the regulation is supported by substantial evidence. *Id.* at 16.

We do not think that the original citation can be read to include an allegation that Consol violated section 75.364(a)(2) by taking an incomplete cross-sectional reading, and the Secretary has never moved to amend the citation, even in her brief, to include the alleged incomplete reading. Mine Act section 104(a) requires that a citation "describe with particularity the nature of the violation." 30 U.S.C. § 814(a). However, under Rule 15(b) of the Federal Rules of Civil Procedure,[9] in certain circumstances amendments to pleadings can be made at any stage, including after judgment, and are not even necessary for a valid judgment when the non-pleaded issues have been tried by express or implied consent of the parties. Nevertheless, with respect to post-hearing consideration of an issue not raised by the pleadings, the Commission has recognized Rule 15(b)'s "emphasis upon the parties' understanding that the unpleaded claim is, in fact, being litigated." *Magma Copper Co.*, 8 FMSHRC 656, 659 n.6 (May 1986).

While the issue of the incomplete reading was raised in the Secretary's Post-Hearing Brief (*see* S. Post-Hearing Br. at 46-47), the trial record does not reflect that Consol understood, or should have understood, that the allegation of an incomplete cross-sectional reading was being litigated as a violation. The Secretary's witness, Uhl, repeatedly characterized any failure by

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[9] Commission Procedural Rule 1(b), 29 C.F.R. § 2700.1(b), incorporates the Federal Rules of Civil Procedure, so far as practicable, on any procedural question not regulated by the Mine Act, the Commission's Procedural Rules, or the Administrative Procedure Act. Rule 15(b) provides in pertinent part:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues.

Consol to make the last weekly return air reading before the accident as irrelevant to the Secretary's case, because it was the Secretary's position that even a complete cross-sectional reading was, under the circumstances, a violation of section 75.364(a)(2). *See* 17 FMSHRC at 2017; Tr. IV 222, 243-44, 257, 259, 314-15. As the Secretary failed to either timely plead the allegation as a revised or alternate theory or demonstrate the parties' understanding below that it was being litigated, we deny the Secretary's request for a remand to the judge for a decision on the issue.

B. The Section 75.334(b)(1) Citations

The Secretary contends that the judge's finding that she failed to establish a violation of section 75.334(b)(1) by Consol is not supported by substantial evidence and does not accord with the law. S. Br. at 17-40. The Secretary argues that remand is necessary because the judge misunderstood both the requirements of the mandatory standard and the issue he was required to decide, in that he improperly focused on the cause of the explosion. *Id.* at 17-23. The Secretary contends that her evidence established that Consol failed to maintain an adequate bleeder system to control the air passing through the worked-out area of the 2-1/2 section. *Id.* at 24-29. The Secretary also cites eight errors the judge made in discrediting the Secretary's ventilation expert, Wirth. *Id.* at 29-40. The Secretary requests that remand include the issues of whether the alleged section 75.334(b)(1) violation was S&S and the result of Consol's unwarrantable failure, as well as the Section 110(c) charges against the two individual respondents. S. Pet. at 25 n.7; S. Br. at 43-48.

Consol responds that the judge only considered the cause of the accident because it was an integral part of the Secretary's theory of the section 75.334(b)(1) violation. C. Br. at 6. Consol argues that the judge demonstrated complete comprehension of the regulation and the issue presented to him for decision. *Id.* at 7. Consol claims that the judge's decision to discredit the conclusions drawn by the Secretary's primary witnesses was the result of considering not only the testimony of those witnesses, but also Consol's evidence and the testimony of its witnesses, particularly its ventilation expert, Mitchell. *Id.* at 10-14. Consol also contends that the Secretary is improperly using litigation to implement new requirements regarding bleeder system functioning and evaluation. *Id.* at 16-19. Consol argues for upholding the judge's conclusions that none of the alleged violations resulted from unwarrantable or aggravated conduct. *Id.* at 20-25.

Commissioners Riley and Verheggen would affirm the judge's decision. Chairman Jordan and Commissioner Marks would vacate and remand the judge's decision. Under *Pennsylvania Elec. Co.*, 12 FMSHRC 1562, 1563-65 (August 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992), the effect of the split decision is to allow the judge's decision on this issue to stand as if affirmed.

III.

Separate Opinions of the Commissioners

Commissioners Riley and Verheggen, in favor of affirming the finding of the administrative law judge that MSHA failed to prove a violation of 30 C.F.R. § 75.334(b)(1):

In determining whether Judge Koutras properly found that the Secretary failed to meet her burden of proving a violation of section 75.334(b)(1) (*see* 17 FMSHRC at 2057), we are guided by several well established principles. First is the fundamental principle that the Mine Act imposes on the Secretary the burden of proving an alleged violation by a preponderance of the credible evidence. *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (November 1989). A logical corollary to this rule of law is that if the trier of fact finds such proof lacking, that is the end of the matter. He or she is under no obligation to go any further to examine the case of the alleged wrongdoer — any such exercise would be a waste of time and resources the end result of which would be mere dicta.

Second is the substantial evidence test by which the Commission is statutorily bound when reviewing an judge's findings of fact. 30 U.S.C. § 823(d)(2)(A)(ii)(I); *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994). When reciting this test, the Commission customarily states merely that "substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *See, e.g., Jim Walter Resources, Inc.*, 19 FMSHRC 1761, 1767 n.8 (November 1997) (citing *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989)). But in practice, the test involves more than this simple formulation conveys. It means that the Commission may not "substitute a competing view of the facts for the view [an] ALJ reasonably reached." *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983). The Fourth Circuit recently explained the test when it overturned a Commission decision reversing a judge's determination that a company did not discriminate against an independent contractor, Billy McClanahan. *Wellmore Coal Corp. v. FMSHRC*, No. 97-1280, 1997 WL 794132 (4th Cir. Dec. 30, 1997). The court stated:

> The fact that evidence exists in the record to support McClanahan's position is not determinative. Rather, the Commission's review was statutorily limited to whether the ALJ's findings of fact were supported by substantial evidence. The "'possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'"

Id. at *3 (citations omitted).

The Commission must exercise a great degree of deference when considering a judge's credibility determinations. *In re: Contests of Respirable Dust Sample Alteration Citations*,

17 FMSHRC 1819, 1878 (November 1995) ("*Dust Cases*"), *appeal docketed sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, No. 95-1619 (D.C. Cir. December 28, 1995). The Commission has noted that "the general rule [is] that, absent exceptional circumstances, appellate courts do not overturn findings based on credibility resolutions." *Id.* at 1881 n.80. The sorts of exceptional circumstances that would warrant overturning a judge's credibility findings are where such findings are self-contradictory, based on irrational criteria, or contradict the evidence. *Id.* As the Eleventh Circuit has explained, "[s]ince the ALJ has an opportunity to hear the testimony and view the witnesses he is ordinarily in the best position to make a credibility determination." *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984). In light of this, the *Ona* court concluded that "as a general rule courts are bound by the credibility choices of the ALJ, even if they 'might have made different findings had the matter been before [them] . . . de novo.'" *Id.* at 719 (quoting *Gulf States Mfrs., Inc. v. NLRB*, 579 F.2d 1298, 1329 (5th Cir. 1978)); *cf. Brock v. Roadway Express, Inc.*, 481 U.S. 252, 266 (1987) ("Final assessments of the credibility of supporting witnesses are appropriately reserved for the administrative law judge, before whom an opportunity for complete cross-examination of opposing witnesses is provided.").[1]

We set forth these principles at some length because our colleagues appear to have lost sight of them in their haste to vacate the judge's finding of no violation. Our colleagues argue at some length that Judge Koutras misunderstood key testimony and failed properly to consider all the testimony and evidence.[2] Slip op. at 17-25 (separate opinion of Chairman Jordan, joined by Commissioner Marks in his separate opinion). We disagree.

After carefully reviewing the record, Judge Koutras concluded that the agency's allegation of a violation of section 75.334(b)(1) "was based on two principal factors, namely, the occurrence of the ignition, and the assumption that there was insufficient air flow through the drill hole regulator to dilute and render harmless the 'body of methane' that MSHA assumed was

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[1] *See also Metric Constructors, Inc.*, 6 FMSHRC 226, 232 (February 1984) (when judge's finding rests on credibility determination, Commission will not substitute its judgment for that of judge absent clear indication of error), *aff'd*, 766 F.2d 469 (11th Cir. 1985); *Wellmore*, 1997 WL 794132 at *3 ("'[T]he ALJ has sole power to make credibility determinations and resolve inconsistencies in the evidence.'") (citations omitted).

[2] We note that Judge Koutras, though recently retired, sat as a Commission judge from the agency's inception. In fact, he authored the first judge's decision to be reported in a Commission "Blue Book." *See Western States Coal Corp.*, 1 FMSHRC, Docket No. DENV 78-521-P (March 1, 1979). Moreover, during his long tenure, he presided over several complex proceedings involving issues pertaining to mine ventilation, as did this case. *See, e.g., Island Creek Coal Co.*, 13 FMSHRC 592 (April 1991); *Greenwich Collieries*, 8 FMSHRC 1535 (October 1986). We believe that Judge Koutras had a complete grasp of the facts of this case, and considered all the testimony and evidence necessary to a determination of whether the Secretary carried her burden of proof.

accumulating in the gob area." 17 FMSHRC at 2056. Regarding the first factor, the judge properly concluded that "the occurrence of the ignition is not, in and of itself, evidentiary proof of an inadequate bleeder system." *Id.*; *see Mar-Land Indus. Contractor, Inc.*, 14 FMSHRC 754, 758 (May 1992); *Old Ben Coal Co.*, 4 FMSHRC 1800, 1804 n.4 (October 1982) ("As we have repeatedly emphasized in our decisions, the fact of an accident or injury does not by itself necessarily prove or disprove the existence of a violation. . . . A violation may occur absent an accident, and an injury or death does not *ipso facto* make out a violation.").

Regarding the second factor, the judge opined:

> I remain unconvinced that the amount of air that MSHA assumed was passing through the regulator, a factor that is but one component of the total bleeder system, supports a conclusion that the bleeder was inadequate and failed to provide a means for controlling the air passing through the cited gob area to continuously dilute and move away methane-air mixtures from the active workings and into a return air course.

17 FMSHRC at 2057. MSHA's case rested primarily upon the testimony of two experts, MSHA mining engineer Gary Wirth and MSHA Inspector William Uhl, Jr.[3] The judge found the testimony of these two witnesses lacking in credibility.

After a thorough review of Wirth's testimony, the judge found it "inconsistent and contradictory." *Id.* at 2050-54. The judge noted, for instance, that Wirth relied upon a ventilation survey he took after the accident as being representative of conditions existing at the time of the accident, even though he was told that the accident had altered the area's ventilation. *Id.* at 2051. The judge had other problems with Wirth's survey, including his inability "to perform and develop a complete air quantity balance of the bleeder system." *Id.* at 2052-53. The judge also noted that portions of MSHA's accident report authored by Wirth were at odds with the testimony of eyewitnesses on a miner crew. *Id.* at 2051. Regarding Wirth's failure to review any examination records from before the accident "because he did not believe they were relevant," the judge noted: "Since Mr. Wirth acknowledge[d] that intake air is a component of a bleeder system, I fail to understand why such air readings would not be relevant to a survey taken to evaluate such a system." *Id.* at 2053. Nor did Wirth familiarize himself with the relevant ventilation plan in formulating his opinion. *Id.* at 2051-52. Although Wirth took a series of bottle samples to evaluate the air exiting the gob, samples which indicated "that methane was exiting the gob through the drill holes," this potentially exculpatory information was left out of

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[3] As to the adequacy of Consol's bleeder system, the judge essentially discounted as irrelevant the testimony of MSHA's expert witness Clete Stephan, noting that MSHA's counsel conceded at trial that Stephan "*was not a ventilation expert*" and that his expertise did not extend to the issue of whether the bleeder system was adequate. 17 FMSHRC at 2050.

MSHA's accident report. *Id.* at 2052. These and other aspects[4] of Wirth's testimony led the judge to conclude that he could not "accept it as reasonable evidentiary support for any conclusion that there was in fact a lack of sufficient air in the gob to dilute and carry away methane through the return." *Id.* at 2054. The judge similarly found Uhl's testimony "confusing and contradictory," noting among other things Uhl's lack of relevant experience. *Id.* at 2054-55.[5]

The judge summed up his assessment of MSHA's case when he characterized it as an "attempt[] to establish an inadequate bleeder system through post-ignition investigative assumptions, theories, and conclusions based on conjecture, speculation, and contradictory information and testimony that I find lacking in credible evidentiary support." *Id.* at 2055. We conclude that the judge's credibility findings as to Wirth and Uhl, and the rest of the Secretary's case, are not "self-contradictory [or] based on irrational criteria," nor do they "contradict the evidence." *Dust Cases*, 17 FMSHRC at 1881 n.80. In short, we find nothing in the record or in the judge's opinion that would lead us to take the extraordinary step of overturning the judge's credibility findings.[6] We thus defer to his findings and affirm his ultimate conclusion that the Secretary failed to meet her burden of proving a violation of section 75.334(b)(1) by a preponderance of the evidence.

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[4] For example, the judge noted that Wirth "testified . . . that he was 'somewhat' familiar with this case." 17 FMSHRC at 2050. The Secretary argues that "the judge plainly took Wirth's statement out of context" and that "Wirth's response was clearly facetious." S. Br. at 38-39. Considered in context, we find nothing to indicate that Wirth's comment should have been treated differently by the judge. Tr. IV 182. Moreover, if Wirth was in fact being facetious, as the Secretary argues, we would find such a response disrespectful and inappropriate, one which would cast very serious doubt on Wirth's credibility.

[5] Our colleagues fault us for "relying solely on the judge's own decision . . . without any independent review of the record" in drawing our conclusion that the judge's credibility determinations do not contradict the evidence. Slip op. at 22 n.6. We would like to reassure our colleagues that we have, in fact, carefully reviewed the record in this case. We cite only to the judge's opinion in the foregoing discussion because it, in turn, is so thoroughly based on the record evidence. Nor have we found evidence in the record that would lead us to take the extraordinary step of overturning the judge's credibility findings.

[6] The Secretary's response is, in essence, that the judge did not understand this case. She alleges, for instance, that the judge was "unfocussed and confused." S. Br. at 22. A close reading of the trial transcript and judge's opinion, however, indicates he was very thorough and clearly understood MSHA's case. He asked numerous pointed questions during the hearing, showing a complete understanding of a complicated case. In light of the record of this case and the long experience of Judge Koutras (*see* note 2, *supra*), we find the Secretary's criticisms of the judge inappropriate and disingenuous.

At several points in their opinion, our colleagues refer to the Secretary's "theory that the lighter-than-air methane . . . was accumulating from pillaring in the back part of the section." Slip op. at 18. The judge, however, explicitly rejected this theory of the Secretary. The judge noted that MSHA believed that "an explosive body of methane that was allowed to accumulate in the gob," whereas Consol believed that "a spontaneous and unpredictable outburst [of methane occurred] from a sandstone roof crack." 17 FMSHRC at 2048. Finding that "both parties presented speculative causation theories based on after-the-fact 'best guesstimates,' assumptions, and opinions based on information I find conjectural, contradictory, or unreliable," the judge concluded that neither party has proven their theory "with any reasonable degree of evidentiary certainty." *Id.*

In other words, the judge concluded that MSHA failed to prove that there was an accumulation of methane that led to an explosion. We find this conclusion amply supported by record evidence. Our colleagues, however, appear to accept the Secretary's theory as if proven. For example, they state: "The judge was therefore mistaken in interpreting Wirth's testimony as establishing the adequacy of the bleeder system, for, as Wirth stated, a large body of methane remained in the gob area, unaffected by the intake airflow." Slip op. at 22. The point they miss is that the judge *rejected the Secretary's theory* that "a large body of methane remained in the gob area."

We are, of course, aware that the record could be read very differently, as do the Secretary and our colleagues. But our standard of review dictates that we may not "substitute a competing view of the facts for the view [an] ALJ reasonably reached." *Phelps Dodge*, 709 F.2d at 92. Instead, we are limited to determining whether the judge's decision is supported by "'such relevant evidence as a reasonable mind might accept as adequate.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC at 2163 (quoting *Consolidation Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Under this deferential standard, and the even more deferential standard governing our review of credibility determinations, the judge's decision here more than passes muster.

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Chairman Jordan, in favor of vacating the decision of the administrative law judge that MSHA failed to prove a violation of 30 C.F.R. § 75.334(b)(1):

To comply with section 75.334(b)(1), the Consol bleeder system on the 2-1/2 section had to ensure that any pillared area was ventilated in such a manner that methane did not accumulate but instead was diluted and the resulting methane-air mixtures moved to a return air course and away from active workings. Consequently, an understanding of airflow direction and amounts, and how various factors impacted airflow direction and amounts, is necessary to a proper determination of whether the Consol bleeder system was adequate. The judge based his determination that the standard was not violated on his conclusion that the Secretary did not establish that the Consol bleeder system was inadequate. 17 FMSHRC at 2057. Because I believe the judge did not properly analyze the Secretary's evidence, and even misinterpreted key portions of that evidence, I would vacate and remand the judge's determination of no violation.

The Secretary's theories regarding air direction and amounts in the 2-1/2 section on December 29, 1992, fully support her position that the Consol bleeder system was inadequate. The genesis of the problem was Consol's decision to mine the left side of the section before it finished mining the back part of the section. MSHA had approved Consol's use of cross-sectional readings in lieu of measurements taken at the back regulator, which would become generally inaccessible once pillaring began. *Id.* at 2007, 2013-14. In mining the left side of the section first, however, Consol constructed two other regulators, which were also inaccessible. *Id.* at 2007, 2014. Consol does not dispute that those regulators provided additional airflow exit points when mining of the back part of the section eventually occurred, nor that its cross-sectional readings did not permit it to know the amount of air that was flowing through the back regulator and the amount of air that was exiting through the left side regulators. *Id.* at 2024-25.

Consol also does not dispute the other major component of the Secretary's case — that only a small fraction of the air that Consol intended to be channeled by the back regulator into the return aircourse ever actually flowed through that regulator. Consol's assistant mine superintendent, Mark Hrovatic, unequivocally testified that Consol constructed the back regulator under the assumption that, once completed, between 10,000 and 12,000 cfm of air would flow through the drilled holes which constituted the regulator. *Id.* at 1999-2000. However, MSHA's mining ventilation expert, Gary Wirth, concluded from his ventilation survey that only 2,037 cfm of air was exiting the drilled hole regulator following the accident, and that no more than 2,828 cfm of air could have been going through the holes prior to the accident. *Id.* at 2005, 2057. Wirth also concluded that the remaining volume of air in the gob was exiting through the left side regulators, but he was unable to calculate the amounts that had been flowing through each because they remained inaccessible after the accident. *Id.* at 2005-06. Importantly, Consol does not contest Wirth's conclusions on this subject, and its expert actually confirmed that Wirth's methodology was "in accordance with the best engineering principles." *Id.* at 2034; Tr. VI 231.

Those two uncontested facts — that only a limited amount of air was flowing through the back regulator, and that the remainder was exiting elsewhere on the section — provided MSHA the framework in which to analyze the adequacy of the Consol bleeder system. MSHA found the bleeder inadequate under the circumstances, on the theory that the lighter-than-air methane, which was accumulating from pillaring in the back part of the section, migrated to the gob area near the back regulator because that area was higher than the other side of the 2-1/2 section. 17 FMSHRC at 2006. According to Wirth, with most of the intake air taking paths of least resistance to the alternative exit points provided by the left side regulators, the remaining limited airflow through the back regulator was insufficient to dilute and render harmless the methane accumulating in the gob. *Id.*; Tr. IV 85-88. William Uhl, MSHA's lead coordinator in the accident investigation, agreed, stating that it was "common sense" that, given how the bleeder system had been set up, the intake air would skirt the edges of the gob, leaving dead air space in the gob in which methane could accumulate. Tr. IV 280-81. Thus, the Consol bleeder system was not accomplishing its intended purpose of diluting and removing the methane from the pillared area of the 2-1/2 section.

The judge, however, never analyzed the totality of the evidence to determine whether the Consol bleeder was inadequate under the circumstances. Instead, he separately analyzed each individual action taken by Consol leading up to the incident and ruled on whether Consol had violated the Act or any regulation in taking each of those actions. Having found none of these actions violative when taken in isolation, the judge discarded them as irrelevant to his analysis of whether section 75.334(b)(1) was violated. The judge failed to take into account the extent to which the change in direction of mining negatively impacted the adequacy of the bleeder system. While that change in direction was not foreseen when Consol received approval of the April supplement showing how it intended to ventilate the back part of the section (17 FMSHRC at 2022), its importance to the ventilation of the 2-1/2 section cannot be doubted, for it resulted in the construction of the two left side regulators, and thus two additional inaccessible exit points for the air on the section. The judge, however, simply focused on the lack of a ventilation plan provision prohibiting Consol from changing direction in mining the 2-1/2 section, and found that silence dispositive on the issue of whether the change in direction led to an inadequate bleeder system. 17 FMSHRC at 2055. He reasoned that because the plan did not prohibit a change in direction, the change could not have contributed to an inadequate bleeder system. *Id.*

I find the narrowness of the judge's inquiry disturbing. It is comparable to exonerating a driver charged with reckless driving in severe weather merely because the driver had not exceeded the posted speed limit. Regardless of whether the change in direction in mining was a separate offense in and of itself, it clearly is relevant in determining whether Consol's bleeder system was adequate *under the circumstances*, which is what section 75.334(b)(1) requires. Consequently, I would specifically instruct the judge to consider the negative impact posed by the change in mining direction on the adequacy of the Consol bleeder system.

Even more disturbing is how the judge treated the testimony concerning the amount of air that was passing through the drilled hole regulator prior to the accident. Wirth calculated that no

more than 2,828 cfm of air could have been flowing through that regulator prior to the accident (17 FMSHRC at 2005), while Hrovatic testified that he had calculated that approximately 6,000 to 7,000 cfm was passing through the drilled holes before pillaring made them inaccessible. *Id.* at 1999. The judge did not resolve this apparent conflict,[1] and simply relied on Hrovatic's different calculation as a reason to discredit Wirth because both used an anemometer in making their respective surveys. *Id.* at 2057. In addition, after noting that there was no minimum amount of air required by the ventilation plan, the judge dismissed the airflow through the back regulator as simply being "a factor that is but one component of the total bleeder system." *Id.* at 2056-57. While true, this statement represents a profound misunderstanding of the Secretary's position in this case.

The judge erred in several respects in his treatment of this very central issue. Most importantly, he erred in failing to consider the significance of the amount of air passing through the back regulator to the issue of whether the Consol bleeder system was adequate under the circumstances. According to MSHA, at the time of the accident, the only air that was ventilating the gob, and not just skirting it, was the air passing through the back regulator. Moreover, the record is clear that it was not MSHA that determined the amount of air that should have been flowing through that regulator, but Consol. Prior to the pillaring of the back part of 2-1/2 section, Consol thought it important that the back regulator be constructed in a manner that permitted 10,000 or more cfm of air to pass through the drilled holes. *See id.* at 1999-2000, 2028; Tr. V 93-94. The judge should have taken into account this evidence showing what the operator believed was necessary for the bleeder system to be adequate under the circumstances.

The judge also failed to recognize that by the time of the trial, there no longer was a disagreement between MSHA and Consol regarding the amount of air that was flowing through the back regulator at the time of the accident, for Consol had abandoned any contention that Hrovatic's measurements were correct, and did not contest the accuracy of Wirth's measurements. Consol's ventilation expert, Mitchell, agreed with Wirth's measurements and described Wirth's methodology as "in accordance with the best engineering principles." *Id.* at 2034; Tr. VI 231. Consol's defense at trial was not that a higher amount of air was passing through the drilled hole regulator, but that the bleeder system was adequate even with only 2,000 cfm passing through that regulator, because, contrary to MSHA's assertion, the gob was also being ventilated by the air that would then exit the other regulators. 17 FMSHRC at 2032; *see also* Tr. VI 115 (Wyatt agreeing that only 2,000 to 2,500 cfm was going through drilled holes prior to accident). Thus, the judge used airflow calculations on which even Consol no longer

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[1] The judge described Wirth's measurements as being "the amount of air that MSHA assumed was passing through the regulator" (*id.* at 2057), but failed to directly address whether or not that assumption was correct.

relied as a reason to discredit conclusions reached by Wirth with which Consol agrees.[2] The Commission simply should not ignore this blatant error in the judge's analysis.[3]

In addition to failing to recognize the factual underpinnings of the Secretary's charge that the Consol bleeder system was inadequate, the judge clearly erred in concluding that the testimony of the Secretary's own witnesses established that the Consol bleeder system satisfied the requirements of section 75.334(b)(1). He also erred in finding that the Secretary's ventilation expert, Wirth, was not credible. The judge's failure to correctly state significant aspects of the testimony of those witnesses is yet further reason why I decline to affirm his ruling that no violation occurred.

Without relying on Consol's evidence, the judge found that the testimony of two of the Secretary's primary witnesses, Wirth and Uhl, established that the Consol bleeder system was doing "precisely what a bleeder system is designed to do, as required by cited section 75.334(b)(1)[,]" i.e., diluting methane with intake air and carrying the mixture away from active workings and into a return aircourse. 17 FMSHRC at 2057. The judge, however, made a number of significant errors in interpreting that testimony. When read in its proper context, the testimony does not establish the adequacy of the Consol bleeder system. Rather, the testimony supports the Secretary's contention that the bleeder system was inadequate.

It is plain that the judge erred in relying on Wirth's "belie[f] that methane was exiting the gob through the regulator" as evidence that the bleeder system was functioning properly. 17 FMSHRC at 2057. First, Wirth clearly indicated his belief that, at the time of the accident, only part of the gob gas was mixing with the intake air and exiting through the back regulator. *See* Tr. IV 85-88; Gov't Ex. 59. As that testimony is not inconsistent with the Secretary's theory that the

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[2] Hrovatic was called as a witness not by Consol, but by the Secretary, and primarily for the purpose of discussing the drilling of the holes. *See* Tr. III 64-91. No party has cited Hrovatic's measurements as authoritative evidence of the amount of air that was flowing through the holes prior to the accident.

[3] In addition, after the judge pointed out that Wirth's measurements were contradicted by Hrovatic's, he should have attempted to resolve the conflict and make a reasoned finding regarding the amount of air passing through the back regulator prior to the accident. There was ample evidence on which to draw. The judge was clearly mistaken in believing that Hrovatic's measurement methodology was identical to that employed by Wirth. *See* 17 FMSHRC at 2057. The record reveals that Wirth was more thorough than Hrovatic in measuring airflow through the drilled holes. While both did use an anemometer to make their respective measurements, Hrovatic used his to only measure one individual hole, while Wirth measured both inby and outby the exit point of the drilled holes. *Id.* at 2005; Tr. IV 38. In addition, Wirth, but not Hrovatic, used a pitot tube and magnahelic gauge to confirm and refine his measurements. Tr. IV 26-28. The judge entirely ignored this evidence.

remaining methane was permitted to accumulate in gob area, it does not establish that the bleeder system was performing in accordance with section 75.334(b)(1).

Second, the judge mistakenly relied on Wirth's testimony regarding the relatively low levels of methane moving through the back regulator a week after the accident as evidence that methane was sufficiently diluted before it entered the regulator prior to the accident. 17 FMSHRC at 2054. Wirth made it plain that, in his view, post-accident methane levels were not indicative that the bleeder system was working properly prior to the accident, because much of the previously accumulated methane had burned off as a result of the ignition, and methane was not reaccumulating as quickly afterward because mining did not take place on the 2-1/2 section during the intervening week. Tr. IV 124-30. The judge entirely failed to take this testimony into account.[4]

The judge also misconstrued that part of Wirth's testimony in which Wirth explained why a gas-off of the continuous miner while it was in the No. 4 entry was an indication of an inadequate bleeder system. Wirth testified that, at the time the miner was in the No. 4 entry, the location of it and the timbers that had been set were such that the intake air, after it went over the miner, instead of penetrating the gob area, was taking the "path[s] of least resistance." Tr. IV 59. He specifically identified one such path as being towards the right of the miner on the way to the No. 5 return entry. Tr. IV 60. Wirth stated that Bandy's 1% methane measurement around that time, because it was a level higher than normally found on the section but lower than that which would cause the miner to shut down, was an indication that the airflow to the right of the miner resulted in part of the methane from the gob being swept into the right return. 17 FMSHRC at 2006-07.

It is from this testimony that the judge erroneously concluded that Wirth had "acknowledged that the air flow pattern was sweeping the gob gas and reducing it to one percent and diluting it with the air leaving the mine, and that the air sweeping the gob was diluting and dissipating the methane that caused the miner machine to gas-off." 17 FMSHRC at 2057. The record is plain that Wirth was testifying about only part of the methane accumulating in the gob area. Tr. IV 59-67; Gov't Ex. 60. Wirth's statement was made in response to the judge's question about the 1% methane found in the No. 5 entry at the time of the final gas-off, and clearly referred to the methane that had migrated from the gob to the miner, causing it to gas-off. Wirth explained that the right "air flow pattern was picking up *the part of this body of methane*

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[4] The judge also incorrectly analyzed the testimony of Uhl on a similar point. The judge cited Uhl as "believ[ing] that with only 2,000 cfm of air passing through the [back] regulator, a methane-air mixture was exiting through the regulator holes and into the return air-course." 17 FMSHRC at 2057. However, Uhl merely testified that if pillaring had ceased for a period of a weekend or more, 2,000 cfm exiting the back regulator may have been sufficient to dilute any methane that was accumulating *at that time*. Tr. IV 216-17. He clearly was not conceding that 2,000 cfm through the back regulator was sufficient to dilute the methane that was constantly accumulating while pillaring *was occurring*.

and bringing it down into the return. It was sweeping *that* body of gob gas." Tr. IV 61 (emphasis added). The judge was therefore mistaken in interpreting Wirth's testimony as establishing the adequacy of the bleeder system, for, as Wirth stated, a large body of methane remained in the gob area, unaffected by the intake airflow. Tr. IV 64-65; Gov't Ex. 60.[5] Wirth never acknowledged that the airflow pattern was sweeping the gob gas. Rather, Wirth steadfastly maintained that the airflow pattern was resulting in most of the air skirting the edge of the gob. *See* Tr. IV 60-62, 65-66, 85-88. Clearly, Wirth was not describing an adequate bleeder system, but one that was inadequate.

In light of the foregoing, the judge erred in concluding that the Secretary's witnesses, by their testimony, established that the Consol bleeder system was adequate under section 75.334(b)(1). For that reason alone I would remand this case to the judge for proper consideration of the testimony and evidence.

The judge's determination of no violation is also based on his finding that Wirth was not credible. The judge discredited Wirth without comparing Wirth's testimony to the testimony of Consol's expert, Mitchell. In fact, the judge never addressed Mitchell's testimony concerning the adequacy of the bleeder system. While the judge gave a number of reasons in support of his credibility finding, his primary concern was that he found Wirth's testimony to be inconsistent and contradictory. 17 FMSHRC at 2051, 2054, 2057.[6]

While the Commission usually defers to judges on matters of credibility, it has also recognized that there are exceptions to that general rule. *See In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1881 n.80 (November 1995), *appeal docketed sub nom., Secretary of Labor v. Keystone Coal Mining Corp.*, No. 95-1619 (D.C. Cir. Dec. 28, 1995) ("*Dust Cases*"). Because "[c]redibility involves more than a witness' demeanor and comprehends an overall evaluation of testimony in the light of its rationality or internal consistency and the manner which it hangs together with other evidence,"[7] the Commission has recognized one such exceptional circumstance to be where a credibility determination is

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[5] Contrary to my colleagues' contention (slip op. at 16), I refer to Wirth's statement not to indicate my acceptance of the Secretary's methane accumulation theory, but to emphasize that Wirth's testimony is consistent with the Secretary's hypothesis. The judge may, on evidentiary grounds, properly reject the Secretary's theory that a body of methane accumulated in the gob. Here, however, the judge claimed to reject it on the basis of testimony that he incorrectly considered to be inconsistent with the Secretary's views. *See* 17 FMSHRC at 2054, 2057.

[6] Remarkably, my colleagues conclude, relying solely on the judge's own decision and without any independent review of the record, that his credibility determination does not contradict the evidence.

[7] 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2586 (2d ed. 1995) (citing cases).

contradicted by the evidence. *Dust Cases*, 17 FMSHRC at 1881 n.80 (citing *Medline Indus., Inc. v. NLRB*, 593 F.2d 788, 795 (7th Cir. 1979); *NLRB v. Huntington Hospital, Inc.*, 550 F.2d 921, 924 (4th Cir. 1977)). Similarly, there is no reason to defer to a credibility finding based on an improper understanding of testimony or evidence. *See Irving v. United States*, 49 F.3d 830, 835-36 (1st Cir. 1995) (setting aside credibility-based finding of trial judge because of "little confidence" in judge's finding that reviewing court found to be based on testimony that judge "fundamentally misconstrued"); *Consolidation Coal Co. v. NLRB*, 669 F.2d 482, 488 (7th Cir. 1982) (noting that deference not necessarily owed to credibility determination based on judge's flawed analysis of evidence).

Many of the reasons the judge gave for discrediting Wirth were based on aspects of Wirth's testimony and conclusions which the judge found to be inconsistent with Wirth's ultimate opinion that the Consol bleeder system was inadequate. *See* 17 FMSHRC at 2051, 2054. Because the judge clearly misinterpreted Wirth's testimony, I would vacate the judge's credibility determination and remand the case for reexamination in light of a proper analysis of Wirth's testimony.[8]

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[8] Remand is also warranted because the judge's discussion of Wirth's credibility exhibits an incomplete consideration of the evidence presented. For instance, one reason the judge gave for discrediting Wirth as a witness was that Wirth, in conducting his post-accident ventilation study, had not determined the amount of air that was exiting each of the inaccessible left side regulators. *Id.* at 2052-53. The judge apparently assumed that Wirth needed to do so to ensure the accuracy of his conclusions. However, there is nothing in the record on which to base such an assumption; indeed, Wirth testified that as long as he could estimate the total amount of air exiting those regulators, the exact amount that was exiting each regulator was irrelevant. Tr. IV 145-46. The judge should explain why Wirth needed to ascertain the amount of air exiting each regulator to guarantee the accuracy of his conclusions.

The judge also discredited Wirth's post-accident ventilation study because certain conditions on the 2-1/2 section were different prior to the accident. 17 FMSHRC at 2051. Given the nature of the accident, that is not surprising, but it hardly constitutes sufficient reason to doubt the accuracy of the post-accident study. If it did, most post-accident surveys would be irrelevant in Commission proceedings, regardless of their overall probative value. I would therefore have the judge explain how the specific differences in conditions on the 2-1/2 section negatively impacted the reliability of the post-accident survey.

The judge also discredited Wirth based on Wirth's conceded failure to examine section weekly examination books or the pre-shift or on-shift books for intake air readings for the days preceding the ignition. *Id.* at 2053. The judge failed to explain what additional information, if any, Wirth would have gained from those readings, given that Wirth had accepted Consol's statement of the amount of intake air at the time of the accident. *See* Tr. IV 150-51.

In sum, the judge examined the evidence presented by the Secretary (while failing to discuss the evidence presented by Consol) but, in so doing, misconstrued its significance. In fact, the evidence on which he relied does not support his conclusion that the bleeder system was adequate.[9] I believe that the case should be remanded to allow the judge to evaluate the evidence, in light of the concerns expressed above, and to ensure that all relevant record evidence is analyzed.[10]

The judge also stated that, even if he were to find that Consol violated section 75.334(b)(1), he would not conclude that it had been established that the two individual respondents cited for violating that regulation had "knowingly" done so. *Id.* at 2063. However, he gave no reasoning in support of that conclusion. A judge is required to state his rationale for reaching findings and conclusions. *Mid-Continent Resources*, 16 FMSHRC at 1222. Given that the judge misinterpreted the testimony presented on the alleged violation of section 75.334(b)(1),

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[9] Although the Commission "do[es] not lightly overturn a judge's factual findings and credibility resolutions, neither will [it] affirm such findings if there is . . . dubious evidence to support them." *Consolidation Coal Co.*, 11 FMSHRC 966, 974 (June 1989). While I fully agree that the Commission is precluded from substituting its own analysis of the record "for the ALJ's reasonable factual determinations" (*Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 94 (D.C. Cir. 1983)), a reading of the record demonstrates that the judge's factual findings were not reasonable. Rather, as I have discussed above, they were based on fundamental errors made in reviewing the evidence.

[10] The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I); *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994). That standard of review requires that a fact finder weigh all probative record evidence and that a reviewing body examine the fact finder's rationale in arriving at his decision. *See Wyoming Fuel*, 16 FMSHRC at 1627; *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-89) (1951)). A judge must analyze and weigh the relevant testimony, make appropriate findings, and explain the reasons for his decision. *Wyoming Fuel*, 16 FMSHRC at 1627; *Mid-Continent,* 16 FMSHRC at 1222 (citing *Anaconda Co.,* 3 FMSHRC 299, 299-300 (February 1981)).

I would vacate his section 110(c) determinations and remand to the judge with instructions to set forth his reasoning.[11]

Mary Lu Jordan, Chairman

[11] Similarly, I would include in the remand the issues of whether any violation of section 75.334(b)(1) by Consol was S&S or due to unwarrantable failure. Having found that the Secretary failed to establish that Consol violated section 75.334(b)(1), the judge had no reason to address these issues in his decision.

Commissioner Marks, concurring with the separate opinion of Chairman Jordan and dissenting:

I concur and join with Chairman Jordan in concluding that the judge's determination to dismiss the section 75.334(b)(1) citation should be vacated and that the matter should be remanded for an appropriate analysis.

With regard to the citation charging a violation of section 75.364(a)(2), I conclude that the judge's dismissal of the citation should be vacated and that the matter should be remanded for an analysis consistent with the below discussed conclusions. Therefore, I dissent from my colleagues' conclusion to affirm the judge.

The judge based his dismissal of the violation on the conclusion that "cross-sectional readings and daily monitoring at the BEP-10 location [i]s a reasonably proper method for evaluating the cited bleeder in question." 17 FMSHRC at 2062-63. In so concluding, the judge rejected *one* of the theories argued by the Secretary — that the cross-sectional method of inspection itself was not compliant with the cited standard. *See* S. Post-Hearing Br. at 45-51. However, the judge's analysis did not reach the Secretary's alternative theory. Having determined that cross-sectional inspection of the bleeder was an acceptable method under the standard, the judge failed to then examine whether that *method* — cross-sectional inspection — was in fact being *adequately* completed as charged by the Secretary.[1] *See* 17 FMSHRC at 2058-63.

My colleagues have determined to affirm the judge's dismissal of the citation, concluding that the Secretary did not charge Consol with a failure to make a *complete* cross-sectional inspection of the subject bleeder system. Slip op. at 10. Apparently, my colleagues conclude that the *only* basis for violation charged in the citation was the prohibited *use* of a cross-sectional inspection. I do not agree with that narrow interpretation of the scope of the citation.

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[1] The citation included the following:

> Based on evidence obtained during this accident investigation, it is determined that *adequate weekly examinations were not being made* to determine the effectiveness of the 2-1/2 section bleeder system. Statements given by company officials, Bob Wyatt, superintendent, and Danny Crutchfield, mine foreman, were that no one was examining the bleeder regulator and the area was inaccessible. The approved ventilation map indicates that the back side of the 2-1/2 section, MMU 015, can be examined. This is a contributing factor to the methane explosion which occurred on 2-1/2 section, MMU 015, December 29, 1992.

17 FMSHRC at 1987 (emphasis added).

It is quite clear from the wording of the subject citation that Consol was on notice that the Secretary concluded a violation occurred because "adequate weekly examinations were not being made." 17 FMSHRC at 1987. Indeed, the disputed method of inspection — "cross-sectional" — is not even stated in the text of the citation. However, my colleagues have concluded that the citation can only be interpreted to charge one theory of liability — that the *use* of a cross-sectional method of inspection was not permissible. Slip op. at 10-11. I do not agree. I have no difficulty in concluding that the citation, as written, served to clearly place Consol on notice that the Secretary found Consol's inspection of the bleeders to be "inadequate." As such, an adequately represented operator would be on notice that a successful defense to the charge would certainly include, not only that the cross-sectional method was permissible, but also, that such an inspection was being "adequately" or completely performed! As such, I reject the notion that Consol was not placed on notice of such liability because of the wording of the citation.

Beyond the wording of the citation, my colleagues further attempt to support their conclusion to affirm the dismissal of the citation because "the trial record does not reflect that Consol understood, or should have understood, that the allegation of an incomplete cross-sectional reading was being litigated as a violation." Slip op. at 10. I do not agree.

An examination of the transcript of the testimony of MSHA Inspector Uhl clearly establishes that MSHA's prosecution of this violation was based on the theory that a cross-sectional inspection did not satisfy the requirements of the standard and, alternatively, if a cross-sectional inspection was deemed to be in compliance, Consol had failed to adequately perform such inspection. Moreover, careful review of the transcript also establishes that Consol's counsel recognized during the hearing that the issue of whether the cross-sectional inspections were being conducted in a complete and adequate manner was in dispute. On the cross-examination of Inspector Uhl, Consol's counsel posed the following questions, which indicate that he recognized that the adequacy of the cross-sectional inspections was also in issue:

> Q Now, was it your testimony earlier that readings were not being done on the Two-and-one-half Section, cross-sectional readings were not being done?
>
> . . . .
>
> Q Would it be fair to say that this book will indicate that a fellow named Jay Browning did some readings on the Two-and-one-half on 12/21/92?
>
> . . . .
>
> Q Would you agree that the reading on 12/9/92 is a full cross-sectional reading for the Two-and-one-half?

. . . .

Q Now, Mr. Uhl, would you agree that on 12/21/92, it appears that a Mr. Browning did a partial cross-sectional reading?

. . . .

Q Were there full cross-sectional readings being done prior to this one that is partially incomplete on 12/21/92?

. . . .

Q This is not a trick question. I just want to know if, during this investigation, did you come up with any pattern or indication that there was a pattern at the mine to not perform full — now, you can argue about whether they are adequate — but full cross-sectional readings there on the Two-and-one-half?

. . . .

Q The only [cross-sectional inspection] that was not full was the last one, right?

Tr. IV 312-16.

Beyond the foregoing, which is sufficient to establish that Consol certainly recognized, or should have recognized, that the "adequacy" of the cross-sectional inspections was in issue, the Secretary's post-trial brief confirms the same point:

> However, even assuming that cross sectional readings was (sic) an approved and effective method, the operator was not even taking proper cross sectional readings. Proper cross sectional readings require that air readings be taken in the intake, return and belt entries. (T-V-116) However, the most recent entry in the weekly examination book, dated December 21, 1992, shows that readings were taken only in an intake entry and in the belt entry. (GX-47, p. 10) Mr. Crutchfield testified that these readings alone do not provide the necessary information for determining how much air was entering the gob. (T-V-118)

S. Post-Hearing Br. at 46-47.

In consideration of the foregoing, I cannot conclude that "the trial record does not reflect that Consol understood, or should have understood, that the allegation of an incomplete cross-sectional reading was being litigated as a violation." Slip op. at 10.

Accordingly, I find that the dismissal of this citation by the judge should be vacated and that the matter should be remanded for an analysis and determination of whether Consol was performing adequate cross-sectional inspections.

Marc Lincoln Marks, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAR 4 1998

ROCK OF AGES CORPORATION, Contestant	:	CONTEST PROCEEDINGS[1]
v.	:	Docket No. YORK 94-76-RM Citation No. 4282251; 5/20/94
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. YORK 94-77-RM Order No. 4282252; 5/20/94
	:	Docket No. YORK 94-78-RM Order No. 4282253; 5/20/94
	:	Docket No. YORK 94-79-RM Order No. 4282254; 5/20/94
	:	Docket No. YORK 94-80-RM Order No. 4282255; 5/20/94
	:	Docket No. YORK 94-81-RM Order No. 4282256; 5/20/94
	:	Docket No. YORK 94-82-RM Order No. 4282257; 5/20/94
	:	Docket No. YORK 94-83-RM Order No. 4282258; 5/20/94
	:	Rock Of Ages Lite Side Mine ID 43-00024

[1] Order Nos. 4282252, 4282253, 4282254 and 4282258 were vacated by the Secretary prior to trial. Consequently, Rock of Ages Corporation's motion to withdraw its contest with respect to these orders was granted at the hearing. Tr. I at 11-12.

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 95-55-M
Petitioner	:	A.C. No. 43-00024-05518
v.	:	
	:	Rock of Ages Lite Side
ROCK OF AGES QUARRIES, INC.,	:	
A/K/A ROCK OF AGES CORP.,	:	
Respondent	:	

REMAND DECISION

Before: Judge Feldman

These matters concern four citations issued as a result of the Mine Safety and Health Administration's (MSHA's) accident investigation of the May 20, 1994, death of Michael Bassett, a channel burner operator, at Rock of Ages Corporation's (ROA's) Lite Side Quarry.[2] The citations involve 30 C.F.R. Part 56, Subpart E, which governs the use of explosives at surface metal/nonmetal mines. MSHA charged ROA with violating 30 C.F.R. § 56.6311(b), for permitting work other than work necessary to remove a misfire in the blast area; 30 C.F.R. § 56.6306(g), for permitting work to resume prior to an adequate post-blast inspection following the June 22, 1993, blast that resulted in the fatal misfires; 30 C.F.R. § 56.6904, for permitting an open flame within 50 feet of explosive material; and 30 C.F.R. § 56.6300(a), for inadequately training blasting personnel. MSHA alleged the violations were significant and substantial in nature and the result of ROA's unwarrantable failure. The initial decision in this case found that ROA committed the alleged violations as charged and that the violations were attributable to ROA's unwarrantable failure. A total civil penalty of $180,000 was assessed. 17 FMSHRC 1925 (November 1995) (ALJ).

On February 24, 1998, the Commission affirmed the initial decision that the violations occurred, and that they were the result of ROA's unwarrantable failure. *Slip op.*, 20 FMSHRC. __ . However, with respect to the appropriate civil penalty to be imposed, the Commission, citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 292-93; *aff'd* 763 F.2d 1147 (7th Cir. 1984), vacated the initial penalty assessment and remanded this case for a detailed

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[2] The Smith Quarry is a component of Rock of Ages Corporation's Lite Side Quarry. The Smith and Lite Side Quarries have been referred to interchangeably in this matter. The Mine Safety and Health Administration designated the Lite Side Quarry as the site of the fatality. 17 FMSHRC at 1926.

analysis of each of the six penalty criteria in section 110(i) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 820(i).[3]

In its remand, the Commission noted, in adjudicating the appropriate civil penalty, the judge must make "[f]indings of fact on each of the criteria [to] not only provide the operator with the required notice as to the basis upon which it is being assessed a particular penalty, but also provide the Commission and the courts . . . with the necessary foundation upon which to base a determination as to whether the penalties assessed by the judge are appropriate, excessive, or insufficient." *Slip op.* at 21, *quoting Sellersburg*, 5 FMSHRC at 292-93.

Although all of the statutory penalty criteria must be considered in assessing the appropriate penalty, it is not uncommon, due to aggravating or mitigating circumstances, for one criterion to outweigh another when determining the ultimate penalty. For example, the appropriateness of the penalty to the size of the operator may warrant a lower civil penalty despite aggravating circumstances that ordinarily would justify a higher penalty. In this case, as noted by the Commission in its remand, I based the imposed $180,000 civil penalty primarily upon the "extremely high negligence and serious gravity associated with each of the violations." *Id.* at 21. Consistent with the Commission's remand directive, a discussion of all of the penalty criteria follows.

1. History of Violations

The record reflects that ROA had a history of 32 violations during the two year period preceding the fatal accident. The vast majority of these violations were designated as non S&S. I view this as a good history of compliance, particularly in view of the fact that ROA is a large operator with numerous employees. However, as discussed below, I do not view this as a significant mitigating circumstance in view of the magnitude of negligence and the serious gravity involved in this case.

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[3]Section 110(i) sets forth six forth six criteria to be considered in the assessment of penalties under the Act:

> [1]the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

2. Appropriateness of Penalty to Size of the Operator

ROA is a large operator with approximately 500 employees. It has gross sales of more than $25,000,000 annually. It has neither been contended nor shown that the civil penalty liability imposed in this case is disproportionately excessive with respect to ROA's size.

3. Degree of Negligence[4]

The ROA quarry process is set forth in the Commission's remand and need not be repeated in detail. *See Id.* at 1-4. However, in order to appreciate the exceptionally high degree of negligence in this case, it is important to briefly revisit ROA's experimental use of pyrodex in its quarry process.

As a threshold matter, it is this experimental nature of the sequential ignition of its pyrodex blasts that should have alerted ROA to the importance of exercising a high degree of care.[5] Unlike its usual practice of using seismic cord (a continuous charge) as a blasting agent, bags of pyrodex were placed at the front, in the middle, and in the rear of lift holes, without any connecting detonating or ignition cord. The heat generated from the front bag, ignited by a squib at the mouth of the lift hole, was supposed to travel through the lift hole and ignite the middle bag. Similarly, it was anticipated the heat from ignition of the middle bag would travel to the rear of the lift hole igniting the rear bags.

As discussed in the Commission's decision, the blasting process routinely occurs 35 days into quarrying the bench. *Id.* at 2. The entire bench is ordinarily removed, in pieces, approximately 47 days from the initial channel burning that starts the quarrying process. *Id.* at 3. Consequently, it takes approximately 12 days to remove a bench after it is blasted.

On June 22, 1993, a granite bench, measuring approximately 42 feet wide, 16 feet high and 37 feet deep, was separated from the quarry floor using a pyrodex blast. This was accomplished by loading four bags of pyrodex in every fourth of 80 lift holes, measuring 1⅞ inches in diameter, drilled at six-inch intervals, 37 feet deep across the bottom of the face. The loading pattern in every fourth hole was one pyrodex bag in front, one in the middle, and two in the back placed approximately 32 to 37 feet from the mouth of the hole. *Id.* at 4.

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[4] Although the Commission has affirmed the unwarrantable failure findings for each of the four violations in issue, it is essential to summarize the specific findings to provide the required notice regarding the basis for the imposed civil penalties. *Sellersburg*, 5 FMSHRC at 292-93.

[5] As a consequence of its unfamiliarity with pyrodex, ROA kept blasting reports for each pyrodex shot. There are less than ten documented production uses of pyrodex by ROA in its 90 year history. *See* Gov. Ex. R-7; 17 FMSHRC at n.7.

Approximately eight days after the blast, around July 1, 1993, ROA's derrick operator was loading blocks of granite to be lifted out of the quarry from the June 22, 1993, blast site when he saw four misfired bags of pyrodex that had shaken loose and were hanging from a block. There were no squibs attached to the bags. *Id.* As these bags were discovered in the midst of the 12 day post-blast quarry removal process, it is reasonable to conclude they were bags placed in the middle of the lift holes. This conclusion is supported by the accident investigation that revealed the June 22, 1993, blast resulted in nine pairs of rear bag misfires (18 total bags) in nine different lift holes.[6] Even, if the four discoverd bags were rear bags, multiple rear misfires should have alerted ROA to a potential systematic failure of rear bag ignition, as well as a potential for additional middle bag ignition failure. 17 FMSHRC at 1947-48.

The derrick operator reported the misfires to the blasting foreman who noted the misfires on the June 22, 1993, blasting report. Gov. Ex. R-7. The uncontroverted testimony is that the blasting foreman, who was not called to testify by ROA, stated he "forgot" to search for more misfires. *Slip op.* at 4-5.

The four misfires without attached squibs discovered during the granite removal process on July 1, 1993, should have alerted ROA that there was a substantial probability, if not a certainty, that at least eight rear bags in four different lift holes could not have ignited as planned. Misfired rear bags are the most dangerous because the channel burner will torch this rear area where the lift holes, previously drilled in the lower face of the quarried bench, become the surface of the bench to be channel burned as the level of the quarry descends.

Misfires are an unavoidable consequence of blasting and do not, alone, establish negligence. Although there is ample evidence reflecting ROA was highly negligent in its use of pyrodex, particularly in view of the 26 percent misfire rate resulting in 22 misfired bags located at the immediate scene of the fatality, the overwhelming justification for high penalties in this case is ROA's failure to take any meaningful action to probe caprock in an effort to remove additional misfires after the four misfires were found. In this regard, the Commission concurred with the initial decision that the foreman's "failure to order any meaningful search for unexploded pyrodex, such as probing caprock at the blast site, 'evidenced a callous disregard for the hazards associated with misfires.'" *Id.* at 10, *quoting* 17 FMSHRC at 1948.

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[6] Bassett's torch passed within two feet at the rear of a lift hole covered by caprock that contained two bags of misfired pyrodex moments before his torch ignited two other misfires located three lift holes away. After the accident, 14 additional bags were found under caprock at the rear of seven different lift holes. *Slip op.* at 5. "Caprock" is a layer of rock covering a lift hole that remains in place, sometimes with misfires inside, if the post-blast lift and separation from the quarry floor were not clean. *Id.* at 3. All of the misfired bags recovered during the accident investigation were found at the rear of lift holes. *See* Gov. Ex. R-10. Counting the four misfires found by the derrick operator, there was a total of 22 misfires at the accident bench.

In analyzing the degree of negligence, I note ROA's argument that the perceived hazard in this case is only clear in hindsight. Contrary to ROA's assertion, it does not require hindsight to recognize that known misfires recovered during the bench removal process could not generate the heat required to ignite the rear bags placed in the lift holes behind the recovered bags. Similarly, hindsight is not essential to appreciate the potential exposure of a channel burner operator who was certain to torch the rear of the bench below the June 22, 1993, blast.[7]

As previously noted, the Commission has affirmed the unwarrantable failure findings in this case. A finding of unwarrantable failure requires evidence of unjustifiable or aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (December 1987). Unwarrantable failure is characterized by conduct evidencing "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (February 1991); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). Thus, the issue of unwarrantability must be based on what was known, or what should have been known, at the time of the alleged unwarrantable act.

While hindsight may be a relevant mitigating consideration in cases of ordinary negligence, hindsight is not material in cases of unwarrantable failure, as the operative consideration is the nature and extent of the information available at the time of the alleged unwarrantable conduct, *i.e.*, the occurrence of misfires and the likelihood of additional misfires. Consequently, I am not persuaded by ROA's attempt to use the issue of hindsight as a justification for its failure to exercise common sense.

In short, ROA's conduct manifested a reckless disregard which, absent any significant mitigating circumstances, warrants the imposition of the highest civil penalties contemplated by the Mine Act. This exceptionally high degree of negligence, which caused ROA to ignore the probability of misfires in close proximity to torch flames, is applicable to all four of the cited violations under consideration.

4. The Effect of the Civil Penalty on ROA's Business

It has neither been contended nor shown that ROA's ability to continue in business, given its multi-million dollar revenue, would be effected by the imposition of a $180,000 civil penalty in this case.

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[7] The dimensions of benches essentially were unchanged as they were quarried in a vertical direction down into the rock formation. The Commission noted "unexploded bags of pyrodex would not lie harmlessly under piles of rock but would eventually be exposed as benches were removed and pose a hazard as channel burning resumed." *Slip op.* at 10.

5. Gravity

This case concerns a fatality that was caused by four violations of mandatory safety standards that resulted in the foreseeable presence of torch flames in the vicinity of potential misfires. One cannot imagine a scenario constituting more serious gravity.

6. Good Faith Abatement and Compliance

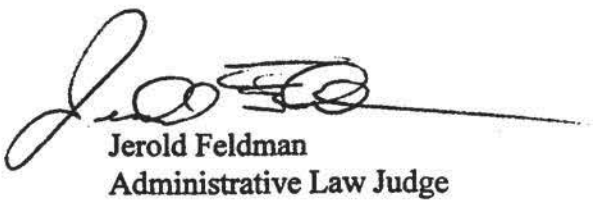
ROA cooperated with MSHA during its accident investigation, during which time operations were halted and a total of 40 pyrodex misfires were found. As noted above, given the degree of negligence and serious gravity, and, the exigent nature of the circumstances that required an immediate cessation of operations, I do not view ROA's cooperation as a significant mitigating factor.

Citation No. 4282251 and Order No. 4282257 concern ROA's failure to act prudently immediately after the June 22, 1993, blast that resulted in the fatal misfires. Accordingly, the maximum $50,000 penalties are imposed for the failure of ROA to take any meaningful action to search for additional misfires immediately after four misfires were discovered on July 1, 1993. The two remaining orders concern violations that occurred in May 1994, approximately one year later, when the victim began channel burning the bench below. The reduced $40,000 civil penalties are imposed for these orders because of the slight mitigation associated with the time period that elapsed between the initial June 22, 1993, blast that caused the misfires and the May 20, 1994, fatal ignition of those misfires.

In view of the above I am reinstating the total $180,000 civil penalty imposed in the initial decision. This civil penalty is comprised of: $50,000 for Citation No. 4282251/violation of 30 C.F.R. § 56.6311(b); $40,000 for Order No. 4282255/violation of C.F.R. § 56.6306(g); $40,000 for Order No. 4282256/30 C.F. R. § 56.6904; and $50,000 for Order No. 4282257/violation of C.F.R. § 56.6300(a).

ORDER

Accordingly, consistent with the penalty criteria in section 110(i) of the Mine Act, the $180,000 civil penalty in this matter **IS REINSTATED**. Consequently, **IT IS ORDERED** that Rock of Ages Corporation pay a civil penalty of $180,000 in satisfaction of the citation and orders in issue within 30 days of this order, and, upon receipt of timely payment, these docketed proceedings **ARE DISMISSED**.



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAR 10 1998

GLENN SADLER,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. SE 97-227-D
v.	:	BIRM CD 97-05
	:	
JIM WALTER RESOURCES, INC.,	:	No. 5 Mine
Respondent	:	Mine ID 01-01322

ORDER OF DISMISSAL

Before: Judge Feldman

The record reflects the complainant, Glenn Sadler, was terminated by Jim Walter Resources, Inc. (JWR), on June 7, 1989. The respondent asserts Sadler's discharge was based on his unexcused absence from work on June 1 and June 2, 1989, that allegedly violated Article XXII(i)(4) of the National Bituminous Coal Wage Agreement of 1988 between JWR and the United Mine Worker's of America. Sadler did not report to work on June 1 and June 2, 1989, because he had been arrested.

Sadler's discharge was the subject of a union grievance proceeding. The arbitration decision supports JWR's contention that Sadler was terminated as a consequence of his unexcused absence from work on June 1 and June 2, 1989. The arbitrator denied Sadler's grievance on July 28, 1989. A copy of the July 28, 1989, arbitration decision was previously provided to Sadler.

On May 19, 1997, approximately eight years after his employment was terminated by JWR, Sadler filed the subject discrimination complaint with the Mine Safety and Health Administration (MSHA) under section 105(c) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 815(c). Sadler's complaint stated:

> I was not given the opportunity to take personal days off when I had an emergency. My mental state was not stable at the time to make decisions, when confronted later, I was not given the opportunity to rectify the situation.

MSHA conducted an investigation in response to Sadler's complaint. On July 29, 1997, MSHA determined that Sadler's discharge by JWR did not violate section 105(c) of the Mine Act. On August 12, 1997, Sadler filed his discrimination complaint on his own behalf with this Commission. On November 3, 1997, JWR moved for dismissal of Sadler's complaint on timeliness and substantive grounds.

On January 8, 1998, Sadler was ordered to show cause why his discrimination complaint should not be dismissed as untimely, or, in the alternative, why his discrimination complaint should not be dismissed for failure to state a cause of action under section 105(c) of the Mine Act. Specifically, Sadler was ordered to state why his complaint was not filed within the 60 day filing deadline, and why it was initially filed approximately eight years after his termination. Sadler was also ordered to state whether he agreed with the decision of the arbitrator that his absence from work on June 1 and June 2, 1989, was the reason for his termination. If Sadler believed his absence from work was not the basis for his discharge, Sadler was ordered to specifically describe any safety related protected activity he engaged in while employed by JWR, including the dates of such activity, and whether and why he believed that such activity was a factor in his discharge.

The January 8, 1998, Order to Show Cause was served on Sadler by certified mail. The record reflects Sadler received the Order on January 12, 1998. The Order stated, **"Sadler's written response must be filed within 21 days of the date of this Order. Sadler's failure to submit a timely response may result in the entry of a default decision dismissing his discrimination complaint** (emphasis in original)." To date, Sadler has failed to respond to the Order to Show Cause. In view of Sadler's failure to respond, on February 17, 1998, JWR filed a Motion to Dismiss. Sadler has failed to oppose JWR's request for dismissal.

Timeliness Issue

Generally stated, section 105(c) of the Mine Act prohibits a mine operator from discharging a miner as a consequence of any safety related activities engaged in by that miner that are protected by the Act. Section 105(c)(2) of the Mine Act requires a complaining miner to file his discrimination complaint with MSHA within 60 days of the alleged discriminatory discharge. While this 60 day filing period is not jurisdictional in nature, there is a strong public policy against consideration of stale claims that invariably involve faded memories, unavailable witnesses and lost records. *Schulte v. Lizza Industries*, 6 FMSHRC 8, 12-13 (January 1984) (citations omitted). Thus, while reasonable filing delays may be excused on a case-by-case basis upon a showing of justifiable circumstances, Sadler's eight year filing lapse requires a showing of extraordinary circumstances to avoid dismissal of his complaint as untimely. Sadler's failure to provide any basis for his failure to file his discrimination complaint in a timely manner warrants the dismissal of his complaint as untimely.

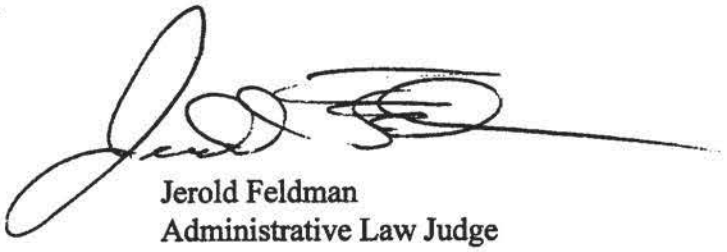
Substantive Issues

A miner alleging to be a victim of prohibited retaliatory conduct bears the burden of proving a *prima facie* case of discrimination under section 105(c) of the Mine Act. In order to establish a *prima facie* case, a miner must establish that he engaged in protected activity, and, that the adverse action complained of (Sadler's discharge), was motivated in some part by that protected activity. *See Secretary on behalf of David Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (October 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Secretary on behalf of Thomas Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981).

Sadler's absence from work on June 1 and June 2, 1989, caused by his incarceration, is not protected by section 105(c) of the Mine Act. Moreover, Sadler's complaint fails to allege that he engaged in safety related activity protected by the Mine Act, or, that his June 7, 1989, discharge, immediately following his imprisonment and absence from work, was in any way motivated by activity entitled to Mine Act protection. Accordingly, Sadler's complaint fails to state a cause of action under the anti-discrimination provisions of section 105(c) of the Mine Act.

ORDER

In view of the above, Sadler's May 19, 1997, discrimination complaint is dismissed as untimely. Alternatively, Sadler's May 19, 1997, discrimination complaint **IS DISMISSED** for failure to state a cause of action. Accordingly, the respondent's Motion to Dismiss **IS GRANTED**, and this discrimination proceeding, docketed as Docket No. SE 97-227-D, **IS DISMISSED** with prejudice.



Jerold Feldman
Administrative Law Judge

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MAR 10 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of CLAY BAIER	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 97-96-DM
Complainant	:	J & J Pit
v.	:	Mine I.D. 05-04517
DURANGO GRAVEL, Respondent	:	

SUPPLEMENTAL DECISION AND FINAL ORDER

Appearances: Kristi Floyd, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for Complainant;
Jim Helmericks, owner, Durango Gravel, Durango, Colorado, for Respondent.

Before: Judge Manning

This proceeding was brought by the Secretary of Labor on behalf of Clay Baier against Durango Gravel under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c) (the "Mine Act"). In a decision entered on January 27, 1998, I found that Mr. Baier's discharge from his employment violated section 105(c) of the Mine Act. 20 FMSHRC 59. Counsel for the Secretary filed a brief setting forth the amount of back pay she contends that Mr. Baier is entitled to, the calculations she used to arrive at the back pay amount, and the civil penalty that she contends should be assessed under the penalty criteria of section 110(i) of the Mine Act. Durango Gravel filed a response.

I. MOTION FOR RECONSIDERATION

On February 3, 1998, Durango Gravel filed a motion asking that I reconsider my decision granting the complaint of discrimination. The Secretary opposes this motion. Durango Gravel states that I made a number of errors. First, it argues that I incorrectly determined that Jim Helmericks, the owner of Durango Gravel, was hostile towards MSHA and Mr. Baier's

conversations with MSHA Inspector Williams. 20 FMSHRC at 66. Mr. Helmericks contends that he never exchanged harsh words with MSHA. The record shows that Mr. Helmericks believes that Williams should not have discussed safety issues with Baier and that Helmericks considered such conversations to be a threat to his ability to manage the pit. I recognize that Durango Gravel was not so hostile towards MSHA that it did not cooperate during inspections. Nevertheless, it was hostile when employees attempted to discuss safety issues with MSHA.

Second, Mr. Helmericks maintains that he never ordered or required Baier to dig from the toe of the highwall. Mr. Helmericks proceeded without counsel in this case. On a number of occasions I attempted to advise Mr. Helmericks about the legal issues in this case and how he should attempt to establish that Durango Gravel did not discriminate against Mr. Baier. 20 FMSHRC at 69. The hearing lasted about a day and a half and Mr. Helmericks chose to devote most of his resources attempting to establish that the Secretary's witnesses were not credible. In the motion for reconsideration, Durango Gravel asks that I "see through" its "crude defense and somewhat misguided approach" at the hearing and find that Mr. Baier was not a credible witness. (Motion at 5). I am required to base my decision on the evidence presented at the hearing. I cannot make findings based on what I think "really happened" unless these findings are supported by evidence presented at the hearing. Durango Gravel did not present facts to establish that the testimony of Secretary's witnesses should not be given any credibility.

In my decision, I found that Mr. Baier's termination was motivated at least in part by his protected activity. I further found that Baier also engaged in activity that was not protected under the Mine Act. I determined that Durango Gravel did not establish that it would have terminated Mr. Baier for his unprotected activity alone. Mr. Helmericks was given the opportunity to present evidence on this issue at the hearing. The motion for reconsideration does not set forth sound reasons to alter my findings and conclusions set forth in the decision of January 27. For the reasons set forth above, the motion for reconsideration is **DENIED**.

II. BACK WAGES

Mr. Baier did not ask for reinstatement, but seeks back wages for a period of three weeks and three days. Part of this back pay is for one week and three days between July 21 and July 31, 1996, when he worked for Durango Gravel but was not paid. The second part is for the two weeks following his August 1 termination when he was not employed.

Baier testified that he was paid $11 per hour at the time of his discharge and that he worked an average of 50 hours a week. (Tr. 11, 13, 69). The Secretary contends that he should be awarded $825 for the period prior to his termination. The Secretary contends that he should be awarded $1,100 for the two-week period he was out of work.

Durango Gravel presented Baier's time cards for the period between July 21 and July 31. The time cards show that Baier worked 51 hours the first week and that his gross pay was $622. The hourly rate is shown as $16.50 for those hours above 40 hours a week. The time cards show

that he worked 25 hours the partial week and his gross pay would have been $275.00. The total would be $897. Durango Gravel contends that Mr. Baier caused more than $3,000 damage to its equipment while he worked at the pit and it seeks to withhold any pay for this period as partial payment for this damage.

Durango Gravel also contends that Mr. Baier was unemployed for only one week following his termination at the pit. It attached to its brief a payroll statement from K2 Enterprises showing that Baier worked there on August 8 and 9, 1996. Durango Gravel also maintains that Baier worked an average of 40 hours a week during the summer of 1996. It attached time cards to its brief in support.

As I previously held, Durango Gravel is not entitled to deduct from the back-pay award the amount of any damage Baier caused to equipment. 20 FMSHRC at 71-72. The evidence shows that Baier damaged a loader about ten days prior to his termination. It is clear that the damage was accidental. There was conflicting testimony as to whether Mr. Helmericks was concerned about this accident at the time. 20 FMSHRC at 69-70. Mr. Helmericks did not tell Baier that he would deduct the cost of repairing the damage from his wages. The damaged loader was not repaired until about a week before the hearing in this case. (Tr. 309). I find that there is insufficient evidence that Durango Gravel would have required Baier to pay for the damage if he had not been terminated. I could find no Commission cases in which an administrative law judge deducted accidental damage to equipment from a back-pay award.

Based on the payroll records provided by Durango Gravel, I find that Baier is entitled to $897 in back pay for the period July 21 through July 31, 1996. With respect to the period after Baier's termination, the record contains little information. His starting date at K2 Enterprises was not established by the Secretary. (See, for example, Sec. Response to Interrogatories at 2). All time frames were rough estimates and Mr. Baier's estimates of time and dates at the hearing were quite vague and unreliable. I credit Durango Gravel's evidence that Baier worked about 40 hours per week, on average. I also credit its evidence that Baier was not unemployed for a full two- week period following his discharge. I hold that Baier is entitled to 50 hours of back pay for the period after his discharge, which is $550. Accordingly, the total back-pay award is $1,447.

The Commission has held that a miner is entitled to interest on a back-pay award. *Arkansas-Carbona Co.*, 5 FMSHRC 2040, 2051-53 (December 1983); *modified by Clinchfield Coal Co.* 10 FMSHRC 1493, 1504-06 (November 1988). The Commission uses the short-term Federal rate applicable to the underpayment of taxes. 10 FMSHRC at 1505. The Commission uses the following formula to calculate interest: Amount of interest = The calendar quarter's net back pay x number of accrued days of interest from the last day of that quarter to the date of payment x the daily short-term rate interest factor. 5 FMSHRC at 2052. The relevant short-term rate is 9 percent and the daily short-term rate interest factor is .00025. Using this formula, the amount of interest owed through March 6, 1998, is $187. Thus, the total award is $1,634, provided that the amount owed is paid within 40 days of the date of this decision.

III. CIVIL PENALTY

The Secretary proposes a civil penalty of $2,500. Section 110(i) of the Mine Act provides that in assessing a civil penalty "the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation." 30 U.S.C. § 820(i).

The record shows that other employees had complained about unsafe practices at the mine and that a formal complaint was filed in 1996 under section 103(g) of the Mine Act. Durango Gravel does not have any previous history of violations of section 105(c) of the Mine Act. MSHA Inspector Royal Williams testified that the J&J Pit had been issued more citations than is typical for a mine of its size in the area. (Tr. 230). Based on this evidence, I find that Durango Gravel's history of previous violations is moderate to high.

Durango Gravel is a sole proprietorship owned by James Helmericks. The J&J Pit consists of a pit and a small crusher. The crusher is old and, according to Mr. Baier, it could only operate about eight hours per week. It broke down on a regular basis. Durango Gravel employed only two individuals at any given time. One of these employees was often Mr. Helmericks' son. Production was very low and the operation was not very profitable. I find that Durango Gravel is a very small operator.

The Secretary contends that Durango Gravel was highly negligent. I disagree. The evidence shows that Mr. Helmericks was concerned that Baier was operating the loader on the top of the highwall without his authorization. Although I concluded that Durango Gravel discriminated against Clay Baier, I found the case to be close. Baier did not have a protected right to operate equipment without the permission of Mr. Helmericks. I held for Mr. Baier because Durango Gravel did not establish that it would have terminated Mr. Baier for his unprotected activities alone. 20 FMSHRC at 69-71. It was this unprotected activity that was particularly troubling to Mr. Helmericks. Accordingly, I find that Durango Gravel's negligence was moderate to low.

I find that the proposed penalty would have a deleterious effect on Durango Gravel's ability to continue in business. As stated above, Durango Gravel is a very small family-run business. The description of Durango Gravel's operations offered by both Helmericks and Baier indicate that it is not a very profitable operation. The crusher is down for repair most of the time and the amount of throughput is quite low. Mr. Helmericks testified that the company is "running on fumes" and that it has not been operating much since late 1996. (Tr. 305). In its brief, Durango Gravel alleges that it will be "faced with bankruptcy" if the proposed penalty is assessed. (DG Br. at 4). The record does not establish that bankruptcy is imminent, but it does show that the operation is marginal at the current level of capitalization and that a penalty of $2,500 would seriously affect its ability to continue in business.

I find that the violation in this case is serious. Operating a loader under a highwall is reasonably likely to cause death or serious injury to the loader operator assuming continued mining operations.

Whether Durango Gravel demonstrated good faith in attempting rapid compliance after notification of a violation in this case is difficult to analyze. Nothing in the record indicates that Durango Gravel's contest of the complaint of discrimination was frivolous or was filed in bad faith. It honestly believed that it terminated Mr. Baier for reasons that were not protected by the Mine Act. Much of the misunderstanding between Baier and Helmericks was caused by a failure of communication. On the other hand, Durango Gravel had been notified by MSHA that employees were not to dig into highwalls at the mine. As I stated in my decision, this practice did not stop. After reviewing the record and the arguments of the parties, I conclude that it has not been established that Durango Gravel failed to demonstrate good faith in this case.

Taking into consideration all of the penalty criteria, I conclude that a penalty of $100 is appropriate in this case. In reducing the penalty, I rely primarily on the fact that Durango Gravel is a very small operator and that the proposed penalty would have a serious effect on its ability to continue in business. The operator's small size was especially important in my analysis.

IV. ORDER

A. Durango Gravel is **ORDERED TO PAY** Clay Baier the sum of $1,634 within 40 days of the date of this decision. This payment shall be subject to normal withholding as authorized by law.

B. Durango Gravel is **ORDERED TO PAY** the Secretary of Labor a civil penalty in the amount of $100 for its violation of section 105(c) within 40 days of the date of this decision.

C. My decision of January 27, 1998, and this supplemental decision and order shall constitute my final disposition of this proceeding.

Richard W. Manning
Administrative Law Judge

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

MAR 18 1998

CLARK ELKHORN COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. KENT 97-77-R
	:	Citation No. 4495292; 11-26-96
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Sunset Mine No. 1
ADMINISTRATION,	:	Mine ID: 15-11905
Respondent	:	
	:	Docket No. Kent 97-176-R
	:	Citation No. 4224867; 03/12/97
	:	
	:	Ratliff Mine No. 110
	:	Mine ID 15-16121

DECISION

Appearances: William C. Miller, Esq., Jackson & Kelly, Charleston, West Virginia, for the Contestant;
Thomas A. Grooms, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for Respondent.

Before: Judge Barbour

These contest proceedings arise under section 105(d) of the Federal Mine Safety and Health Act of 1977 (Mine Act or Act) (30 U.S.C. § 815(d)) and involve two citations issued pursuant to section 104(a) of the Act (30 U.S.C. § 814(a)). Each citation alleges Clark Elkhorn Coal Company (Clark Elkhorn) violated a mandatory safety standard for underground coal mines. Clark Elkhorn contested the validity of the citations, the Secretary answered, the matters were assigned to me, and I consolidated them for hearing and decision. Upon the parties' joint motion, the proceedings were continued pending the decision of Commission

Administrative Law Judge William Fauver in *Apex Minerals, Inc.*, 19 FMSHRC 796 (April 1977).[1] The parties hoped the decision would provide them with a basis to resolve their differences. It did not, and the hearing was rescheduled. At the hearing, counsels announced the Secretary had vacated the citation contested in Docket No. KENT 97-77-R and Clark Elkhorn had withdrawn its contest (see Joint Exh. 1; Tr. 8).[2] Thus, the only issue at trial was the validity of Citation No. 4224867, as contested in Docket No. KENT 97-176-R.

DOCKET NO. KENT 97-176-R
THE CITATION

Citation No.	Date	30 C.F.R. §
4224867	3/12/97	75.1711-2

The citation states:

> The mine operator has failed to seal all mine openings. There are three openings located on Rockhouse Fork and there are seven openings on Greasy Creek that are not sealed. All these openings are . . . interconnected with the mine. The mine was abandoned on November 20, 1996 (Gov. Exh. 1).[3]

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[1]/ *Apex*, involved two mines, Mine No. 4 and adjacent Mine No. 7. In the past both mines had been operated by Eastern Coal Corporation. Apex Minerals, Inc. (Apex) purchased the mining rights to Mine No. 4 and applied to MSHA to operate the mine. At that time, Mine No. 7 and Mine No. 4 were connected underground. Mine No. 7 mine had been used as part of a bleeder system to ventilate Mine No. 4, but Mine No. 7 long had been shut down when Apex took over Mine No. 4.

Once Apex was in control of Mine No. 4, it completely separated the two mines by installing underground seals between them. Subsequently, water burst from a surface opening of Mine No. 7, and MSHA cited Apex for a violation of 30 C.F.R. § 75.334 (b)(2), a mandatory safety standard requiring, in part, that worked-out areas be sealed. Apex contested the citation, arguing that after the underground seals were installed, Mine No. 7 was not a part of Mine No. 4 and Apex was not responsible for the outburst or for failing to seal the opening.

Judge Fauver agreed. He stated the construction of the underground seals raised "the legal issue whether a mine that is connected underground with another mine may seal off its connection and thereby become a separate mine with no responsibility for the adjoining mine" (19 FMSHRC at 801). He concluded Apex had a "legal right to seal off its mining rights boundary and thereby become a separate mine without responsibility or liability for conditions in . . . Mine No. 7" (19 FMSHRC at 803). The Secretary did not appeal the decision.

[2]/ I accepted the withdrawal and advised the parties I would dismiss Docket No. KENT 97-77-R in this decision (Tr. 9) .

[3]/ The Secretary gave the company until April 14, 1997, to abate the alleged violation. Subsequently, the Secretary agreed to extend the time at least until this decision issued (Tr. 113).

THE STANDARDS

30 C.F.R. § 75.1711 states:

> [T]he opening of any coal mine that is declared inactive . . . or is permanently closed, or abandoned for more than 90 days, shall be sealed by the operator in a manner prescribed by the Secretary.

Section 75.1711-2 implements section 75.1711, and specifies the manner in which slope or drift mine openings shall be sealed. It requires they be "sealed with solid, substantial, incombustible material, such as concrete blocks . . . or . . . be completely filled with incombustible material for . . . at least 25 feet into such openings."

THE ISSUES

The fundamental issues are whether the cited openings were part of a mine that was abandoned by Clark Elkhorn for more than 90 days; and, if so, whether the openings were sealed or completely filled as required. As in *Apex*, the key to resolving the issues is to determine whether works that had been connected underground were part of the single mine after they were separated by the installation of underground seals.

THE EVIDENCE

MSHA Inspector Douglas Looney was the Secretary's first witness. He testified the company abandoned the Ratliff No. 110 Mine in late 1996. (The mine is located in MSHA District 6.) On March 12, 1997, more than 90 days after the mine was abandoned, Looney went to the mine "to check all openings within [its] boundaries" (Tr. 15). At the mine, he met with John Swiney, the mine operations manager. Looney advised Sweeney that he, Looney, needed to travel to all of the mine openings to determine if they had been sealed in accordance with section 75.1711-2 (Id.). Looney and Swiney traveled together. As Looney described it, "we . . . [rode] in a vehicle to a certain point. Then we . . . park[ed] the vehicle, [got] out and walk[ed] up on the mountain to where the old openings were" (Tr. 16).

Looney identified a copy of the Ratliff No. 110 Mine map. For all intents and purposes it was the same as the map he used when conducting the inspection (Gov. Exh. 2; Tr. 18-19). The map showed the mine's ventilation system (Tr. 19). It also showed two different and adjoining mined areas. Looney believed the Ratliff No. 110 Mine consisted of these two areas. One area, the "old works," had been developed and mined several years ago by a company other than Clark Elkhorn. The other area, the "new works," had been developed and mined relatively recently by Clark Elkhorn.

Originally, the two areas had been completely separate mines. However, when retreat mining began in the new works, the company chose to cut into the adjacent old mine and to use the old works as part of a bleeder system ventilating the retreat mining. Return air from the new works circulated through the old works and exhausted through several of the openings of the old mine (Tr. 45). Before the company cut into the old workings, it obtained approval from MSHA (Tr. 38-39).

The old works had constituted a drift mine, and the old mine openings were parallel to, or practically level with, the coal seam (Tr. 46). The company tested the effectiveness of the bleeder system at some of the old openings (Tr. 21, 23-25). The company referred to these openings as evaluation points or "EPs."[4]

Clark Elkhorn was not required to cut into the old works in that there were alternative ways to establish the bleeder system (Tr. 25). However, it was safer to use the old works for ventilation and to evaluate the bleeder system from the surface EPs (Tr. 39). It was also cheaper. Indeed, according to Clark Elkhorn's Safety Coordinator Roger Cantrell, because of safety considerations, MSHA encouraged the use of surface EPs (Tr. 103). Looney agreed it was "fairly common" in District 6 to use adjacent old works as part of a mine's ventilation system (Tr. 38-39).

There came a time, however, when the company finished retreat mining and no longer needed to use the old works for ventilation. The company therefore installed underground seals between the new and old works (Tr. 31, 45; see Gov. Exh. 2 at yellow line labeled "Underground Seals J.S."). The underground seals completely separated the old and new works and nothing -- neither miners, nor equipment, nor air -- could pass between. Functionally, it was as though the old mine had been reconstituted. Once the seals were installed, Clark Elkhorn stopped using the surface openings as evaluation points (see Tr. 32, 101).

In Looney's opinion, even though the underground seals completely separated the new and old works, Clark Elkhorn remained responsible for the old works (Tr. 32.). He believed the new and old works together constituted one mine (Tr. 32-33). He stated, "I see [the old works] as just a continuation of the mine" (Tr. 41). In other words, Clark Elkhorn's use of the old works and of their openings made the old works a permanent part of the Ratliff No. 110 Mine.

With regard to the openings he inspected on March 12, Looney acknowledge he and Swiney did not travel to all of the openings of the old mine because of "time restraints" (Tr. 27, 28). Therefore, Looney testified specifically about two openings, EP1 and EP2. Both were on the Greasy Creek side of the mine (see Gov. Exh. 2; Tr. 21, 25). EP1 was partially filled with

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[4]/ When asked to describe the tests conducted at the EPs, Looney stated, "They made methane tests, [and] determine[d] if air was moving in the proper course and velocity and oxygen tests and stuff like that" (Tr. 22). The tests were conducted weekly (Tr. 23, 49-50).

dirt and debris. Ventilation pipes (18 inch corrugated plastic pipes) protruded out of the opening through the dirt (Tr. 21, 36). The pipes, which were 10 to 12 feet long, also extended back from the opening, through the dirt, and into the atmosphere of the old works (Tr. 64). The "fill" that partially closed the opening did not extend from the mouth of the opening into the mine for 25 feet as required by section 75.1711-2. EP2 also had 18 inch ventilation pipes protruding from the dirt and debris that partially closed the opening.[5] EP2 also had "fill" that did not extend 25 feet into the mine (See Gov Exh 2; Tr. 26, 36-37).

Looney believed that to comply with section 75.1711-2 the company should have packed dirt or other fill from the mouths of the openings at least 25 feet into the old works. He also believed the ends of the ventilation pipes should have been sealed or guarded (Tr. 36-37, 47). Looney acknowledged to seal or properly fill some of the openings it might have been necessary to alter the surface of the land (Tr. 44, 46).[6] Looney did not know if the company had "surface rights" to make necessary alterations, nor did he consider whether or not the company had such rights when he issued the citation (Tr. 44). Looney also thought he and Swiney visited openings other than EP1 and EP2 that had not been used as EPs and that had not been sealed as required, but Looney could not specify on the mine map where these other openings were (Tr. 27, 29).

In Looney's opinion the company's failure to comply was not a hazard to underground miners. The only persons endangered were those who, for whatever reasons, might try to crawl into the openings (Tr. 42, 48). Looney considered this unlikely because the openings were "pretty much in isolated areas" (Tr. 46).

Looney testified, the company was at most moderately negligent in failing to seal the openings (Tr. 42-43). He did not know of anyone who told the company it was responsible for sealing the openings prior to him issuing the citation (Tr. 45). Nevertheless, the citation was not unique. Looney stated he issued similar citations for similar conditions, although he could not recall when, where, or their number (Tr. 40-41).

Swiney, who testified for Clark Elkhorn, worked for the company for 23 years. He explained the Ratliff No. 110 Mine started operating in 1987 and the old works were then in existence (Tr. 52, 61). (According to Cantrell, the old works were cut "in the 40s or 50s, maybe early 60s" (Tr. 103).) Swiney testified the company submitted to MSHA plans to cut into the old works and establish the EPs for the bleeder system (Tr. 52). The plans were approved, but prior

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[5]/ According to Swiney, the pipes extended out from the openings so miners did not have to go under overhanging highwalls to evaluate the bleeder system ventilation. Rather, they conducted the bleeder system tests at the outby end of the pipes (Tr. 62).

[6]/ Cantrell asserted the company would have had to build roads to get needed personnel and materials to the sites (Tr. 105).

to cutting into the works no one from MSHA told Swiney the company would have to seal the openings to the old works. Nor could he recall hearing of a situation where an operator had been required to seal such openings (Tr. 53).

As best Swiney could remember, the underground seals separating the new and old works were constructed in 1995 (Tr. 54). Before constructing the seals, it was again necessary to receive MSHA's approval. Nothing in the submission the company made to MSHA to obtain approval indicated the company was going to seal the surface openings after the underground seals were constructed; nor was the company advised it would have to do so (Tr. 54-55).

As opposed to Swiney, Cantrell testified he was aware MSHA believed the openings would have to be sealed. It was during "the latter part of '95 or first part of '96'" that Cantrell "encountered MSHA saying that [it] would require EPs where we'd used old mines to be sealed" (Tr. 100). Cantrell recalled a person from the MSHA ventilation department "started talking about the EP would have to be sealed" (Tr. 105).[7] This was after the company had cut into the old works (Tr. 108). However, no one from MSHA indicated sections 75.1711 and 75.1711-2 required the openings to be sealed (Tr. 102).

MSHA Inspector Thomas Griffith, who was called as a witness by Clark Elkhorn, has been employed by MSHA for 22 or 23 years, the past 8 as a District 6 specialist in coal mine ventilation. As a ventilation specialist he is responsible for reviewing operators' ventilation plans (Tr. 76). If an operator is going to use old works as part of a ventilation system, MSHA has not required the operator's ventilation map to indicate that the surface openings of the old works will be sealed (Tr. 78, 80-81). Griffith could not recall ever telling anyone at Clark Elkhorn the openings had to be sealed (Tr. 82). On the other hand, "three and four and five year[s] ago" he advised several other companies that section 75.1711-2 required the sealing of such openings, but he only gave the advice to operators whose mines liberated high volumes of methane (Tr. 81-82, 93).

William Simpkins, a former MSHA ventilation specialist in District 6, also testified for Clark Elkhorn. When he retired from MSHA in September 1994, he had been a ventilation specialist for 16 years (Tr. 110). Simpkins could not remember any time the agency used section 75.1711 to require an operator to seal openings in old works when the openings had been used as part of another mine's ventilation system (Tr. 111).

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[7]/ Q. So you were on notice as of the last part of '95 or early '96 that MSHA was changing its policy, is that correct?

A. That's the first time I heard of those EP's had to be sealed (Tr. 106).

RESOLUTION OF THE CONTEST

In resolving the question of whether Clark Elkhorn was properly cited for a violation of section 75.1711-2, heed must be paid first to the wording of sections 75.1711 and 75.1711-2 in order to determine what was required of the company. If the language is clear, the standards' terms must be enforced as written. (*Island Creek Coal Co.*, 20 FMSHRC ____, Docket No. KENT 95-214, slip op. 5 (January 30, 1997). If the language is not clear, if it is ambiguous, deference must be given to the Secretary's interpretation of the regulations (*Island Creek*, slip op. 5-6; citing to *Energy West Mining Co.* v. *FMSHRC*, 40 F.3D 457, 463 (D.C. Cir. 1994); *Secretary of Labor* v. *Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990)). While at first blush the requirement to defer seems to ordain the Secretary always will prevail, the requirement comes with a concomitant responsibility that offers a constitutionally-based protection to the operator. The Secretary must afford fair notice of her interpretation. If she does not, the operator cannot be held liable (*General Electric Company* v. *E.P.A.*, 53 F.3d, 1324, 1328-29 (D.C. Cir. 1995); *Island Creek*, slip op. 11).

THE SECRETARY'S INTERPRETATION OF SECTION 75.1711-2

To establish noncompliance with section 75.1711-2, the Secretary must prove the existence of openings "required to be sealed under § 75.1711." Section 75.1711, restates section 317(k) of the Act (30 USC § 877(k)) in requiring "the opening of any coal mine that is . . . abandoned for more than 90 days, [to] be sealed . . . in a manner prescribed by the Secretary." Looney's testimony regarding the openings at EP1 and EP2 was detailed. He described how he and Swiney visited the openings, how the openings had 18 inch, open-ended ventilation pipes protruding through the dirt, how the dirt did not completely close the openings, and how the "fill" did not extend 25 feet back into the mine (Tr. 23, 26, 36-37, 47, 49-50). There is no dispute the Ratliff No. 110 Mine was abandoned on November 20, 1996 (Gov. Exh. 1, 4). There also is no dispute Looney visited the mine more than 90 days later. Looney's testimony amply demonstrates, and I find, that at the time of the visit, EP1 and EP2 were not "sealed . . . in a manner prescribed by the Secretary" (30 C.F.R. § 75.1711) in that neither was "sealed with solid incombustible material" or "completely filled with incombustible material for a distance of at least 25 feet" (30 C.F.R. § 75.1711-2).

In contrast to the detailed descriptions of EP1 and EP2, Looney's testimony regarding the other openings of the old works was not sufficiently precise to allow findings concerning compliance with the standard. Although he initially testified he went to the mine to "check all openings within [the mine's] boundaries" (Tr. 15), Looney modified his testimony from "all openings," to the openings he and Swiney could see on the day of the inspection, and agreed they did not see them all (Id., Tr. 28, see also Tr. 48). Further, when cross examined concerning the ten openings he listed specifically on the citation, he stated "it could have been one or two less than ten" (Tr. 43). Finally, although he stated "according to [his] notes" (Tr. 27) other openings not used as EPs were in violation of section 75.1711-2, the notes were not introduced and Looney provided no further description of the "other openings."

Despite these deficiencies, proof EP1 and EP2 were not "sealed with solid incombustible material" or "completely filed with incombustible material for . . . at least 25" is sufficient to establish noncomplicance with section 75.1711-2, provided EP1 and EP2 were "openings of a coal mine declared abandoned for more than 90 days" (30 C.F.R. § 75.1711); in other words, provided they were openings of the Ratliff No. 110 Mine.

Section 3(h)(2) of the Act defines "coal mine" as "an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area . . . coal" (30 U.S.C. § 802(h)(2)). Section 318(l) includes in the definition of "coal mine," "areas of adjoining mines connected underground" (30 U.S.C. § 878(l)), and this definition is repeated in the regulations (30 C.F.R, § 75.2). When uncut coal and rock physically separated the works of the old mine from the new works it is certain the old and new works were not "connected underground" and the openings of the old mine were not part of the Ratliff No. 110 Mine. Just as certain, when the coal and rock were cut through and the old works were joined to the new works as part of the ventilation system for the new works, the old works became "shafts, slopes, tunnels, [or] excavations . . . used in the work of extracting . . . coal." They were "connected underground," and they were part of the Ratliff No. 110 Mine.

When the old works again were physically separated from the new works — albeit by underground seals, not by coal and rock — and the openings no longer were used for any purpose connected with the new works, did the openings continue to be a part of the "coal mine" the company subsequently abandoned? The Act and regulations are ambiguous.

The definitions of "coal mine" can be read as including openings previously "used in . . . or resulting from the work of extracting . . . coal" because the statutory and regulatory definitions of "mine" never have been interpreted only on the basis of present use. Clark Elkhorn made the openings part of the ventilation system of the Ratliff No. 110 Mine, controlled the openings, and used them to mine coal. In so doing, the company assumed responsibility for the openings. It is reasonable to read the statutory and regulatory definitions to prohibit Clark Elkhorn from abandoning this responsibility simply because it chose physically to wall-off the openings from the rest of the mine, and it is reasonable to conclude the statutory and regulatory definitions do not permit a company to segment its responsibility by making "shafts, slopes, tunnels, [or] excavations" parts of the mine when it suits the company's convenience and by disowning them when it does not.

On the other hand, it is equally reasonable to read the definitions of "coal mine" in section 318(l) of the Act and section 75.2 of the regulations to warrant Clark Elkhorn's belief the openings were not parts of the mine it abandoned . As noted, the Act and regulations define "coal mine" as including "areas of adjoining mines connected underground" (emphasis supplied). "Connected" is defined as being "joined or linked together" (*Webster's Third New International Dictionary* (1986) at 480). The underground seals physically severed all that had joined or

linked the old and new works (Tr. 32, 55, 82, 100-101, 107-108). Once the underground seals were in place, Clark Elkhorn, or any company in its position, reasonably and in good faith could have concluded the adjacent old works no longer were "connected underground" with the new works and no longer were a part of the of the Ratliff No. 110 Mine.[8]

As I have stated, where both the Secretary and Clark Elkhorn could have read the Act and the regulations and in good faith reached reasonable but opposite conclusions, I must defer to the interpretation of the Secretary unless it is "plainly erroneous or inconsistent with the regulation" (*Hazardous Waste Treatment Council* v. *Reilly*, 938 F.2d 1390, 1395 (D.C. Cir. 1991); see also, *Island Creek*, slip op. at 5-6). I would be remiss if I did not recognize that ultimately what is at stake is responsibility for compliance at mines whose original operators have departed leaving potentially hazardous conditions in their wake. The Secretary's interpretation assigns responsibility for those conditions and in so doing furthers the overall purpose of the Act. Because the Secretary's interpretation of the regulation is not plainly erroneous or inconsistent with the Act and its purpose, it is permissible and is affirmed.

FAIR NOTICE

Where affirmance of the Secretary's interpretation means a civil penalty may be assessed against the operator for a violation of the regulation, due process requires the operator receive fair notice of what the Secretary believes is required. In this way, due process "prevents . . . deference from validating the application of a regulation that fails to give fair warning of the conduct it . . . requires" and prevents regulation by fiat (*Gates & Fox Co.* v. *OSHRC*, 790 F.2d 154,156 (D.C. Cir. 1986)).

Just as an operator faces an uphill battle in proving the Secretary has invoked an arbitrary and capricious interpretation when the relevant statutory and regulatory language lacks clarity (*General Electric Co.*, 53 F.3d. At 1327), so too the Secretary faces an uphill battle in proving

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[8]/ The Secretary argues Clark Elkhorn should have concluded from 30 C.F.R. § 75.335, "that it was not the Secretary's intent for there to be a disconnection of the worked-out areas from active workings when seals are constructed" (see Sec. Br. 10, see also Sec. Br. 8). Sections 75.334 and 75.335 require, in part, the insertion of pipes through underground seals to allow sampling for atmospheric gases and water in worked-out areas behind the seals. The Secretary reasons if the old, worked out areas were a separate mine over which Clark Elkhorn had no responsibility, insertion of the pipes into the worked-out areas would constitute a trespass by Clark Elkhorn, something the Secretary could not have intended.

This argument is too convoluted to accept. It is much more likely Clark Elkhorn, or any operator in its position, would have concluded sections 75.334 and 75.335 had no bearing on the meaning of "adjoining mines connected underground," but rather presupposed a situation where a single operator mined both the worked-out areas behind the seals and the active areas outside the seals and where the inby and outby areas always were parts of a single mine.

fair notice when she lacks evidence of a clear and direct announcement of her interpretation. In this way, the doctrines of deference and fair notice balance one another and require the Secretary's actions to be reflected by rational, principled, and clear decision making.

The testimony reveals significant lapses by the Secretary in meeting her obligation to provide fair notice. The agency, which approved the bleeder system and the company's plan to cut into the old works, had ample warning the company intended to use the openings as part of its ventilation system (Tr. 39, 54-55, 99-100). Yet, there is no evidence that either prior to or during the approval process MSHA advised the company it would be responsible under sections 75.1711 and 75.1711-2 for sealing the openings if the company installed underground seals and abandoned the Ratliff No. 110 Mine (Tr. 45, 82, 99). And this was so even though the practice of using adjacent old works as part of bleeder systems was "fairly common" in MSHA District 6 (Tr. 38-39, see also Tr. 79). It is certain as well the lack of notice was not because MSHA believed Clark Elkhorn voluntarily would seal the openings. The company never mislead MSHA in this regard (Tr. 73-74, 80-81).

I conclude there simply was no clearly defined and applied MSHA policy in District 6, or elsewhere, interpreting sections 75.1711 and 75.1711-2 to require the sealing of openings like those at issue.[9] Looney testified he issued other citations for similar conditions, but he could not recall where, when, or the number of citations he issued (see Tr. 40-41). Griffith testified "3 and 4 and 5 year[s] ago" he advised several companies that openings in mines the companies cut into had to be sealed, but he agreed he did not so advise Clark Elkhorn (Tr. 82). Further, he admitted whether or not he gave such advise depended upon the volume of methane liberated at the mine, a condition wholly extraneous to sections 75.1711 and 75.1711-2 (Tr. 82-83).

I fully recognize Roger Cantrell testified he knew during "the latter part of '95 or first part of '96" (Tr. 100), MSHA would require openings of the old works to be sealed. (This was after the underground seals were in place and before Clark Elkhorn abandoned the Ratliff No. 110 Mine). The question is whether the safety coordinator's knowledge constituted fair notice, and I conclude it did not. Critically, the record does not reveal whether Cantrell was told the requirement to seal the openings related to sections 75.1711 and 75.1711-2. As is evident from Judge Fauver's decision in *Apex*, the agency has been casting about for a standard to "cure" the

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[9] The obscurity of MSHA's policy on the question is exemplified by the only comment regarding section 75.1711 in the agency's Program Policy Manual. The comment provides guidance concerning the timing of sealing activities, but does not address the circumstances under which adjacent old works are considered part of a mine that has been closed or abandoned:

"Work to seal inactive or permanently closed mines shall commence promptly after ventilation is discontinued and shall be carried out with reasonable diligence . . . . For the purpose of this standard, a mine or opening to a mine is inactive, closed or permanently abandoned when ventilation by means of the mine fan or fans is intentionally discontinued" (*Department of Labor, Mine Safety and Health Administration*, v. *Program Policy Manual* 140 (4/1/96)).

problem of the unsealed openings of old works. What Cantrell was told might have related to section 77.334(b)(2) (the standard cited in *Apex*), to sections 75.1711 and 75.1711-2, to some other standard, or no standard.

Here, where the Secretary offered no evidence of any consistently applied policy with regard to MSHA's interpretation of the cited standard, or indeed, of any standard; where the "best" she could do was offer vague testimony the cited standard was used before in similar situations, but not with regard to Clark Elkhorn (noticeable, the citations were not introduced), and where, in at least some situations use of the standard was based upon a wholly extraneous condition (Tr. 40-41, 81-82), I cannot find the Secretary provided Clark Elkhorn fair notice of what was required. (*Compare U. S.* v. *Hoechst Celavesc Corp.*, 128 F.3d, 216, 227, 228 (4th Cir. 1997) (letter from regional office advising regulated party of agency's interpretation of regulation establishes fair notice)).[10] Therefore, I conclude the Secretary may not hold Clark Elkhorn responsible under section 75.1711-2 for failing to seal EP1 and EP2.

ORDER

Citation No. 4495292 has been vacated by MSHA, and Clark Elkhorn has withdrawn its contest. Docket No. KENT 97-77-R is **DISMISSED.**

Because Clark Elkhorn may not be held responsible for the violation charged in Citation No. 44224867, Clark Elkhorn's contest is **GRANTED,** the citation is **VACATED**, and Docket No. KENT 97-176-R is **DISMISSED**.

David Barbour
Administrative Law Judge

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dcp

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[10]/ There are may ways the Secretary may choose to afford operators fair notice of her interpretation; written notification being one, but whatever method she chooses, it must meet the standard — not met here — of providing a clear and direct announcement of her interpretation.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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MAR 19 1998

CYPRUS CUMBERLAND RESOURCES, CORPORATION	:	CONTEST PROCEEDING
Contestant	:	Docket No. PENN 98-15-R
v.	:	Order No. 3657679; 9/25/97
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Cumberland Mine Mine ID 36-05018
Respondent	:	

DECISION

Appearances: Howard Agran, Esq., Jacqueline A. Hershey, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania for the Petitioner; R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania, for the Respondents.

Before: Judge Feldman

This contest proceeding, heard on November 18 through November 20, 1997, in Morgantown, West Virginia, concerns the validity of withdrawal Order No. 3657679 issued on September 25, 1997, pursuant to section 104(d)(2) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 814(d)(2), to Cyprus Cumberland Resources Corporation (Cyprus) at its Cumberland Mine. At trial, Cyprus stipulated to the significant & substantial nature of the violation cited in Order No. 3657679, and to the fact that the violation was attributable to its unwarrantable failure. (Tr. 768-70).

Order No. 3657679 was premised on the June 18, 1997, issuance of Order No. 3657625 pursuant to section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1). The validity of underlying 104(d)(1) Order No. 3657625 is not at issue in this matter. The only matter at issue is whether an inspection under section 104(d)(2) of the Act, commonly referred to as a "clean inspection," occurred between the June 18, 1997, issuance of Order No. 3657625 and the September 25, 1997 issuance of the order in question. The parties' proposed findings and conclusions, and reply briefs have been considered in the disposition of this matter.

Statutory Framework

Section 103(a) of the Act, 30 U.S.C. § 813(a), mandates that MSHA inspect each underground coal mine in its entirety at least four times a year. In addition to regular quarterly inspections mandated by section 103(a), MSHA frequently performs "spot inspections," also known as special or technical inspections, that focus on particular categories of safety hazards such as electrical, structural or ventilation conditions. When an inspection reveals a mine operator has violated the Act or a mandatory safety standard, section 104(a) authorizes an MSHA inspector to issue a citation detailing the violative condition.

Under section 104(d), the MSHA inspector is obliged to designate violations that are attributable to an operator's unwarrantable failure. A finding of unwarrantable failure requires evidence of unjustifiable or aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (December 1987). Unwarrantable failure is characterized by conduct evidencing "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (February 1991); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

Section 104(d), which provides increasingly severe withdrawal sanctions for an operator's repeated failure to exercise due care, is an essential element of the Mine Act's enforcement scheme. This case raises important questions concerning the application of the withdrawal sanctions in section 104(d) of the Act. Consequently, it is important to summarize the substance and purpose of this statutory provision. The Commission addressed the role of section 104(d) in achieving mine safety in *Greenwich Collieries*, 12 FMSHRC 940 (May 1990). The Commission explained:

> Under section 104(d) of the Act, if an inspector finds a violation and also finds that the violation is of a significant and substantial nature and resulted from an operator's unwarrantable failure to comply with a mandatory standard, a citation noting those findings is issued. For the sake of convenience, this citation, the "predicate" citation in the section 104(d) "chain," is commonly referred to as a "section 104(d)(1) citation." *Nacco Mining Co.*, 9 FMSHRC 1541 n. 6 (September 1987). The Commission has explained, however, that a "section 104(d)(1) citation" nevertheless is a citation issued *pursuant* to section 104(a) of the Act containing the special findings referred to in section 104(d)(1). *Utah Power & Light Co.*, 11 FMSHRC 953, 956-57 (June 1989).
>
> Section 104(d)(1) provides that "[i]f, during the same inspection or any subsequent inspection . . . within 90 days after the issuance of such citation," the inspector finds a further unwarrantable failure violation, a withdrawal order is to be issued under section 104(d)(1). Further, if more unwarrantable violations are found during any subsequent inspection of the mine, withdrawal orders under

section 104(d)(2) of the Act are to be issued. 30 U.S.C. § 814(d)(2). The operator remains on probation, and issuance of withdrawal orders based on unwarrantable findings does not cease, until an inspection of the mine discloses no further unwarrantable failure violations. *Kitt Energy Corp.*, 6 FMSHRC 1596 (July 1984), *aff'd sub nom. UMWA v. FMSHRC,*, 768 F.2d 1477 (D.C. Cir. 1985). This, then, is the section 104(d) "chain."

Section 104(d) is an integral part of the Mine Act's graduated enforcement scheme, a scheme providing for "increasingly severe sanctions for increasingly serious violations or operator behavior." *Nacco, supra,* 9 FMSHRC at 1545, *quoting Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 828 (April 1981). Like the overall enforcement scheme of the Act, section 104(d) imposes sanctions in a graduated manner, with increasingly, serious consequences. *White County Coal Corp.*, 9 FMSHRC 1578, 1581 (September 1987). The focus of section 104(d) is upon the operator's unwarrantable conduct. Section 104(d) seeks to discourage repetition of such conduct by placing the operator on a probationary "chain." This probationary period, backed up by the threat of a withdrawal order, is "among the Secretary's most powerful instruments for enforcing mine safety." *UMWA v. FMSHRC, supra*, 768 F.2d at 1479. 12 FMSHRC at 945. (Emphasis added).

As noted above, the provisions of section 104(d)(2) of the Act remove an operator from the "probationary chain" at "such time as an inspection of such mine discloses no similar [no unwarrantable failure] violations." At issue is whether an intervening "clean inspection" as contemplated by section 104(d)(2) had occurred between June 18, 1997, when the predicate 104(d)(1) Order was issued, and September 25, 1997, when the subject 104(d)(2) withdrawal order was written.

It is uncontroverted that the only reason a complete quarterly inspection had not occurred during the interim period between June 18 and September 25, 1997, is because Cyprus' 60 West Mains haulage was not inspected until September 26, 1997, the day following the issuance of 104(d)(2) Withdrawal Order No. 3657679. *Joint Stip.* 13. Cyprus, however, contends its 60 West Mains haulage had been inspected for the section 104(d)(2) purpose of determining if "similar violations" existed because it is also uncontroverted that at least two MSHA inspectors traversed this 4,200 feet long entry in crickets or mantrips three to five times a week, totaling approximately 240 trips. (Tr. 354-55).

Findings of Fact

The Cumberland Mine is an underground bituminous coal mine located near Waynesburg, Pennsylvania. The mine is the subject of four "quarterly AAA inspections" by Mine Safety and Health Administration (MSHA) inspectors as required section 103(a). MSHA designates the quarters on a fiscal basis starting on the first of October. Thus, October 1 through

December 31; January 1 through March 31; April 1 through June 30; and July 1 through September 30, are the first through fourth quarters, respectively. (Tr. 97-8). MSHA assigns, on a full time basis, two inspectors from its Waynesburg field office to conduct each quarterly inspection.

These inspectors spend between 3 and 5 days a week at the Cumberland Mine and normally take the full quarter to complete the inspection. Thus, in essence, there is a continuous presence at Cyprus' Cumberland facility of at least two MSHA inspectors who are performing quarterly inspections. These two inspectors are assisted by other inspectors from the Waynesburg field office, which has two supervisors and approximately 15 inspectors. In addition, MSHA District 2 Office personnel may also inspect the mine site during a given quarter. Thus, there may be as many as 6 or 7 inspectors at the site on any particular day.

The two inspectors assigned to perform the quarterly inspection keep a record of their inspections by tracking their progress on a mine map. This map does not reflect the inspections of other inspectors who inspected the mine during the same period.

During a quarterly inspection of a mine "in its entirety," as specified in section 103(a) of the Act, MSHA inspectors do not inspect each piece of mining equipment, all ventilation controls, or all the entries in a mine. (Tr. 144, 331-2, 481, 708-9, 804-5). Rather, they focus their attention on areas where mining is actively occurring. (Tr. 294).

An inspector who enters a mine is conducting an inspection from the moment he enters mine property. As such, an inspector observes conditions as he travels in and out of a mine, even when he intends to inspect another area of the mine in more detail. If an inspector observes any condition he deems to be a violation while traveling through a mine, he is supposed to take appropriate enforcement action. For example, inspectors routinely observe and evaluate track haulage, rib and roof conditions while riding in an open mine vehicle, although it is MSHA's practice to have inspectors inspect haulage roads by walking the length of such areas.

The 60 West Mains haulage is approximately 4,200 feet long and has been the primary route of travel into and out of the mine since 1983. It is an area where there is no active mining. Consequently, it changes little from inspection to inspection.

During the period June 18 through September 25, 1997, inspectors traveled this track entry "many times" as stipulated by the Secretary. *See Joint Stip.* 14 and 15. Cyprus' Director of Safety testified Cyprus' records reflect inspectors made approximately 64 round trips in the 60 West Mains haulage during the relevant period. (Tr. 786). Consistent with this testimony, at the hearing, it was estimated that the two inspectors, assigned the task of conducting the quarterly inspection, each traveled the 60 West Mains track entry 60 round trips or 120 times. (Tr. 352-55). While traveling in this entry, inspectors can observe the condition of the roof, ribs and track. (Tr. 141-42, 300-01, 488-90, 705-08, 736-37, 794, 797-99).

Travel in this track entry was in slow moving rail mounted, battery operated vehicles. The vehicles consisted of both closed mantrips or open jeeps known as "crickets." Mantrips hold approximately ten people and are covered by a canopy. The ability to observe rib and roof conditions in a mantrip depends on where one sits in relation to the canopy. Crickets do not have canopies. The record reflects the average speed for mantrips is approximately 15 to 20 miles per hour and the average speed for crickets is approximately 10 to 12 miles per hour. The record also reflects these vehicles may be operated as slow as 4.7 miles per hour. *Resp.'s Reply*, at 3.

The 60 West Mains haulage was inspected on foot during the April 1 through June 30, 1997, quarterly inspection by MSHA Inspector Tom McCort on May 5, 1997. His inspection took approximately 1½ hours to complete. At that time, McCort found no violations. The 60 West Mains haulage was next inspected on foot during the July 1 through September 30, 1997, quarterly inspection by inspector George Rantovich on September 26, 1997, the day after the subject 104(d)(2) Order was issued. Rantovich's inspection also took approximately 1½ hours to complete. Like McCort, Rantovich detected no violations of mandatory safety standards in the subject track entry.

Further Findings and Conclusions of Law

The Deference Issue

I have carefully considered the Secretary's assertion that the "clean inspection" requirement to break the 104(d) chain in this case required a detailed inspection of the 60 West Mains entry conducted on foot. As discussed below, I cannot find the Secretary's interpretation to be unreasonable given the legislative history of section 104(d). However, I decline to defer to the Secretary's interpretation and application of section 104(d)(2) of the Act as it applies to the facts in this case.[1]

Moreover, the propriety of deference in a particular mine safety enforcement proceeding must be determined on a case-by-case basis.[2] Judicial deference is a principle born of necessity. Courts of general jurisdiction, called upon to resolve a myriad of regulatory issues requiring

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[1] Having declined to defer to the Secretary on this question, I also give little weight to the affidavit, submitted by Cyprus, of John M. DeMichiei's interpretation of section 104(d)(2). DeMichiei is a current employee of Cyprus and a former MSHA official.

[2] For example, the Secretary may bear a different burden of proof with respect to her regulatory interpretation in an enforcement proceeding as compared to her burden in a proceeding where a regulation is challenged following its promulgation. *Natl. Indus. Sand*, 601 F.2d at 699-700, n.36. Deference is also more readily accorded with respect to interpretations of recently promulgated regulations that are "yet untried and new." *Id.* at 698. Less deference may be called for when an agency is interpreting the scope of its own jurisdiction. *Id.* at 698-99, n.32. There is a positive correlation between the deference owed agency action and the degree of scientific or technical agency expertise that serves as the basis for such action. *Ethyl Corp. v. Environmental Protection Agcy.*, 541 F.2d 1 (D.C. Cir. 1976).

extensive agency experience and technical expertise, are ill equipped to substitute their judgement for an "interpretation given the statute by the officers or agency charged with its administration." *National Indus. Sand Ass'n v.Marshall*, 601 F.2d 689 (3rd Cir. 1979) *citing Udall v. Tallman*, 380 U.S. 1, 16, 85, S.Ct. 792, 801, 13 L.Ed. 2d 616 (1965).

This Commission, however, is an not an entity of general jurisdiction. Rather, it was created by Congress as an "independent adjudicative body authorized to hear disputes arising under the Mine Act." 30 U.S.C. §§ 815(d), 823. *Energy West Mining Corp. v . FMSHRC*, 40 F3d 457, 459 (D.C. Cir. 1994). In this regard, the Mine Act has a bifurcated scheme of statutory administration. Although 30 U.S.C. §§ 811(a) and 814(a), respectively, empower the Secretary with rule making and enforcement authority, adjudicatory review of an ALJ decision by the Commission is not "a matter of right but of the sound discretion of the Commission." 30 U.S.C. § 823(d)(2)(A)(i). Of paramount importance, the Mine Act authorizes the Commission to resolve industry disputes involving "substantial questions of law, policy or discretion . . . ." 30 U.S.C. § 823(d)(2)(A)(ii)(IV). In the final analysis, recognition of the enforcement power conferred by the Mine Act on the Secretary, also requires recognition of the adjudicatory responsibility to resolve industry disputes conferred by the Act on the Commission.

Consequently, the established case law dealing with the reluctance of a federal appellate court to substitute its statutory interpretation for that of the agency charged with enforcing a statute must be carefully considered and properly applied. *See, e.g., Udall v. Tallman*, 380 U.S. at 4. The question in a given mine safety case is whether Congress intended the Department of Labor's discretion, or, this Commission's discretion, to be the controlling authority. The Commission addressed this fundamental question in 1979, shortly after its creation:

> The cases cited by the Secretary [in support of deference] are inapposite. They deal with the deference that federal courts often accord to those administrative agency heads who alone have been entrusted by Congress with all administrative and policy functions under a statute. The Commission, however is not entirely in the position of a court and the Secretary is not in the position of most agency heads. Inasmuch as the 1977 Act divides administrative and policy responsibilities between the Commission and the Secretary, neither has exclusive expertise in the subject matter covered by the 1977 Act. See our decision in *Old Ben Coal Company*, No. VINC 79-119 (October 29, 1979) (slip op. At 5).
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> One of the essential reforms of the mine safety program is the creation of an independent Federal Mine Safety and Health Review Commission charged with the responsibility for assessing civil penalties for violations of safety or health standards, for reviewing the enforcement activities of the Secretary of Labor, and for protecting miners against unlawful discrimination.

It is our hope that in fulfilling its responsibilities under the Act, the Commission will provide just and expeditious resolution of disputes, and will develop a uniform and comprehensive interpretation of the law. Such actions will provide guidance to the Secretary in enforcing the Act and to the mining industry and miners in appreciating their responsibilities under the law. When the Secretary and mine operators understand precisely what the law expects of them, they can do what is necessary to protect our Nation's miners and to improve productivity in a safe and healthful working environment.

Our position is buttressed by the conclusion reached by the Fourth Circuit when it examined the similar relationship between the Occupational Safety and Health Review Commission and the Secretary of Labor. In *Gilles & Cotting, supra* at 5, the court rejected an attempt by the Secretary to reduce that Commission to "little more than a specialized jury, an agency charged only with fact finding." It found that Commission "was designed to have a policy role and its discretion therefore includes some questions of law." 504 F.2d at 1262. The Occupational Safety and Health Review Commission has itself adopted a similar view of its role under OSHA. *United States Steel Corp.*, 5 BNA OSHC 1289, 1294-1295, 1977-78 OSHD 21, 795 (1977).[3]

Finally, the Secretary relies upon the legislative history of the 1977 Act for support for his position. Although that history states that the Commission is to accord weight to the Secretary's views, it does not support the more far-reaching result that he seeks here. The Senate committee report states only that because the Secretary "is charged with responsibility for implementing this Act, it is the intention of the Committee, consistent with generally accepted precedent, that the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts." S. Rep. at 49; 1977 Legis. Hist. At 637. The most apposite and well reasoned precedent does not require the Commission to accord to the Secretary's view of the statute the degree of deference he claims here, however. Moreover, the Senate committee did not state that the Secretary's views are entitled to "considerable deference" or are to be controlling unless there are compelling indications that they are wrong. The Senate committee stated only

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[3] The Supreme Court has expressed a contrary opinion with respect to the deference owed by OSHRC to the Secretary. *Martin v. Occupational Health and Safety Review Comm'n*, 499 U.S. 144 (1991). However, the Supreme Court's subsequent decision in *Thunder Basin* is distinguishable from *Martin* in that it concerns the Mine Act rather than the OSHA Act. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 127 L.Ed. 2d 29 (1994). Moreover, unlike *Martin*, *Thunder Basin* explicitly acknowledged the policy making authority conferred to the Commission under the Mine Act. *See infra* at p.8; *see also Tanglewood Energy Inc.*, 18 FMSHRC 1315, 1325 at n.18, (August 1996) *quoting Drummond Co.*, 14 FMSHRC 661, 674-75 (May 1992).

that "weight" is owed. The Secretary's broader reading is inconsistent with the Senate committee's and Congress' intention that the Commission be truly independent of the Secretary and with the policy role that the 1977 Act entrusted to the Commission.

In accordance with this expression of congressional intent, we will accord special weight to the Secretary's view of the 1977 Act and the standards and regulations he adopts under them. His views will not be treated like those of any other party, but will be treated with extra attention and respect. Although this weight may vary with the question before the Commission, especially where the Secretary has gained some special practical knowledge or experience through his inspection, investigation, prosecution, or standards-making activities, it will not rise to the inappropriate level the Secretary has sought here. The issue in this case is one of statutory interpretation. Resolution of such questions is a primary role of the Commission. *The Helen Mining Company*, 1 FMSHRC 1796, 1800-01 (November 1979); *see also Sewell Coal Company*, 3 FMSHRC 1402, 1404 (June 1981).

Consistent with the Commission's analysis in *Helen Mining*, the court recently addressed the Commission's adjudicatory role in *Energy West Mining Company*, 111 F.3d 900 (D.C. Cir. 1997). The court stated:

[B]ecause "the Mine Act is 'silent or ambiguous with respect to the specific issue,'" we "need ask only whether the FMSHRC interpretation is 'rational and consistent with the statute,' . . . according deference to 'reasonably defensible' constructions of the Mine Act by the Commission." 863 F.2d at 53 (quoting *Simpson v. FMSHRC*, 842 F.2d 453, 458 (D.C. Cir. 1988) (ellipsis in original). Further, "[t]he respect due to FMSHRC is heightened in this case because the Secretary agrees with the Commission." *Id.* (*Citing Emerald Mines*, 863 F.2d at 53). We find the Commission's decision passes muster under our highly deferential standard of review. *Id.* at 903.

Finally, and most importantly, the Supreme Court also recognized the significance of the Commission's limited jurisdictional mandate when it concluded the Mine Act precluded district court jurisdiction of an operator's pre-enforcement challenge to MSHA's interpretation of the miner representative "walk-around" provisions of 30 U.S.C. § 813(f). *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 127 L.Ed. 2d 29 (1994). The Court stated:

Petitioner's statutory claims at root require interpretation of the parties' rights and duties under § 813(f) and 30 C.F.R. Part 40, and as such arise under the Mine Act and fall squarely within the Commission's expertise. The Commission, which was established as an independent-review body to 'develop a uniform and comprehensive interpretation' of the Mine Act, Hearing on the Nomination of Members of the Federal Mine Safety and Health Review Commission before Senate Committee on Human resources, 95th Cong., 2d Sess., 1 (1978), has extensive experience interpreting [the statute]. Id. 510 U.S. at 214, 127 L. Ed. at 42.

The fact the Commission's exercise of deference has, on occasion, been affirmed on appeal, does not mean the Commission is compelled to defer to the Secretary.[4] If deference were accorded the Secretary in this instance, it would be accorded pursuant to the discretion committed to the Commission under the Mine Act. However, as discussed below, I decline to defer to the Secretary's interpretation of section 104(d)(2) because it is less reasonable than the interpretation advanced by the respondent.

Turning to the facts of this case, the Secretary maintains an "inspection" as contemplated by section 104(d)(2) did not occur prior to the September 25, 1997, order in issue because the 60 West Mains haulage was not inspected on foot until September 26, 1997. While I am reluctant to conclude a simple word such as "inspection" is ambiguous, I concede the operative phrase "inspection of such mine" in section 104(d)(2) as it applies in this case presents a legitimate question. It is unclear whether this phrase requires a comprehensive quarterly inspection of the entire mine as the Secretary maintains, or whether, as the respondent asserts, the operative phrase requires an inspection of the total mine that is adequate to ensure the absence of conditions attributable to the operator's unwarrantable failure.

In support of her position, the Secretary points to the following pertinent legislative history:

> [w]hen an order has been issued pursuant to [section 104(d)(1)], and subsequent inspection . . . reveals the existence in such mine of violations similar to those which triggered the 104(d)(1) order], the inspector shall promptly issue a withdrawal order under [section 104(d)(2)] on each such occurrence until an inspection of the mine in its entirety shows 'no similar violations.' S. Rep. 95-181, *95th Cong., 1st Sess.* 31 (1977), reprinted in *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 619-22 (1978).

However, the legislative history also reflects the term "similar violations" as used in section 104(d)(2) means "unwarrantable violations, whether or not the violations found are substantively similar to the violation upon which the order . . . was based." *Id.* at *1st Sess. 32*, *Legislative History* at 620.

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[4] In *Secretary of Labor v. Cannelton Industries*, 867 F.2d 1432, 1435 (D.C. Cir. 1989), the court ruled the Secretary's interpretation of the Mine Act is "emphatically due" deference even when it conflicts with the Commission's interpretation. The circuit court's *Cannelton* decision that the Commission is subordinate to the Secretary in cases of statutory construction cannot be reconciled with the Supreme Court's subsequent holding in *Thunder Basin*. *See* 510 U.S. at 214. Moreover, the proposition advanced in *Cannelton*, concerning the Commission's allegiance to the Secretary's interpretive view, subsequently was not adopted in *Energy West*. *See* p.8, *supra*.

Thus, the legislative history must be read in context. The purpose of the "inspection of the entire mine" in the legislative history of section 104(d)(2) is to determine if additional unwarrantable conduct exists. Unwarrantable violations are hazardous conditions attributable to an operator's aggravated or unjustifiable conduct. As such, they are generally more readily detectable on inspection.

In this case, despite MSHA's daily trips down the subject entry, the Secretary asserts the entry was not inspected until September 26, 1997, when Rantovich measured the track gauge and distance between rails, and when he inspected for broken rails and faulty electrical installations. *Secy. 's Proposed Findings* at 8; Tr. 471-74.

I am not convinced by the Secretary's assertion that no stone must remain unturned in an effort to satisfy MSHA of no further unwarrantable conduct before the "clean inspection" requirements of section 104(d)(2) are met. Rather, the Commission and the court have concluded that inspections other than regular quarterly inspections, such as spot inspections, can be taken into account under section 104(d)(2). *Kitt Energy Corp., supra.* Significantly, the court, in affirming *Kitt*, concluded the question of whether a clean inspection has occurred must be "decided on a case by case basis." 768 F.2d at 1480.

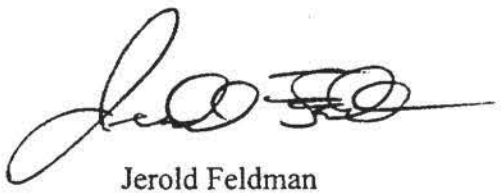
Here, MSHA inspectors had an opportunity to observe the rib and roof conditions and experience the track conditions in the 60 West Mains haulage on a daily basis hundreds of times. I am not suggesting, as the Secretary implies, that the mere "travel through [a mine] area is sufficient to constitute an inspection of that area for the purpose of determining whether a 'clean' inspection has occurred." *Secy. 's Proposed Findings* at 19. Rather, it is both a qualitative and a quantitative test.

Six round trips by two MSHA inspectors through the 60 West Mains track entry may not satisfy the "clean inspection" requirements of section 104(d)(2). However, somewhere between the sixth round trip, and the hundredth round trip, particularly in this static area of the mine, the inspection requirements of the pertinent statutory provision were complied with.

In conclusion, MSHA's repeated observations of the roof, rib and track conditions in the 60 West Mains prior to September 25, 1997, in addition to its regular inspection of the rest of the Cumberland Mine since June 18, 1997, constituted an "inspection of such mine disclosing no similar violations" under section 104(d)(2). The Secretary's proffered interpretation of this statutory provision to the contrary, although plausible, is rejected.

ORDER

In view of the above, Cyprus Cumberland Resources Corporation's contest of 104(d)(2) Order No. 3657679 **IS GRANTED IN PART**. As a "clean inspection had occurred prior the September 25, 1997, issuance of Order No. 3657679, the subject order **IS HEREBY MODIFIED** to a 104(d)(1) citation. Accordingly, this contest proceeding **IS DISMISSED**.



Jerold Feldman
Administrative Law Judge

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/mh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

MAR 3 1 1998

GEORGES COLLIERS INC., Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. CENT 97-26-R
	:	Citation No. 4366607; 11/7/96
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ANDMINISTRATION (MSHA), Respondent	:	Docket No. CENT 97-27-R
	:	Citation No. 4366608; 11/7/96
	:	Docket No. CENT 97-28-R
	:	Citation No. 4366609; 11/7/96
	:	Docket No. CENT 97-29-R
	:	Citation No. 4366610; 11/796
	:	Docket No. CENT 97-30-R
	:	Citation No. 4366611; 11/7/96
	:	Docket No. CENT 97-31-R
	:	Order No. 4366591; 11/5/96
	:	Docket No. CENT 97-32-R
	:	Order No. 4366592; 11/5/96
	:	Docket No. CENT 97-33-R
	:	Citation No. 4366593; 11/6/96
	:	Pollyanna No. 8 Mine
	:	Mine ID No. 34-01787
	:	Docket No. CENT 97-34-R
	:	Citation No. 4366594; 11/6/96
	:	Docket No. CENT 97-35-R
	:	Citation No. 4366595; 11/6/96
	:	Docket No. CENT 97-36-R
	:	Citation No. 4366596; 11/6/96

	:	Docket No. CENT 97-38-R
	:	Citation No. 4366598; 11/6/96
	:	
	:	Pollyanna No. 9 Mine
	:	Mine ID No. 34-01790
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 97-69
Petitioner	:	A. C. No. 34-01787-03514
v.	:	
	:	Docket No. CENT 97-112
GEORGES COLLIERS INC.,	:	A.C. No. 34-01787-03520
Respondent	:	
	:	Pollyanna No. 8 Mine
	:	
	:	Docket No. CENT 97-90
	:	A. C. No. 34-01790-03501
	:	
	:	Pollyanna No. 9 Mine

DECISION

Appearances: Madeleine T. Le, Esq., and David C. Rivela, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
Elizabeth Maxine Christian, Esq., Oklahoma City, Oklahoma, for Respondent.

Before: Judge Hodgdon

These consolidated cases are before me on Notices of Contest and Petitions for Assessment of Civil Penalty filed by Georges Colliers, Inc., against the Secretary of Labor, and by the Secretary, acting through her Mine Safety and Health Administration (MSHA), against Georges Colliers, respectively, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The company contests the issuance to it of two orders and 10 citations. The petitions allege 17 violations of the Secretary's mandatory health and safety standards and seek penalties of $5,899.00. For the reasons set forth below, I affirm all of the orders and citations, approve the parties' agreement on 15 of the orders and citations, and assess penalties of $5,399.20.

A hearing was held on December 2, 1997, in Ft. Smith, Arkansas. The parties also submitted post-hearing briefs in the cases.

Settled Dockets and Citations

At the beginning of the hearing, counsel for the Secretary announced that the parties had settled all of the citations in Docket Nos. CENT 97-69, including the citations contested in Docket Nos. CENT 97-29-R, CENT 97-30-R and CENT 97-33-R, and CENT 97-90, including the citations contested in Docket Nos. 97-34-R, 97-35-R, 97-36-R and 97-38-R. The agreement provides for a 20 percent reduction in the penalties assessed in each docket. Later during the case, the parties agreed to settle Citation Nos. 4366277, 4366280, 4366591 and 4366592 in Docket No. CENT 97-112. The agreement provides for a 10 percent reduction in the penalties for those citations.

After considering the parties representations, I concluded that the settlements were appropriate under the criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i), and informed the parties that I would approve the agreements. The provisions of the agreements will be carried out in the Civil Penalty Assessment section and the order at the end of this decision.

With the settlements, an order in Docket No. CENT 97-26-R and an order and citation in Docket No. CENT 97-112 remained to be contested. They are Order Nos. 4366607 and 4366609 and Citation No. 4366608.

Contested Matters

I. *Background*

The Pollyanna No. 8 Mine is an underground coal mine in Le Flore County, Oklahoma. The mine is an underground continuation of a surface mine. It is entered through portals cut into the high wall left by the surface mine. The mine continues underground on a decline from the portals. There are five portals into the mine. Portals 1 and 5 have fans in them which pull air and gases out of the mine. Portal 2 is for the belt line. Portals 3 and 4 provide intake air to the mine and also serve as a means of entry.

Portals 1 and 5 have "weak wall" stoppings at their entrances. The stoppings consist of two cinder block and concrete walls with a space in between them. The walls are constructed so that in the event of an explosion in the mine, the walls will give way, releasing the pressure of the explosion, so that the fans will not be damaged and can be quickly rehabilitated and put back into use to ventilate the mine for rescue efforts. There are two walls so that opening the door in one will not affect the air pressure in the mine. Thus, to exit through those portals one has to open the inner door, enter the cubicle between the two walls, close the inner door and then open the outer door and go out.

On November 7, 1996, MSHA Inspectors Kendell Whitman, Bob Cornette and Jimmy Stewart went to the mine to inspect for smoking materials as part of a nationwide MSHA

"smoke-out" campaign. Whitman and Cornette entered the mine through Portal 3 and proceeded to the working section to carry out the inspection.

It had rained heavily, approximately six to eight inches total, for several days prior to the inspection, although it was not raining on the day of the inspection. As he came out of the mine, Inspector Whitman observed water standing in front of Portals 1 and 5 and running into Portal 3. He also observed large amounts of water in front of the portals behind an earthen berm. The water was beginning to seep through the berm and the berm itself was so saturated that when he walked on it, he sank in up to his knees. Based on his observations, Inspector Whitman issued a 107(a) imminent danger order, 30 U.S.C. § 817(a), Order No. 4366607, a 104(a) citation, 30 U.S.C. § 814(a), Citation No. 4366608, and a 104(d)(2) order, 30 U.S.C. § 814(d)(2), Order No. 4366609.

II. *Findings of Fact and Conclusions of Law*

A. *Order No. 4366607*

Order No. 4366607 states:

> The following conditions constitute an imminent danger to the 10 miners working in the underground coal mine. The flood water from the open strip pit was full of water, the water level is higher then [*sic*] the elevation of the return, belt and intake portals. The flood water is running into the #1 return portal accumulating in front of the "weak walled stopping," the level was even with the top of the stopping. The water from the strip pit was running into the return portal and intake. The water is running back into the bottom of the main entries accumulating water in large amounts. If the "weak walled stopping" were to fail, it would cause large amounts of water to flow into the mine trapping the miner[s] in the 1st right section by blocking the escapeways with water.

(Govt. Ex. 10.)

Section 107(a) of the Act states:

> If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons . . . to be withdrawn from, and to be prohibited from entering, such area until an

> authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist.

Section 3(j) of the Act, 30 U.S.C. § 802(j), defines "imminent danger" as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

Inspector Whitman testified that he issued the imminent danger order because the amount of water and saturated mud that had collected in the surface mine pit in front of the portals, along with the water already flowing into the mine, led him to believe that an inundation of the mine was impending. He explained that the only way out of the mine was through the five portals and that the mine pitched downward from the portals before it turned back up at the first right panel. He said: "If the water is pouring in there, and a person can be walking up there and the water would come in, and he would be trapped. The water would wash him away." (Tr. 80.)

The inspector also testified that if the mine were inundated and a miner attempted to get out of the mine through the doors in the weak wall stoppings, the water collected in front of the stoppings, which was higher than the top of the door in the stopping, would rush in when the outer door was opened, trapping the miner between the two walls of the stoppings and drowning him. He further related that the night before the company had had a large diesel powered pump pumping at the opposite end of the pit to lower the water level, but that the pump had broken down and instead of waiting until the pump was repaired to get the water down to a safe level, "they allowed the miners of this coal mine to go underground in what I feel is a dangerous situation . . . ." (Tr. 82.)

The Commission has held that: "To support a finding of imminent danger, the inspector must find that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time." *Utah Power & Light Co.*, 13 FMSHRC 1617, 1622 (October 1991). *Accord Blue Bayou Sand and Gravel, Inc.*, 18 FMSHRC 853, 858 (June 1996). The Commission has further held that:

> In reviewing an inspector's finding of an imminent danger, the Commission must support the inspector's finding "unless there is evidence that he has abused his discretion or authority." An inspector abuses his discretion, making a decision that is not in accordance with the law, if he orders the immediate withdrawal of miners in circumstances where there is not an imminent threat to safety. An inspector is granted wide discretion because he must act quickly to remove miners from a situation he believes is hazardous.

Id. (citations omitted).

The Respondent argues, in effect, that the inspector did not make a reasonable investigation of the surrounding facts, stating that "he should have taken one or two hours after issuing the order to take measurements or surveys to determine if there was sufficient standing waters to inundate the mine and cause permanent injuries or fatalities." (Resp. Br. at 11-12.) This argument fails for two reasons. In the first place, the issue in an imminent danger situation is what the inspector knew at the time he issued the order, not what he should have done afterward. In the second place, if the inspector felt that he had time to spend an hour or two taking measurements and surveys then there was no imminent danger.

The company's other arguments concerning the imminent danger order are also rejected. The assertions that there were no men working near Portal 1, that there were two other escape ways, that there were two additional portals, that there was no indication of a build-up of explosive gases and that there was no indication that the fan and ventilation system at Portal 1 or at any other location of the mine was not working, even if true, are not relevant to the issue of whether the mine was threatened by flooding.

I find that the inspector made a reasonable investigation of the surrounding facts. The large amounts of standing water in the area, the fact that water completely covered the exit door from the weak wall stopping at Portal 1, the fact that the mud berms were saturated and that water was already running into Portal 3 and the fact that the pump was no longer working all support the inspector's conclusion that an inundation of the mine was imminent. Accordingly, I conclude that Inspector Whitman did not abuse his discretion in this instance and affirm the 107(a) order.

B. *Citation No. 4366608*

Citation No. 4366608 alleges a violation of section 75.310(d), 30 C.F.R. § 75.310(d), and states:

> This citation is issued in conjunction with the imminent danger order #4366607. Due to the large amount of rain fall in the mine area the night before (11/06/96), the open strip pit water level is higher than the intakes, returns and the belt portals. The water was allowed to accumulate in large amounts in front of the #1 return entry portal sealing it off with water. The level of water total[ly] covered the "weak walled stopping," used as a pressure relieve [*sic*] for the #1 fan. The water in front of the weak walled explosion stopping would not relieve the pressure from an explosion in accordance with the design of the stopping, due to the large amount of water build up in the front.

(Govt. Ex. 5.)

Section 75.310(d) requires that: "Weak walls and explosion doors shall have cross-sectional areas at least equal to that of the entry through which the pressure from an explosion underground would be relieved. A weak wall and explosion door combination shall have a total cross-sectional area at least equal to that of the entry through which the pressure from an explosion underground would be relieved." In short, the regulation requires that the weak wall completely fit into the entry so that the entire entry is filled in.

Unfortunately, none of the evidence at the hearing went to the issue of whether the weak wall stopping met this requirement. The citation discusses the fact that the water in front of the stopping prevented the stopping from serving its purpose of relieving pressure from an explosion. Indeed, the fact that water built up in front of the stopping, rather than leaking into the mine, would indicate that the stopping complied with this regulation.

The inspector testified that the company violated the regulation because: "When you pile water up in front of it, whether it is two inches or you pile four inches or you completely cover it, you have rendered the purpose of that wall useless. The whole purpose of this is to prevent -- that weak wall is there so it can be blown out by the gases. If I pile a bunch of water in front of it, it is not going to work as adequately as it is designed to work." (Tr. 104.) The Respondent presented no evidence on this issue and argued in its brief only that "no evidence was presented that the weak walls and explosion doors were inoperable." (Resp. Br. at 13-14.)

While none of the evidence is relevant to section 75.310(d), it does go to section 75.310(a)(5), 30 C.F.R. § 75.310(a)(5), which requires that: "(a) Each main mine fan shall be-- (5) Protected by one or more weak walls or explosion doors, or a combination of weak walls and explosion doors, located in direct line with possible explosive forces." On March 9, 1998, the Secretary filed a Motion to Amend the Citation to allege a violation of section 75.310(a)(5).[1] On March 23, 1998, the Respondent filed an Objection to Secretary's Motion to Amend Citation, Request for Mistrial on Prejudicial Error and Request for New Hearing.

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[1] On March 3, 1998, I initiated a telephone conference call with the parties and advised them that it did not appear to me that any of the evidence concerned section 75.310(d), but that it did address a violation of section 75.310(a)(5). I asked counsel for the Secretary if she wished to move to amend the citation. In another telephone conference call on March 6, 1998, counsel for the Secretary stated that she did want to file a Motion to Amend the citation. Counsel for the Respondent stated that she objected and would file an opposition.

The Secretary's motion is made pursuant to Fed. R. Civ. P. 15(b)[2] to conform the citation to the evidence.[3] The Respondent objects to the amendment on the grounds that to amend the citation at this stage of the proceedings is prejudicial to the Respondent and that the judge committed prejudicial error by advising the Secretary of the need to amend. In the alternative, the Respondent requests that if amendment is permitted, it be allowed to present additional evidence on the issue. For the reasons that follow, the Motion to Amend is granted and the Respondent's objections and requests are overruled and denied.

The company has not shown how it will be prejudiced as a result of this amendment. It states only that it will be prejudiced because it did not know that section 75.310(a)(5) "would be argued" and that the Secretary unduly delayed her request to amend and would not have made the motion but for the judge bringing the issue to the Secretary's attention. (Resp. Op. at 4-5.) The Company also argues that the evidence presented at the hearing is "arguably relevant" to section 75.310(d). No specific prejudice is alleged.

The Respondent did not object to the citation at the hearing as failing to set forth a violation of section 75.310(d). The Respondent did not object at the hearing to the evidence presented by the Secretary as not being relevant to a violation of section 75.310(d). The Respondent did not cross-examine the Secretary's witness concerning the cross-sectional area of the weak wall stopping, although the inspector was cross-examined about the effect of the water outside the stopping. It was in response to that questioning that he gave the answer set out above about the weak wall not working as it was designed to work with the water behind it. The Respondent did not present any evidence at the hearing concerning Citation No. 4366608 generally, or whether the weak wall stopping conformed to section 75.310(d) specifically. Finally, the Respondent did not argue in its brief that the evidence failed to establish that the cross-sectional area of the weak wall stopping was at least equal to that of the entry. The company argued only that there was no showing the weak wall stopping was inoperable.

It is obvious from the evidence presented that both parties were proceeding on the facts set out in the narrative of the citation. It is equally obvious that those facts actually allege a

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[2] Fed. R. Civ. P. 15(b) states: "**Amendments to Conform to the Evidence**. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment . . . ."

[3] Commission Rule 1(b), 29 C.F.R. § 2700.1(b), states that: "On any procedural question not regulated by Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. ("the Act"), these Procedural Rules, or the Administrative Procedure Act (particularly 5 U.S.C. 554 and 556), the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure . . . ."

violation of section 75.310(a)(5). All of the evidence went to whether the water in front of the weak wall stopping would prevent the stopping from relieving the pressure of an explosion as designed. Thus, all of the evidence presented was concerning the facts alleged in the citation, not the requirements of section 75.310(d), and those facts go to the section of the regulation to which the Secretary seeks to have the citation amended to allege.

With regard to my having alerted the Secretary that she might wish to amend the citation, I did so based on guidance from the Commission. In a similar case where the Secretary had alleged a violation of the wrong section of the regulations, the Commission stated that when the judge "discovered the Secretary's error, the judge should have issued an order directing the Secretary to show cause why the citation should not be amended to conform to the evidence and charge a violation of the applicable standard." *Faith Coal Co.*, 19 FMSHRC 1357, 1361 (August 1997). While I did not issue an order to show cause, the effect was the same.

The Respondent has not shown prejudice. What little the company did present and argue on the citation went to the facts of the citation, not whether those facts actually set out a violation of section 310(d). I find that the company fully understood the gravamen of the violation charged and knowingly litigated the citation on that basis. Therefore, the Respondent has not been mislead and is not entitled to present additional evidence on the issue. Nor is the company entitled to a mistrial. Accordingly, pursuant to Fed. R. Civ. P 15(b), I grant the Secretary's Motion to Amend the citation to allege a violation of section 75.310(a)(5) of the regulations.

Having amended the citation, I find that the Secretary has established that the build up of water behind the weak wall stopping in Portal 1, which completely covered the stopping, meant that the fan in that entry was not protected by a weak wall in direct line with possible explosive forces. Consequently, I conclude that the company violated section 75.210(a)(5) of the regulations.

1. *Significant and Substantial*

The Inspector found this violation to be "significant and substantial." A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 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 Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out four criteria that have to be met for a violation to be S&S. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987)(approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued

normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

As the inspector testified, the purpose of the weak wall stopping is to prevent the fan from being destroyed in the event of an explosion. If the fan is destroyed, there is no way to dilute, render harmless, and carry away any noxious fumes or gases generated by the explosion. Thus, I find that the first two criteria in *Mathies* have been met, there was a violation of the regulations and that violation contributed to a discrete safety hazard in that the fan could be destroyed as a result of the violation and miners be subjected to hazardous fumes and gases.

As is usually the case, whether this violation is S&S rests on the third *Mathies* factor, whether there is a reasonable likelihood that the hazard contributed to will result in an injury. With regard to this element, the evidence indicates that this mine is in the lower Hartshorne seam of coal and liberates a massive amount of methane. The inspector testified that: "Historically every mine that has been on the lower Hartshorne seam at one time or another was blown up due to a build-up of methane and dust." (Tr. 61.) In addition, as previously noted, with the water completely covering the stopping anyone trying to exit through the doors in the stopping would likely be trapped between the walls and drowned.

Accordingly, I find that it was reasonably likely that a mine explosion would occur, destroying the fan and resulting in permanently disabling or fatal injuries resulting from fumes, gas or drowning. Therefore, I conclude that the violation was "significant and substantial."

2. *Negligence*

The inspector found the negligence involved in this violation to be "high." The evidence that this filling up of the area in front of the weak wall stopping had occurred the night before, that the operator was aware of it, that he had done nothing to alleviate it (perhaps because a pump had broken down), and that miners had been permitted to enter the mine without at least beginning to drain the area supports this finding. Consequently, I conclude that the degree of negligence for this violation is "high."

C. *Order No. 4366609*

Order No. 4366609 alleges a violation of section 75.380(e) of the regulations, 30 C.F.R. § 75.380(e). It states:

> This citation is issued in conjunction with the imminent danger order #4366607. Due to the large amount of rainfall in the mine area the night before (11/06/96), the open strip pit water level is higher than the intakes, returns and belt portals. The water was

> allowed to accumulate in large amounts at an elevation greater than the level of the portals. The water from the pit is [*sic*] located next to the portals is flooding allowing the water to obstruct the portal openings. The pit contains a large amount of water. If the weak wall stopping in the #1 return entry or the weakly constructed burms [*sic*] were to fail, the inrush of water would be great, causing 10 coal miners on the 1st right section to be trapped underground by water. [Th]is condition might cause death to the miners underground. This mine is on a 8.5% decline slope allowing the water to flow into the mine rapidly trapping the miners below. The bottom of the main entries are already full of standing water adding to the dangerous condition. It is unexcusable [*sic*] of management to allow this condition to exist.

(Govt. Ex. 6.)

Section 75.380(e) requires that: "Surface openings shall be adequately protected to prevent surface fires, fumes, smoke, and flood water from entering the mine." For the same reasons that I concluded that the inspector reasonably believed that an imminent danger existed, *see supra* pp. 5-6, I conclude that the company violated this section.

1. *Significant and Substantial*

The inspector found this violation to be "significant and substantial." Since this violation was one of the main reasons that the inspector issued his imminent danger order, which I have already affirmed, it logically follows that the violation was S&S. Therefore, I conclude that the company's violation of section 75.380(e) was "significant and substantial."

2. *Unwarrantable Failure*

This order was issued under section 104(d)(2) of the Act, 30 U.S.C. § 814(d)(2).[4] The withdrawal order issued under section 104(d)(1), 30 U.S.C. § 814(d)(1), which served as the predicate for this order was Order No. 4366277, (Govt. Ex. 1), which the parties agreed to settle by reducing the civil penalty. (Tr. 47-8.)

---

[4] Section 104(d)(2) states: "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) . . . ."

A 104(d)(2) order requires a showing of "unwarrantable failure." The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2010 (December 1987). "Unwarrantable failure is characterized by such conduct as 'reckless disregard,' 'intentional misconduct,' 'indifference' or a 'serious lack of reasonable care.' [*Emery*] at 2003-04; *Rochester & Pittsburgh Coal Corp.* 13 FMSHRC 189, 193-94 (February 1991)." *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994).

The inspector testified that he believed that this violation resulted from the company's unwarrantable failure because:

> The operator knew about this condition. He allowed it to exist. He allowed the men to enter the mine.
>
> He knew about it. As we entered the mine, there was [*sic*] men already involved in the pumping process.
>
> The night before that the operator had put out a large diesel-powered pump at the opposite end of the pit.
>
> They knew they had problems with the water. They were trying to pump it. The pump failed them. Rather than wait to get the water pump[ed] down to a safe level, they allowed the miners of this coal mine to go underground in what I feel is a dangerous situation, go underground and work.

(Tr. 82.)

In addition to the potential for the water outside to go into the mine, there is always water inside the mine due to the nature of the seam. This water is continually pumped out by a 450 gallon per minute pump.

The Respondent argues that there was no unwarrantable failure because there was not as much water outside of the mine as the inspector seemed to think that there was. Therefore, the company asserts, the mine would not have been inundated and since no miners were working in the vicinity of the entries there was no real danger.

This argument is not persuasive. As the Secretary points out, the entries slope downward, so that even if water did not completely fill up the mine, it would be channeled down the entries to collect at the bottom and would trap the miners in the mine.

I conclude that the operator displayed a serious lack of reasonable care in this instance. Accordingly, I conclude that the violation of section 75.380(e) resulted from the company's unwarrantable failure.

Civil Penalty Assessment

The Secretary has proposed penalties of $1,000.00 each for Citation No. 4366608 and Order No. 4366609. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act. *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with the penalty criteria, the parties stipulated that the Pollyanna No. 8 mine produced 1,875 tons of coal in 1996 and that the company demonstrated good faith in abating the violations. (Tr. 14-15.) No evidence was offered as to the company's history of prior violations. Since the Secretary has the burden of presenting this evidence, I find that the company's history of prior violations is not an aggravating factor in this case. No evidence was presented on the effect of the penalties on the operator's ability to remain in business. Since the operator has the burden on this issue, I find that the penalties will not adversely affect the operator's ability to remain in business. For both of the contested violations, I find the operator's negligence to have been "high" and the gravity of the violations to be serious.

Taking all of these factors into consideration, I find the penalties proposed by the Secretary to be appropriate.[5] The penalty for each order or citation is as follows:

Docket No. CENT 97-69

Order/Citation No.		Proposed Penalty	Assessed Penalty
4366582		$ 81.00	$ 64.80
4366589		$ 136.00	$ 108.80
4366593		$ 50.00	$ 40.00
4366610		$ 81.00	$ 64.80
4366611		$ 157.00	$ 125.60
	Totals	$ 505.00	$ 404.00

[5] Attached to the Secretary's brief as Exhibit A is a copy of a Decision Approving Settlement issued by Judge Bulluck on January 30, 1998. The decision deals with numerous cases involving Georges Colliers Inc. (lead Docket No. CENT 97-74). The Brief makes no reference to the exhibit. I do not know why it is attached, but I have not considered it in deciding the cases before me or arriving at penalties.

Docket No. CENT 97-90

4366594	$ 128.00	$ 102.40
4366595	$ 210.00	$ 168.00
4366596	$ 50.00	$ 40.00
4366598	$ 50.00	$ 40.00
4366599	$ 81.00	$ 64.80
4366600	$ 75.00	$ 60.00
Totals	$ 594.00	$ 475.20

Docket No. CENT 97-112

4366277	$ 700.00	$ 630.00
4366280	$ 700.00	$ 630.00
4366591	$ 700.00	$ 630.00
4366592	$ 700.00	$ 630.00
4366608	$1,000.00	$1,000.00
4366609	$1,000.00	$1,000.00
Totals	$4,800.00	$4,520.00

ORDER

Accordingly, Order No. 436607 in Docket No. CENT 97-26-R is **AFFIRMED**; Citation Nos. 4366582, 4366589, 4366593, 4366610 and 4366611 in Docket Nos. CENT 97-29-R, CENT 97-30-R, CENT 97-33-R and CENT 97-69 are **AFFIRMED**; Order No. 436659 5 and Citation Nos. 4366594, 4366596, 4366598, 4366599 and 4366600 in Docket Nos. CENT 97-34-R, CENT 97-35-R, CENT 97-36-R, CENT 97-38-R and CENT 97-90 are **AFFIRMED**; Citation No. 4366608 in Docket Nos. CENT 97-27-R and CENT 97-112 is **MODIFIED** to allege a violation of section 75.310(a)(5), instead of section 75.310(d), and is **AFFIRMED** as modified; and Order Nos. 4366277, 4366280, 4366591, 4366592 and 4366609 in Docket Nos. CENT 97-28-R, CENT 97-31-R, CENT 97-32-R and CENT 97-112 are **AFFIRMED**.

Georges Colliers Inc. is **ORDERED TO PAY** civil penalties of **$5,399.20** within 30 days of the date of this decision. On receipt of payment, these cases are **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, Suite 1000
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

March 4, 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 98-14-M
Petitioner	:	A. C. No. 36-00184-05525
v.	:	
	:	
GLOBAL STONE PENROC, INC.,	:	
Respondent	:	Penroc

ORDER DENYING MOTION FOR SUMMARY DECISION

On February 17, 1998, Global Stone Penroc Inc., (Global) filed a motion for summary decision pursuant to Commission Rule 67, 29 C.F.R. Section 2700.67. Under Commission Rule 67(b), a motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits shows: (1) that there is no genuine issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law. Global's motion addresses each of the six citations contested in the instant case.

Citations No. 4434034 and 4434035

In examining the respective documentation of the parties, it is obvious from the conflicting statements that there remain genuine issues as to material facts, i.e., whether the cited pumps were, as a factual matter, grounded or provided with equivalent protection within the meaning of the cited standard, 30 C.F.R. Section 56.12025. Accordingly, the motion for summary decision with respect to the instant citations must be denied.

Citations No. 4434002 and 4434004

Global argues that these citations should also be vacated as duplicative of the preceding citations. Global notes that both Citations No. 4434002 and 4434035 concern the grounding of a single piece of equipment, i.e., Global's 75 horsepower consolidated pit sump pump and that Citations No. 4434004 and 4434034 concern the grounding of another single piece of equipment i.e., Global's 200 horsepower consolidated pit sump pump.

The standard at 30 C.F.R. Section 56.12025 charged in Citations No. 4434035 and 4434034 provides in relevant part that "all metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection . . ." The standard at 30 C.F.R. Section

56.12030 charged in Citations No. 4434002 and 4434004 provides that "when a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized." The Secretary argues that Global violated the cited standards in two ways, i.e., that it violated the standard at 30 C.F.R. Section 56.12025 by omission, in failing to ensure that the pumps were grounded and that it violated 30 C.F.R. Section 56.12030 by commission, in allowing the pumps to be energized with a potentially hazardous condition, the ground fault hazard.

The facts of this case are not unlike those in *Southern Ohio Coal Co., 4 FMSHRC 1459 (August 1982)* wherein the Commission held that violations which arise out of a single series of events may under certain circumstances constitute separate and distinct violations. In that case, the operator was cited for failure to remove temporary roof supports by remote methods and by then allowing miners to work under the unsupported roof. The operator argued that the violations should merge because the required duties were the same, i.e., that miners should not work under unsupported roof. In affirming the citations, the Commission held, however, that the standards were violated in two ways, by omission in failing to use remote methods, and by commission, by allowing the miners to work under unsupported roof. The Commission's reasoning in the *Southern Ohio* is applicable hereto and controlling. The cases cited by Global in its brief are distinguishable. Under the circumstances Global is not entitled to a summary decision as a matter of law with respect to the citations at issue.

Citation No. 4076955

Global notes that the above citation alleges that a "safe means of access was not provided to the engine compartment walkway" on a caterpillar front end loader Model 992-C, in violation of 30 C.F.R. Section 56.11001, thereby exposing employees to a falling hazard of approximately 3 ½ feet. The cited standard provides that "safe means of access shall be provided and maintained to all working places." While acknowledging that one of the manufacturer-installed steps to the engine compartment was missing and another may have been damaged at the time the citation was issued, Global nevertheless claims that it provided a step ladder as a safe means of access. The Secretary notes however and provides a supporting affidavit to demonstrate, that conflicting evidence exists concerning the circumstances under which miners might climb or otherwise access the engine compartment without the stairs or step ladder. In addition, there appears to be a factual dispute as to whether miners had in fact accessed the engine using unsafe means such as crawling or climbing.

Genuine issues clearly remain as to material facts and accordingly, Global is not entitled to a summary decision as matter of law.

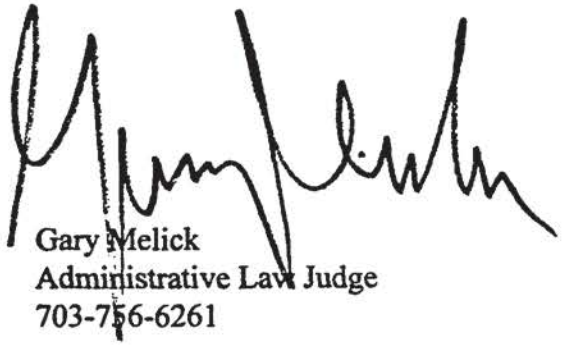
Order No. 4076957

Global notes that the above order alleges that "21 bent steps were observed on the stairway" leading to the scalper screen, a "regularly traveled walkway." Global also notes that MSHA alleged that the "bent" steps exposed employees to a "significant and substantial" falling

hazard and that this constituted an "unwarrantable failure." In connection with its motion herein, Global submitted photocopies of photographs which it maintains shows that no steps were missing and that "bends" in individual steps did not pose a safety hazard. Global also quotes one of its employees purportedly stating that he "felt perfectly safe" using the steps.

In her response, the Secretary notes that the photographs are not verified and do not represent the hazard as it existed when cited. She further notes that the photographs do not accurately represent the condition of the steps at issue. She further notes that the condition was recorded by the company in its own examination book as constituting a hazard and was reported over a three-month period without any apparent remedial action. Finally, the Secretary notes that Inspector Amati observed the cited stairs and noted that twenty-one of the steps were significantly damaged and created a fall hazard.

Under the circumstances, there are clearly genuine issues as to material fact concerning Order No. 4076957, and Global's motion for summary decision must accordingly be DENIED.



Gary Melick
Administrative Law Judge
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