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SOL (MSHA) V. WYOMING FUEL
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FEDERAL MINE SAFETY AND HELTH REVIEW COMMISION
1730 K STREET 6TH FLOOR
WASHINGTON, D.C. 20006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. WEST 92-340 WEST 92-384
WYOMING FUEL COMPANY, n/k/a BASIN RESOURCES, INC.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 93-186
EARL WHITE, employed by WYOMING FUEL COMPANY, n/k/a BASIN RESOURCES, INC.	:	

BEFORE: Jordan, Chairman; Backley, Doyle and Holen, Commissioners

DECISION

BY: Backley, Commissioner

This consolidated civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)("Mine Act" or "Act"). The Secretary of Labor has charged Basin Resources, Inc. ("Basin") with two violations of 30 C.F.R. 75.316

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FOOTNOTE 1
Commissioner Backley is the only Commissioner in the majority on all issues presented.

(1991). Administrative Law Judge John J. Morris concluded that Basin violated its ventilation plan and, thus, section 75.316 by: (1) making an unauthorized, major change in its ventilation system and (2) permitting excessive levels of methane to accumulate. 15 FMSHRC 1968, 1969-74, 1978-80 (September 1993)(ALJ). The judge also determined that the violation involving the change to the ventilation plan was significant and substantial ("S&S") but was not the result of Basin's unwarrantable failure to comply with the standard, and that the mine's General Manager, Earl White, had not "knowingly authorized, ordered, or carried out" the violation within the meaning of section 110(c) of the Mine Act, 30 U.S.C. 820(c). Id. at 1974-78, 1981-82. He determined that the methane violation was neither S&S nor the result of unwarrantable failure. Id. at 1980.

For the reasons that follow, the Commission affirms in result the judge's conclusion that Basin violated its ventilation plan by changing its ventilation system; remands the issue of whether that violation was S&S; affirms the judge's determinations that this violation was not the result of unwarrantable failure and that White was not personally liable for the violation under section 110(c); and reverses the judge's determination that the methane accumulation violated Basin's ventilation plan.

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FOOTNOTE 2

30 C.F.R. 75.316 provided:

> A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

On November 16, 1992, 30 C.F.R. 75.316 was superseded by 30 C.F.R. 75.370, which imposes similar requirements

FOOTNOTE 3

With respect to the ventilation change, all Commissioners affirm in result the judge's finding of violation. With respect to whether that violation arose from the operator's unwarrantable failure, Commissioners Backley, Doyle and Holen vote to affirm the judge's determination that it did not. Commissioners Backley, Doyle and Holen also affirm the judge's determination that White was not personally liable for the violation under section 110(c). Chairman Jordan dissents on the unwarrantable failure and section 110(c) issues. As to whether the ventilation change violation was S&S, all Commissioners vote to remand the issue. Chairman Jordan and Commissioner Backley do not reach the issue of whether a final uncontested imminent danger order can be used to establish that a violation is S&S. Commissioner Doyle and Commissioner Holen would reverse the judge's determination on that issue. In Pennsylvania Electric Co., 12 FMSHRC 1562, 1563-65 (August

1990), aff'd on other grounds, 969 F.2d 1501 (3d Cir. 1992), the Commission determined that the effect of an evenly split vote, in which at least two Commissioners would affirm a judge's decision, is to leave the decision standing as if affirmed. No Commissioner votes to affirm the judge's S&S determination. As a corollary to those principles, the vote of Chairman Jordan and Commissioner Backley, closest in effect to the judge's decision, is the Commission's disposition. All Commissioners reverse the judge's finding of violation based on the methane accumulations. Commissioners' separate opinions follow the decision.

I.

Factual and Procedural Background

On June 1, 1991, the Golden Eagle Mine, an underground coal mine in Weston, Colorado was purchased from Wyoming Fuel Company ("Wyoming Fuel") by Entech, Inc., the parent company of Basin. During that month, the Northwest No. 1 section, where longwall mining was being conducted, experienced methane liberation problems. In order to deal with the situation, General Manager Earl White decided on Sunday, June 23, to make a major change in the air flow. Basin changed return entry No. 3 on the longwall's headgate side to an intake entry and converted intake entries Nos. 2 and 3 on the tailgate side to return entries.

The next morning, White telephoned Inspector Donald Jordan of the Department of Labor's Mine Safety and Health Administration ("MSHA") and informed him of the change. The following morning, June 25, MSHA Inspectors Jordan and Roland Phelps visited the mine, reviewed the mine's ventilation plan, and confirmed that the plan's specified air flow in the longwall section had been changed. Inspector Jordan issued withdrawal order No. 3244406, pursuant to section 104(d)(2) of the Act, 30 U.S.C. 814(d)(2), alleging that, by reversing the air flow, Basin was out of compliance with its ventilation plan, and that the violation was S&S and the result of unwarrantable failure. The Secretary subsequently filed

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FOOTNOTE 4

Order No. 3244406 states:

The methane, ventilation and dust control plan, approved April 16, 1991 was not in compliance in the North West #1 Long Wall, MMU 009-0 in that page 3 of this addendum shows #3 headgate entry as a return air course. The air was redirected on 6-23-91 in this entry and it is now an intake and in turn the air is coursed through #1 and #2 bleeder entries toward 0he new proposed exhaust shaft. At the shaft, the air is coursed to #58 crosscut of the tailgate return.

a civil penalty petition against White, pursuant to section 110(c) of the Act, alleging that White had knowingly authorized the violation.

Later in the day on June 25, Inspectors Jordan and Phelps inspected the Northwest No. 1 section. Using handheld methane detectors, they measured methane concentrations of 4% to 5% and higher in the tailgate area, four feet outby the Kennedy stoppings at crosscuts 62 and 63, between the No. 3 and 4 tailgate entries. 15 FMSHRC at 1978; Tr. 35, 121-22. They also took two bottle samples of the air, which, upon testing, showed explosive concen- trations of methane at 6.8% and 9.4%. Tr. 36-37, 123.

Based on these methane levels, the inspectors issued an imminent danger order to Basin pursuant to section 107(a) of the Act, 30 U.S.C. 817(a). They also cited Basin under section 104(a) of the Act, 30 U.S.C. 814(a), alleging, as later modified, that the methane concentration was an S&S violation of the ventilation plan and section 75.316. On June 28, 1991, MSHA approved, with some modifications, Basin's ventilation changes. Gov't Ex. M-2; Tr. 165-66, 240-41, 405.

Following an evidentiary hearing, the judge concluded that, by altering the air flow required by its plan without having obtained MSHA's prior approval, Basin had failed to comply with its ventilation plan, thereby violating section 75.316.15 FMSHRC 1970-74. The judge based his determination on a provision requiring prior approval set forth in an MSHA cover letter, which he found was part of the ventilation plan. Id. at 1971-74. He concluded that the violation was S&S, finding that a reasonable likelihood of injury had been established by the uncontested imminent danger order. Id. at 1976. He further found that the violation had not resulted from Basin's unwarrantable failure because White had a good

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FOOTNOTE 5

Citation No. 3244408 states:

Methane in excess of 4.0% and 5.0% was present outby the Kennedy stoppings in xcut #62 and #63 between #3 and #4 entries in the #3 side of the NW LW Tailgate area. Also oxygen in amounts of 17.1% was measured with hand held detectors at least 4 ft. outby the stopping in #62 crosscut. Both samples were collected to substantiate this citation and order. This was the main contributing factor to the issuance of imminent danger order #3244407....

The citation was modified on June 27, 1991, by citation No. 3244408-01:

Citation no. 3244408 issued 06/25/91 is hereby modified to add in part 8 that this is a violation of the methane and ventilation and dust control plan as approved on page 37, November 15, 1990, and to change part 9.C from a violation of 75.329 to 75.316.

faith, although mistaken, belief that his actions complied with the Secretary's regulations. Id. at 1976-78. The judge concluded that White was not personally liable under section 110(c) for this violation because his conduct was not "aggravated." Id. at 1981. With regard to the cited methane concentrations, the judge determined that the high methane levels violated the plan and, thus, section 75.316. Id. at 1978-80. He concluded, however, that this methane violation was not S&S or the result of Basin's unwarrantable failure. Id. He assessed a penalty of $300 for the first violation and $400 for the second violation. Id. at 1982.

The Commission granted the parties' cross-petitions for discretionary review and heard oral argument. The Secretary's petition sought review of the judge's holdings that the ventilation change was not the result of unwarrantable failure, that White was not liable under section 110(c), and that the methane accumulation was not S&S or the result of unwarrantable failure. Basin's petition sought review of the judge's determinations that the ventilation change and the methane accumulations were violations and that the ventilation change violation was S&S.

II.

Disposition

A. Change in Ventilation

1. Validity of section 104(d)(2) order

As a threshold matter, Basin argues in its brief on review that the section 104(d)(2) order alleging a violation based on the change in the ventilation plan was procedurally defective. Basin argues that, because the underlying section 104(d)(1) order was issued not to Basin but to its predecessor, Wyoming Fuel, there was no "predicate" order in place and, thus, a section 104(d)(2) order could not properly be issued. The order citing the ventilation plan

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FOOTNOTE 6

All Commissioners affirm in result the judge's conclusion that Basin violated section 75.316 by failing to comply with the air flow requirements of its ventilation plan.

FOOTNOTE 7

If an inspector finds a violation that is S&S and results from an unwarrantable failure by the operator to comply, a citation noting those findings is issued. This citation is commonly referred to as a "section 104(d)(1) citation" (30 U.S.C. 814(d)(1)). Greenwich Collieries, Div. of Pa. Mines Corp., 12 FMSHRC 940, 945 (May 1990), citing Nacco Mining Co., 9 FMSHRC 1541, 1545 n.6 (September 1987). If, during the same inspection or a subsequent inspection within 90 days of such citation, another violation resulting from unwarrantable failure is found, a withdrawal order is issued under section 104(d)(1) of the Act. This is a "predicate" order. If subsequent inspections of the mine reveal additional unwarrantable failure violations, withdrawal orders are issued under section 104(d)(2) of the Act until such time as an

inspection of the mine discloses no further unwarrantable failure violations. Greenwich Collieries, 12 FMSHRC at 945.

violation reflects that MSHA issued the predicate section 104(d)(1) order to Wyoming Fuel on March 21, 1991. Basin raised this issue below, but the judge did not rule on it.

Basin did not raise this issue in its petition for discretionary review, nor did the Commission direct its review sua sponte. Under the Mine Act and the Commission's procedural rules, review is limited to the questions raised in the petition and by the Commission sua sponte. 30 U.S.C. 823(d)(2)(A)(iii) and (B); 29 C.F.R. 2700.70(f) (1993). Therefore, Basin's procedural challenge is not properly before the Commission.

2. Violation

Under section 75.316, which repeated the language in section 303(o) of the Mine Act, 30 U.S.C. 863(o), an operator was required to adopt and operate under "a ventilation system and methane and dust control plan and revisions thereof" that have been approved by the Secretary. The judge determined that Basin violated section 75.316 because it failed to obtain MSHA's prior approval before changing the air flow. 15 FMSHRC at 1970-74. He found that a prior approval requirement was contained in an MSHA cover letter attached to the mine's ventilation plan, adopted by Basin from Wyoming Fuel. Id. at 1974. Basin argues that it had no notice that MSHA's prior approval was necessary and that it was not aware of the cover letter. B. Br. 15-18. The Secretary responds that the cover letter was an effective part of the plan. S. Reply Br. 8-12.
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FOOTNOTE 8

Section 104(d)(2) provides:

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

30 U.S.C. 814(d)(2)(emphasis added).

We note that the plain language of section 104(d)(2) addresses repeated violations at a mine, regardless of ownership. Section 104(d)(2) lifts the probationary chain only when the mine passes an inspection without an unwarrantable failure violation. Moreover, even if the section 104(d)(2) order were modified, the allegations of violation would survive. See Consolidation Coal Co., 4 FMSHRC 1791, 1794-98 (October 1982). The judge's failure to rule on Basin's argument was harmless error.

We conclude that the cover letter, upon which the judge relied, merely reiterated to the operator that, under section 75.316, a ventilation plan and revisions thereof must first be approved by MSHA. For the reasons set forth below, we reject as unreasonable the assertion of counsel for the Secretary at oral argument that, absent the cover letter, Basin's ventilation change would not have required prior approval. Oral Arg. Tr. 27-30.

Once a ventilation plan is approved and adopted, its provisions and revisions are enforceable as mandatory standards. UMWA v. Dole, 870 F.2d 662, 671 (D.C. Cir. 1989); Zeigler Coal Co. v. Kleppe, 536 F.2d 398, 409 (D.C. Cir. 1976); Freeman United Coal Mining Co., 11 FMSHRC 161, 164 (February 1989); Jim Walter Resources, Inc., 9 FMSHRC 903, 907 (May 1987). Basin's ventilation plan required use of the No. 3 headgate entry as a return entry and tailgate entries No. 2 and 3 as intake entries. Gov't Ex. M-1 (ventilation diagram labeled p. 3). There is no dispute that, on June 23, Basin converted the No. 3 headgate entry to an intake entry and the two tailgate entries to return entries. It is also undisputed that Basin did not secure MSHA's prior approval. This unilateral, major change in the ventilation system constituted a failure to comply with the approved plan and violated section 75.316. We note the regulatory history of current section 75.370, the successor to section 75.316. The preamble to section 75.370 states that MSHA's "existing practice" under section 75.316 required prior approval of proposed major revisions. 57 Fed. Reg. 20868, 20899 (May 15, 1992). Both the Mine Act and the Secretary's regulations recognize the potential dangers attendant upon major ventilation changes by setting forth procedures for implementation of such changes. 30 U.S.C. 863(u); 30 C.F.R. 75.322 (1991), superseded by 30 C.F.R. 75.324 (1992).

The Commission rejects, as did the judge, Basin's assertion that 30 C.F.R. 75.308 and 75.309(a) (1991) undercut any requirement of prior approval because those regulations authorized ventilation "changes or adjustments" when methane reached 1% in face areas and return aircourses. 15 FMSHRC at 1974. The "changes or adjustments" in those sections referred only to "increasing the quantity of air ... or improving the distribution of air." 30 C.F.R. 75.308-1, 75.309-3 (1991). As noted, White's air reversal was a major ventilation change.

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FOOTNOTE 9

We note further that the Secretary was unable to produce the cover letter during discovery and did not do so until the hearing. 15 FMSHRC at 1973; Tr. 362-64.

FOOTNOTE 10

In 1992, sections 75.308 and 75.309(a) were superseded by 30 C.F.R. 75.323(b)(ii), 75.323(c), and 75.323(d)(2)(i), which impose similar requirements.

FOOTNOTE 11

Similarly, we reject Basin's suggestion, made at oral argument, that the ventilation change was authorized by a plan provision that mirrored 30 C.F.R. 75.308 (1991). Gov't Ex. M- 1, p. 17; Oral Arg. Tr. 9-13.

For the foregoing reasons, the Commission concludes that Basin did not comply with its plan when it unilaterally changed the air flow and, accordingly, that Basin violated section 75.316. The Commission affirms in result the judge's finding of violation.

3. S&S

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825-26 (April 1981). In Mathies Coal Co., 6 FMSHRC 1 (January 1984), the Commission further explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Id. at 3-4; see also Austin Power, Inc. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g, 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985).

The major dispute on review is the third Mathies element, a reasonable likelihood of resulting injury. The judge, focusing solely on the somewhat speculative terms used by the inspectors, found that the Secretary had failed to establish that element. 15 FMSHRC at 1975-76. The judge determined, however, that the uncontested imminent danger order established a reasonable likelihood that the hazard contributed to would result in an injury. Id. The judge's conclusion regarding the preclusive effect of the uncontested imminent danger order fails to provide any analysis nor does it direct us to any relevant legal authority.

Basin asserts, also without providing us with any relevant legal authority, that, as a matter of law, an uncontested imminent danger order cannot provide a basis for sustaining an

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FOOTNOTE 12

All Commissioners vote to remand the judge's S&S determination. Chairman Jordan and Commissioner Backley do not reach the judge's determination that a final uncontested imminent danger order established the facts alleged in that order. Commissioners Doyle and Holen vote to reverse that holding. Accordingly, this section of the decision reflects the rationale of Chairman Jordan and Commissioner Backley. See n.3, supra.

S&S designation. Basin argues further that if allegations in an uncontested imminent danger order are held to establish the S&S element of a related citation as a matter of law, "operators would be forced to litigate imminent danger orders merely to preserve the opportunity to litigate a 'significant and substantial' allegation in a related citation." B. Reply Br. 5. Finally, Basin asserts that, in any event, by the time the imminent danger order was issued on June 25, Basin had returned to use of the plan's approved ventilation scheme so that the conditions referenced in the order could not have been linked to the earlier air reversal.

The Secretary relies, without discussion or reference to relevant citations, on the judge's conclusion that the imminent danger order established the third step of the Mathies test. The Secretary fails to address the policy issue raised by Basin concerning needless litigation, and limits his S&S argument to contending that the weight of the evidence demonstrates that Basin had not changed the air back when the high methane concentrations were found and that, accordingly, the concentrations stemmed from the impermissible change to the ventilation.

The Commission need not resolve in this case whether, as a general rule, an uncontested imminent danger order may be used to establish a reasonable likelihood of injury in a related citation. Cf. generally Ranger Fuel Corp., 12 FMSHRC 363, 370-73 (March 1990). Here, regardless of the fact that the inspectors issued the order, the record evidence supports a finding that a dangerous condition reasonably likely to lead to injury existed on the afternoon of June 25. It is uncontroverted that explosive levels of methane were detected at that time in an area containing several ignition sources. Tr. 123-24. Moreover, the Golden Eagle Mine is a highly gassy mine liberating over 1,000,000 cubic feet of methane during a 24-hour period and is subject to five-day spot inspection pursuant to section 103(i) of the Mine Act, 30 U.S.C. 813(i). Tr. 25. In addition, the mine had experienced a very serious methane explosion only five months prior to the air reversal. See 15 FMSHRC at 1978; Tr. 38-39. The judge, relying solely on the imminent danger order for his S&S findings, overlooked all of this evidence. Accordingly, we vacate the judge's finding that the Secretary failed to offer evidence establishing the reasonable likelihood of injury.

Under Mathies, the Secretary must show that the hazardous condition is caused by the violation of the cited safety standard in order to make out the special finding of S&S. Here the hazardous condition involved methane accumulations. The cited violation concerned the operator's failure to comply with the approved ventilation plan. The unanswered question is whether the deviation from the ventilation plan caused the methane accumulations. The judge's decision fails to address the causal link required under Mathies.

The record evidence linking the methane levels to the air flow change is controverted. The inspectors testified that the explosive levels of methane that they detected resulted from Basin's air reversal and reflected the serious hazards associated with the reversal. Tr. 35-36, 54, 123-24. Inspector Jordan testified that when he measured the methane levels on June 25, the intake and return entries were still functioning in the altered form that General Manager White had implemented. Tr. 374-76. Jordan's contemporaneous notes support his

testimony.

Id. Jordan's testimony was further supported by former mine foreman David Huey, who testified that White's ventilation changes remained in effect until later in the week. Tr. 86- 87. White, on the other hand, maintained that, on June 25, before Inspector Jordan took the methane measurements, Huey and another manager had already returned the intake and return entries to the pre-June 23 configuration. Tr. 211-15.

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). 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. 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. Mid-Continent, 16 FMSHRC at 1222, citing Anaconda Co., 3 FMSHRC 299, 299-300 (February 1981).

The judge failed to analyze any of the evidence concerning whether the methane accumulations were, in fact, caused by the air reversal. Nor did he make a finding concerning this issue of causality. Accordingly, we vacate the judge's conclusion that the violation was S&S, and remand for further analysis consistent with this decision.

4. Unwarrantable Failure

The unwarrantable failure terminology is taken from section 104(d) of the Act and refers to more serious conduct by an operator in connection with a violation. In Emery Mining Corp., 9 FMSHRC 1997 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. Id. at 2001. This determination was derived, in part, from the plain meaning of "unwarrantable" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" (the failure to use such care as a reasonably prudent and careful person would use, characterized by "inadvertence," "thoughtlessness," and "inattention"). Id. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." Id. at at 2003-04; Rochester & Pittsburgh Coal Corp., 13 FMSHRC 189, 193-94 (February 1991). This determination was also based on the purpose of the unwarrantable failure sanctions in the Mine Act, the Act's legislative history, and judicial precedent. Emery, 9 FMSHRC at 2002-03.
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FOOTNOTE 13

Commissioners Backley, Doyle and Holen vote to affirm the judge's finding that this violation did not result from Basin's unwarrantable failure to comply with the standard. Chairman Jordan votes to vacate and remand. This section of the decision is based on the rationale of Commissioners Backley, Doyle and Holen.

In analyzing whether the violation arose from Basin's unwarrantable failure, the judge examined General Manager Earl White's conduct because it was White who decided to make the ventilation change. The judge found that White believed that section 75.316 did not require MSHA's prior approval of the change. 15 FMSHRC at 1976-78. The judge reasoned that "there cannot be an unwarrantable failure resulting from a good faith, although mistaken belief that [an operator's] actions were in compliance with regulations." Id. at 1977 (citations omitted). The judge is correct that, under Commission caselaw, unwarrantable failure does not result from good faith, although mistaken, belief that an operator was complying with regulations. Florence Mining Co., 11 FMSHRC 747, 754 (May 1989).

The Secretary argues that White, as mine manager, should have known that prior approval was required and that, according to Commission cases, Basin's conduct was unwarrantable. S. Br. 8-11 & n.7. Citing Virginia Crews Coal Co., 15 FMSHRC 2103 (October 1993), Basin asserts that this is insufficient to establish unwarrantable failure. B. Br. 24. Basin is correct that, according to Commission precedent, a "should have known" standard is not determinative of unwarrantable failure. Virginia Crews, 15 FMSHRC at 2107. "Use of a 'knew or should have known' test by itself would make unwarrantable failure indistinguishable from ordinary negligence." Id. Here, as in Virginia Crews, we reject such an interpretation of the Commission's decision in Emery. Id.

The Secretary objects to the judge's finding on the grounds that he should have determined not only that White had a good faith belief but whether, under the totality of the circumstances, that belief was reasonable. The Secretary further contends that the weight of evidence demonstrates that White's belief was not reasonable. In response, Basin asserts that substantial evidence supports the judge's determination.

The Secretary is correct that the operator's good faith belief must be reasonable under the circumstances. Cyprus Plateau Mining Corp., No. WEST 92-371-R, 16 FMSHRC ___, slip. op. at 6 (August 26, 1994); see Southern Ohio Coal Co., 13 FMSHRC 912, 919 (June 1991), citing Utah Power & Light Co., 12 FMSHRC 965, 972 (May 1990), aff'd, 951 F.2d 292 (10th Cir. 1991). Moreover, the Commission has used a similar approach in work refusal cases under section 105(c) of the Mine Act, 30 U.S.C. 815(c). A miner's work refusal constitutes protected activity when he has a good faith belief that the work involves a hazard and that belief is also reasonable. See Paula Price v. Monterey Coal Co., 12 FMSHRC 1505, 1515 (August 1990).

It is undisputed that, in directing the ventilation change, White was attempting to improve the mine's ventilation. In June 1991, the Northwest No. 1 longwall section was experiencing serious methane liberation problems. Following a number of unsuccessful adjustments (Tr. 219-21, 306-07), White decided to make the reversal in order to deliver more intake air to that section. Tr. 396. The judge found that White reasonably believed that "he could have been cited for failing to correct the problems in the ventilation system." 15 FMSHRC at 1977.

The Secretary's evidentiary objections to the judge's findings are unpersuasive. The Secretary argues that two of White's subordinates informed him that MSHA should be notified before making the contemplated changes. The judge found that White responded by consulting 30 C.F.R. Part 75 and, in particular, section 75.316, but found no requirement for such prior approval. 15 FMSHRC at 1977. Section 75.370(c), which superseded section 75.316, now explicitly requires that major changes to the ventilation system "shall be submitted to and approved by the district manager before implementation." The earlier standard, in effect at the time, did not contain this express requirement. Moreover, Inspector William Denning conceded that, under the regulations in place in June 1991, there was no guidance for mine operators as to the type of changes that could or could not be made without prior approval. Tr. 162-63. The Secretary's position at oral argument that, absent the cover letter, prior approval was not required (Oral Arg. Tr. 27-30), further supports the reasonableness of the operator's belief that, based on the language of the regulation, prior approval was not required. The Commission does not find unreasonable White's good faith belief that prior approval was not required.

The Secretary further asserts that White's belief was unreasonable based on Inspector Jordan's testimony that, one week before the air reversal, he advised White that MSHA approval was necessary for ventilation changes. The inspector stated, "We had discussed it and, if I remember correctly, I indicated to Mr. White, whatever he did, to make sure that approval was obtained before it was done." Tr. 53 (emphasis added). White denied discussing a prior approval requirement with anyone from MSHA. Tr. 264. The inspector's testimony was uncertain; it does not overcome the substantial evidence supporting the judge's determination that White, whose testimony the judge credited, had a good faith belief that he was complying with the regulations. 15 FMSHRC at 1977-78. The Commission has often emphasized that a judge's credibility determinations may not be overturned lightly. E.g. Quinland Coals, Inc., 9 FMSHRC 1614, 1618 (September 1987).

Substantial evidence supports the judge's conclusion that Basin had a good faith, although mistaken, belief that it was complying with the Secretary's regulations when it attempted to improve the safety of the mine's ventilation system. The judge implicitly found that White's belief was reasonable under the circumstances and that determination also has substantial support in the record. Accordingly, the Commission affirms the judge's determination that Basin's conduct was not aggravated and, thus, that the violation did not result from unwarrantable failure.

B. Section 110(c) Liability

Section 110(c) of the Mine Act provides that, whenever a corporate operator violates

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FOOTNOTE 14

Commissioners Backley, Doyle and Holen vote to affirm the judge's determination that White was not liable for the violation under section 110(c) of the Act. Chairman Jordan votes to vacate and remand. This section of the decision is based on the rationale of Commissioners

Backley, Doyle and Holen.

a mandatory safety or health standard, any agent of the corporate operator who "knowingly authorized, ordered, or carried out such violation" shall be subject to civil penalty. 30 U.S.C. 820(c). The Commission has held that a "violation under section 110(c) involves aggravated conduct, not ordinary negligence." BethEnergy Mines, Inc., 14 FMSHRC 1232, 1245 (August 1992).

The judge determined that the General Manager, Earl White, had not knowingly authorized the violation. The Secretary contends that all the evidence supporting a finding that the ventilation change resulted from Basin's unwarrantable failure also compels a conclusion that White should be held liable under section 110(c). White responds that his reasonable, good faith belief that he was acting within the regulations to improve safety precludes a finding of section 110(c) liability.

Substantial evidence supports the judge's conclusion that White is not liable. White's concern in implementing the ventilation change was safety; he was attempting to rectify a serious ventilation problem. The judge found that, although White was mistaken, he had a good faith belief that he did not need MSHA's prior approval for the ventilation change. 15 FMSHRC at 1977. The Commission has affirmed the judge's implicit finding that White's belief was reasonable. The Commission concludes that substantial evidence supports the judge's determination that White did not engage in aggravated conduct and affirms the judge's dismissal of the section 110(c) complaint.

C. High Methane Levels

The second citation, as modified, alleged that Basin violated its ventilation plan in that the mine's bleeder systems were to meet or exceed the criteria set forth in 30 C.F.R. 75.316-2(e) through (i)(1991). See Gov't Ex. M-1, p. 37. The judge found a violation

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FOOTNOTE 15

All Commissioners reverse the judge's determination of violation with respect to the methane accumulations.

FOOTNOTE 16

Section 75.316-2, in effect in June 1991, provided in relevant part:

> (h) The methane content of the air current in the bleeder split at the point where such split enters any other air split should not exceed 2.0 volume per centum.
>
> (i) When the return aircourses from all or part of the bleeder entries of a gob area and air other than that used to ventilate the gob area is passing through the return aircourses, the bleeder connectors between the return aircourses and the gob shall be considered as bleeder entries and the concentration of methane should not exceed 2.0 volume per centum at the intersection of the bleeder connectors and the return aircourses.

In 1992, these provisions were superseded by 30 C.F.R. 75.323(e).

because the MSHA inspectors measured methane levels of 4% to 5% and more in the tailgate section four feet from the Kennedy stoppings at crosscuts 62 and 63, some 60 feet from the No. 3 return entry. 15 FMSHRC at 1978. He determined that the inspector "measured the methane at the proper location and manner." Id. at 1980. Basin argues that MSHA measured the methane at a location other than that required by the plan. It asserts that the readings were taken no more than four feet outby the stoppings separating the gob from the bleeder taps, 50 to 60 feet inby from where the measurements should have been taken, i.e., the mixing point where the bleeder connectors intersect the return entry. The Secretary counters that the measurements were taken at the appropriate place and that the ventilation change caused impermissible levels of methane to accumulate in the section.

As discussed earlier, we are bound by the substantial evidence test when reviewing an administrative law judge's factual determinations. The Commission is guided by the settled principle that, in reviewing the record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. Universal Camera Corp. v. NLRB, 340 U.S. at 488.

The cited plan provisions address methane levels at the intersection of bleeder connectors and return air courses (n.16, supra). The record evidence, relied on by the judge (15 FMSHRC at 1978), reveals that the inspectors measured the methane at two locations in the bleeder connectors nearly 60 feet inby the mixing point where the connectors intersect the return entry. The Secretary presented no evidence or argument that these locations were valid testing points for the bleeder-return intersections. Thus, the judge's finding that the measurements were taken at proper locations lacks substantial evidentiary support, and the Commission reverses his determination of violation.

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Richard V. Backley, Commissioner

The separate opinions of Commissioners follow.

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FOOTNOTE 17

We do not reach the S&S and unwarrantable failure issues associated with this violation. We note, however, that the Secretary argued on review that Basin's methane violation was the result of unwarrantable failure, although he neither charged this nor argued the point below. In his decision, the judge inadvertently addressed unwarrantable failure and found that such an allegation had not been proven.

Commissioner Doyle and Commissioner Holen, concurring in part and dissenting in part:

We concur with the opinion in all respects except that we must respectfully dissent in part from the rationale set forth for the determination of whether the violation based on the ventilation change was significant and substantial ("S&S").

We agree with the judge that Inspector Jordan's testimony to the effect that "anything that has the potential for serious injury or bodily harm is automatically significant and substantial" and his further testimony that "it is only a 'guesstimate'" as to the consequences of the violation conflict with the Commission's settled law. 15 FMSHRC at 1975. Under Commission precedent, neither statement would support an S&S finding. Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984).

We believe that our colleagues err in failing to reach the issue on which the judge based his decision, i.e., that an uncontested imminent danger order, by virtue of being a final Commission order, establishes that an imminent danger actually existed. 15 FMSHRC at 1976. They remand for further analysis of the evidence. Slip op. at 10. Although we agree that further analysis is required, the imminent danger order issue should be decided at this stage. The judge's ruling on the effect of the imminent danger order served as the sole basis for his S&S finding and must be disposed of before the adequacy of the judge's analysis of the record evidence is reached. Further, should the judge on remand again find that the Secretary failed to establish S&S, his conclusion on the effect of the imminent danger order would be left standing and another Commission proceeding would be required to decide that issue.

We would reverse the judge's determination. Section 107(e)(1) of the Mine Act provides operators with the opportunity to challenge section 107(a) imminent danger orders within 30 days after issuance. 30 U.S.C. 817. The finality of such orders is not referenced in the Mine Act, except in section 111, as a basis for compensation to miners who are idled as a consequence. 30 U.S.C. 821. The judge's opinion appears to be based on a theory that the imminent danger order, as a final order of the Commission, is equivalent to a final judgment on a litigated issue. Under this theory, Basin is prohibited, presumably under the doctrine of either res judicata or collateral estoppel, from challenging whether an imminent danger actually existed on June 25. We disagree that this is the effect of a final imminent danger order.

The judge offers no legal theory or other basis for his conclusion that the allegations set forth in a final imminent danger order can be used in another proceeding to irrebuttably establish those allegations. The Mine Act and Commission precedent address the finality of an imminent danger order only in the context of compensation proceedings arising under

section 111. The doctrines of res judicata and collateral estoppel would not preclude challenge to such a final order because those doctrines require the claim or issue to have been previously litigated. Moreover, those doctrines have "the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979), citing Blonder-Tongue Lab., Inc. v. University of Ill. Found., 402 U.S. 313, 328-329 (1971).

Here, neither purpose would be served. Presently, an operator has, in most instances, no reason to contest an imminent danger order unless compensation is in issue. Penalties are not assessed in connection with an imminent danger order. Nor are alleged violations giving rise to an imminent danger order part of the imminent danger order itself, but rather are set forth in other citations and orders issued in connection with the dangerous condition, as was the case here. Under the judge's logic, operators desiring to avoid a per se finding of reasonable likelihood of injury, the third element of the Commission's S&S test, would need to litigate each and every imminent danger order, irrespective of whether compensation were in issue. Where no imminent danger was found, the reasonable likelihood allegation, which could be based on a less dangerous and less immediate threat to safety, would still be in issue and subject to litigation.

To the extent our colleagues' opinion suggests that Ranger Fuel Corp., 12 FMSHRC 363 (March 1990), would support the judge's conclusion, we believe it is in error. Slip op. at 9. Ranger is not relevant here. That case involved section 111 compensation to miners arising from an imminent danger withdrawal order. Under section 111, limited compensation is payable to miners irrespective of the validity of the withdrawal order but the further compensation sought in Ranger was contingent upon the relevant order becoming "final." 30 U.S.C. 821; 12 FMSHRC at 373. The operator attempted to contest the validity of a final imminent danger order in the compensation proceeding although, under section 111, the challenged compensation was contingent only upon the order being final, not on the actual existence of an imminent danger. See 30 U.S.C. 821. The Commission denied Ranger's challenge. 12 FMSHRC at 373. Here the issue is not whether the order is final but whether a final unlitigated imminent danger order can be used in a penalty proceeding to irrebuttably establish that an imminent danger actually existed.

We join in vacating the judge's determination that the Secretary had failed to offer evidence establishing reasonable likelihood of injury. On remand, we would ask the judge for further analysis of the record, including Inspector Denning's testimony that the ventilation change implemented by the operator caused methane to accumulate in the tailgate as well as his testimony that such accumulation, along with the ignition source of the longwall

equipment, had, in fact, created an imminent danger. Tr. at 123-24. We would also ask the judge to resolve expressly whether the ventilation change instituted by Mr. White remained in effect at the time of the citation. Contrary to our colleagues' view, we would leave to the judge the evaluation of whether an explosion five months earlier is relevant. Slip op. at 9.

_____
Joyce A. Doyle, Commissioner

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Arlene Holen, Commissioner

Chairman Jordan, concurring in part and dissenting in part:

I concur with Parts I., II. A. 1-3, and II. C. of the opinion. I cannot join my col- leagues in affirming the judge's determination that the unauthorized change to the ventilation plan was not the result of the operator's unwarrantable failure to comply with 30 C.F.R. 75.316 (1991). I also dissent from the majority's section 110(c), 30 U.S.C. 820(c), determination.

I.

The judge decided that the allegations of unwarrantable failure should be stricken because "the operator through its manager [Earl White] had a good faith honest belief that he was complying with the regulations." 15 FMSHRC at 1978. I find this conclusion lacking in two respects. First, the judge based his good faith finding on irreconcilably conflicting credibility determinations and failed to analyze important record evidence bearing on good faith. Second, the judge has failed to determine the reasonableness of any belief on White's part that his actions constituted the safest way of adhering to the requirements of section 75.316. The judge's failure to analyze the reasonableness of White's belief is particularly troublesome in light of significant record evidence that casts doubt on Basin's claim that White reasonably believed he did not need the approval of the Department of Labor's Mine Safety and Health Administration ("MSHA") before reversing the air flow from the configu- ration set forth in the ventilation plan. Accordingly, I would vacate the judge's finding that there was no unwarrantable failure and remand it for further consideration consistent with the analysis contained in this opinion.

The violation occurred when White unilaterally revised the ventilation system on Sunday, June 23, 1991, so that it deviated substantially from the ventilation plan that had been approved by MSHA. Basin maintains that White reasonably and in good faith believed that section 75.316 permitted him to implement the major ventilation changes that were carried out on June 23 before obtaining MSHA's approval. The question to be determined is whether the judge properly analyzed the twin factors of reasonableness and good faith in the context of the circumstances confronting White at the time.

The Commission has held that "if an operator reasonably believes in good faith that the cited conduct is the safest method of compliance with applicable regulations, even if it is in error," the operator will not be found to have acted with the aggravated conduct necessary to establish a finding that the conduct resulted from unwarrantable failure. Southern Ohio Coal Co., 13 FMSHRC 912, 919 (June 1991). The Commission's requirement that the operator demonstrate a good faith and reasonable belief that it was pursuing the safest method of complying with applicable regulations is analogous to the Commission's doctrine that a miner's work refusal is protected when he entertains a reasonable, good faith belief that his assigned duties involve a hazard. Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 808-12 (April 1981).

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FOOTNOTE 1

All dates are 1991.

An operator's belief that his viol0000e conduct was the safest method of complying with MSHA regulations must be both reasonable and held in good faith in order to establish a defense to a charge of unwarrantable failure. Southern Ohio Coal Co., supra; see Robinette, supra. "Good faith belief simply means honest belief" that the conduct constitutes the safest method of complying with applicable regulations. See Robinette, 3 FMSHRC at 810. But a good faith belief in and of itself is not sufficient to defend against the unwarrant- able failure charge. "Good faith also implies an accompanying rule requiring validation of reasonable belief." Id. at 811. In the work refusal context, the Commission has held that reasonableness "is a simple requirement that the miner's honest perception be a reasonable one under the circumstances." Id. at 812 (emphasis in original). Similarly, in the unwar- rantable failure setting, the operator's good faith belief should meet the same requirement.

A.

Bearing in mind that "in reviewing the whole record, an appellate tribunal must also consider anything in the record that 'fairly detracts' from the weight of the evidence that supports a challenged finding," (Asarco Mining Co., 15 FMSHRC 1303, 1307 (July 1993), citing Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951)), it is my view that the judge made credibility determinations which cannot be squared with his finding that White "had a good faith honest belief that he was complying with the regulations." 15 FMSHRC at 1978.

At the outset, I note that the good faith with which the Commission must be con- cerned here has nothing to do with blameworthiness or good intentions. Rather, good faith simply means that the operator in fact entertained the belief that his course of action was designed to safely comply with applicable regulations. The good faith requirement insures that fraudulent or deceptive operator claims to be mistakenly acting in accordance with MSHA regulations will not shield the operator from an unwarrantable failure finding. See Robinette, 3 FMSHRC at 810. It is therefore irrelevant for the purposes of the good faith inquiry whether the operator is motivated to violate a safety standard in the hope or expecta- tion that the result will be a safer working environment. If the operator believes that he is violating MSHA regulations, his good intentions will not translate into a good faith belief that he is safely complying with applicable standards.

Thus, the judge did not base his finding that White acted in good faith on White's motivation for making the ventilation change. Rather, the judge found that "White did not believe that 30 C.F.R. 75.316 required that he obtain prior approval from MSHA before implementing changes in the ventilation system." 15 FMSHRC at 1977. In explaining their agreement with the judge's unwarrantable failure finding, however, the majority finds relevant the fact that "in directing the ventilation change, White was attempting to improve the mine's ventilation." Slip op. at 11. This conclusion misses the mark. While I accept at

face value Basin's protestations that White was motivated by a desire to improve the ventila- tion, unless it is shown that he believed that he was complying with MSHA regulations, he cannot be found to have acted in good faith.

The judge found White's belief that section 75.316 permitted him to change the ventilation before getting MSHA approval to be "based on the language in the regulations and his previous experience," and he concluded that "this evidence is credible." 15 FMSH- RC at 1977. Thus, the judge's conclusion regarding unwarrantable failure was based, at least in part, on credibility determinations. The judge apparently credited White's testimony regarding what White believed to be his obligations under section 75.316. The judge offered no explanation why he found White's testimony concerning the requirements under section 75.316 to be "credible" when, at the same time, he determined White was not telling the truth regarding the events that led up to his decision to implement the ventilation change.

White's deputies, Steve Salazar and David Huey, testified that in the course of discussing White's proposed ventilation changes, they warned him of the need to obtain prior approval from MSHA. Tr. 63-64, 80-82. White flatly denied receiving these warnings. Tr. 240. The judge, however, credited the testimony of the deputies, concluding: "It is true that Salazar and Huey told White prior notification was necessary." 15 FMSHRC at 1977. According to Salazar, White responded to the warning about the need for prior approval by stating that "he was in charge of the operation, not MSHA, and that he was going to run the operation." Tr. 64; see also Tr. 82. This comment is hardly indicative of someone who is attempting in good faith to ascertain his obligation under the law. Neither the judge nor my colleagues discuss this comment, which I view as detracting mightily from the conclusion that White was acting in good faith. Nor do they discuss the impact of White's untruthful- ness here on the judge's finding credible White's asserted belief that section 75.316 permitted White to make major ventilation changes without prior MSHA approval.

Similarly, Inspector Jordan testified that he specifically warned White just days before the incident that MSHA approval was required before any change to the ventilation plan could be made. Tr. 53. Again, White denied that Jordan warned him to contact MSHA first. Tr. 264. There is no hint in the judge's decision that he even considered the differing versions of Jordan and White, much less that he credited White over Jordan concerning this conversation, as my colleagues imply. Slip op. at 12. Yet this evidence bears directly on whether White in

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FOOTNOTE 2

Indeed it is difficult to imagine a situation in which an operator would deliberately reverse the direction of the air flow without intending to improve the ventilation. Good intentions, however, don't always translate into safe results. Between Sunday, when White implemented the ventilation change, and Tuesday morning, when MSHA arrived at the mine, the miners were working under a ventilation scheme that, while it represented White's view of the best way to provide air to the No. 1 longwall, did not have the benefit of MSHA's review and approval. Tr. 55, 208. During this time, the mine apparently experienced methane

accumulations resulting in the cessation of operations for over an hour. Tr. 329.

fact believed that he was complying with MSHA regulations when he made the ventilation change.

As the judge did not find White to be a credible witness concerning his deputies' explicit warning that prior notification of MSHA was necessary, and because he failed to even discuss Jordan's testimony that Jordan had specifically warned White about the require- ment of prior MSHA approval, the judge's conclusion that White's action was based on an honest good faith belief that he was complying with section 75.316 cannot be said to be supported by substantial evidence.

B.

Equally damaging to the judge's unwarrantable failure conclusion is his failure to discuss the reasonableness requirement at all or reach a conclusion with respect thereto. Because an operator seeking to avoid the unwarrantable failure sanction must establish reasonableness in addition to good faith, the judge's conclusion that "[t]here was no unwar- rantable failure because the operator through its manager had a good faith honest belief that he was complying with the regulations" is, as a matter of law, erroneous. 15 FMSHRC at 1978. This formulation by the judge addresses only half of the two-pronged test under the good faith reasonable belief defense to unwarrantable failure.

The language of section 75.316 casts serious doubt on the reasonableness of White's belief that he could unilaterally deviate from the approved ventilation plan. Section 75.316 tracked section 303(o) of the Mine Act, 30 U.S.C. 863(o), and provided in pertinent part:

> A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining

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FOOTNOTE 3

Jordan testified: "We had discussed it and, if I remember correctly, I indicated to Mr. White, whatever he did, to make sure that approval was obtained before it was done." Tr. 53. Emphasizing the phrase "if I remember correctly," the majority characterizes Jordan's testimony as "uncertain." Slip op. at 12. I disagree. I construe Jordan's words as a common locution employed by witnesses on the stand, rather than as a query whether Jordan is in fact inventing the conversation to which he himself is testifying. In any event, the point here is that whatever I or the majority believe this phrase means, we cannot know what the judge thought it meant, since he did not advert to Jordan's testimony at all.

FOOTNOTE 4

The judge's failure to even address the reasonableness question is not cured by the majority's finding that "[t]he judge implicitly found that White's belief was reasonable . . .- ." Slip op. at 12 (emphasis added). As we have already had occasion to observe in this case, "[a] judge must analyze and weigh the relevant testimony, make appropriate findings, and explain the reasons for his decision." Slip op. at 10, citing Mid-Continent Resources, Inc., 16 FMSHRC 1218, 1222 (June 1994) and Anaconda Co., 3 FMSHRC 299, 299-300 (February 1981).

> system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. . . .

30 C.F.R. 75.316 (emphasis added).

I fail to see how the plain language of section 75.316 supports a view that an operator is free to deviate from its approved ventilation plan as long as that operator subsequently informs MSHA. Indeed it would appear that by requiring an operator to adopt a ventilation plan that is approved by the Secretary, the opposite assumption should arise: that an operator is not free to deviate from the ventilation requirements without prior recourse to the approval process that created them. The specific requirement that "revisions" to the plan also be "approved" by the Secretary lends further support to this view.

The judge found that when White was told about the need to inform MSHA of his planned ventilation change, he read section 75.316 and stated, "Show me in the book where it says I have to notify MSHA of this change." 15 FMSHRC at 1977. White apparently took the view that, since section 75.316 did not contain language explicitly prohibiting variance from the approved ventilation plan, he was free to deviate from the plan and simply inform MSHA about it later. My colleagues and the judge below apparently consider it reasonable that White could reach this conclusion after reading section 75.316. I decline to affirm a judge's ruling which appears to accept as reasonable a view of the law which I find to be not only illogical, but also contradicted by the regulatory language and the case law.

The case law concerning enforcement of ventilation plans undermines the reasonable- ness of any belief on White's part that he could unilaterally change the ventilation plan. A manager of White's experience may be fairly charged with knowledge of the basic holdings under the Mine Act, just as a miner claiming to have engaged in a protected work refusal may be charged under certain circumstances with knowledge of the applicable safety standard. See Secretary on behalf of Boswell v. National Cement Co., Inc., No. SE 93-48- DM, 16 FMSHRC _____, slip op. at 8 (August 17, 1994) (Chairman Jordan, concurring). It is well established under Commission and court precedent that once a ventilation plan is approved and adopted, its provisions and revisions are enforceable as mandatory standards. UMWA v. Dole, 870 F.2d 662, 671 (D.C. Cir. 1989); Freeman United Coal Mining Co, 11 FMSHRC 161, 164 (February 1989); Jim Walter Resources Inc., 9 FMSHRC 903, 907 (May 1987). Just as it would be unreasonable for an operator to assume that it could deviate from the requirements of a mandatory safety standard, it is equally unreasonable for an operator to assume that it may unilaterally change its approved ventilation plan, which is enforceable as a mandatory safety standard.

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FOOTNOTE 5

White has worked in the mining industry since 1965. Tr. 244.

The judge's decision fails to analyze the reasonableness of White's belief in the context of the language of section 75.316 or the cases interpreting that standard. Moreover, the majority's conclusion that White's interpretation of section 75.316 was reasonable conflicts with the judge's stated view that "[i]f the Commission accepts White's theory then the ventilation regulations would be meaningless." 15 FMSHRC at 1972. On this last point at least the judge was on target. Obviously, if an operator were permitted to change its approved ventilation plan at will, and notify MSHA post hoc, section 75.316's requirement that the mine operate under a "ventilation . . . plan and revisions thereof . . . approved by the Secretary" would be a nullity. I am unable to conclude that an operator who insists on acting in accordance with a view of the law that makes the ventilation requirements "mean- ingless" should be considered to entertain a reasonable belief that his conduct complies with the ventilation regulation.

The case might be otherwise had White been faced with an emergency requiring immediate action without the possibility of contacting MSHA. But the judge made no such finding, and the record here certainly does not suggest this was the case. The record in fact contains significant evidence that undercuts any claim that White was confronted with an unexpected emergency situation which prevented him from obtaining the necessary prior approval from MSHA.

Thus, Inspector Denning testified that the conditions prompting the air change had developed over an extended period of time, and that proper plans could have been submitted to and approved by MSHA. Tr. 137-38. Inspector Jordan described the problem as an "ongoing" one that had been occurring for at least two to three weeks. Tr. 41. According to him, White's unauthorized changes to the ventilation system converted what had been a "borderline" problem into an "imminent danger" prompting the issuance of a withdrawal order on the evening of Tuesday, June 25. Tr. 36. Basin's project engineer described the problem as occurring "off and on from early June up to the 21st." Tr. 419. It is also clear from the record that White did not need to fear that any increase in the severity of the problem would go undetected. Mine Foreman Salazar explained that subsequent to an explosion which had occurred five months earlier, employees were monitoring the area "24 hours a day" and were working with MSHA on the ventilation in that area. Tr. 62; see Tr. 27. Moreover, as counsel for Basin conceded at oral argument, there is nothing in the record that indicates MSHA warned White that he might be cited unless he made significant changes in the ventilation system. Oral Arg. Tr. 43.

The closest the judge comes to even hinting at the existence of an exigent situation is his conclusion that "White felt he could have been cited for failing to correct the problems in

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FOOTNOTE 6

The record contains conflicting testimony about whether White's changes caused the conditions which prompted the issuance of the imminent danger order. Because the judge failed to reconcile the conflict and make the necessary findings of fact, the Commission has vacated the S&S finding and remanded for additional proceedings. Slip op. at 8-10.

the ventilation system." 15 FMSHRC at 1977. But the judge failed to discuss any evidence relating to this issue, nor did he make any findings of fact which would allow us to conclude that White's concern in this regard was in fact reasonable.

The majority relies on the explicit requirement in section 75.370, the successor to section 75.316, that major changes to the ventilation system must be submitted to and approved by the MSHA district manager before implementation. Slip op. at 12. My colleagues also cite MSHA inspector Denning's testimony to the effect that section 75.316 provided "no guidance" for mine operators as to the type of changes that could be made without prior approval, and they point to the Secretary's position at oral argument that, absent the cover letter, prior approval was not required. Id. On the basis of this evidence, the majority concludes that it "does not find unreasonable White's good faith belief that prior approval was not required." Id.

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FOOTNOTE 7

The judge's sole record reference to the conditions in the mine prior to the ventilation change is a parenthetical instruction to "see Exhibit BR-1" in order to learn of "apparent problems in the system." 15 FMSHRC at 1977. BR-1 consists of a 3-page typed chronolo- gy covering the period from June 1 through June 29 with 279 pages of supporting documents including preshift, daily and on-shift reports. It is certainly not apparent from these examination reports that conditions arose which caused White to decide on Friday, June 21, that he must implement immediate changes. Indeed the opposite conclusion arises. For instance, under the heading "Violation or Hazardous Condition," the preshift exam for the Northwest longwall at 4:00 a.m. that day reports "[n]one observed." The on-shift report shows the highest level of methane to be 0.5% and reports that the area was "safe at time of inspection." The preshift at 1:04 p.m. on June 21 reports no hazardous conditions and the highest methane level to be 0.5%, the same reading reported in the on-shift report for that evening. The six examination reports dated June 22 likewise reflect methane levels well under 1% (although the chronology prepared by White inexplicably refers to a reading of 1.1 - 1.3% for that date).

The judge's conclusion that White feared being cited for failing to change the ventilation system might be a reference to White's testimony that other regulations, such as 30 C.F.R. 75.308 and 75.309, mandate changes or adjustments when certain levels of methane are found in specified areas of the mine. Tr. 248-49, 370. Of course, whether White actually considered these regulations at the time he made his decision is open to question since, according to the version of events described by White's deputies and accepted by the judge, it would appear that White's sole reference in determining his obligation to obtain prior authorization from MSHA was section 75.316. 15 FMSHRC at 1977. While reliance on these other regulations might be a relevant consideration in assessing whether an operator acted unwarrantably, the judge has made no findings which would allow us to conclude either that White in fact relied on these regulations or that such reliance was reasonable under the circumstances.

This conclusion is unfounded. The commentary accompanying MSHA's rulemaking indicates that MSHA viewed the prior approval requirement for major ventilation changes as a continuation of the practice already in existence. 57 Fed. Reg. 20868, 20899 (May 15, 1992). Moreover, while Inspector Denning may not have been able to point to exact guidelines that spelled out the type of ventilation changes that could not be made without prior approval, he was certain that "[a] major change, such as reversing the air in an air course, would definitely require approval." Tr. 173. Finally, the comment of Secretary's counsel that the majority rely on to support the reasonableness of White's belief has itself been rejected as an unreasonable view of the regulation. Slip op. at 7.

Whether White could reasonably conclude he did not need MSHA's prior authoriza- tion must be determined on the basis of the particular circumstances confronting White at the time. In this regard, I consider it relevant that when White decided to unilaterally implement the ventilation change, the mine in question was a gassy mine and only five months earlier had experienced a major explosion which caused varying degrees of injury to eleven miners. Tr. 27, 39. Moreover, the explosion occurred in the very section of the mine, the Northwest No. 1 longwall panel, where White planned to change the ventilation design. Tr. 142-43. It seems to me these facts alone, which were not considered by the judge, would seriously undermine the reasonableness of White's belief that no prior authorization from MSHA was needed before implementing changes that significantly departed from the approved ventilation plan. Here, however, we have the additional fact that White reversed the air flow in the face of explicit warnings by his two subordinates that MSHA insisted on approving ventilation changes at the Golden Eagle Mine prior to their implementation. Tr. 63-64, 80-82. The judge should have considered whether White's insistence on going forward under these circumstances, when he could have easily picked up the phone and clarified his obliga- tions,

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FOOTNOTE 8

Before implementing a change of this magnitude, White had to idle the mine and shut off the power; White's change was therefore a far cry from merely adjusting a line curtain or opening a regulator, the kinds of adjustments to ventilation that Inspectors Denning and Reitz testified were authorized by 30 C.F.R. 75.308 and 75.309 and would not require prior approval. Tr. 157, 189-90, 207-08. White himself seemed to recognize the distinction. While he provided MSHA with post-hoc notification of his air reversal, he did not feel it necessary to provide even such after-the-fact notification when he opened a regulator to provide more air on the longwall. Tr. 261-62.

FOOTNOTE 9

Inspector Jordan testified that the Golden Eagle Mine "is number one in the State of Colorado for methane liberation." Tr. 26.

FOOTNOTE 10

Although White took over the operation of the mine on June 1, he had been at the property on a daily basis since April 9 and during that time learned about the explosion that occurred. Tr. 339-40.

FOOTNOTE 11

At oral argument, counsel for the Secretary confirmed that someone from MSHA would have been available on the weekend to handle calls. Oral Arg. Tr. 35.

amounted to a willful intent to remain in the dark about what section 75.316 required. The judge should have determined whether such action fell outside the protection of the good faith and reasonable belief defense the Commission has articulated, and accordingly constitut- ed aggravated conduct.

II.

The judge's failure to reconcile inconsistent credibility determinations, and his failure to consider evidence which detracts from a finding that White acted reasonably and in good faith, cause me to conclude that the judge's finding of no unwarrantable failure is not supported by substantial evidence and should therefore be vacated and the matter remanded for further proceedings. With respect to the Secretary's assessment of a civil penalty against White personally pursuant to section 110(c) of the Mine Act, the judge merely stated, "The evidence as to White has been previously reviewed. His conduct was not 'aggravated.'" 15 FMSHRC at 1981. Because the judge's analysis of that evidence was flawed, as I have detailed above, I would also vacate and remand the judge's section 110(c) finding.

Mary Lu Jordan, Chairman