FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 21, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket Nos. SE 2008-881
v.	:	SE 2008-268-R
JIM WALTER RESOURCES, INC.	:	

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

DECISION

BY: Jordan, Chairman; Nakamura and Althen, Commissioners

This consolidated contest and civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012). At issue is whether a Commission Administrative Law Judge abused his discretion in reducing a civil penalty assessed against Jim Walter Resources, Inc. ("JWR") for a failure-to-wear-fall-protection violation of 30 C.F.R. § 77.1710(g).[1] 33 FMSHRC 362 (Feb. 2011) (ALJ). The citation was issued to JWR following a fall by an employee of JWR's contractor, O&O Services. The Judge assessed a penalty of $500 rather than the proposed penalty of $45,000. *Id.* at 370-71. The Secretary of Labor filed a petition for discretionary review, challenging the penalty reduction, the Judge's finding that JWR was not negligent, and the Judge's related treatment of evidence regarding two prior incidents involving violations of section 77.1710(g) by JWR. For the reasons that follow, we affirm the Judge's decision.

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[1] 30 C.F.R. § 77.1710 provides in part that, "Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below." Paragraph (g) provides:

> Safety belts and lines where there is a danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.

30 C.F.R § 77.1710(g).

I.

Factual and Procedural Background

The clean coal load-out facility at JWR's No. 4 Mine funnels clean coal into trucks and rail cars. Clean coal is moved by conveyor belt to the top of the facility, where it is dumped into a large, downward pointing metal cone-shaped loading bin. The cone surrounds an opening in the floor of a platform, which is approximately 21 by 48 inches in size. The cone funnels and loads the coal into trucks parked beneath the loading bin. Tr. 64, 117; JWR Exs. 6g-6i.

JWR contracted with O&O to provide the labor and supervision for a project to replace the cone-shaped bin. 33 FMSHRC at 364. O&O was to remove the eight sections of the cone and replace them with new sections.

O&O's work on the project began on December 2, 2007. *Id.* Loops, called "pad eyes" were welded onto the existing bin and the new sections of the cone. *Id.* at 370; Gov't Ex. 20F; Tr. 334-35, 389. The loops could be used to lift the structure's pieces or for miners to tie-off on them. Tr. 389. Removal of the cone sections exposed the hole in the floor of the platform. During part of the project, the hole was covered with a metal plate that had metal fins, or "gussets," protruding from it. Tr. 64-65.

On December 4, two issues arose regarding the project. Tr. 319-21. First, there were concerns that part of the structure had been unevenly cut, which could potentially result in gaps between the new cone sections. Tr. 233-36, 263-64, 277, 310. Second, O&O experienced difficulty in positioning some of the new sections of the cone into place because the metal fins on the metal plate covering the hole in the platform were interfering with placement of the pieces. Tr. 67-68, 312.

At some point during installation of the cone pieces, the metal plate was moved away from covering the entire hole and a section of 2 x 12 wooden board was placed over the open space, partially covering the hole. Tr. 78, 317, 393. Tony Pierce, an O&O employee, stood on the board using a pry bar to move the fifth cone section into place. Tr. 67, 109-10, 117-18, 316-17. The board was dislodged, and Mr. Pierce fell through the hole a distance of 25 feet and landed on a concrete platform. Tr. 81, 139. Pierce was not wearing a safety belt or fall protection. Tr. 113.

The Department of Labor's Mine Safety and Health Administration ("MSHA") investigated the accident. As a result of the investigation, MSHA Inspector Stephen Womack issued citations to O&O and JWR. The citation issued to O&O alleged a significant and substantial ("S&S") violation of section 77.1710(g) that had been caused by O&O's

unwarrantable failure.[2] Gov't Ex. 2. The Secretary proposed a penalty of $60,000 against O&O. O&O agreed to pay $5,000 in settlement of the citation, and the Judge approved the settlement. 33 FMSHRC at 364 n.1; PDR at 3, 4.

The citation issued to JWR, Citation No. 7693051, alleged an S&S violation of section 77.1710(g) that had been caused by moderate negligence. Gov't Ex. 3. The citation was terminated on February 5, 2008, after "[JWR] management . . . submitted to MSHA a statement indicating that a greater emphasis on the use of PPE [personal protective equipment] will be related to contractors doing work on JWR No. 4 mine property, and during the process of hazard training will review recent accidents of contractor employees." *Id.* The Secretary proposed a special assessment of $45,000 against JWR.[3]

JWR challenged the citation, and the parties conducted discovery and filed prehearing pleadings. Prior to and during the hearing, the Judge granted in part a motion in limine filed by the operator seeking to exclude evidence that had been the subject of previously issued protective orders. PDR at 3 n.1; Tr. 7-10. The Judge excluded evidence regarding a 2001 incident, including proposed Gov't Ex. 13A, which is a citation issued to JWR alleging a violation of section 77.1710(g). Tr. 7-8, 10. The Judge admitted evidence regarding a 2007 incident, including a citation issued to JWR for a violation of section 77.1710(g) arising from a fatal fall by JWR's contractor (Gov't Ex. 9) and a decision approving settlement regarding the 2007 incident (Gov't Ex. 11). Tr. 134-35. The Judge excluded other evidence regarding the 2007 incident. Tr. 5, 7.

Following a hearing on the citation issued to JWR, the Judge affirmed the citation and assessed a civil penalty of $500 against JWR rather than the proposed penalty of $45,000. 33 FMSHRC at 368, 370-71. He concluded that O&O violated the standard, and that the violation was S&S. *Id.* at 368-69. The Judge reasoned that because the Secretary may cite JWR as an owner-operator for its contractor's violations, JWR was also liable for the violation. *Id.* at 368.

Applying the factors set forth in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), in his assessment of penalty, the Judge found that JWR is a large business, that there was no evidence that the proposed penalty would affect its ability to remain in business, and that the violation was

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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." The unwarrantable failure terminology is also taken from section 104(d)(1) of the Act, which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards." 30 U.S.C. § 814(d)(1).

[3] In the Secretary's determination of a proposed penalty amount, the Secretary may propose a "regular assessment" under 30 C.F.R. § 100.3 or a "special assessment" under 30 C.F.R. § 100.5.

abated promptly and in good faith. *Id.* at 369. The Judge further found that gravity was high, and that JWR had a significant history of violations. *Id.* at 368-69.

Regarding negligence, the Judge noted that Inspector Womack testified that JWR was moderately negligent because it did not do "everything [it] could" to see that its contractor was following federal regulations. *Id.* at 369-70. The Judge reasoned that the Secretary was in essence suggesting that JWR must maintain direct and continuous supervision over its contractor's employees, but that such a requirement is not required by law. *Id.* at 370. He stated that the closest the Secretary had come to providing notice as to the standard of care required of JWR was the abatement required regarding the 2007 incident. *Id.* Those abatement actions included additional training and requiring JWR to install an adequate anchorage system. *Id.* The Judge found that, in this instance, JWR had provided an adequate anchorage system and that O&O employees were provided adequate training prior to beginning work. *Id.* The Judge concluded, accordingly, that JWR exercised the standard of care required by law and that the Secretary failed to prove that JWR was negligent. *Id.*

The Secretary filed a petition for discretionary review challenging the Judge's finding that JWR was not negligent, the Judge's treatment of evidence regarding the 2001 and 2007 incidents, and the Judge's reduction of penalty. The Commission granted the Secretary's petition.

II.

Disposition

A. The Judge's Finding that JWR was Not Negligent Is Supported by Substantial Evidence.

The Commission has recognized that "[e]ach mandatory standard . . . carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an operator met its duty of care, we consider what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation.[4] *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910

[4] We reject the Secretary's argument that the Commission must apply the standard of care set forth in 30 C.F.R. § 100.3(d) in considering whether JWR was negligent. Section 100.3(d) defines negligence in part as "conduct, either by commission, or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d). The Secretary's Part 100 regulations apply only to the Secretary's. penalty proposals, while the Commission exercises independent authority to assess penalties pursuant to section 110(i) of the Mine Act. *Deshetty, emp. by Island Creek Coal Co.*, 16

(Aug. 1984).

Considering JWR's conduct against this framework, we conclude that substantial evidence supports the Judge's determination that JWR was not negligent.[5] The record demonstrates that JWR was not negligent in hiring O&O. O&O had no prior MSHA violations. Tr. 197, 333, 414. O&O had completed other projects for JWR safely, including three or four that year, and was considered an "approved vendor" for JWR. Tr. 274, 292-93. JWR also determined that O&O was appropriately aware of MSHA's regulations. JWR ensured that O&O had received required training before work on the project began. Tr. 299, 349-50. As part of their hazard training, O&O's employees watched an MSHA fall protection video. Tr. 387, 400-02. O&O's training program had been approved by MSHA. Tr. 185-86, 414. Robin O'Dell, an employee of O&O who provided training, was an MSHA certified trainer. Tr. 387, 398-401.

Furthermore, we disagree with the Secretary's argument that JWR failed to adequately monitor O&O's compliance with safety standards once O&O began work. The project was relatively brief in duration. O&O began the project during the night shift Sunday and had removed the cone and was in the process of replacing the fifth of eight cone pieces at the time of the accident on the following Tuesday morning. Tr. 67, 173, 232, 275. JWR Senior Maintenance Engineer Jerry Pullen met with O&O on Tuesday, and JWR Project Supervisor Randy Osborne and JWR Plant Manager Alan Smith met with O&O at the site on Monday and Tuesday mornings. Tr. 231-32, 261-62, 276-77. Osborne and Smith testified that at the time that they were on the site, they did not observe any miners who were in danger of falling who were not wearing fall protection. Tr. 260-61, 266, 299. Smith testified that he had previously seen O&O employees working at heights on previous projects, and that they had been wearing and using fall protection. Tr. 295. Inspector Womack testified that he had been informed by O&O Foreman Kris Gamble that Pierce had been wearing fall protection earlier in the day of the accident when he was on a ladder. Tr. 108-09, 177.

There is likewise no evidence that there was an unusual condition that should have alerted JWR to a hazardous condition. Fall protection equipment had been provided and was located in the area of the accident, and pad eyes used for tying off had been installed on the cone sections.

FMSHRC 1046, 1053 (May 1994); *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984), *aff'g Sellersburg Stone Co.*, 5 FMSHRC 287 (Mar. 1983) ("[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties . . . we find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also govern the Commission.").

[5] 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 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

33 FMSHRC at 370; Gov't Exs. 20F, 20H; Tr. 73, 334. There were no allegations that use of the metal plate with gussets to cover the hole was negligent.

In addition, JWR had not been informed that O&O was having difficulty installing the cone sections because the gussets of the plate covering the hole interfered with placement of the sections. Tr. 231-32, 263-64, 268-69, 320-21. Pullen's and Osborne's testimony that they had not been informed of the problem with the plate was corroborated by O&O Foreman Gamble, who testified that although he discussed with Pullen and Osborne the problem involving the cone sections not matching up because one had not been cut level, he did not discuss the plate problem. Tr. 320-21. On the morning of the accident, Pullen and Osborne were in the area of the plate covering the platform but saw no hole in the platform because the hole was covered at the time of their visit. Tr. 235, 243, 245, 264-65, 267.

Substantial evidence also supports the Judge's finding that JWR was not aware that Pierce was working over the open hole or that Pierce failed to wear fall protection. 33 FMSHRC at 370. As discussed above, Pullen and Osborne testified that at the time they were at the site, the hole in the platform was covered. Tr. 243, 245, 265, 267. Smith testified that he was not aware that O&O had installed a plate over the hole or that it had been moved. Tr. 280-81.

The Secretary fails to describe any specific action that JWR did not take to meet its standard of care. Rather, Inspector Womack explained that the citation had been issued to JWR because MSHA believed there was negligence and JWR "did not do everything [it] could" to see that the contractor was following regulations. Tr. 125. The inspector's accident investigation report does not specify any actions or failure to act by JWR that contributed to the violation. Rather, the report only states that "the contractor [O&O] failed to adequately control the work site and workers actions." Gov't Ex. 6 at 2 (emphasis added); Tr. 126-27, 160-61, 211-12. We conclude that substantial evidence supports the Judge's determination that the Secretary did not meet her burden of proving negligence on the part of JWR. 33 FMSHRC at 370.[6]

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[6] Our colleagues agree with us that the appropriate legal standard to determine negligence in this matter is the reasonably prudent person standard. Slip op. at 12. They would remand the case and instruct the Judge to apply this standard to the facts in the record.

This would be an unnecessary exercise, since the Judge articulated and applied a standard that was similar, and that took into account the reasonableness of the operator's actions 33 FMSHRC at 369-70 ("Negligence has been defined as conduct involving an unreasonably great risk of causing damage or conduct that falls below the standard established by law for the protection of others against unreasonable risk of harm."). Finally, even if the foregoing had not occurred, remand here is not necessary because the evidence in this case supports no other conclusion than that the Secretary failed to prove that JWR was negligent. *See American Mine Svcs., Inc.*, 15 FMSHRC 1830, 1833-34 (Sept. 1993) (holding that remand would serve no purpose because the evidence presented on the record supported no other conclusion than that the operator's conduct was not unwarrantable).

B. The Judge Did Not Err in his Treatment of the 2001 and 2007 Incidents.

The Secretary contends that the Judge failed to consider the 2001 and 2007 incidents, which the Secretary argues should have put JWR on notice that it was not meeting its standard of care. He does not dispute the Judge's exclusion of evidence with respect to the 2007 incident but, rather, argues that the Judge failed to adequately consider the 2007 violation in finding that JWR was not negligent. Sec. Reply Br. at 1-2 n.1, 6. Regarding the 2001 incident, the Secretary contends that the Judge erred in excluding proposed Gov't Ex. 13A, the citation issued to JWR arising from the 2001 incident. Sec. Reply Br. at 1-2 n.1. The Secretary explains that the Judge excluded the citation because "he believed it was 'too old to represent an expression of the [Secretary's] unreviewable prosecutorial discretion in late 2007." *Id.* at 3. The Secretary submits that his discretion to cite an owner for the violations of its independent contractor is unreviewable and because the Judge had no authority to even consider the Secretary's prosecutorial discretion, he abused his discretion in excluding the citation. *Id.*

When reviewing a Judge's evidentiary rulings, the Commission applies an abuse of discretion standard. *Gray v. North Fork Coal Corp*, 35 FMSHRC 2349, 2356 (Aug. 2013). An abuse of discretion may be found when "there is no evidence to support the decision or if the decision is based on an improper understanding of the law." *Id.* (quotations and emphasis omitted).

In his negligence analysis, the Judge noted that the 2007 citation involved "a prior violation of the same standard by JWR about one month before the incident herein and involving a fatal fall accident of an employee of a JWR contractor." 33 FMSHRC at 370. He considered the accident to determine the notice provided to JWR of the required standard of care. *Id.* The Judge noted the actions required by the Secretary for JWR to abate the 2007 violation (providing additional training and installing an adequate anchorage system to secure personnel from falling) and that JWR had taken those actions before the time that the subject accident occurred. *Id.* As noted above, the anchorage system available at the subject accident site and JWR's actions in ensuring that O&O had received adequate training are relevant to the consideration of negligence. Accordingly, we conclude that the Judge adequately considered the 2007 violation in his negligence analysis.

We further conclude that the Judge did not abuse his discretion in excluding proposed Gov't Ex. 13A, the citation issued to JWR arising from the 2001 incident. After viewing in context the Judge's statement, it is clear that the Judge was not actually considering the Secretary's prosecutorial discretion. *See, e.g.,* Tr. 25 (stating in part, "I am referring to notice. I don't have any problem with exercising discretion"). Rather, the Judge's statements demonstrate that he considered the standard of care required of an owner-operator in cases in which its independent contractor has been cited to be vague, and that the 2001 citation did not provide notice to JWR of what was expected of it at the time of the subject accident. Tr. 17-19, 25-27;

see also 33 FMSHRC at 370 & n.5. Thus, the Judge's exclusion of the 2001 citation was not based on an erroneous conclusion that he could consider the Secretary's prosecutorial discretion in citing JWR.

In any event, even if we were to conclude that the Judge erred in excluding Gov't Ex. 13A, we would find such error to be harmless. For the reasons discussed above, we find substantial evidence in the record supporting the Judge's negligence holding, and consideration of the 2001 citation would not alter our conclusion.

C. The Judge Did Not Err in Reducing the Penalty Amount.

The Secretary argues that the Judge abused his discretion in reducing the penalty assessed against JWR from the proposed amount of $45,000 to $500. He asserts that the Judge failed to explain the reduction adequately, even if the reduction were based on his no negligence finding, because the Judge also found the violation history to be significant and gravity to be high. The Secretary contends that a Judge may not give dispositive weight to any one penalty factor.

Commission Judges are accorded broad discretion in assessing civil penalties under the Mine Act. *See, e.g., Cantera Green*, 22 FMSHRC 616, 620 (May 2000). Such discretion is not unbounded, however, and must reflect proper consideration of the penalty criteria set forth in section 110(i) and the deterrent purpose of the Act. *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Although there is no presumption of validity given to the Secretary's proposed assessments, the Commission has recognized that substantial deviations from the Secretary's proposed assessments must be adequately explained using the section 110(i) criteria. *Cantera Green*, 22 FMSHRC at 620-21. Assessments "lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal." *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984).

We conclude that the Judge did not abuse his discretion in assessing the penalty. The Judge addressed and made findings on all six section 110(i) factors in his assessment of penalty. 33 FMSHRC at 369-70.

The Commission has recognized that in assessing a civil penalty, there is no requirement that equal weight must be assigned to each of the penalty assessment criteria. Rather, "Judges have discretion to assign different weight to the various factors, according to the circumstances of the case." *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001), *citing Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Indeed, the Commission has held that Judges have not abused their discretion by more heavily weighing gravity and negligence than the other

penalty criteria.[7] *Lopke*, 23 FMSHRC at 713; *Musser Engineering, Inc.*, 32 FMSHRC 1257, 1289 (Oct. 2010).

The Judge did not err by weighing the negligence criterion more heavily than the other section 110(i) factors in assessing the penalty against JWR. In proposing a penalty, the Secretary weighs the gravity criterion more heavily than the negligence criterion. PDR at 7. However, the Judge was not required to weigh the criteria in assessing the penalty in the same manner that the criteria are weighed in the proposal of a penalty. In determining the amount of a penalty, neither the Judge nor the Commission is restricted by the penalty proposed by the Secretary. *Musser Engineering*, 32 FMSHRC at 1288 (citations omitted). *See also* 29 C.F.R. § 2700.30(b) ("In determining the amount of a penalty, neither the Judge nor the Commission shall be bound by a penalty proposed by the Secretary or by any offer of settlement made by a party.").

Moreover, when cited for a contractor's violation, an owner-operator is strictly liable for the violation and its fault, or lack thereof, may be taken into account only in the consideration of negligence during penalty assessment. *Int'l Union, UMWA v. FMSHRC*, 840 F.2d 77, 83-84 (D.C. Cir. 1988); *Musser*, 32 FMSHRC at 1272, *citing Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989) ("the operator's fault or lack thereof, rather than being a determinant of liability, is a factor to be considered in assessing a civil penalty"). Here, the Judge appropriately considered JWR's fault, or lack thereof, in his determination of negligence and assessment of penalty. Accordingly, we affirm the Judge's assessment of a penalty of $500.[8]

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[7] We conclude that *Fort Scott Fertilizer-Cullor, Inc.*, 19 FMSHRC 1511 (Sept. 1997), the case cited by the Secretary to support his argument, is distinguishable. In that case, the Commission vacated the penalty assessed by the Judge because the Judge only addressed and made findings with respect to one of the six criteria. 19 FMSHRC at 1518. Here, as noted, the Judge addressed and made findings on all six criteria.

[8] We note that if the penalty had been proposed as a regular assessment (rather than a special assessment) with a finding of no negligence, the proposed penalty would have been within the general range of the $500 penalty assessed by the Judge. *Cf. Sedgman*, 28 FMSHRC 322, 327 n.6 (June 2006) (noting that the Secretary proposed a penalty of $1,270 against JWR for its violation of section 77.1710(g)).

III.

Conclusion

For the reasons discussed above, we affirm the Judge's determination that JWR was not negligent, his treatment of evidence regarding the 2001 and 2007 incidents, and his assessment of penalty.

Mary Lu Jordan, Chairman

Patrick K. Nakamura, Commissioner

William I. Althen, Commissioner

Commissioners Young and Cohen, dissenting:

We cannot agree with the Judge's analysis of JWR's negligence in this case, which fails to fully appreciate the context in which this violation occurred or to analyze the operator's duty in that context. While we do not believe the record requires reversal, we would remand the case for re-evaluation of the negligence and, if necessary, reconsideration of the penalty.[1] Accordingly, we dissent.

The near-fatal fall in this case was the third time in seven years that a contractor's employee had fallen at a JWR operation while working, unprotected, at height. The previous two falls, in 2001 and 2007, had been fatal. The miner in this case fell 25 feet onto a concrete pad, was seriously injured, and easily could have been killed. Tr. 139.

The Judge seemed to lack sufficient grasp of the influence that the prior falls might reasonably have exerted on JWR's appreciation of the potential danger. It may well be that JWR was justified in trusting O&O to safely oversee its own workers, using JWR's remedial abatement measures and fall protection which O&O should have known was required under the circumstances. However, the owner-operator's conduct here must also be properly evaluated in light of the Act and the duties it imposes upon operators.

We thus agree with the Secretary that the Judge improperly imposed an additional burden on the Secretary to provide notice to an owner-operator of the standard of care owed to contractor employees. While the allocations of duty and responsibility may vary under different circumstances, an operator of a mine does indeed owe a high duty of care to all miners working in that mine, including contractor employees.

This is organic to the structure and purpose of the Act. Section 2 of the Mine Act notes the terrible toll exacted by unsafe and unhealthful conditions and practices in the nation's mines and provides that "the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of such conditions and practices in such mines." 30 U.S.C. § 801(e).

Thus, while the Judge agreed with JWR that it had not been provided with notice of the standard of care, 33 FMSHRC 362, 369-70 (Feb. 2011) (ALJ), the Act itself imposes a duty to prevent unsafe conditions or practices. Furthermore, while 30 C.F.R. Part 100 is not binding on the Commission,[2] it clearly provides notice to operators of the Secretary's conception of the duty

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[1] We agree with the majority that if the Judge properly analyzes the negligence element and explains a significant reduction in the penalty based on that element alone, as he did in this case, he has not abused his discretion.

[2] The majority misapprehends the significance of Section 100.3. *See* slip op. at 4, n.4. To the extent the Judge held that the operator did not have notice of the duty it owes its miners,

owed to miners under the Act. Section 100.3(d) informs JWR and every other operator of the Secretary's expectation of the "high standard of care" owed to all miners in its mines, and of its responsibility to "be on the alert" for unsafe practices or conditions and "take steps necessary to correct or prevent them." PDR at 8-9, *citing* 30 C.F.R. § 100.3(d).[3] The regulation goes on to flatly state that the failure to do so constitutes negligence. *Id.* The operator should have at least known the Secretary's expectations, expressed in a published regulation.

Thus, the question posed by this case is not whether JWR did "everything they [sic] could," 33 FMSHRC at 369, but whether the operator failed to apprehend the evident danger in this case and to take such steps as a reasonable person, familiar with the mining industry and the protective purposes of the Act, would take under the circumstances to prevent miners from being exposed to a risk of injury or death. The majority acknowledges this as the correct standard. Slip op. at 4, citing *U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984). However, the majority then analyzes JWR's duty in terms of substantial evidence, disregarding the Judge's legal error in miscasting the concept of negligence in this case. Slip op. at 5.

In evaluating an operator's duty, and its possible breach, context is crucial. Yet the Judge utterly failed to consider two nearly identical, fatal injuries to contractor employees in JWR's recent history. One of the two falls happened a mere four months before the fall in this case. G. Ex. 9; PDR at 13-14. Instead of considering the two prior falls by contract employees, he misapplied the law and excluded evidence of the 2001 accident altogether, on grounds that it was "too old" to provide notice to JWR of MSHA's policy of prosecuting injuries to contract employees. Tr. 10.[4] The Secretary correctly questions how a fatal accident only seven years

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he is refuted by a published regulation, and the well-understood operation of the broad definition of "miner" under the Act.

[3] Section 100.3(d) provides in part:

> Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a *high standard of care. A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices.* The failure to exercise a high standard of care constitutes negligence.

30 C.F.R. § 100.3(d) (emphasis added).

[4] The fact that the Secretary did not articulate the law properly below does not excuse the Judge's legal error, which we review *de novo.* As the majority acknowledges, a decision based

earlier could have faded from memory. PDR at 13. Indeed, it is not unreasonable to expect it to have become part of JWR's consciousness on safety issues involving contractors.

As the Secretary notes (PDR at 12; Sec. Reply Br. at 4-5), as demonstrated by Alabama law, for example, a Judge should have considered both accidents as evidence of negligence, "so long as the conditions of the prior incidents are substantially similar" – in this case, they are nearly identical – "and are not too remote in time." *See e.g.*, *Wyatt v. Otis Elevator Co.*, 921 F.2d 1224, 1227 (11th Cir. 1991). Here, the Judge did not do so, nor did he explain why a fatal accident seven years earlier at one of the operator's own work sites was too remote in time, a fact we cannot accept as self-evident.

If the 2001 fatality was at least arguably relevant to JWR's negligence, the 2007 fatality was doubly so. The Judge therefore was required to determine whether a reasonably prudent person would have recognized the danger that event evinced, as well as the possibility that this fall and the 2001 fatality may have represented a pattern of inadequate contractor attention to the safety standards governing fall protection. Instead, the 2007 accident, which was the subject of evidence presented to the Judge,[5] is not meaningfully considered in his negligence analysis. The majority errs in miscasting the relevance of the very recent fatality in nearly identical circumstances. The important question is not JWR's notice of the standard of care. *See* slip op. at 7; 33 FMSHRC at 369-70. It is whether and how JWR's duty to protect the workers in its mines, in light of an incident that a reasonable person would have to consider in determining how to uphold that duty, was fulfilled.

The Judge therefore erred in two significant regards. His understanding of JWR's duty did not conform to the expectations of the Mine Act and the regulations implementing it, and he failed to consider incidents similar enough to be relevant to JWR's knowledge and actions in the context of this case. The result is an improperly constrained view of the operator's actions here. The Judge faults the Secretary for "suggesting that JWR must maintain direct and continuous supervision over its contractor's employees" to ensure fall protection is employed when required, 33 FMSHRC at 370. But his opinion is devoid of analysis of any lesser measures that JWR might have undertaken in these circumstances, in light of a recent history of contractor employees falling to their deaths.

The Judge thus never considered whether, for example, JWR might have averted the severe consequences in this case by taking a more safety-conscious approach, such as reminding

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on an improper understanding of the law is abuse of discretion *per se*. Slip op. at 7, citing *Gray v. North Fork Coal Corp.*, 35 FMSHRC 2349, 2356 (Aug. 2013).

[5] The Judge also took testimony on the 2001 incident as a proffer to preserve the facts for a possible appeal. Tr. 222-26. As noted above, failure to consider the 2001 incident was erroneous.

the contractor specifically, before commencing work each day,[6] of the steps JWR had taken to provide a safe work environment, and the need for the contractor to ensure its employees used the fall protection JWR had made available.

This is not a case where the operator "did nothing."[7] Nor is it a case where the operator should be excused without reflection for "not doing everything it could." It is instead a garden-variety negligence case, in which the operator's conduct must be properly evaluated against the expectations imposed upon a reasonable operator in the same context. The Judge failed to recognize this, and we therefore dissent and suggest that the case should be remanded for a proper analysis of the operator's conduct.

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

[6] Chris O'Dell of O&O testified that the contractor had a safety meeting each morning on the job and that fall protection was specifically addressed. Tr. 332. There is no evidence of any JWR representatives discussing fall protection with O&O employees at the daily meetings.

[7] As the operator says in its brief, witnesses for O&O noted that JWR routinely applied pressure to contractors to abide by safety rules, especially those pertaining to fall protection. JWR Br. at 7; Tr. 330-31. JWR also discussed fall protection with O&O each time the contractor bid on a job, and JWR expressly told O&O that "[i]f we didn't follow safety procedures as in tying off . . . we would be escorted off the site." JWR Br. at 7; Tr. 384. We note that the Judge did not evaluate these actions either, and on remand would be required to do so under the appropriate standard of care.

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