FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 2 2 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. VA 2013-291-M
v.	:	
SUNBELT RENTALS, INC.	:	

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen, and Traynor, Commissioners

DECISION

BY: Young and Althen, Commissioners

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). At issue is a citation issued to Sunbelt Rentals, Inc., ("Sunbelt") by the Department of Labor's Mine Safety and Health Administration ("MSHA") after an accident at a concrete plant. The citation alleged that Sunbelt failed to conduct an adequate examination of a "working place" in the pre-heat tower, which processed limestone to make concrete. MSHA charged a violation of 30 C.F.R. § 56.18002(a)[1] and designated the violation as significant and substantial ("S&S")[2] and a result of high negligence. MSHA also proposed a penalty of $51,900.

An Administrative Law Judge of the Commission was assigned to this matter. The Judge granted Sunbelt's motion for summary decision, reasoning that the standard does not explicitly require that exams be "adequate" and therefore that an exam need not necessarily identify all hazards which a reasonably prudent person would identify. 35 FMSHRC 3208 (Sept. 2013) (ALJ).

Subsequently, the Commission vacated the summary decision and remanded the case to the Judge, holding that the regulatory requirement that a "competent" person conduct the examination means that the examination must be adequate. 38 FMSHRC 1619, 1625-28, 1629 (July 2016).

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[1] Section 56.18002(a) provides that "[a] competent person . . . shall examine each working place at least once each shift for conditions which may adversely affect safety or health." 30 C.F.R. § 56.18002(a) (2017) (amended Apr. 9, 2018).

[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."

After a hearing on remand, the Judge determined that the operator had failed to examine adequately the working place at issue. He held that the violation was S&S and a result of the operator's high negligence. He assessed a penalty of $23,750. 40 FMSHRC 573, 578-79 (Apr. 2018) (ALJ).

The operator petitioned the Commission for review, which was granted, and challenged the Judge's findings regarding the violation, S&S, and negligence.[3] Upon review, a majority of Commissioners affirms the Judge's finding of a violation and the S&S finding because they conclude that substantial evidence supports the Judge's ruling that the operator did not conduct an adequate examination.[4] Chairman Rajkovich, writing separately, would find no violation. Commissioners Jordan and Traynor would affirm the Judge's finding of high negligence, while Commissioners Young and Althen conclude the violation was instead the result of ordinary negligence. Chairman Rajkovich, while finding no violation, concurs with Commissioners Young and Althen solely for the purpose of forming a majority decision of ordinary negligence to remand for a new penalty assessment. The Judge's negligence determination and penalty assessment are reversed, and the case remanded for a new penalty.

I.

Background

Roanoke Cement Co. ("Roanoke") operated a cement plant that included a pre-heat tower. The inside of the pre-heat tower contained six numbered, vertically connected conical vessels – each about 50 feet tall. The accident resulting in the citation occurred in a vessel denominated as the fourth vessel. That vessel consisted of an upper and a lower compartment connected through an opening, called a "thimble," between them. The inspector did not measure the compartments or the thimble and did not testify to their size. An operator witness testified that each floor in the tower was about 20 to 30 feet high and that the upper compartment of the fourth vessel was smaller than the lower compartment.

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[3] The operator also claims that it lacked notice that exams of working places must be "adequate." However, as set forth below, this issue was already resolved in our prior decision on this matter.

[4] 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)). Under the substantial evidence test, the "possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Sec'y on behalf of Wamsley v. Mutual Min., Inc.*, 80 F.3d 110, 113 (4th Cir. 1996) (citation omitted).

Nine floors were located on the outside of the tower, adjacent to the vessels on the inside. A miner could use an exterior staircase or elevator to reach each floor. The floors outside the vessels were numbered in ascending order. The sixth floor was adjacent to the lower compartment of the fourth vessel while the seventh floor was adjacent to the upper compartment of the fourth vessel. Tr. 118.

The interior walls of each vessel were lined with heat-resistant refractory brick to prevent corrosion. Over time, some of the limestone could adhere to the refractory, resulting in limestone building up inside the vessels. There were three two feet by two feet portholes ("large portholes") and an one inch by one inch porthole ("small porthole") on the sixth floor, outside the lower compartment of the fourth vessel. The smaller upper compartment of that vessel also contained two large portholes, two feet by two feet in size. Tr. 256-58. The small porthole in the lower compartment allowed miners to clear buildup of loose material in each vessel with an air lance.[5] The large portholes allowed miners to look into each vessel while standing on an adjacent floor of the tower.

Sunbelt contracted with LVR, Inc. ("LVR") to erect scaffolding inside the vessels of the tower. Once the scaffolding was erected, LVR would perform annual maintenance on the tower, as per its contract with Roanoke. However, before scaffolding was erected, a miner could examine the inside of each vessel by standing on an adjacent floor and looking through the corresponding portholes.

On December 30, 2012, the tower was shut down. On that day or shortly afterwards, each vessel of the tower was air lanced through the small portholes. Subsequently, an employee of Roanoke, Jason Oedel, inspected the tower through the portholes in early January 2013. He looked through the portholes on the seventh floor in the upper compartment of the fourth vessel and did not observe any loose hanging material in the vessel. Instead, he testified that if there was any potentially loose material, it was indistinguishable from the solid refractory of the vessel.

A few days later, Sunbelt began to work in the fourth vessel. As stated a large open tube (the "thimble") was located between the lower and upper compartments of the fourth vessel. Sunbelt planned to erect scaffolding in the lower compartment of the fourth vessel between the sixth and seventh floors, after which LVR would replace the thimble in the vessel.

On January 8, at approximately 7:30 a.m.,[6] Kendrick Davis examined the interior of the fourth vessel by looking through portholes on the sixth floor. At the time, Davis, an employee of

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[5] An air lance uses "compressed air . . . blown . . . to free choked passages." U.S. Dep't of Interior, *A Dictionary of Mining, Mineral and Related Terms* 21 (1st ed. 1968).

[6] The pre-shift hazard assessment form indicated that Davis conducted his exam at 7:00 a.m. However, the Judge credited Davis's testimony that he met with an individual at 7:00 a.m. for approximately 20 to 30 minutes and began to examine the fourth vessel afterwards. 40 FMSHRC at 583.

Sunbelt, had been designated by Sunbelt as its examiner for working places inside the fourth vessel and had received site-specific training from Roanoke to inspect for falling material hazards in the vessel.

Unlike Oedel, Davis did not examine the top of the vessel by looking through any seventh floor portholes. It is undisputed that instead, he simply examined this portion of the vessel while standing on the sixth floor, 20-30 feet below. The interior of the vessel lacked a lighting system, and Davis did not use any portable lights to examine the top of the fourth vessel. Instead, he relied on the early morning sunlight to inspect the portion of the vessel above the seventh floor. 40 FMSHRC at 579-80, 83-86.

During his examination, Davis did not observe any loose hanging material in the part of the vessel above the seventh floor. *Id.* at 584-85. Davis documented his examination of the fourth vessel in his Pre-Shift Hazard Assessment. While filling out the Pre-Shift Hazard Assessment, Davis listed falling material and poor lighting as potential hazards. Gov't Ex. 6. Subsequently, on Davis's instruction, other employees of Sunbelt beat the side of the fourth vessel to dislodge any loose material.

Shortly afterwards, at 10:30 a.m. on January 8, loose material fell from the top of the vessel. The falling material struck and knocked unconscious an employee of Sunbelt, Brian Tyler, while he was helping to erect scaffolding in the fourth vessel. At the time of the accident, Tyler was on a platform in the scaffolding below the open thimble. Material in the upper compartment of the vessel, above the adjacent seventh floor of the tower, fell and knocked Tyler unconscious. Three of the four straps on the headband to his hard hat were broken. The exact nature of the material that struck Tyler is unclear. Subsequently, a "headache board"[7] was installed to protect miners from falling material. *Id.* at 589.

After being notified of the accident that morning, MSHA issued an order at 11:00 a.m. under 30 U.S.C. § 813(j) to preserve the conditions of the tower.[8] MSHA Inspector David Nichols arrived at the tower soon afterwards, just after Tyler had been placed into an ambulance following his injury. Subsequently, Inspector Nichols peered through portholes on the seventh floor and observed a buildup of material on the walls of the fourth vessel above the seventh floor of the tower.

Inspector Nichols inferred that the buildup indicated that loose, hanging material was present in the upper compartment of the vessel, above the seventh floor, during Davis's examination. Following his inspection, the inspector issued a citation to Sunbelt for a violation of 30 C.F.R. § 56.18002(a). The citation was issued for failure to conduct an adequate examination based upon the failure of Davis to look through portholes on the seventh floor.

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[7] A "headache board" is a board placed above the point where miners would be working to protect them from falling material.

[8] This provision of the Mine Act authorizes the Secretary to supervise and direct rescue and recovery activities in a mine.

The standard provides that "[a] competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions." 30 C.F.R. § 56.18002(a). The citation alleged that Sunbelt "did not do an adequate work[ing] place exam in the [relevant area] as there [was] hanging material overhead that had not been noted on the work[ing] place exam. The area above was never checked." Gov't Ex. 8. MSHA proposed a penalty of $51,900. 40 FMSHRC at 573.

As set forth at the outset, the Judge initially granted summary decision in favor of Sunbelt. On appeal, the Commission vacated the citation and instructed the Judge, on remand, to consider whether the area of the fourth vessel above the seventh floor was a "working place" and whether Sunbelt violated the standard by failing to conduct an adequate exam of such area. 38 FMSHRC at 1628. More specifically, the Commission held that the examination "must be adequate in the sense that it identifies conditions which may adversely affect safety and health that a reasonably prudent competent examiner would recognize."[9] *Id.* at 1627.

II.

Judge's Decision on Remand

On remand, the Judge applied the standard identified by the Commission and determined that the standard required Davis to (1) examine the upper compartment of the fourth vessel, (2) look through the seventh floor portholes while conducting such an exam, and (3) identify and correct the hazard of loose hanging material in the upper compartment above the adjacent seventh floor of the tower. 40 FMSHRC at 599.

The examination requirement under section 56.18002(a) applies to a "working place." The Judge found that the area of the upper compartment of the fourth vessel above the seventh

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[9] The Commission further found:

> The Commission has consistently applied the reasonably prudent person test to broadly worded standards. *See U.S. Steel Mining Co.*, 27 FMSHRC at 439. The reasonably prudent person test provides that an alleged violation is appropriately measured against whether a reasonably prudent person, familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting correction within the purview of the applicable standard. *Spartan Mining Co., Inc.*, 30 FMSHRC 699, 711 (Aug. 2008); *see also Asarco, Inc.*, 14 FMSHRC 941, 948 (June 1992); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982).

38 FMSHRC at 1626 (footnote omitted).

floor (the area at issue) was a working place. Therefore, the Judge determined that the operator was required to conduct an exam of this area. *Id.* at 598.

The Judge ruled that Sunbelt's examiners failed to adequately examine a working place – that is, the vessel's walls and ceiling above the seventh floor. *Id.* at 600. He rejected Davis's testimony that he could see the entire upper compartment of the vessel while standing on the sixth floor. *Id.* at 584. The Judge found that the sixth floor portholes provided an incomplete view of the area of the upper compartment above the adjacent seventh floor of the tower. Therefore, the Judge agreed with Inspector Nichols' determination that a reasonable examiner would have looked through the seventh floor portholes when examining the area of the upper compartment above the seventh floor. *Id.* at 597-99.

Furthermore, the Judge found that if Davis had looked through the seventh floor portholes, he would have seen loose material in the area at issue above the seventh floor and would have identified such loose material as a falling material hazard. He concluded that a reasonably prudent examiner would not only have examined the area at issue from the seventh floor portholes, but would have identified and corrected the hazard. *Id.* at 599.

In addition, the Judge determined that the violation was S&S and resulted from the operator's high negligence. The Judge found that Sunbelt was highly negligent because it failed to identify and correct a loose material hazard despite being informed by another operator, Roanoke, of potential hazards of falling material in the pre-heat tower. Specifically, the Judge noted that Roanoke had provided site-specific training to Davis, which alerted Davis to a potential hazard of falling material in the tower. The Judge assessed a penalty of $23,750. *Id.* at 601, 604-05, 608.

On appeal, Sunbelt challenges the Judge's conclusion that there was a violation, that the violation was S&S, and that it was the result of high negligence. Sunbelt also claims that it lacked notice that its examination of the working place at issue – the area of the fourth vessel above the seventh floor – needed to be adequate. In its subsequent reply brief, the operator claims for the first time that the Judge was not appointed in accordance with the Appointments Clause of the U.S. Constitution.

III.

Disposition

A. The Appointments Clause Issue Has Not Been Properly Raised Before the Commission on Review.

Judges deemed to be officers of the United States are subject to the Appointments Clause of the Constitution of the United States. U.S. Const. Art. II, § 2, cl. 2. In *Lucia v. S.E.C.*, 138 S. Ct. 2044, 2053 (2018), the Supreme Court ruled that administrative law judges of the Securities and Exchange Commission were subject to the Appointments Clause because they were "inferior officers" of the United States. In *Jones Bros. Inc. v. Sec'y of Labor*, 898 F.3d 669, 679 (6th Cir. 2018), a decision rendered a month after *Lucia*, the Sixth Circuit concluded that administrative

law judges of this Commission are officers of the United States. As such, they are subject to the Appointments Clause and must be appointed by the President, a Court, or the Head of a Department. *Id.*

In its reply brief in this case, Sunbelt claimed for the first time that the Judge who presided over this case was not constitutionally appointed, as he had not been appointed by the President, a court, or the head of a department when he conducted the hearing in this matter in May 2017. Sunbelt Reply Br. at 10-13.

Sunbelt failed to raise the issue in its petition for discretionary review ("PDR"). If an issue is not raised before the Judge, the Mine Act allows a party to raise the issue before the Commission only if the party shows there is "good cause" to excuse its failure to raise the issue below. 30 U.S.C. § 823(d)(2)(A)(iii). Going further, however, the Mine Act limits the Commission's appellate authority to those issues that were raised in the PDR. Specifically, the Mine Act states that "if [a PDR is] granted, review [by the Commissioners] shall be limited to the questions raised by the petition." *Id.* Commission Procedural Rule 70(g), 29 C.F.R. § 2700.70(g), reiterates that the scope of appellate review by the Commission is limited to issues which were raised in the PDR unless Commissioners decide to review additional issues on their own motion, pursuant to the rule.[10]

Contrary to Sunbelt's argument, our disposition of the Appointments Clause issue is fully consistent with the Sixth Circuit's decision in *Jones Bros.* In that case, the court concluded that the operator had forfeited the appointments clause issue because it had failed to properly raise the issue in its PDR. *Jones Bros.*, 898 F.3d at 677-79. The operator had briefly mentioned the issue in a footnote in its PDR, but the court ruled that the footnote language was not sufficient to constitute a developed argument that could be acted upon by the Commission.

The court then addressed the question of whether the operator's forfeiture could be excused pursuant to section 106(a)(1) of the Mine Act, 30 U.S.C. § 816(a)(1), which allows appellate courts to excuse forfeiture "because of extraordinary circumstances." The court determined that because of confusion about whether the Commissioners could entertain this constitutional claim, it would excuse the forfeiture in that case under the "extraordinary circumstances" provision.

In contrast to the court in *Jones Bros.*, the Commission is bound to apply the twin requirements that the Commission may only consider an issue not raised before a Judge upon a showing of "good cause," and that the Commission may only review issues raised in the PDR. Second, the operator in *Jones Bros.*, unlike Sunbelt in this case, did raise the appointments clause issue in its PDR. Therefore, the Mine Act did not foreclose review. In short, *Jones Bros.* provides no support for Sunbelt's position.

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[10] Applying this rule in *Central Sand and Gravel Co.*, 23 FMSHRC 250, 261 (Mar. 2001), the Commission declined to consider an issue which the petitioner did not raise in its PDR, even though the petitioner belatedly raised the issue in a subsequent appellate brief.

Here, Sunbelt did not raise the Appointments Clause issue in its PDR (or in its opening appellate brief). Only in its reply brief responding to the Secretary did Sunbelt raise the Appointments Clause issue. Furthermore, Sunbelt failed to ever address, in its reply brief or in subsequent oral argument, the statutory provision (30 U.S.C. § 823(d)(2)(A)(iii)) which limits the Commission's scope of review to issues raised in the PDR.

For the foregoing reasons, we decline to review the Appointments Clause issue.

B. The Judge Properly Held That The Area of the Vessel above the Seventh Floor Was a "Working Place."

The standard in question, 30 C.F.R. § 56.18002(a), provides that "[a] competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health" (emphasis added). MSHA's regulations define a "working place" as any place in or about a mine "where work is being performed." 30 C.F.R. § 56.2.

The Judge found that the upper compartment of the fourth vessel above the adjacent seventh floor of the tower was a working place because the entire vessel was the working area, rendering the upper compartment part of the working area. In addition, the Judge noted that the area of the vessel above the seventh floor was directly above miners who were working between the sixth and seventh floors. 40 FMSHRC at 598. In contrast, Sunbelt claims that on the day in question, it planned to erect scaffolding to the top of the lower compartment of the fourth vessel and did not plan to work in the upper compartment.

The regulatory definition of "working place" in a surface metal and nonmetal mine is "any place in or about a mine where work is being performed." 30 C.F.R. § 56.2. It is undisputed that Tyler was a miner working in the lower compartment of the double-compartmented fourth vessel. PDR at 13-15. The thimble created a large opening between the lower and upper compartments of the vessel through which materials could fall. In fact, the very reason for the thimble was to allow passage of materials from the upper to the lower compartment. Therefore, the fourth vessel clearly constituted one integrated work site in which falling material from the upper compartment would threaten a miner below it within the vessel. Without a doubt, that entire vessel was a place where work was being performed.

Indeed, the Pre-Shift Hazard Assessment form, completed by Davis, indicated that the entire fourth vessel, not just a particular area in that vessel, constituted the "designated work area" on January 8. Gov't Ex. 6. Moreover, Davis testified that while standing on the sixth floor, he raised his head to look through the thimble at the top of the vessel above the seventh floor. Tr. 350-51. That was a natural act demonstrating that the upper compartment of the vessel was a working place. Given the opening from that area, there obviously was a danger of material falling though the thimble that required an examination of the upper compartment.

C. The Judge Correctly Concluded that the Operator Violated 30 C.F.R. § 56.18002(a).

In the Commission's earlier decision, the Commission found that under 30 C.F.R. § 56.18002(a), the operator must conduct "adequate" exams of any working place. 38 FMSHRC at 1625-29. The Commission further defined such adequate exams as those which would identify all hazards which a reasonably prudent examiner would recognize. In addition, the Commission concluded that Sunbelt had notice that 30 C.F.R. § 56.18002(a) contains an adequacy requirement, *i.e.*, that the reasonably prudent examiner test would be used to determine violations of the standard. 38 FMSHRC at 1627-28. The Commission's prior decision on this exact issue is the "law of the case." *Black Beauty Coal Co.*, 38 FMSHRC 1307, 1311-12 (June 2016). Under the Commission's prior decision, the operator had notice of the adequacy requirement, for the reasons set forth in that decision.

On appeal, the operator argues that there was no violation because the Secretary conceded that the hazard in the working place at issue – the portion of the fourth vessel above the seventh floor — was "latent"[11] rather than "obvious" during Davis's examination and that an operator cannot be required to identify a latent hazard. However, it is unnecessary to resolve this issue because the Judge's finding of a violation is supported by substantial evidence even if the hazard was latent during Davis's exam.

Sunbelt's argument misapprehends the nature of the violation in this case. It is not necessary for the Secretary to prove that there was loose material that would have been noted by Davis in his examination. Rather, the Secretary need only prove that the examination was inadequate – that is, that a reasonably prudent examiner would have gone to the seventh floor and examined the vessel from those portholes.

The Judge predicated his determination that Sunbelt failed to conduct an adequate exam on "Sunbelt's . . . [failure] to identify conditions which a reasonably prudent and competent examiner would recognize as hazardous." 40 FMSHRC at 599. While substantial evidence supports the Judge's conclusion as to the *consequences* of the inadequate examination, he, too, misses the fundamental deficiency. It is a failure to *look*, not a failure to *see*. The operator's examiner must perform a complete examination of the entire working place. That required Davis to place himself in a position to identify hazards in the working place at issue – the upper compartment of the vessel above the adjacent seventh floor. In other words, Sunbelt needed to examine this working place from all vantage points a reasonable examiner would use, *i.e.*, all vantage points that were reasonably necessary for an examination of such area. In a nutshell, an adequate exam must include areas where a hazard might endanger miners – which here includes the area from which objects could fall on miners working below.

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[11] By "latent" the operator apparently meant that material that later fell could not have been discovered before the material fell. But there is no evidence to support this theory because neither Davis nor any other qualified person examined the area from the seventh floor portholes before the accident.

The Judge concluded that Sunbelt did not adequately examine the seventh floor walls and ceiling. *Id.* at 600. The Judge found that the portholes on the seventh floor were reasonably necessary vantage points because the sixth floor portholes provided an incomplete view of the working place at issue. *Id.* at 584. In turn, this factual determination was predicated on a credibility determination, where the Judge "discredited Davis's testimony that he could see any loose material hanging [in the upper compartment] from the sixth floor [portholes]." *Id.* at 604. We find no basis for overturning this credibility determination.[12]

The Judge's finding that the examination was not adequate is supported by his credibility determination, as well as by facts recounted in the decision.[13] First, the Judge noted that Davis examined the portion of the fourth vessel above the seventh floor while standing on the sixth floor approximately 20 to 30 feet below. Tr. 339; 40 FMSHRC at 580-84. Second, the Judge noted that there was no lighting system inside the vessel and that Davis did not use any portable light during his exam.[14] While some natural light came into the vessel through the portholes, artificial light was only installed following Davis' examination. Tr. 101-02, 371-72, 392; 40 FMSHRC at 580, 586.

The Judge discredited Davis's testimony that his view of the upper compartment of the vessel would be partially restricted if he looked through the seventh floor portholes.[15] However, it is unnecessary for us to discuss this credibility determination. As stated above, the Judge found that the sixth floor portholes provided an incomplete view of the working place at issue. Therefore, even if Davis's view from the seventh floor portholes was restricted, a reasonably

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[12] Credibility determinations "reside in the province of the administrative law judge's discretion, are subject to review only for abuse of that discretion, and cannot be overturned lightly." *Dynamic Energy, Inc.*, 32 FMSHRC 1168, 1174 (Sept. 2010) (citing *Buck Creek Coal Co.*, 52 F.3d 133, 135 (7th Cir. 1995)); *see also Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1540-41 (Sept. 1992). When reviewing a Judge's credibility determination, we simply review whether his credibility determination was amply supported by factual evidence, not whether we would have made the same credibility determination as the Judge.

[13] The record contains evidence that another Sunbelt employee, Douglas Redmond, examined the fourth vessel before the shift began on the day of the accident. However, the operator does not appeal the Judge's decision to ignore the alleged working place exam of the upper compartment of the vessel conducted by Redmond. Therefore, there is no dispute in this appellate proceeding that Davis bore the responsibility to conduct Sunbelt's working place exam of the fourth vessel. 40 FMSHRC at 583, 596.

[14] The Judge credited Davis's testimony that during his exam there was first light at daybreak over Nichols' testimony suggesting that the working place would have been dark during Davis's exam. However, the Judge did not discuss the exact amount of light in the fourth vessel during Davis's exam. 40 FMSHRC at 583.

[15] Davis claimed that he could only see straight across through the seventh floor portholes. 40 FMSHRC at 584.

prudent examiner would have used these portholes to further examine the working place rather than simply relying on the sixth floor portholes.

The inspector testified that he issued the citation for failure to perform an adequate workplace examination because:

> After surveying the area, and looking at the seventh floor, sixth floor, I determined that it would have been very easy for them to have went [sic] to the seventh floor as part of their inspection, since it was overhead of the sixth level.

Tr. 152, 40 FMSHRC at 593. The inspector added that "Anytime you are in that area, if there could possibly be a hazard overhead, then you should examine that." Tr. 154.

Roanoke and LVR employees examined the area at issue from the seventh floor portholes. As previously noted, during a walkthrough in early January, Jason Oedel, Roanoke's pyro supervisor (who was responsible for the pre-heat tower and kiln system), inspected every open porthole throughout the tower (although he was not performing or documenting any formal workplace examination at that time). He testified that he was looking "for any damage [that he] didn't know about, or work that needs to be replaced, and any type of buildup that we need to remove before contractors showed up on site." Tr. 264; 40 FMSHRC at 579, 582. After this initial walkthrough, he testified that he conducted an additional walkthrough of each floor of the tower with construction supervisor Gary Snyder from LVR, and that Roanoke and LVR inspected each level of the pre-heat tower, including the seventh floor, by looking through the exterior doors for loose refractory and build-up. 40 FMSHRC at 582. The Judge also pointed out that right after the accident, Oedel and Gary Snyder from LVR went to the seventh floor to look at the area above where the miners had been working. Tr. 271. When they looked at the upper compartment of the vessel through the seventh floor portholes, they saw buildup. 40 FMSHRC at 598.

Moreover, the Judge found, and the operator does not dispute, that the seventh floor portholes were reasonably accessible to Davis on February 8. *Id.* at 600. Rather, Davis claims that he did not look through the seventh floor portholes simply because none of the miners would be physically standing or walking in the area of the vessel above the seventh floor.

We respectfully disagree with the Chairman's dissenting/concurring analysis of the examination standard at issue. As previously stated, the standard requires that "a competent person . . . shall examine each working place . . . for conditions which *may* adversely affect safety or health." The standard thus mandates that an operator conduct an examination (which the Commission has interpreted as an "adequate" examination) for *potential* hazards. To prove a violation, therefore, the Secretary need only show that this adequate examination was not conducted. Nothing in the language of the standard requires a showing that the Secretary present evidence of hazards missed by the examiner. But this is exactly what the Chairman's dissent/concurrence would require as he emphasizes that "the focus should hone in on what was loose, or fractured, or on the point of material failure at the time of the examination." Slip op. at

22. This approach would eviscerate the protective purpose of examinations, and jeopardize miner safety.

For example, what if a Sunbelt examiner failed to look into the sixth floor portholes (which no one disputes is required for an adequate examination here), but the evidence at trial revealed that no hazards had existed in the vessel? Clearly, the operator is liable for a failure to examine a working place "for conditions which may adversely affect safety and health." *Manalapan Mining Co.*, 18 FMSHRC 1375, 1396 (Aug. 1996) ("[T]he determination of risk to be accorded to a failure to conduct the pre-shift exam should not turn on the fortuitous circumstance that the unexamined area did not contain the hazardous conditions the exam was designed to detect") (opinion of Chairman Jordan and Commissioner Marks); *Jim Walter Res., Inc.*, 28 FMSHRC 579, 604 (Aug. 2006) ("because pre-shift examinations have a prophylactic purpose and because certain mine conditions are transitory in nature, later examinations are not sufficiently indicative of the conditions that may have existed at the time the area should have been examined").

The Chairman's dissent/concurrence asserts that the Secretary is imposing a "presumption . . . that something could have been seen from the seventh floor that would have indicated the presence of a hazard." Slip op. at 22. This is incorrect. We do not know what a competent examiner would have seen from the seventh floor before the accident occurred, because Davis did not view the tower from that perspective – as we hold a reasonably prudent, competent person should have done. But, more significantly, the conditions that might subsequently have been discovered are not relevant to the inquiry of whether an adequate examination was conducted in the first place.

The Chairman's dissent/concurrence also relies repeatedly on Davis's assertion that he could see to the top of the vessel, beyond the seventh floor, from port holes on the sixth floor. Slip op. at 20. This ignores the fact that the Judge explicitly rejected this testimony ("I do not credit Davis's testimony that he could see any loose material hanging from the sixth floor [portholes] and that he could only see straight across from the portholes on the seventh floor"). 40 FMSHRC at 584.

Finally, our dissenting/concurring colleague's reliance on *Asarco, Inc.*, 14 FMSHRC 941 (June 1992), is misplaced. In *Asarco*, which involved a roof examination, the examiners testified that they had looked at the relevant area, and the Secretary did not dispute this assertion. The violation was based on the fact that a roof fall had occurred, rather than on evidence that an exam had not adequately been conducted. In contrast, Sunbelt's liability centers on its failure to examine a portion of the "working place" – the finding of violation is not based on the fact that an accident occurred.

The Judge's finding that the portholes on the seventh floor were a reasonably necessary and accessible vantage point is supported by substantial evidence. Therefore, we affirm the Judge's finding that Sunbelt violated the standard because Davis failed to act as a reasonably prudent examiner and did not perform an adequate examination.

D. The Judge Did Not Err in Finding that the Violation was S&S.

The Judge determined that the violation at issue was S&S. 40 FMSHRC at 603. The operator argues that because there was no violation, the Judge erred in finding that the violation was S&S. Crucially, the operator did not claim that any of the other elements of the S&S analysis were not met.

As set forth above, substantial evidence supports the Judge's finding of a violation, which was the only element of the S&S analysis challenged by the operator. Furthermore, the exhibits and the operator's own witnesses noted the potential hazard of falling material, and the standard requires the examination in order to identify such hazards. Finally, the serious injury that resulted from an identified hazard here demonstrates the significant potential for serious injury here. Therefore, the Judge's S&S determination should be affirmed.

E. The Judge Erred in Finding that the Violation was a Result of High Negligence.

The Judge found high negligence. The bases for his finding are that Sunbelt "ignored" site-specific training requiring it to inspect working places for falling material hazards and breached its duty to identify loose hanging material. 40 FMSHRC at 604-05.

The Judge below correctly stated that Commission Judges are not bound by the Secretary's characterizations and that in assessing negligence, a Judge must 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." 40 FMSHRC at 603 (citing *Brody Mining, LLC*, 37 FMSHRC 1687, 1701-03 (Aug. 2015)). This is, of course, the same as the normal civil law definition of negligence. The Judge further correctly found that "the gravamen of high negligence is 'an aggravated lack of care that is more than ordinary negligence.' *Brody Mining*, 37 FMSHRC 1687, 1701 (Aug. 2015) (citing *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998))." 40 FMSHRC at 603.

The Judge found that Sunbelt demonstrated an "aggravated lack of care," asserting Sunbelt "ignored" site-specific training requiring it to inspect working places for falling material hazards and did not identify a buildup of materials on the inside of the upper compartment of the vessel. 40 FMSHRC at 605. We disagree. The record simply does not support the notion that Davis showed an aggravated lack of care, "ignored" the danger of falling material or that, had Davis gone to the seventh floor, he would have observed loose and hanging material.

While we accept that substantial evidence supports the Judge's decision that Sunbelt erred by Davis' failure to go to the seventh floor and therefore, was negligent, substantial evidence does not support the claim that Sunbelt "ignored" the hazards of falling material or would have found loose material if the Sunbelt inspectors had looked through the portholes on the seventh floor. The totality of the evidence shows a measure of respect for safety inconsistent with a finding of an aggravated lack of care.

Jason Oedel, the Safety Manager for Roanoke who at the time of the accident was the Pyro Manager in charge of the pre-heat tower, inspected the pre-heat tower twice before the day

of the accident. On the latter of those inspections, Gary Snyder, a manager for LVR, the subcontractor charged with cleaning the pre-heat tower, accompanied him. Oedel looked through portholes on the seventh floor. He clearly testified that he did not see any loose material that was in danger of falling. Tr. 260, 282, 294-95, 298, 308-09.

Oedel testified that the inside of the upper compartment appeared to be a monolith — that is, poured shotcrete over bricks used to form a consistent smooth surface near the bottom of the chamber. Oedel explained that before the accident, the interior material all "looked one color, one shape. It was completely smooth." Tr. 308. He further testified:

> Like I said, when we went through — well, I went through twice myself — neither did Gary Snyder — neither one of us saw that as a potential hazard, because we thought it was all part of the monolithic. We didn't know until after it had fractured that there was buildup on there.

Tr. 298.[16]

This testimony undercuts the view that going to the seventh floor certainly would have revealed problems. Further, these views are consistent with LVR Foreman Snyder's view. Davis testified that he went to Snyder the morning of the accident, which would have been after Snyder had examined the pre-heat tower with Oedel. According to Davis, "I always go to him in the mornings at 7:00 to meet with him about our next work area and what we are going to be doing. So I went to meet with him that morning, and ask him what areas would he like us to proceed with for our work. And he referred to stage four. And I asked him, had it been inspected by him, Roanoke Cement? Was it safe for us to go in? And he said, '[Y]es, everything is safe.' You can go ahead and proceed with your work." Tr. 343.

Snyder's answer did not relieve Sunbelt of the obligation to do an adequate pre-shift inspection. However, it does demonstrate that both LVR and Roanoke had inspected the stage four vessel and did not see any danger of material falling as the Judge simply speculates Davis would have found. Further, separate from the Judge's unfounded speculation of what Sunbelt would have seen through the seventh floor portholes, many acts by Sunbelt demonstrate that it did not engage in an aggravated lack of care or wholly fail to examine the upper compartment.[17]

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[16] The opinion notes that at one point during the hearing, Oedel testified that Sunbelt inspectors should have gone to the seventh floor. It does not note that Oedel separately testified that it was not necessary to go to the seventh floor. During a lengthy examination by the Judge himself, the Judge and Oedel had the following colloquy, "Q. Do you know whether he went to the seventh level? A. Me personally? Q. Yeah. A. No. Q. In your judgment, should he have done so? A. No." Tr. 313.

[17] It appears that the occurrence of a serious injury weighed heavily on the Judge's negligence consideration. The Judge said, "The opening statement, although it is not evidence in this Court, said a serious injury occurred, which is high negligence." Tr. 233.

Davis testified that he could see the upper compartment of the fourth vessel through the thimble. Indeed, he testified he had a better look at it from the sixth than the seventh floor. Although the Judge discredited the latter testimony, there is no doubt that Davis could see through the thimble to the upper compartment. Pictures taken by the MSHA inspector depict views of the upper compartment through the thimble. Indeed, photographs taken by the MSHA inspector from the sixth floor porthole through the thimble show an area that witnesses believed may have been the point from which material fell. Tr. 75-77, 91-92, 307. Clearly, because it is visible in the photograph, that area was visible from the sixth floor porthole and may have been part of the monolith referred to by Oedel.

Davis in fact testified that he believed he could see the area above better from the sixth level because of the inability to see parts of the upper compartment of the vessel from the seventh floor. Tr. 421. He also testified that there was sufficient light to conduct the examination. He had 26 years' experience conducting workplace examinations. Tr. 325. Indeed, Davis had conducted approximately 100 to 130 workplace examinations at the Roanoke cement plant.[18] When asked, Davis supplied a cogent reason for his examination from the sixth floor. He explained:

> And my thoughts was, looking from the sixth up through the seventh, I can see any loose material hanging from there, and also I could see the thimbl[e] from the inside and outside and the brick on the outside of the thimble.

Tr. 350-51.

We accept the Judge's decision on the violation but it is clearly not correct that Davis "ignored" safety. Indeed, although the absence of testimony by Foreman Douglas Redmond renders his participation immaterial to the adequacy of the investigation, he conducted a second inspection. Multiple inspections the same day show a concern for safety rather than a lack of care.

Moreover, even after Davis' examination did not disclose hazards, he had workers beat the sides of the vessel in an effort to dislodge any material he had not seen. This was not an aggravated lack of care and additionally undercuts the notion that Sunbelt was blindly cavalier about safety.

Further, two exhibits belie the Judge's notion that Sunbelt "ignored" overhead dangers. The Judge refers to Government Exhibit 6, a pre-shift hazard assessment given to Sunbelt by Roanoke. 40 FMSHRC at 604. The Judge fails to note, however, that it was Davis, the Sunbelt examiner, who filled out the report. Davis expressly included "loose objects falling" in his List of Potential Hazards. Thus, far from ignoring the hazard of falling materials as the Judge asserts, Sunbelt's examiner expressly noted it in writing for the crew. Separately, Respondent's Exhibit 10 is a Job Safety Analysis used by Sunbelt to provide for the safety of workers. Sunbelt Foreman Redmond completed it and specifically noted the danger of falling material. Rather

[18] Davis had worked at Roanoke for the past 13 years during which time he conducted 8 to 10 examinations each year. Tr. 335.

than ignoring task training by Roanoke, therefore, Sunbelt trained its own employees on the concern for falling material. It is simply incorrect to assert that Sunbelt "ignored" the concern of falling material because Davis later examined the upper compartment through a position he thought was appropriate.

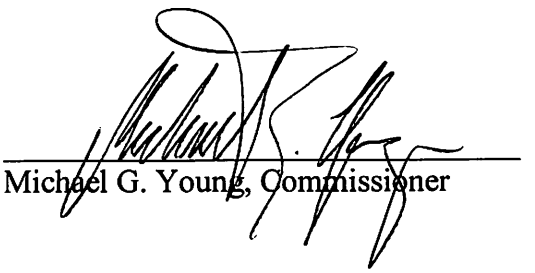
Although an examiner should avail himself of every reasonably accessible perspective when examining for the type of hazards present here, the actions of this experienced safety inspector do not reflect aggravated misconduct. The steps Davis did take go significantly beyond the Judge's mischaracterization of the evidence as showing "a standard of care slightly surpassing not conducting the examination at all." 38 FMSHRC at 1625.

We therefore find that the violation here was a result of the operator's ordinary negligence.[19]

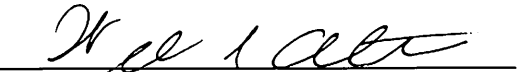
IV.

Conclusion

As discussed above, we affirm the Judge's finding of a violation on the ground that a reasonably prudent examiner would have used the seventh floor portholes to examine the portion of the fourth vessel above the seventh floor. We also affirm the Judge's finding that the violation was significant and substantial. However, we reverse the Judge's finding of high negligence and instead find that the violation was a result of ordinary negligence. Therefore, we remand this matter for a reassessment of the penalty.



Michael G. Young, Commissioner



William I. Althen, Commissioner

[19] The Judge made a laudably thorough and independent penalty assessment in which he considered and evaluated the facts and circumstances in the context of his findings on the penalty criteria. Nonetheless, because a change in the degree of negligence is an important penalty consideration, we remand the case for reassessment of the penalty.

Commissioner Jordan, Concurring in Part and Dissenting in Part:

I join my colleagues, Commissioners Young and Althen, in declining to consider the Appointments Clause issue and in affirming the Judge's finding that the area at issue was a working place. I further join them in affirming the Judge's finding of a violation and the Judge's finding that the violation was S&S, for the reasons set forth in their opinion.

However, I respectfully disagree with their analysis of the negligence issue and subsequent reversal of the Judge's high negligence determination. Instead, I would affirm the Judge's ruling that the violation was the result of Sunbelt's high negligence. High negligence "suggests an aggravated lack of care that is more than ordinary negligence." *Mach Mining, LLC,* 40 FMSHRC 1, 5 (Jan. 2018). Here, the Sunbelt supervisor, who was fully aware of the potential hazard of falling material, chose not to go up to the seventh level of the tower while conducting his examination. The supervisor's actions "involved[d] a conscious choice to take actions with knowledge of facts that would disclose to a reasonable foreman an unjustifiably high risk of potentially fatal injury to a miner." *Lehigh Anthracite Coal, LLC*, 40 FMSHRC 273, 283 (Apr. 2018) (holding that operator's conduct amounted to reckless disregard).

Substantial evidence supports the Judge's finding that Sunbelt knew that the nature of the work exposed miners to falling materials. 40 FMSHRC 573, 604 (Apr. 2018) (ALJ). The Judge noted that Roanoke had provided the Sunbelt supervisor and his crew with training instructing them to remain alert and check for overhead hazards. Roanoke had instructed the supervisor, as well as all contractors performing work inside the pre-heat tower that "[p]rior to vessel entry, *inspect vessel overhead* and remove any potential loose material" (emphasis added). Tr. 149-50, Tr. 288 (testimony of Roanoke safety manager), Tr. 384. In fact, Jason Oedel, a Roanoke supervisor responsible for the pre-heat tower, testified that material could fall due to the cooling of the tower. Tr. 276-77. Thus, Sunbelt was on notice that an adequate examination was especially important because of these possible overhead safety hazards. In addition, as previously noted, Davis' pre-shift hazard assessment documenting the exam at issue listed potential hazards of loose objects falling and dust. Gov't Ex. 6. Nonetheless, "Davis said he never thought of the area on the 7th level." 40 FMSHRC at 604.

A finding of high negligence is also supported by the fact that, when Roanoke and LVR personnel conducted an inspection, they inspected each level of the pre-heat tower, including the seventh floor. This indicates that going to the seventh floor was considered an integral part of the inspection process.

In short, the Judge here could reasonably conclude that the violation was due to high negligence, and his finding is supported by substantial evidence. *See, e.g.*, *Mach Mining*, 40 FMSHRC at 15 (affirming Judge's high negligence determination partly because an examiner conducted his inspection while driving on a travelway, and stating that "the operator should have at least ensured that a closer examination was made in areas more prone to accumulations, especially in light of what the operator acknowledged as an ongoing problem"); *Matney, employed by Knox Creek Coal Corp.*, 34 FMSHRC 777, 786 (Apr. 2012) (finding aggravated

conduct in a section 110(c) case[1] for failure to conduct an adequate pre-shift examination in part because the examiner observed the relevant area from 65 feet away and from behind equipment approximately 45 feet away).

For the foregoing reasons, the Judge's negligence ruling should be affirmed.

Mary Lu Jordan, Commissioner

[1] Section 110(c) of the Mine Act, 30 U.S.C. § 820(c), provides for individual liability under certain circumstances.

Chairman Rajkovich, Dissenting on Part III C, D and Concurring on Part III A, B, and in Result Only, on the Issue of Negligence:

I join the majority with regard to the Appointments Clause and "working place" issues. I dissent with respect to whether a violation of the standard was established by the Secretary. Considering the split of opinion among my colleagues with respect to the issue of negligence, I find no support in the record warranting a label of "high negligence." Accordingly, and in order to form a majority on that issue, I concur in result only in the opinion of Commissioners Young and Althen.

A. The Appointments Clause Issue was Waived by the Respondent and an Adequate Examination of the "Working Place" Includes the Area Above Both the Sixth and Seventh Floors of the Fourth Vessel.

I join my colleagues in their rejection of the issue raised by the Respondent regarding the Appointments Clause of the Constitution. U.S. Const. Art. II, § 2, cl. 2. Our appellate proceedings are governed by section 113(d)(2)(A)(iii) of the Mine Act. *See* 30 U.S.C. § 823(d)(2)(A)(iii). Accordingly, Commission Procedural Rule 70(g), 29 C.F.R. § 2700.70(g), mandates that the scope of appellate review is limited to issues that were raised in the Petition for Discretionary Review. Given that this particular issue did not debut until the Respondent's Reply Brief to the Commission, it is waived.

I also agree with the majority in their analysis of what constitutes a "working place" under these particular facts. Under 30 C.F.R. § 56.2, a "working place" is any place in or about a mine "where work is being performed." The complicating factor, in this instance, is that this particular structure is a multi-leveled facility with six vertically connected conical vessels, each chamber-like with offsets and approximately fifty feet tall. Regarding the examination at issue in this case, Sunbelt employee-examiner Kendrick Davis testified that he conducted a working place exam of the fourth vessel by standing on the sixth floor, looking through the sixth floor portholes, and raising his head to look at the top of the vessel beyond the seventh floor. 40 FMSHRC at 573, 583-84 (Apr. 2018) (ALJ).

As we unanimously found in the previous appeal of the Judge's summary decision in this case (38 FMSHRC 1619, 1626 (July 2016)), the examination standard[1] requires "adequate" working place exams in the sense that such exams must identify all hazards that a reasonably prudent examiner would identify. That is just plain common sense. Common sense also dictates that any examiner must look to the conditions around, below, and above to insure that any area is safe for work to be performed. Davis, by his own testimony, looked above the sixth floor level and therefore, defined the "working place" to include more than just the sixth floor.

[1] The standard provides that "[a] competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions." 30 C.F.R. § 56.18002(a).

Accordingly, the "working place" delineated by the majority as the fourth vessel, including the areas above the sixth and seventh floors, is proper in this case.[2]

B. There was No Substantial Evidence of a Violation.

I cannot agree, however, with the majority finding that there was a violation in this case. There was no substantial evidence of a violation of 30 C.F.R. § 56.18002(a) here.

1. The Facts Show that there was an Adequate Examination.

On or about December 30, 2012, Roanoke Cement Co., operator of the cement plant, which included this pre-heat tower, shut it down and conducted its last workplace examination of the area as part of the shutdown activities. Tr. 121-23. Once the tower began cooling, Roanoke employees commenced air-lancing through one-inch square portholes in an effort to blow down any "build-up" material. Tr. 108, 123-25, 259-60. Because of the intense heat, no one performing the air lancing could enter the tower at that time. Tr. 122.

On January 2, 2013, Sunbelt arrived on site and started preparing to construct the scaffolding inside the preheat tower. Gov't Ex. 3, at 4. Roanoke instructed Davis, as well as all contractors performing work inside the preheat tower, that "[p]rior to vessel entry inspect vessel overhead and remove any potential loose material." Gov't Ex. 7, at 3; Tr. 149-50, 288-92.

Davis[3] testified that he took the elevator to the sixth floor of the pre-heat tower, walked the floor looking for tripping hazards, and then visually inspected the interior of the vessel through the three port holes on the sixth floor, "looking for loose material, missing refractory, loose brick, loose thimbles-anything out of the ordinary." Tr. 348-49. Davis testified (credited by the Judge) that there was daylight when he performed his workplace examination. 40 FMSHRC at 583. Davis testified that he could see inside the vessel. Tr. 363. He testified that he could see all the way up to the ceiling of the seventh floor and could see the roof from the sixth floor up to the seventh. Tr. 349-50. Davis noted that the sixth floor port holes gave a better vantage point to examine the seventh since from the sixth floor, "you can see the under-roof of the sixth floor, and you can see the top roof of the seventh floor from the sixth." Tr. 349-50. As to this examination, Davis testified that he did not see

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[2] While it would be optimum to establish defined boundaries of a "working place" for concentration of efforts on examination, a general rule is difficult to formulate for multi-leveled facilities like this one. However, again, common sense dictates that conditions around, below, and above must be examined to insure safety.

[3] Davis had 26 years of experience working with scaffolding, safety supervision, and workplace examinations (Tr. 324-25) and was trained to recognize potential hazards related to scaffold erection. Tr. 326-27, 329; R. Ex. 9. Davis testified that he had never received any reports of material falling inside the preheat tower, and never had an injury or accident on his crew. Tr. 335-37.

any "hanging material" nor did he see "any hazard." Tr. 351.

The Secretary presented one witness for testimony in his case-in-chief—MSHA Inspector David Nichols. Nichols testified that he had never been trained on how to look for hazards in a pre-heat tower. Tr. 180. He had never been trained on how to look for hazards in cyclones. *Id.* He had never performed any work in a cement plant. *Id.* He had never performed any work in a cyclone. *Id.* He had never performed any work related to scaffolding. *Id.* He did not know that the accident site was "stage four" of the unit.[4] Tr. 177. He had never seen the inside of the cyclone prior to the accident. Tr. 172. He had no evidence as to what the inside of the cyclone looked like prior to the accident. Tr. 179-80. Nichols did not know whether Davis could see all the way to the top of the vessel, above the seventh floor, from portholes on the sixth floor. Tr. 189. Nichols was not aware of any other employee ever being struck by falling material at the facility. Tr. 183. He did not find any issues with Sunbelt's training program nor the training of its personnel. Tr. 182-83.

Nichols began his investigation at the accident site *on the sixth level* and took a series of photographs through *those* port holes. Tr. 91. He testified that "[o]n the sixth floor, the concrete and everything *looks like the seventh.*" Tr. 96 (emphasis added). He further noted that:

> There is no way to get inside at the seventh level. There was no floor. There was no scaffolding. There is nothing in there. There is an elbow. So I just basically reached in through the open door and took the pictures from my camera.

Tr. 111.

There was no evidence presented in the record of any direct concerns about conditions that needed to be immediately remedied during the course of Nichols' investigation. There was no evidence of any Section 107(a) Imminent Danger orders issued or even discussed. At the conclusion of his inspection on January 8th, Nichols was on a telephone call at which he was purported to have said, "*Well, I didn't find anything that Sunbelt did* wrong" (emphasis added). Tr. 380. This quotation was cited in the Judge's Decision (40 FMSHRC at 594) and never refuted at the hearing.

Two days later, on January 10th, Nichols issued the citation, which is the subject of this litigation, citing that Sunbelt "did not do an adequate work place exam in the area they were working as there were hanging material overhead" and that "the area above was never checked." Gov't Ex. 8. Yet, on cross-examination, Nichols did *not know*, for a fact, that the material hitting the victim actually *came from the seventh floor*, nor did he know how much the material actually weighed. Tr. 178-79, 191. He could not pick out the exact area from which anything fell. Tr. 206. More importantly, however, is that Nichols admitted that,

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[4] Nichols did not know the height of the tower or the height of each stage. Tr. 183. Other than the dimensions of the porthole into which he peered, he took no measurements, at all, during his investigation. Tr. 186-87.

regarding the "build-up" that he saw, *there was no way to tell when or if it would ever fall.* Tr. 179. That statement was never refuted at the hearing.

2. <u>The Secretary has Failed to Prove a Violation</u>.

The Secretary is required to prove a violation by a preponderance of the evidence. *See Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989); *Consolidation Coal Co.*, 11 FMSHRC 966, 973 (June 1989). Regarding this evidentiary standard, we have stated: "[t]he burden of showing something by a 'preponderance of the evidence,' the most common standard in the civil law, simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence.'" *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998). Here, the Secretary's burden was to persuade the Judge that it was more likely than not that an inadequate examination occurred through a combination of direct and circumstantial evidence. The Secretary has fallen far short.

The Secretary claims that the violation here is that Sunbelt's examiner should have gone to the seventh floor on his inspection. The presumption is that *something* could have been seen on the seventh floor that would have indicated the presence of a hazard. Therein lies the problem. The real question in this case is – *what should have been seen from the seventh floor?*

The Secretary's only witness could not identify *that "something,"* nor could he say where it was. His own testimony was about the presence of "build-up." Yet, the presence of "build-up" was no secret in this situation. That was precisely what this entire operation was focused upon. The whole idea of this project was that some "build-up" was going to be removed, any needed repairs would be done to the "monolith," and damaged "refractory bricks" were going to be repaired.

Obviously, this examiner actually saw the build-up, and the monolith, and the refractory.[5] The examiner saw things that the following clean-up crew was charged to remedy. The purpose of the examination – what the examiner was really supposed to be looking for – was whether the area was safe enough to install the scaffolding so that the whole tower could be cleaned and/or repaired. Even Nichols, himself, admitted there was no way to tell when *or if* the build-up that he saw would *ever* fall.

By no means is the accident and serious injury here to be discounted. *Something* fell from *somewhere* and hit this miner. The prime focus should be to determine what happened and to take measures to insure that it does not happen again.[6] Further, the focus should hone in on what was loose, or fractured, or on the point of material failure at the time of the examination.

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[5] Both the monolith and refractory were part of the design and not excess build-up of material.

[6] Subsequent remedial measures (Tr. 124-25) were taken in the manner in which the removal/repair process proceeded post-accident. While this goes to the heart of making sure this

That is the question that went unanswered here. That is the key cadre of evidence that is completely missing in this case.

To assert that something hit this miner, in and of itself, is not dispositive of an inadequate examination. In *Asarco, Inc.*, 14 FMSHRC 941 (June 1992) we concluded that:

> Neither the presence of loose materials, nor the fact that the roof fell, by themselves, indicate that the area was not properly examined. Roof conditions in a mine are dynamic; a miner can perform a thorough and competent examination as required by the standard and determine that the roof is secure and yet, at a later time, material can become loose and fall.

Id. at 946. In *Asarco*, an underground drill operator conducted an examination of his surroundings by making a "visual examination of the area and found no cracks, discoloration, loose ground, or fallen material on the floor." *Id.* at 942. That same operator was later found crushed under a slab that had fallen from the mine roof and he died of the injuries sustained. *Id.* at 943. An MSHA Inspector who arrived at the scene shortly after the incident concluded that the ground fall that killed the victim was unpredictable. *Id.* at 944. On the day after the accident, however, two MSHA investigators issued a citation charging Asarco with a violation of failure to examine and test for loose ground prior to the accident. *Id.* In *Asarco*, we stated:

> The Secretary introduced no evidence to show that the area was not examined before Norton started working there on the day of the accident. The only evidence that the roof was not examined is (a) the fact that part of the roof fell and (b) the testimony of MSHA inspectors that they observed some areas of loose roof in the heading at the time of the accident investigation.

Id. at 946.

In this case, there *was* evidence of an examination. Davis, the examiner, testified that he could see all the way up to the ceiling above the seventh floor and could see the roof from the sixth floor up to the seventh. Tr. 349-50. Nichols did not refute Davis' testimony that he could see all the way to the top of the seventh floor from portholes on the sixth floor. Tr. 189. The Secretary only asserts that Davis did not physically go to the seventh level. Unlike *Asarco,* the MSHA inspector, here, had no evidence or any way to tell when or if anything would ever fall.

No witnesses were specifically called to provide expert testimony in this case. No testifying witness pointed to any cracks anywhere in the structure to predict a failure. No witness pointed to any stress points. Regarding any differences in coloration, no witness testified

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situation does not occur again via another process, it still leaves unanswered as to what should have been seen on an examination.

as to what any such variations would mean regarding any imminent failure.

There was a spot on the inside wall speculated to be an area from which some material had fallen. Tr. 75-77, 91, 307. Given that the exhibit photo of that area was taken by Nichols *from the sixth floor*, obviously this area was visible from the sixth floor. Even if that were the actual area from which this material had fallen, there is still no analysis of that spot. There was no expert testimony of the strength of material at that spot. There was no discussion of any cracking or stressing *seen* around that spot. To the point, there was no expert testimony to say, "this material was likely to fall and here's why it should have been seen on an examination."

3. <u>An Examiner must be given Specific Guidance On Where an Examination was Deficient and Why</u>.

As noted in the Preamble to the Mine Act:

> [T]here is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal or other mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines.

30 U.S.C. § 801(c). A workplace examination is crucial to providing the most effective means and measures for assessing working conditions and practices. It is therefore imperative that an examiner be given thorough training on what conditions to observe. It is also imperative to give an examiner a thorough explanation of where his or her examination has been deficient. That is my concern with the majority opinion in this case. There is no guidance.

The examiner, here, is told only that he should have gone to the seventh floor of the tower – but he is not being told what, if anything, that he missed. What were any signs of material failure that he should have seen? What conditions of the "build-up" signaled imminent failure? What were any signs of loose monolithic structure? What indicated any break-down of the refractory bricks?

The investigating inspector actually went to the seventh floor, and purportedly looked directly at the seventh floor area from that vantage point. From that vantage point, looking straight into the seventh floor area, the inspector could not find the source of the falling material. He found nothing but the existence of build-up, monolith and refractory brick. At the time of these observations, Nichols gave no indication of anything that needed to be corrected immediately to prevent others from encountering hazards. The inspector's own conclusion, after direct visual inspection, was that there was no way to tell when or if it would ever fall. His initial unrefuted statement was that he did not find anything that Sunbelt did wrong. Tr. 380. We cannot blame the examiner for something no one else could find.

The Secretary has failed to prove a violation by a preponderance of the evidence. In fact, the evidence, as a whole, shows quite the opposite. There was no substantial evidence of a

violation of 30 C.F.R. § 56.18002(a) and I would reverse the Judge's findings on that issue and respectfully dissent.

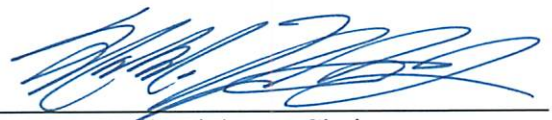
C. Alternatively, Even if There Was a Violation, it was Due to No More than Ordinary Negligence.

If my view had prevailed—that there was no violation—that would be the end of the matter. When there is not a finding of violation, the issue of negligence is never reached, as a finding on operator negligence is only necessary when the Commission assesses a penalty. *See* 30 U.S.C. § 820(i). My colleagues, however, have upheld the finding of violation, and both parties have raised important concerns regarding an operator's duty of care under section 56.18002(a). As noted earlier, I find nothing in the record to support the notion of an aggravated lack of care, warranting a label of "high negligence," and neither do Commissioners Althen and Young.

It defies logic that if a majority of Commissioners find no evidence of "high negligence" in this case, the ultimate decision would be a finding of "high negligence." Moreover, given my view that there was no violation, it would be wholly inconsistent for me to find that the record supports the notion of an aggravated lack of care, warranting a label of "high negligence."

In its Petition for Discretionary Review, Sunbelt specifically requested review on the finding of negligence. As an appellate body we are obligated to, whenever possible, fully vote on all issues presented, regardless of the resolution of underlying issues. In *Douglas v. Comm'r of Internal Revenue*, 322 U.S. 275, 287 (1944), the Supreme Court stated "[t]he members of this Court who join in the dissent do not reach this question but their position on other issues results in their voting for a reversal of the entire judgment of the" court below, thus determining the result of the appeal. More recently, however, in *Dep't of Commerce v. New York*, 588 U.S. ___, 139 S. Ct. 2551, 2596, 2606 n.15 (2019), Justice Alito, concurring in part and dissenting in part, explained that "[a]lthough I would hold that the Secretary [of Commerce]'s decision is not reviewable under the [Administrative Procedure Act], in the alternative I would conclude that the decision survives review under the applicable standards. I join Parts IV–B and IV–C on that understanding," thus determining the outcome of those parts of the case.

With the other Commissioners having split on the issue of the degree of negligence that the Secretary established, my vote in the alternative is with Commissioners Althen and Young on the lower level of negligence. Contrary to my concurring colleague's opinion set forth below, *Douglas* and, most recently, *Dep't of Commerce* are precisely on point and consistent with my reasoning to reach this opinion. Following Justice Alito's lead, I dissent on Part III C, D and concur on Part III A, B, and in result only, on the issue of negligence.



Marco M. Rajkovich, Jr., Chairman

Commissioner Traynor, Concurring with Commissioner Jordan:

I join Commissioner Jordan's opinion in its entirety. However, I write separately to note the Commission in this case has not arrived at a valid majority necessary to reverse the Judge's negligence determination.

For the first time, a Commissioner attempts to cast two "votes" on a single issue. We arrived at a 2-2 split on the question of whether the operator's violation was the result of high or ordinary negligence, with a fifth dissenting Commissioner deciding no violation occurred and therefore the operator was not at all negligent. Unhappy as we all are with split decisions, my dissenting colleague purports to cast a second vote in an attempt to form a majority decision finding *de novo* that the record evidence compels the conclusion that the operator exhibited ordinary negligence. This second vote to find ordinary negligence is plainly inconsistent with his principal decision that the operator was not at all negligent.

And it is this inconsistency that prevents my dissenting colleague's decision that there was no negligence from counting toward a majority finding the operator was negligent. The cases he cites in support of his claim to a second vote are inapposite, as neither involves a jurist taking two inconsistent positions on a single issue.

In *Douglas v. Comm'r of Internal Revenue*, 322 U.S. 275 (1944), the Supreme Court took review of an Eighth Circuit decision affirming a tax agency's rule counting a capital depletion deduction as reportable income in four consolidated administrative tax cases. But in one of the four cases, the Eighth Circuit had reversed the tax agency's decision to exclude the depletion deduction from the income of a taxpayer who saw "no tax benefit" from the deduction due to a net negative income. *Douglas*, 134 F.2d 762, 766 (8th Cir. 1943). In disposing of the fourth case, the Court counted the votes of two dissenting Justices who had not reached the issue in dispute – but had voted to reverse the Eight Circuit's decision in its entirety – as votes to reverse as to the fourth case.[1]

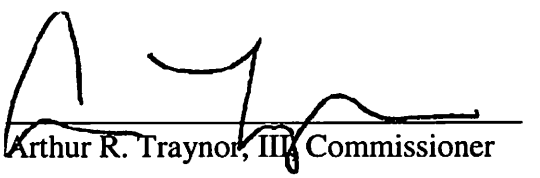
The Supreme Court more recently counted a dissenting Justice's view to form a majority on which the other Justices were split. *Dep't of Commerce v. New York*, 588 U.S. ___, 139 S.Ct. 2551 (2019). In *Dep't of Commerce*, the dissenting Justice's decision that a regulation was

[1] More specifically, in *Douglas*, the Supreme Court voted 6-2 to affirm the Court of Appeals decision approving the depletion deduction rule, with one Justice recused from the case. 322 U.S. at 281, 287, 291. But on the question presented in the fourth case, whether a taxpayer who received 'no tax benefit' must report the deduction, the Supreme Court split. The two Justices who dissented from the majority affirming the Court of Appeals' approval of the depletion deduction rule were counted with the vote of two other Justices who would reverse the Court of Appeals only on the agency's decision that the deduction should be excluded from income where the taxpayer sees "no tax benefit" due to negative net income. With four Justices on the other side of the "no tax benefit" issue, the Court arrived at a split 4-4 decision. In sum, the Court added two dissenting Justices' votes to reverse the Court of Appeals in its entirety with two other Justices' votes to reverse the Court of Appeals in the fourth case to arrive at a split decision affirming the fourth case.

not subject to judicial review was counted to form a majority reaching the same result in a consistent decision that the regulation survives judicial review. *Id.* at 2596, 2606 n.15.

In both of these cases, the decision of a dissenting jurist was incorporated by the majority as a vote that was consistent with the result of the dissent. But my dissenting colleague in this case seeks to have his decision that the operator was not negligent and therefore should pay no civil penalty counted toward a decision that the operator was in fact negligent and liable for a penalty. There is no coherent logic or precedent for resolving a split this way. Neither *Douglas* nor *Dep't of Commerce* is authority for the counterintuitive proposition that a dissenting jurist may be counted to form a majority position that is inconsistent with the decision he reached in dissent.

My dissenting colleague could have formed the majority he seeks. Jurists who would prefer to dissent often nevertheless file a "reluctant concurrence" to create a majority and avoid a split decision while nevertheless expressing their disagreement with that majority decision. *See e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 354 (1974) (Blackmun, J., concurring) ("If my vote were not needed to create a majority, I would adhere to my prior view. A definitive ruling, however, is paramount"). Had he filed a "reluctant concurrence" with the opinion of Commissioners Althen and Young, my dissenting colleague would have been able to set forth in that opinion every one of the views he expresses in dissent. And there would be no cause to question the existence of a valid majority on the issue of negligence, which I reluctantly must.



Arthur R. Traynor, III, Commissioner

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