FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N

WASHINGTON, DC 20004-1710

FEB 25 2016

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. KENT 2010-956
	:	KENT 2010-990
v.	:	KENT 2010-1087
	:	
REX COAL COMPANY, INC.	:	

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

DECISION

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). The Department of Labor's Mine Safety and Health Administration ("MSHA") issued a citation and order to Rex Coal Company, Inc. after MSHA investigated a fire at the operator's C-5 Mine. A Commission Administrative Law Judge upheld the citation, which alleged a violation of a reporting requirement.[1] He also upheld the order,

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[1] 30 C.F.R. § 50.10 requires that:

> The operator shall immediately contact MSHA at once without delay and within 15 minutes at the toll-free number, 1-800-746-1553, once the operator knows or should know that an accident has occurred involving:
>
> (a) A death of an individual at the mine;
>
> (b) An injury of an individual at the mine which has a reasonable potential to cause death;
>
> (c) An entrapment of an individual at the mine which has a reasonable potential to cause death; or
>
> (d) Any other accident.

For the purposes of section 50.10, the term "accident" includes, "[i]n underground mines, an unplanned fire not extinguished within 10 minutes of discovery; in surface mines and surface

which alleged a violation of a preshift examination standard.[2] 35 FMSHRC 2377, 2378-79, 2398-99 (Aug. 2013) (ALJ).

Rex Coal filed a petition for discretionary review, which we granted.[3] We affirm the Judge's decision and conclude that: (1) the reporting violation is supported by substantial evidence; (2) the record evidence does not mitigate Rex Coal's penalty assessment for the reporting violation; and (3) the preshift violation is supported by substantial evidence.

I.

Factual and Procedural Background

The fire occurred on November 26, 2009, which was Thanksgiving Day. Only two miners, Billy Joe Clem and foreman Anthony Coots, were working underground, and a security guard was on duty at the surface. Coots arrived at the mine before Clem. He testified that he conducted a preshift examination, placing his first preshift date, time and initials ("DTIs") at 4:45 a.m. 35 FMSHRC at 2406; Sec'y Ex. 26. He placed additional DTIs at 4:55, 5:02, 5:08, and later. 35 FMSHRC at 2406. Thereafter, Coots met Clem at the surface, and the two miners headed underground to begin the shift. After doing some work with Clem, Coots went to the #3 tailpiece to install skirting, which required burning holes in the metal. While he was working on the tailpiece, a carbon monoxide alarm went off, and the guard called Coots for help shutting down the alarm. Coots traveled to the surface, shut off the alarm, and went back underground. *Id.* at 2380, 2384, 2385.

No later than 10:45 a.m., Coots encountered an orange glow and heavy smoke around the #3 tailpiece. At that point, Coots knew there was a fire. *Id.* at 2380, 2384, 2387. After attempting to put it out, he began to search for Clem, working his way back and forth across all six entries on foot until he reached the surface. This took about 40 minutes. Once he reached the surface, Coots called his father, who was a foreman at another mine, and Rex Coal's bookkeeper, Joe Reece, to tell them what was happening. *Id.* at 2380, 2384, 2385-86, 2389.

Coots' father and a few other miners arrived soon after Coots' call and began preparing to enter the mine and search for Clem. Before they went underground, Clem called out to the surface on the mine phone. Coots answered the phone, told Clem that there was a fire, and instructed him to get to the intake. Coots and the other miners then went underground, picked up Clem, and put the fire out. *Id.* at 2380, 2384-86.

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areas of underground mines, an unplanned fire not extinguished within 30 minutes of discovery." 30 C.F.R. § 50.2(h)(6).

[2] 30 C.F.R. § 75.360(b) requires that "[t]he person conducting the preshift examination shall . . . test for methane and oxygen deficiency" in several locations, including "areas where work or travel during the oncoming shift is scheduled."

[3] The Commission did not grant review of another order affirmed as written in the Judge's Decision: Order No. 8401220 alleged a violation of 30 C.F.R. § 75.1501(a) for failure to have a responsible person in attendance when miners were working underground.

During these events, Coots never contacted MSHA. *Id.* at 2382, 2386. Although the Judge found that Rex Coal employee Lewis Blevins may have tried to contact the agency around 11:54 a.m., MSHA officials heard about the fire on a news report. They immediately sent inspectors to the mine to investigate. During MSHA's accident investigation, Inspectors Arthur Jackson and Charles Ramsey interviewed Coots and traveled underground to the accident site. MSHA also took into custody the Solaris multi-gas detectors used by Coots, Clem, and Mine Superintendent Tim Johnson. These instruments, which are referred to as "spotters," monitor the concentrations of certain gases in the atmosphere and are used to perform methane checks during preshift examinations. 35 FMSHRC at 2400, 2403. Carla Marcum, a geologist in MSHA's roof control division, downloaded stored information from these spotters. However, Clem's spotter did not download properly. After analyzing the spotter data, Marcum determined that Coots had not turned on his spotter until 5:10 a.m. at the earliest on the day of the fire – that is, 25 to 30 minutes after Coots entered his first DTI initials in the mine. *Id.* at 2400-02.

Based on the results of its investigation, MSHA issued the citation and order at issue in this case. Citation No. 8401221 alleges a violation of 30 C.F.R. § 50.10, which requires the operator to contact MSHA within 15 minutes if an unplanned mine fire has burned for more than 10 minutes. The citation stated that MSHA was not immediately notified of the fire. MSHA also issued Order No. 8355742. This order alleges a violation of 30 C.F.R. § 75.360(b), which requires the preshift examiner to test for methane and oxygen deficiency as part of the preshift examination. The preshift order was issued because Coots' first DTIs were placed at 4:45 a.m., but the spotter data as interpreted by Marcum showed that his spotter was not turned on until 5:10 a.m., making it impossible for Coots to have checked all of the areas he said he had examined for methane. *Id.* at 2398-99.

The Judge upheld both violations. He found that Rex Coal violated section 50.10, and that the violation involved high negligence because the operator knew or should have known to contact MSHA when a fire burned for over 10 minutes, and there were no mitigating circumstances. The Judge also found that the violation was significant and substantial ("S&S").[4] In light of these findings, he determined that the Secretary's proposed penalty of $18,271 was justified and assessed the penalty in that amount. *Id.* at 2387-91.

The Judge also concluded that Rex Coal violated section 75.360(b) because the Secretary provided credible evidence that the operator did not test for methane and oxygen during the preshift examination. He found Rex Coal's evidence less credible than the Secretary's evidence. Additionally, the Judge found that the violation involved high negligence because Coots knew or should have known that the spotter was not on. He also determined that the violation was S&S and an unwarrantable failure to comply.[5] The Judge assessed the proposed, specially-assessed penalty of $44,600. *Id.* at 2406-10.

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[4] 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."

[5] The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by

II.

Disposition

A. Citation No. 8401221 – The Reporting Citation

1. Whether the Judge's finding of a violation is supported by substantial evidence.

Rex Coal argues that this citation should not have been issued. According to the operator, for Coots to have gone to the surface to call MSHA instead of searching for Clem would have been futile because, if the fire had been spreading, Clem would have died before MSHA was prepared to respond to the accident. It also asserts that calling the guard and asking him to report the fire would have violated section 50.10 because the guard is not an agent of the operator. Finally, Rex Coal claims that the greater hazard defense applies to this citation.

We review this citation under the substantial evidence standard. "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)). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)). The Commission has also held that "the substantial evidence standard may be met by reasonable inferences drawn from indirect evidence." *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984).

Section 50.10, read together with the definition of "accident" in section 50.2(h)(6), requires mine operators to notify MSHA within 15 minutes if an unplanned fire has burned for more than 10 minutes. Rex Coal does not dispute that there was a fire, that Coots knew about the fire, that the fire was not put out within 10 minutes of the time Coots learned of its existence, and that no attempt to contact MSHA was made until 11:54 a.m., more than an hour after Coots discovered the fire at or before 10:45 a.m. All of these uncontroverted findings are supported by substantial evidence in the record.

Because Rex Coal did not notify MSHA within the 15-minute time frame set out by section 50.10, a violation has been established. While we acknowledge that Coots was in a difficult position when he discovered that the belt was on fire and did not know where Clem was, the operator's argument poses a false choice between going to the surface to call MSHA and searching the mine for Clem. Although the Judge correctly found that the security guard was not an "agent" of the operator,[6] he determined, quite sensibly, that MSHA was unlikely to reject a

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"an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

[6] According to section 3(e) of the Mine Act, an "agent" of the operator is "any person charged with responsibility for the operation of all or part of a coal or other mine or the

notification of a fire simply because it came from a security guard instead of a member of mine management. The Judge also properly found that the guard could also have contacted other company officials who could have called MSHA. 35 FMSHRC at 2388. Section 50.10 imposes an affirmative duty on the operator to report accidents immediately within 15 minutes, and Rex Coal failed to do this.

Rex Coal further asserts before the Commission that the citation should be vacated because it has proven the elements of the greater hazard defense.[7] However, Rex Coal did not present the greater hazard defense before the Judge. Although the elements of the greater hazard defense are closely intertwined with the evidence that the operator put on before the Judge, there is no reference to the defense in the prehearing pleadings, the hearing transcript, or the posthearing briefs. Nor was the defense argued anywhere in the record. Thus, the defense was not "presented below in such a manner as to obtain a ruling." *Gray v. North Star*, 27 FMSHRC 1, 6 (Jan. 2005) (quoting *Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1320 (Aug. 1992). Consequently, the Commission will not consider it on appeal.[8]

The fact of violation has been established by uncontroverted evidence, and the operator's arguments do not constitute grounds for overturning the citation. Accordingly, we affirm the Judge's decision that the operator violated 30 C.F.R. § 50.10.

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supervision of the miners in a coal or other mine." 30 U.S.C. § 802(e). There is no evidence in the record that the security guard's job involved any of these functions.

[7] To invoke the greater hazard defense, the operator must prove all three of the following elements: (1) the hazards of compliance are greater than non-compliance; (2) alternative means of protecting miners are unavailable; and (3) a modification proceeding under section 101(c) of the Mine Act would not have been appropriate. *Westmoreland Coal Co.*, 7 FMSHRC 1338, 1341 (Sept. 1985) (citing *Penn Allegh Coal Co.*, 3 FMSHRC 1392 (June 1981); *Sewell Coal Co.*, 5 FMSHRC 2026 (Dec. 1983)). In order to prove that there were no alternative means of protecting miners available, the operator must show that other means of compliance were at least considered. *Westmoreland*, 7 FMSHRC at 1342.

[8] Moreover, even if the Commission were to consider the argument, the record shows that the operator has not established the greater hazard defense. The Judge found that alternate means of protecting miners were available because Coots could have called out to the guard and instructed him to either report the matter to MSHA or contact a member of mine management who could report the incident. 35 FMSHRC at 2388. This finding shows that the hazards of compliance were not greater than the hazards of noncompliance; setting the notification process into action by calling the guard would have allowed Coots to continue his search for Clem while still complying with the law. There is also no evidence that other means of compliance were considered. Coots testified that it never occurred to him to call out to the guard because he was focused on finding Clem. Tr. 208.

2. Whether the Judge disregarded mitigating evidence in his penalty assessment.

Rex Coal argues that the Judge erred in his penalty assessment by disregarding mitigating evidence, including statements made by the inspectors and special circumstances on the day of the fire. Although Rex Coal complains about the alleged harshness of the penalty assessed for violating section 50.10, it does not focus on the specific factors to be considered in assessing a penalty. In any event, as discussed below, the Judge properly determined that mitigation was not warranted.

According to Rex Coal, statements by Inspectors Jackson and Ramsey show that they approved of Coots' decision to search for Clem instead of contacting MSHA. Rex Coal claims that this calls into question the credibility of the inspectors' negligence and gravity designations and MSHA's proposed penalties for all of the citations issued in relation to the accident. The operator stresses Jackson's statement that "I do not have a problem with what [Coots] did." Tr. 84. The operator also points to a statement by Inspector Ramsey as evidence that MSHA approved of Coots' actions: "Okay. Well, Mr. Coots, again, we appreciate your time and realize—hate that you went through what you did, and we appreciate your efforts and what you—what you did first of all to take care of the safety of the mine." Tr. 182.

The Judge found that in context, the inspectors' comments do not show "endorsement of Coots' actions or a belief that he acted correctly." 35 FMSHRC at 2389. After reviewing the record, we find that the Judge's conclusions about the inspectors' statements are supported by substantial evidence. As the Judge points out, immediately after saying that he did not have a problem with what Coots did, Jackson stated that, "I have a problem because he didn't do what he was required to do." 35 FMSHRC at 2389 n.13 (quoting Tr. 84). Jackson's testimony suggests that he would have had no problem with Coots searching for Clem if he had first notified the guard of the fire, his own location, and his plan to search for Clem. Tr. 80-81. It does not indicate that Jackson approved of Coots' failure to contact the guard or MSHA. *See* Tr. 80-85. Ramsey's statement was taken from an interview transcript and presented with little context beyond the fact that it was made at the end of one of Ramsey's interviews with Coots. Tr. 181-82. A reasonable factfinder could certainly conclude that Ramsey's comment was not intended to convey his support for all of Coots' actions on the day of the fire.

The operator's second mitigation argument is that Clem "did the right thing" by searching for Coots, and that his decision to search for his fellow miner should mitigate the severity of the penalty, or even justify vacating the citation. PDR at 23. The Judge addressed this argument and properly concluded that Coots' decision to search the mine for Clem instead of contacting MSHA was negligent in spite of Coots' good intentions. The Judge correctly identified the root of the problem as the operator's poor staffing choices on the day of the fire. *Id.* at 2388. These staffing choices put two miners in a dangerous situation: working separately underground; outside of close contact with the surface or each other; cutting with torches; working on a holiday when the rest of mine management is harder to contact; and without an emergency plan appropriate to the circumstances or available staff. These deviations from a normal workday put Coots and Clem in a position where it was difficult to comply with the law and get help in an emergency.

In *Wolf Run Mining Co.*, the Commission discussed the importance of strictly adhering to emergency plans and MSHA regulations in the "difficult and frantic" moments after a mining accident. 35 FMSHRC 3512, 3518 (Dec. 2013). The Commission also pointed out that an emergency plan should be self-executing in order to account for accidents that occur after business hours or on holidays. *Id.* at 3519 n.10. Although Coots found himself in a difficult situation on the day of the fire, he did not take the necessary steps to deal with the situation, which suggests that he had not been prepared to deal with it. Because a rescue team cannot assemble until it knows about an emergency, it is imperative to follow the law and notify MSHA immediately so that help can arrive as quickly as possible. Coots knew that he could use the mine phone to contact the guard at the surface. By not calling out to the surface to let the guard know what was going on and where he was going, and to instruct the guard to make the necessary calls to get help, Coots imperiled both himself and Clem.

The Commission's Judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). Such discretion is not unbounded, however, and must reflect proper consideration of the penalty criteria set forth in section 110(i).[9] *Id.* (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984)). We find that the Judge properly considered the penalty factors set out in section 110(i). As a result, we uphold the Judge's penalty assessment of $18,271 for Citation No. 8401221.

B. Order No. 8355742 – The Inadequate Preshift Order

Rex Coal argues that Order No. 8355742, the preshift violation, is not supported by substantial evidence. The operator claims that the Judge improperly credited MSHA's method of determining what time Coots' spotter was turned on during the day of the fire, and erroneously disregarded evidence that undermines the accuracy of the time adjustment methods used by MSHA geologist Carla Marcum.

We review this order under the substantial evidence standard. In addition, the resolution of the issues involving this order depends heavily on credibility determinations. A Judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3

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

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

30 U.S.C. § 820(i).

FMSHRC 2767, 2770 (Dec. 1981). The Commission has recognized that, because the judge "has an opportunity to hear the testimony and view the witnesses[,] he [or she] is ordinarily in the best position to make a credibility determination." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff'd sub nom., Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998).

When the Judge considered MSHA's time adjustment method, he credited Marcum's testimony and found that her calculated times were accurate. Marcum's testimony about her training and experience was specific and credible, and the times she arrived at using the time adjustment method are consistent with the record evidence and witness testimony. In contrast, the Judge did not find Coots' testimony to be credible. Coots' credibility suffered because his testimony about the time he entered the mine contradicted the times that he told the inspectors during the investigation that he entered the mine and placed his first DTIs. It also contradicted the DTIs that he placed in the mine on the day of the fire. 35 FMSHRC at 2406; Tr. 204; Sec'y Ex. 26.

Rex Coal argues that Coots' spotter experienced "time drift," making it impossible for Marcum's time adjustment method to accurately determine when Coots' spotter was first activated on the morning of the fire. In support of this argument, the operator introduced an MSHA study conducted after the Upper Big Branch disaster as evidence that a phenomenon known as "time drift" makes the clocks on Solaris spotters inherently unreliable. This study was done on multi-gas detectors recovered from the Upper Big Branch disaster. However, it does not show that the clocks on all or even most Solaris spotters are unreliable and can "drift" randomly. Res. Ex. 1 at 3. Instead, the study shows that erratic time readings were an anomaly found in only one of the many Solaris spotters recovered after the accident. Res. Ex. 1 at 10.

The operator also lists all of the first shift starting times from the printout of Coots' spotter, which varied widely. According to the operator, because the activation times showed so much variance even though Coots worked the same shift each day, Coots' spotter had experienced "time drift" and did not keep accurate time. The Judge considered this evidence and found it unpersuasive because the operator did not present any evidence beyond Coots' testimony to verify that Coots actually arrived at the mine and turned on his spotter at the same time every day. 35 FMSHRC at 2407-08. The Judge did not find Coots' testimony credible, and nothing else in the record makes it more likely than not that Coots arrived at the mine and turned on his spotter at the same time every day. In light of these considerations, the Judge's conclusion that Coots' spotter did not experience "time drift" is supported by substantial evidence.

Finally, the operator argues that the data retrieved from Clem's spotter, as opposed to Coots' spotter, undermines the Secretary's theory about when Coots turned on his spotter. The operator points out that Marcum's time adjustment method shows that Clem's spotter was turned on at 5:15 a.m., which is 20-25 minutes before Clem arrived at the mine. Tr. 199; Res. Ex. 3 at 6. According to the operator, this shows that the Secretary's time calculation method is fundamentally inaccurate and shows that Marcum simply "disregarded" evidence that undermined her theory. At the hearing, however, Marcum testified that she could not use the

information she downloaded from Clem's spotter because there was something wrong with the spotter itself. Tr. 105-07. In his opinion, the Judge credited Marcum's testimony about the problems with Clem's spotter. 35 FMSHRC at 2408. The Judge also relied on Marcum's experience and training when he determined that there was no reason to doubt her testimony that the information from Clem's spotter was not usable. *Id.*

The record provides no basis for overturning the Judge's credibility determinations for either witness. As a result, we find that the Secretary adequately proved that Coots' spotter was not turned on until 5:10 a.m., well after Coots began his preshift examination. The Judge's decision with regard to Order No. 8355742 is supported by substantial evidence. Accordingly, we affirm the Judge's decision that the Secretary has established a violation of 30 C.F.R. § 75.360(b).

III.

Conclusion

We affirm the Judge's decision upholding Citation No. 8401221 and Order No. 8355742 in all respects.

Mary Lu Jordan, Chairman

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

William I. Althen, Commissioner