# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA) | : | |
| v. | : | Docket No. KENT 2011-827 |
| PREMIER ELKHORN COAL<br>COMPANY | : | |

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

## DECISION

BY: Jordan, Chairman; Young, Nakamura, and Althen, Commissioners

This case involves two citations issued to Premier Elkhorn Coal Company ("Premier") by the Department of Labor's Mine Safety and Health Administration ("MSHA") in connection with a fatal accident in which a coal truck hit a berm and turned over. Pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"), MSHA issued citations alleging violations of 30 C.F.R. § 77.1607(b)[1] and 30 C.F.R. § 77.1605(b).[2]

The Administrative Law Judge found that the Secretary failed to establish either the cause of the fatal accident or that the brakes on the truck were inadequate. He vacated both citations. 35 FMSHRC 150, 164 (Jan. 2013) (ALJ). For the reasons that follow, we conclude that the Judge erred by vacating the citation alleging that the mobile equipment operator failed to maintain full control of his vehicle. We affirm the vacation of the citation alleging that the mobile equipment was equipped with inadequate brakes.[3]

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[1] 30 C.F.R. § 77.1607(b) requires that "[m]obile equipment operators shall have full control of the equipment while it is in motion."

[2] 30 C.F.R. § 77.1605(b) provides that "[m]obile equipment shall be equipped with adequate brakes, and all trucks and front-end loaders shall also be equipped with parking brakes."

[3] On this same date, the Commission is also issuing a decision in a companion case which arose from the same incident. *Trivette Trucking*, 38 FMSHRC ___, No. KENT 2011-1223 (July 8, 2016); *see also infra* note 4.

## I.

## Factual and Procedural Background

Premier operates a surface coal mine in Kentucky and a nearby preparation plant. In December 2009, Steve Johnson, chief mechanic of contract trucking company Trivette Trucking, was hauling coal from the mine to Premier's plant in a 2006 International Paystar coal truck. During his first trip to the plant, Johnson began to experience problems with his truck's power steering after his truck was loaded with coal. Johnson notified a fellow coal truck driver of the steering problem over the CB radio and pulled his truck over so that he and the other driver could inspect the steering system. They were not able to identify any defects, so Johnson resumed driving to the plant.

The section of haulage road on which Johnson was traveling was a relatively straight, but steep, gravel road flanked with berms on both sides. After about 1300 feet at a downward grade of 15–18%, the road leveled out for approximately two miles. While descending the steep section of the road, Johnson's truck left the normal travelway and started heading directly towards the left berm. Before the truck began to make contact with the berm, Johnson jumped out of the truck's cab but was unable to clear the vehicle. Johnson became ensnared in the back left tandem wheels and was dragged down the hillside until the truck ultimately flipped over. Johnson's injuries were fatal.

Following its fatality investigation, MSHA issued Premier two citations.[4] Citation No. 8230316 alleges a violation of 30 C.F.R. § 77.1607(b) for failure to maintain full control over the haulage truck while it was in motion. The citation contends that Johnson's truck was overloaded by 37,600 pounds based on the maximum gross vehicle weight rating ("GVWR") recommended by the truck's manufacturer and that the overloading contributed to Johnson losing control of his vehicle. Citation No. 8230317 alleges a violation of 30 C.F.R. § 77.1605(b) for failure to maintain the truck's brakes in adequate condition. The citation notes that axle grease was present on the left and right brake drums and that the brake on the right rear tandem axle was not functional. MSHA designated both violations as S&S, attributable to high negligence on the part of Premier. Citation No. 8230316 was designated as an unwarrantable failure.[5]

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[4] Johnson's employer, Trivette Trucking, was also issued two orders. Order No. 8230314 alleged a violation of 30 C.F.R. § 77.1607(b), and Order No. 8230315 alleged a violation of 30 C.F.R. § 77.1605(b).

[5] The S&S and unwarrantable failure 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," and establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

In his decision, the Judge vacated both citations issued to Premier in connection with the fatal accident. Concerning Citation No. 8230316, the Judge held that the Secretary failed to prove that Johnson's truck was hauling an unsafe amount of coal. Consequently, he could not find a violation of the standard. 35 FMSHRC at 155. The Judge noted that the Secretary failed to establish a weight at which the truck would become unsafe or that exceeding the manufacturer's GVWR was *per se* hazardous. *Id.* at 155–56. The Judge found that the load in Johnson's truck was not too heavy for Johnson's truck to safely haul the coal even if it exceeded 120,000 pounds as the Secretary alleged. *Id.* at 156–57.

With regard to Citation No. 8230317, the Judge suggested that a violation of section 77.1605(b) could be found if the Secretary could prove either: (1) that the condition of the brakes of Johnson's truck caused the accident, or (2) that the defects in the brakes were significant enough to cause the brakes to fail during typical usage of the vehicle. *Id.* at 163. The Judge, however, found that the accident was most likely attributable to a steering problem or another problem that caused the brakes and steering to fail simultaneously. *Id.* at 161, 163. In addition, the Judge credited the testimony of Premier's expert witness that the brakes, while suffering from minor defects, would have been adequate to stop Johnson's truck at an estimated speed of 10 mph.[6] Accordingly, the Judge found that the Secretary had not met his burden of proof to show that the brakes on Johnson's truck were inadequate.

The Commission granted the Secretary's petition for discretionary review.

## II.

## Disposition

### A. Exclusion of Evidence

At the hearing, the Judge made several evidentiary rulings that the Secretary claims were detrimental to his case. In particular, the Judge did not admit Secretary's Exhibit 29, a vehicle manual purported to apply to the truck Johnson was driving. The Secretary had sought to introduce this evidence to establish that he truck's manufacturer warned that overloading in excess of the GVWR of 82,600 pounds could cause "component failure, result in property damage, personal injury, or death." Tr. 222. However, the Judge found that the Secretary failed to establish sufficient foundation that the manual related to the particular truck in question, in part because the manual was published in 2005 while the truck was a 2006 model. Tr. 220–22.

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[6] The Judge found the Secretary's expert witness's testimony to the contrary to be unconvincing. The Judge noted that he gave such testimony little weight due to the witness's lack of experience in steering systems, inconsistencies between his report and his testimony, "generally poor reasoning," and reliance on a potentially biased report authored by the manufacturer of the steering system. 35 FMSHRC at 164.

The Judge also excluded Secretary's Exhibits 13–17, which purported to demonstrate that Premier regularly loaded trucks in excess of 120,000 pounds. These exhibits included truck weight tickets for the trucks loaded immediately before Johnson's truck on the day of the accident and for loads that Johnson had taken a couple of weeks prior to the accident. Tr. 53. The Judge ruled that the weight tickets were irrelevant to determining the weight of Johnson's truck at the time of the accident and noted that the small sample size was inadequate to establish a pattern of overloading. Tr. 64.

The Commission's procedural rules and other federal rules place a low bar on the relevancy of evidence that can be admitted. Commission Procedural Rule 63(a) states only that "[r]elevant evidence . . . that is not unduly repetitious or cumulative is admissible." 29 C.F.R. § 2700.63(a). Section 556(d) of the Administrative Procedure Act, in turn, states that "[a]ny oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence." 5 U.S.C. § 556(d).[7]

The Commission's rules do not define what constitutes "relevant evidence." However, Rule 401 of the Federal Rules of Evidence defines it as evidence having "any tendency to make a fact more or less probable than it would be without the evidence" where that fact "is of consequence in determining the action."[8] Fed. R. Evid. 401. Generally, courts have viewed Rule 401 as having "a low threshold of relevancy." *In Re: Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 782–83 (3d Cir. 1994); *see also Hurley v. Atlantic City Police Dep't*, 174 F.3d 95, 109–10 (3d Cir. 1999) ("Rule 401 does not raise a high standard.").

We conclude that the Judge erred by not admitting both the truck manual[9] and the weight tickets into evidence. The weight tickets presented sufficiently similar factual

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[7] Section 556(d) of the Administrative Procedure Act ("APA") does not directly apply to Commission proceedings, because section 507 of the Mine Act states that provisions of the APA do not apply unless the Mine Act explicitly states that they do. 30 U.S.C. § 956. However, section 556(d) provides useful guidance in this case.

[8] While the Federal Rules of Evidence are not required to be applied to Commission hearings, they may have value by analogy. *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1135–36 & n.6 (May 1984).

[9] While the threshold for admissibility is low, a party seeking to introduce evidence must nonetheless provide a proper foundation to establish its relevance. In the case of the truck manual, Commissioner Young questions whether this was done. He notes that the Judge may have foreclosed the Secretary's efforts to provide a foundation for admissibility. Had the exclusion of evidence been prejudicial, preventing a party from offering facts demonstrating its relevance would be reversible error. *See Gray v. North Fork Coal Corp.*, 35 FMSHRC 2349, 2359–60 (Aug. 2013) (noting an abuse of discretion standard for evaluating the Judge's exclusion of evidence, but characterizing exclusion of critical evidence as an "'extreme' sanction."). Conversely, if the Secretary

situations for a factfinder to draw reasonable inferences as to Premier's loading practices. The tickets were issued in close temporal proximity to the accident, involved the same or similar haulage trucks, and were from the same mine. Similarly, the truck manual, even if it was for the vehicle's prior model year, could be relevant for the question of how much weight Johnson's truck could safely carry.

Nevertheless, the decision to exclude the evidence above did not prejudice the Secretary's case and thus was harmless error. *See* Fed. R. Civ. P. 61. Although the Judge stated that he excluded the evidence, it is apparent from his decision that he considered the evidence anyway, but afforded it little weight.[10] The weight tickets and the truck manual do not definitely prove the Secretary's theory of causation. Rather, they only provide limited circumstantial evidence that the weight of Johnson's truck may have caused or contributed to the fatal accident. In light of the credited expert testimony and evidence at the scene of the accident, however, the Judge determined that the weight of the evidence ultimately did not prove that Johnson's truck was carrying a load that was too heavy for it to safely haul coal. 35 FMSHRC at 155–57.

**B. Citation No. 8230316 – Failure to Maintain Full Control of the Truck**

The Judge vacated Citation No. 8230316 because he found that the Secretary was unable to prove that Johnson's truck was loaded in excess of what it could safely haul. However, the Secretary argues that the act of driving the truck off a haulage road constituted a *per se* violation of section 77.1607(b). The Secretary points to the fact that there is no evidence to support the contention that Johnson was in complete control of his vehicle as the standard requires. Numerous witnesses testified that Johnson lost control of his truck, and the Judge mentions this fact several times in his decision. *See, e.g.*, Tr. 150 (Premier Safety Director Wilder), 205–06 (MSHA Mining Engineer Bellamy), 323 (MSHA Mechanical Engineer Medina); 35 FMSHRC at 158, 160–01.

The Commission previously addressed this issue in *Clintwood Elkhorn Mining Co.*, 35 FMSHRC 365 (Feb. 2013). In *Clintwood*, the Judge vacated a citation alleging a violation of section 77.1607(b) in part because he believed that the citation was

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had not effectively made a record of the evidence's relevance, his objection to the exclusion of that evidence may be deemed waived. *See Cavataio v. City of Bella Villa,* 570 F.3d 1015, 1021 (8th Cir. 2009) (the requirement of making an offer of proof to preserve the issue for appeal is "[o]ne of the most fundamental principles in the law of evidence."); *but see Waltzer v. Transidyne Gen. Corp.*, 697 F.2d 130, 134 (6th Cir. 1983) (the failure to make an offer of proof is not fatal where the "substance of the excluded evidence is apparent from context within which the questions were asked.").

[10] Additionally, we note that the Judge did not wholly exclude such evidence. The Judge permitted the Secretary's witnesses to testify as to the truck's GVWR (Tr. 48) and the approximate load Johnson's truck was carrying at the time of the accident. Tr. 312–315, 328–29. Similar information was also entered into evidence through MSHA's accident report. Sec'y Ex. 4.

"'predicated on the unproved allegation that overloading existed.'" *Id.* at 370 (citing 32 FMSHRC 1880, 1890 (Dec. 2010) (ALJ)). The Commission, however, concluded that section 77.1607(b) did not require the Secretary to prove "a causal or contributing factor for the loss of control." *Id.* The proper scope of analysis for a violation under this standard is limited to the question of whether the driver maintained control of his vehicle.

As the Judge himself recognized in his subsequent decision in *Trivette Trucking*, our holding in *Clintwood Elkhorn* requires that we reverse the Judge's vacation of Citation No. 8230316. *See Trivette Trucking*, 35 FMSHRC 1934, 1943 (June 2013) (ALJ). It is uncontroverted that Johnson failed to maintain control of his truck. It can be easily inferred from the record that Johnson would not have placed himself in mortal danger by jumping out of the truck had he been in full control of his vehicle. Even if we declined to make such an inference, the fact that Johnson left the cab before the vehicle stopped clearly establishes that he did not maintain control of the vehicle. Accordingly, we reverse the Judge and hold that the Secretary has established a violation of section 77.1607(b).

Having found a violation, we next turn to the Secretary's S&S determination. Given the tragic result of Johnson's inability to maintain control of his truck, we find that the record can only support a finding that the violation was S&S. *See American Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (where the evidence supports only one conclusion, remand on that issue is unnecessary). Stated simply, the failure of the driver to maintain control of the truck violated the standard, constituted the hazard at which the standard is directed, and was reasonably likely to result in serious injury. *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984).

Finally, we address the unwarrantable failure allegations. The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001.

We conclude that the Judge's factual findings and credibility determinations are supported by the record and preclude a finding that the violation resulted from an unwarrantable failure. The Secretary's allegations of a heightened degree of negligence were predicated on the theory that Johnson's loss of control of his vehicle was caused, or contributed to, by the overloading of his truck. However, the Judge determined that the record was insufficient to establish the Secretary's theory.

The Secretary's evidence that Johnson's truck was loaded in excess of 120,000 pounds is, at best, circumstantial. The fact that the Secretary only relied on weight tickets of the truck involved in the accident from four dates prior to the accident, and weight tickets of a different type of truck from the day of the accident, calls into question the reliability of any inference as to the weight of Johnson's truck on the day of the accident.

Moreover, the Secretary was unable to convincingly establish that the GVWR set by the manufacturer was a reliable measure for determining the maximum load that this particular truck could safely transport. It is thus difficult to discern what the operator could have done differently to prevent or mitigate a hazardous condition or practice.

Even considering the excluded evidence and assuming that Johnson's truck was loaded in excess of the manufacturer's GVWR, the Judge's findings do not support the Secretary's theory. Importantly, the Judge credited the testimony of Premier's expert witness, Steve Rasnick, who testified that Johnson's truck was capable of safely handling a 120,000 pound load. 35 FMSHRC at 1942. We see no basis for overturning the Judge's determination on this point. *See, e.g.*, *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992) (stating that Judge's credibility determinations are entitled to great weight and may not be overturned lightly). Consequently, we find that the Secretary has failed, as a threshold matter, to meet his burden of proof as to the unwarrantable failure designation.[11]

Accordingly, we reverse the Judge and find a violation of section 77.1607(b). We further find that the violation was S&S, but that it was not the result of an unwarrantable failure to comply with the standard.

**C. Citation No. 8230317 – Failure to Equip Truck with Adequate Brakes**

To find a violation of section 77.1605(b), the Judge determined that the fact of the violation could be established on either of two separate grounds. First, the Secretary could show that the condition of the brakes on Johnson's truck caused the fatal accident. If the brakes played a role in the accident, the Judge reasoned that the inadequacy of the brakes would be self-evident. Failing to establish the brakes' role in the accident, the Secretary could also prove a violation by showing that the defects in the brakes were significant enough to cause the brakes to fail during typical usage of the vehicle. 35 FMSHRC at 163. The Judge ultimately found that the Secretary had failed to establish either theory and vacated the citation.

On appeal, the Secretary argues that the Judge should be reversed because his analysis concerning this second citation was predicated on his prior finding that the Secretary had failed to prove that the truck was overloaded. The Secretary also contends that the Judge should not have credited the testimony of Premier's expert witness over his own expert witness.

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[11] Because the Secretary was unable to prove, as a threshold matter, that overloading the truck caused the accident and that the operator was highly negligent in this regard, we need not employ in this case the seven-factor test for an unwarrantable failure set forth in *IO Coal Co.*, 31 FMSHRC 1346, 1350–51 (Dec. 2009), and other decisions.

We conclude that the Judge's finding that the brakes did not cause the fatal accident is supported by substantial evidence.[12] The events leading up to the accident were not indicative of an accident caused by a brake failure. Prior to the accident, Johnson complained that he was having difficulty steering his vehicle. Tr. 139–40. The problem was serious enough that Johnson felt the need to pull the truck temporarily out of service to examine the vehicle.[13] Additionally, at the scene of the accident there were no skid marks to indicate that Johnson had unsuccessfully attempted to slow or stop his vehicle. Rather, the tire tracks indicated that Johnson drove straight into the berm.

Furthermore, Premier's expert witness advanced a plausible theory of causation that better fit the evidence in the record. The expert hypothesized that Johnson's truck may have been stuck in idle mode, causing both the brakes and steering to be simultaneously rendered ineffective. 35 FMSHRC at 162. While the expert's testimony did not definitively conclude that the accident was caused by the truck slipping into idle mode, the existence of the expert's alternate theory of causation substantially detracts from the Secretary's theory of the case.[14]

Next, we examine the Judge's finding that the defects in the truck's brakes were not significant enough to cause the brakes to fail in typical usage. It was undisputed that the brakes on Johnson's truck had some defects, but that alone is insufficient to constitute a violation of section 77.1605(b). Neither party's expert witness testified that the defects were great enough to render the brakes completely inoperable. Rather, the disagreement lies in whether the brakes, in the condition in which they were found during MSHA's investigation, would have been adequate to stop Johnson's truck on the roads it typically travels.

The crux of the Judge's analysis on this point is the weight he gave to the testimony of each party's expert witness. The Secretary's expert witness testified that the faults in the truck's service brakes would have prevented Johnson from safely stopping his vehicle and that it was likely that the truck was traveling at a speed of more than 10

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

[13] We note that during the accident investigation, it was discovered that the truck's steering system was not well maintained. Several seals on the truck's steering mechanism had been installed backwards, resulting in a leakage of power steering fluid. 35 FMSHRC at 160.

[14] Of course, as a general matter, in order to prove a violation of this standard requiring adequate brakes, the Secretary is not required to prove that the violation caused an accident.

miles per hour. However, the Judge gave little weight to this opinion due to the witness' lack of experience with steering systems, inconsistencies in his testimony concerning the speed of the truck and the condition of the parking brake, and "generally poor reasoning." 35 FMSHRC at 164. The Judge also noted that the opinion of the Secretary's expert as to the cause of the accident was influenced by a report from manufacturer of the steering box, whom the expert admitted had an interest in finding that the steering box was not at fault.. *Id.* at 160.

At the same time, the Judge found that the testimony of Premier's expert witness was well explained. *Id.* at 163–64. Premier's expert witness testified that the defects in the service brakes were not extensive, with only one of the six drum brakes too worn to have functioned. Notwithstanding this defect, the expert testified that Johnson should have been able to stop his vehicle traveling at a rate of 10 miles per hour. *Id.* at 159–60. Similarly, Premier's expert testified that the presence of grease on the brake drums and evidence of past overheating would not have a meaningful effect on the brake's performance. *Id.* at 158–59.

A Judge's determinations of the weight given to expert opinions may not be overturned lightly. *Farmer*, 14 FMSHRC at 1541; *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). Further, 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)).

Although the Secretary offered some evidence that the brakes on Johnson's truck were incapable of stopping the truck, such evidence was mainly derived from testimony from a witness that the Judge determined not to be credible. We see no reason to take the extraordinary step of disturbing the Judge's credibility determination. Accordingly, we affirm the vacation of Citation No. 8230317.

## III.

## Conclusion

For the foregoing reasons, we reverse the Judge on Citation No. 8230316 and find that section 77.1607(b) was violated and that the violation was S&S. We affirm the Judge's vacation of Citation No. 8230317. We hereby remand the case to the Chief Administrative Law Judge for reassignment[15] and assessment of a civil penalty.

Mary Lu Jordan, Chairman

Michael G. Young, Commissioner

Patrick K. Nakamura, Commissioner

William I. Althen, Commissioner

[15] We note that Judge Jeffery Tureck, who originally decided this case, has retired from the Commission.

Commissioner Cohen, dissenting:

Although I agree with my colleagues that the record unquestionably demonstrates that Premier Elkhorn committed an S&S violation of section 77.1607(b), I cannot join them in dismissing the Judge's erroneous exclusion of relevant evidence as mere harmless error. For the reasons that follow, I conclude that this matter must be remanded for the Judge to reconsider Premier Elkhorn's level of negligence and the MSHA-alleged unwarrantable failure in violating section 77.1607(b), and also whether the mine operator violated section 77.1605(b).[1]

Steve Johnson was a mechanic and truck driver for Trivette Trucking, a contractor that hauled coal from Premier Elkhorn's PE Southern Pike Co. coal mine to the company's preparation plant. On December 12, 2009, Johnson was driving a 5600i-model International Paystar truck built in May 2005. Sec'y Ex. 1, 2, 12.

Truck manufacturers assign each vehicle a gross vehicle weight rating ("GVWR") which prescribes the weight that the truck's components are designed to handle. The GVWR derives from a combination of factors, including the tire and rims on the vehicle, the suspension system, and the axle and braking system. Tr. 273–74. International Paystar assigned a GVWR of 82,600 pounds to the truck Johnson used in December 2009. Tr. 272, 521. International Paystar rated the truck's axle and braking system up to 85,000 pounds. Tr. 274–75. In the January 2005 operator's manual for International Paystar's 5000i truck, the manufacturer warned that exceeding the truck's gross axle weight, gross vehicle weight, or gross combination weight rating by overloading "can cause component failure resulting in property damage, personal injury, or death." Tr. 222; Sec'y Ex. 29 (excluded). Heavier vehicles require more force to stop than do lighter vehicles. Tr. 229. A driver would need to use the brakes harder and longer to stop a heavier truck. Tr. 278–79. The friction from using a brake generates heat. Tr. 278. When a brake overheats, it becomes less effective. Tr. 233, 291. This phenomenon, called brake fade, can ultimately lead the brake to fail outright. Tr. 233, 278. To prevent overheating, the truck is equipped with brake drums that dissipate the heat from the braking system. Tr. 233. When the truck is overloaded beyond the gross axle weight, however, the brakes can generate more heat than can be dissipated through the brake drums. Tr. 277–78, 292–93. Truck drivers use the engine's braking power to help control the vehicle's speed and preserve the regular brakes. Tr. 319. This engine brake,

[1] I recognize that Judge Jeffrey Tureck, who decided this case, has retired. I would have Chief Judge Robert Lesnick assign another Judge to decide the issues of negligence and unwarrantable failure for the section 77.1607(b) violation, as well as liability under section 77.1605(b), on remand. This case involved the fatality of a truck driver whose coal truck was overloaded, and the virtual exoneration of the production operator, Premier Elkhorn. The Secretary—and indeed the community of American citizens concerned about mine safety and health—is entitled to have the issues in this case correctly adjudicated.

called a Jake brake, does not function when the truck is out of gear or when the truck engine enters a self-preserving idle mode. Tr. 319, 454.

Unloaded, Johnson's truck weighed approximately 42,000 pounds. Tr. 286, 315, 354. The truck's bed could hold nearly 80,000 pounds of the coal mined at the Premier Elkhorn mine. Tr. 315. Accordingly, the truck would weigh approximately 120,000 pounds when loaded to the brim. Tr. 313–15, 521–22.

On the day of the accident, Premier Elkhorn miner Bobby Warf was operating the front-end loader to load the Trivette trucks with coal. Tr. 118–21. Because Premier Elkhorn's front-end loaders did not have bucket scales weighing each bucket of coal, Warf was not aware of precisely how much coal he loaded into the Trivette trucks.[2] Tr. 127–28, 132. When Kentucky state transportation officials were in the area, however, Warf and the other Premier Elkhorn load operators routinely lightened the trucks' loads to keep the vehicles from exceeding the state's 90,000 pound weight limit. Tr. 130–32.

Warf told MSHA that he had loaded Johnson's truck "heavy with a hump." Tr. 83, 113–14. Warf himself testified that he, like other Premier Elkhorn employees, loaded the coal transport trucks with a hump in the back of the bed, called a graveyard hump. Tr. 125. On December 12, 2009, Warf loaded Johnson's International Paystar truck the same way that he loaded the previous four trucks, including a graveyard hump. Tr. 114, 124–25. Because Johnson's truck overturned, officials could not determine precisely how much coal the truck was carrying prior to the accident. Tr. 82. The truck immediately following Johnson's was similarly loaded, with a graveyard hump protruding above the top of the truck bed. Premier Ex. 6; Tr. 435–36. Because Premier Elkhorn paid Trivette by the weight of coal hauled, the mine maintained weight records for each truck's delivery. Tr. 61–63, 163, 187. The four trucks before Johnson's each carried between 71,000 and 85,000 pounds of coal. *See* Sec'y Ex. 17 (excluded); Tr. 51–56, 71–73. Fully loaded, those four trucks, which were Mack trucks approximately the same size as Johnson's International Paystar truck, weighed from 116,000 pounds to 124,000 pounds.[3] *Id.* In the two previous Saturdays hauling coal from the PE Southern Pike Co. mine, Johnson made four trips, on average carrying nearly 73,000 pounds of coal per trip and weighing slightly less than 115,000. *See* Sec'y Exs.13, 15 (excluded). Johnson similarly carried heavy loads from other Premier Elkhorn mine sites, with his vehicle averaging approximately 116,000 pounds. *See id.*; Sec'y Exs. 14, 16 (excluded).

MSHA's accident investigation uncovered a number of problems with Johnson's truck. One of the four rear brakes did not function whatsoever, allowing the truck's rear right wheels to roll even without the additional weight of coal. Tr. 285–86, 354. All three of the rear brake drums that MSHA could safely examine were worn beyond the

[2] Premier Elkhorn installed bucket scales on its front-end loaders in the weeks following the fatal accident on December 12, 2009. Tr. 174.

[3] MSHA's mechanical engineer, Ronald Medina, testified that he had never seen a coal truck with a GVWR exceeding 90,000 pounds. Tr. 247–50, 275–77.

acceptable level. Tr. 288–90. The worn-out drums had a diminished ability to transfer heat, reducing the brakes' effectiveness. Tr. 288–90. In addition, both of the truck's front brake drums were covered with grease that lubricated the brakes, potentially reducing the friction produced and thus the brakes' effectiveness. Tr. 287.

MSHA's regulations require operators to perform safety checks each day and fix any discovered problems before the vehicle is put into service. *See* Tr. 457–58. Premier Elkhorn's expert witness testified that truck operators should keep a log book of all such pre-operational examinations and repair work performed on the vehicle. Tr. 457–59. During MSHA's investigation, however, the agency was unable to find any record of daily examinations being performed or maintenance and repairs to Trivette's fleet of trucks for more than a month prior to the fatal accident. Tr. 105–107. Meanwhile, Premier Elkhorn did not have any system in place to ensure its contractor, Trivette, was complying with MSHA regulations. Tr. 175–78.

## Analysis

### A. The Excluded Evidence

At the hearing, the Judge refused to admit several pieces of evidence that formed the foundation of the Secretary's case. First, the Judge excluded Secretary's Exhibits 13–17, the alleged weight tickets from the four trucks that immediately preceded Johnson's on the day of the accident and other weight tickets from Johnson's trucks during the weeks leading up to Johnson's death. Tr. 64, 67–68, 71. The ALJ reasoned that the weight tickets were not relevant to determining the weight of Johnson's vehicle. Tr. 64–65. Next, the Judge refused to admit Secretary's Exhibit 29, an operator's manual for a 5000i-model International Paystar truck containing a warning regarding the hazards of exceeding the vehicle's GVWR. Tr. 218–22. The Judge determined that the Secretary had failed to provide sufficient foundation for the manual. Tr. 222.

Commission Procedural Rule 63(a) provides, "[r]elevant evidence, including hearsay evidence, that is not unduly repetitious or cumulative is admissible." 29 C.F.R. § 2700.63(a). Although the Federal Rules of Evidence are not binding for Commission proceedings, the Commission has looked to the rules for guidance. *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1135–36 & n.6 (May 1984). Federal Rule of Evidence 401 defines evidence as relevant if it "has any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action." Fed. R. Evid. 401. The federal courts have held that Rule 401 has set a low bar for establishing relevancy. *In Re: Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 782–83 (3d Cir. 1994); *see also Hurley v. Atlantic City Police Dep't*, 174 F.3d 95, 109–10 (3d Cir. 1999) ("Rule 401 does not raise a high standard.").

The Secretary asserts that Johnson's truck was too heavily laden with coal for the brakes to stop the vehicle. PDR at 23–29. The weight tickets suggest that at least 17 times in the three weeks prior to the December 12 accident, Premier Elkhorn loaded

Johnson's truck with nearly twice as much coal as the vehicle's components were designed to carry. Sec'y Exs. 13–16; Tr. 223–26. The tickets further suggest that on the morning of the accident, Premier Elkhorn loaded the four similar trucks that immediately preceded Johnson's with equally oversized loads. Sec'y Ex. 17. These weight tickets suggest that Premier Elkhorn customarily loaded Trivette's trucks beyond the vehicles' GVWR, and therefore similarly loaded Johnson's truck.[4] The evidence from the weight tickets is completely consistent with Mr. Warf's statement that he and other employees at Premier Elkhorn regularly loaded trucks "heavy with a hump." Tr. 83, 114, 125. Indeed, Mr. Warf testified that he did not load Johnson's truck any differently from the way he had loaded the four preceding trucks. Tr. 124–25. He also testified that he would load the trucks more lightly when he was aware that state Department of Transportation inspectors were on the nearby highway and might inspect them. Tr. 131–32.

The weight tickets also support MSHA's evidence that the brakes on Johnson's trucks had been worn down from heavy use. Similarly, the operator's manual supports the assertion that overlarge loads caused the brake components in Johnson's truck to fail. The manual contained the following warning set out in bold type preceded by the sign of an exclamation point in a black triangle: "**WARNING: Do not exceed the truck's gross axle weight, gross vehicle weight, and gross combination weight ratings. Exceeding these ratings by overloading can cause component failure resulting in property damage, personal injury or death.**" Sec'y Ex. 29 at 100.[5] Given the relevancy of this evidence, the Judge clearly erred by excluding the Secretary's exhibits.

Contrary to my colleagues, I cannot dismiss the Judge's erroneous exclusions of relevant evidence as mere harmless error. Before even reaching the merits of the Secretary's case, the Judge stated outright, "I will not consider any proposed findings for which excluded evidence is cited as support." 35 FMSHRC 150, 151 (Jan. 2013). Thus, the Judge preemptively foreclosed any consideration of the Secretary's assertion that the truck was overloaded during the accident and that overloading can strain a vehicle's brakes, causing them to fail catastrophically. Given the Judge's ruling, it is difficult to

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[4] "Evidence of habit or custom is relevant to an issue of behavior on a specific occasion because it tends to prove that the behavior on such occasion conformed to the habit or custom." *Frase v. Henry*, 444 F.2d 1228, 1232 (10th Cir. 1971).

[5] The Judge excluded the truck manual because it was dated January 2005 and the truck, which had been manufactured in May 2005 according to the VIN number, was a 2006 model. Tr. 166–69, 220, 222; Sec'y Ex. 12. The Judge's statement in excluding the manual was: "Probably doesn't cover a 2006 model." Tr. 166–69. It is inconceivable to me how the Judge could determine that a manual containing a clear warning that loading the truck in excess of its GVWR can cause component failure resulting in death was not relevant to this case simply because it was printed in conjunction with a year-earlier model of the truck. Perhaps the Judge was thinking that International Paystar would omit the warning in the manual for next year's 5000i-model truck because some change in the configuration of the 2006 model of the 5000i made the warning unnecessary.

understand how my colleagues could conclude that the admittedly erroneous exclusion of the Secretary's evidence was harmless.

Indeed, after foreclosing consideration of the Secretary's evidence and suggested findings, the Judge determined that lack of evidence compelled him to conclude that "it is impossible for the Secretary to prove that the truck was overloaded." *Id.* at 155. This was an impossibility of the Judge's own design. Because Premier Elkhorn was not using a bucket scale on the front-end loader, the operator only registered a truck's weight after delivery to Premier Elkhorn's preparation plant. *See* Tr. 127–28, 133. Under the Judge's logic and evidentiary rulings, the Secretary could never demonstrate that the truck was overloaded, shy of setting Johnson's overturned truck upright, picking up every bit of spilled coal from the roadway, placing all the coal back in the truck bed, and then weighing the truck with the coal in it.

In addition to finding that the truck was not overloaded, the Judge further determined that "there is no basis to find that it is inherently unsafe for a truck to haul a load in excess of the manufacturer's GVWR." 35 FMSHRC at 156. In stating such, the Judge not only ignored the relevant operator's manual, but also disregarded detailed, uncontradicted testimony regarding the wear that extra weight places on a vehicle's brakes. MSHA's Bellamy and Medina both explained that the additional friction necessary to stop overloaded vehicles wears down the vehicle's brakes and generates excess heat. Tr. 228–30, 232–33, 277–79.

Indeed, in addition to ignoring the Secretary's evidence, the Judge misconstrued the testimony of Medina, MSHA's expert witness. Medina explained that Johnson's truck was capable of carrying a load of up to 120,000 pounds. Tr. 313. However, he did not suggest, as the Judge wrongly claimed, that the truck could carry such a heavy load safely on a steep incline. 35 FMSHRC at 156–57. To the contrary, Medina testified that carrying such large loads risked the deterioration and ultimate failure of the brakes.[6] Tr. 278–79, 318–22.

Under the harmless error rule, an error in admitting or excluding evidence may provide a basis for granting a new trial if it affects a party's "substantial rights" or if justice so requires. Fed. R. Civ. P. 61; *CFE Racing Products, Inc. v. BMF Wheels, Inc.*, 793 F.3d 571, 584 (6th Cir. 2015) (citing *Morales v. Am. Honda Motor Co.*, 151 F.3d 500, 514 (6th Cir. 1998)).

Given the rulings by the Judge, I can only conclude that he did not give due consideration to either the excluded evidence or related evidence from the Secretary, and thus adversely affected the Secretary's substantial rights.[7] Here, justice required that the

[6] Premier Elkhorn's expert, Rasnick, did not challenge Medina's testimony regarding the greater strain that overloading can place on a vehicle's components.

[7] The majority insists that the Judge nevertheless gave proper consideration to the evidence. *See* slip op. at 5. Where the Judge expressly considered excluded evidence,

Judge give full consideration to the Secretary's erroneously-excluded evidence. The exclusion of the evidence adversely affected the Secretary's ability to prove high negligence and unwarrantable failure in the section 77.1607(b) violation and to prove the section 77.1605(b) violation.

**B. Citation No. 8230316 – Failure to Maintain Control of the Truck (Sec'y Ex. 2)**

I agree with the majority that the record unquestionably demonstrates that Johnson failed to maintain control of his truck. The Judge incorrectly concluded that the Secretary needed to demonstrate the cause of the accident to prove a violation of the section. The Commission's holding to the contrary in *Clintwood Elkhorn Mining Co.*, 35 FMSHRC 365 (Feb. 2013), is controlling and requires that we reverse the Judge's vacation of Citation No. 8230316 and find a violation of section 77.1607(b). *See* slip op. at 6. I similarly agree with my colleagues that the record can only support a finding that the violation was S&S. *Id.* However, I disagree with their conclusion that the Secretary would be unable to prove unwarrantable failure on remand.

Given the Judge's incorrect understanding of the law and his improper exclusion of evidence, the Commission should not rely upon his analysis to determine the operator's level of negligence. The courts have found a Judge's improper evidentiary decisions to be reversible error where the Judge incorrectly understood the evidence's relevance to the substantive law at issue. *See Laney v. Celotex Corp.*, 901 F.2d 1319, 1320 (6th Cir. 1990) (reversing and remanding for a new trial where the Judge improperly excluded evidence relevant to determining whether a product was a substantial factor in plaintiff's sickness); *Davidson Oil Country Supply Co. v. Klockner, Inc.*, 917 F.2d 185, 186–87 (5th Cir. 1990) (remanding for a new trial because the Judge's incorrect exclusion of evidence of similar product failures prevented appellant from developing case).

Here, the Judge declined to consider the truck's weight and GVWR in the context of the violation. *See* 35 FMSHRC at 156. While that evidence is not necessary to show a violation of section 77.1607(b), it is highly relevant as to whether Premier Elkhorn was negligent in overfilling Johnson's truck. By overloading the trucks, Premier Elkhorn

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however, he did so to detriment of the Secretary. *See* 35 FMSHRC at 157 n.3 ("Had I admitted into evidence the weight records for coal haul trucks that the Secretary proffered, they would have shown that the trucks routinely carried loads of about 120,000 pounds without incident."). In determining whether a lower court abused its discretion in excluding relevant evidence under Federal Rule of Evidence 403, however, the court views the excluded evidence in the light most favorable to its proponent, giving the evidence its maximum reasonable probative force. *See Laney v. Celotex Corp.*, 901 F.2d 1319, 1320–21 (6th Cir. 1990), citing *U.S. v. Schrock*, 855 F.2d 327, 333 (6th Cir. 1988); *Kelso v. Noble*, 162 F.3d 1161, —— (6th Cir. 1998) (unpublished table decision). Accordingly, the majority's reliance upon the Judge's reading of the evidence is misplaced.

increased the strain and wear on the vehicles' brakes, and thus the chances of a driver being unable to stop in an emergency.[8] Warf's testimony and the excluded weight tickets suggest Premier Elkhorn did just that to Johnson's truck. Having dismissed Citation No. 8230316 outright, the Judge never gave consideration to what role Premier Elkhorn's actions played in causing the accident.

After reversing the Judge's primary holding in this case, the majority nevertheless decides to embrace the Judge's other findings and holdings to reach conclusions the Judge never considered. Because the Judge failed to properly consider the evidence in this matter, I would remand the case for further deliberation regarding Premier Elkhorn's negligence and whether the operator's actions constituted an unwarrantable failure to comply with section 77.1607(b).[9] The Judge makes no mention of Trivette's failure to maintain a log of inspections and repairs for its vehicles, or of Premier Elkhorn's lax oversight of its contractor. These inadequacies similarly militate for this case to be remanded for further consideration.

### C. Citation No. 8230317 – Failure to Equip Truck with Adequate Brakes

In determining whether Premier Elkhorn violated section 77.1605(b) by failing to provide adequate brakes, the Judge reasoned that the Secretary could prove a violation in two ways: (1) by showing the condition of the brakes on Johnson's truck caused the fatal accident, or (2) by demonstrating the brakes were not adequate to stop the vehicle while carrying its typical load on the road it normally travels. 35 FMSHRC at 163. In his analysis, the Judge determined that "[t]he only way this accident makes any sense is if both the steering and the brakes were not applied or stopped functioning simultaneously." *Id.* at 161. Nevertheless, the Judge concluded that the vehicle's defective brakes were not the cause of the crash. *Id.* at 162. Moving to the second step, the Judge determined that the Secretary had not proven the defects in the vehicle's brakes would fail in typical usage.

The majority affirms the Judge's findings.[10] Again, I cannot join them.

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[8] I note that, contrary to the Judge's view of incentives, 35 FMSHRC at 157, Premier Elkhorn's policy of paying Trivette by the weight of coal hauled established an economic incentive for Trivette to overload its trucks, move as much coal as possible in a limited time, and then move on to another job. Trivette's incentive to have its trucks overloaded created the economic benefit to Premier Elkhorn of moving its coal more quickly.

[9] Although the majority summarily rules out a finding of unwarrantable failure in this matter without analyzing the factors relevant to such determinations, it remains unclear what negligence they would assign to the operator in this matter. Slip op. at 7.

[10] In upholding the Judge's determinations, the majority reasons in part that "[n]either party's expert witness testified that the defects were great enough to render the brakes completely inoperable." Slip op. at 8. To the contrary, however, Medina testified

As to the first prong, the Judge himself said that both the steering and the brakes ceased working. *Id.* at 161. Yet, the Judge's analysis failed to recognize that causation necessarily includes contribution. *See, e.g.*, *Michael v. United States*, 338 F.2d 219, 221 (6th Cir. 1964) (recognizing that a negligent act "need not be the final and immediate cause, but may be actionable if it is a cause concurring with other negligence in proximately bringing about the charged injury.").

Regarding the second prong, as explained above, the Judge failed to fully consider relevant evidence regarding the vehicle's typical weight as loaded and the usual adequacy of its brakes. This evidence goes to the heart of the adequacy of the vehicle's brakes in everyday usage. Moreover, the Judge misunderstood or misrepresented the testimony of witnesses, and subsequently discounted their testimony. *See* 35 FMSHRC at 158.[11] Because I find that the Judge failed to properly consider excluded evidence and misunderstood the evidence before him, I would vacate his decision to dismiss Citation No. 8230317.

## Conclusion

For the foregoing reasons, I would reverse the Judge on Citation No. 8230316 and find an S&S violation of section 77.1607(b). I would remand the decision for a new Judge to consider the negligence and unwarrantable failure designations for the violation. I would also vacate and remand the Judge's decision on Citation No. 8230317.

Robert F. Cohen Jr., Commissioner

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that the damaged brakes on Johnson's truck would not have held a 120,000 pound vehicle on a 15% slope without the help of the engine retarder. Tr. 318. Medina further testified that the brakes were unsafe even when the truck was not overloaded. Tr. 323; 35 FMSHRC at 158.

[11] Medina testified the parking brake did not work whatsoever on one of the truck's wheels. He explained, however, that the parking brake simply engaged the truck's regular brakes on the rear axles. Tr. 267–68, 346–47. This testimony does not conflict with MSHA's investigation report. I note that the Judge discounted Medina's testimony because Medina had limited experience with steering systems, and because Medina relied upon a report that Rasnick *embraced.* 35 FMSHRC at 160, 164. It is thus a mystery to me why the Judge disregarded all of Medina's testimony.

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