FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 18 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2012-166
v.	:	
LEECO, INC.	:	

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

DECISION

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

Pursuant to 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 to Leeco, Inc. after MSHA investigated a fatal accident at the operator's No. 68 Mine. The citation alleged a violation of Leeco's roof control plan. At the hearing, the only issues were the operator's negligence and the amount of the penalty. A Commission Administrative Law Judge found that Leeco was moderately negligent and assessed the penalty amount that the Secretary of Labor proposed. 36 FMSHRC 1866 (July 2014) (ALJ).

Leeco filed a petition for discretionary review, which we granted. For the reasons set forth below, we reverse the Judge's decision and conclude that substantial evidence does not support a finding that the operator was negligent. As a result, we remand to the Judge for assessment of a new penalty.

I.

Factual and Procedural Background

This case involves whether, and to what extent, Leeco was negligent in supervising one of its continuous mining machine operators. Continuous miner operator Bobby Smith had run a continuous mining machine on Foreman Harry Bronson's section for six to seven months. Smith was killed while attempting to free the continuous miner after it was hung against the rib during a cleanup run. There were no witnesses to the accident, and the foreman was in another part of the section doing a pre-shift inspection when the accident occurred. The Secretary's inspector who investigated the accident determined that Smith was killed after he stepped into the "red zone" while trying to free the machine. The "red zone" is a pinch point area where serious and

fatal crushing accidents have occurred. According to the inspector, Smith was pinned against the rib when the continuous miner broke free. 36 FMSHRC at 1867, 1870; Tr. 105.

Smith had 12 years of mining experience, and he had worked as a continuous mining machine operator at Leeco for 89 weeks before the accident. "[A] couple of months" before the accident, Superintendent Rick Campbell observed Smith standing "in the outer area of the red zone" while he was tramming the continuous miner. 36 FMSHRC at 1867. Campbell made Smith shut down the machine, counseled him about what he did wrong and how important it is to avoid the red zone, and showed him where he should and should not position himself. *Id.* at 1867, 1871; Tr. 81-83. Campbell also spoke with Foreman Bronson about the incident and asked Bronson to watch Smith for more of this behavior. Bronson testified that he watched Smith for red zone violations, but did not observe Smith approaching the red zone after Campbell spoke with him. Bronson admitted that he did not observe Smith tramming the continuous miner very often. 36 FMSHRC at 1868.

All of Leeco's miners undergo annual training, which includes discussions of red zone issues. Posters explaining the dangers of the red zone are hung in the mine foreman's office as well as Leeco's changing rooms, light house, and warehouse. Leeco also holds weekly safety meetings, and red zone issues are discussed in these meetings about once a month. *Id.* at 1870. Campbell did not recall holding a safety meeting in response to Smith's red zone incident. *Id.* at 1868. Bronson testified that he had never seen Smith in the red zone while operating the continuous miner. He also testified that he had no reason to believe Smith would enter the red zone while operating the continuous miner, but the judge disregarded this testimony. *Id.* at 1870, 71.

MSHA issued the citation after completing its investigation. It alleged a violation of 30 C.F.R. § 75.220(a)(1), which requires the operator to develop and follow a roof control plan. Leeco's roof control plan required that "[w]hile using remote controls, the continuous mining machine operator and all other persons will position themselves [w]hen the continuous mining machine is in operation, in a safe location away from such machine and away from pinch points created by either the continuous mining machine and/or haulage equipment." Sec'y Ex. 4 at 10. The parties stipulated to the fact of a violation. The parties also stipulated that the violation was significant and substantial ("S&S"),[1] that one miner was fatally injured, and that Leeco abated the citation in good faith and in a timely manner. At the hearing, the only issues were the negligence level and the penalty amount.

The Judge upheld the citation's "moderate" negligence designation and assessed the penalty amount proposed by the Secretary—$21,442. The Judge found that the operator was moderately negligent because Campbell had instructed Bronson to keep an eye out for Smith near the red zone. The Judge decided that Bronson had reason to believe that Smith would enter the red zone again because of this instruction, which made Smith's actions on the day of the

[1] 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."

accident foreseeable.[2] 36 FMSHRC at 1871. The Judge determined that, because of the need for this admonishment, the operator should have been more vigilant about watching Smith and preventing the accident. The Judge further found that Leeco took no "concrete steps" to prevent continuous miner operators from entering the red zone. *Id.* at 1872. He dismissed Campbell's actions in counseling Smith and asking Bronson to keep an eye on him because Campbell did not follow up with Smith or Bronson at a later time or hold a safety meeting about Smith's conduct, and because Bronson did not observe Smith tramming the continuous mining machine very often. *Id.*

II.

Disposition

Leeco argues that there is no evidence that Smith had ever actually entered the red zone before the accident, and that the Judge erred by treating Smith's conduct as a prior violation that proved that Smith would enter the red zone in the future. According to Leeco, evidence that an hourly employee came close to committing a violation should not prove a level of knowledge sufficient to establish that Leeco was negligent. Leeco also claims that its actions were consistent with the standard of care as outlined by the Secretary's witness. Leeco argues that because the Secretary concedes that its miners were adequately trained, and because the company made reasonable efforts to make sure that employees were aware of the red zone's dangers, it should not be held liable for Smith's negligence. Finally, Leeco contends that because it was not negligent, the penalty should be reduced.

In response, the Secretary argues that regardless of whether Smith entered the red zone on the day that Campbell spoke with him, the Judge correctly determined that Smith's hazardous actions and Campbell's request that Bronson watch him for similar conduct put Leeco on notice that Smith might enter the red zone in the future. The Secretary contends that there is no evidence that Leeco made any changes to its safety program, training methods, or the way it supervised Smith in response to his previous incident. As a result, the Secretary claims that Leeco did not take any steps that a reasonably prudent operator would have taken to ensure that Smith did not commit any future violations.

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)). In *Jim Walter Resources, Inc.*, the Commission applied the substantial evidence test to the Judge's conclusion about the operator's negligence. 36 FMSHRC 1972, 1976 (Aug. 2014) ("*JWR*").

[2] Although the Judge ultimately placed a great deal of weight on Smith's prior red zone-related incident, the Secretary was apparently reluctant to offer evidence concerning the prior incident, or even subpoena Smith's disciplinary records, out of concern that the response to Smith's previous incident would be viewed in the operator's favor. Tr. 61-63.

The operator has a duty of care to avoid violations of mandatory standards, and the failure to do so can lead to a finding of negligence when a violation occurs. *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). To determine whether an operator has met its duty of care, the Commission considers what actions a reasonably prudent person who is familiar with the mining industry, the relevant facts, and the protective purpose of the regulation would have taken under the same circumstances. *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015); *JWR*, 36 FMSHRC at 1975, *citing U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984). The Commission may evaluate the degree of negligence using "a traditional negligence analysis." *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir. 2016) (citation omitted). Because the Commission is not bound by the Secretary's regulations addressing the proposal of civil penalties set forth in 30 C.F.R. Part 100, the Commission and its Judges need not apply, and in fact are not even required to consider, the negligence standards in 30 C.F.R. § 100.3(d). *Id.* at 1263-64.

In cases where a rank-and-file miner has violated the Act or its mandatory standards, the Commission examines the operator's supervision, training, and disciplining of its employees to determine whether the operator had taken reasonable steps necessary to prevent the rank-and-file miner's violative conduct. *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (Aug. 1982) ("*SOCCO*"), *citing Nacco Mining Co.*, 3 FMSHRC 848, 850-51 (Apr. 1981). The Commission also considers the foreseeability of the miner's conduct and the risks involved when determining whether the operator was negligent. *A. H. Smith*, 5 FMSHRC at 15, *citing SOCCO*, 4 FMSHRC at 1463-64; *Nacco*, 3 FMSHRC at 850-51.

The test for negligence under these circumstances is what a reasonably prudent operator, with knowledge of the goals of the Act, would have undertaken under similar circumstances. Commission Rule 63(b) states that the proponent of an order has the burden of proof. 29 C.F.R. § 2700.63(b). The key question here is whether, after Smith's previous red zone-related incident, the actions that Leeco took were those that a reasonably prudent operator would have employed to ensure that Smith would not enter the red zone in the future. The operator contends that its response—Superintendent Campbell's counseling of the miner, and instructing the foreman to watch the miner in the future—was adequate.

The Secretary was required to meet his burden of proof by showing what additional steps should have been taken. Because the record lacks any evidence about what more the operator should have done to meet the standard of care, we conclude that the Secretary failed to meet his burden and show that Leeco was negligent.

The Secretary's evidence as to what a reasonably prudent operator would have done in this situation was very limited. The inspector testified that the foreman "should have done better" at making sure Smith did not have a practice of approaching the red zone. Tr. 44. When asked how the foreman should make sure that the continuous miner operator is in a safe position, the inspector suggested watching the miner operator from time to time as he mines coal or changes places and discussing the red zone in safety meetings. Tr. 55-56. Campbell and Bronson took these actions. Tr. 102, 104, 111-13. Later, the inspector explained that if a foreman is aware of a miner who is positioning himself in the red zone, the foreman needs to

"stop that from happening and just spend more time to see that he's not doing that." Tr. 58-59. The inspector's testimony about Smith's previous incident was also weak in that it did not demonstrate that Smith had ever actually entered a red zone. The inspector testified that he believed that Smith had been disciplined for working in the red zone in the past, but testified that he was "not a hundred percent positive" of that. Tr. 59-61.

As a result of the Secretary's limited evidence, the Judge's decision that Smith's actions on the day of the fatal accident were foreseeable is not supported by substantial evidence. Although the Judge placed a great deal of weight on Smith's previous red zone incident, he did not make a clear factual determination that Smith had entered the red zone. In fact, the record suggests that Smith did not actually enter the red zone during the incident in which Campbell pulled him aside and counseled him.[3] Therefore, Smith's behavior, while a cause for concern, may not have amounted to a violation of the roof control plan. This fact is important because Leeco had to decide, after the first incident occurred, what actions to take to prevent Smith from placing himself in harm's way, without the benefit of hindsight.

Leeco did not fail to act in response to Smith's prior incident. Having the mine superintendent pull a miner off of his machine for a counseling session is a significant event that could be expected to get a miner's attention. The counseling that Smith received from Campbell is something that should be encouraged. While it could show that Smith had some tendency to approach the red zone, it also shows diligent efforts by Leeco's management in attempting to actively prevent red zone violations.

Asking the foreman to keep an eye on a miner was also a reasonable response to the situation. The Judge stressed that Bronson admitted to not observing Smith tramming the machine very often. 36 FMSHRC at 1872. However, Bronson did observe Smith, and he never observed Smith enter or approach the red zone again after Campbell spoke with him. Tr. 111-13.

We also note that, prior to Smith's incident, the operator already had several measures in place to prevent red zone-related injuries. Posters explaining the dangers of the red zone were hung in Leeco's mine foreman's office, changing rooms, light house, and warehouse. 36 FMSHRC at 1870; Tr. 103-04. Leeco held weekly safety meetings, in which it discussed red zone issues about once a month. 36 FMSHRC at 1870; Tr. 102. Leeco's miners also received annual training, which included discussions of red zone issues. *Id.*

Where the operator has taken significant, specific steps to prevent violations, the Secretary must establish that a reasonably prudent operator would have done more under the circumstances to meet its duty of care. Simply arguing that the operator "should have done more" is not a satisfactory standard. *See JWR*, 36 FMSHRC at 1977.

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[3] Throughout the hearing, Campbell consistently testified that he did not see Smith in the red zone when he pulled Smith off the continuous mining machine and counseled him. Campbell stated that he saw Smith in the "area around the red zone," and that Smith was "approaching the red zone." Tr. 79, 88, 90. Bronson also testified that Campbell told him that Smith was "not in the red zone but he was borderline." Tr. 111.

The Judge's reliance on certain "best practices" was inappropriate. 36 FMSHRC at 1872. Although there was very little testimony or evidence from the Secretary about how to meet the standard of care, the Judge listed certain measures that the operator could have taken in response to Smith's actions.[4] Because Leeco did not take any of these steps, the Judge found that the operator did not meet the standard of what a reasonably prudent mine operator would have done under similar circumstances. The Judge characterized several of these measures as "best practices promulgated by MSHA." *Id.* However, these measures were not presented as "best practices" by the Secretary. The only possible source of these measures in the record is the Action Plan that was put in place to abate the violation. This plan is set out in the citation and MSHA's Accident Summary Report. Sec'y Ex. 1, Sec'y Ex. 3 at 6.

Using these measures as the yardstick by which the operator's actions should be measured is problematic. Abatement plans are, by nature, subsequent remedial measures. Under Rule 407 of the Federal Rules of Evidence, remedial measures taken after the fact cannot be used to show negligence before the fact.[5] Fed. R. Evid. 407. Rule 407 is based in part on "a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety." Fed. R. Evid. 407 advisory committee's note to 1972 proposed rules. Although the Federal Rules of Evidence do not directly apply to Commission proceedings, we believe that the same policy makes the use of measures set out in the post-accident Action Plan inappropriate as proof of "best practices" that the operator should have had in place. This is especially true in this case because they were presented without additional evidence that they are in fact MSHA's best practices.

In light of the foregoing discussion, we conclude that the Judge's decision is not supported by substantial evidence. Without evidence that a reasonably prudent operator would have done more under the circumstances, it was error for the Judge to conclude that Leeco's response to Smith's previous incident was insufficient. Because the Secretary did not explain what a reasonably prudent operator would have done under these circumstances, we cannot find the operator to be negligent.

[4] For example, the Judge noted that the operator did not put engineering controls in place to prevent red zone fatalities. 36 FMSHRC at 1872.

[5] Rule 407 states in part that "[w]hen measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove . . . negligence . . . ." Fed. R. Evid. 407.

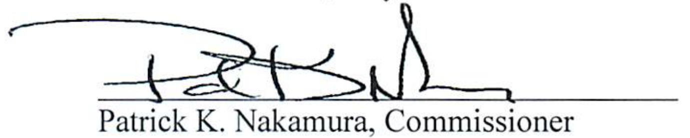
III.

Conclusion

For the foregoing reasons, we reverse the Judge's finding of moderate negligence and remand the case so that a new penalty can be assessed for the citation.

Mary Lu Jordan, Chairman

Michael G. Young, Commissioner



Patrick K. Nakamura, Commissioner

William I. Althen, Commissioner

Commissioner Cohen, dissenting:

On June 24, 2010, a continuous mining machine fatally crushed operator Bobby Smith, a miner at Leeco's Mine No. 68 with 12 years of experience. Sec'y Ex. 3. As recently as two months prior to the fatal accident, the mine's superintendent noticed Smith standing too close to the continuous miner. Tr. 80.[1] In reversing the Judge's decision and finding no negligence as a matter of law, my colleagues have set a dangerous precedent. In the future, the Commission will be at pains to distinguish this decision.

Under the Mine Act, operators have a duty to provide supervision, training, and discipline to employees to prevent rank-and-file miners from violating safety regulations. *See Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (Aug. 1982). The Commission has recognized that "[e]ach mandatory standard . . . carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). An operator is negligent when it fails to take such steps as a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purposes of the safety standard would have taken under the same circumstances. *See Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015); *Jim Walter Resources, Inc.*, 36 FMSHRC 1972, 1975 (Aug. 2014) ("*JWR*"), *citing U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984).

When reviewing an Administrative Law Judge's factual determinations, the Commission applies 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)). The Commission has similarly applied the substantial evidence test in reviewing the Judge's conclusion regarding an operator's negligence. *See JWR*, 36 FMSHRC at 1976. The judge's credibility determinations are entitled to great weight and may not be overturned lightly. *See, e.g., Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992) (citation omitted). I believe that my colleagues have failed to properly apply these principles in this case.

After considering the evidence presented at hearing, the Judge concluded that Leeco did not satisfy its duty of care to avoid a violation by ensuring that miners remained a safe distance

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[1] My colleagues place great emphasis on the fact that the Judge "did not make a clear factual determination that Smith [previously] had entered the red zone" and that "the record suggests that Smith did not actually enter the red zone during the incident in which Campbell pulled him aside and counseled him". Slip op. at 5. Given that Campbell was not sure whether or not Smith was actually in the red zone, it is hardly surprising that the Judge did not make a "clear factual determination." More importantly, however, it does not matter whether Smith was actually in the red zone during the previous incident. The fact is, as Mine Superintendent Campbell recognized, Smith was too close to a very dangerous piece of equipment. He needed to be cautioned, and later, his work tramming the continuous miner needed to be monitored.

from the mining machines. 36 FMSHRC at 1872.[2] The Judge found that Smith's prior incident gave Leeco notice that the company needed to take additional steps to prevent Smith from again infringing upon the continuous miner's safety zone. *Id.* In so finding, the Judge discounted the testimony of the section foreman, Harry Bronson, who averred that he had no reason to believe Smith would again get dangerously close to the continuous miner. *Id.* at 1871. The Judge determined that the operator's general safety efforts did not satisfy the operator's heightened burden. *Id.* at 1872. Rather, the operator needed to take specific steps to retrain miners on avoiding red zones, increase monitoring and oversight of miners, or install improved safety equipment on the mining machinery. *Id.*

My colleagues overturn the Judge's factual findings, asserting that the Secretary has failed to explain what a reasonably prudent mine operator should have done.[3] Slip op. at 5-6. However, the question is not whether the Secretary correctly articulated what would comprise the operator's duty of care under the circumstances (including the fact that Smith had recently put himself into a dangerous position near a continuous miner) but whether the Judge's decision that the operator failed to exercise the required standard of care is supported by substantial evidence. *See JWR*, 36 FMSHRC at 1975 n.4 (Aug. 2014) (rejecting the Secretary's argument that the Commission must apply the standard of care defined by the Secretary when considering whether the operator was negligent).

Moreover, it is a well-accepted legal principle that the duty owed is proportional to the danger of the hazardous practice. *See Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928) ("[t]he risk reasonably to be perceived defines the duty to be obeyed").

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[2] Earlier in his decision, the Judge quoted the Secretary's definitions relative to negligence from 30 C.F.R. § 100.3(d). 36 FMSHRC at 1870-71. I agree with my colleagues that an operator's duty of care is not defined by the Secretary's Part 100 regulations but rather by traditional negligence principles. Slip op. at 4. *Brody Mining,* 37 FMSHRC at 1702*; Mach Mining, LLC v. Sec'y of Labor,* 809 F.3d 1259, 1263-64 (D.C. Cir. 2016). In this case, although the Judge quoted the Secretary's Part 100 definitions, he actually applied traditional negligence principles to find ordinary (i.e., "moderate") negligence. 36 FMSHRC at 1872.

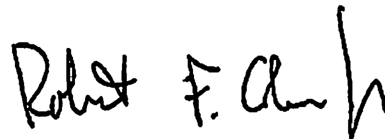
[3] The majority relies on *JWR* for support. Slip op. at 3-5. In that case, the Judge determined that the mine operator (Jim Walter) had met its duty of care by providing additional fall training and safety measures as directed by MSHA following a similar accident just one month earlier. *JWR*, 36 FMSHRC at 1978, *citing Jim Walter Res., Inc.*, 33 FMSHRC 362, 370 (Feb. 2011) (ALJ). The Judge credited the operator's witnesses and found that Jim Walter was not on heightened notice that it needed to take further steps. 33 FMSHRC at 370. On appeal, a majority of the Commissioners declined to disturb the Judge's factual findings and, applying the substantial evidence test, upheld his negligence determination. 36 FMSHRC at 1976-77. In contrast, the Judge here discounted the operator's witnesses, found that the mine was on notice that it needed to enhance safety precautions around Smith, and determined that the mine had not taken any specific steps to meet that duty following Smith's encroachment just a few months prior. 36 FMSHRC at 1871-72. Another distinction is that in *JWR*, the injury was to an employee of a contractor. The Judge's finding of no negligence in that case related to the supervision of the contractor by Jim Walter, a far different situation than here, where Leeco's own employee was killed.

Accordingly, a reasonably prudent mine operator is required to exercise an especially high degree of care when miners are at high risk of a fatal accident. Here, working in close proximity to the continuous miner is one of the most dangerous practices in underground mining. *See* www.arlweb.msha.gov/REGS/fedreg/final/2015/proximity-detection/ ("Since 1984, there have been 35 deaths where miners have been pinned, crushed, or struck by continuous mining machines in underground coal mines."). In recognition of this hazard, MSHA recently promulgated a rule requiring mine operators to install proximity detection systems on continuous mining machines. *See* 30 C.F.R. § 75.1732; 80 Fed. Reg. 2188, 2199 (Jan. 15, 2015) (projecting that requiring proximity detectors will prevent approximately nine deaths and another 49 non-fatal crushing or pinning injuries over 10 years.)

To reach its conclusion, the majority determines that the Judge improperly considered Leeco's efforts to abate the MSHA citation, in contrast to Rule 407 of the Federal Rules of Evidence. Slip op. at 6. My colleagues' reliance on Rule 407 of the Federal Rules of Evidence is misplaced. Rule 407 reflects a public policy encouraging potential defendants to fix hazardous conditions without fearing that those actions will be used as evidence against them. Fed. R. Evid. 407 advisory committee's note to 1972 proposed rules ("ground for exclusion rests on a social policy of encouraging people to take . . . steps in furtherance of added safety."). That policy goal is not present where MSHA has directed the abatement actions. The Mine Act mandates abatement of safety violations. *See* 30 U.S.C. § 814(b). Moreover, Congress chose not to apply the Federal Rules of Evidence to Commission proceedings. Commission Judges are amply capable of weighing the probative value of such evidence.

Smith, an experienced miner, previously had disregarded substantial safety training and improperly approached active mining machinery. Tr. 80. Leeco had numerous avenues available to help prevent such a hazard from reoccurring, including mandatory retraining, improved oversight, and additional safety measures. Sec'y Ex. 3 at 6. The Judge weighed the evidence before him and the testimony at hearing and concluded that Leeco did not satisfy the rigorous duty to ensure miner safety imposed by the Mine Act. 36 FMSHRC 1872. Considering the record, I find that substantial evidence supports the Judge's findings and conclusion that Leeco demonstrated ordinary negligence.

Accordingly, I dissent.



Robert F. Cohen, Jr., Commissioner

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