FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

AUG 25 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. WEVA 2009-1000 WEVA 2009-1306
v.	:	
BRODY MINING, LLC	:	

BEFORE: Cohen, Nakamura, and Althen, Commissioners[1]

DECISION

BY: Cohen and Nakamura, Commissioners

These consolidated civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). The Secretary of Labor is appealing various determinations that the Administrative Law Judge made with regard to seven Mine Act violations by Brody Mining, LLC, which the Judge affirmed with modifications to the Secretary's negligence, unwarrantable failure, and/or significant and substantial ("S&S") allegations. 33 FMSHRC 1329 (May 2011) (ALJ). For the reasons that follow, we vacate and remand the challenged determinations for further proceedings consistent with this decision.

I.

General Factual and Procedural Background

The seven orders were issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Brody's No. 1 mine, located in Boone County, WV. The orders

[1] Chairman Mary Lu Jordan and Commissioner Michael G. Young reassumed office after this case had been considered at a Commission meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1218 n.2 (June 1994). In the interest of efficient decision-making, Chairman Jordan and Commissioner Young have elected not to participate in this matter.

resulted from inspections conducted by MSHA Inspectors Charles H. Ward and James Jackson on five different dates between January 15 and March 3, 2009.[2] We address the Judge's findings that the Secretary is challenging with regard to: (1) an accumulations violation the Judge found to be neither S&S nor attributable to Brody's unwarrantable failure to comply;[3] (2) three orders derived from violations related to ventilation, all of which the Judge found not to be due to Brody's unwarrantable failure to comply, two of which he reduced the findings on negligence to no and moderate negligence, respectively, and one of which he reduced the gravity finding; and (3) three orders in which the Judge found the violations to be due to only moderate negligence, despite concluding that the operator's conduct constituted an unwarrantable failure to comply.

II.

Whether the Judge Erred in His Tail Piece Accumulations Violation Determinations

A. Violation

On January 22, 2009, Inspector Jackson issued Order No. 8079179 to Brody for violating 30 C.F.R. § 75.400,[4] alleging that the operator had permitted loose coal, coal dust, and float coal dust to congest a belt line tail piece and pile up along the side of the belt where miners would not normally work or travel. 33 FMSHRC at 1352; Gov't Ex. 10; Tr. 143. A belt line tail piece is where coal is dumped from the feeder that is used to transfer coal from a continuous miner. Tr. 117. Jackson estimated that the accumulation was 31 feet long, four feet wide, and six to seventeen inches deep. In the order Jackson further stated that accumulations under the belt were in contact with the belt and tail piece rollers. 33 FMSHRC at 1352; Gov't Ex. 10.

The inspector designated the violation as S&S based on his observation that the color of the coal under and around the belt indicated that the coal was drying out and heating up, and thus the belt friction had the potential to cause an ignition and fire. Tr. 119-20. Jackson also designated the violation as attributable to Brody's unwarrantable failure, alleging that the operator's reckless disregard was established by the fact that, given the amount of coal he

---

[2] The Judge's decision also affirmed an eighth order, involving a failure to wear eye protection, discovered as the result of a separate inspection by Jackson (33 FMSHRC at 1357-62), but neither party appealed the determinations the Judge made with respect to that violation.

[3] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." The unwarrantable failure terminology is taken from the same section, 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."

[4] Section 75.400 provides: "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein."

observed, it must have accumulated over the course of more than the present shift. Tr. 120-22. The inspector also took into account that Brody had been cited 29 times during the preceding four months for section 75.400 violations, and that the mine's primary escapeway was not available, due to flooding, should miners have to evacuate as the result of a fire precipitated by the accumulations. Tr. 122-23.

B. Judge's Decision

While the Judge affirmed that the accumulations constituted a violation of section 75.400, he did not affirm any of the special findings, concluding that the violation was neither S&S nor due to Brody's unwarrantable failure to comply with section 75.400. He also rejected the Secretary's position that Brody's negligence rose to the level of "reckless disregard." Consequently, he reduced the Secretary's proposed penalty of $70,000 to $4,450. 33 FMSHRC at 1352-57.

In concluding that the Secretary had failed to establish that the violation was S&S, the Judge applied the Commission's four-step analysis set forth in *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), as he had described earlier in his decision. 33 FMSHRC at 1349, 1356. In addition to finding a violation of section 75.400, he concluded that even if the coal accumulations were wet, they were susceptible to being heated to a point at which they would ignite. He went on to find, however, that nearby fire suppression systems made the likelihood of miner injury from any resulting fire remote. As a result, he concluded that the violation was not S&S and discounted the gravity of the violation. *Id.* at 1356.

In rejecting the Secretary's claim that Brody's conduct with respect to the accumulations violation was unwarrantable, the Judge found the Secretary's evidence not to be "convincing." *Id.* at 1354. With respect to the level of Brody's negligence, the Judge concluded that it was significantly mitigated in this instance because both the mine in general and the area in question were wet, and thus the accumulations were less likely to combust. *Id.* at 1354-55.

C. Disposition

1. Significant and Substantial

A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies*, the Commission further explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury;

and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

6 FMSHRC at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). Under the Commission's *Mathies* test, it is the contribution of the violation at issue to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984). In evaluating that contribution, it is assumed that normal mining operations will continue. *See U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574-75 (July 1984); *see also U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

We review the Judge's application of the *Mathies* criteria under the substantial evidence standard.[5] The violation of section 75.400 that was found below (33 FMSHRC at 1354) and not appealed by Brody establishes the first step of *Mathies*. With regard to whether the violation posed a hazard, the Judge did not explain his findings in a consistent manner, so his conclusion that the second step of *Mathies* was satisfied in this instance is not supported by substantial evidence.

The Judge found "[t]here is an articulable and credible danger that even wet coal accumulations can be heated by belt friction to the point of ignition." 33 FMSHRC at 1356. This is generally consistent with Jackson's testimony that while the area of the mine in question was generally wet, the coal he observed in contact with the belt's rollers, by virtue of its lighter color in contrast to nearby wet coal, appeared to have become dry from that contact. This led him to fear that the process that would result in a fire had already begun. Tr. 118-20.

Elsewhere in his decision on this violation, however, the Judge refused to credit Jackson's conclusions regarding the physical state of the accumulations and the danger they thus posed in this instance. The Judge noted that Jackson failed to touch the coal to check whether it was dry or warm. 33 FMSHRC at 1355.

In addition, the mine's superintendent, Glenn Fields, who accompanied Jackson that day, testified that Brody had rock dusted the tail piece area the day before, as it did every day with regard to the area in which the tail piece was located, in order to dilute float coal dust. Fields stated that the white substance Jackson saw could have been that rock dust. Tr. 202-05, 209-10. The Judge cited this evidence of rock dust on the accumulations as a possible reason for the lighter color of the coal. 33 FMSHRC at 1355.[6]

---

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

[6] The Judge cites Jackson as being asked what color "rock dust" is, and answering "black." 33 FMSHRC at 1353. As Fields explained, rock dust is actually white. Tr. 210.

Remand of the S&S issue is thus necessary for the Judge to resolve the internal inconsistencies in his findings regarding the state of the accumulations. *See Drummond Co.*, 13 FMSHRC 1362, 1368-69 (Sept. 1991). To the extent possible the Judge should make findings regarding whether the rock dust ameliorated any immediate danger posed by the accumulations. *See, e.g, Twentymile Coal Co.*, 36 FMSHRC 1533, 1537 (June 2014) (affirming finding that application of rock dust was not sufficiently concentrated to effectively dilute coal dust).

The Judge further erred in his S&S analysis by basing his conclusion that there was not a reasonable likelihood of serious injury on the presence of fire suppression equipment. According to the Judge, the presence "of a dedicated water spray fire suppression system along the belt line, carbon monoxide detectors, and secondary fire hose system at regular intervals" made the likelihood remote that miners would be injured in the event of a fire or smoke caused by belt friction in the accumulations. 33 FMSHRC at 1356. When deciding whether a violation is S&S, courts and the Commission have consistently rejected as irrelevant evidence regarding the presence of safety measures designed to mitigate the likelihood of injury resulting from the danger posed by the violation. *See Buck Creek*, 52 F.3d at 136; *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2369 (Oct. 2011), *aff'd*, 717 F.3d 1020 (D.C. Cir. 2013); *Black Beauty Coal Co.*, 36 FMSHRC 1121, 1124-25 (May 2014).

In light of the foregoing, we vacate the Judge's determination that the section 75.400 violation was not S&S and remand the case for a reexamination of the testimony and other evidence under the *Mathies* criteria.

2. Unwarrantable Failure

In *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek*, 52 F.3d at 136 (approving Commission's unwarrantable failure test).

The Commission has recognized that whether conduct is "aggravated" in the context of unwarrantable failure is determined by considering the facts and circumstances of each case to determine if any aggravating or mitigating circumstances exist. Whether the conduct is "aggravated" in the context of unwarrantable failure is determined by looking at (1) the extent of the violative condition, (2) the length of time it has existed, (3) whether the violation posed a high risk of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and

---

This may have been why the Judge refused to credit Jackson on the significance of the color of the coal near the roller. We note that Jackson's seemingly inconsistent answer to the question immediately following it indicates that he may have merely misspoken in answering the first question. Tr. 142.

(7) whether the operator had been placed on notice that greater efforts were necessary for compliance. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2330 (Aug. 2013); *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1351-57 (Dec. 2009).

All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). The Commission has made clear that it is necessary for a Judge to consider all relevant factors. *Windsor Coal Co.*, 21 FMSHRC 997, 1001 (Sept. 1999); *San Juan Coal Co.*, 29 FMSHRC 125, 129-31 (Mar. 2007) (remanding unwarrantable determination for further analysis and findings when Judge failed to analyze all factors). While a Judge may determine, in his or her discretion, "that some factors are not relevant, or may determine that some factors are much less important than other factors under the circumstances, all of the factors must be taken into consideration and at least noted by the Judge." *IO Coal*, 31 FMSHRC at 1351.

As we explain in detail below, with regard to the unwarrantability of the tail piece accumulations violation the Judge made unclear findings on some factors, summarily dismissed the significance of other factors, and entirely ignored additional factors. Consequently we are vacating and remanding his determination that the accumulations violation was not attributable to Brody's unwarrantable failure for a reexamination of the evidence and further analysis by the Judge.[7]

a. The Length of Time the Accumulations Existed

The Commission has emphasized that the duration of the violative condition is a necessary element of the unwarrantable failure analysis. *See Windsor Coal Co.*, 21 FMSHRC at 1001-04 (remanding for consideration of duration evidence of cited conditions). This is particularly the case with accumulations violations. *See, e.g.*, *Buck Creek*, 52 F.3d at 136 (holding that accumulations that were present for more than one shift, after a pre-shift examination had been performed, were properly designated as unwarrantable); *Consolidation Coal Co.*, 23 FMSHRC 588, 594 (June 2001) (unwarrantable failure found where accumulations existed over several shifts).

Here, there was a significant dispute over the duration of the accumulations. In Jackson's estimation, the coal he observed on and around the tail piece was so extensive that it could not have accumulated simply from the 30 feet of coal he understood had been mined so far on that shift (at least without the belt malfunctioning, which it had not). Jackson thus concluded that some of the accumulations had carried over from prior to that shift. Tr. 120-22. Fields, however, testified that just one shuttle car, loaded with between nine and ten tons of coal, could

[7] We recognize that the Judge's unwarrantability findings are largely bound together with his conclusions regarding Brody's level of negligence in this instance. However, the Secretary did not appeal the Judge's determination that Brody was only moderately negligent with respect to this violation, so we do not review that determination.

cause the amount of accumulations cited in a matter of minutes, particularly when the coal was wet, as it was here. Tr. 201-02.

We are uncertain from the Judge's decision how he resolved this conflict. The decision states in relevant part:

> I cannot conclude that the accumulations Jackson saw were the result of spillage from the limited mining that occurred in the time between the pre-shift report and his inspection, as Brody argued. Although there is more inferential support for this than for the contrary view advocated by the Secretary, the weight of the evidence is still not convincing. Without more convincing evidence, and given that it is the Secretary's burden to prove this point, I cannot conclude that Brody's actions reflected an unwarrantable failure to abide by the standard.

33 FMSHRC at 1354. On remand the Judge should examine the evidence submitted and explain his consideration of the length of time the accumulations existed in the context of his unwarrantable failure analysis. *See Coal River Mining, LLC*, 32 FMSHRC 82, 93 (Feb. 2010) (even where conclusive findings are not possible, imperfect evidence of duration should still be considered by the Judge when making an unwarrantable failure determination).[8]

b. The Degree of Danger Posed by the Accumulations

The Commission has relied upon the high degree of danger posed by a violation to support an unwarrantable failure finding. *See BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129-30 (July 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). As discussed with regard to the Judge's S&S findings and analysis, here too there are unresolved conflicts in the evidence. On remand the Judge, after examining the evidence with regard to whether the Secretary established that the coal in contact with rollers was drying out and thus posed an ignition risk, must discuss the degree of danger, if any, posed by the cited accumulations. *See Windsor*, 21 FMSHRC at 1007.

---

[8] It appears that the Judge may have inferred from MSHA's failure to challenge Brody's pre-shift examination records that the accumulations had not reached the violative stage when the pre-shift examination was conducted on the previous shift. *See* 33 FMSHRC at 1354 ("There is no basis to discount Brody's evidence that it conducted an effective pre-shift examination as reflected in Exhibits R-4 and [Gov't]-10"). Inferences drawn by a Judge are "permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred." *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984) (citations omitted). Here, the Judge may need to rely on inferences drawn from the evidence in reaching a conclusion on the length of time the accumulations existed, including the possibility that the accumulations may have been present for so long that they were dusted earlier. *See Windsor*, 21 FMSHRC at 1003-04.

c. Prior Notice that Brody Needed to Make Greater Efforts to Comply

The Commission has stated that repeated similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *IO Coal*, 31 FMSHRC at 1353-55; *Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997). This is particularly true with respect to accumulations violations. *See Consolidation Coal*, 23 FMSHRC at 595 ("a high number of past violations of section 75.400 serve to place an operator on notice that it has a recurring safety problem in need of correction."). "The purpose of evaluating the number of past section 75.400 violations is to determine the degree to which those violations have 'engendered in the operator a heightened awareness of a serious accumulation problem.'" *San Juan Coal Co.*, 29 FMSHRC at 131 (operator cited 47 times during 39-month period) (quoting *Mid-Continent*, 16 FMSHRC at 1226).

Without further explanation, the Judge stated that he was not "convince[d]" that the violation here was unwarrantable despite the operator having received 39 citations for section 75.400 violations over the four months prior to January 22, 2009. 33 FMSHRC at 1355 n.26. Elsewhere in his decision, however, with respect to the other accumulations order, No. 8079224, which had been issued only one month later, the Judge found the following:

> Brody had been cited for Section 75.400 violations twenty-three times in the previous two-month period. I find that Brody was on notice from this relevant and recent history that it should put forth greater effort to comply with Section 75.400. From this I conclude that Brody was generally indifferent to the requirements of Section 75.400.

Id. at 1385.

We are unable to reconcile these two seemingly inconsistent conclusions regarding the effect of Brody's recent history of accumulations violations on the question of whether these subsequent violations could be attributed to the operator's unwarrantable failure. On remand the Judge will have the opportunity to discuss and clarify Brody's history of accumulations violations in terms of the issue of unwarrantable failure. The finding in Order No. 8079224 that Brody was "generally indifferent" to accumulations problems would seem to require a similar finding here.

d. Remaining Relevant Factors

The Judge's unwarrantable failure analysis did not address the physical extent of the accumulations. The purpose of taking into account the extensiveness of a violation under the unwarrantability analysis is to factor in the scope or magnitude of a violation. *See Peabody Coal Co.*, 14 FMSHRC 1258, 1260-61 (Aug. 1992) (holding that five accumulations of loose coal and coal dust were extensive). On remand the Judge should consider that the inspector measured the

accumulations to be 31 feet long, four feet wide, and six to seventeen inches deep, and that they were in contact with the belt and tail piece rollers.

Related factors are whether the operator had knowledge of the existence of the violative accumulations, or whether the hazardous nature of the accumulations was obvious and thus the operator should have known it was violating section 75.400. While the Secretary did not take the position that Brody had actual knowledge of the cited conditions, he did argue that the physical extent of the accumulations made them obvious to the operator. On remand the Judge should address the Secretary's argument, as well as evidence that during the pre-shift examination of the belt, it was reported that the tail piece needed spot cleaning. *See* 33 FMSHRC at 1353 (citing Tr. 206; Gov't Ex 10; B. Ex. 4).

We thus vacate and remand the Judge's findings with respect to whether the tail piece accumulations violation was S&S and attributable to Brody's unwarrantable failure. Should the Judge arrive at different conclusions with respect to either or both issues, he should reassess the penalty imposed to be consistent with his new findings.

III.

The Judge's Determinations Regarding the Ventilation Plan-Related Orders

A. The Three Violations

In early 2009, the Brody ventilation plan required an airflow of at least 3,000 cubic feet per minute ("CFM") at the face. Tr. 26-27, 74, 379-80. On January 15, 2009, MSHA Inspector Ward measured less than 2,000 CFM at two of the faces, and noticed that flypads in the intersections were not positioned properly, and thus were not working as intended to divert and direct sufficient air to those faces.[9] Tr. 26, 74, 379-80. Ward issued Order No. 8075863 to Brody for failing to follow its ventilation plan with regard to the 3,000 CFM minimum, and thus violating 30 C.F.R. § 75.370(a)(1).[10] Tr. 25-26. Brody hung additional flypads to abate the violation. Tr. 73. Ward also issued Order No. 8075864, alleging that Brody had failed to note the condition of the flypads on its most recent preshift examination, thereby violating 30 C.F.R. § 75.360(b)(3). Tr. 41-43, 80; B. Ex 2.

When Ward returned to the mine for an inspection on February 11, 2009, he measured the amount of air at the face, and found it to be a little over 1,000 CFM. He attributed the deficiency to loose material having been pushed into the face area resulting in a restriction of the

---

[9] Flypads are plastic strips used for curtain material, hung in overlapping increments so as to permit equipment to pass through as necessary while still serving to direct airflow. 33 FMSHRC at 1335 n.7.

[10] 30 C.F.R. § 75.370(a)(1) provides in pertinent part that an "operator shall develop and follow a ventilation plan approved by the [MSHA] district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine."

air flow behind a line curtain. Tr. 46-49. Consequently, he issued Order No. 8075874, alleging another violation of section 75.370(a)(1). Gov't Ex. 6. Shortly thereafter, Brody's Safety Manager, Carl Blankenship, who was accompanying Ward that day, moved the curtain back one row of bolts to create more space between it and the face, which abated the violation. Tr. 46-47, 84, 390-91.

All three violations were initially designated as S&S, but the Secretary deleted those designations prior to the hearing. 33 FMSHRC at 1334, 1340 n.15, 1363 n.34; Tr. 12. With regard to the gravity of the violation, each order indicated that it was reasonably likely to result in lost workdays or restricted duty for at least five miners (14 miners in the case of the inadequate preshift violation). Gov't Ex. 2, 4, 6.

The orders also attributed the violations to Brody's unwarrantable failures. Ward considered Brody's conduct aggravated under the circumstances based on the number of ventilation plan citations or orders that he had personally issued to the mine in the preceding six months (including two on January 13, 2009), his efforts to alert Brody that it had a problem with low air flow at curtains, the total number of ventilation plan citations the mine had received over the previous four months, and the fact that the mine is one that liberates a large quantity of methane. Tr. 29-34, 46, 48; Gov't Ex. 3.

B. Judge's Decision

The Judge affirmed all three of the violations. The Judge found none of the violations unwarrantable, however, and concluded that the negligence associated with the two direct ventilation plan violations were moderate and no negligence, respectively. He reduced the penalties from the total of $17,435 proposed by the Secretary to a total of $1,850 for the three violations. 33 FMSHRC at 1334-44, 1363-68.[11]

In finding the first ventilation plan violation not to be unwarrantable and to be the result of only moderate negligence, the Judge was persuaded by the fact that when Inspector Ward checked, he detected neither any methane nor a decreased oxygen content in connection with the low air at the faces. Despite recognizing that the lack of methane appeared to be nothing more than a "fortuitous circumstance," the Judge considered it as a factor that mitigated against attributing the violation to the operator's unwarrantable failure. The Judge further concluded that Ward put too much emphasis on the mine's overall methane liberation rate in writing the order. *Id.* at 1336-39.

The Judge also found the associated preshift violation not to be unwarrantable, concluding that it was "derivative" of the ventilation plan violation caused by the defective fly pads. *Id.* at 1344. However, he concluded that the lack of methane did not mitigate the failure to conduct a pre-shift examination that should have detected the flypad problem. Thus, he affirmed the designation of high negligence with respect to that violation. *Id.* at 1343-44.

[11] The Judge reduced the penalty for Order No. 8075863 from $5211 to $350. He reduced the penalty for Order No. 8075864 from $7774 to $1400. He reduced the penalty for Order No. 8075874 from $4440 to $100.

In finding the later ventilation plan violation also not to be unwarrantable, and in this case the result of no negligence at all, the Judge was again persuaded by the fact that Ward had detected no methane or decreased level of oxygen in connection with the low air flow. The Judge again concluded that the mine's overall methane liberation rate had little relevance. While the Judge acknowledged Brody's recent history of ventilation plan violations, he found that it had nothing to do with the nature of the ventilation plan violation in this instance. *Id.* at 1365-68.

C. Disposition

1. Unwarrantable Failure

As with the tail piece area accumulations violation, we are remanding the Judge's findings that the three violations related to the ventilation plan were not attributable to the operator's unwarrantable failure. While the Judge in these instances made more complete findings with regard to at least some of the various relevant unwarrantable failure factors, his decision does not discuss key evidence in reaching those findings. He also did not consider other relevant factors. Accordingly, his conclusions on unwarrantable failure are not supported by substantial evidence.

a. The Degree of Danger Posed by the Violations

With regard to the danger posed by the three violations at issue here, the Judge considered the lack of evidence at the time of the violations of any immediate effect on methane or oxygen content not only to negate the importance of the mine's overall liberation methane rate, but to serve to mitigate the circumstances of the violation. *See* 33 FMSHRC at 1338 ("the fact that there was no 'harm' does affect the assessment of the 'foul'"). In light of not only the evidence in the case but also our precedents, this was plain error.

Section 103(i) of the Mine Act provides that any mine that liberates in excess of one million cubic feet of methane or other explosive gases during a 24-hour period is subject to a minimum of one spot inspection every five working days. 30 U.S.C. § 813(i). At the outset of the hearing, it was established that the Brody mine had a history of liberating 1.5 million cubic feet of methane per day. Tr. 30, 34. Brody did not dispute that it thus easily exceeded the statutory threshold to be what is known as a "gassy" mine. Tr. 318.

Brody's own witness, third shift move boss Jay Heiss, explained the significance of the mine's high methane liberation. He described methane as being something "to keep your eye on [be]cause that is a gassy mine and gas can come and go whenever." Tr. 293. Inspector Ward confirmed that from his working experience in mines, including at a gassy mine, methane could accumulate very quickly. Tr. 96-97.

Consequently, the fact that Ward detected no methane at the time of the two ventilation plan violations does not establish that the violations posed no danger to miners. Contrary to the

Judge's conclusions, the Commission places significant weight on the mine's gassy status in determining the degree of danger of the violations.[12]

The hazard caused by the improperly hung fly pads had not been noted in the previous preshift examination. If it had not been caught by the inspector, it might well have persisted throughout the shift. During the shift, methane could have been liberated.

This is not to say that the mine's gassy status automatically rendered any ventilation plan violation dangerous for unwarrantable failure analysis purposes, or that the lack of methane detected during the MSHA inspection was irrelevant to that question. In this case, the Secretary deleted his initial designation of the violations as S&S, and the Judge reduced the gravity of the violations, findings that the Secretary did not appeal with respect to the two direct ventilation plan violations. 33 FMSHRC at 1339, 1368; Tr. 12. Moreover, the ventilation plan provision violated was a relatively short-lived part of the plan.[13] On remand, in determining whether the violations were unwarrantable, the Judge needs to take into account all relevant evidence to determine the degree of danger the violations posed.

b. The Length of Time the Violations Existed

With regard to the length of the time the first violation of the ventilation plan existed, the Judge made an implicit finding that it had existed since at least the time of the previous pre-shift examination. 33 FMSHRC at 1343. However, he did not take into account the duration of the violation in his unwarrantable failure analysis. On remand he should do so.

With regard to the later violation, the Judge concluded that the conditions "did not exist long enough to put Brody on notice." *Id.* at 1367. To the extent that the Judge is relying upon Ward's testimony that he was told that the material had been pushed into the area shortly before he arrived (Tr. 47), and that no evidence to the contrary was submitted, that would support the Judge's conclusion. However, the Judge also states that the condition was only "a short-term" one because it was fixed in six minutes. 33 FMSHRC at 1368. It was fixed only because the inspector discovered the condition and ordered it abated. That is not a relevant consideration with regard to the length of time the condition existed; absent the inspection and abatement order, the violative condition would have continued. *See Enlow Fork Mining Co.*, 19 FMSHRC 5, 17 (Jan. 1997) ("Post-citation efforts are not relevant to the determination whether the operator

[12] We have recognized that a sudden release of methane in a gassy mine can occur without warning. *See U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985); *see also Twentymile*, 36 FMSHRC at 1536.

[13] According to Ward, the 3,000 CFM requirement was a relatively recent addition to the Brody ventilation plan, as it was included in the plan only after he encouraged the operator to add it soon after he began inspecting the mine during the previous quarter. Tr. 29-30. Moreover, Ward conceded that because the plan was changed in 2010 to one focusing on air quality instead of quantity, the low air readings would no longer constitute a violation of the ventilation plan when, as in these instances, no methane was detected. Tr. 85-86.

has engaged in aggravated conduct in allowing the violative condition to occur"). On remand the Judge should clarify the basis for his conclusion regarding the length of time the later ventilation plan violation existed.

c. Obviousness and Whether Brody Knew or Should Have Known of the Violative Conditions

The Judge in his unwarrantable failure analysis failed to address the obviousness of the conditions that caused the violations of the ventilation plan – the improperly hung flypads and that a large pile (8 feet by 2 feet by 18 inches) of loose material had been pushed into the face area by Brody. On remand the Judge should do so.

In addition, the Judge made seemingly inconsistent findings regarding Brody's knowledge of the conditions, with respect to the two direct ventilation plan violations. *Compare* 33 FMSHRC at 1338 ("[i]t is appropriate to attribute to Brody knowledge of the low airflow and how to properly deploy fly pads") *with* 33 FMSHRC at 1367 ("[t]here is no evidence to suggest that Brody knew or could have known that this otherwise innocuous circumstance [of debris between the face and the line curtain] could affect the airflow"). If on remand the Judge affirms these findings, he needs to explain the differences in his two conclusions and, with respect to his latter finding, square it with the principle "that general mine management retains responsibility for safety and health compliance." *IO Coal*, 31 FMSHRC at 1354 (citing *Eastern Assoc. Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991)).

Moreover, in considering the knowledge element of unwarrantable failure, a Judge is to consider not only the operator's actual knowledge but also whether the operator "had reason to know" or "should have known." *Eastern Assoc.*, 13 FMSHRC at 187. The pile of material which Brody pushed into the area between the face and the line curtain was large enough to cause ventilation to be reduced to one-third of what it should have been. In light of that fact, the Judge should reconsider on remand whether Brody had reason to know that its action would cause a violation of the ventilation plan.

d. Prior Notice that Brody Needed to Make Greater Efforts to Comply

As discussed above, an operator's history of similar violations puts the operator on notice that greater efforts are necessary for compliance with a standard. Here, the Judge acknowledged that Brody had a recent history of violating its ventilation plan, but refused to find it an aggravating factor in his unwarrantable failure analysis. As the Judge was aware, Brody had a history of 31 citations for violations of its ventilation plan in the 10-week period between October 28, 2008, and January 15, 2009. 33 FMSHRC at 1364; Tr. 32-34; Gov't. Ex. 13. However, the Judge concluded that the Secretary had provided nothing in the way of a nexus between the specific circumstances of the violations here and Brody's previous violations. 33 FMSHRC at 1367.

The Judge erred. The Commission in *IO Coal* rejected the position that, for prior plan violations to be relevant for unwarrantable failure determination purposes, the violations must

involve precisely the same provision and have occurred in the same area. 31 FMSHRC at 1353-54 (roof control violations); *see also Enlow Fork*, 19 FMSHRC at 11-12 (rejecting argument that cited accumulations must be of the same material as in previous instances to be relevant to the question of whether the operator had been put on notice that greater compliance efforts were necessary). A ventilation plan is composed of many different provisions; it would not further the goal of safety to ignore the fact that an operator had a history of plan violations simply because previous violations had involved different provisions of the plan.

The Judge also failed to take into account that Ward had met with mine representatives to discuss the mine's difficulties with maintaining the required air behind line curtain. Tr. 32-33, 383-84. The Commission has held that "past discussions with MSHA" about a problem "serve to put an operator on heightened scrutiny that it must increase its efforts to comply with the standard." *San Juan*, 29 FMSHRC at 131 (citing *Consolidation Coal*, 23 FMSHRC at 595). The inescapable conclusion based on the evidence is that Brody was on notice that greater efforts were necessary to comply with its ventilation plan. This must be factored into the unwarrantable failure analysis in this case.[14]

2. Separate Issues Posed by the Pre-Shift Violation

a. Unwarrantable Failure

The Judge summarily determined that the pre-shift violation was not unwarrantable based solely on his conclusion that the underlying ventilation plan violation was not unwarrantable. He stated that "[t]here is no separate allegation or separate proof that this faulty pre-shift examination order was anything more than a derivative action." 33 FMSHRC at 1344. This was erroneous in a number of respects.

The Secretary correctly argued to the Judge that such factors as the obviousness of the condition of the flypads were relevant not only to whether the violation of the ventilation plan was unwarrantable, but also to determining whether the inadequate examination that failed to detect that condition was separately unwarrantable. Importantly, in addressing Brody's negligence in connection with the pre-shift violation, the Judge was correct when he concluded that the pre-shift violation required a separate analysis, because the "[f]ailure to conduct and document an effective pre-shift report carries its own potential consequences and does not depend on the conditions" of the associated violation. *Id.* at 1343. The need for a separate analysis is just as applicable in the context of unwarrantable failure. *See Sierra Rock Prod., Inc.*, 37 FMSHRC 1, 4 (Jan. 2015) ("separate unwarrantability analyses are required, even for factually related violations, where the violations involve mandatory standards that impose separate and distinct duties on an operator. The relative significance of a fact or circumstance may change when different violative conduct is at issue") (citation omitted).

---

[14] Brody would have the Commission hold that the history of prior ventilation plan violations should have no bearing on the unwarrantability of the pre-shift violation. A history of prior plan violations, however, should increase the operator's overall vigilance with respect to failures to follow the plan, including, of course, during any required mine examination.

b. Gravity

Similarly, in reducing the gravity finding associated with the pre-shift violation, the Judge held that the gravity of the violation was dependent upon the gravity of the flypad violation that led to its issuance. 33 FMSHRC at 1343. The seriousness of a pre-shift violation is evaluated apart from any seriousness of any hazard that may have been detected by an adequate pre-shift examination. *See JWR Res., Inc.*, 28 FMSHRC 579, 603-04 (Aug. 2006). Consequently, we vacate and remand the gravity and unwarrantability findings the Judge made with respect to the pre-shift violation.

3. Negligence in Connection with the Two Ventilation Plan Violations

The Secretary is appealing the Judge's reduction in negligence with respect to the first ventilation plan violation from MSHA's designation as "high" negligence to "moderate" negligence. *See* 33 FMSHRC at 1336-37. With respect to the later violation, the Secretary objects that the Judge made an even greater reduction, from MSHA's designation of high negligence to "no" negligence. *See id.* at 1365-66. The Secretary contends that the Judge misapplied MSHA's penalty regulations in determining the level of negligence, and that the errors the Judge made in finding neither violation attributable to Brody's unwarrantable failure also undermine the conclusions he reached regarding Brody's negligence. We vacate and remand the negligence findings for the two ventilation plan violations challenged by the Secretary so that the Judge may reexamine the evidence and come to conclusions with regard to the degree of Brody's negligence under Mine Act section 110(i) in connection with each of the violations.

Section 110(i) of the Mine Act authorizes the Commission to assess penalties for violations of the Act, and includes the operator's negligence as one of the criteria the Commission is required to consider in assessing a penalty.[15] To start the process, MSHA proposes a penalty pursuant to section 105(a) of the Act, 30 U.S.C. § 815(a). MSHA has published regulations explaining its role in the penalty process, including how it arrives at proposed penalty amounts. *See* 30 C.F.R. Part 100.

The Part 100 regulations address how MSHA calculates most proposed penalties in light of the statutory criteria the Commission must consider, and explains how MSHA views each of the criteria. *See* 30 C.F.R. § 100.3. With regard to the negligence criteria, MSHA has adopted a formulaic approach, categorizing negligence into five different levels, from "no" negligence to "reckless disregard," based on the existence of a mitigating circumstance, or multiple such

---

[15] The six statutory factors the Commission must take into account in assessing a penalty are (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 operator charged in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

circumstances, for the violation. 30 C.F.R. § 100.3(d); *see generally Hidden Splendor Res., Inc.*, 36 FMSHRC 3099, 3106 (Dec. 2014) (Comm'r Cohen, concurring).

In this case, the Judge looked to MSHA's definitions in its penalty regulations in determining Brody's negligence with respect to each violation, focusing in each instance on the extent to which there were mitigating circumstances. As we recently explained, however, the Part 100 regulations apply only to the *proposal* of penalties by MSHA and the Secretary of Labor; under both Commission and court precedent, the regulations do not extend to the independent Commission, and thus the MSHA regulations are not binding in any way in Commission proceedings. *JWR Res. Inc.*, 36 FMSHRC 1972, 1975 n.4 (Aug. 2014); *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984), *aff'g* 5 FMSHRC 287 (Mar. 1983) ("[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties . . . we find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also govern the Commission.").[16]

In light of the Commission holding that Commission judges are not required to apply the definitions of Part 100, judges may evaluate negligence from the starting point of a traditional negligence analysis rather than based upon the Part 100 definitions. Under such an analysis, an operator is negligent if it fails to meet the requisite standard of care – a standard of care that is high under the Mine Act

"Negligence" is not defined in the Mine Act. The Commission, has, however,

> recognized that "[e]ach mandatory standard . . . carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an operator met its duty of care, we consider what actions

---

[16] As stated in his concurring opinion in *Hidden Splendor*, 36 FMSHRC at 3105-08, Commissioner Cohen urges the Commission to hold not merely that the definitions of the degrees of negligence contained in 30 C.F.R. § 100.3(d) and Table X contained therein are not binding on the Commission, but that these definitions are too restrictive, and should not be used by Commission judges. In these definitions, the distinctions between "low" negligence, "moderate" negligence and "high" negligence are made by counting the number of mitigating circumstances. Thus, in this case the Judge ruled out the possibility of high negligence in Order Nos. 8075863 and 8075874 because Table X provides that a finding of high negligence can be made only if there are no mitigating circumstances. 33 FMSHRC at 1331, 1336-37, 1365. Counting the number of mitigating circumstances is an appropriate approach for MSHA inspectors at mine sites who must make determinations regarding negligence efficiently and quickly. However, it is too mechanical and restrictive an approach for Commission judges who have the opportunity to "evaluate all of the evidence presented to them after a full hearing and take a more nuanced approach to the degree of negligence." 36 FMSHRC at 3108.

> would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984).

JWR, 36 FMSHRC at 1975; *see, e.g., id.* at 1976-77 (requiring Secretary to show that operator failed to take specific action required by standard violated); *Spartan Mining Co.*, 30 FMSHRC 699, 708 (Aug. 2008) (negligence inquiry circumscribed by scope of duties imposed by regulation violated). Thus in making a negligence determination, a Judge is not limited to an evaluation of allegedly "mitigating" circumstances. Instead, the Judge may consider the totality of the circumstances holistically.

Moreover, because Commission Judges are not bound by the definitions in Part 100 when considering an operator's negligence, they are not limited to a specific evaluation of potential mitigating circumstances, and therefore a Commission Judge may find "high negligence" in spite of mitigating circumstances or may find "moderate" negligence without identifying mitigating circumstances. In this respect, the Commission has recognized that the gravamen of high negligence is that it "suggests an aggravated lack of care that is more than ordinary negligence." *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998) (citation omitted).[17]

On remand the Judge will need to examine the two violations and determine the degree of negligence on the part of the operator that led to the violations. The Judge must consider the actions that a reasonably prudent operator would or would not have taken, under the circumstances presented that are relevant to an operator's obligation to comply with the ventilation plan provisions in question. *See, e.g., DQ Fire & Explosion Consultants, Inc.*, 36 FMSHRC 3090, 3095-97 (Dec. 2014), *appeal docketed*, No. 15-1008 (D.C. Cir. Jan. 15, 2015) (examining operator's claim of mitigating circumstances in reviewing Judge's high negligence finding); *Wolf Run Mining Co.*, 35 FMSHRC 3512, 3519-20 (Dec. 2013) (examining operator's conduct as a whole in attempting to comply with regulation); *Consol*, 35 FMSHRC at 2345-46 (repeated violations of regulation merited increase in level of negligence ascribed to operator).

Regarding Order No. 8075863, it appears the Judge reduced the negligence from "high" to "moderate" based solely on the finding of what he conceived to be a single mitigating circumstance – the lack of any measurable level of methane at the time of the MSHA inspection. 33 FMSHRC at 1336-37. That was error. The absence of methane at the time of inspection is not relevant to negligence, and, in a holistic review, a single mitigating circumstance does not *per se* reduce an operator's negligence from high to moderate.

---

[17] When a Judge finds an operator negligent, the Judge would take the degree of negligence, which would be on a scale between low negligence and reckless disregard, into account in assessing an appropriate penalty. Of course, because Judges are required to explain substantial divergences from the penalty proposed by the Secretary, if the Judge makes a substantial penalty adjustment based upon a negligence finding, the Judge must explain his/her determination.

An absence of methane at the moment of the MSHA inspection does not mitigate Brody's negligence in ventilating the No. 5 face at a level less than half the required volume and in ventilating the No. 6 face at a level which was only two-thirds of the required volume. *Id.* at 1334-35. The fact that no methane was measured at the time of the MSHA inspection was merely a fortuitous circumstance. As the Judge recognized, there was no evidence that the absence of methane at the time of the inspection resulted from Brody's care or diligence. *Id.* at 1338. This is a gassy mine which liberates about 1.5 million cubic feet of methane a day. *Id.* at 1336-37. But for the MSHA inspection, the cutting of coal at the face could have liberated methane which the inadequate level of ventilation would not have removed.

Order No. 8075874 was issued because the ventilation behind the line curtain in the No. 4 face measured 1050 cubic feet per minute – only one-third of the required 3000 cubic feet per minute. *Id.* at 1364. The low airflow was caused by Brody pushing loose gob material into the face area which caused a restriction of the airflow behind the line curtain. *Id.* The Judge found no negligence associated with this violation, both because of the absence of methane at the time of the MSHA inspection (an allegedly mitigating circumstance), and because he found that Brody did not have actual knowledge that pushing the gob to the face had caused a restriction in the airflow. *Id.* at 1365-66. As discussed above, the absence of methane at the moment of the MSHA inspection is irrelevant to a determination of an operator's negligence. Regarding Brody's lack of actual knowledge of the insufficient airflow, this is only part of the inquiry. An operator is also negligent if it should have known that its actions would cause a violation. *Signal Peak Energy, LLC*, 37 FMSHRC 470, 482 (Mar. 2015) (affirming a Judge's finding of reckless disregard where "the operator should have known that [the miner]'s injuries were immediately reportable"). The pile of gob which Brody pushed into the face area behind the line curtain was large enough to reduce the airflow to one-third of what it should have been.

Some of the same evidence that the Judge will examine with respect to the unwarrantable failure factors will be relevant to the question of the degree of the operator's negligence. *See Topper Coal*, 20 FMSHRC at 350 (characterizing "high negligence" as suggesting an aggravated lack of care that is more than ordinary negligence, and noting that, in particular, "an operator's intentional violation constitutes high negligence for penalty purposes"); *see also San Juan Coal Co.*, 29 FMSHRC at 136 (remanding for Judge to explain why operator's high negligence in connection with violation did not rise to an unwarrantable failure). Nevertheless the issues of negligence and unwarrantable failure must be treated separately, because they are distinct issues even though they may focus on the same or similar circumstances. *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1122 (Aug. 1985).

In summary, we are remanding the three ventilation plan-associated violations for the Judge to reexamine the evidence and make new findings with respect to: (1) whether each of the violations was attributable to Brody's unwarrantable failure; (2) the operator's negligence in connection with the two instances of its violation of the ventilation plan provision; and (3) the gravity of the preshift violation. New findings on any of those issues will necessitate a reassessment of the penalty for the involved violation.

IV.

The Three Unwarrantable Failure Violations for Which the Judge Found Only Moderate Negligence

These three orders involve violations that the Judge found to be attributable to Brody's unwarrantable failure. The Secretary contends that a finding that a violation is due to an operator's unwarrantable failure mandates that the Judge explain why he found only moderate negligence on the part of the operator in connection with the violations, instead of finding that the operator was highly negligent or exhibited reckless disregard, as the Secretary had requested with respect to each violation. For the three violations, the Judge assessed total penalties of approximately $26,000 after the Secretary had requested a total of approximately $131,000 in penalties.

A. Judge's Decision

The Judge affirmed Order No. 8079178, issued for Brody's violation of 30 C.F.R. § 75.380(d)(1), which requires that each escapeway in a mine be maintained in safe condition to always assure passage of anyone, including disabled persons. Gov't Ex. 8. The Judge agreed with MSHA Inspector Jackson that on January 22, 2009, the primary escapeway on the mine's No. 3 section was not passable by miners for approximately 175 feet. In that stretch, the mine floor was covered in 12 to 20 inches of water, dark in color, that obscured the coal and rock on the floor that evacuating miners would need to avoid. The Judge found the violation to be S&S and due to Brody's unwarrantable failure, but also found that because an alternate escapeway was available, Brody's negligence was only moderate. The Judge thus decreased the level of negligence from MSHA's highest level of "reckless disregard," which the Secretary had sought in this instance. 33 FMSHRC at 1348-51. The Judge reduced the Secretary's proposed penalty of $56,929 to $18,750.

The Judge affirmed Order No. 8075906, issued by Inspector Ward when he found, during a March 3, 2009 inspection, that a Brody shuttle car had an exposed opening, one foot by one foot in size, to a cable reel sprocket, due to a missing guard. Gov't Ex. 7. The absence of the guard, and the fact that it had been lying in the operator compartment of the car for at least two weeks, led the Judge to conclude that the violation of 30 C.F.R. § 75.1722(a) was both S&S and attributable to Brody's unwarrantable failure.[18] Again, however, the Judge found Brody's negligence in connection with the violation to be only moderate, and not the high negligence alleged by the Secretary. He assessed the penalty at $450, in contrast to the Secretary's proposed penalty of $4,000. 33 FMSHRC at 1373-78.

The last of the orders was Order No. 8079224, issued by Inspector Jackson on February 26, 2009, for another accumulations violation that the Judge affirmed in part. The order alleged

[18] 30 C.F.R. § 75.1722(a) requires that "[g]ears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings, shafts; saw blades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded."

that loose coal, coal dust, and float coal dust, up to 18 inches deep and 12 feet long, was on and around the oil tank, oil filters, valve chest, electrical components, and hydraulic hoses of a feeder. Gov't Ex. 11. The Judge held that the violation had not been shown by the Secretary to be S&S but that it was unwarrantable, given Brody's recent history of accumulations violations. Again the Judge found the level of Brody's negligence to be moderate, instead of finding that the operator had acted in reckless disregard as alleged by the Secretary, whose proposed penalty of $70,000 the Judge reduced to $7,000. 33 FMSHRC at 1382-85.

B. Disposition

The Secretary is appealing the moderate negligence findings, citing *San Juan Coal Co.*, 29 FMSHRC at 136. In *San Juan*, the Secretary argues, the Commission held that a conclusion that a violation is attributable to unwarrantable failure tends to be associated with a finding of no less than high negligence. As a result, the Secretary maintains that the three orders here should be remanded for the Judge to explain how he found only moderate negligence in the context of affirming the unwarrantable failure designations of the three violations.

In *San Juan*, the Commission remanded a Judge's determination that a violation was not attributable to the operator's unwarrantable failure in a case in which the Judge had found the operator to be highly negligent in connection with the violation. *Id.* The Secretary thus argues that the converse of the *San Juan* situation, present here, also requires remand.

It is not necessary to rule on the Secretary's suggestion in this case,[19] because, as with the two ventilation plan violations, the Judge predicated his negligence analysis as if 30 C.F.R. § 100.3(d)'s definitions of operator negligence governed Commission proceedings. In each instance he presumably felt constrained by the Part 100 definitions. Therefore, we vacate and remand these three negligence findings as well for an analysis of the evidence under the negligence principles outlined above, and reassessment of the penalties if necessary. As discussed, that analysis focuses on the duty of care imposed by the regulation violated.

Furthermore, with respect to Order No. 8079178, the escapeway violation, the Judge recognized that the availability of an alternative means of escape did not prevent a finding of violation of the standard, or foreclose a finding that the violation was S&S. He nevertheless concluded that the existence of an alternative working escapeway could be taken into account in determining the level of Brody's negligence. *See* 33 FMSHRC at 1348, 1349-50, 1350-51.

---

[19] We note, though, that in *Excel Mining, LLC v. Department of Labor*, 497 Fed. Appx. 78, 79-80 (D.C. Cir. 2013), the court, drawing on Commission case law, stated that "just as a finding of 'high negligence' does not *necessarily* compel a finding of an 'unwarrantable failure,' a finding of 'moderate negligence' does not foreclose a finding of an 'unwarrantable failure.'" (emphasis in original) (citations omitted). The court thus recognized that conclusions such as those reached by the Judge here are not automatically suspect. However, because it appears that in that case the negligence findings under review were couched in MSHA's Part 100 terms (*Excel Mining, LLC*, 34 FMSHRC 99, 113-14 (Jan. 2012) (ALJ)), instead of as a result of a negligence analysis under section 110(i) of the Mine Act, we do not find the court's analysis compelling.

However, the regulation in question, 30 C.F.R. § 75.380(d)(1), imposes a maintenance obligation with respect to *each* designated escapeway, so for negligence analysis purposes the availability of alternative means of escape is irrelevant and may not be taken into account on remand.

We find further specific error with regard to Order No. 8075906, the guarding violation. The Judge found that Brody management had known for two weeks that the guard plate on the shuttle car was not in place. 33 FMSHRC at 1375 n.4, 1378. He reduced the level of negligence from "high" to "moderate" based on mitigating circumstances even though he found that "[t]he weight of mitigation here is quite low." *Id.* at 1375. The Judge erred by failing to weigh the "quite low" mitigation against the fact that Brody management had known for two weeks that the guard plate was not in place on the shuttle car. Moreover, one of the mitigating circumstances found by the Judge was that the missing guard plate was on the off side of the shuttle car, and the operator had a company policy forbidding anyone from walking on the off side of a shuttle car while it is in operation. *Id.* at 1370, 1374. However, the fact that Brody had a company policy against walking on the off side of the shuttle car is not relevant to Brody's duty of care to comply with the guarding standard in this case in that Brody management knew that the guard plate was not in place for two weeks.

V.

Conclusion

For the foregoing reasons, we vacate and remand the following issues in Docket No. WEVA 2009-1000: (1) the unwarrantability of the violation and the negligence of the operator in connection with the violation in Order No. 8075863; (2) the unwarrantability and gravity of the violation in Order No. 8075864; (3) the negligence in connection with the violation in Order No. 8079178; and (4) whether the violation in Order No. 8079179 was S&S and unwarrantable.

For the foregoing reasons, we also vacate and remand the following issues in Docket No. WEVA 2009-1306: (1) the unwarrantability of the violation and the negligence of the operator in connection with the violation in Order No. 8075874; (2) the negligence in connection with the violation in Order No. 8075906; and (3) the negligence in connection with the violation in Order No. 8079224.

To the extent the Judge arrives at any different conclusions with respect to the issues than he did in his initial decision, he should reassess the penalty for that violation consistent with this decision.

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

Commissioner Althen, concurring:

I join in the majority decision. I write separately only to note that, with respect to Order No. 8075874, the Judge found that "[t]here is no evidence that would show that Brody should have known that gob was restricting the airflow at face No. 4 prior to Ward's inspection." 33 FMSHRC at 1366.

A finding that the operator neither knew nor should have known of the lessened airflow supports a finding of no negligence. When substantial evidence supports a finding, it is our duty to affirm. Here, the Judge cited evidence to support his finding. However, in the context of the entirety of the violations resolved in this case and the Judge's discussion of the history of prior violations, I believe it prudent to include this violation in the remand to permit the Judge to reconsider whether the operator should have known of this violation. Should the Judge continue to find no negligence based on the evidence already cited or additional evidence gleaned from the record, then, in my view the further finding of no unwarrantable failure would continue to be appropriate.

William I. Althen, Commissioner

Distribution:

Jason M. Nutzman, Esq.
Dinsmore & Shohl, LLP
Huntington Square
900 Lee Street, Suite 600
Charleston, WV 25301
jason.nutzman@dinsmore.com

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
201 12th St., South, Suite 500
Arlington, VA 22209-3939

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
201 12th St. South, Suite 500
Arlington, VA 22209-2247

Administrative Law Judge L. Zane Gill
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N. W., Suite 520N
Washington, D.C. 20004-1710