FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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WASHINGTON, DC 20004

August 22, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket Nos. KENT 2008-260
v.	:	KENT 2008-986
	:	KENT 2009-1154
MCCOY ELKHORN COAL CORP.	:	
and	:	
JASON ROBINSON, employed by MCCOY ELKHORN COAL CORP.	:	

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

DECISION

BY: Jordan, Chairman; Cohen and Nakamura, Commissioners

These cases arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012). They involve two citations issued by the U.S. Department of Labor's Mine Safety and Health Administration ("MSHA") to McCoy Elkhorn Coal Corporation for permitting combustible material to accumulate in the active workings of its mine and for its failure to record those accumulations in its preshift report. MSHA also sought to impose personal liability under Mine Act section 110(c), 30 U.S.C. § 820(c), against McCoy Elkhorn foreman Jason Robinson for the accumulations violation.[1] At issue is whether the Administrative Law Judge correctly determined that: (1) the accumulations violation was significant and substantial ("S&S");[2] (2)

[1] MSHA also charged two other foremen – James Slone and Michael Diamond – with personal liability under section 110(c), but the Judge vacated the citations issued to Slone and Diamond. 33 FMSHRC 2403, 2424-25 (Oct. 2011) (ALJ).

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

the violation was a result of unwarrantable failure;[3] (3) Robinson should be held personally liable for the accumulations violation; and (4) the preshift violation was a result of high negligence. 33 FMSHRC 2403 (Oct. 2011) (ALJ). For the reasons that follow, we affirm the Judge in result.

I.

Factual and Procedural Background

On October 17, 2007, at approximately 8:00 a.m., MSHA Inspector Brian Dotson arrived at McCoy Elkhorn's No. 15 Mine for an inspection. Tr. I 182-83; 33 FMSHRC at 2408. Before going underground, the inspector examined the preshift examination books at the mine office, and noted that no conditions were listed on the preshift books for the 001/002 section, the section at issue in this case. Tr. I 180; 33 FMSHRC at 2409. The 001/002 MMU section was known as a "supersection," in which two continuous miners cut simultaneously across nine entries. *Id.* at 2406. The left-side continuous miner mined entries one through four and the right-side continuous miner mined entries five through nine. In the mine office, Inspector Dotson also noticed that a computer screen which listed the belt lines and CO sensors depicted that the belts were operational and running. Tr. I 179, 352-53; 33 FMSHRC at 2408.

Inspector Dotson proceeded underground and arrived at the 001/002 MMU section at approximately 10:00 a.m. *Id.* at 2409. Foreman Jason Robinson was in charge of the first shift of the day at that time. Tr. I 80; *id.* at 2408.[4] The inspector observed accumulations ranging from 8 to 24 inches in depth on the mine floor roadways, in four crosscuts and in all nine entries of the 001/002 section. Tr. I 171, 189; Gov't Ex. 5, 10/17/07 notes at 6; 33 FMSHRC at 2409. The accumulations consisted of float coal dust and loose coal that were dry and black in color and had not been rockdusted. Tr. I 189-90, 223-29; 33 FMSHRC at 2409.

The inspector's notes, written at the time of the inspection, indicated that foreman Robinson said that he knew the entire section "was dirty from the feeder to the face [and that the] third shift was supposed to clean [the night before] but didn't do [a] very good [job]." Tr. I 171; Gov't Ex. 5, 10/17/07 notes at 7. Dotson's notes also stated that Robinson said "when he arrived

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[3] The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

[4] At the time of the citations, there were three shifts at the mine. Jason Robinson was the section foreman for the first shift that worked from 6:00 a.m. to 2:00 p.m. James Slone was the section foreman for the second shift that began at 2:00 p.m. and ended at 10:00 p.m. Michael Diamond was the section foreman for the third shift that began at 10:00 p.m. and ended at 6:00 a.m. Tr. I 172; Gov't Ex. 5, 10/17/07 notes at 7-8; 33 FMSHRC at 2407.

on the section this morning [Robinson] finished cutting . . . where the miners[5] were in [the] 3R and 5 Heading." Tr. I 171, 191; Gov't Ex. 5, 10/17/07 notes at 7; 33 FMSHRC at 2410. When the inspector arrived on the 001/002 section, no mining was ongoing, and Robinson's crew was cleaning up coal accumulations with shovels. Tr. I 259; 33 FMSHRC at 2409.

Inspector Dotson issued Citation No. 7432120 under Mine Act section 104(d)(1), 30 U.S.C. § 814(d)(1), alleging a violation of 30 C.F.R. § 75.400,[6] for permitting combustible materials to accumulate in active workings. Gov't Ex. 7. The inspector designated the violation as S&S and a result of the operator's unwarrantable failure. Gov't Ex. 7. Because the extensive accumulations were not listed on the preshift book, the inspector also issued Citation No. 7420523 under Mine Act section 104(a), 30 U.S.C. § 814(a), alleging an S&S violation of 30 C.F.R. § 75.360(b)(3),[7] for failure to perform an adequate preshift examination of the 001/002 section. 33 FMSHRC at 2411; Gov't Ex. 8.

It required four hours for the entire crew to clean the section, shoveling and using two scoops as they became available. Tr. I 175, 267; Gov't Ex. 5, 10/17/07 notes at 11-12, 23. The inspector abated the accumulations violation at approximately 2:30 that afternoon. Tr. I 267, 303-04; Gov't Ex. 5, 10/17/07 notes at 23; Gov't Ex. 7. Dotson remained on the section until the accumulations violation was abated. Tr. I 302. Upon returning to the surface, Dotson noted that the preshift record for the shift had been changed. Sometime after the inspector went underground, McCoy Elkhorn superintendent Gary Hensley had added the words "section needs cleaned" to the preshift report that had been signed by the previous shift foreman at 5:50 a.m. that morning. Tr. I 181-82; Gov't Ex. 1; Gov't Ex. 5, 10/17/07 notes at 24-25; 33 FMSHRC at 2411.

After further investigation, MSHA issued individual citations under section 110(c) against foremen Slone, Diamond and Robinson. 33 FMSHRC at 2405.

A hearing was held before an Administrative Law Judge, who determined that the conditions on the 001/002 MMU section on the morning of October 17, 2007 constituted an accumulations violation under section 75.400 that was S&S and a result of McCoy Elkhorn's unwarrantable failure. 33 FMSHRC at 2412-19.

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[5] The word "miners," as used by Inspector Dotson in his testimony and notes, refers to continuous mining machines rather than to human miners.

[6] Section 75.400 provides in pertinent part that "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."

[7] Section 75.360(b)(3) provides in pertinent part that "the person conducting the preshift examination shall examine for hazardous conditions and violations of the mandatory health or safety standards [pertaining to accumulations of combustible materials]."

The Judge also concluded that, while Slone and Diamond did not have personal liability, foreman Robinson was liable under section 110(c) for knowingly permitting the combustible materials to accumulate. Critical to the Judge's findings was his credibility determination that Robinson's crew had made two mining cuts before initiating cleanup on the section. 33 FMSHRC at 2416-18, 2425. The Judge credited the inspector's notes that were made at the time of the inspection, as well as other evidence, over Robinson's and two other miners' testimony that the two cuts were made later in the day after the section was cleaned. *Id.*

As to Citation No. 7420523, the Judge found a S&S violation because of preshift examiner Diamond's failure to report the extensive accumulations that existed at the time of the preshift. *Id.* at 2420-21. He raised the negligence from moderate to high because of the mine superintendent's addition of the notation that "section needs cleaned" to the preshift book many hours after the preshift had been completed. *Id.* at 2421. Reasoning that such "conduct undermines the fundamental role of the preshift examinations in promoting mine safety," the Judge raised the penalty from $3,689, which was proposed by the Secretary, to $6,500. *Id.* at 2422.

McCoy Elkhorn and Robinson filed appeals from the Judge's decision to the Commission. McCoy Elkhorn does not contest the fact of the violations, but disputes the Judge's findings of S&S and unwarrantable failure in Citation No. 7432120 (the accumulations violation) and the Judge's finding of high negligence in Citation No. 7420523 (the preshift examination violation).

II.

Disposition

A. Whether the Accumulations Violation was S&S

Under Commission case law, 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 Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission set forth the following four-part test to evaluate whether a violation is properly designated as S&S:

> 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.

Id. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 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). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *See U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

As an initial matter, McCoy Elkhorn asserts that the Judge erred in his S&S finding because it was in the process of cleaning the accumulations when the inspector arrived. It maintains that, assuming continued operations, those accumulations would have been removed before mining resumed.

We are not persuaded by McCoy Elkhorn's argument. The Commission has long held that an S&S determination must be made at the time the citation is issued "*without any assumptions as to abatement*" and in the context of "continued normal mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984) (emphasis added). Thus, in *Gatliff Coal Co.*, 14 FMSHRC 1982, 1986 (Dec. 1992), the Commission determined that the Judge misapplied the *Mathies* test by inferring that the violative condition would cease. Further, the "operative time frame for determining if a reasonable likelihood of injury exists includes both the time that a violative condition existed prior to the citation and the time that it would have existed if normal mining operations had continued." *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989). Clearly, mining had occurred during times when the accumulations existed. Moreover, we decline to assume that the operator would have completely abated the accumulations violation in the absence of the citation. Accordingly, we find no merit to the operator's abatement argument.[8]

We now examine each step of the *Mathies* test to determine whether the Judge correctly analyzed each element based on the record.[9]

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[8] Commissioner Young notes that active abatement efforts may form part of the context for analyzing the continuation of normal mining operations, and that accumulations which are noted in examinations and promptly addressed may preclude a finding that the accumulations are S&S. However, in this case even if active abatement was underway at the time of the inspection, the operator fails to account for the fact that the accumulations presented a danger to miners for at least parts of two previous shifts. The S&S analysis at that point would have found that the discrete hazard contributed to by the violation – extensive, unreported accumulations of dangerous, combustible material – was reasonably likely to cause injury during that period.

[9] 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)).

The first *Mathies* element is satisfied by the Judge's determination of a violation, a finding which has not been appealed. 33 FMSHRC at 2413.

With respect to the second *Mathies* element, the Judge determined that the accumulations violation presented the hazard of combustion and propagation of a fire or explosion. *Id.* at 2414. Substantial evidence in the record supports this determination. The cited accumulations were extensive, spanning all nine entries, and it took the entire first shift crew four hours to clean them. Tr. I 189, 302-04; Gov't Ex. 6; 33 FMSHRC at 2415. The accumulations consisted of highly-combustible float coal dust and loose coal. Tr. I 189-90, 238, 249.

The mine liberates large quantities of methane and is subject to 15-day methane spot inspections under Mine Act section 103(i), 30 U.S.C. § 813(i). Tr. I 156, 247-49. As the Judge held, "in the event of a methane ignition, the cited accumulations could be put in suspension, increasing the hazard associated with a fire or explosion." 33 FMSHRC at 2415. The inspector testified that methane increases the potential danger of explosion or fire and that methane at the explosive level had been detected at the mine. Tr. I 155-57. Additionally, potential ignition sources were present on the supersection in the form of the cutter heads on the continuous miners Tr. I 247; 33 FMSHRC at 2415. *See also* Tr. I 235-36; Gov't Exs. 6 & 7 (continuous miner electric cables passed through the accumulations). This hazardous situation lasted for the two shifts preceding Dotson's inspection. 33 FMSHRC at 2412; Tr. I 144, 251, Tr. II 600; Gov't Ex. 5, 10/17/07 notes at 8-9.

Given these conditions, the inspector testified that "if there was a face ignition with the amount of excessive accumulations of float coal dust . . . it would propagate and spread across the whole section." Tr. I 248-49. Accordingly, we conclude that the Judge's statement is an accurate description of the relevant hazard contributed to by the accumulations violation in this case, and that it is supported by substantial evidence.

In addressing the third *Mathies* element, the Commission has held that, in cases involving violations which may contribute to the hazard of methane explosions or ignitions, the likelihood of an injury resulting from the hazard depends on whether a "confluence of factors" exists that could trigger an explosion or ignition. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988). Some of the factors to be considered include the presence of methane, possible ignition sources, and the types of equipment operating in the area. *Id.*; *Enlow Fork Mining Co.*, 19 FMSHRC 5, 9 (Jan. 1997).

The Judge found that there was a reasonable likelihood that the combustion hazard caused by the violation would result in serious injury. 33 FMSHRC at 2414-15. Substantial evidence in the record supports his determination. Inspector Dotson testified that, due to the extensive nature of the accumulations and the mine's excessive methane liberation, an ignition would be reasonably likely to result in fatal injuries that would affect all 14 people on the section. Tr. I 246-49. As noted above, cutter heads from the continuous miners served as potential ignition sources. Accordingly, we affirm the Judge's determination that there was a confluence of factors present that would make a fire or ignition reasonably likely. 33 FMSHRC at 2414-15.

See Amax Coal Co., 19 FMSHRC 846, 849 (May 1997) (holding that an ignition source and large amounts of coal and coal dust that could propagate a fire or fuel an explosion satisfies the third element of *Mathies*).

As to the fourth *Mathies* element, the Judge determined that any injury resulting from the hazard contributed to by the violation would be serious. 33 FMSHRC at 2414. He relied on Inspector Dotson's testimony that an ignition was reasonably likely to result in fatal injuries to the miners on the section. Tr. I 246-49. As the Seventh Circuit explained in *Buck Creek*, 52 F.3d at 135-36, in affirming a Judge's S&S determination, nothing more was necessary to support an inspector's "common sense conclusion that a fire burning in an underground coal mine would present a serious risk of smoke and gas inhalation." *See also Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1120 (Aug. 1985) (recognizing that "ignitions and explosions are major causes of death and injury to miners").

On this record, substantial evidence supports the Judge's determination that the accumulations violation contributed to a discrete safety hazard which would be reasonably likely to result in an injury of a reasonably serious nature, as required by our S&S analysis. Thus, we affirm the Judge's finding that the accumulations violation was properly designated S&S.

B. Whether the Accumulations Violation Resulted from an Unwarrantable Failure

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). 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).

Whether the conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case, including (1) the extent of the violative condition, (2) the length of time that 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 (7) whether the operator has been placed on notice that greater efforts are necessary for compliance. *See Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1350-57 (Dec. 2009); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999). These factors need to be viewed in the context of the factual circumstances of the particular case. *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). All of the relevant facts and circumstances of each case must be examined to determine if an operator's conduct is aggravated or whether mitigating circumstances exist. *Id.*

1. Extensiveness and Obviousness

Regarding the extensiveness and obviousness of the violation, the evidence demonstrated that the accumulations were extensive in nature in that it took the entire first shift four hours to clean up the condition. 33 FMSHRC at 2418; Tr. I 175, 267, 304. The accumulations consisted of combustible coal and float coal dust spillage and accumulations from mining cuts and in the roadways that were in all nine entries from the feeder to the face. 33 FMSHRC at 2409, 2412; Tr. I 171, 189; *see* Gov't Ex. 6 (Inspector's diagram showing extensive accumulations on 001/002 section). The inspector measured the accumulations as ranging from 8 to 24 inches in depth, and observed that they were dry and black in color. Tr. I 171, 189, 223, 229, 238-40; 33 FMSHRC at 2418. The inspector's notes contain Robinson's admission that the section was "dirty from feeder to face," and that "third shift was supposed to clean last night . . . but didn't do very good." Tr. I 171; Gov't Ex. 5, 10/17/07 notes at 7. One miner testified that the coal spillages were more extensive than normal. Tr. II 559. McCoy Elkhorn's production report from the shift preceding the citation also indicates that the section was not adequately cleaned. It reads that the crew "cleaned what we could." Gov't Ex. 2. Robinson's decision to have the entire crew of 14 persons engage in cleanup prior to the inspector's arrival also is indicative of the extensiveness and obvious nature of the accumulations.

Although McCoy Elkhorn disputes the obvious and extensive nature of the accumulations, substantial evidence in the record supports the Judge's determination that the accumulations were both extensive and obvious. For example, the Judge recognized that, as McCoy Elkhorn contended, some of the accumulations cited by Dotson were material that had sloughed from the ribs and had been sufficiently rock dusted to render them inert. 33 FMSHRC at 2412. However, the Judge credited Dotson's testimony that "while some accumulations were the result of non-violative sloughage, what he cited were accumulations from continuous miner cuts and roadway spillage in nine entries from the face to the feeder. (Tr. II 373)." *Id.*

2. Danger

With respect to the level of danger, we conclude that the violation posed a significant degree of danger. The accumulations created a hazard, which was reasonably likely to lead to, or propagate, a mine fire or explosion. Slip op., *supra* at 7; 33 FMSHRC at 2415.

3. Notice

As the Judge noted, McCoy Elkhorn had been issued 17 citations for accumulations violations under 30 C.F.R. § 75.400 at the No. 15 Mine in the two year period prior to October 2007. 33 FMSHRC at 2419; Gov't Ex. 10. Two of these citations had been issued in the week before Inspector Dotson's October 17, 2007 inspection, on October 11 and October 15. Tr. I 158-68; Gov't Ex. 4, 10/11/07 notes at 4; Gov't Ex. 5, 10/15/07 notes at 5; 33 FMSHRC at 2419. Dotson testified that on October 11, during a closeout conference with Superintendent Gary Hensley after his inspection, Dotson specifically addressed the excessive accumulations violations at the mine. Tr. I 160-61. The inspector's notes of October 11 state: "I explain[ed] to Mr.

Hensley that he is on notice that he has been issued an excessive amount of 75.400 citations in the past 4 months and better efforts are required to remedy this condition." Gov't Ex. 4, 10/11/07 notes at 17. McCoy Elkhorn's assertion that its prior citations do not provide notice overlooks the inspector's actual notice given a week earlier that greater compliance efforts were needed with respect to combustible accumulations. *See* Tr. I 219; Gov't Ex. 5, 10/17/07 notes at 10 (Inspector noted that this is the third citation for accumulation of combustible material issued on this section in the past two weeks). Thus, substantial evidence in the record supports the conclusion that McCoy Elkhorn was on notice that it had an ongoing accumulations problem at the mine requiring greater compliance with section 75.400.

4. Duration

The record demonstrates that the majority of the accumulations resulted from mining cuts that were made on the second shift on October 16 from 2 p.m. to 10 p.m. Tr. I 251; Gov't Ex. 2 (McCoy Elkhorn's production report shows that 14 ½ cuts were made on second shift on October 16). Four of the cuts were unbolted and could not be cleaned up until the roof bolter went in on the third (maintenance) shift. Tr. II 600. The maintenance shift could not clean the accumulations satisfactorily, as recorded on the production report as follows: "cleaned what we could, had 2 scoops down." Gov't Ex. 2. The record demonstrates that the accumulations persisted at least for some of the second shift on October 16, through the third shift covering the night of October 16-17, and then into the first shift the morning of October 17, as shown by Robinson's admission that the section was dirty when he arrived on the section. Gov't Ex. 5, 10/17/07 notes at 7. Accordingly, we affirm that the accumulations existed for a sufficient duration to support a finding of unwarrantable failure. *See 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).

5. Abatement Efforts

As the Judge found, McCoy Elkhorn was experiencing non-functioning scoop problems, which impeded efforts to clean up the accumulations. 33 FMSHRC at 2408-09, 2412-13, 2418. Without adequate and working scoops, the mine was unable to clean the coal accumulations caused by mining. Tr. I 125-26 (after cutting coal and roof-bolting, the scoop is supposed to come in and clean all loose coal). Second shift foreman Slone testified that on his October 16 shift he had two continuous miners operating but one of the three scoops was down with a part ordered and the other two scoops had dead batteries. Tr. I 117, 139-40. Given the time necessary to charge a scoop battery, Slone effectively had one working scoop for the two continuous miners. Tr. I 142-43. The inspector noted that, according to day shift foreman Ronnie Loyne, the section had four scoops and that "two stay broke down all the time." Tr. I 171-72; Gov't Ex. 5, 10/17/07 notes at 8. Slone conceded that there was a scoop "issue" at the mine, which "was part of the foul up." Tr. I 117. Day shift mine foreman Loyne said that they "had a problem with scoops broken down ever since he came to the mine two months ago." Tr. I 173; Gov't Ex. 5, 10/17/07 notes at 9. Jason Robinson reported to the inspector that he had two dead scoops and two broken down when he arrived on October 17. Tr. I 174; Gov't Ex. 5, 10/17/07 notes at 10. Third shift Foreman Diamond

testified that "I quarrel with them a lot about their scoops." Tr. II 636-37; *see also* Gov't Ex. 2 (Diamond's production report noted that it had two scoops down).

The Judge determined that McCoy Elkhorn's persistent problem maintaining functioning scoops was an aggravating factor, rather than a mitigating factor as the operator contended. 33 FMSHRC at 2413, 2418. This is a proper finding. The operator is responsible for keeping its equipment in working condition. If its equipment needs repair or replacement, and the result is combustible accumulations or other conditions endangering the safety of miners, this certainly does not constitute a mitigating circumstance for purposes of an unwarrantable failure determination. The evidence demonstrates that McCoy Elkhorn did not maintain its scoops on this section in proper working condition.

6. Possible Mitigation

We are not persuaded by McCoy Elkhorn's argument that the unwarrantable failure finding should be mitigated because it was in the process of cleaning the section when the inspector arrived. McC. Br. at 12-13. McCoy Elkhorn continued mining with inadequate scoops, despite prior warnings that greater compliance efforts were required, with the result that extensive, combustible accumulations persisted for at least two shifts. *See Consolidation Coal Co.*, 22 FMSHRC 328, 332-33 (Mar. 2000) (finding unwarrantable failure when operator had made some efforts to rectify the condition, but failed to expeditiously remedy the condition after receiving an inspector's admonition of the need for greater compliance).

In summary, we affirm as supported by substantial evidence the Judge's determination that McCoy Elkhorn's violation of section 75.400 was a result of its unwarrantable failure.[10]

C. Section 110(c) Liability of Foreman Robinson

Section 110(c) of the Mine Act provides in part:

> Whenever a corporate operator violates a mandatory health or safety standard . . . , any . . . agent of such corporation who knowingly authorized, ordered or carried out such violation . . . shall be subject to . . . penalties.

The proper inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16

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[10] We note that the Judge's unwarrantable failure finding also relied on his determination that foreman Robinson had taken mining cuts before ensuring cleanup of the accumulations. 33 FMSHRC at 2415-18. Irrespective of whether Robinson initiated mining before cleanup, a question on which Commissioners disagree, we unanimously conclude that the record supports an unwarrantable failure determination against McCoy Elkhorn.

(Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982). The Secretary need prove only that an individual knowingly acted, not that the individual knowingly violated the law. *Warren Steen Const. Inc.*, 14 FMSHRC 1125, 1131 (July 1992). An individual acts knowingly where he is "in a position to protect employee safety and health [and] fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *LaFarge Constr. Materials*, 20 FMSHRC 1140, 1148 (Oct. 1998); *Kenny Richardson,* 3 FMSHRC at 16.

The Judge found that Robinson, who was aware of the extensive accumulations, directed his crew to make two mining cuts before initiating cleanup of the accumulations. 33 FMSHRC at 2416-18, 2425. On this basis, the Judge determined that Robinson deliberately failed to act to protect the miners on his crew by removing the combustible accumulations and was therefore liable under section 110(c). *Id.* Similarly, the inspector explained the section 110(c) allegation against Robinson: "Once he decided to go ahead and produce coal while those accumulations of combustible material were in the area, he knowingly and willfully violated the law at that time." Tr. II 359. *See Prabhu Deshetty*, 16 FMSHRC 1046, 1050 (May 1994) (foreman subject to section 110(c) liability for failure to address known accumulations).

On appeal, the central issue with respect to Robinson's section 110(c) liability is whether substantial evidence supports the Judge's determination that Robinson ordered the mining cuts at the 3-right crosscut (3-R) and the 5 Heading (5-H) before starting cleanup of the accumulations. McCoy Elkhorn and Robinson dispute the Judge's finding, based on the inspector's testimony and notes, that Robinson took two cuts before starting cleanup. Instead, Robinson testified that the two cuts in question were taken at 2:00 p.m. and 2:20 p.m, at the end of his shift. Tr. II 671.

Turning to the 3-R cut, we conclude that substantial evidence in the record supports the Judge's conclusion that Robinson's crew cut the 3-R on October 17 before Inspector Dotson arrived. The cuts for the two shifts leading up to Robinson's shift were listed in McCoy Elkhorn's production reports. Gov't Ex. 2. On the October 16 second shift, foreman Slone's crew made 14 ½ cuts but 3-R was not listed as one of them. On the following maintenance shift, foreman Diamond noted that his crew had "finished cutting 6L," but that was the only cut listed. Gov't Ex. 2; *see also* Tr. I 69, 71-72. Thus, the evidence indicates that the 3-R was not cut prior to Robinson's shift. While Dotson was on the section, he observed that the 3-R had been cut and improperly bolted. Tr. III at 438-39.[11] The inspector issued a citation for the inadequate bolting of the 3-R at 11:10 a.m. Tr. III at 438, 440; Gov't Ex. 9. The fact that 3-R had not been cut on previous shifts but was cut when Inspector Dotson observed it at 11:10 a.m. strongly supports the conclusion that it had been cut by Robinson's crew on the morning of October 17, before Dotson

[11] Dotson found that the 3-R had been only partially bolted, observing that the last row of bolts was six to nine feet from the face. This was contrary to the approved roof control plan that required a minimum distance of four feet from the face. Gov't Ex. 9.

arrived.[12]

Inspector Dotson testified that when he discussed this with Robinson, Robinson said that he had been aware of the condition for about four hours. Tr. III 439; *see also* Gov't Ex. 5, 10/17/07 notes at 17. The inspector testified that this led him to believe that Robinson's crew had cut and bolted the 3-R that morning. Tr. III 438-40. As the Judge found, foreman Diamond's testimony was corroborating. 33 FMSHRC at 2416. Diamond testified that he had bolted all the cuts that had been made before Robinson's shift had begun. Tr. I 72-73, Tr. II 601. Accordingly, the Judge credited Inspector Dotson's testimony that the 3-R was cut on Robinson's shift prior to Dotson's arrival, and not later in the day as testified by Robinson. 33 FMSHRC at 2416.

Additionally, the inspector testified that he remained on the section until the citation was abated at 2:30 p.m., which is after Robinson testified that he made the cuts. Tr. I 267, 302; Gov't Ex. 7. The inspector further testified that he was not aware of any cuts made while he was on the section. Tr. I 302-03. This testimony undermines Robinson's claim that the two cuts were made at approximately 2:00 and 2:20 p.m. Presumably, if cuts were made at those times, Dotson would have been aware of them.

We also find that the contemporaneous inspector's notes support the Judge's section 110(c) finding. Those notes state that Robinson told him that "when [Robinson] arrived on the section this morning he finished cutting . . . where the miners were in 3R and 5 heading." Tr. I 171; Gov't Ex. 5, 10/17/07 notes at 7. The Judge credited the contemporaneous notes of the inspector that cuts in the 3-R and 5-H were taken before the cleanup over the testimony of Robinson and the McCoy Elkhorn miners that the cuts were taken at approximately 2:00 and 2:20 p.m. 33 FMSHRC at 2416-18; Tr. III 476-78. In addition, as the Judge found, the inspector was unequivocal that it was not possible that he misunderstood Robinson as to when he cut the coal. Tr. III 450-51; 33 FMSHRC at 2417 & n.6.

As we have long held, a Judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). Credibility determinations reside in the province of the administrative law judge's discretion and are subject to review only for abuse of discretion. *Dynamic Energy, Inc.*, 32 FMSHRC 1168, 1174 (Sept. 2010). We find that the record contains support for the Judge's credibility determinations.

Robinson argues that no coal was cut in the morning because the mine diagram drawn by

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[12] We note that neither of McCoy Elkhorn's briefs addresses or explains when the cut actually occurred with respect to the 3-R bolting citation that was issued at 11:10 a.m. on October 17, 2007. Gov't Ex. 9. We also note that neither foreman from the two preceding shifts listed the roof bolting hazard in their preshift reports, which also supports the view that the 3-R cut was not made until Robinson's shift. Gov't Ex. 1. *See also* Tr. II 610 (Foreman Diamond's testimony that roof hazards must be listed on preshift reports).

the inspector, Gov't Ex. 6, indicates that the 3-R was clean, and, if there had been recent cuts, some coal should have been shown. McC. Br. at 9. It is true that the 3-R is marked as clean on Gov't Ex. 6. Nonetheless, according to Robinson, some cleaning of the section took place before inspector Dotson arrived in the morning, Tr. I 90, and 3-R may have been cleaned at that time.[13]

Although some of the operator's arguments with respect to a cut at the 5-H could be viewed as fairly detracting from the Judge's finding,[14] our review of the record demonstrates that substantial evidence supports the conclusion that Robinson cut the 3-R before the inspector arrived. Accordingly, on balance we conclude that substantial evidence, including the Judge's credibility determinations, support the finding that Robinson's crew cut coal before it initiated cleanup of the extensive accumulations.

Our dissenting colleagues allege that we fail "to account for direct testimony and evidence which detracts from the Judge's conclusion," and that the Judge "failed to consider the evidence as a whole," particularly the direct testimony by Robinson, right-side continuous miner operator William Lowe and left-side shuttle car operator Ricky Varney that no mining occurred on the morning of October 17. Slip op. at 17. These allegations are incorrect. The Judge specifically considered the testimony of Robinson, Lowe and Varney. With regard to Lowe, the Judge noted that "Lowe, the continuous miner operator responsible for cutting the five heading . . . conceded he could not recall if, or when, he cut the five heading on that day. (Tr. II 507-10)." 33 FMSHRC at 2418. With regard to Varney, the Judge concluded that Varney's testimony "is entitled to little weight when considered in the context of Dotson's conflicting contemporaneous notes." *Id.* It is the Judge's responsibility to resolve conflicts in the evidence, and the Judge did so here.

Additionally, our colleagues, taking us to task for relying on "minor circumstantial evidence," characterize the 3-R cut as "small (perhaps 10 foot)." Slip op. at 18. However, Robinson testified that of the 40 feet he advanced on the October 17 shift, 25 or 30 feet – a not insubstantial distance – was in the 3 right while the 10 foot cut was in the 5 heading. Tr. III 478-79. Overall, he loaded 70 shuttle cars. *Id.* It is true that in affirming the Judge's decision on Robinson's liability, we are relying to a large extent on circumstantial evidence in the form of information obtained from McCoy Elkhorn production reports, together with the fact of the roof

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[13] McCoy Elkhorn argues that the 3-R could not possibly have been cleaned with the scoops not fully charged. However, foreman Slone testified that cleaning was possible when a scoop just had "a little charge." Tr. I 142.

[14] According to Dotson's sketch of the section, when he arrived, the face of the 5 Heading was flush with the inby ribs of the left and right crosscuts entering the 5 Heading. Gov't Ex. 6. One of these was the 6-L crosscut which Diamond's crew had completed on the previous shift. Tr. I 68-69. The substantial evidence rule requires that the Commission consider whatever in the record fairly detracts from the weight of the evidence supporting the judge's determination. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

bolting citation issued at 11:10 a.m. on October 17. However, the Commission has long recognized that "the substantial evidence standard may be met by reasonable inferences drawn from indirect evidence." *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984). Thus, similar to our conclusion herein, the Commission held in *Windsor Coal Co.*, 21 FMSHRC 997, 1001-02 (Sept. 1999) that for purposes of unwarrantable failure, the duration of a violation may be proven by an operator's preshift and onshift reports.

Finally, our colleagues argue that even if Robinson directed mining on the morning of October 17, he then stopped the mining and had the whole crew shovel the accumulations. This, according to the dissent, "undermines [our] conclusion that [Robinson] knowingly acted in failing to protect miners." Slip op. at 21. However, the fact that Robinson had his crew shoveling the coal accumulations at the time Dotson arrived on the section does not exonerate him from previously mining coal in the presence of those accumulations. *See Warren Steen Construction, Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (section 110(c) violation occurred when supervisor authorized miners to perform actions violative of statute).

Ultimately, this is a case where, on this issue, any set of facts from the record is susceptible to rebuttal by another set of facts from the record. It is the Judge's duty to weigh the competing facts and resolve the conflicts. Here, the Judge decided to believe Dotson and not Robinson, Lowe and Varney. The Commission's task is to determine whether the Judge's decision is supported by substantial evidence. Although it would be possible to reach a different result, we conclude that substantial evidence in the record supports the Judge's determination that Robinson was personally liable under section 110(c) for his failure to clean up the extensive and combustible accumulations before cutting coal.

D. Finding of High Negligence Regarding the Preshift Violation

The Judge determined that McCoy Elkhorn's initial failure to note that the section needed cleaning on the preshift report was an S&S violation of section 75.360(b)(3). 33 FMSHRC at 2421. Section 75.360(b)(3) requires that, before a shift begins, a preshift examiner must conduct an examination for hazardous conditions at the mine such as accumulations of combustible materials. *Enlow Fork Mining*, 19 FMSHRC at 14-15 (holding that preshift examiner must record accumulations of combustible materials as hazardous conditions.) The preshift examination requirement "is of fundamental importance in assuring a safe working environment underground." *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995).

Although McCoy Elkhorn has not appealed the preshift violation or its S&S nature, it takes issue with the Judge's raising of the negligence level from moderate, as originally found by the Secretary, to high.[15] The Judge raised the level because Hensley added the words that the "section

[15] The Commission reviews a Judge's negligence finding, which is a component of a penalty assessment, to determine whether it is supported by substantial evidence and consistent with the statutory penalty criteria set forth in section 110(i) of the Mine Act, 30 U.S.C. § 820(i).

needs cleaned" to the preshift report some time after the preshift examination had already been completed. Gov't Ex. 1, at 4 (Preshift Report); 33 FMSHRC at 2421-22. We agree with the Judge that the degree of negligence is high for the preshift violation; however, we do not endorse his reasoning. Accordingly, we affirm the Judge in result.

Substantial evidence on the record supports a determination of high negligence for the failure to report the extensive accumulations in the preshift book. The inspector testified that the negligence should have been marked as high because he believed that the accumulations had been there since the second shift on October 16 and were not noted by either the second or third shift foremen for the oncoming shifts. Tr. I 298-99; *see also* Gov't Ex. 5, 10/17/07 notes at 14 ("Mike Diamond did not list any hazards on his preshift on 10/17/07 for the day shift on 001/002 section. A 104(d) citation was issued for 75.400 across the section. Mr. Diamond should have known of condition – it has existed for at least 6 hours since preshift . . . [and] 14 men on dayshift crew were exposed to the condition.") At the hearing, Diamond conceded that he should "have tried to do more on the report." Tr. II 626.

We have already concluded that, at the time of the inspection, extensive and obvious accumulations of combustible coal and float coal dust were present in all nine entries on the 001/002 MMU section for at least two shifts. Slip op., *supra* at 8. Additionally, Inspector Dotson had specifically warned McCoy Elkhorn six days before the citation was issued that better efforts were required to remedy the accumulation problem in the mine. Tr. I 158-61; Gov't Ex. 4, 10/11/17 notes at 17. The operator then was on heightened awareness that it needed to expend greater efforts to clean up accumulations.

Given this warning, McCoy Elkhorn's failure to even list the extensive accumulations on its preshift reports so that its foremen could take appropriate cleanup efforts constitutes a high level of indifference to Mine Act requirements. *See National Mining Assoc. v. MSHA*, 116 F.3d 520, 540 (D.C. Cir. 1997) ("preshift examinations assess the overall safety conditions in the mine; . . . identify hazards . . .; and through this identification facilitate correction of hazardous conditions.") By failing to list obvious accumulations on the two preshift reports preceding the inspector's arrival, McCoy Elkhorn disregarded the safety of the oncoming miners and displayed a high degree of negligence. *See Deshetty*, 16 FMSHRC at 1053 (failing to remedy known accumulation hazards indicates high degree of negligence).

Although the Secretary initially designated the negligence as only moderate, it is well established that the Commission and its Judges may modify the negligence determination. *Spartan Mining Co.*, 30 FMSHRC 699, 723-25 (Aug. 2008). In determining the amount of the penalty, neither the Judge nor the Commission shall be bound by a penalty recommended by the Secretary. *Sellersburg Stone*, 5 FMSHRC 287, 291 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Substantial evidence in the record supports a high level of negligence as well as an accompanying increase in the penalty amount to $6,500. Accordingly, we affirm the Judge in result.

Westmoreland Coal Co., 8 FMSHRC 491, 492 (Apr. 1986).

III.

Conclusion

For the foregoing reasons, we affirm the Judge's determination that McCoy Elkhorn's accumulations violation, as set forth in Citation No. 7432120, is S&S and the result of an unwarrantable failure to comply with section 75.400. We also affirm the determination that Jason Robinson was liable for a section 110(c) penalty with respect to that accumulations violation. We affirm in result the Judge's determination that the preshift violation, set forth in Citation No. 7420523, was a result of high negligence and affirm the associated penalty.

Mary Lu Jordan, Chairman

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

Commissioners Young and Althen, concurring in part and dissenting in part:

We concur with our majority colleagues in affirming the Judge's findings that the accumulations violation was both significant and substantial and a result of McCoy Elkhorn's unwarrantable failure to comply with 30 C.F.R. § 75.400. We also agree with the majority's conclusion that substantial evidence supports the Judge's conclusion that McCoy was highly negligent in failing to conduct an adequate preshift violation. We therefore join our colleagues on those sections of their opinion. Slip op. at 4-10, 14-15.

However, we disagree with the majority's conclusion that McCoy's foreman Jason Robinson should be held personally liable for the accumulations violation pursuant to section 110(c), 30 U.S.C § 820(c), of the Mine Act. The majority fails to account for direct testimony and evidence which detracts from the Judge's conclusion that Robinson "'knowingly' permitt[ed] the combustible coal dust and loose coal . . . to develop without ordering the timely removal of the violative accumulations." 33 FMSHRC 2403, 2422 (Oct. 2011) (ALJ). As a result, the Judge failed to consider the evidence as a whole, especially evidence fatal to his conclusion that Robinson is personally liable under section 110(c).

Robinson testified that no mining occurred on the morning of October 17, the date of Inspector Dotson's inspection. Tr. II 671. The direct testimony of two other miners on Robinson's crew, right-side continuous miner operator William Lowe (Tr. II 457-58, 465-66), and left-side shuttle car operator Ricky Varney (Tr. II 534-35, 543, 570), corroborates Robinson's testimony. Further, Michael Diamond, the foreman on the shift preceding Robinson, and Robinson both testified that no scoop was available for use at the start of Robinson's shift, because one scoop was down and the other needed re-charging, making it virtually impossible for Robinson's crew to clean any coal cut on the morning of October 17, prior to Inspector Dotson's arrival. Tr. I 75, 82, 102-04. Moreover, there was no evidence of coal accumulations or coal being transported out of the mine on belts on the morning of October 17, which would have indicated that mining occurred. Gov't Ex. 6; Tr. I 353-54. Diamond also testified that on his shift, his crew finished the cut in 6-Left, which was started on the preceding shift, into the No. 5 entry. Tr. I 68-69, Tr. II 583-87. This is consistent with the mining pattern and the inspector's own map of the mine on the morning of his inspection, showing no cuts in the 3-right crosscut (3-R) and the 5 Heading (5-H), where the continuous miners were left by the third shift because they were the next cuts to be made in the mining sequence. Gov't Ex. 2; Tr. II 527, 604. The unequivocal and convincing evidence that no mining occurred in 5-H prior to the inspector's arrival and other direct testimony wholly undermines the inspector's notes that Robinson said he had mined 5-H. Inspector Dotson even admitted that the testimony of Diamond was consistent with the mine's normal mining pattern. Tr. I 205, Tr. III 449-50.

Against all this evidence, the majority relies on the inspector's discredited notes and only circumstantial evidence to support its conclusion that substantial evidence supports the Judge's finding that mining did take place on the morning of October 17 during Robinson's shift. Despite clear and convincing evidence that the inspector's notes were unreliable, the majority relies on the Judge's credibility determination regarding the inspector's notes. Slip op. at 12-13. The majority

also falls into the trap of adopting the Judge's inference that because Dotson testified that he was told by Robinson that he knew about the inadequate bolting for about four hours, that means that Robinson ordered the cuts at 3-R. Slip op. at 12; Tr. III 439; Gov't Ex. 5, 10/17/07 notes at 17. Finally, the majority relies on the operator's production reports of the preceding shifts, which did not note a small (perhaps 10 foot) cut in 3-R, to support the inference that Robinson made that cut on his shift. Slip op. at 11-12. However, as we will see, inferences drawn from minor circumstantial evidence falls far short when compared to direct testimony of four miners and the inspector showing that no mining occurred prior to the inspection. The totality of the evidence, indeed overwhelming evidence, supports the conclusion that mining resumed after Dotson's inspection.

As our majority colleagues state, section 110(c) of the Mine Act provides that a director, officer, or agent of a corporate operator who knowingly authorized, ordered, or carried out a violation of a mandatory health or safety standard shall be subject to an individual civil penalty. 30 U.S.C. § 820(c). The proper legal inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); *accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997). A knowing violation occurs when an individual "in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Kenny Richardson*, 3 FMSHRC at 16. Section 110(c) liability is predicated on aggravated conduct constituting more than ordinary negligence. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992).

Below, the Judge predicated his conclusion that Robinson was personally liable under section 110(c) on his findings that Robinson, who knew of the extensive accumulations, allegedly directed his crew to make two small mining cuts before initiating cleanup of the accumulations. 33 FMSHRC at 2425. Based on this finding, the Judge concluded that Robinson deliberately failed to act to protect miners on his crew.

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 reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

First, we conclude that substantial evidence does not support the Judge's finding that Robinson ordered the cuts on his shift. Both the Judge below and the majority on review discount or ignore direct testimony and rely principally on circumstantial evidence to support the Judge's finding that mining occurred on the morning of Inspector Dotson's October 17 inspection. This

finding essentially serves as the entire basis of the Judge's conclusion that Robinson was liable under section 110(c).

In finding that Robinson ordered the cuts on 3-R and 5-H, the Judge relied almost exclusively on the inspector's notes, because the inspector had no independent recollection of his conversation with Robinson. 33 FMSHRC at 2425; Gov't Ex. 5, 10/17/07 notes, at 7; Tr. III 450-51, 479-81. Based on the inspector's notes and the inspector's testimony that Robinson acknowledged that on the morning of October 17 he was aware of the improperly bolted roof condition for four hours, the Judge found that Robinson's crew had made the cuts in the early morning hours of their shift.[1] Slip op. at 11-12 (citing Tr. III 438-40; Gov't Ex. 5, 10/17/07 notes at 17). The majority also relies on the production reports to support that the cuts had not been made on the prior shift. Slip op. at 11-12 (citing Gov't Ex. 2). This evidence, equivocal at best, is insufficient to support a conclusion that Robinson knowingly violated the Act in the face of testimony that refuted the inspector's thesis.

The Judge failed to adequately reconcile contrary direct evidence that wholly undermines the inspector's notes, namely the testimony of every miner corroborating Robinson's testimony that no mining was performed in the morning of the inspection. The evidence also demonstrated that the inspector's own map of the area was inconsistent with his notes and instead was consistent with the miners' direct testimony of no mining. Robinson and miners on his crew testified that no coal was cut on the first shift until around 2 p.m. 33 FMSHRC at 2416-18; Tr. II 377-78, 457, 466-67, 476-78, 499, 534-35, 543, 570. Because no scoops were available, had mining immediately commenced on the first shift, the coal almost certainly could not have been cleaned before the inspector's arrival. Tr. I 75, 82, 94-95, 102-04; Tr. II 457-58; Gov't Ex. 2. Yet, the area was clean. This direct evidence undermines the inference that the cuts were made at the start of Robinson's shift.

Regarding the alleged cut at 5-H, substantial evidence does not support a finding that a cut was taken before abatement. Such a cut would be inconsistent with (1) the inspector's own map which showed 5-H no further advanced than at the end of the preceding shift, and no coal accumulation in the area, which would indicate that it had been mined on the first shift (Gov't Ex. 6; Tr. I 191; Tr. II 673); (2) the testimony of highly experienced miners and the inspector about McCoy's usual mining sequences and that a cut at 5-H would contravene this mining pattern (Tr. I

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[1] It appears that the Judge drew an inference based on circumstantial evidence consisting of the inspector's notes and certain testimony and record evidence that the cuts were not made on the prior shift, and hence, must have been made by Robinson's crew on the morning of October 17. 33 FMSHRC at 2416-18. While the Judge is permitted to draw inferences from the evidence before him, such inferences must be "inherently reasonable and there [must be] a logical and rational connection between the evidentiary facts and the ultimate fact inferred." *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984). Here, the Judge failed to adequately take into account contrary direct evidence, which undermines the basis for his inference, instead "cherry picking" and crediting the evidence which only supports his ultimate finding.

71-73, 125-29, 205, 208, 428; Tr. II 458, 524-27); (3) Diamond's testimony that he finished the 6L cut and was flush with the entry, consistent with McCoy's normal mining pattern (Tr. II 512-13, 582-87); (4) the testimony of the right side miner operator, William Lowe, that when he got to the section he was told to standby and then was given a shovel, told to start shoveling, and spent the next several hours shoveling (Tr. II 465-66); and (5) Robinson's own direct testimony. Thus, the clear weight of the evidence undermines reliance upon the inspector's notes.

As to the alleged cut at 3-R, the majority cites only circumstantial evidence for cutting on 3-R, largely ignoring the direct testimony of disinterested miners and Robinson himself. Slip op. at 11-12. Contrary to that circumstantial evidence is the direct testimony of the left side shuttle car operator who repeatedly testified that they did not cut coal in the morning and that they made a cut in 3-R that afternoon after 2:00 p.m. Tr. II 531-32, 543, 546-47, 560. Also, on direct examination, Robinson testified that there was a small cut in 3-R when he inspected the section in the morning:

> Q. It was flush. What about in 3 right? Is there – from [the inspector's] diagram, does it look to you like anyone would have cut coal in 3 right on your shift?
>
> A. No. Nobody cut coal on my shift. There was a small cut of 3 right, but it was not done by me or anybody on my shift.
>
> Q. Okay. And if 3 right had been cut that morning on your shift, would it be clean as Mr. Dotson has written in that area?
>
> A. If I would have cut – I didn't have a scoop till after Mr. Dotson got there. This is the only time I had ever used a scoop. So it couldn't have been cleaned. It had to be cleaned from the previous shift.

Tr. II 674. Likewise, the uncontroverted testimony is that no scoops were available during Robinson's shift. Hence, making it unlikely, if not impossible, for Robinson's crew to make the alleged cuts and clean up the section before Inspector Dotson arrived at 8:00 a.m. 33 FMSHRC at 2408; Tr. I 75, 82, 105, 191; Tr. II 471, 480-82, 557-58; Gov't Ex. 2.

A judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). Nonetheless, the Commission will not affirm such determinations if, as here, they are self-contradictory or dubious evidence supports them. *Keystone Coal Mining Corp.*, 17 FMSHRC, 1819, 1881 n.80 (Nov. 1995); *Consolidation Coal Co.*, 11 FMSHRC 966, 974 (June 1989). We find the weight of this direct evidence so overwhelming as to undermine the Judge's credibility determination crediting the inspector's testimony and notes.

In whole, the totality of the evidence is insufficient to support the conclusion that Robinson "knowingly" violated the Mine Act by ordering mining to proceed in the face of accumulations.

The inspector's notes-based testimony is contradicted by overwhelming direct evidence of McCoy's mining practices and the testimony of many miners as to the events leading up to and occurring on Robinson's shift, undermining a finding that mining occurred at the beginning of the first shift on October 17. Rather, the record as a whole proves that as soon as Robinson became aware of the extent of the accumulations, he ordered his crew not to mine and to instead devote their resources exclusively to cleaning the accumulations. Tr. I 94-95, 103-04.

Second, even if we were to infer that the record shows that Robinson had permitted some small amount of mining to commence on the morning of October 17, even the majority points to Robinson's decision to stop mining and to have the entire crew of 14 persons engage solely in cleanup prior to the inspector's arrival. Slip op. at 8. This fact undermines the majority's conclusion that he knowingly acted in failing to protect miners. Rather, such evidence unequivocally undermines the Judge's conclusion that Robinson knowingly violated the Act.

Thus, even accepting the Judge's credibility determination and findings, the evidence at most shows that Robinson arrived at the section, performed an imminent danger run of the relevant area, prepared his crew for production, began production on the right side cutting into the 3-R section, before Robinson walked the section and saw accumulations, shut down production, and ordered his crew to stop mining and start cleaning the accumulations. Tr. I 94-95, 102-04.

Since the small cut in 3-R would have taken no more than 20 minutes (Tr. II 461), presumably all this would have happened within an hour or so of the start of the shift – before the inspector arrived at the mine. There is no evidence at all supporting any theory of aggravated conduct on Robinson's part, given Dotson's testimony that no mining occurred during his inspection. Tr. II 353-54. Thus, any production occurred either in a brief period before Dotson arrived, or after 2 p.m., as Robinson and every other miner testified.

Given the mine's conditions experiencing high rib sloughage, we cannot conclude that the foreman's actions rose to the level of conduct amounting to a violation of section 110(c). Even if the inspector's notes were accepted as reliable, Robinson did not commit a knowing violation by not immediately correcting a problem that had persisted over multiple shifts, when upon discovering the violative condition shortly after the start of his shift, he promptly stopped production to address it. This evidence even accepting the Judge's erroneous fact findings, as the majority has, does not demonstrate aggravated conduct constituting more than ordinary negligence. *See Roy Glenn*, 6 FMSHRC 1583, 1586 (July 1984) (stating that a violation of section 110(c) occurs "when, based upon facts available to him, [an agent] either knew or had reason to know that a violative condition or conduct would occur, but *failed to take appropriate preventative steps*") (emphasis added); *Cannelton Indus., Inc.*, 20 FMSHRC 726, 736-37 (July 1998) (holding that Judge erred by failing to take into consideration evidence regarding agents' efforts to clean up accumulations when determining section 110(c) liability).

Accordingly, we conclude that neither the record nor the law supports the Judge's holding that Robinson is personally liable under section 110(c).

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