**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**
**601 NEW JERSEY AVENUE, NW**
**SUITE 9500**
**WASHINGTON, DC 20001**

August 28, 2008

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| SECRETARY OF LABOR, | : | Docket Nos. WEVA 2004-117-RM |
| MINE SAFETY AND HEALTH | : | WEVA 2004-118-RM |
| ADMINISTRATION (MSHA) | : | WEVA 2004-119-RM |
| | : | WEVA 2004-120-RM |
| v. | : | WEVA 2004-121-RM |
| | : | WEVA 2004-122-RM |
| SPARTAN MINING COMPANY, INC. | : | WEVA 2005-34 |
| | : | WEVA 2005-53 |

BEFORE: Duffy, Chairman, Jordan, Young, and Cohen, Commissioners

DECISION

BY: Jordan, Young, and Cohen, Commissioners

These consolidated civil penalty and contest proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000), stem from a fatal electrical accident that occurred at Spartan Mining Company's ("Spartan") Ruby Energy Mine. Administrative Law Judge Jerold Feldman affirmed two citations arising under section 104(a) of the Mine Act, 30 U.S.C. § 814(a), and one citation and one order arising under section 104(d), 30 U.S.C. § 814(d). 29 FMSHRC 465 (June 2007) (ALJ). He imposed penalty assessments of $190,000 for the violations. *Id.* at 488-89. Spartan successfully petitioned for review, and the Commission held oral argument in the case. For the reasons that follow, we affirm the judge in part, and vacate and reverse in part.

I.

Factual and Procedural Background

Spartan, owned by Massey Coal Services, operated the Ruby Energy Mine near Delbarton in Mingo County, West Virginia. 29 FMSHRC at 468-69. On February 5, 2004, the 002 section crew under the direction of section foreman William Sada entered the mine at its regular starting time of 7:00 a.m. *Id.* at 469. There were two continuous mining machines on the 002 section. The continuous miner on the left side of the section was used to mine a line of pillars from the No. 4 entry to the No. 1 entry. The continuous miner on the right side of the section mined pillars from the No. 8 entry to the No. 5 entry. *Id.* Continuous miner operator Jamie Hatfield

began operating the left continuous miner in the No. 4 entry at approximately 7:35 a.m. Mining continued in entries numbered 3, 2, and 1 as the day progressed. Upon completion of the No. 1 entry, Hatfield backed the continuous miner two crosscuts outby the pillar line in the No. 3 entry for servicing. *Id.* at 470. Hatfield and crew electrician Kenneth McNeely serviced the miner. *Id.* at 469, 470. After servicing, Sada instructed Hatfield to move the continuous mining machine into the No. 4 entry to start mining. At approximately 1:04 p.m., as Hatfield trammed the continuous miner, the ripper head or the cutting drum of the continuous miner struck the trailing cable, which provided electrical power to the continuous miner.[1] The damage caused two conductors to come into contact, resulting in a phase-to-phase short circuit. *Id.* at 470. The continuous miner immediately ceased operating, and power went out on the section and the power station. *Id.* The mine fan stopped, and ventilation ceased. *Id.*

Foreman Sada and shuttle car operator Kenneth Collins were a few feet outby the continuous mining machine when contact with the ripper head occurred. Jt. Ex. 2, ¶ 5. The foreman went to the section phone, located approximately 280 feet away by the feeder, to call the surface. 29 FMSHRC at 471. He spoke with Superintendent Steven Neace, who informed him that all power to the mine, including the mine fan and all power to surface facilities, including the preparation plant, was out. 29 FMSHRC at 471. Neace and Sada testified that Neace informed Sada that he thought Appalachian Power Company had caused the power outage. *Id.*; Tr. 559, 621.

Meanwhile, Hatfield and Collins unsuccessfully attempted to remove the trailing cable from beneath the continuous miner's ripper head. *Id.* at 472. Collins then walked approximately six crosscuts outby the section belt head to retrieve a scoop for the purpose of attempting to bump the ripper head from the cable. Collins met scoop operator Charles Smith, and both brought the scoop back to the continuous miner. *Id.* McNeely, who was not at the continuous miner at the time, went to the section phone and inquired about the power outage; Neace informed McNeely that if the ventilation did not resume operation within 15 minutes, all personnel would have to leave. *Id.*

Sada returned to the continuous miner at approximately 1:09 p.m. *Id.* As he approached, he saw McNeely sitting in a personnel carrier in the crosscut adjacent to Sada's position between the No. 3 and No. 2 crosscuts. *Id.* at 472-73. Sada stated that he told McNeely that they would have to go outside in 15 minutes. *Id.* at 473. Sada could see the scoop being operated in front of the continuous miner. *Id.* at 472; Jt. Ex. 2, ¶ 10. Smith bumped the scoop against the ripper drum of the continuous miner, allowing Hatfield to pull the cable free. 29 FMSHRC at 473. Sada heard Hatfield state that the cable was freed and the cable jacket "was not even busted." 29 FMSHRC at 473; Jt. Ex. 2, ¶ 11. Sada left to tell the miners in the right side of the section that they might have to evacuate the mine. 29 FMSHRC at 473. McNeely arrived at the continuous

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[1] The ripper head extends the full width of the continuous mining machine. It contains a number of bit lugs, pointed metallic objects, that are attached to the cutting drum. The bit lugs are the equivalent of teeth on a circular saw. *Id.* at 467.

mining machine and told Hatfield and Collins that he needed to check the damaged area of the cable. *Id.* He also told Hatfield and Collins that "they only had 15 minutes until they had to leave the section." *Id.*; Jt. Ex. 2, ¶ 12. McNeely began cutting the outer jacket off the trailing cable at the damaged area. 29 FMSHRC at 473. Smith returned the scoop to the section belt head. *Id.* After traveling to the right side of the section, Sada returned to the section mine phone. *Id.*

McNeely and Hatfield continued repairing the cable as Collins pulled on the waterline that was also struck, in an attempt to remove it from under the ripper drum. *Id.* McNeely cut about 14 inches of the outer jacket off the trailing cable, exposing the three power phases, a ground wire, and a monitor wire. *Id.* Two of the power phases were burned and needed to be cut and spliced. The outer jacket on the third power phase was damaged and needed to be re-insulated. The ground and monitor wires were not damaged. McNeely walked to his personnel carrier to get tape and connectors. He returned on his personnel carrier, parking it behind the continuous mining machine. *Id.* As McNeely worked on the second power phase, Hatfield heard a humming noise and felt air movement. The mine's carbon monoxide sensor data base reflects that power was restored to the mine at 1:18 p.m., approximately 14 minutes after power was lost. *Id.* McNeely asked Collins to go to the section power center to see if mine power had been restored. McNeely began work on the third phase and cut the third phase apart. Foreman Sada was at the dumping point area at 1:18 p.m. and noticed that the mine power had been restored. He went to the section power center located approximately 400 feet from the left continuous miner and started closing the circuit breakers for all face equipment. 29 FMSHRC at 473. All cable plugs were still attached to their receptacles on the power center. *Id.*

At approximately 1:20 p.m., Sada closed the circuit breaker for the left continuous mining machine. As a result of the breaker being closed, McNeely received a fatal shock while repairing the cable. As Collins walked toward the power center to see if the power had been restored, he saw Sada closing the circuit breakers. Collins called out to Sada, telling him not to close the circuit breaker for the left continuous mining machine. Collins heard Sada say, "Oh no." *Id.* at 474; Jt. Ex. 2, ¶ 18.

The Department of Labor's Mine Safety and Health Administration ("MSHA") investigated the accident and issued a number of citations and orders. A hearing was then held before Commission Administrative Law Judge Feldman. At the outset, the judge found that the violations concerned a high level of gravity, as self-evident from the fatality. 29 FMSHRC at 478. He also determined that the "magnitude of negligence" required the imposition of civil penalties that were higher than those initially proposed by the Secretary. *Id.* He discussed each violation separately.

A. Citation No. 7224651 – Protection of Cable Under 30 C.F.R § 75.606

The judge found a violation of 30 C.F.R. § 75.606[2] because the "fact that the trailing cable was run over and damaged by the continuous miner is beyond dispute." 29 FMSHRC at 479. He rejected Spartan's assertion that because it had a policy in place to prevent cables from damage it should not be held liable for the violation. *Id.* Although the judge determined that running over the cable evidences no more than a moderate degree of negligence,[3] he found that the negligence analysis must also include the obligation to ensure that damaged cables are properly handled. 29 FMSHRC at 479. The judge found that Sada knew or should have known that there was at least a reasonable likelihood that the trailing cable was damaged. *Id.* at 479-80. In so doing, the judge discredited Sada's and Hatfield's testimony that they believed the cable was not damaged. *Id.* at 480. Relying on Spartan's policy of removing the cathead[4] from the power center and checking the cable after it is run over, the judge found that Sada's failure to ensure that the cathead was disconnected and the cable tested to determine if it had been damaged constituted a reckless disregard of an electrocution hazard. 29 FMSHRC at 468, 479-80. The judge also found that the violation was significant and substantial ("S&S")[5] and that the gravity was extreme. 29 FMSHRC at 481. The judge raised the penalty from $32,500 to $50,000. *Id.* at 478, 481.

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[2] Section 75.606 provides: "Trailing cables shall be adequately protected to prevent damage by mobile equipment."

[3] MSHA's citation had indicated that the negligence was "moderate." *Id.* at 478; Gov't Ex. 4 at 1.

[4] The catheads are the ends of the trailing cables that are plugged into the power center. "Catheads are physically . . . plugged into the receptacle [of the power center] similar to plugging a cable into [a] . . . television." Tr. 45.

[5] 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."

B. Citation No. 7224650 – Lock Out Requirements under 30 C.F.R. § 75.511

Spartan stipulated that the trailing cable was not locked out, thereby violating 30 C.F.R. § 75.511.[6] 29 FMSHRC at 482. The judge found that the violation was S&S, given the gravity of the violation resulting in a fatality. *Id.* at 483. The judge found that McNeely's failure to lock out and tag was a careless act that was highly negligent. *Id.* at 482-83. The judge found Spartan to be directly negligent because Sada knew that the cathead had not been locked out when he closed the continuous miner's circuit breaker. *Id.* at 476-77, 483. The judge also imputed the negligence of McNeely to the mine operator because of the lack of proper supervision received by McNeely, Hatfield and Collins. *Id.* at 475-77, 483. He found that Sada permitted McNeely to remain at the site of the damaged cable without ensuring that proper procedures were followed. *Id.* at 483. The judge concluded that Sada's lack of supervision, as evidenced by his asserted lack of knowledge of the activities of the members of his crew, including his electrician, after the power was lost and ventilation was interrupted, and a trailing cable had been struck, warrants the imputation of an extremely high degree of negligence. *Id.* Instead of the $32,500 penalty proposed by the Secretary, the judge assessed a $50,000 penalty given the S&S nature, the extreme gravity and the reckless disregard in supervision that enabled a splicing repair to occur on a damaged cable that Spartan knew was not locked and tagged out. *Id.*

C. Citation No. 7224652 – Removal From Service under 30 C.F.R. § 75.1725(a)

The judge found that Spartan violated 30 C.F.R. § 75.1725(a)[7] because it failed to remove from service an electrical cable that had likely been damaged by the mobile equipment, consistent with its own policy. 29 FMSHRC at 484. The judge found the gravity to be severe and found the violation to be S&S. *Id.* The judge also determined that Spartan's conduct was aggravated because Sada knew that the cable was struck by the ripper head and that power was lost at the moment the trailing cable was struck. *Id.* Relying on Spartan's concession that a damaged cable represents an extremely hazardous condition, the judge also concluded that Spartan's failure to remove the cable from service was a result of unwarrantable failure. *Id.* He

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[6] Section 75.511 provides in pertinent part:

> No electrical work shall be performed on low-, medium-, or high-voltage distribution circuits or equipment, except by a qualified person or by a person trained to perform electrical work . . . . Disconnecting devices shall be locked out and suitably tagged by the persons who perform such work . . . .

[7] Section 75.1725(a) provides:

> Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

assessed a penalty of $60,000 rather than the $56,000 penalty proposed by the Secretary. *Id.* at 484, 485.

The judge rejected Spartan's argument that this citation and citation No. 7224650 (citing a violation of section 75.511, for failure to lock and tag out) were duplicative. The judge found that the standard obligated two distinct duties: Spartan could have locked out the continuous miner for the purpose of initiating repairs or it could have removed the equipment from service and postponed the repairs. The judge found that Spartan chose to do neither and that its inaction constituted separate and distinct acts of omission. *Id.* at 481-82.

D. Order No. 7228963 – Withdrawal from Working Section Requirement under 30 C.F.R. § 75.313(a)(3)

The judge found that Spartan violated section 75.313(a)(3)[8] because Foreman Sada did not order his crew to retreat from the working section during the mine fan stoppage. 29 FMSHRC 486. He determined that "[i]f McNeely had been withdrawn from the working section, instead of being allowed to repair an electrical cable while mine fan power was lost, he would not have been electrocuted." *Id.* Although the judge disagreed with the Secretary's conclusion that the violation was not S&S, he was not authorized to modify the order. *Id.* at 486-87. The judge found that the gravity of the violation was "extremely serious" because permitting mine operations to continue during the hazardous period of no mine ventilation exposed eight miners to serious or fatal injuries. *Id.* at 487. The judge concluded that the violation was properly designated as a result of unwarrantable failure because Sada's failure to withdraw the miners from the working section constituted reckless disregard of safety procedures. *Id.* The judge assessed a penalty of $30,000, instead of the $3,700 proposed by the Secretary, because of the grave nature of the violation and the reckless and conscious failure to withdraw miners from the working section. *Id.* at 486, 487.[9]

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[8] Section 75.313(a)(3) provides:

> If a main mine fan stops while anyone is underground and the ventilating quantity provided by the fan is not maintained by a back-up fan system – . . . [e]veryone shall be withdrawn from the working sections and areas where the mechanized mining equipment is being installed or removed.

[9] The judge approved the parties' settlement agreement with respect to a violation of 30 C.F.R. § 75.310(b)(1), which requires a mine's fan power circuit to operate independently of other mine circuits, and a violation of 30 C.F.R. § 75.313(b), which provides that, if fan ventilation is restored within 15 minutes, a methane exam must be performed before work is resumed. 29 FMSHRC at 488.

II.

Disposition[10]

A. Citation No. 7224651– Failure to Protect the Cable

Spartan argues that the judge's finding of a violation of section 75.606, requiring that "[t]railing cables shall be adequately protected to prevent damage by mobile equipment," was not supported and is contrary to law. PDR at 15. It relies on its policy that prevents cables from being damaged, and asserts that there was no history of running over cables at this mine, and that this was the first time that the cable had been damaged by the continuous mine operator. *Id.* at 15-16. Spartan further asserts that if a violation occurred, the violation was not S&S because the damaged cable in and of itself posed no hazard and there were also breaker switches designed to trip should there be a cable problem. Sp. Reply Br. at 12. Additionally, Spartan takes issue with the judge's raising of the negligence level from moderate to reckless disregard, asserting that the judge erroneously determined the degree of negligence for failing to protect the cable by considering events after the damage occurred. *Id.* at 10-12.

The Secretary responds that the judge properly concluded that Spartan violated section 75.606. She argues that the judge was correct in finding that, because the cable was damaged by mobile equipment, the cable was not adequately protected and a violation of section 75.606 occurred. Sec'y Br. at 15. The Secretary also asserts that the judge correctly concluded that the violation was S&S because the damaged cable posed a significant danger to miners. *Id*. at 17-20.

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[10] Three Commissioners agree on the disposition of the issues raised on review with regard to Citation No. 7224651, the violation of section 75.606, with Chairman Duffy writing separately to concur, except that he would remand the penalty for it to be determined by the judge instead of reinstating the penalty sought by the Secretary. All Commissioners also affirm the judge with regard to the S&S and unwarrantable violation of section 75.1725(a) alleged by Citation No. 7224652, except that Chairman Duffy and Commissioner Young believe that the record supports ascribing a lesser degree of negligence to the operator than the judge did in this instance. All Commissioners also affirm the penalty assessed by the judge for Citation No. 7224652. With respect to Citation No. 7224650, the violation of section 75.511, Commissioners Jordan and Cohen would affirm the judge that an S&S violation and high negligence occurred and affirm the penalty he assessed, while Chairman Duffy and Commissioner Young would reverse the judge on the ground that the citation alleges a violation duplicative of the section 75.1725(a) violation. Finally, three Commissioners affirm the judge regarding the unwarrantability of the section 75.313(a) violation alleged in Order No. 7228963 and the penalty, while Chairman Duffy would remand those issues to the judge for reconsideration. The effect of an evenly split decision on an issue is to allow the judge's decision to stand as if affirmed on that issue. *See Pennsylvania Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501, 1505 (3d Cir. 1992).

The Secretary maintains that the judge properly determined that the violation of section 75.606 was a result of reckless disregard, contending that Foreman Sada's failure to take action to ensure that the cable was not protected from further damage after it had been run over supports a high negligence finding. *Id*. at 22.

Section 75.606 provides that "[t]railing cables must be adequately protected to prevent damage by mobile equipment." It is undisputed that the trailing cable was run over and damaged by the continuous mining machine. 29 FMSHRC at 479. Marcus A. Smith, an MSHA electrical engineer who participated in the accident investigation, testified that whenever a multi-ton mining machine smashes into a cable, "it creates significant damage." Tr. 157, 159. Accordingly, the cable at issue was not adequately protected, and there was a violation of section 75.606.

We are not persuaded by Spartan's defenses that no violation should be found because this was the first time the operator had run over a cable and that Spartan had a policy in place to protect cables. The Mine Act is a strict liability statute, such that an operator will be held liable if a violation of a mandatory standard occurs regardless of the level of fault. *Asarco, Inc*., 8 FMSHRC 1632, 1634-36 (Nov. 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989). Additionally, the Commission has held that compliance with an operator's plan, such as a ventilation or roof control plan, does not preclude a finding of violation of the underlying roof or dust control regulations. *Cumberland Coal Res. LP*, 28 FMSHRC 545, 553 (Aug 2006), *aff'd,* 515 F.3d 247 (3d Cir. 2008). If compliance with an MSHA-approved plan does not insulate an operator from liability, it follows *a fortiori* that compliance with an internal policy cannot preclude a finding of violation.

As to whether the violation was properly designated as S&S, the S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to "significant and substantial," i.e., more serious violations. 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 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.

*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. Secretary 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).

Although Spartan argues that the cable itself posed no hazard, Congress has emphasized the hazardous nature of unprotected trailing cables in mines. Section 75.606 mirrors section 306(f) of the Mine Act, 30 U.S.C. § 866(f), which was carried over from the Federal Coal Mine Safety and Health Act of 1969, 30 U.S.C. § 801 et seq. (1976). In enacting that provision, Congress recognized the significant danger posed by damage to trailing cables, such as shock hazards and mine fires. S. Rep. No. 91-411, at 71 (1969), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 197 (1975) ("*Coal Act Legis. History*").

In addition, MSHA Electrical Engineer Smith testified as to the great danger posed by an unprotected trailing cable. Tr. 172-73. Spartan's contention that, because the cable was protected by a circuit breaker the cable was not hazardous, overlooks the fact that the circuit breaker function failed to prevent a fatal injury in the instant case. Moreover, the Commission and the Seventh Circuit have rejected an analogous argument with respect to installation of safety measures to contain mine fires. *Buck Creek*, 52 F.3d at 136; *Amax Coal Co.*, 18 FMSHRC 1355, 1359 n.8 (Aug. 1996). The court reasoned that the fact that an operator has "safety measures in place to deal with a fire does not mean that fires do not pose a serious safety risk to miners. Indeed, the precautions are presumably in place . . . precisely because of the significant dangers associated with coal mine fires." *Buck Creek*, 52 F.3d at 136. Likewise, installing a breaker system does not mean that electrocution from cables will no longer pose a serious risk to miners. This case demonstrates that failure to protect cables from damage can result in extremely serious injuries. Accordingly, we affirm the judge's S&S determination that failing to protect the cable contributed to an electrocution hazard that was reasonably likely to result in an injury of a reasonably serious nature.

On the question of the degree of negligence that should be attributed to Spartan, the judge found that "the act of running over the cable while tramming the continuous miner evidences, as the Secretary suggests, no more than a moderate degree of negligence." 29 FMSHRC at 479. However, the judge determined that the analysis of the degree of negligence does not stop at that point. *Id.* He held that section 75.606 also required the mine operator to further protect cables after they have been struck. *Id.* The judge and the Secretary point to the operator's actions after the cable was smashed to substantiate the reckless disregard allegation. For example, the judge faulted Spartan for "ignoring" the damaged cable and rested his reckless disregard determination on Sada's failure to de-energize or otherwise isolate the cable so as to avoid an electrocution hazard. *Id.* at 480-81; *see also* Sec'y Br. at 21-22.

Contrary to the holding of the judge and the assertion of the Secretary, the text of section 75.606 does not apply to conditions after a violation has occurred. The regulation indicates that an operator has to protect a cable from damage from mobile equipment. As mentioned above, it states: "Trailing cables shall be adequately protected to prevent damage by mobile equipment." Similarly, the citation only focused on the failure to protect the cable before the continuous mining machine ran over it. Gov't Ex. 4.[11] The standard does not refer to conditions that arise *after* the damage has already occurred. The judge in effect faulted Spartan for failing to remove the cable from service and for failing to lock and tag out the cable before making a repair. These shortcomings are addressed in Citations Nos. 7224652 and 7224650, respectively, and are discussed more fully in this decision. Accordingly, we conclude that the judge erred in his determination of reckless disregard when he expanded his analysis beyond the time when the damage occurred to the cable by the continuous mining machine, and thus vacate his finding.

The judge determined that no more than a moderate degree of negligence is associated with the failure to protect the cable before the damage occurred. 29 FMSHRC at 479. Likewise, we conclude that the record demonstrates that the degree of negligence for the violation is moderate. Smith testified that his evaluation of moderate negligence was based on the fact that Sada was standing near the continuous miner and gave the directive for the machine to be moved whereby the machine then smashed into the cable. Tr. 173-74. *Cf. Virginia Slate Co.*, 24 FMSHRC 507, 513 (June 2002) (holding that involvement of supervisor who is held to a high standard of care is important to the unwarrantable failure analysis). However, the inspector determined that the foreman's action was not highly aggravated because his view was partially obscured. Tr. 174-76. Additionally, the company had a policy to protect cables, which in this case did not protect the cable in question. Tr. 160-61. Based on these factors, the Secretary found that the violation was a result of moderate negligence. Gov't Ex. 4. Similarly, we conclude that the record as a whole demonstrates that Spartan's violation of section 75.606 stemmed from moderate negligence. *American Mine Srvcs. Inc.*, 15 FMSHRC 1830, 1833-34 (Sept. 1993) (holding that no need to remand exists when only one conclusion possible); *Walker Stone Co.,* 19 FMSHRC 48, 53 (Jan. 1997) (same), *aff'd on other grounds*, 156 F.3d 1076 (10th Cir. 1998).

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[11] Citation No. 7224651 provides in pertinent part:

> The . . . trailing cable that provides . . . power to the . . . left continuous mining machine . . . was not protected to prevent damage by mobile equipment. When the mining machine . . . was trammed forward about 21 inches, the cutter head smashed the cable. This forced energized conductors from two phases to come into contact, creating a short circuit that caused a loss of electrical power to the entire mine. This violation is a contributing factor to the fatal accident which occurred on February 5, 2004 . . . .

B. Citation No. 7224650 – Failure to Lock and Tag Out[12]

1. Violation and S&S

Spartan stipulated that the trailing cable's cathead was connected to the power center and not locked and tagged out at the time McNeely was performing repairs. Consequently, the judge found a violation of section 75.511. 29 FMSHRC at 482. Spartan does not dispute the violation on appeal. Accordingly, we affirm the violation of section 75.511 for failing to lock and tag out before performing electrical repairs.

The judge also found that the violation was properly designated as S&S in that it was reasonably likely that the failure to lock out a damaged cable prior to performing repairs would result in a fatal electrocution. *Id.* at 483. He determined that the gravity was severe. Spartan does not take issue with these findings on review. Accordingly, we affirm the determinations that the violation of section 75.511 was S&S and that the gravity of the violation was severe.

2. Negligence

Spartan asserts that the judge's finding of high negligence was incorrect because he failed to consider McNeely's misconduct in determining the degree of Spartan's negligence and he incorrectly imputed Sada's conduct to Spartan. Sp. Br. at 25-27; Sp. Reply Br. at 26-28. The Secretary counters that the judge's finding of high negligence is supported by the record. Sec'y Br. at 29-32. She asserts that in reaching that negligence determination, the judge properly relied on Foreman Sada's failure to supervise his crew. *Id.* at 30.

Judge Feldman concluded that there was negligence both directly attributable to Spartan and also that McNeely's negligence was imputable to Spartan. 29 FMSHRC at 483. With regard to Spartan's direct negligence, the judge found that Sada knew that the continuous miner had lost power the instant that the ripper head contacted the trailing cable, and that the trailing cable had not been locked out at the power center even though it had been run over by the miner. *Id.* The judge found that Sada had reason to know that the cable was damaged, and that his failure to respond to this potential hazard constitutes a disregard that is directly attributable to Spartan. *Id.* The judge further found that Sada's mistaken belief that the cable was undamaged is not a mitigating circumstance because it was brought about by Spartan's failure to follow its own safety procedures, which would have confirmed the defective condition of the cable. *Id.*

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*

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[12] As noted previously, Commissioner Young joins Chairman Duffy in his separate opinion on this issue. *See* slip op. at 7 n.10.

*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)).

After reviewing the record, we conclude that the judge's findings regarding Sada's responsibility for the section 75.511 violation are supported by substantial evidence, and that the judge did not err in determining that the violation was directly attributable to Spartan's own negligence.

With regard to imputing McNeely's negligence to Spartan, in *Cougar Coal Co.*, 25 FMSHRC 513, 519 (Sept. 2003), the Commission reiterated that an operator may be held responsible for the negligent act of a rank-and-file miner based on its own conduct. As the Commission has stated, "[W]here a rank-and-file employee has violated the Act, the operator's supervision, training and disciplining of the employees must be examined to determine if the operator has taken reasonable steps to prevent the rank-and-file miner's violative conduct." *Whayne Supply Co.*, 19 FMSHRC 447, 452-53 (Mar. 1997) (quoting *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (Aug. 1982) (emphasis omitted)). Similarly, the Commission stated in *A.H. Smith Stone Co.* that:

> [T]he fact that a violation was committed by a non-supervisory employee does not necessarily shield an operator from being deemed negligent. In this type of case, we look to such considerations as the foreseeability of the miner's conduct, the risks involved, and the *operator's* supervising, training, and disciplining of its employees to prevent violations of the standard in issue.

5 FMSHRC 13, 15 (Jan. 1983) (citation omitted).

The record reveals that McNeely, Hatfield, and Collins were working on the cable without any supervision by Foreman Sada. Under the circumstances of this case, where a cable had been smashed, power to the continuous miner had simultaneously gone out, and there was no mine ventilation, Spartan should have ensured that proper lock-out procedures were being followed. This is particularly true because Sada was aware of an earlier incident where McNeely neglected to lock and tag out equipment. This should have put Sada on notice that additional care was necessary with regard to supervising McNeely's lock out procedures. In *A.H. Smith*, the Commission concluded that the operator was negligent in discharging its duty of care when it was foreseeable that an employee "might" engage in the violative conduct involving a highly dangerous instrumentality. 5 FMSHRC at 15-16.

By contrast, in *Cougar Coal*, 25 FMSHRC at 519, the Commission declined to hold the operator responsible for a miner's negligence, where the supervisor expressly prohibited the

miner on two separate occasions from engaging in the violative conduct and the rank-and-file miner had never disobeyed a supervisory order. In the instant case, Sada never expressly told McNeely, Hatfield, or Collins not to work on the cable. He also did not order the cable locked and tagged out when the cable had been smashed by the continuous miner and when he saw Hatfield with the cable across his knee. The miners were working under a very stressful condition of no mine ventilation, which called for a higher duty of care on the part of Spartan.

As the judge found, Spartan cannot escape the imputation of negligence of rank-and-file personnel by asserting that Sada was unaware of the actions of its crew. 29 FMSHRC at 477, 483. The fact that Sada did not know that McNeely and Hatfield were repairing the cable is an aggravating factor which supports a showing of highly negligent supervision on the part of Sada.

Accordingly, we conclude that the judge's imputation of negligence to Spartan is supported by substantial evidence. Therefore, we affirm the judge's finding of high negligence for the lock-and-tag-out violation.

C. Citation No. 7224652 – Failure to Remove Unsafe Equipment from Service

1. Violation

Spartan asserts that the judge's finding of violation of section 75.1725(a) is erroneous because the cable was not unsafe as it tripped the power to the continuous miner causing it to become inoperable. PDR at 16. It also asserts that Foreman Sada did not foresee that McNeely would repair the cable without locking and tagging it out and therefore he did not consider the cable unsafe. Sp. Reply Br. at 17-19. The Secretary responds that the judge properly found a violation. Sec'y Br. at 33. She characterizes Spartan's assertion that the cable was not unsafe as specious because the circuit breaker could be re-closed and the cable would become a danger. *Id.* at 34-35.

Under section 75.1725(a), in deciding whether machinery or equipment is in an unsafe operating condition, the alleged violative condition is measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation. *Alabama By-Prods. Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982). The standard imposes two duties upon an operator: (1) to maintain machinery and equipment in safe operating condition, and (2) to remove unsafe equipment from service. Derogation of either duty violates the regulation. 4 FMSHRC at 2130. The Commission requires that the unsafe equipment be removed from service immediately. *Cyprus Plateau Mining Corp*., 16 FMSHRC 1604, 1607 (Aug. 1994).

We reject Spartan's argument that the cable was not unsafe at the time of the violation because it was not powered. The evidence overwhelmingly shows that when normal conditions were restored, the cable presented a safety hazard to miners, highlighting the grave danger from damaged trailing cables that are not immediately removed from service. The inspector testified

that the damaged cable posed serious safety risks to miners. Tr. 157, 172-73. Spartan's own policy also recognized the danger of damaged cables. Tr. 657-58. Spartan Superintendent Neace testified that it was the mine's policy, if a cable was run over, to remove the cable from service and check it for damage, and if damaged, to repair it. This is consistent with standard industry practice. Tr. 703. Moreover, the legislative history of the Coal Act discussed the danger of mine fires and electrocution that damaged cables pose in mines. *Coal Act Legis. History*, at 197.

At the hearing, Foreman Sada testified that he did not think that the cable was damaged and therefore did not consider it a danger. The judge, however, did not find his testimony credible. 29 FMSHRC at 479-80. We hold that substantial evidence supports the judge's credibility determination. The Commission has recognized that, because the judge has an opportunity to hear the testimony and view the witnesses, he or she is ordinarily in the best position to make a credibility determination. *Virginia Slate*, 24 FMSHRC at 512 (citations omitted). Accordingly, the judge's credibility determinations, discounting the testimony of Sada and Hatfield, are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992).

Sada was standing in close proximity to the continuous miner when he observed the instantaneous loss of power when the ripper head of a multi-ton piece of equipment struck the cable. Tr. 550, 557, 561. Both Sada and Hatfield conceded that they initially believed the loss of power was caused by the damaged cable. Tr. 511-13, 554, 562, 563-64. The record also reveals that Sada saw that miners needed a scoop to remove the cable that was trapped under the multi-ton continuous miner. Tr. 208-09.

MSHA Electrical Engineer Smith and Inspector James Humphrey both testified that Sada, as foreman, should have known that when the mining machine hit the cable and power was subsequently lost, the cable was no longer functioning and should have been taken out of service, tested and repaired before being put to use again, or prior to closing the breaker. Tr. 207-10, 306-16, 462, 469. Inspector Humphrey testified that every time a cable is run over, it creates an unsafe condition, even if the jacket does not appear to be damaged. Tr. 464-65. The impact can create small pinhole openings where persons can receive an electrical shock even if the circuit breaker is not tripped. Tr. 464-65. Electrical Engineer Smith testified that during his investigation, many miners knew that the cable had been damaged and McNeely had overheard it from multiple people who were underground that day. Tr. 245, 329-30, 340.

Spartan's own expert, Keith Hainer, Director of Maintenance at Massey Coal Services, testified that if a trailing cable has been run over, that cable should be tested to see if there is any internal damage. Tr. 661, 665, 721. He further testified that it would have been prudent to examine the cable for problems as there was a concurrent power outage. Tr. 721. Spartan's expert stated that it would have been obvious and significant that there might have been a problem with the cable when it was run over by the ripper head. Tr. 738-39. We note that there was testimony that continuous miner operator Hatfield informed Sada that the cable jacket did not appear to be damaged. Tr. 528. However, Hatfield is not an electrician. On balance, the

weight of the evidence strongly supports the judge's determination that a reasonably prudent person would have recognized that the cable posed a hazard requiring corrective action.

We are not persuaded by Spartan's assertion that McNeely's act was unforeseeable and that, under section 75.1725, unforeseeable acts do not necessitate removal from service. Sp. Reply Br. at 18-19. The record revealed that approximately a week prior, Sada counseled McNeely for repairing without locking and tagging out. Tr. 223, 250. Additionally, the cable posed a danger to any miner underground, not just to the electrician, and Sada saw Hatfield sitting with the cable across his knee. Tr. 581. Therefore, we conclude that a reasonably prudent foreman would have recognized that the damaged cable constituted a hazard warranting corrective action as required under *Alabama By-Prods.*, 4 FMSHRC at 2129.

The second requirement of section 75.1725(a) requires removal from service. Inspector Smith testified that after the cable was smashed, a "prudent" foreman would require that the piece of equipment be removed from service to be troubleshot, tested, and repaired prior to being placed back in service. Tr. 181. The inspector testified that placing equipment out of service is a management decision and that the equipment is labeled out of service and the condition is entered in the books on the surface. Tr. 210-11, 216. A management decision is then needed to place the equipment back in service. Tr. 218. It is undisputed that neither Sada nor other Spartan management officials took any steps to remove the cable from service. Accordingly, the damaged cable posed a danger and should have been removed from service. Because it was not, we affirm the judge's finding of violation of section 75.1725(a).

2. S&S and Unwarrantable Failure[13]

As to the S&S determination, Spartan reiterates its assertions that the cable was not unsafe primarily because it was de-energized, and it was not foreseeable that McNeely would make an electrical repair without locking and tagging out. Sp. Br. at 17-18. It asserts that the violation was also not a result of unwarrantable failure because even if Sada knew that the cable was damaged, which Spartan disputes, Sada had no reason to know that it would pose a danger. Sp. Reply Br. at 20. The Secretary maintains that the violation of section 75.1725(a) was properly determined to be S&S because failure to take the cable out of service made it reasonably likely that the continuous mining machine would be energized and that the damaged cable would seriously injure miners through electrical shock or fire, as demonstrated by this case. Sec'y Br. at 36. She also submits that the judge correctly concluded that the violation was the result of unwarrantable failure. *Id*. at 36-38. The Secretary asserts that the violation was obvious, that it was extremely dangerous, that a supervisor was involved in the violative conduct and knew or should have known about the danger, and that the operator did nothing to abate the violative condition. *Id.*

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[13] Commissioner Young joins Chairman Duffy, writing separately on the issue of the degree of the operator's negligence. *See* slip op. at 7 n.10.

As we held above, the fact that the cable was de-energized did not eliminate the significant danger it posed to miners. The cable remained in service, and when power was restored, miners were exposed to a severe electrical hazard. Tr. 157, 172-73; *Coal Act Legis. History*, at 197. The record also refutes Spartan's contention that the cable did not present a serious hazard to all miners on the section. The record reveals that the cable that had been run over by a continuous miner posed a danger to all miners, not just to McNeely. As we have already discussed herein, MSHA Inspector Humphrey testified that even if power was not lost, the impact from the cutting head can create small pinhole openings in the cable where persons can receive an electrical shock. Tr. 465-66. Sada testified that he observed Hatfield with the cable at issue across his knee just minutes before power was restored. Tr. 581. Accordingly, we affirm the judge's determination that failure to remove the cable from service was reasonably likely to result in a serious injury and, as such, was properly designated as S&S. 29 FMSHRC at 485.

Turning to the issue of unwarrantable failure, the unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. 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. Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) ("*Consol*"); *Cyprus Emerald Res. Corp*., 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc*., 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc*., 10 FMSHRC 705, 709 (June 1988). 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. *Consol*, 22 FMSHRC at 353.

In determining that the failure to remove the cable from service was aggravated conduct, the judge pointed to the undisputed fact that Foreman Sada knew that the cable was struck by the ripper head and that power was simultaneously lost. Hence, the violative condition was known and obvious. 29 FMSHRC at 484-85. The damaged cable presented a condition of high danger to miners. *See Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992) (finding

violation to be aggravated and unwarrantable based upon "common knowledge that power lines are hazardous, and . . . that precautions are required when working near power lines with heavy equipment"). Indeed, Spartan recognizes this danger by requiring all potentially damaged cables to be removed from service and to be tested and repaired. Tr. 657-58. Despite this knowledge and Spartan's own policy, Foreman Sada did not take any steps to have the cable removed from service. As Electrical Engineer Smith testified, Sada had multiple opportunities to have the cable removed from service – once when he was present at the moment of impact and spoke to Hatfield about the condition of the cable, and a second time, when he returned to the left continuous miner and saw the miners trying to free the cable with the scoop. Tr. 243-44, 576-77, 579-80. At this time, he observed Hatfield with the cable across his knee. Tr. 581. On both of these occasions, Sada should have directed that the cable be taken out of service for trouble-shooting, testing, and repair. The foreman's inaction is further aggravated because rather than taking the cable out of service when he was aware that miners had been working on it just minutes earlier, Sada energized the cable, an action directly contrary to what the regulation requires. We emphasize that Sada as a foreman is held to a high standard of care. *Virginia Slate*, 24 FMSHRC at 513 (holding that the involvement of a supervisor in the violation is an important factor in an unwarrantable failure determination because supervisors are held to a high standard of care).

We reject Spartan's argument that, because Sada did not know that the cable was damaged, the failure to remove it from service was not unwarrantable failure. As discussed previously, the judge expressly discredited Sada's testimony that he did not believe the cable was damaged. 29 FMSHRC at 480. We hold that there is no basis to overturn that credibility determination. *Farmer*, 14 FMSHRC at 1541. Additionally, even if Sada did not believe that the cable was damaged, the fact that the multi-ton continuous miner ran over the cable is indisputably cause for a prudent foreman to have the cable removed from service and tested. *See* Tr. 721 (testimony of Spartan's expert, Keith Hainer). We find equally unpersuasive Spartan's contention that a finding of unwarrantable failure is not justified because Sada had no reason to believe that McNeely would be undertaking repairs on the cable. Although the record showed that Sada was unaware that McNeely was repairing the cable, Sada was well aware that other miners were in contact with the cable as they were trying to free the cable and, the last time he observed the cable, it was on the knee of Hatfield. Given these circumstances, it is quite foreseeable that a miner could come into contact with the cable once Sada energized it. Accordingly, we uphold the judge's finding that the violation of section 75.1725(a) was a result of unwarrantable failure.

3. Duplication[14]

Spartan maintains that the failure to lock out citation, No. 7224650, and the failure to remove from service citation, No. 7224652, punish it twice for the same actions. PDR at 19. It asserts that the judge erred when he ruled that the two citations were not duplicative. *Id*. Spartan

[14] Commissioner Young joins Chairman Duffy in his separate opinion on this issue. *See* slip op. at 7 n.10.

contends that the crux of MSHA's case in both citations is the failure to lock and tag out, which is the most practical means to remove equipment from service. *Id*. at 20; Sp. Reply Br. at 19. The Secretary responds that the two citations at issue are not duplicative as the violations involve separate and distinct legal duties. Sec'y Br. at 38-40.

The Commission has held that citations are not duplicative as long as the standards involved impose separate and distinct duties on an operator. *Western Fuels-Utah, Inc*., 19 FMSHRC 994, 1003-04 (June 1997) (citing *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (Mar. 1993); *Southern Ohio*, 4 FMSHRC at 1462-63; *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 40 (Jan. 1981)). The record reveals that the responsibilities under sections 75.511 and 75.1725(a) were different. The section 75.511 standard only arises when electrical repairs are undertaken, and its implementation is, in the first instance, in the hands of the electrician. The section 75.1725(a) regulation is broader, applying to all machinery and equipment which becomes unsafe, and is exclusively in the hands of management. Tr. 254-55. It incorporates a management decision to remove equipment from service, and a management decision to place it back into service.[15] Tr. 217-18. Moreover, the two regulations do not have identical purposes, as the lock-and-tag-out standard appears designed to protect the electrician actually repairing the equipment, while the removal from service requirement would protect anyone in the mine who might otherwise attempt to use the equipment not knowing it was unsafe.

Electrical Engineer Smith testified that under the "removal from service" standard, management should have removed the cable from service for troubleshooting, testing, and repair, prior to placing it back in service. Tr. 158, 188-89, 207. He clarified that removal from service did not mean that the cable had to be immediately repaired. Tr. 210-16. Smith also explained that locking and tagging out alone does not constitute placing equipment out-of-service, because to satisfy the requirements of section 75.1725(a), the equipment must be labeled out of service and be listed on electrical exam records as "out-of-service." Tr. 216-17.

As Smith further testified, the two violations occurred at different points in time. Tr. 254-55. The removal from service violation (section 75.1725(a)) occurred at the left continuous miner when the cable was smashed. *Id.*; *see Cyprus Plateau*, 16 FMSHRC at 1607 (holding that unsafe equipment must be removed from service immediately). However, the lock out violation (section 75.511) occurred a number of minutes later, when McNeely began working to repair the cable without first locking and tagging it out at the power center. Tr. 254-55.

We reject Spartan's contention that the crux of both of the violations was the failure to lock and tag out. The citations at issue allege distinct shortcomings on the part of Spartan. Citation No. 7224650 alleged that "[t]he section electrician and the continuous mining machine

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[15] Because the requirements of section 75.1725(a) involve management responsibilities, the negligence involved in a violation of that standard is not mitigated by the "unforeseen and idiosyncratic conduct of a rank and file miner," contrary to the suggestion of our colleagues. Slip op. at 29, 32.

operator performed electrical work on a distribution circuit while the disconnecting device was not locked out nor suitably tagged." Gov't Ex. 6. Citation No. 7224652 alleged that:

> The operator, after witnessing the creation of an unsafe condition on a piece of mobile equipment, failed to cause the equipment to be immediately removed from service. When the . . . left continuous ming machine . . . trammed onto its . . .trailing cable, the section foreman was present and knew that the cable was damaged. He also witnessed the mining machine losing power when this occurred. Afterwards, the section foreman closed the circuit breaker, thereby energizing the trailing cable, without first: (A) causing the cable plug to be immediately disconnected from its receptacle and (B) instructing the section electrician to do the necessary troubleshooting, testing, and repair work on the cable to restore it to a safe condition.

Gov't Ex. 5.

Thus, separate and distinct from the section 75.511 violation, section 75.1725(a) required Spartan's management to remove the trailing cable from service and ensure that it was not brought back into service until it was certified as safe. However, by closing the circuit breaker, Foreman Sada not only failed to take unsafe equipment out of service, he also negligently put unsafe equipment into service, without testing it, thereby causing McNeely's death. The distinctions between the violations are clearly stated in the two MSHA citations. Gov't Exs. 5, 6.

We conclude that the standards impose separate and distinct duties on Spartan. Section 75.1725(a) requires that unsafe equipment be immediately removed from service. Not taking the continuous mining machine out of service represented a violation of omission. In contrast, section 75.511 requires that before electrical work is performed, the equipment must be locked and tagged out. Section 75.511 was violated in this case only upon McNeely's commencement of the electrical work on the cable. By performing electrical work without locking and tagging out, Spartan committed a violation of commission. The Commission has held that a violation of omission and a violation of commission are not duplicative. *Dynatec Mining Corp.*, 23 FMSHRC 4, 20 n.14 (Jan. 2001); *Southern Ohio*, 4 FMSHRC at 1463. Here, Spartan failed in its affirmative duty to remove unsafe equipment from service, and then compounded the damage by undertaking electrical work without locking and tagging out.

Our colleagues rely on *Western Fuels* to support two propositions. They assert that when a duty to comply with the requirements of one regulation may be "subsumed" in the duty to comply with the requirements of another, only one regulation should be cited. Slip op. at 32, *citing* 19 FMSHRC at 1004. They also state that *Western Fuels* stands for the concept that if the method of abatement for two citations is the same, the citations are duplicative. Slip op. at 30-31, *citing* 19 FMSHRC at 1003-05. They are correct on the first point, but the analysis does not

apply to the facts of this case. We believe that our colleagues are mistaken regarding their second point.

As to subsuming one regulation in another, *Western Fuels* involved one regulation imposing a broad obligation to install dry powder chemical systems that will protect the components of a conveyor belt system most susceptible to fires (section 75.1101-14(a)), and another, more specific, regulation pertaining to the numerical sufficiency of nozzles and reservoirs of such dry powder chemical systems (section 75.1101-15(d)). 19 FMSHRC at 1004. In finding the citations duplicative, the Commission held,

> Implicit in the duty to install a self-contained dry powder chemical system that protects the specified components of the conveyor belt is the duty to install a sufficient number of nozzles and reservoirs so that the chemical substance is effectively disbursed to those components. Because the duty to install a sufficient number of reservoirs is subsumed in the duty to install a dry powder chemical system that adequately protects the specified components, every violation of section 75.1101-15(d) will inexorably constitute a violation of section 75.1101-14(a).

*Id*. Thus, the Commission found that a violation of section 75.1101-15(d) could not be committed without also violating section 75.1101-14(a), and hence a violation of the latter was duplicative of a violation of the former.

In the present case, however, it is quite possible for a mine operator to violate section 75.511 without also violating section 75.1725(a), and vice versa. An electrician must lock and tag out prior to performing routine electrical maintenance work. If the electrician fails to lock and tag out the equipment before performing routine work, it is a violation of section 75.511. But if the maintenance work is routine, the equipment is not "in unsafe condition," and need not be removed from service under section 75.1725(a). Thus, a violation of section 75.511 can be committed without violating section 75.1725(a). Hence, section 75.511 is not subsumed in section 75.1725(a), and *Western Fuels* is factually distinguishable.

Second, our colleagues assert that *Western Fuels* stands for the proposition that if the method of abatement of citations is the same, the citations are duplicative. However, the Commission never focused on abatement in its analysis. 19 FMSHRC at 1003-1005. Rather, it emphasized more than once that standards are not duplicative when the initial conduct required by each regulation involved different actions. *Id*. Thus, *Western Fuels* does not stand for the proposition asserted by our colleagues.

Furthermore, in *Western Fuels*, the Commission asked whether MSHA was citing the operator on the basis of more than one specific act or omission. *Id*. at 1004 n.12. It noted that if MSHA had presented evidence of additional deficiencies that violated one of the regulations instead of relying on the identical evidence used to support the other, it would not have found them duplicative. *Id*.

Here, the Secretary presented different evidence to prove that Spartan violated each of the regulations at issue. In particular, the citation for the section 75.511 violation alleged that the miners "performed electrical work" while a disconnecting device was not locked or tagged out. Gov't Ex. 6. By contrast, the duty to refrain from performing electrical work simply does not come into play in her charge that 75.1725(a) was violated. Gov't Ex. 5. Likewise, the citation for the section 75.1725(a) violation centered on Foreman Sada's closing the circuit breaker, thereby energizing the trailing cable, without making sure that the necessary troubleshooting, testing and repair work had been performed. *Id*. Thus, this case is more similar to *Cyprus Tonopah*, in which the Commission emphasized that, although the operators' violations "may have emanated from the same events, the citations are not duplicative because the two standards impose separate and distinct duties upon an operator." 15 FMSHRC at 378.

Accordingly, we conclude that the violations are not duplicative and determine that both violations should be affirmed.

D. Order No. 7228963 – Failure to Withdraw Miners From Working Section

Spartan contends that the judge erred in finding unwarrantable failure with respect to the section 75.313(a)(3) violation because the record did not show reckless disregard, indifference, or intentional misconduct. Sp. Reply Br. at 23-25. It asserts that Sada instructed his crew that they had to leave the mine should power not be restored in 15 minutes and that, from this, they understood they had to withdraw from the working sections. Sp. Br. at 27. Spartan contends that all except Hatfield, McNeely, and Collins ceased to work and moved off the working section and there is no evidence that Sada knew that McNeely and Hatfield were not among those miners gathering and preparing to leave the mine. PDR at 28. The Secretary contends that the judge correctly found that the section 75.313(a) violation was a result of unwarrantable failure because Sada's failure to inform all miners to leave the section immediately was an egregious disregard for safety procedures. Sec'y Br. at 43-45. She asserts that Sada's silence in light of his crew's actions could only be seen by them as tacit approval of their efforts to repair the cable when they should have been withdrawing from the working section. *Id.* at 43. The Secretary emphasizes that the loss of ventilation causes chaotic situations that breed poor judgment. *Id*. at 44.

Section 75.313(a)(3) provides: "If a main mine fan stops while anyone is underground and ventilating quantity provided by the fan is not maintained by a back-up fan system– . . . [e]veryone shall be withdrawn from the working sections and areas where mechanized mining equipment is being installed or removed." 30 C.F.R. § 75.313(a)(3).

The judge determined that the failure to withdraw miners from the working section was a reckless disregard of proper safety procedures and a result of unwarrantable failure. 29 FMSHRC at 487. We are not persuaded by Spartan's assertion that Sada's instruction, that everyone would have to leave the mine in 15 minutes, mitigates that determination of unwarrantable failure. Inspector Humphrey testified that Sada's statement did not fulfill the requirements of section 75.313(a)(3) because it "in no way . . . resemble[d]" a command to

withdraw from the working section within that 15-minute period. Tr. 431-32. At best, Sada's statement was vague and ambiguous.

When Sada returned to the left continuous miner after talking with Neace on the mine phone, he "told McNeely that the power was off, the mine fan was down, and they would have to go outside in 15 minutes." Jt. Ex. 2, ¶ 10. Then Sada left to go to the other side of the section, and McNeely went to the continuous mining machine. McNeely "told Hatfield and Collins that he needed to check the damaged area of the trailing cable. He also informed them that the fan was off and that they *only had 15 minutes until they had to leave the section*." Jt. Ex. 2, ¶ 12 (emphasis added). Then "McNeely began cutting the outer jacket off the trailing cable at the damaged area." *Id.* "McNeely and Hatfield continued repairing the cable as Collins pulled on the waterline in an attempt to remove it from the ripper drum." Jt. Ex.2, ¶ 14. Thus, it appears that McNeely, Hatfield, and Collins all believed that the direction from Sada was to get the cable repaired within 15 minutes and *then* leave the section if ventilation was not restored.

The inspector testified that a prudent foreman would have made it clear that all persons were to withdraw to a safe location and would have then ensured that all miners on the crew were at that safe location. Tr. 432. In contrast, Sada was in view of the miners at the continuous miner and at no point did he instruct them to leave the working section. Tr. 434. Sada testified that he never told the miners to leave the working section directly. Tr. 567. Nor did he take a head count to see if all the men on his crew had withdrawn. Tr. 569. Eight miners remained on the working section during the entire mine fan outage, leading us to conclude that they either did not understand the instruction or they were not given one. Continuous miner operator Hatfield stated that he never heard Sada's directive. Tr. 519. Accordingly, we conclude that Sada's alleged instruction, which did not meet the requirements of the standard, does not undercut the judge's unwarrantable failure determination.

We also reject Spartan's contention that the violation was not a result of unwarrantable failure because Sada was unaware that McNeely was working on the cable. Although it appears from the record that Sada did not know specifically that McNeely was working on the cable, this is no defense because Sada was aware that other crew members were working on the cable. 29 FMSHRC at 480 n.6. The Joint Stipulations state that Sada witnessed the scoop being operated and that Hatfield and the crew were working on the cable when Sada returned from talking on the phone with Neace. Jt. Ex. 2, ¶¶ 10, 11. Instead of directing those miners to leave the working section, Sada testified that he told the miners that they had to leave in 15 minutes if power was not restored. Tr. 581-82. Under these conditions, Sada should have expressly told his crew to stop working and withdraw. In *Lion Mining Co.*, 19 FMSHRC 1774, 1778 (Nov. 1997), the Commission found that when a foreman witnessed a violation yet did not immediately stop it, the operator's violation was a result of unwarrantable failure. Similarly, Sada's failure to withdraw the miners supports a finding of unwarrantable failure.

We are likewise unconvinced by Spartan's contention that there is no time limit in section 75.313(a)(3) and therefore that Sada's failure to require the men to withdraw immediately cannot be considered a result of unwarrantable failure. Sp. Reply Br. at 24-25. We note that section

75.313, entitled "Main mine fan stoppage with persons underground," contains procedures that must be followed when a mine fan goes out. The standard has two applicable times that trigger different requirements: one if ventilation is restored within 15 minutes and, the second, if it is not restored within that 15 minute period. 30 C.F.R.§ 75.313(b) & (c).[16]

The Commission adheres to the principle that "[t]he Secretary's regulations should be interpreted to give comprehensive, harmonious meaning to all provisions." *New Warwick Mining Co.*, 18 FMSHRC 1365, 1368 (Aug. 1996). Construing section 75.313 in its entirety, it becomes clear that when a main mine fan stops, everyone should be withdrawn from a working section as soon as reasonably possible and well within 15 minutes, because after 15 minutes of fan stoppage, miners have to evacuate the entire mine. Miners must withdraw from the working section within 15 minutes, or else there would be no reason to include the working section withdrawal provision in the standard, because evacuation of the entire mine commences after 15 minutes of ventilation outage. *See Daanen & Janssen, Inc.*, 20 FMSHRC 189, 194 (Mar. 1998) (providing that effect must be given to every part of a regulation). Furthermore, subsection (b) of the regulation requires a methane check "before work is resumed" in the mine's "working places," even if the fan is restarted within 15 minutes. 30 C.F.R. § 75.313(b). Logically, work must have ceased in order to resume.

We hold that once a main mine fan stops, withdrawal from the working section must commence immediately, subject to completion of those tasks reasonably necessary to avoid

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[16] 30 C.F.R. § 75.313 provides in part:

> (a) If a main mine fan stops while anyone is underground and the ventilating quantity provided by the fan is not maintained by a back-up fan system–
> (1) Electrically powered equipment in each working section shall be deenergized;
> (2) Other mechanized equipment in each working section shall be shut off; and
> (3) Everyone shall be withdrawn from the working sections and areas where mechanized mining equipment is being installed or removed.
> (b) If ventilation is restored within 15 minutes after a main mine fan stops, certified persons shall examine for methane in the working places and in other areas where methane is likely to accumulate before work is resumed and before equipment is energized or restarted in these areas.
> (c) If ventilation is not restored within 15 minutes after a main mine fan stops–
> (1) Everyone shall be withdrawn from the mine . . . .

leaving hazards in the mine.[17] This does not mean that miners should attempt to repair equipment such as a continuous mining cable during this time, but rather that the cable should be taken out of service so that it will not pose a danger to returning miners. Although Spartan argues that the lack of precise time limits would mitigate unwarrantability if it had withdrawn all miners within a reasonable time, we are not required to decide this issue because a significant number of miners remained on the working section for the entire mine fan outage, and Spartan's argument is thus unavailing.

We agree with the judge that a loss of ventilation in any mine can cause a "chaotic situation that breeds poor judgment and a lack of due diligence if miners are not removed from the working section." 29 FMSHRC at 486. As noted *supra*, the electrician was trying to quickly repair the cable before the mine needed to be evacuated. Jt. Ex. 2, ¶¶ 10, 12, 14. If withdrawal procedures had been followed, he would not have been able to continue working on the cable and this tragedy would have been averted. The heightened danger present in this case bolsters the conclusion that this violation resulted from the operator's unwarrantable failure. *Midwest Material*, 19 FMSHRC at 35 (holding that failure of foreman to exercise prudent care in a condition of extreme danger supports unwarrantable failure determination).

Substantial evidence supports the judge's determination of aggravated conduct and reckless disregard of proper safety procedures. 29 FMSHRC at 487. This violation involved a supervisor, a person held to a higher standard of care, who was aware that his miners continued working on the section after the mine fan went out, exposed to an obvious danger and serious hazards. *Id*. at 485-87. We conclude that Spartan exhibited a serious lack of reasonable care when it failed to ensure that all miners withdrew from the working section during the fan outage. *Rochester & Pittsburgh*, 13 FMSHRC at 194. Accordingly, we affirm the judge's determination

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[17] Chairman Duffy asserts that the requirement that the miners withdraw from the working section and assemble at the loading point did not arise until after Sada had "received confirmation from the surface that the mine fan was out and then returned to the left section." Slip op. at 35. However, the withdrawal requirement of section 75.313(a) is triggered when "a main mine fan stops while anyone is underground" and there is no back-up fan. 30 C.F.R. § 75.313(a). Nowhere in the language of the regulation is it implied, much less stated, that the withdrawal requirement only begins after a foreman receives confirmation from the surface of an outage and then arrives back at the section where he had been working.

Furthermore, the record reflects that Sada knew the fan was off even without receiving confirmation from the surface. Sada testified that when the fan shut down, he could feel the absence of ventilation. Tr. 577-78. Consequently, Sada did not call Neace to receive confirmation that the mine fan was out. Rather, he called him "[t]o see if the power was out outside." Tr. 558; s*ee also* Tr. 563, 621. We thus reject this proposed qualification of the withdrawal requirement under section 75.313(a), as it has no basis in the language of the regulation, and was not needed to alert those underground that the mine fan had indeed stopped.

that the section 75.313(a)(3) violation was a result of unwarrantable failure and reckless disregard.

E. Penalties

Spartan argues that in raising the penalties from the amounts that were proposed by the Secretary, the judge erred by failing to discuss the required penalty criteria under section 110(i) of the Mine Act, 30 U.S.C. § 820(i). Sp. Br. at 31-32. It further asserts that the judge failed to adequately justify his significant departure from the Secretary's penalties, and that the penalties were unfair and excessive under the facts of the case. *Id.* at 30-31. The Secretary responds that the judge did not abuse his discretion in assessing the penalties at issue. Sec'y Br. at 46. She states that the judge specifically applied the penalty criteria and appropriately justified the bases for his penalty determinations. *Id.* at 47-48.

Commission judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Cantera Green*, 22 FMSHRC 616, 620 (May 2000). 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 Co.*, 5 FMSHRC 287, 291 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). However, such discretion is not unbounded and must reflect proper consideration of the penalty criteria set forth in section 110(i) and the deterrent purposes of the Act.[18] *Cantera Green*, 22 FMSHRC at 620. Additionally, the Commission in *Sellersburg*, 5 FMSHRC at 293, explained that "when . . . it is determined that penalties are appropriate which substantially diverge from those originally proposed, it behooves the Commission and its judges to provide a sufficient explanation of the bases underlying the penalties assessed by the Commission." In *Cantera Green*, the Commission clarified that "[w]hile the findings and explanations relating to a penalty assessment do not have to be exhaustive, they must at least provide the Commission with a basis for determining whether the judge complied with the requirement to consider and make findings concerning the section 110(i) penalty criteria." 22 FMSHRC at 621.

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[18] Section 110(i) provides in part:

> In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

The judge generally discussed the civil penalty criteria with regard to all the violations at issue. 29 FMSHRC at 477-78. He found that Spartan is a large mine operator and that the imposition of the civil penalties would not impede Spartan's ongoing business operations. *Id.* at 478. The judge determined that the history of violations and Spartan's abatement efforts were neutral factors in determining the appropriate penalty liability. *Id.* He then explained that the two overarching material considerations for all penalties consisted of the magnitude of the gravity and the degree of negligence. *Id.* We agree with the judge's reasoning. Although Spartan broadly maintains that the judge did not discuss at length all six factors, Spartan itself specifically takes issue only with the two factors of negligence and gravity. Accordingly, we affirm the judge's general discussion of the other four penalty factors as adequate to support the penalty determinations. We now discuss the factors of negligence and gravity for each violation.

As to Citation No. 7224651, for the failure to protect the cable, we affirm the judge's determination that the violation was S&S and that the gravity was extreme given that this violation contributed to a fatal electrocution. *Id.* at 480-81. However, as discussed in our opinion, we vacate the judge's negligence determination of reckless disregard as it rests on Spartan's failure to protect the cable after it was already hit, which goes beyond the scope of section 75.606. We have concluded herein that the record demonstrates that the violation was a result of moderate negligence, which was the level of negligence originally proposed by the Secretary. *See also id.* at 479. As we have affirmed all the other five penalty factors for this assessment, we have determined that a remand of the penalty is not necessary. *See Sellersburg*, 5 FMSHRC at 293-94 (holding that remand for judge to make findings on discrete penalty factors not necessary in the interest of judicial economy and would unnecessarily prolong the case). In *LJ's Corp*., 14 FMSHRC 1278, 1280 (Aug. 1992), when the Commission reversed the judge, it assessed the civil penalty that was proposed by the Secretary. So too, we determine that the Secretary's proposed penalty appropriately reflects all the Mine Act section 110(i) criteria. Accordingly, in this case, we reinstate the penalty assessment of $32,500, which was the original amount proposed by the Secretary.

As to Citation No. 7224650, for the failure to lock and tag out, we reject Spartan's contention that the judge was bound by the Secretary's assessment of the degree of negligence of "moderate" contained in the citation. Sp. Reply Br. at 26. Spartan unpersuasively relies on *Mechanicsville Concrete, Inc*., 18 FMSHRC 877, 879-80 (June 1996) (finding that judge may not designate a violation as S&S on his own initiative), to assert that the judge's alteration of the citation was impermissible. However, *Mechanicsville* is distinguishable because modifying a negligence determination, as the judge did here, is authorized by the Mine Act, whereas inserting an S&S designation is not. 30 U.S.C. § 814(h).

By this decision, we have affirmed the judge's finding of high negligence for the failure to lock and tag out. Spartan does not take issue with the judge's determination that the gravity of the violation was severe. 29 FMSHRC at 482-83. It has long been established that the Commission is not bound by the Secretary's penalty assessments and that the penalty to be assessed is a de novo determination based on the six statutory criteria specified in section 110(i) of the Act. *Sellersburg*, 5 FMSHRC at 291. The judge adequately substantiated the need for the penalty

increase due to the high levels of negligence and gravity. As a result, we hold that the judge did not abuse his discretion, and we affirm the penalty of $50,000. 29 FMSHRC at 483.

As to Citation No. 7224652, for the failure to remove unsafe equipment from service, the judge found that the violation was S&S and that the gravity was extreme as it contributed to the electrocution fatality. *Id.* at 485. As discussed herein, these findings are supported by substantial evidence, including credibility determinations. With respect to the level of negligence, we have also affirmed the judge's findings that Spartan's conduct in failing to remove the cable from service was aggravated and a result of unwarrantable failure. Given these holdings, we conclude that the judge has not abused his discretion and has adequately substantiated the penalty increase to $60,000. *Id.*

As to Order No. 7228963, for the failure to withdraw miners from the working section, we have affirmed the judge's determination that the violation was a result of unwarrantable failure and reckless disregard for the safety of miners. Additionally, we concur in the judge's finding that permitting miners to continue working during a hazardous period caused by an interruption of mine ventilation was an extremely grave and serious violation. *Id.* at 486-87. We reject Spartan's contention that the judge failed to substantiate the reason for significantly raising the penalty. On the contrary, the judge specifically discussed in detail his reasoning for increasing the penalty from $3,700 to $30,000. *Id.* He stated:

> Thus, although the violation in Order No. 7228963 has been designated as non-S&S, greater weight must be accorded to the material facts that reflect that the cited condition affects the entire section's personnel, that is indicative of extreme gravity, and that is attributable to unjustifiable and inexcusable conduct. . . .
>
> Ensuring the rapid and safe withdrawal of miners faced with hazardous conditions is fundamental to mine safety. . . . [T]he grave nature of the violation as well as the fatality that followed justify a substantial penalty.

*Id*. at 487. The judge has adequately explained the bases for his decision to assess a higher penalty than originally proposed. We held in *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001), that a judge did not abuse his discretion by weighing the factors of negligence and gravity more heavily than the other four statutory criteria. Similarly, we hold here that it was certainly appropriate for the judge to raise the penalty significantly based on his findings of extreme gravity and unwarrantable failure. 29 FMSHRC at 486-87. Accordingly, we hold that the judge was well within his discretion in assessing a penalty of $30,000 for the section 75.313(a)(3) violation.

III.

Conclusion

For the foregoing reasons, with the exception of Citation No. 7224651, we affirm the judge's decision in its entirety. As to Citation No. 7224651, we affirm the violation of section 75.606 and its S&S designation. However, we vacate the negligence finding and conclude that the record demonstrates that the violation was a result of moderate negligence and, considering the factors in section 110(i) of the Mine Act, order the operator to pay a penalty of $32,500 for this violation.

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Mary Lu Jordan, Commissioner

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Michael G. Young, Commissioner

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Robert F. Cohen, Jr., Commissioner

Chairman Duffy, concurring in part and dissenting in part:

I concur with my colleagues in affirming the judge's finding of a violation of 30 C.F.R. § 75.606, relating to the protection of trailing cables, and in affirming the judge's finding of a violation of 30 C.F.R. § 75.313(a)(3), relating to the withdrawal of miners from a working section during a mine fan outage. I further concur that with respect to the violation of section 75.606, the judge impermissibly considered events that occurred after the trailing cable was damaged in order to determine the level of negligence associated with the violation. Accordingly, I would vacate the judge's finding of reckless disregard with respect to that violation and remand to the judge the determination of an appropriate civil penalty in light of my colleagues' findings set forth at slip op. 8-10, above.

As for the alleged violation of 30 C.F.R. § 75.511, relating to locking and tagging out of electrical equipment before repair work is performed, and the alleged violation of 30 C.F.R. § 75.1725(a), relating to the immediate removal from service of unsafe machinery or equipment, I dissent from my colleagues' affirmance of the judge's finding that both standards were violated and, therefore, properly cited. Under the particular circumstances of this case, one might conclude that either of the standards – but not both – could appropriately have been cited. Upon further review of the facts, and for the reasons more fully set forth below, I believe that section 75.1725(a) should have been cited, and that the charge that Spartan violated section 75.511 was duplicative of the violation charged under section 75.1725(a). Accordingly, I would vacate Citation No. 7224650 relating to the failure to lock and tag out the trailing cable prior to initiating repairs.

Moreover, I dissent with respect to my colleagues' affirmance of certain negligence findings arrived at by the judge. To be sure, negligence is present in each of the three violations that I believe the judge correctly upheld. My conclusion, as further explained below, is that the levels of negligence found by the judge are higher than the record can support. Most particularly, the level of negligence attributed by the judge with respect to the violation of section 75.313(a)(3) is not only unsupported by the evidence, it is clearly contradicted by the undisputed testimony of the Secretary's own witness. Accordingly, I would therefore remand the issue of unwarrantable failure and the appropriate civil penalty to be assessed for further consideration by the judge.

With respect to the violation of section 75.1725(a), relating to the removal from service of unsafe equipment, while I believe that the violation involves unforeseen and idiosyncratic conduct of a rank-and-file miner, such conduct does not mitigate the level of negligence to a degree warranting remand to the judge for a reassessment of the civil penalty.

Lastly, it is important to place the events of the afternoon of February 5, 2004, in context, both as to the chronology of their occurrence and the conditions in which they occurred. The events that led to the death of Mr. McNeely took place over the space of 14 minutes during which time there was considerable confusion as to what was happening. Except for the violation relating to running into the trailing cable, the violations alleged to have directly or indirectly led to the

fatality transpired over the space of about nine minutes and apparently took place in total darkness save for the light from the miners' cap lamps and the battery-powered scoop.

Moreover, the Ruby Energy Mine is located in a fairly narrow coal seam with an average roof height of just under four and a half feet (Tr. 550-51), about the height of a wall switch in a typical home. Mr. Sada, who by his testimony is a large man (*id.*), stated that he had to "duckwalk" back to the mine phone to call the surface and to move between the left and right sections when he returned to tell the miners about the mine-wide power outage and to tell them they might have to evacuate. Tr. 550, 566-67. That labored travel to and fro did have an effect on his ability to observe everything that was going on in the left section during the period in question.[1] While these factors have no bearing on whether or not the violations should be upheld, they do affect the level of negligence attributable to Mr. Sada, and, in turn, to Spartan. As the judge noted at the hearing:

> It's easy in hindsight to see things that weren't seen on the spur of the moment. But my function is to look at it with hindsight and see how the people should have acted – reacted without the benefit of hindsight. But that's what the term the degrees of negligence is about.

Tr. 774-75.

That said, I will proceed to each point upon which I disagree with my colleagues.

A. Duplicative Citations[2]

Spartan was cited for a violation of section 75.511 for failure to lock and tag out before engaging in repairs, and for a violation of section 75.1725 for failure to immediately remove the trailing cable from service. In my view, under the unique circumstances of this case, the citations are duplicative under the Commission's holding in *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1003-05 (June 1997). I read the Commission's holding in *Western Fuels* as standing for the proposition that if the method of abatement for dual citations is the same, the citations are

[1] The distance between the continuous miner and the mine phone to the surface was 280 feet. Tr. 282-84. Thus, in the space of 14 minutes Mr. Sada crawled or duckwalked almost three football fields in order to reach the mine phone, return to the left section to inform the miners of the power outage, travel to the right section to apprise those miners of the problem, return to the mine phone to await further instructions from the surface, and then travel to the power center once power to the mine had been restored. I invite the reader to imagine doing the same while in a crouched position and to do so in pitch black darkness. In my view, Mr. Sada's actions hardly reflect the conduct of a disengaged supervisor.

[2] Commissioner Young joins Chairman Duffy in section A of his opinion.

duplicative. *Id*. That is the case here. Abatement for both citations was the disconnecting of the trailing cable from the power source and the locking and tagging out of that cable. There was no other practical way of abating the two violations.[3]

The question then becomes what actions was Spartan required to take with respect to the violation of section 75.1725 and the violation of section 75.511, and are those actions somehow different? The short answer is, they were not. Both citations would have been abated by disconnecting the cable and then locking and tagging it out.

The Secretary argues that there is a distinction between the two methods of abatement because one standard (section 75.511) only requires the actions of a certified electrician, while the other standard (section 75.1725) requires a decision by management. Oral Arg. Tr. 44. That argument is not borne out by the facts. Mr. Sada testified without contradiction that the policy in the Ruby Energy Mine was that a certified electrician was authorized to remove a trailing cable from service. Tr. 585. It should also be noted that "management" does not act but through its authorized agents or employees, which in this case was Mr. McNeely, who had authority to remove the trailing cable from service until such time it was determined that the cable was safe or was in need of repair before being returned to service.

Moreover, in terms of strict chronology, the cable should have, at first, been removed from service to allow for inspection, troubleshooting, and repair, as the inspector's citation states. Gov't Ex. 5. Had that been done, the citation relating to the protocol for repairs would have been superfluous and redundant.[4]

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[3] MSHA's witness, Mr. Smith, testified that Spartan could have abated the violation of section 75.1725 by disconnecting the trailing cable and wrapping it around the continuous miner. Confronted with the impracticality of miners having to drag a 700-foot cable weighing over a thousand pounds several hundred feet back to the continuous miner in a matter of minutes, Mr. Smith was ultimately compelled to agree that locking and tagging out the cable was the most practical means of abating the violation of section 75.1725. Tr. 356-59.

[4] In attempting to distinguish *Western Fuels* from the present case, my colleagues allude to instances where an operator could "violate section 75.511 without also violating section 75.1725(a), and vice versa." Slip op. at 20. However, the scenario they postulate is not the facts in this case and hence, their distinction fails. Here, Spartan was not performing routine maintenance work on the cable, and the record clearly establishes that McNeely could have taken the steps to remove the damaged cable from service (Tr. 585), which, under the time constraints in this case, would have included locking and tagging out the cable at the power center before necessary troubleshooting, testing, and repair work could be performed. Thus, under the circumstances in this case, the Secretary's citation of Spartan for both sections 75.511 and 75.1725(a) is duplicative.

The Secretary, the judge, and my colleagues make much of the fact that both citations are valid because one (section 75.511) relates to a "violation of commission," while the other relates to a "violation of omission." S. Br. at 39-40; 29 FMSHRC 465, 482 (June 2007) (ALJ); slip op. at 19. That attempt to differentiate the two citations is unavailing. One could just as easily say that McNeely's failure to lock and tag out the trailing cable before initiating repairs was a "violation of omission" on a par with his failure to lock and tag the cable (thus removing it from service) once he suspected it was damaged. Failure to disconnect, lock out and tag out are essential elements of both offenses and, under the mine's own protocol, should have been undertaken as the first steps of compliance with either standard. The safety purposes of both standards were met and satisfied by the same compliance action regardless of whether the underlying violations were of commission or omission, thus bringing this case within the parameters of *Western Fuels*.

Moreover, in terms of the Commission's analysis in *Western Fuels*, when the duty to comply with the requirements of one standard can be "subsumed" in the duty to comply with the requirements of another standard, only one standard should be cited. 19 FMSHRC at 1004. Here the requirements of section 75.511 are subsumed in the requirements of section 75.1725 so that the commission/omission dichotomy becomes a distinction without a difference.

B. Negligence Associated With the Section 75.1725 Violation[5]

It is fundamental that the Mine Act is a strict liability statute so that violations committed by miners, even those committed in contravention of the mine operator's workplace rules and contrary to the miner's training, are attributable to the operator. The Commission has also, held, however, that the level of operator negligence can be mitigated in a case where the miner's conduct is unforeseen and idiosyncratic, and contrary to the operator's policies. *See Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 260-61 (Mar. 1988); *Asarco, Inc.*, 8 FMSHRC 1632, 1636 (Nov. 1986), *aff'd on other grounds*, 868 F.2d 1195 (10th Cir. 1989).

In this instance, I believe that Mr. McNeeley's conduct falls within the scope of unforeseen and idiosyncratic conduct. He was an experienced and certified mine electrician, fully trained and retrained, and he violated a fundamental rule by failing to disconnect, lock, and tag out the trailing cable.

As for the incident that occurred the week earlier, when Mr. Sada told Mr. McNeeley not to do any electrical work without first locking and tagging out (slip op. at 15), I do not view that as an indication that Mr. Sada should have been put on notice that Mr. McNeeley was an unsafe worker. On the contrary, I view it as an admonishment that underscored the training that Mr. McNeeley had received, and demonstrates vigilance on Mr. Sada's part.

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[5] Commissioner Young joins Chairman Duffy in section B of his opinion.

Nevertheless, McNeeley's conduct does not, in my view, serve to fully mitigate Spartan's negligence in this case. It was Mr. Sada's responsibility to make sure that Mr. McNeeley had removed the cable from service if he, Sada, had any suspicion that the cable was damaged. Accordingly, I believe Spartan's share of the negligence was more than moderate, and I would not overrule the Judge's finding of unwarrantable failure. My disagreement with the Judge on this issue is one of degree.

C. Withdrawal of Miners

As to this issue, I find a fundamental error on the part of the judge that does not contradict his conclusion that a violation occurred but seriously undermines his determination that the violation was caused by Spartan's unwarrantable failure to comply with section 75.313(a)(3). At the close of the hearing, the judge directed the parties to address a number of issues in their post-hearing briefs, and he summarized the evidence adduced at that point of the trial. With respect to the violation of section 75.313(a)(3), the judge stated the following:

> I don't think that there's even anything in the testimony that indicates there was any communication by Mr. Sada or anybody else in authority that the personnel should have been removed from the working section. Mr. Sada repeatedly testified he told them they'd have to go out in 15 minutes if the fan didn't come on. But even Mr. Sada's testimony doesn't assert that he told them to leave the working section.

Tr. 755.

That characterization of the testimony, however, was incorrect. In point of fact, Mr. Sada testified without contradiction that he had instructed the miners in the left section to move to the loading point during questioning by the judge himself:

> Q. Okay. Did you go and search out other miners ---
>
> A. I went to the left ---.
>
> Q. --- to talk to them based on your conversation with Mr. Neace?
>
> A. I went to the left side of the section and started going across the faces, telling my people to come to the feeder.[6]
>
> Q. Okay. So you just told them to come to the feeder?

[6] The "feeder" and the "loading point" were at the same location. Tr. 427-28.

A. No, sir.

Q. What did you tell them?

A. I told them that the power and the fan was out outside, and for everybody to come to the feeder. We had to start evacuating in 15 minutes, or going outside. My exact words was get your stuff, we got to go outside in 15 minutes.

Q. Okay. Did you tell them that they needed to immediately come out outby the dumping point?

A. No, sir. I probably didn't, no, sir. I didn't say immediately. I just told them what I just told you.

Tr. 566-67.[7]

It is undisputed that the miners in the left section did not immediately move to the loading point; rather, they stayed on the section. Consequently, a violation of the standard occurred. Nevertheless, a reading of the judge's opinion reveals that his finding of unwarrantable failure was based on his mistaken belief that Mr. Sada had not specifically ordered the miners to leave the section and assemble at the loading point.[8] *See* 29 FMSHRC at 487.

Furthermore, Neace testified that the miners had been trained to remove themselves from the working section whenever the main fan ceased operating so that Mr. Sada's

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[7] Sada later reasserted that point:

Q. Okay. So at that point, as I understand your testimony, you went over to talk to the right side?

A. I gave a direction that everybody to come out to the feeder. The power and the fan was off. I went to the right side loading crew.

Tr. 581.

[8] It should be noted that Mr. Sada was called as the Secretary's witness, not Spartan's. Tr. 543. Accordingly, the Secretary must acknowledge and accept the thrust of Mr. Sada's testimony on this issue.

admonition to assemble at the loading point should have been obeyed. Tr. 637. Moreover, Mr. Sada testified that he did see the lights from the miners' cap lamps coming toward him as he waited by the mine phone, leading him to believe that they were obeying his order to move to the feeder. Tr. 585. The evidence clearly establishes that Mr. Sada definitely ordered the miners to evacuate the section. That they did not establishes a violation, but it does not establish an unwarrantable failure violation.

Lastly, the requirement that the miners withdraw from the working section and assemble at the loading point did not arise until after Sada received confirmation from the surface that the mine fan was out and then returned to the left section.[9] Whatever Mr. Hatfield and Mr. Collins were doing to free the trailing cable while Mr. Sada was traveling back and forth between the left section and the mine phone would be permissible up to the point where Mr. Sada advised them of the fan outage and the need for them to move to the loading point.

When Mr. Sada gave that order, moreover, Mr. McNeeley was nowhere near the cable but was sitting on a personnel carrier on the section. Tr. 474; Gov't Ex. 1. At that point Mr. Sada moved on to the right section to give the same notification to the miners working there. Tr. 581. While Mr. Sada could have been more forceful in ordering the miners to the loading

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[9] This is borne out by the testimony of Mr. Humphrey, the head of the investigation and author of the official MSHA report in this case:

Q. Okay. And in fact, when Mr. Sada walked up to the left machine, they were just --- had just bumped the ripper head; right, to get the cable free?
A. The scoop was operating inby the miner, yes, sir.
Q. Right. And he had not yet told them that the fan was down; right?
A. That's unclear.
Q. Well, didn't you find that he had to go back to the phone, talk to Mr. Neace?
A. Yes.
Q. Find out that the fan was off? Do you recall that?
A. Yes. Uh-huh (yes).
Q. And then he walked back over here as they're bumping the head free; correct?
A. Right. And he observed those people.
Q. Right. So when they went and got the scoop and brought it up there and bumped the head, he had not had a chance to tell them that the fan was off, had he?
A. He had a chance within seconds to tell them after getting there.

Tr. 435-37.

Whether Mr. Sada suspected the fan was down before it was confirmed by his phone call to Mr. Neace on the surface is irrelevant in this case. The Secretary's chief investigator found that the violation arose *after* Mr. Sada had phoned up to the surface and returned to the left section, and that is the charge we are called upon to consider in this case.

point, I do not consider that his actions can be characterized as having "allowed the section electrician and several co-workers to perform electrical work on the trailing cable . . . during the power outage to the mine ventilation fan," as the citation alleges. Gov't Ex. 9. Nevertheless, by assuming that the requirement to withdraw the miners from the working section arose immediately (when the cable was hit and power was interrupted) rather than several minutes later when Mr. Sada received confirmation of the fan outage during his phone call to the surface, the judge also concluded that Mr. Sada "stood by" and allowed the miners to continue working rather than moving to the loading point.[10] 29 FMSHRC at 487. So again, I believe the judge's conclusions regarding the level of negligence are based on a misapprehension of the sequence of events following the continuous miner running into the trailing cable.

Accordingly, I would find a violation of the standard, but I would remand the unwarrantable failure issue to allow the judge an opportunity to reconsider his holding in light of Mr. Sada's uncontradicted testimony that he did, indeed, direct the miners to move to the loading point and in light of the fact that the requirement to withdraw arose only after confirmation from the surface that the fan was out. I would also remand the matter of an appropriate civil penalty upon reconsideration of the unwarrantable failure issue.

______________________________________
Michael F. Duffy, Chairman

[10] The evidence shows that Mr. Sada was not "standing by." He was on his way to the mine phone to contact the surface and determine the extent of the power outage. Tr. 558, 584.

Distribution:

Mark E. Heath, Esq.
Spilman, Thomas & Battle, PLLC
300 Kanawha Blvd. East
P.O. Box 273
Charleston, WV 25321

Mark R. Malecki, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2226
Arlington, VA 22209-2296

Robin Rosenbluth, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor West
Arlington, VA 22209-2296

Administrative Law Judge Jerold Feldman
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021