FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 14, 2009

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEVA 2007-293
v.	:	
IO COAL COMPANY, INC.	:	

DECISION

BY: Duffy, Young, and Cohen, Commissioners

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act" or "Act"), Administrative Law Judge David F. Barbour found a significant and substantial ("S&S")[1] violation of 30 C.F.R. § 75.220(a)(1)[2] but did not find the violation to be a result of the operator's unwarrantable failure.[3] 30 FMSHRC 847, 868-69 (Aug. 2008) (ALJ). The Secretary petitioned the Commission to review the unwarrantable failure determination, and the Commission granted the petition. For the reasons that follow, we vacate and remand the judge's unwarrantable failure determination.

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

[2] 30 C.F.R. § 75.220(a)(1) provides: "Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered."

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

I.

Factual and Procedural Background

A. Events of June 12 and 13, 2006

IO Coal Company ("IO") is the operator of the Europa Mine, an underground coal mine located in West Virginia. 30 FMSHRC at 847-48; Gov't Ex. 11. IO is owned by Magnum Coal Company. Tr. 265. On the morning of June 12, 2006, Inspector Jack Hatfield of the Department of Labor's Mine Safety and Health Administration ("MSHA") conducted an inspection of the mine. 30 FMSHRC at 853. Hatfield examined the 005 Mechanized Mining Unit ("MMU") section, which consists of seven mining entries and encompasses approximately 2100 linear feet. Tr. 147. Hatfield was accompanied at times by General Mine Foreman Fred Thomas and at other times by Section Foreman Michael Jefferson. 30 FMSHRC at 853; Tr. 233-34.

Hatfield first checked the 005 MMU section for imminent dangers. 30 FMSHRC at 853. He testified that as he did, he noticed that the roof on the section contained surface cracks and other kinds of cracks, as well as unsupported kettle bottoms.[4] *Id.* The men walked up the number 4 entry and then walked to the number 1 entry and across the face, at which point Hatfield traveled back to the number 7 entry. *Id.* (citing Tr. 190). As the inspector was pointing out conditions he considered unsafe, IO personnel installed additional roof support. Tr. 257, 339, 341.

Hatfield believed that IO was not complying with its roof control plan. He issued a section 104(d)(1) order,[5] closing the section. 30 U.S.C. § 814(d)(1). In the order, the inspector alleged that the 005 MMU section contained adverse roof conditions in the form of "multiple inadequately supported and unsupported surface cracks and kettle bottoms." Gov't Ex. 1.

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[4] Kettle bottoms are "basically . . . petrified tree trunk[s] surrounded by a thin layer of coal." 30 FMSHRC at 851 n.4. The size of the kettle bottom depends on the size of the tree trunk. *Id.* Kettle bottoms are circular, oval or oblong with coal encrusted around the circumference. Tr. 37-38; R. Ex. 2. According to the *Dictionary of Mining, Mineral, and Related Terms*, 297 (2d ed. 1997) (American Geological Institute), a kettle bottom "may drop out of the roof of a mine without warning, sometimes causing serious injuries to miners." *Eagle Energy, Inc*., 23 FMSHRC 1107, 1108 n.2 (Oct. 2001).

[5] A Mine Act section 104(d)(1) order is issued during an inspection of a mine when MSHA finds an unwarrantable failure violation within 90 days of a prior issuance of a citation to that mine that was designated as both S&S and a result of unwarrantable failure. Under that order, the operator must "cause all persons in the area affected by such violation . . . to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated." 30 U.S.C. § 814(d)(1).

In Hatfield's opinion, the conditions violated the mine's roof control plan, Safety Precaution No. 7, which stated:

> When adverse roof conditions are encountered[,] such as horsebacks, slicken-sided slip formations, clay veins, kettle bottoms, surface cracks, mud streaks or similar types of conditions in the mine roof, supplemental roof supports shall be installed in addition to primary roof support as appropriate in the affected area.

Gov't Ex. 1, 6.

Mine Foreman Thomas was "very upset." Tr. 205. He called the Mine Superintendent, Tim Beckner, who met Inspector Hatfield as he was leaving. Tr. 363, 371-72. Beckner allegedly asked Hatfield to go back to the section with him, but Hatfield declined. Tr. 372-73. The Mine Superintendent called the Operations Manager and the Vice-President for Magnum Coal. Tr. 373-74. At about 5:00 p.m. on June 12, Beckner, Thomas, Doug Williams (the operations manager), and two mining engineers employed by Magnum Coal entered the 005 section. Tr. 268-70. They examined all the entries and crosscuts on the section without physically walking every one of them. Tr. 269-70, 430.

On the following morning, Inspector Hatfield and MSHA Inspection Supervisor Terry Price returned to the mine. Tr. 77. IO was in the process of putting up additional roof support. Tr. 78. The inspectors determined that the right side of the section could open to allow production but that entries Nos. 1, 2, and 3 needed more support and were to remain closed. Tr. 79-80. The order was terminated later in the day. Tr. 80.

B. Prior Citations

On May 1, 2006, Inspector Hatfield had issued Citation No. 7252337 to IO alleging a section 75.220(a)(1) violation because of adverse roof conditions on the 004 MMU section of the Europa mine. 30 FMSHRC at 850. The conditions consisted of surface cracks, kettle bottoms, and mud streaks at several locations. *Id.*; Gov't Ex. 2. This citation was issued to former Mine Foreman Joe Glenn. Gov't Ex. 2. Fred Thomas was aware of its issuance. Tr. 209-10.

On May 17, Hatfield had issued Citation No. 7252378 for another section 75.220(a)(1) violation for adverse roof conditions to Mine Foreman Thomas. 30 FMSHRC at 852; Gov't Ex. 3. The citation involved unsupported kettle bottoms and surface cracks on the 006 MMU section. 30 FMSHRC at 852. After he issued the citation, Hatfield stated that he had reviewed the roof control plan, particularly Safety Precaution No. 7, with Thomas. *Id*. The company abated the condition by installing supplemental roof support. *Id.*

On June 5, Hatfield had issued Citation No. 7252411 to Thomas pursuant to section 75.220(a)(1) concerning roof conditions on the 006 MMU section when he detected a large kettle bottom that was two feet in diameter and unsupported. *Id.*; Gov't Ex. 4. Hatfield testified that, after issuing the citation, he discussed kettle bottoms with company officials and told them they should pay more attention to the problem. 30 FMSHRC at 852; Tr. 47.

On June 8, Hatfield had issued Citation No. 7252417 alleging a violation of section 75.220(a)(1) to Thomas for another large unsupported kettle bottom in the 006 MMU section. 30 FMSHRC at 852; Gov't Ex. 5. The citation stated: "This MMU has had this condition previously cited." Gov't Ex. 5. As with previous citations, Hatfield testified that he showed management officials a copy of the roof control plan, including Safety Precaution No. 7. 30 FMSHRC at 852; Tr. 48.

C. Judge's Decision

IO contested the June 12 order, and a hearing was held before Judge Barbour. The judge found a violation of section 75.220(a)(1) because he concluded that the Secretary had established the existence of multiple inadequately supported kettle bottoms on the section. 30 FMSHRC at 865-66.[6] He also determined that the violation was S&S. *Id*. at 867-68. He found that the violation was serious because "if a miner were struck by a falling kettle bottom, serious injury or death would most likely result." *Id.* at 868.

However, the judge found that IO's lack of care was not a result of unwarrantable failure. *Id.* He reasoned that not all kettle bottoms were inadequately supported or unsupported. *Id.* Since some kettle bottoms in the cited area were adequately supported, the judge inferred that "there was not a wide-spread and reckless disregard of the requirements of the roof control plan." *Id.* Additionally, the judge stated that the foreman "simply misjudged some of the kettle bottoms" and that there was a genuine and good faith disagreement between the inspector and IO personnel as to what constituted a kettle bottom. *Id*. He concluded that the violation was due to the company's ordinary negligence. *Id.* at 869. In a footnote, the judge noted that the inspector's finding of unwarrantable failure and high negligence may have been based on "personal pique," citing the inspector's testimony that he found the violation due to high negligence "'[b]ecause [the inspector] talked to the operator on several occasions about the roof control plan and it seemed [he] wasn't getting anywhere with just writing a citation.'" *Id*. at 869 n.18 (citing Tr. 76).

[6] The judge found that the Secretary failed to meet her burden of proof with respect to surface cracks. 30 FMSHRC at 865. The issue of surface cracks is not before us.

II.

Disposition

The Secretary argues that the judge's finding that the violation was not a result of unwarrantable failure should be remanded to the judge for a proper application of the unwarrantable failure analysis. PDR at 11; S. Reply Br. at 3-4. She argues that the judge erred in five ways: (1) by ignoring the operator's history of previous section 75.220(a) violations, the degree of danger posed by the violative condition, and the length of time the violative condition existed; (2) by relying on the fact that "not all" of the kettle bottoms were unsupported or inadequately supported; (3) by relying on a finding that section foreman Jefferson "tried" to meet the standard of care required of him; (4) by relying on a finding that there were "genuine and good faith disagreements" between the inspector and the mine personnel as to what constituted a kettle bottom; and (5) by speculating that the inspector may have acted out of "personal pique" in designating the violation in question an unwarrantable failure. S. Reply Br. at 1.[7]

IO responds that the judge's unwarrantable failure fact-finding should be upheld because record evidence supports the judge's determination that there were genuine and good faith disagreements between the inspector and IO personnel as to what constituted a kettle bottom. IO Br. at 12, 26-29. IO contends that, because of its good faith belief that the roof conditions in question were not kettle bottoms, most of the unwarrantable failure factors are not relevant. *Id*. at 13, 22-24. Additionally, IO maintains that the four previous citations occurred in different parts of the mine with different crews and, as a result, were not germane to the present unwarrantable failure analysis. *Id.* at 19, 26. Finally, IO submits that the judge did not err because the record evidence supports the conclusion that "personal pique" may have improperly played a part in the inspector's unwarrantable determination. *Id.* at 32.

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 Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (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

[7] The Secretary designated her petition for discretionary review as her brief in this case. Sec'y letter dated 10/22/08.

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. The Commission has made clear that it is necessary for a judge to consider all relevant factors, rather than relying on one to the exclusion of others. *Windsor Coal Co.*, 21 FMSHRC 997, 1001 (Sept. 1999); *San Juan Coal Co.*, 29 FMSHRC 125, 129-36 (Mar. 2007) (remanding unwarrantable determination for further analysis and findings when judge failed to analyze all factors). While an administrative law judge may determine, in his discretion, that some factors are not relevant, or may determine that some factors are much less important than other factors under the circumstances, all of the factors must be taken into consideration and at least noted by the judge.

Because the judge did not address all the elements of the unwarrantable failure analysis, we vacate his finding of no unwarrantable failure and remand for a fuller discussion that identifies and incorporates all the relevant elements and explains how each element affects his unwarrantable failure determination. Commission Procedural Rule 69(a) requires that a Commission judge's decision "shall include all findings of fact and conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record." 29 C.F.R. § 2700.69(a). As the D.C. Circuit has emphasized, "[p]erhaps the most essential purpose served by the requirement of an articulated decision is the facilitation of judicial review." *Harborlite Corp. v. ICC*, 613 F.2d 1088, 1092 (D.C. Cir. 1979). Without findings of fact and some justification for the conclusions reached by a judge, the Commission cannot perform its review function effectively. *Anaconda Co.*, 3 FMSHRC 299, 299-300 (Feb. 1981). Thus, the Commission has held that a judge must analyze and weigh all probative record evidence, make appropriate findings, and explain the reasons for his or her decision. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222 (June 1994).

We discuss each of the aggravating factors of the unwarrantable failure analysis in turn.

A. Extent of the Violative Condition

The Commission has viewed the extent of a violative condition as an important element in the unwarrantable failure analysis. *See Peabody*, 14 FMSHRC at 1261 (holding that five accumulations of loose coal and coal dust were extensive). However, the judge here did not expressly address the unwarrantable failure element of extensiveness. Additionally, his findings

relevant to the extensiveness of the kettle bottoms were somewhat conflicting. He found that there were more than 15 unsupported or inadequately supported kettle bottoms (30 FMSHRC at 865-66; Gov't Ex. 9), a number that the Secretary submits is extensive. PDR at 9. Nonetheless, the judge also found that IO performed some work to support kettle bottoms when he concluded that "[n]ot all kettle bottoms in the cited area of the section were inadequately supported or unsupported" and that there was not a "wide-spread" disregard of the requirement to provide supplemental roof support. 30 FMSHRC at 868.

Moreover, the judge does not appear to have considered all of the evidence pertaining to extensiveness. He did not discuss Supervisory MSHA Inspector Terry Price's testimony that, when he returned the following day, three entries of the section still needed more support and only four of the entries could be released back to production. Tr. 167-68. The final three entries were satisfactorily supported by the end of the day. Tr. 80. *See Peabody*, 14 FMSHRC at 1263 (providing that extensiveness can be shown by a condition that requires significant abatement efforts).

We conclude that the judge failed to rule on whether the number and distribution of unsupported kettle bottoms meets the extensiveness factor of the unwarrantable failure analysis. On remand, if the judge relies on the extensiveness factor as a mitigating measure against unwarrantable failure, he should explain how this factor weighs against the other factors in the unwarrantable failure analysis. *San Juan*, 29 FMSHRC at 133 (directing the judge to make findings on the unwarrantable failure elements and to set forth his rationale whether the element supports an unwarrantable failure finding).

B. The Length of Time That the Violative Condition Existed

The Commission has emphasized that duration of the violative condition is a necessary element of the unwarrantable failure analysis. *See Windsor Coal*, 21 FMSHRC at 1001-04 (remanding for consideration of duration evidence of cited conditions). The judge did not make a finding as to the duration of the conditions in which the kettle bottoms remained unsupported. The Secretary asserts that the kettle bottoms remained unsupported for a period of five days, exposing multiple shifts to unsupported roof danger. PDR at 8-9. IO does not dispute that the conditions lasted for five days. IO Br. at 22. The record indicates that the roof conditions on the 005 MMU section were in existence for four or five days. Tr. 66-67, 250-251 (testimony that entries had been in existence for four or five days).[8]

Because the judge did not mention the duration of the roof conditions as a factor in his analysis, we remand this question so that the judge may weigh the record evidence on duration and determine if it qualifies as an aggravating factor in the unwarrantable failure analysis. We

[8] IO did not preserve the pre-shift and on-shift examination reports completed in the days prior to the issuance of the order in question. Tr. 253-54.

note that analysis of the duration factor may be affected by the judge's analysis, see *infra*, of whether IO Coal's "good faith" belief in the non-existence of kettle bottoms was reasonable.

C. Whether the Operator Was Placed on Notice that Greater Efforts Were Necessary for Compliance

Repeated similar violations may be relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997) (citation omitted); *see also Consolidation Coal Co.*, 23 FMSHRC 588, 595 (June 2001) ("a high number of past violations of section 75.400 serve to place an operator on notice that it has a recurring safety problem in need of correction.") (citations omitted). The purpose of evaluating the number of past violations is to determine the degree to which those violations have "'engendered in the operator a heightened awareness of a serious . . . problem.'" *San Juan*, 29 FMSHRC at 131 (citing *Mid-Continent Res., Inc*., 16 FMSHRC 1226, 1232 (June 1994)). The Commission has also recognized that "'past discussions with MSHA'" about a problem "'serve to put an operator on heightened scrutiny that it must increase its efforts to comply with the standard.'" *San Juan*, 29 FMSHRC at 131 (quoting *Consolidation Coal*, 23 FMSHRC at 595).

In making his unwarrantable determination, the judge did not consider the previous four citations for poor roof conditions, especially kettle bottoms, issued to the Europa Mine. Gov't Exs. 2, 3, 4, 5. Additionally, the inspector testified that, following the issuance of three of the citations, he discussed kettle bottoms with company officials and told them they should pay more attention to the problem. 30 FMSHRC at 852; Tr. 47-48. The order at issue states: "This mine has been put on heightened alert by the issuance of similar citations regarding the supporting of surface cracks and kettle bottoms and discussions with mine management regarding the supporting of these roof conditions." Gov't Ex. 1.

Inspector Hatfield testified that, when he spoke with management regarding the roof support problems contained in the earlier citations, "there was no discussion at all" that the condition in question was "not a kettle bottom." Tr. 84 (stating that it "never even became a point, that [the inspector] misidentified [kettle bottoms] at any time"). Foreman Thomas denied that the roof control plan was discussed following the citations. 30 FMSHRC at 852 n.6; Tr. 251. However, the operator's brief appears to accept as a fact that such discussions occurred. IO Br. at 18-19, 26 n.17. The judge did not resolve the conflict in testimony with regard to the extent of the operator's prior notice based on discussions with the inspector.

Nor did the judge's unwarrantable failure analysis factor in the four previous citations for unsupported kettle bottoms in the six week period prior to the issuance of the section 104(d)(1) order on June 12, 2006. These citations are highly relevant to the issue of whether the operator was on notice that greater efforts at compliance were necessary. *See Eagle Energy Inc.,* 23 FMSHRC 829, 838-39 (Aug. 2001) (directing the judge to consider the operator's prior citations as an aggravating factor).

Moreover, the operator's argument that the prior citations for unsupported kettle bottoms do not constitute conclusive evidence of the factual existence of unsupported kettle bottoms in the past is contrary to law. The legal principle of finality holds that an uncontested citation is akin to an unappealed judgment. *See Old Ben Coal Co.*, 7 FMSHRC 205, 209 (Feb. 1985) (an operator cannot deny the fact of violation and at the same time pay a civil penalty; paid penalties that have become final orders conclusively reflect violations of the Act). In this case, IO could have contested the assessments in the prior citations, thereby putting at issue the existence of kettle bottoms on four occasions in the six weeks before June 12, 2006. It chose not to do so, even after the issuance of the section 104(d)(1) order on June 12 implicitly raised the issue of prior violations. Hence, the fact that unsupported kettle bottoms existed as described in the four prior citations can not now be questioned.

Nor are we persuaded by IO's argument that the four prior citations do not serve as adequate prior notice because they involved different crews on "far removed" sections rather than the one at issue here. IO Br. at 18. IO overlooks a critical fact: three of the four citations were issued to the same mine foreman, Fred Thomas, who is involved here, and Thomas was well aware of the other citation issued to the previous mine foreman. Thomas had the responsibility to raise safety awareness on all the mine sections regarding kettle bottoms and other roof conditions. We reject as untenable and contrary to the Mine Act IO's suggestion that until such time as a violation is found on a particular section, the section is immune from knowledge of a safety problem elsewhere in the mine. The Commission has rejected the argument that only past violations involving the same regulation and occurring in the same area within a continuing time frame may be properly considered when determining whether a violation is unwarrantable. *Peabody Coal Co.*, 14 FMSHRC at 1263; *Enlow Fork Mining Co.*, 19 FMSHRC 5, 11-12 (Jan. 1997). Finally, we note that general mine management retains responsibility for safety and health compliance. *Eastern Assoc. Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991) (actual knowledge not necessary element to establish aggravated conduct for an unwarrantable failure finding). Accordingly, under Commission case law, past violations covering a different area than the one cited may serve to provide an operator with sufficient awareness of a problem. *San Juan*, 29 FMSHRC at 131-32.

We also reject the operator's argument that the four prior citations are an insufficient basis for a finding of unwarrantable failure because all of the previous citations had included a finding of only moderate negligence. IO Br. at 17. Inspector Hatfield engaged in a process of progressive enforcement. The first four times he observed unsupported kettle bottoms, he issued section 104(a) citations and found only moderate negligence. On the fifth occasion, because the operator continued to engage in the same unsafe conduct, Inspector Hatfield made a finding of unwarrantable failure and issued a section 104(d)(1) closure order. This appears to be a measured response to the operator's persistent non-compliance with the terms of its roof control plan. Moreover, the Commission has recognized that under its precedent, prior citations, even if not for unwarrantable failure, put operators on notice that greater compliance is necessary. *Eagle Energy,* 23 FMSHRC at 838.

We note that the judge in a footnote stated: "Hatfield's finding of unwarrantable failure and high negligence may have been based on personal pique more than on an analysis of the standard of care IO and its employees were required to meet. When asked why [Hatfield] found the violation was due to IO's 'high' negligence, he responded, 'Because I talked to the operator on several occasions about the roof control plan and it seemed I wasn't getting anywhere with just writing a citation.'" 30 FMSHRC at 869 n.18 (citing Tr. 76). We question the judge's statement that the Inspector may have acted out of "personal pique." The Mine Act contemplates a progressive enforcement scheme whereby if an operator incurs repeated similar serious violations and fails to remedy the situation, MSHA appropriately is to increase the severity of the enforcement action. *See* 30 U.S.C. § 814(d) & (e). This scheme is intended to induce meaningful compliance by operators with the safety and health requirements of the law. As stated by the Court of Appeals for the District of Columbia in *Coal Employment Project v. Dole*, quoting the legislative history: "Thus, we understand the [Senate Human Resources] Committee to say that an unwarrantable failure citation is a remedy available to an inspector confronting a non-technical violation that involves unwarrantable behavior, such as the operator's deliberate *or repetitious violation* of a health or safety standard." 889 F.2d 1127, 1133-34 (D.C. Cir. 1989) (emphasis added).

Based on the record, we conclude that IO Coal was on notice that greater efforts at compliance with its roof control plan were needed. *American Mines Servs., Inc.* 15 FMSHRC 1830, 1834 (Sept. 1993) (concluding that the evidence presented on the record supported no other conclusion and remand was unnecessary). Because the operator has maintained that it disagreed in good faith with the inspector's characterization of kettle bottoms, this is a critical factor in the unwarrantable failure determination in this case. On remand, the judge should weigh this factor of notice together with the other factors in his unwarrantable failure analysis.

D. Whether the Violation Posed a High Degree of Danger

The Commission has relied upon the high degree of danger posed by a violation to support an unwarrantable failure finding. *See BethEnergy Mines, Inc.*, 14 FMSHRC at 1243-44 (finding unwarrantable failure where unsaddled beams "presented a danger" to miners entering the area); *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"); *Quinland Coals*, 10 FMSHRC at 709 (finding unwarrantable failure where roof conditions were "highly dangerous").

The judge found that the violation was S&S and of serious gravity. 30 FMSHRC at 867-68. The judge held that the "inadequately supported and unsupported kettle bottoms posed discrete safety hazards" because kettle bottoms could slip from the roof without warning, sometimes causing serious injuries to miners. *Id*. at 867 & n.17. The judge emphasized that eight miners worked and traveled under the cited kettle bottoms and that the inadequately supported and

unsupported kettle bottoms could fall at any time, resulting in serious injury or death. *Id*. at 867-68.

Although the judge considered dangerousness in considering whether IO violated section 75.220(a)(1) and whether that violation was S&S, the judge did not relate any of those findings to his unwarrantable failure analysis. In *San Juan*, 29 FMSHRC at 133, the Commission determined that the judge erred by failing to make necessary findings and conclusions as to whether evidence of the danger posed by the violation demonstrated that the operator's conduct was aggravated, and how this factor weighed against other factors in his analysis. We likewise remand the danger factor for further evaluation.

E. The Operator's Effort in Abating the Violative Condition

An operator's effort in abating the violative condition is one of the factors established by the Commission as determinative of whether a violation is unwarrantable. Where an operator has been placed on notice of a problem, the level of priority that the operator places on the abatement of the problem is relevant. *Enlow Fork*, 19 FMSHRC at 17. Previous repeated violations and warnings from MSHA should place on operator on "heightened alert" that more is needed to rectify the problem. *New Warwick Mining Co.*, 18 FMSHRC 1568, 1574 (Sept. 1996). The focus on the operator's abatement efforts is on those efforts made prior to the citation or order. *Id.*

The record evidence appears to demonstrate that prior to the inspection at issue IO did not take any additional steps to remedy its roof conditions in response to the previous four citations. Tr. 252-53. Mine Foreman Thomas testified that, following the issuance of the three prior violations having to do with Safety Precaution No. 7 of the Roof Control Plan, he did not take any special steps, such as a safety meeting with the section foremen relating to roof conditions. Tr. 253.

The judge failed to consider IO's apparent lack of remedial actions to improve its roof safety following the four prior citations. He also made no findings as to the extent of the operator's abatement efforts and how that factor related to his unwarrantable failure analysis. *See San Juan*, 29 FMSHRC at 136 (remanding the question of whether the operator's prior actions in abating the violative condition supports an unwarrantable failure finding). Accordingly, we remand for evaluation of the abatement factor. We note that analysis of the abatement factor will be affected by the judge's analysis, see *infra*, of whether IO Coal's "good faith" belief in the non-existence of kettle bottoms was reasonable.

F. The Operator's Knowledge of the Existence of the Violation and whether the Violation was Obvious; the Reasonableness of the Operator's "Good Faith Disagreement" with MSHA as to What Constitutes a Kettle Bottom

An operator's knowledge of the existence of a violation and whether the violation is obvious are important elements of an unwarrantable failure analysis. Moreover, it is well settled that an operator's knowledge may be established, and a finding of unwarrantable failure

supported, where an operator reasonably should have known of a violative condition. *See Emery,* 9 FMSHRC at 2002-04; *Drummond Co., Inc.,* 13 FMSHRC 1362, 1367-68 (Sept. 1991), *quoting Eastern Assoc. Coal Corp.,* 13 FMSHRC 178, 187 (Feb. 1991) ("*Emery* makes clear that unwarrantable failure my stem from what an operator 'had reason to know' or 'should have known'").

In this case, IO contends that it had a good faith disagreement with Inspector Hatfield regarding what was, and what was not, a kettle bottom. IO Br. at 4-14; Tr. 199-201, 309-11, 346, 377. The issue of the operator's "good faith disagreement" with Inspector Hatfield as to certain roof formations being kettle bottoms is inextricably intertwined with the issues of the operator's knowledge of the existence of the violation and the obviousness of the violation. It also affects the issues of duration and efforts at abatement.

In weighing the evidence, the judge found that section foreman Jefferson "simply misjudged some of the kettle bottoms" and that there were "genuine and good faith disagreements between the inspector and IO personnel as to what constituted a kettle bottom." 30 FMSHRC at 868-69. The judge's finding of "genuine" disagreements is supported by substantial evidence.[9] Regarding the disagreements being in "good faith," the judge, after describing the witnesses' conflicting testimony about the existence of unsupported kettle bottoms, found that "[n]one of the witnesses were, in my opinion, disingenuous." *Id*. at 866. We find no compelling evidence in the record to take the extraordinary step of overturning the judge's credibility determination in this regard.[10]

However, a finding of a subjective "good faith disagreement" does not end the inquiry. The trier-of-fact must determine whether the operator's belief was objectively reasonable under the circumstances. In *Kellys Creek Resources, Inc*., 19 FMSHRC 457 (Mar. 1997), the

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

[10] A judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). Generally, the Commission will uphold a judge's credibility determination unless compelling evidence supporting reversal is offered. *See Bjes v. Consolidation Coal Co.,* 6 FMSHRC 1411, 1418 (June 1984) (refusing to take the "exceptional step" of overturning judge's findings based on credibility resolutions); *see also Metric Constructors, Inc.,* 6 FMSHRC 226, 232 (Feb. 1984), *aff'd* 766 F.2d 469 (11th Cir. 1985) (stating that when the judge's finding rests upon a credibility determination, the Commission will not substitute its judgment for that of the judge absent clear indication of error).

Commission held that "if an operator acted on the good-faith belief that its cited conduct was actually in compliance with applicable law, and that belief was *objectively reasonable under the circumstances,* the operator's conduct will not be considered to be the result of unwarrantable failure when it is later determined that the operator's belief was in error." *Id*. at 463 (citing *Cyprus Plateau Mining Corp*., 16 FMSHRC 1610, 1615-16 (Aug. 1994)) (emphasis added). In *Cyprus,* the Commission overturned the judge's finding that the foreman's good faith belief precluded an unwarrantable failure determination because the judge failed to consider the "reasonableness" of the foreman's belief. 16 FMSHRC at 1615. In *Kellys Creek*, 19 FMSHRC at 463-65, the Commission reversed the judge's determination that a good faith belief precluded unwarrantable failure because the Commission found that the belief was not reasonable. *See also Wyoming Fuel Co.*, 16 FMSHRC 1618, 1628-29 (Aug. 1994) (holding that an operator's conduct was not aggravated where judge implicitly found that operator's good faith belief that it was in compliance with regulations was reasonable under the circumstances), *aff'd*, 81 F.3d 173 (10th Cir.1996) (unpublished table decision).

In this case, the judge did not determine whether the operator's "genuine and good faith disagreements" with the MSHA inspector as to what constituted a kettle bottom were objectively reasonable under the circumstances. For example, the judge did not harmonize his finding of "good faith disagreements" with his earlier finding that "[i]f, in fact, Hatfield misidentified kettle bottoms, it is reasonable to expect IO personnel to have protested long and loud, then and there. They did not. [Tr. 84, 114] A close reading of the testimony reveals that it was after he issued the order that they began to argue he misidentified the formations." 30 FMSHRC at 866.

Additionally, the judge did not pose the question of whether IO's conduct was "reasonable" under the circumstances after it had received four MSHA citations on this very issue. In *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996), the Commission affirmed the judge's finding of no reasonable, good faith belief where the operator failed to inquire into MSHA's enforcement position. Analogously, IO apparently did not seek MSHA's guidance on its decision not to support the alleged kettle bottom formations even though it had received a number of citations.

Most significantly, the judge's finding that section foreman Jefferson "was not indifferent to his responsibilities" for roof control on the section and "tried, but failed to meet the standard of care required of him," 30 FMSHRC at 868, does not dispose of the issue of reasonableness. Jefferson's supervisor was Thomas, the mine foreman, and Thomas was certainly aware of the four previous citations for unsupported kettle bottoms in the six weeks before this order was issued. Thomas had received the last three of these citations directly from Hatfield, and was aware of the first one being given to his predecessor as mine foreman. Hatfield testified that in issuing each of these previous violations, he had talked with Thomas or his predecessor about what he classified as a kettle bottom, and the need to comply with Safety Precaution No. 7 of the roof control plan. Tr. 37, 39-40, 45, 48, 52. His testimony is corroborated by the fact that the section 104(d)(1) order issued in this case on June 12, 2006 states: "This mine has been put on heightened alert by the issuance of similar citations regarding the supporting of surface cracks and

kettle bottoms and discussions with mine management regarding the supporting of these roof conditions." Gov. Ex. 1. Although Thomas denied talking with Hatfield about the roof control plan after receiving the previous citations, Tr. 251, it is undisputed that IO Coal neither contested the previous citations for unsupported kettle bottoms nor inquired of MSHA supervisory personnel regarding Hatfield's understanding of what constituted a kettle bottom.

The conduct of section foreman Jefferson in this case is thus much less significant than the conduct of mine foreman Thomas in determining whether the "good faith disagreement" with MSHA was reasonable under the circumstances. Thomas acknowledged that after receiving the three previous citations, he did not hold a safety meeting with any of the section foremen to discuss roof control. Tr. 253. Indeed, the record does not indicate that Thomas took any action whatever to acheive greater compliance with the roof control plan during the period he was mine foreman prior to the June 12, 2006 order. In this context, we note our statement in *Consolidation Coal Co.,* 14 FMSHRC 956, 970 (June 1992): "Whatever difficulties may be presented by the Secretary's interpretation of the Act and regulations, no operator is free to take the law into its own hands by deciding for itself what the law means and how it can best be applied."

Finally, a thorough review of all the facts and circumstances bearing on the unwarrantable failure issue should consider that IO did not preserve the pre-shift and on-shift examination reports completed in the days prior to the issuance of the order in question. These reports would likely have shed some light on how much the operator knew about the kettle bottoms before the order was issued. Tr. 253-54. *See Windsor Coal*, 21 FMSHRC at 1004 (preshift books reflecting coal accumulations along the belt were relevant to determination of whether operator was on notice of need for greater efforts at compliance); *Peabody Coal*, 14 FMSHRC at 1262 (same). The judge did not discuss or draw any conclusions with respect to these missing reports.[11] We direct the judge to address the missing examination reports in his evaluation of knowledge and weigh this in his unwarrantable failure analysis.

Hence, on remand, the judge should consider the issues of the operator's knowledge of the existence of the violation and whether the violation was obvious. The principle question in these determinations is whether the operator's "good faith disagreements" with Inspector Hatfield as to what constituted a kettle bottom were objectively reasonable under the circumstances. If the operator's disagreements with the inspector were reasonable, then it may be concluded that the operator did not have knowledge of the existence of the violation and that the violation was not obvious. However, if the disagreements were not reasonable, in light of the judge's finding that

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[11] It is well-recognized that if a party has control over a writing or other type of evidence, which is relevant to an issue, and fails to produce the evidence, an inference can be drawn that the evidence would be adverse to the party. *McCormick on Evidence* provides that "[w]hen it would be natural under the circumstances for a party to . . . produce documents or other objects in his or her possession as evidence and the party fails to do so, tradition has allowed the adversary to use this failure as the basis for invoking an adverse inference." 2 *McCormick on Evid.* § 264 (6th ed. 2006) at 220-21.

the disagreements were not articulated until after the withdrawal order was issued, together with the fact of IO Coal's response (or lack thereof) to the issuance of four previous citations for the same type of violations of the roof control plan, then it may be concluded that the operator did have knowledge of the violation.

Ultimately, the judge should bear in mind the D.C. Circuit's characterization of Congressional intent:

> Congress was particularly concerned about curbing repeat offenders among mine operators. Reporting on the bill that became the Mine Act, the Senate Committee on Human Resources stated:
>
> > In evaluating the history of the operator's violations in assessing penalties, it is the intent of the Committee that repeated violations of the same standard, particularly within a matter of a few inspections, should result in the substantial increase in the amount of the penalty to be assessed.

Coal Employment Project v. Dole, 889 F. 2d at 1132.

III.

Conclusion

For the reasons discussed above, we vacate the judge's determination that IO's violation of section 75.220(a)(1) was not caused by its unwarrantable failure. We remand for reconsideration of the record consistent with this decision, and for reassessment of the civil penalty, if appropriate.[12]

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Michael F. Duffy, Commissioner

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Michael G. Young, Commissioner

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Robert F. Cohen, Jr., Commissioner

[12] Our dissenting colleague would have the Commission reverse the judge's determination and hold, as a matter of law, that the evidence compels a finding that the violation was due to the operator's unwarrantable failure. While we agree that the evidence, particularly the four previous violations of section 75.220(a)(1) because of unsupported kettle bottoms, strongly suggests a finding of unwarrantable failure, it is the function of the judge, not the Commission, to weigh all the relevant evidence and make a determination on this issue. *Martin County Coal Corp.,* 28 FMSHRC 247, 257 (May 2006).

Chairman Jordan, dissenting:

Over the course of six weeks, IO Coal received four citations because it failed to install supplemental roof support in the face of adverse conditions. Three of the four citations were issued to the same individual, general mine foreman, Fred Thomas, after MSHA inspector Hatfield observed unsupported kettle bottoms in the mine.[1] Tr. 33-49. According to the inspector, after issuing each citation he discussed the hazards posed by the kettle bottoms with mine officials and urged them to take precautions. Tr. 45-48.[2] Nevertheless, four days after he issued his fourth citation, Inspector Hatfield returned to the mine and observed at least fifteen unsupported kettle bottoms, a situation which prompted the inspector to issue the section 104(d)(1) unwarrantable failure order under review. Tr. 53, 56-59, 68; Gov't Ex. 1.

The judge below upheld the violation but eliminated the unwarrantable failure designation. My colleagues have concluded that the judge's unwarrantable failure determination must be vacated and that issue remanded for reconsideration. Because I find the operator's ongoing failure to support kettle bottoms in the mine, despite repeated warnings from MSHA, to constitute precisely the type of behavior that Congress intended to address in section 104(d)(1) of the Mine Act, I would reverse the judge and find the subject violation to have been properly designated as resulting from the operator's unwarrantable failure to comply with its roof control plan.

Unwarrantable failure is demonstrated by "aggravated conduct, constituting more than ordinary negligence," characterized by "reckless disregard," "intentional misconduct," "Indifference," or a "serious lack of reasonable care." *Emery Mining Corp.*, 9 FMSHRC 1997, 2001, 2003-04 (Dec. 1987). These terms aptly describe the operator's conduct in this case. Although the four previous citations clearly put IO on notice it was failing to address the hazardous conditions posed by the kettle bottoms in its mine, the operator took no meaningful steps to rectify the situation until the subject withdrawal order was issued. If this behavior does not constitute unwarrantable failure, I'm not sure what does. As Congress explained when it enacted the Mine Act, "the unwarranted failure order recognizes that the law should not tolerate miners continuing to work in the face of hazards resulting from conditions violative of the Act which the operator knew of or should have known of and had not corrected." S. Rep. No. 95-181, at 31, (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 619 (1978).

The Commission has recognized that whether conduct results from an operator's 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

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[1] The material constituting a kettle bottom is not part of the coal bed and can slip from the roof at any time unless adequate support is provided. 30 FMSHRC 847, 867 (Aug. 2008).

[2] The operator appears to concede that these conversations took place. IO Br. at 18-19.

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.

My colleagues concede that the operator was on notice that greater efforts at compliance with its roof control plan were needed and they acknowledge that "[t]he record evidence appears to demonstrate that prior to the inspection at issue IO did not take any additional steps to remedy its roof conditions in response to the previous four citations." Slip op. at 11, citing Tr. 252-53. In addition, they agree that the judge correctly found the violation to be significant and substantial, and thus of high gravity.[3] With regard to the duration of the violation, it is undisputed that the cited condition lasted for at least four or five days. Tr. 66-67, 250-51; IO Br. at 22. In terms of the extensiveness of the condition, the judge found there were more than 15 unsupported or inadequately supported kettle bottoms. 30 FMSHRC at 865-66; Gov't Ex. 9.[4] Given these circumstances - wherein the operator was on notice of an extensive and dangerous violation of long duration that MSHA had cited it for repeatedly, and which IO did not take any significant steps to address - the record can only support one conclusion: that the violation was caused by the operator's unwarrantable failure to comply.

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[3] Although the majority acknowledges the judge's finding that "eight miners worked and traveled under the cited kettle bottoms and that the inadequately supported and unsupported kettle bottoms could fall at any time, resulting in serious injury or death," slip op. at 10-11, citing 30 FMSHRC at 867-68, they nonetheless remand the case to the judge for consideration of the "danger factor." Slip op. at 11. In light of his significant and substantial finding, I do not see how the judge could fail to find the dangerous nature of the cited condition to be an aggravating factor. The inspector testified that the cited roof conditions presented the hazard of falling roof material, Tr. 75-76, 158-59, that should a roof fall occur, injuries would reasonably be expected to be permanently disabling, Tr. 47, 75, and that a roof fall was reasonably likely to occur due to the lack of supplemental support for numerous adverse roof conditions. Tr. 75-76.

[4] The inspector testified that the unsupported kettle bottoms were obvious and extensive. Tr. 52. Moreover, as my colleagues have noted, the extensiveness of the violation can be shown by the significant abatement effort that was necessary before the order was terminated. Slip op. at 7.

My colleagues' would have the judge focus on the reasonableness of the operator's disagreement with MSHA regarding whether or not certain roof conditions at the mine constituted kettle bottoms. Slip op. at 11-15. However, after receiving four prior citations for unsupported kettle bottoms, the operator's position was patently unreasonable. By the fifth time IO was cited, MSHA's view on the question was eminently clear. It was unreasonable for IO to stubbornly adhere to its position, given MSHA's vigorous and consistent enforcement actions. As we emphasized in *Consolidation Coal Co*., 14 FMSHRC 956, 970 (June 1992), a high degree of negligence is appropriately attributed to an operator who does not comply with MSHA's interpretation after MSHA has made its view evident:

> Whatever difficulties may be presented by the Secretary's interpretation of the Act and regulations, no operator is free to take the law into its own hands by deciding for itself what the law means and how it can best be applied.

(citation and internal quotation marks omitted).

Although IO now contends that the inspector misidentified formations which were not, in fact, kettle bottoms, it is apparent that the operator was simply conducting "business as usual," as it made no meaningful inquiries to MSHA at the relevant time about its alleged disagreement over what constituted a kettle bottom. Its argument that the cited condition was simply the result of a "good faith disagreement" or "difference in judgment" would have more credence if mine officials had bothered to speak with MSHA about this question before the mine closure. Instead, they failed to challenge any of the previous citations and did not bring up the dispute when accompanying the MSHA inspector. Tr. 114.

Although my colleagues correctly fault the judge for failing to address all of the elements of the unwarrantable failure analysis, slip op. at 6, their remedy - remanding the case "for a fuller discussion that identifies and incorporates all the relevant elements and explains how each element affects his unwarrantable failure determination," - *id*., is unnecessary. Given the findings by the judge, findings with which the majority does not disagree, and the overwhelming "'evidence [of] a callous disregard for the hazards,'" *Rock of Ages Corp*., 20 FMSHRC 106, 115 (Feb.1998) (citation omitted), demonstrated by IO's persistent failure to properly support the roof even after it was repeatedly cited by MSHA, any additional analysis would be superfluous. Although the factors articulated by the Commission in prior unwarrantable failure cases have created invaluable guideposts, *see, e.g., Mullins & Sons Coal*, 16 FMSHRC at 195-96, at this point in the litigation the judge should not be obliged to produce a mechanistic litany on every factor.

The Commission has not hesitated to reverse a finding of no unwarrantable failure when faced with compelling evidence to the contrary. For example, in *Jim Walter Resources, Inc.*, 19 FMSHRC 480 (Mar. 1997), we reversed the judge's conclusion that three coal accumulation violations were not the result of unwarrantable failure, explaining that:

> [o]ur review of this record as a whole - particularly the undisputed evidence regarding the prior warnings and the extensive and obvious nature of the violation - leads us to conclude that there is not substantial evidence to support the judge's finding that no aggravated conduct occurred. In such a case, the proper course of action is reversal, not remand.

Id. at 489 n.8. *See also Consolidation Coal Co*., 22 FMSHRC 328, 333 (Mar. 2000) (reversing judge's finding of no unwarrantable failure when operator failed to respond effectively to rectify a violative condition of which it was aware). As in those cases, we have here a record in which there is not substantial evidence to support a finding that aggravated conduct did not occur.

Congress created the unwarrantable failure designation in section 104(d)(1) as an enforcement mechanism to be used in exactly the type of circumstance presented in this case: an operator whom MSHA repeatedly cited but who nonetheless failed to remedy a safety problem. Although the trial judge is, of course, the initial finder of fact, it is axiomatic that when the evidence supports only one conclusion, a remand to the judge serves no purpose. *See American. Mine Servs., Inc*., 15 FMSHRC 1830, 1834 (Sept. 1993) (affirming judge's finding of no unwarrantable failure, despite judge's error in not addressing some of the Secretary's evidence). Here, the record compels the conclusion that the violation was due to the operator's unwarrantable failure. Accordingly, I would reverse.

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Mary Lu Jordan, Chairman

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