FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

January 20, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. LAKE 93-241
BUCK CREEK COAL COMPANY, INC.	:	

BEFORE: Jordan, Chairman; Doyle, Holen and Marks, Commissioners

DECISION

BY: Jordan, Chairman; Doyle and Holen, Commissioners

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1988) ("Mine Act" or "Act"). The Department of Labor's Mine Safety and Health Administration ("MSHA") cited Buck Creek Coal Company, Inc. ("Buck Creek") for an alleged violation of 30 C.F.R. ' 75.360(a) (1992).[1] Administrative Law Judge T. Todd Hodgdon concluded that Buck Creek violated section 75.360(a) by permitting three miners to enter its mine before the preshift examination had been completed and recorded at the surface. 16 FMSHRC 133, 137 (January 1994) (ALJ). The judge also determined that the violation was not significant and substantial ("S&S"), but resulted from Buck Creek's unwarrantable failure to comply with the standard. *Id*. at 137-40.

Both parties timely filed petitions for discretionary review. The Secretary sought review of the judge's conclusion that the violation was not S&S. Buck Creek sought review of the judge's determination that the Secretary had established a violation of the standard and that Buck

[1] Section 75.360(a) provides:

> Within 3 hours preceding the beginning of any shift and before anyone on the oncoming shift, other than certified persons conducting examinations required by this subpart, enters any underground area of the mine, a certified person designated by the operator shall make a preshift examination.

Creek's conduct resulted from unwarrantable failure. Buck Creek also alleged that the judge had deprived it of due process. The Commission granted the petitions.

For the reasons that follow, the Commission affirms the judge's conclusions that Buck Creek violated section 75.360(a) and that the violation resulted from Buck Creek's unwarrantable failure; we reverse the judge's determination that the violation was not S&S. We conclude that Buck Creek was not deprived of due process.

I.

Factual and Procedural Background

Buck Creek operates an underground coal mine in Sullivan, Indiana. The mine, developed in two sections referred to as "north" and "south," extends about three miles from one end to the other. Entry is gained through the bathhouse portal, which is situated near the middle of the mine.

The mine was idle from 3:30 p.m. on Saturday, April 24, 1993, until Monday morning, April 26. Buck Creek postponed the start of the first shift on April 26 from 7:00 a.m. to 9:00 a.m. 16 FMSHRC at 134; Tr. 19, 111, 167. Charles Austin, mine foreman, and Charles Chin, section foreman, conducted the preshift examination; each examined one side of the mine. According to the preshift books, the examination of the north side began at 6:22 a.m. and concluded at 7:22 a.m.; the examination of the south side began at 7:00 a.m. and was completed at 7:30 a.m. 16 FMSHRC at 134.

In addition to the preshift examiners, three miners, Carlos Maggard, Dave Sales and Terry O'Bannon, were in the mine at 6:45 a.m., when MSHA Inspectors John Stritzel and Mike Bird arrived to conduct a ventilation inspection. Maggard and Sales were certified examiners. The three had descended prior to the completion of the preshift examination in order to repair a mantrip used to transport miners to the face. 16 FMSHRC 133-34, 137, 139; Tr. 163. When they reached the bottom of the slope, where the mantrip was situated, that area had been examined by a preshift examiner. 16 FMSHRC at 134-35, 139.

Mine foreman Austin called the results of his preshift examination to the surface at 7:35 a.m. At that time, Inspector Stritzel told Austin to withdraw all miners from the mine and issued Order No. 4055142 pursuant to section 104(d)(2) of the Act, 30 U.S.C. ' 814(d)(2), which alleged that Buck Creek violated 30 C.F.R. ' 75.360(a) and that the violation was S&S and a result of the operator's unwarrantable failure.[2] The order was terminated after the miners were

[2] Order No. 4055142 states:

Three miners entered the mine at 6:45 a.m. without a valid pre-shift

withdrawn and instructed by Buck Creek's Safety Director not to reenter the mine until the preshift examination was completed and the results recorded. 16 FMSHRC at 134-35; Joint Ex. 1. Maggard, Sales and O'Bannon were assigned other work following their return to the surface. *See* Tr. 214. Normally, employees performing maintenance work join the oncoming production shift. *Id*.

Following an evidentiary hearing, the judge concluded that, by permitting miners to enter the mine before completion of the preshift examination, Buck Creek violated section 75.360(a). 16 FMSHRC at 135-37. The judge also concluded that the violation was not S&S, finding that the Secretary had failed to establish that the violation would result in a reasonable likelihood of injury. *Id*. at 137-39. He further concluded that the violation was due to Buck Creek's unwarrantable failure. *Id*. at 139-40. The judge assessed a penalty of $3,000. *Id*. at 141.

II.

Disposition

A. Violation

> examination of the mine being completed. Two certified pre-shift examiners were in the process of conducting the pre-shift examination. The south side of pre-shifting of the mine began at 7:00 a.m. and finished at 7:30 a.m., called out to surface at 7:35 a.m. and north side of mine pre-shift exam began at 6:22 a.m. and finished at 7:22 a.m. and was called out to surface at 7:30 a.m. Both pre-shift examiners were operator's agents, 1 mine manager and 1 foreman. Operator should know if pre-shift exam is completed before permitting miners to enter the mine.

Joint Ex. 1.

Section 75.360 essentially restates the requirements of section 303(d)(1) of the Mine Act, 30 U.S.C. ' 863(d)(1). Under section 75.360(a), a certified examiner must conduct a preshift examination within three hours before "the beginning of any shift and before anyone on the oncoming shift . . . enters any underground area of the mine . . . ." Subsections (b) through (g) of section 75.360 set forth the required elements of the examination. Under section 75.360(g), the results of the preshift examination must be recorded in a book at the surface before miners are permitted underground.

The judge found that the foot of the slope, where the miners were repairing the mantrip, was an underground area of the mine. 16 FMSHRC at 136. Relying on the fact that Maggard, Sales and O'Bannon worked during the morning shift and that repair of the mantrip was necessary to enable other miners to travel to the face, the judge found that the miners were part of the oncoming shift. *Id*. at 136-37. He concluded that, because the three miners arrived at the foot of the slope before the preshift examination had been recorded, Buck Creek violated section 75.360(a). *Id*.

Buck Creek concedes that the plain language of section 75.360(a) requires a preshift examination before any shift of workers enters the mine to perform production or non-production work. B.C. Br. at 3. It asserts, however, that substantial evidence does not support the judge's conclusion that Maggard, Sales, and O'Bannon were part of the oncoming shift and, thus, subject to section 75.360(a). *Id.* at 4-7. It also contends that the mine was idle when the three miners entered and that, pursuant to 30 C.F.R. ' 75.361, only a limited examination of the slope area was required before miners could enter. *Id.* at 6-7. Buck Creek contends further that, because the area where the miners were working had, in fact, been examined before they entered, Buck Creek was in compliance with section 303(d)(2) of the Mine Act, 30 U.S.C. ' 863(d)(2). *Id.* at 8-9.

The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. ' 823(d)(2)(A)(ii)(I). The term "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 (November 1989), *quoting Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

We conclude that substantial evidence supports the judge's finding that Maggard, Sales and O'Bannon were part of the oncoming shift and thus, that they were not permitted to enter the mine before completion of the preshift examination. The overlapping schedules of the maintenance and production employees, together with the necessity of completing the mantrip repair before production could begin, support the judge's finding that Maggard, O'Bannon and Sales were the vanguard of the first shift on April 26.

The dictionary definitions of the term "shift" proffered by the operator, "[a] group of people who work or occupy themselves in turn with other groups, a scheduled period of work or duty," are sufficiently broad to encompass the three miners who entered the mine to perform

repair work.[3] Buck Creek also relies on the definition of "normal work shift" contained in 30 C.F.R. ' 71.2(i). B.C. Br. at 4. That term, which is used relative to respirable dust sampling, applies only to the Part 71 regulations governing health standards at surface coal mines.[4] Moreover, as the Secretary points out, it is unimportant, for purposes of the preshift standard, whether the miners were the earliest crew of the first shift or whether they constituted a separate maintenance shift; a preshift examination was required before they were permitted to enter the mine.

We also reject Buck Creek's contention that the operator was required to satisfy only the supplemental examination provisions of section 75.361.[5] That section, which implements section 303(m) of the Mine Act, provides, as relevant here, for a supplemental examination of idle and abandoned areas whenever miners who are underground are dispatched to an area of the mine that was not required to be examined as part of the preshift examination. *See* 57 Fed Reg. 20,895 (1992). Such an examination is in addition to, not a substitute for, a preshift examination. Moreover, the record makes clear that all miners had to travel through the area at the bottom of the slope to reach the north and south faces. Tr. 174-77; Resp. Ex. A. Thus, the area was not "idle."[6]

To further support its position that its actions were not violative, Buck Creek erroneously relies on the language of section 303(d)(2) of the Mine Act, 30 U.S.C. ' 863(d)(2). Buck Creek asserts that the judge erred by imposing an additional requirement that the results of the entire examination be reported before miners enter the mine. B.C. Br. at 8. Section 303(d)(2) complements section 303(d)(1) by prohibiting anyone, other than designated certified persons, from entering a mine unless the preshift examination required under the preceding paragraph has been made within the immediately preceding eight hours. Section 303(d)(2) does not repeat the

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[3] B.C. Br. at 4, *citing Webster's Third New Int'l Dictionary* (1976).

[4] That it has no relevance to the preshift standard is evident by the fact that it is defined, in part, as "a shift during which there is no rain . . . ." 30 C.F.R. ' 71.2(i).

[5] Section 75.361 states in part:

> (a) Except for certified persons conducting examinations required by this subpart, within 3 hours before anyone enters an area in which a preshift examination has not been made for that shift, a certified person shall examine the area for hazardous conditions, determine whether the air is traveling in its proper direction and at its normal volume, and test for methane and oxygen deficiency.

30 C.F.R. ' 75.361.

[6] The dissent erroneously concludes that the bottom of the slope "was an area of the mine that was idle." Slip op. at 11.

requirement of section 303(d)(1) that the results of the examination shall be reported to the surface before anyone enters the mine.

Buck Creek's position is without merit. Section 303(d)(1) of the Mine Act and 30 C.F.R. ' 75.360, the regulation under which it was cited, require that the results of the preshift examination be recorded at the surface before miners on an incoming shift enter the mine.[7] Because we have affirmed the judge's determination that Maggard, Sales and O'Bannon were part of a shift, we conclude that the judge was correct in finding that Buck Creek violated section 75.360.

For the foregoing reasons, we affirm the judge's determination of violation.

B. Significant and Substantial

[7] We note that section 75.360(a) does not authorize piecemeal examinations of a mine.

A violation is S&S[8] 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. *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825-26 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 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. *See also Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

The Secretary asserts that the failure to conduct a preshift examination is presumptively S&S. In support, he argues that it was reasonably likely that failure to conduct such an examination would leave undiscovered a hazard that would result in an injury. S. Br. at 17-20. Alternatively, the Secretary argues that the judge incorrectly applied the *Mathies* test and that the record evidence supports an S&S finding. S. Br. at 21-25. Buck Creek challenges the use of a presumption because the record lacks evidence as to why such a presumption is legally supportable. The operator further asserts that substantial evidence supports the judge's determination that the alleged violation was not S&S. B.C. Rep. Br. at 3-7.

In determining that the violation was not S&S, the judge concluded that, although the first and second elements of the *Mathies* test were established, the third element was not. He found a violation of a mandatory safety standard that created a discrete safety hazard, noting that the mine had "a history of roof falls and high methane levels." 16 FMSHRC at 139. He concluded that the Secretary had not proven the third *Mathies* element because two of the three repairmen were certified preshift examiners, they entered the mine only as far as the foot of the slope, and the area where the miners entered had already been inspected with no hazards noted. *Id*. Substantial evidence does not support the judge's conclusion that the violation was not S&S.

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[8] 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 in nature any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard . . . "

The considerations that the judge relied upon in addressing the third element of *Mathies* are not dispositive of the issue. Although we do not lightly overturn a judge's factual findings, neither are we bound to affirm such determinations if only slight or dubious evidence is present to support them. *See, e.g., Krispy Kreme Doughnut Corp. v. NLRB*, 732 F.2d 1288, 1293 (6th Cir. 1984); *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1263 (7th Cir. 1980). Further, the judge viewed the record narrowly, ignoring relevant evidence. *See generally Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1613-14 (August 1994). In reviewing the whole record, an appellate tribunal must also consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 483 (1951).

The Secretary's evidence consisted chiefly of the testimony of Inspector Stritzel. He noted that the mine had been idle over a weekend and that the maintenance workers were the first shift back into the mine on Monday. Tr. 33. He further noted that the last preshift examination before the miners descended had been conducted two days earlier. Tr. 37. During idle periods methane may build up. Further, as Stritzel stated, falls or breaks in stoppings during idle periods could interrupt ventilation, permitting methane to accumulate. Tr. 34, 117-18, 121. Indeed, the mine had prior ventilation problems. Tr. 20. As the judge found, the mine had experienced methane accumulations before the citation was issued and it had a history of roof falls. Tr. 35-36, 118-19.

We reject Buck Creek's contention that the miners were not exposed to any actual hazards because the area where they performed their repair work had been inspected. Hazards in an unexamined portion of the mine could affect the slope area where the repair crew was working. The mine was developed for more than a mile both north and south of the area in question. *See* Tr. 28, 45- 47, 172-73; Resp. Ex. A. Nor does the fact that two of the three miners were certified inspectors bear on the S&S determination. They entered the mine to repair a mantrip, not to inspect the mine, and there is no evidence their attention was focused on mine conditions rather than on the mantrip.

Considering the record as a whole, we find that substantial evidence does not support the judge's determination that Buck Creek's violation was not reasonably likely to result in an injury. We also conclude that the fourth element of *Mathies* is established: injuries resulting from the hazards posed are reasonably likely to be of a reasonably serious nature. Accordingly, we reverse the judge's determination that the violation was not S&S.[9]

[9] In light of our disposition, we need not reach the S&S presumption advocated by the Secretary.

C. Unwarrantable Failure

The unwarrantable failure terminology is taken from section 104(d) of the Act and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. This determination was derived, in part, from the plain meaning of "unwarrantable" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" (the failure to use such care as a reasonably prudent and careful person would use, characterized by "inadvertence," "thoughtlessness," and "inattention"). *Id.* 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 Corp.*, 13 FMSHRC 189, 193-94 (February 1991). This determination was also based on the purpose of the unwarrantable failure sanctions in the Mine Act, the Act's legislative history, and judicial precedent. *Emery*, 9 FMSHRC at 2002-03.

The judge found that Buck Creek's failure to comply with the requirements for a preshift examination was the result of more than inadvertence or thoughtlessness and thus arose from Buck Creek's unwarrantable failure. 16 FMSHRC at 140. Buck Creek argues that its actions do not constitute unwarrantable failure because any Commission decision upholding the finding of a violation would be one of first impression. B.C. Br. at 15. We disagree.

The preshift examination requirement is unambiguous and is of fundamental importance in assuring a safe working environment underground. By its express terms, section 75.360 gives notice to the mine operator of the requirement of a preshift examination under the circumstances presented here. It is common knowledge that the preshift examination must be completed and recorded at the surface before miners are allowed to enter a mine. We reject Buck Creek's argument that the preshift standard is ambiguous and that consequently it is absolved of unwarrantable failure.

We agree with the judge's conclusion that Buck Creek's failure to comply with the requirement that a preshift examination be completed before miners are permitted underground was the result of aggravated conduct, constituting more than ordinary negligence. By sending miners underground prematurely, Buck Creek exhibited the "serious lack of reasonable care" that constitutes unwarrantable failure. *See Cyprus Plateau Mining Corp.*, 16 FMSHRC at 1616. Accordingly, we affirm the judge's determination of unwarrantable failure.

D. Due Process

Buck Creek argues that the judge improperly considered information of a factual nature contained in the Secretary's post-hearing brief: the Secretary alleged that McDowell was superintendent of the Pyro William Station Mine when, following a fatal explosion, a citation was

issued for failure to conduct an adequate preshift examination in areas of the mine considered to be idle. The Secretary argued to the judge that McDowell's involvement in that incident must have made him aware of the requirements of the preshift standard. Buck Creek claims that the judge relied on these statements in refusing to credit McDowell's testimony.

Although the Secretary's belated attempt to discredit McDowell was improper,[10] Buck Creek has failed to demonstrate that it was prejudiced thereby. The Secretary's post-hearing brief provided information to support his argument that the judge should disregard McDowell's testimony regarding distinctions between idle hours and production hours under the standard. S. Post-Hearing Br. at 13-14. There is no indication that the judge in reaching his decision relied on the passage in the Secretary's brief to which Buck Creek objects or that the material in question was admitted by the judge.[11] The judge did not base his interpretation of the standard on a credibility finding. Rather, he relied on the plain language of section 75.360(a) in determining that a violation occurred. 16 FMSHRC at 137.

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[10] We note that Buck Creek likewise appended to its post-hearing brief information that had not been introduced at the hearing. B.C. Post-Hearing Br. at 2.

[11] Unlike juries composed of "'ordinary untrained citizens' . . . judges possess professional experience in valuing evidence." 1 J. Strong, *McCormick on Evidence* 238 (4th ed. 1992) (citations omitted). Appellate bodies reviewing cases tried without a jury generally presume that the judge "disregarded the inadmissible and relied on the admissible evidence." *Id.* The ability of judges to distinguish admissible from inadmissible evidence has led to the common practice "adopted by many experienced trial judges in nonjury cases of provisionally admitting all debatably admissible evidence if objected to with the announcement that all questions of admissibility will be reserved until the evidence is all in." *Id.* at 239 (citations omitted).

The judge's discrediting of McDowell related solely to his testimony that, before proceeding underground, the miners had called into the mine to check conditions.[12] 16 FMSHRC at 140, n. 7. The judge discredited this testimony because he found it "self-serving, uncorroborated [and] hearsay." *Id.* Moreover, the testimony was not dispositive of any issue in this case. Even assuming arguendo that the miners were told it was safe to go into the mine, a violation occurred when they went underground prior to the completion of the preshift examination. The testimony would not affect our determination that substantial evidence supports the judge's conclusion that the violation was S&S. Furthermore, McDowell's testimony, if credited, would not have militated against a finding of unwarrantable failure. Rather, the testimony would have provided additional evidence that the operator, through its supervisory agents, endorsed the miners' entry underground prior to the completion of the preshift examination.

In any event, Buck Creek's attack on the Secretary's post-hearing submission is, in essence, a request to overturn the judge's conclusion that McDowell's testimony regarding the alleged call was not credible. As the Commission has observed, "a judge's credibility determinations may not be overturned lightly." *Wyoming Fuel Co., n/k/a Basin Resources, Inc.*, 16 FMSHRC 1618, 1629 (August 1994), *citing Quinland Coals, Inc.*, 9 FMSHRC 1614, 1618 (September 1987). It was within the judge's discretion to discredit McDowell's testimony for the reasons the judge set forth in his opinion and we find no reason to overturn that determination.

III.

Conclusion

For the foregoing reasons, we affirm the judge's determination that Buck Creek violated section 75.360(a) and that the violation resulted from its unwarrantable failure. We reverse the judge's conclusion that the violation was not S&S, reject Buck Creek's claim that it was denied due process and remand for reassessment of a civil penalty consistent with this opinion.

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[12] The judge credited McDowell over Inspector Stritzel when he accepted McDowell's account of where the miners were working. 16 FMSHRC at 134. The inspector testified that Austin had told him that one of the three miners was in "main north, main east" in "the north part of the coal mine." Tr. 58; Gov't Ex. 1. McDowell testified that all three miners worked on the mantrip repair at the foot of the slope. Tr. 180.

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Mary Lu Jordan, Chairman

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Joyce A. Doyle, Commissioner

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Arlene Holen, Commissioner

Commissioner Marks, dissenting:

I dissent.

I would vacate the decision of the Administrative Law Judge on two independent grounds and remand this case to the Chief Administrative Law Judge for reassignment to another Administrative Law Judge for a hearing *de novo*. First, in my view, the judge erred in not adequately considering the contention of Buck Creek Coal Company, Inc. ("Buck Creek") that under sections 303(d)(2) & (m) of the Mine Act, 30 U.S.C. ' 801 et seq. (1988) ("Act"), it was not required to conduct a section 303(d)(1) of the Act preshift examination under the facts and circumstances of this case. Second, in my view, Buck Creek did not receive a fair hearing.

I.

The Judge Erred in Failing to Consider Whether a Section 303(d)(1) Preshift Examination Was Required Under the Facts and Circumstances of This Case in Light of Section 303(d)(2) & (m) of the Act and 30 C.F.R. ' 75.361

The law generally requires that a preshift examination be conducted prior to a shift entering the mine. *See* section 303(d)(1) of the Act, 30 U.S.C. ' 863(d)(1), and 30 C.F.R. ' 75.360(a). Buck Creek presented an argument that under sections 303(d)(2) & (m) of the Act and regulation section 75.361, a preshift examination is not required when persons enter an idle area of a mine that has not been preshifted, so long as a "certified person [has] examine[d] the area for hazardous conditions, determine[d] whether the air is traveling in its proper direction and at its normal volume, and [has] test[ed] for methane and oxygen deficiency." Section 75.361(a). The judge did not adequately consider Buck Creek's position in this connection. I believe that the judge erred in failing to consider whether, under sections 303(d)(2) & (m) of the Act and regulation section 75.361, a supplemental examination may be conducted in lieu of a preshift examination when anyone enters an idle area in which a preshift examination has not been conducted.

Buck Creek proffered unrebutted testimony that the area into which its maintenance crew descended to conduct repairs was an area of the mine that was idle and that had not been preshifted. Buck Creek further proffered unrebutted testimony that a "certified person . . . examine[d] the area for hazardous conditions, determine[d that] the air [was] traveling in its proper direction and at its normal volume, and [had] test[ed] for methane and oxygen deficiency." Section 75.361(a). Under these facts and circumstances, the judge erred by not fully addressing the issues presented, namely: (1) whether Buck Creek's interpretation of Mine Act sections 303(d)(2) & (m) and regulation section 75.361 is supported by the Act and its implementing regulations; (2) whether the area of the mine in question was in fact an idle area within the meaning of the Act and its implementing regulations; and (3) if issues (1) and (2) were answered in the affirmative, whether a supplemental examination may be conducted in lieu of a preshift examination under the circumstances presented. The judge did not address these issues. Rather,

the judge stated that "I do not decide what difference, if any, McDowell's self-serving, uncorroborated, hearsay testimony that the three men called into the mine before entering to determine if it was safe to go in . . . makes, since I do not credit that testimony." *See Buck Creek Coal Co., Inc.*, 16 FMSHRC 133, 140 at n. 7 (January 1994). In my view, inasmuch as Buck Creek presented unrebutted testimony that the area in question was idle and a "certified person . . . examine[d] the area for hazardous conditions, determine[d that] the air [was] traveling in its proper direction and at its normal volume, and [had] test[ed] for methane and oxygen deficiency[,]" it was incumbent upon the judge to decide the three issues set forth above. Section 75.361(a). Therefore, I would vacate the judge's decision and remand the case for further proceedings on those issues.

II.

Buck Creek Did Not Receive a Fair Hearing

In my view, Buck Creek did not receive a fair hearing. First, as noted above, the judge failed to consider Buck Creek's contention that it was not required by law to conduct a preshift examination under the facts and circumstances presented. The judge rejected Buck Creek's position in this connection out of hand.

Second, the judge accepted and considered new, highly prejudicial evidence that the Secretary of Labor improperly submitted in its post-hearing brief. The Secretary's new, highly prejudicial evidence in his post-hearing brief went to the issue of unwarrantability. The Secretary submitted evidence for the first time in his post-hearing brief to establish that Buck Creek's failure to conduct a preshift examination amounted to more than mere negligence. Again, in concluding that Buck Creek's failure to conduct a preshift examination was unwarrantable, the judge stated that it would be "astonishing to find *any* miner who was not aware of [the preshift examination requirement]." *See Buck Creek Coal Co., Inc.*, 16 FMSHRC at 140. (Emphasis in the original). Because of that view, the judge did not decide what difference, if any, Buck Creek's position that it was not required by law to conduct a preshift examination made, since he did not consider Buck Creek's position in this connection or find it persuasive on the issue of unwarrantability. *Id.* The judge incorrectly rejected out of hand Buck Creek's position that a preshift examination was not required by law under the facts and circumstances of this case, summarily concluding that Buck Creek's position was specious and insufficient to defeat a finding of unwarrantability.

While the judge, in his decision, did not refer to the evidence that the Secretary submitted in his post-hearing brief when he decided the issue of unwarrantability, it is clear to me, for several reasons, that Buck Creek was denied a fair hearing as a result of that submission. First, Buck Creek was not given an opportunity to cross examine the evidence submitted by the Secretary in his post-hearing brief. Second, the evidence submitted by the Secretary was inflammatory and prejudicial. In this connection, the evidence submitted by the Secretary suggested that Buck Creek's witness must have known about the Secretary's position on preshift examinations in idle areas of a mine based on the witness's participation in an investigation of an explosion in which

ten miners lost their lives. Because this inflammatory and prejudicial evidence was submitted by the Secretary in his post-hearing brief, Buck Creek was not afforded an opportunity to confront or cross-examine this evidence. In *Goldberg v. Kelly*, 397 U.S. 254 (1970), the United States Supreme Court stated that:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. . . . [T]his is important in the case of documentary evidence . . . . We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment . . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny."

Id. at 270 (*quoting Greene v. McElroy*, 360 U.S. 474, 496-497 (1959)). I place a higher value on the principles protected by the Sixth Amendment, namely confrontation and cross-examination, than I do on the ability of any one, including judges, to put out of mind highly prejudicial statements that they have heard or read. Experience has taught those of us who have tried hundreds of civil and criminal lawsuits before judges and juries to be skeptical when we hear those with no trial experience blindly state that a trier of fact was not prejudiced because he or she did not refer to the highly prejudicial statements they read or heard, in their opinion. I am unwilling to allow the inflammatory statements deliberately placed in the Secretary's post-hearing brief to be written off as easily as the majority so casually sets them aside. Buck Creek is entitled to the benefits of the Sixth Amendment. I would not trade their Sixth Amendment right on the chance that the judge in this case was not adversely affected by the deliberate insertion by the Secretary's counsel of highly inflammatory, prejudicial statements.

Accordingly, because the judge failed to consider Buck Creek's contention that it was not required by law to conduct a preshift examination under the facts and circumstances of this case and allowed new, prejudicial evidence to be introduced in the Secretary's post-hearing

brief, I would vacate the decision of the judge and remand this case to the Chief Administrative Law Judge for reassignment to another judge for a hearing *de novo*. As a result of the foregoing, I do not reach the other issues disposed of by my colleagues in this case.

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Marc Lincoln Marks, Commissioner