FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 19, 2007

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2004-212
v.	:	
SAN JUAN COAL COMPANY	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

DECISION

BY: Jordan and Young, Commissioners

This civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act" or "Act"), raises the issue of whether Administrative Law Judge T. Todd Hodgdon correctly concluded that a violation of 30 C.F.R. § 75.400[1] by San Juan Coal Company ("San Juan") did not result from its unwarrantable failure to comply with that standard.[2] 28 FMSHRC 35 (Jan. 2006) (ALJ). The Commission granted the Secretary of Labor's petition for discretionary review challenging the judge's conclusion. For the

[1] Section 75.400, entitled "Accumulation of combustible materials," provides:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.

30 C.F.R. § 75.400.

[2] 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.

reasons that follow, we vacate the judge's determination and remand for further analysis.

I.

Factual and Procedural Background

San Juan engages in longwall mining at its San Juan South Mine, an underground coal mine in Waterflow, New Mexico. 28 FMSHRC at 35. The mine liberates more than one million cubic feet of methane per day and is subject to a "spot inspection . . . every five working days at irregular intervals" under section 103(i) of the Mine Act, 30 U.S.C. § 813(i). *Id.* at 36 n.1.

The mine operates 24 hours a day, seven days a week, in three overlapping shifts. *Id.* at 35. The day shift operates from 7:00 a.m. to 5:00 p.m. *Id.* The afternoon, or "swing," shift operates from 4:00 p.m. to 2:00 a.m. *Id.* The "graveyard," or maintenance, shift operates from 10:00 p.m. to 8:00 a.m. *Id.* The day and afternoon shifts are considered production shifts, while maintenance is generally performed on the graveyard shift. *Id.*

At the 102 longwall panel, San Juan uses a double cutting drum shear, which cuts coal as it moves back and forth across the face on a conveyor system. *Id.* The coal falls onto a pan line below the shear and is transported out of the mine. *Id.* at 35-36. The roof is supported by 176 shields across the face. *Id.* at 36. As the shear cuts the coal, the shields automatically advance toward the face, providing support for the newly exposed roof. *Id.* at 36. Propmen clean accumulations from the shields either by using high pressure water from hoses installed every ten shields or by shoveling. Tr. 33-34.

On March 22, 2004, Donald Gibson, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), visited the mine to conduct a spot inspection. 28 FMSHRC at 36. At approximately 7:30 a.m., after reviewing the mine records and meeting with the operator's management, Inspector Gibson traveled underground with Monty Owens, San Juan's safety representative, and Steve Felkins, the miners' representative, to inspect the 102 longwall panel. *Id.*; Tr. 91.

When Inspector Gibson arrived at the face, he observed miners "pouring seals."[3] Tr. 94. In inspecting the longwall, Inspector Gibson observed that shields 130 through 176, a distance of approximately 230 feet, had accumulations of loose coal and coal dust on the jack legs, the toes of the shields, on the base of the shields and on the leminscates.[4] 28 FMSHRC at 36; Tr. 97. The depth of the accumulations measured between 1/8 inch and 10 inches. 28 FMSHRC at 36.

[3] When pouring seals, miners empty bags of "mix" into a hopper, which in turn sends the mix through a hose and into a pre-built form. Tr. 283. The resulting structure is a permanent-type stopping which miners referred to as an "isolation stopping seal." *Id.*

[4] A labeled representation of a typical shield (depicted in Jt. Ex. 1) follows this decision.

Owens informed Inspector Gibson that mining had ceased at the end of the afternoon shift, or at approximately 2:00 a.m. on March 22. Tr. 104-05. Since that time, the graveyard shift (10:00 p.m. to 8:00 a.m.), and later, the day shift (7:00 a.m. to 5:00 p.m.), had come on duty, and the coal accumulations had remained uncorrected for approximately six hours over two shifts. 28 FMSHRC at 38; Gov't Exs. 12, 13. Based on his observations, Inspector Gibson issued Citation No. 4768527, pursuant to section 104(d)(1) of the Act, alleging a significant and substantial ("S&S") violation of section 75.400 that was the result of San Juan's unwarrantable failure to comply with the standard.[5] 28 FMSHRC at 36-37.

San Juan challenged the citation, and the matter proceeded to hearing.

The judge affirmed the allegations in Citation No. 4768527 that San Juan violated section 75.400 and that the violation was S&S, but concluded that the violation was not unwarrantable. *Id.* at 37-42. The judge found that the cited loose coal and coal dust accumulations were extensive and obvious and that no attempts had been made to clean them for approximately six hours. *Id.* at 41. He concluded, however, that San Juan had not been placed on notice that it needed to take greater efforts to control accumulations on the shields because it had not previously been cited for a significant number of violations of section 75.400, particularly given evidence that section 75.400 was the most frequently cited standard industry-wide. *Id.* The judge further determined that the prior citations were even less relevant since none of the prior citations had involved accumulations on the shields. *Id.* In addition, he found that prior discussions between San Juan and MSHA did not provide sufficient notice because those discussions were general in nature and did not amount to "admonishments" that greater efforts at compliance were necessary. *Id.* at 41-42. The judge held that while the operator was "highly negligent," its negligence did not rise to the level of unwarrantable failure. *Id.* at 42. Accordingly, he modified Citation No. 4768527 from a section 104(d)(1) citation to a section 104(a) citation.[6] *Id.* at 46.

The Secretary filed a petition for discretionary review challenging the judge's unwarrantable failure determination. The Commission granted the Secretary's petition.

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[5] The inspector also issued a citation alleging a rock dusting violation and Order No. 4768528, alleging a violation of section 75.400. 28 FMSHRC at 36-37. That citation and the merits of that order are not the subject of this appeal.

[6] The judge also modified Order No. 4768528 from a section 104(d)(1) order to a section 104(d)(1) citation because the subject citation, Citation No. 4768527, was the predicate citation for that order. 28 FMSHRC at 45.

II.

Disposition

The Secretary argues that the judge's holding that San Juan's violation of section 75.400 was not unwarrantable is legally and factually erroneous. PDR at 9-15.[7] First, the Secretary maintains that the judge erred by discounting the operator's history of previous violations on the basis that section 75.400 was the most frequently cited regulation industry-wide. *Id.* at 11. Second, the Secretary asserts that the judge ignored Commission precedent by discounting the previous violations on the ground that none of the violations had involved accumulations on the shields. *Id.* Third, the Secretary contends that, contrary to the judge's discounting of prior violations, the operator had been cited on February 18, 2004 – approximately one month before the subject citation – for a violation of section 75.400 in the same area as the citation in question and that Inspector Gibson had previously informed the operator that it needed to watch clean-up in the shield area. *Id.* at 12-13. Fourth, the Secretary submits that the judge erred because he discounted the inspectors' previous discussions with the operator regarding accumulations because they were not admonishments that greater efforts at compliance were necessary. *Id*. at 13-14. Finally, the Secretary argues that the judge failed to give any weight to the degree of danger posed by the violative condition. *Id.* at 13. Accordingly, the Secretary requests that the Commission vacate the judge's unwarrantable failure determination and remand it for application of the correct legal test and consideration of all evidence. *Id.* at 15-16.

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 a number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure. *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001) ("*Consol*"). These include the extent of the violative condition, the length of time that it has existed, the operator's efforts at abating the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's knowledge of the existence of the violation, whether the violation is obvious, and whether the violation poses a high degree of danger. *Id.*

[7] Pursuant to Commission Procedural Rule 75(a), 29 C.F.R. § 2700.75(a), the Secretary designated her petition for discretionary review as her opening brief.

These unwarrantable failure factors must be examined in the context of all relevant facts and circumstances of each case to determine if an operator's conduct is aggravated, or whether an operator's negligence should be mitigated. *Id.* In considering the factors in this context, some may be relevant, while others may not be. *Id*. Nonetheless, 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. *See, e.g., Windsor Coal Co.*, 21 FMSHRC 997, 1001 (Sept. 1999).

We conclude that, contrary to Commission precedent, the judge erred both in the manner in which he considered the unwarrantable failure factors as a whole, and the manner in which he considered certain factors individually. Thus, we vacate the judge's unwarrantable failure determination and remand for further analysis and findings.

A. Whether the Judge's analysis of the unwarrantable failure factors is consistent with Commission precedent

In accordance with Commission precedent, the judge was required to consider all of the unwarrantable failure factors and make a determination regarding which were relevant, analyze relevant factors in the context of the facts and circumstances of this case, and weigh those factors, setting forth his findings. *Consol*, 23 FMSHRC at 593. Moreover, the judge may not rely on one relevant factor to the exclusion of others. *See Windsor*, 21 FMSHRC at 1001. Nevertheless, the judge's unwarrantable failure analysis relied almost entirely on whether the operator had been placed on notice that greater efforts were necessary for compliance, omitting entirely such other presumably relevant factors as the danger posed by the violation, the operator's knowledge of the existence of the violation, and the operator's efforts at abating the violative condition.

We reject the operator's argument that the Commission may consider only those factors that the Secretary explicitly argued in her post-hearing brief.[8] S.J. Br. at 17. As discussed more fully below, the parties adduced evidence at the hearing on each of the factors. To conclude that the judge was bound to consider only the factors that the Secretary explicitly discussed in her brief, even where the evidence clearly demonstrates the relevance of other factors, would impermissibly constrain the judge's responsibility to apply Commission precedent to the legal issue raised on the facts developed in the record. *See* 29 C.F.R. § 2700.69(a) ("The [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. . . ."). In addition, Commission precedent clearly requires the judge's consideration of all relevant factors. *Consol*, 23 FMSHRC at 593.

[8] While the Secretary's brief listed a number of factors identified by the Commission as relevant in determining whether a violation is unwarrantable, it did not specifically include whether the violation posed a high degree of danger or the operator's knowledge of the existence of the violation. *See* S. Post Hr'g Br. at 18-19, 24-29. San Juan, however, listed each of the factors identified by the Commission. S.J. Post Hr'g Br. at 28.

Thus, the identification and consideration of all relevant factors recognized by Commission caselaw as bearing upon unwarrantable failure is appropriate on review. Section 113(d)(2)(A)(iii) of the Mine Act provides in part that "[e]xcept for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass." 30 U.S.C. § 823(d)(2)(A)(iii). The Commission has recognized that a matter urged on review may have been raised implicitly below or is so intertwined with an element tried before the judge that it may properly be considered on appeal. *Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1320-21 (Aug. 1992); *see also BHP Copper, Inc.*, 21 FMSHRC 758, 762 (July 1999) ("While the points raised by the Secretary before the Commission are not identical to those raised before the judge, they are 'sufficiently related' . . . that the Commission can consider them.") (citation omitted). Here, those unwarrantable failure factors not specifically argued by the Secretary or analyzed by the judge were so intertwined with evidence relating to factors specifically addressed that they may be considered on appeal.[9] Indeed, citing the relevant Commission cases, the judge explicitly set forth all but one of the factors articulated in these precedents, noting that they were "determinative of whether a violation is unwarrantable." 28 FMSHRC at 40. Therefore, the judge had an opportunity to pass on these matters, and we may appropriately review them.

In any event, even if we were to review only those factors explicitly considered by the judge, the decision below simply does not allow us to trace the path that the judge followed to reach his conclusion that the operator's conduct did not constitute an unwarrantable failure. *See Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222 (June 1994) ("A judge must analyze and weigh the relevant testimony of record, make appropriate findings, and explain the reasons for his decision."). The judge erred by failing to explain how two factors that he found would support an unwarrantable failure finding – obviousness and extensiveness of the violative condition – weighed against the single factor of notice to the operator that greater compliance efforts were necessary. The decision does not explain why the factor involving notice to the operator should be accorded controlling weight in the analysis. The judge's failure to explain how he weighed the factors that he did consider is especially troublesome in this case, where the judge found that the operator's conduct was "highly negligent" (28 FMSHRC at 42) but did not explain why that conduct did not rise to the level of aggravated conduct, which includes "a serious lack of reasonable care" (*see Emery*, 9 FMSHRC at 2003 (citations omitted)). In summary, the judge erred by failing to explain how he weighed as a whole those factors that he did consider.

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[9] The judge failed to list "the operator's knowledge of the existence of the violation" as a factor relevant to an unwarrantable failure analysis (*see* 28 FMSHRC at 40), and the Secretary did not raise the error. Nonetheless, the operator's knowledge is essential to determining whether its conduct constitutes an unwarrantable failure because of its bearing on the degree of care exercised by the operator under all of the circumstances. In fact, a finding of unwarrantable failure may hinge on whether an operator was ignorant of, or indifferent to, a violative condition. Therefore, the issue was so intertwined with other unwarrantable failure factors tried and argued before the judge that we may reach the question on review. *Beech Fork*, 14 FMSHRC at 1321.

Finally, in addition to errors in the overall analytical approach, we conclude that the judge erred in how he considered some of the individual factors. We discuss certain factors below and explain in more detail how they were not properly weighed.

B. Whether the operator had been 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); *see also Consol*, 23 FMSHRC at 595 ("a high number of past violations of section 75.400 serve to put 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 accumulation problem." *Mid-Continent Res., Inc.*, 16 FMSHRC 1226, 1232 (June 1994); *see also Consol*, 23 FMSHRC at 595. The Commission has also recognized that "past discussions with MSHA about an accumulation problem serve to put an operator on heightened scrutiny that it must increase its efforts to comply with the standard." *Consol*, 23 FMSHRC at 595 (citations omitted).

Here, the judge erred in finding that the significance of the 47 citations that San Juan received from January 2001 to March 2004 was lessened in light of evidence that section 75.400 was the most frequently cited section of the regulations, industry-wide, in 2004. 28 FMSHRC at 41. Evidence that a standard is frequently cited within the industry as a whole is irrelevant to the determination of whether a particular operator has been placed on notice that there is a recurring safety problem at its particular mine.

The judge also erred in finding that San Juan's 47 past violations of section 75.400 "t[ook] on even less importance inasmuch as none of them were for accumulations on the shields." *Id.* 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 properly be considered when determining whether a violation is unwarrantable. *Peabody Coal Co.*, 14 FMSHRC 1258, 1263 (Aug. 1992); *Enlow Fork Mining Co.*, 19 FMSHRC 5, 11-12 (Jan. 1997). Indeed, the Commission has expressly stated that it has never limited consideration of past violations in such a manner. *Peabody*, 14 FMSHRC at 1263. Receiving a citation in the same area as that previously cited may make an operator aware of an accumulation problem that should be considered for unwarrantable failure purposes. However, even if a different area was cited, past violations may, nonetheless, provide an operator with sufficient awareness of an accumulation problem.[10]

[10] The record does not support the Secretary's assertion that in February 2004, the operator received a citation alleging a violation of section 75.400 that "dealt with the same area" as the subject citation. PDR at 12. As San Juan noted, the longwall was not cited in February

In addition, the record appears to show that the notice factor may be more of a neutral factor than a mitigating factor in this unwarrantable failure analysis. For instance, the parties stipulated that "San Juan management acknowledges several previous discussions with Inspector Gibson concerning the need to clean the shields of coal dust accumulations." 28 FMSHRC at 41; Tr. 59. In fact, Inspector Gibson testified that from February 2003 through March 2004, he had spoken with mine management about coal accumulations and the cleaning responsibilities under the Mine Act from ten to two dozen times. Tr. 108.

In any event, the judge further erred by failing to explain how his finding that San Juan had not been placed on notice that greater compliance efforts were necessary outweighed aggravating factors that appeared to support a finding of unwarrantable failure. Even if such discussions between MSHA and San Juan did not notify San Juan that it was required to increase its cleanup efforts, as the judge found, the judge did not explain how such evidence would constitute a mitigating factor and outweigh all other relevant aggravating factors. In other words, even if the operator had not been placed on notice that greater compliance efforts were necessary, evidence regarding other aggravating factors could nonetheless support an unwarrantable failure determination. On remand, we direct the judge to weigh the factor of the operator's notice that greater compliance efforts were necessary against other relevant factors and to set forth his findings and rationale.

C. Whether the violation poses a high degree of danger

The judge explicitly recognized that whether a violative condition "poses a high degree of danger" is one of the factors that is "determinative of whether a violation is unwarrantable." 28 FMSHRC at 40. Nonetheless, although the judge considered dangerousness in considering whether San Juan violated section 75.400 and whether that violation was S&S, the judge failed to relate any of those findings to his unwarrantable failure analysis.

In concluding that San Juan violated section 75.400, the judge explained that permitting the accumulations to exist was contrary to the standard's underlying purpose of reducing a fire or explosion hazard. *Id.* at 38. He reasoned that such accumulations could be the originating source of a fire or explosion or they could feed fires or explosions that originated elsewhere in the mine. *Id*. The judge further noted that "this danger exists as long as the accumulations exist," and that "the danger does not cease to exist when a production shift is followed by a maintenance shift or when the day shift is putting in an isolation stopping." *Id.*

In concluding that the violation was S&S, the judge found that the accumulations were extensive, covering an area of 230 feet in depths up to 10 inches, and that Inspector Gibson had testified that they were the "worst that [he had] seen" in his many inspections of the longwall and

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2004. S.J. Br. at 17. Rather, the February 2004 citation pertained to accumulations in the Nos. 2 and 3 return entries, which are areas that are the subject of Order No. 4768528, which is not at issue on review. Tr. 81-82; Gov't Ex. 11.

mine. *Id.* at 39; *see also* Tr. 104 (setting forth Inspector Gibson's testimony that "it was the worst that I'd seen, and I'd been at the mine many times and on the longwall many times"). It is undisputed that the accumulations were also comprised of float coal dust (Tr. 98, 132, 287), which Inspector Gibson testified can act as a secondary fuel in the propagation of an explosion. Tr. 107, 118. The inspector stated, "the coal dust again, it's not how much, it's how little is really needed to cause a dust explosion." Tr. 109. The judge further found that the accumulations were dry[11] and that the mine produced more than one million cubic feet of methane per day. 28 FMSHRC at 39. In addition, he stated that there were ignition sources for a fire or explosion at the face, such as the electrical equipment present, and sparks caused when the bits on the shear's drums struck rock or metal. *Id.* In fact, Inspector Gibson testified that he observed that the front metal plates on the shields, or "sprags," had marks indicating that the shear had contacted the shields, so that there could have been metal-on-metal contact in an area in which there were accumulations. Tr. 105-06. The judge rejected San Juan's argument that the Secretary had not established a reasonable likelihood of ignition since no coal was produced on the graveyard shift, finding that electrical equipment was activated during the graveyard shift in order to perform maintenance and such equipment could have been a source of ignition. 28 FMSHRC at 40.

Absent from the judge's decision is any rationale regarding the manner in which these findings related to his conclusion that the operator's accumulation violation was not unwarrantable. The judge erred by failing to make necessary findings and conclusions as to whether evidence of the danger posed by the violation demonstrated that San Juan's conduct was aggravated, and how this factor weighed against other factors in his analysis. On remand, we direct the judge to make findings and set forth his rationale regarding whether the danger posed by San Juan's violation supports an unwarrantable failure finding. *See, e.g., Kellys Creek Res., Inc.*, 19 FMSHRC 457, 463 (Mar. 1997) (holding that the judge erred by failing to take into account the high degree of danger posed by a violation in an unwarrantable failure analysis); *see also Windsor*, 21 FMSHRC at 1007 (remanding in part for examination of whether the violation posed a high degree of danger).

D. The operator's knowledge of the existence of the violation

The judge further erred by failing to consider and make findings regarding the operator's knowledge of the existence of the violation. The parties do not dispute the judge's findings that the cited accumulations were extensive and obvious. 28 FMSHRC at 41. Yet the operator appeared to ignore the condition. For example, the record reveals that information about the

[11] In arguing that its violative conduct was not unwarrantable, the operator states that the accumulations occurred during the mining of a compressed zone which resulted in a dry and brittle roof, and that more coal and debris than usual fell on the shields. S.J. Br. at 6, 11. We disagree that such conditions would mitigate the operator's conduct, particularly given the judge's finding that the dryness of the coal contributed to the danger posed by the violation. 28 FMSHRC at 39.

accumulations could have been relayed to an oncoming shift by a preshift report[12] or by oral communication. Tr. 308, 316. Preshift examinations were performed prior to the arrival of the oncoming graveyard shift on March 21 and during the day shift on March 22. Gov't Ex. 12, 15; Tr. 258-61. In fact, during the preshift examination of the face on March 22, the miner conducting the examination walked past shields 130 through 176 between 7:18 a.m. and 8:24 a.m. Tr. 284-85, 299-301. However, the accumulations were not noted in the preshift report for the graveyard shift of March 21/22 or for the day shift of March 22. Gov't Exs. 12, 15. In addition, information about the accumulations was not relayed orally by the outgoing graveyard shift longwall face boss or the miner who performed the preshift examination to the day shift's longwall face boss. Tr. 301, 308. The judge failed to examine this evidence and make findings regarding whether the operator had or reasonably should have had knowledge of the violative condition. *See Emery*, 9 FMSHRC at 2002-04; *Drummond Co., Inc.*, 13 FMSHRC 1362, 1368 (Sept. 1991), *quoting Eastern Assoc. Coal Corp*., 13 FMSHRC 178, 187 (Feb. 1991) ("*Emery* makes clear that unwarrantable failure may stem from what an operator 'had reason to know' or 'should have known.'").[13] Such findings are critical to the evaluation of the operator's subsequent efforts, or lack thereof, in abating the violative condition. We remand for the judge's determination of whether the operator had knowledge of the violative condition and whether that determination supports an unwarrantable failure determination.

E. The operator's efforts at abating the violative condition

As the judge recognized, an "operator's efforts in abating the violative condition" is one of the factors established by the Commission as "determinative of whether a violation is unwarrantable." 28 FMSHRC at 40. Where an operator has been placed on notice of an accumulation problem, the level of priority that the operator places on the abatement of the problem is relevant. *Enlow Fork*, 19 FMSHRC at 17. The focus on the operator's abatement efforts is on those efforts made prior to the issuance of a citation or order. *Id.* Thus, an operator's efforts in cleaning up accumulations before and during an inspection may support a finding that a violation of section 75.400 was not caused by unwarrantable failure. *Utah Power & Light Co.*, 11 FMSHRC 1926, 1934 (Oct. 1989). On the other hand, an operator's failure to clean up accumulations at the time of inspection, or its subordination of cleanup efforts to other

[12] The onshift examination reports from the afternoon shift of March 21/22 and graveyard shift of March 22 did not indicate the presence of hazardous conditions. Gov't Exs. 13 & 14. However, the afternoon shift's longwall face boss testified that if there are accumulations that need to be cleaned, they would not always be noted as a hazardous condition in an on-shift examination report. Tr. 253.

[13] The application of a constructive knowledge standard does not reduce to ordinary negligence the standard of care required to sustain a finding of unwarrantable failure. We simply acknowledge the facts that should have been available to the operator during review of the operator's actions. It is certainly appropriate to hold the operator in this case responsible for knowledge of conditions the judge found to be "extensive" and "obvious." 28 FMSHRC at 41.

work, may support an unwarrantable failure finding. *New Warwick Mining Co.*, 18 FMSHRC 1568, 1574 (Sept. 1996); *Enlow Fork*, 19 FMSHRC at 17; *Consol*, 23 FMSHRC at 596-97.

The record reveals that the accumulations were not removed between the conclusion of the afternoon shift and the time that they were cited at approximately 7:30 a.m. on March 22. The parties do not dispute the judge's finding that the accumulations existed for approximately six hours. 28 FMSHRC at 41. David Zabriskie, the longwall face boss for the afternoon shift on March 21/22, stated that miners on the afternoon shift shut down the longwall on the headgate side at approximately 1:10 a.m. on March 22, and that it was possible that they left the remaining cleanup of the accumulations for the next shift. Tr. 190, 209-10. Zabriskie stated that his crew then helped the graveyard shift work on pouring a seal in the headgate area. Tr. 228-29. It appears that when the day shift arrived, miners continued to pour seals, rather than to remove the accumulations. Tr. 94. J.P. LaBossiere, the longwall face boss for the day shift on March 22, testified that the day shift miners had to pour the headgate seal before they could start mining. Tr. 280, 282, 283.

In the violation portion of his decision, the judge noted San Juan's argument that it was normal for a production shift to pick up cleaning where the prior production shift left off, concluding that the argument might have had "merit if the subsequent production shift began when the previous production shift left off, but that is not the case here." 28 FMSHRC at 37-38. He found that the operator "made no attempt to clean the accumulations up within a reasonable time." *Id.* at 38. The judge explained that the graveyard shift had apparently made no attempt to clean up the accumulations, nor had the day shift by the time the inspector discovered them, even though the day shift began at 7:00 a.m. *Id.*

The operator submits that the delay in cleaning up the accumulations is explained by the fact that the shift between the afternoon shift and day shift – the graveyard shift – is generally concerned with other, non-production-related duties. S.J. Br. at 8-9 n.7. It states that the day shift on March 22 was the subsequent production shift, and thereby expected to continue cleaning the shields where the previous production shift, the afternoon shift, left off.[14] *Id.* at 12-13.

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[14] The dissent's reliance on the operator's clean-up plan is misplaced. Slip op. at 19. First, San Juan has not argued that the terms of its plan allowed it to wait until the next production shift to remove the accumulations. *See* S.J. Br. at 10; S.J. Post-Hr'g Br. at 7, 30 (noting that the clean-up plan requires that "[a]ll face equipment shall be kept reasonably clean of extraneous materials"). Furthermore, even if we were to consider its plan, the terms of the plan fail to establish that San Juan's conduct was not aggravated. Finally, San Juan has not alleged that it believed that waiting to clean up the accumulations based on its cleanup plan was the safest method of compliance with section 75.400. The Commission has held that "when an operator believed in good faith that the cited conduct was the *safest method* of compliance with applicable regulations, even if they are in error, such conduct does not amount to aggravated conduct exceeding ordinary negligence." *Utah Power & Light Co., Mining Div.*, 12 FMSHRC 965, 972 (May 1990) (emphasis added and omitted). However, such a belief by the operator

It is not clear whether the judge concluded that the graveyard shift should have cleaned the accumulations that had been left by the outgoing afternoon shift. Nor is the matter entirely clarified in reviewing the record. For instance, when questioned whether the day shift, rather than the graveyard shift, would be responsible for cleaning shields that had been left by the afternoon shift, the afternoon shift longwall face boss testified, "yeah, depending on what the maintenance [graveyard] shift had to do that night which I don't have any recollection of what they were doing that night. Depending on their duties that night." Tr. 209-10. Such testimony, although cited by the operator, would not appear to support its assertion that only production shifts were responsible for cleaning accumulations.

Although the judge found that the operator had not cleaned up the accumulations within a reasonable time, the judge failed to relate that finding to his unwarrantable failure analysis. The judge failed to make findings regarding which shift should have cleaned up the accumulations and whether the operator demonstrated aggravated conduct by giving priority to pouring seals rather than removing the accumulations. On remand, we direct the judge to make findings and set forth his rationale regarding whether the operator's actions in abating the violative condition supports an unwarrantable failure finding.

F. Negligence finding

Finally, as noted above (slip op. at 3, 6), the judge found that the operator's conduct, although "highly negligent," did not rise to the level of aggravated conduct. 28 FMSHRC at 42. The Commission has previously recognized that a finding of high negligence suggests an unwarrantable failure. *Eagle Energy Inc.*, 23 FMSHRC 829, 839 (Aug. 2001). The judge failed to adequately set forth his rationale for the reasons that San Juan's conduct could be characterized as highly negligent, but not unwarrantable. Accordingly, on remand, we direct the judge to provide an explanation for any negligence finding seemingly at odds with his unwarrantable failure determination.

G. Summary

We vacate the judge's determination that the violation of section 75.400 set forth in Citation No. 4768527 did not result from San Juan's unwarrantable failure to comply with the standard. We instruct the judge on remand to reconsider the evidence regarding whether the operator had been placed on notice that greater efforts at compliance were necessary, and to make findings regarding whether San Juan's violation of section 75.400 was unwarrantable based on, among other things, the danger posed by the violative condition, the operator's knowledge of the

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must be reasonable. *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1615 (Aug. 1994). Here, a belief by San Juan that waiting to clean up the accumulations was the safest method of compliance would not be reasonable. As the judge expressly found, the operator made no attempt to clean up the accumulations in a reasonable time, particularly since the dangers posed by the accumulations continued during non-production shifts. 28 FMSHRC at 38.

existence of the violation, and the operator's efforts at abating the violative condition. The judge is instructed to set forth his findings evaluating the individual factors and weighing the factors as a whole.

III.

Conclusion

For the reasons discussed above, we hereby vacate the judge's determination that San Juan's violation of section 75.400 was not caused by unwarrantable failure and remand for further analysis consistent with this decision. If the judge concludes that San Juan's violation of section 75.400 was caused by unwarrantable failure, he should reassess the penalty and modify Citation No. 4768527 from a section 104(a) citation to a section 104(d)(1) citation and modify Order No. 4768528 from a section 104(d)(1) citation to a section 104(d)(1) order.

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Chairman Duffy dissenting:

I do not join my colleagues in remanding this matter to the judge for further analysis because I do not find that the Secretary has proven that San Juan Coal Company ("San Juan") unwarrantably failed to comply with 30 C.F.R. §75.400. While I find some shortcomings in that portion of the judge's decision addressing the unwarrantable failure issue, I concur with him in result.

When determining whether a violation is caused by an operator's unwarrantable failure to comply with the Mine Act or a mandatory safety or health standard, the Commission's principal task is not to analyze the nature of the violation itself, but, rather, to weigh the operator's conduct in relation to that violation. Under longstanding Commission policy, we determine an unwarrantable failure to comply by whether an operator's conduct is so aggravated as to exhibit "reckless disregard," "intentional misconduct," "indifference" or "a serious lack of reasonable care." *Buck Creek Coal Co., Inc.*, 17 FMSHRC 8, 15 (Jan. 1995) (citations omitted).

To be sure, the Commission has identified a number of factors relating to the violation itself that are, as my colleagues note, "relevant" in determining whether an operator has unwarrantably failed to comply with a mandatory safety and health standard (slip op. at 4), and I will discuss those factors more fully below. Nevertheless, the gravamen of the unwarrantable failure charge is the relative degree of operator culpability in allowing the violation to arise and to persist. As the Commission stated in *Helen Mining Co*., "in resolving unwarrantable failure questions, the operator's total conduct 'in relation to a violation of the Act' must be examined. This examination includes the operator's conduct in causing the violation, remedying it, or both, depending upon the circumstances of the case." 10 FMSHRC 1672, 1676 n.4 (Dec. 1988) (citations omitted).

The seminal case, of course, for the Commission's jurisprudence regarding unwarrantable failure as that term applies to the degree of operator culpability is *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987). Although that decision has come to be cited routinely over the two decades during which it has held sway, like other leading precedents, it warrants an occasional and careful revisiting to make sure that its potency hasn't been diluted by rote invocation.

In *Emery* the Commission sought to determine where the term "unwarrantable failure" falls within the spectrum between negligent conduct, which is a consideration in the determination of civil penalties generally, and knowing or willful misconduct, which can result in severe civil or even criminal sanctions under the Act. *Id*. at 2000-04. The Commission began by noting that section 104(d) of the Act, which authorizes the use of the unwarrantable failure sanction, "is an integral part of the Act's enforcement scheme, a scheme which, as an incentive for operator compliance, provides for 'increasingly severe sanctions for increasingly serious violations or operator behavior.'" *Id*. at 2000 (citing *Cement Division, National Gypsum Co.,* 3 FMSHRC 822, 828 (Apr. 1981)). The Commission went on to cite the D.C. Circuit Court of Appeals' characterization of the unwarrantable failure sanction as "among the Secretary's most

powerful instruments for enforcing mine safety." *Id.* (quoting *UMWA v. FMSHRC*, 768 F.2d 1477, 1479 (D.C. Cir. 1985)).

Having established the Act's enforcement scheme as its context, the Commission went on to parse the plain meanings of "unwarrantable" and "failure," finding that the terms encompass the "neglect of an assigned, expected, or appropriate action" that is "not justifiable" or "inexcusable," and further finding that "[c]onduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention." 9 FMSHRC at 2001. On that basis the Commission reasoned that "the ordinary meaning of the phrase 'unwarrantable failure' suggests more than ordinary negligence," and then concluded that "construing 'unwarrantable failure' to mean aggravated conduct constituting more than ordinary negligence produces a result in harmony with the Mine Act's statutory enforcement scheme of providing increasingly severe sanctions for increasingly serious mine operator behavior." *Id*.[1]

Taking into consideration the Commission's well-established rationale for ascribing unwarrantable failure to conduct evincing a relatively high level of operator fault coupled with the requirement that we evaluate the operator's "total conduct" when determining whether the Secretary has properly applied section 104(d) of the Act, I must conclude that the judge was correct in finding that the violation of section 75.400 was not caused by San Juan's unwarrantable failure to comply with the standard. While I believe that the judge's decision might have been more expansive in some respects, I nevertheless find that he decided the case presented to him, not the case that could have or should have been presented to him, and to that extent, I agree with him in result. Moreover, I believe that appropriate and necessary consideration of certain mitigating evidence further argues against a finding of unwarrantable failure in the circumstances presented in this case.

As my colleagues correctly note, the Commission has identified a number of factors that are "relevant" in determining whether an operator has unwarrantably failed to comply with a mandatory safety or health standard, i.e., the extent of the violation, the length of time it has existed, the operator's efforts at abating the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's knowledge of the existence of the violation, and whether the violation poses a high degree of danger. Slip op. at 4 (citing *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001)).

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[1] My colleagues fault the judge for not determining whether San Juan "had or reasonably should have had knowledge of the violative condition," citing *Emery* and *Eastern Assoc. Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991), but indicate clearly that they are not suggesting that *Emery* contemplates that determining unwarrantable failure can be reduced to an ordinary negligence test. Slip op. at 10 & n.13. Nevertheless, while the Commission was correct in stating the obvious in *Eastern* that unwarrantable failure "may *stem* from what an operator 'had reason to know' or 'should have known,'" 13 FMSHRC at 187 (emphasis added), more is required to *establish* unwarrantable failure. Something more must rest atop that "stem" of actual or imputed knowledge, and that something is aggravated conduct.

In his decision, the judge correctly set forth these factors and went on to state that "some of [them] are present in this case." 28 FMSHRC at 41. That the judge did not address each and every one of the factors, however, is not reversible error, as my colleagues would seem to have it; rather, it is owing to the Secretary's failure to fully develop the case before the judge.

As we have stated before, "Commission precedent has established that the Secretary bears the burden of proving that an operator's conduct, as it relates to a violation, is unwarrantable." *Peabody Coal Co.*, 18 FMSHRC 494, 499 (Apr. 1996). Moreover, we have held that "a matter must have been presented below in such a manner as to obtain a ruling in order to be considered on review." *Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1320 (Aug. 1992).

In his post-hearing brief to the judge, counsel for the Secretary set forth only three bases for finding that San Juan's violation of §75.400 was owing to its unwarrantable failure to comply: (1) the extensiveness and duration of the accumulations; (2) the notice of a need for greater compliance; and (3) the open and obvious nature of the accumulations. S.'s Post-Hearing Br. at 24-29.[2]

The judge addressed all three bases in his decision and ultimately determined that the Secretary had not made the case for finding unwarrantable failure. My colleagues fault the judge for not addressing arguments not made by the Secretary below. Slip op. at 7- 13. It is not the judge's role to make the Secretary's case for her, and it is certainly not the Commission's role to make her case on review.

In that connection, I take strong exception to my colleagues' contention that the judge should have considered all of the unwarrantable failure factors enunciated in *Consol*, *supra*, and then determined which ones were relevant. He need only have considered those factors proffered by the Secretary and then determined their relevance in the context of the facts and circumstances of the case *presented*, not the case the Secretary could have or should have presented.

Moreover, while it is true that a "judge may not rely on one relevant factor to the exclusion of others," slip op. at 5, that is not the case here. The judge considered those specific factors pressed by the Secretary as bases for finding that San Juan unwarrantably failed to comply with section 75.400, but "taking everything into consideration" he correctly found them to be insufficient to support such a finding. 28 FMSHRC at 41. The judge did conclude that the accumulations were "extensive and obvious" and that they had existed unabated for six hours prior to the arrival of Inspector Gibson. *Id.* Thus, he did address two of the grounds of the Secretary's case, set forth above, and found in the Secretary's favor. As for the third ground on

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[2] The brief summarizes the Secretary's argument as follows: "Based upon the foregoing facts clearly establishing the extensiveness and duration of the violative conditions, that Respondent had been placed on notice that greater efforts were necessary for compliance and that the violative conditions were obvious, a determination of unwarrantable failure is appropriate." *Id*. at 29.

which the Secretary staked her case, that San Juan had been placed on notice that greater efforts at compliance were needed, the judge, correctly, in my view, found the evidence wanting.[3]

First, he found that the San Juan Mine's compliance history did not exhibit a significant number of section 75.400 violations. 28 FMSHRC at 41. Over more than a three-year period from January 2001 to March 2004, records showed that the company had been cited 47 times for violations of section 75.400. That translates to a bit more than one citation per month at a large continuously operating mine where inspectors are present almost every day and which is subject to at least one inspection every five working days due to its methane liberation.[4] Tr. 65-66, 78, 90-91. While I do not believe that the Commission should engage in a mechanistic numbers game when evaluating an operator's conduct vis a` vis unwarrantable failure, an examination of past cases cited by my colleagues would seem to indicate that a much poorer compliance history with section 75.400 has been necessary to support an unwarrantable finding.[5]

With respect to the issue of whether Inspector Gibson's discussions with San Juan representatives about the need to keep the shields clean constituted notice to the operator that greater compliance efforts were necessary, I find that the judge was eminently correct in finding that those discussions were general admonishments, not specific warnings that the mine was not meeting the requirements of section 75.400. 28 FMSHRC at 41-42. The lack of citations for accumulations on the shields bears that out. Inspector Gibson testified that from January of 2003

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[3] It is important to note that counsel for the Secretary in his opening statement indicated that the substance of the charge that San Juan had unwarrantably failed to comply with section 75.400 was "based primarily on the mine's management's notice of the requirements of the Act and a greater need for compliance with the Act." Tr. 8. It is hard to fault the judge for devoting more time to this issue when the Secretary's case hinges on it.

[4] I disagree with my colleagues' assertion that the frequency with which section 75.400 is cited industry-wide is irrelevant in the context of this case. Slip op. at 7. In assessing an operator's total conduct for purposes of evaluating its level of culpability, an industry-wide context may be highly relevant.

[5] A comparison between San Juan's compliance history with section 75.400 and that of other operators in cases cited by the majority is instructive: *Consol*, 23 FMSHRC at 595 ("MSHA warned Consol that its cleanup and rock dusting efforts at the mine were 'borderline to substandard' and needed to be improved. During the previous two years, the operator received 88 citations alleging violations of section 75.400."); *Enlow Fork Mining Co.*, 19 FMSHRC 5, 16 Jan. 1997) ("Enlow's violation history reveals approximately 60 citations for accumulations from December 8, 1991 through December 7, 1993."); *New Warwick Mining Co.*, 18 FMSHRC 1568, 1574 (Sept. 1996) ("The record indicates that, during the previous inspection period (April 1 to June 30, 1993), MSHA had found 16 violations of section 75.400 at Warwick. Moreover, twice during the two days preceding issuance of the instant order, Inspector Santee informed New Warwick that similar accumulations were not permitted.").

to March of 2004, the time of the citation, he had inspected the face of the San Juan mine two to three dozen times and had never issued a citation for accumulations on the shields. Tr. 134-35. Nor was he aware that any other inspector had done so during that period. Tr. 135.[6] Finally, the judge noted that San Juan had assigned two "propmen" to each longwall evincing the operator's heightened awareness of the need to keep the shields clean. 28 FMSHRC at 42. In sum, I believe the judge's analysis is sufficient to support his conclusion that the violation was not caused by San Juan's unwarrantable failure to comply with section 75.400.

Beyond the judge's findings, however, I find that there are additional mitigating factors that lead me to agree in result with the judge's decision on this issue. In *Windsor, supra,* the Commission stated, "in addressing the question of compliance efforts, we ask simply whether the operator's efforts to comply with safety standards and to correct conditions that could lead to violations were taken with sufficient care under the circumstances, even if ultimately unsuccessful in completely preventing a violative condition." 21 FMSHRC at 1005 n.9. With that in mind, I believe an evaluation of San Juan's "total conduct" in this case indicates that the operator was not indifferent to its compliance responsibilities under section 75.400. As the judge found, San Juan assigned two longwall workers to clean accumulations throughout each production shift. 28 FMSHRC at 42. One of the miners assigned, Tony Heaps, testified that cleanup of the shields occupied 75% of his time during a typical shift. Tr. 268. The condition of the roof at the time of the citation was unusual in that the coal was dry and brittle and tended to spill continually onto the shields — even apparently when the longwall was not necessarily in production. Tr. 288-89. On the morning of the inspection, 75% of the shields had been cleaned by the previous production shift. 28 FMSHRC at 41 n.5; Tr. 129.

[6] Inspector Gibson testified that he had discussed keeping the shields clean beginning with his first visit to the mine. 28 FMSHRC at 42. Since he had no personal experience to rely on at that time, his discussion with mine representatives at that point can hardly be considered a warning that San Juan was being placed on "heightened scrutiny that it must increase its efforts to comply with the standard." *Consol*, 23 FMSHRC at 595. Likewise, Inspector Gibson's testimony that the conditions he witnessed on March 22, 2004, were "the worst" he had seen during his many inspections of the longwall (Tr. 104) is perfectly understandable since he had never before cited San Juan for accumulations on the longwall. Tr. 134-35.

In addition, San Juan's protocol for addressing accumulations on the shields must be considered when assessing the operator's total conduct. San Juan's clean-up plan, which I must assume was known to MSHA, states in part:

> *When in use*, all face equipment, including electrical equipment, will be cleaned off *during each production shift*. De-energized equipment should be sprayed off with water and cleaned with the necessary tools to prevent oil and coal dust build up.

S.J. Ex. A at 2 (emphases added).

On this issue I part company with the judge (28 FMSHRC at 41) and conclude that the clean-up plan did not call for the removal of accumulations during the graveyard shift. That was the day shift's responsibility and that shift had only come on duty 30 minutes before Inspector Gibson arrived. Furthermore, abatement had not commenced within the first half-hour of the day shift because those miners had been deployed to finish the graveyard shift's task of constructing a seal, a priority assignment necessary to ensure the integrity of a ventilation system in a mine liberating more than one million cubic feet of methane per day. 28 FMSHRC at 39.[7] These factors mitigate against a finding of aggravated conduct, particularly since there is no reason to believe that San Juan would not have begun cleanup of the shields during the day shift pursuant to its cleanup plan.

Moreover, while my colleagues correctly assert that an operator's inadequate abatement efforts may support an unwarrantable failure finding (slip op. at 10-12), their reliance upon *Enlow Fork* for that proposition is problematic. In *Enlow Fork* the Commission declared that "the level of priority that the operator places on the abatement of the problem is a factor properly considered in the unwarrantable failure analysis," and cited *U.S. Steel Corp.*, 6 FMSHRC 1423, 1437 (June 1984), as authority with the following gloss: "unwarrantable failure may be proved by a showing that the violative condition was not corrected or remedied prior to issuance of a citation or order." 19 FMSHRC at 17. That, however, is not exactly what is stated in *U.S. Steel*. The Commission's actual holding is that "an unwarrantable failure to comply may be proved by a showing that the violative condition or practice was not corrected or remedied, prior to issuance of a citation or order, *because of indifference, willful intent, or a serious lack of reasonable care*." 6 FMSHRC at 1437 (emphasis added). In other words, the failure to abate factor is directly tied back to an operator's careless attitude toward compliance.[8]

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[7] The 'construction" of the seal in this case, which intrinsically served a safety and health purpose, is clearly distinguishable from "construction" associated with mine development and expansion. *See Consol*, 23 FMSHRC at 596-97.

[8] It would also seem axiomatic that if San Juan had cleaned up the accumulation in question prior to the arrival of Inspector Gibson, we would not even be considering a violation of section 75.400, let alone one alleging an unwarrantable failure to comply.

In sum, while the judge could have been more expansive in his analysis, I believe that an examination of the circumstances surrounding the violation in their totality supports his negative finding on the unwarrantable issue. San Juan's efforts to address accumulations on the shields do not bespeak aggravated conduct amounting to reckless disregard, intentional misconduct, indifference or a serious lack of reasonable care. Accordingly, I would affirm the judge in result.

Michael F. Duffy, Chairman

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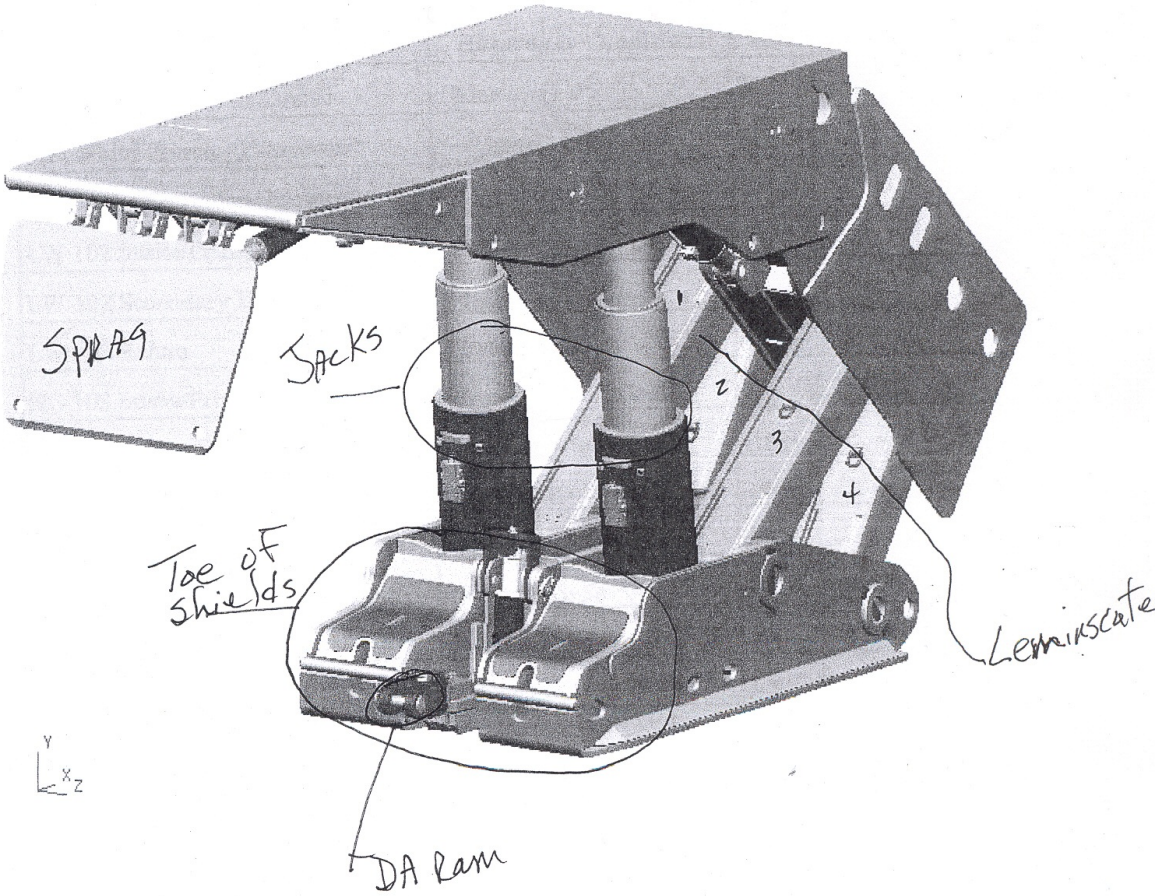
GENERAL SHIELD DRAWING



Joint EXHIBIT 1