

' 75.1101-23(a)² by Consolidation Coal Company (AConsol@) was not significant and substantial (AS&S@).³ 18 FMSHRC 1189 (July 1996) (ALJ). The Commission granted the Secretary's petition for discretionary review. For the reasons that follow, we vacate the judge's S&S determination, and remand for further consideration.

I.

Factual and Procedural Background

Consol engages in longwall mining at the Blacksville No. 2 Mine, an underground coal mine in Monongalia County, West Virginia. 18 FMSHRC at 1190, 1191. On March 15, 1993, there were two fire detection systems in the belt entry of the 16-M longwall section of the mine: a heat sensor system, and a carbon monoxide (ACO@) detector system. *Id.* at 1194. A CO sensor was installed at the belt drive, another at the regulator, and one every 1000 feet along the beltline toward the face, which was approximately 40 blocks⁴ from the mouth of the section. Tr. 30-31, 63-65, 350-52; Gov't Ex. 2. The CO monitoring system on the 16-M section was partially installed, in that a final sensor and an outstation had yet to be installed. 18 FMSHRC at 1195, 1208-09.

The 16-M beltline was ventilated by two splits of air. Tr. 966-68. One air current flowed outby from the longwall face, down the beltline until it entered the return at the regulator. Tr. 72-73, 967. The other air current flowed from the transfer point inby through a box check,⁵ over the belt drive, through a second box check, and into the regulator. Gov't Ex. 3; Tr. 72-73, 966-67. The 17-M longwall section was inby the 16-M section in terms of ventilation. 18 FMSHRC at 1216.

² Section 75.1101-23(a) provides in part:

Each operator of an underground coal mine shall adopt a program for the instruction of all miners in the location and use of fire fighting equipment, location of escapeways, exits, and routes of travel to the surface, and proper evacuation procedures to be followed in the event of an emergency.

30 C.F.R. ' 75.1101.23(a).

³ The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. ' 814(d)(1), which distinguishes as more serious any violation that Acould significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.@

⁴ One block is equivalent to approximately 90 to 100 feet. Tr. 176-77, 273.

⁵ A box check is a stopping containing doors and an opening for the belt, which restricts air flow. Tr. 36.

On March 15, 1993, Danny Ammons, a miner in charge of the 16-M belt transfer area, traveled to the belt tailpiece to take slack out of the belt. *Id.* at 1202. When he stepped through the first of two airlock doors located at the box check near the belt drive, he noticed smoke and haze around the belt. *Id.* at 1203. When he opened the second door, he observed more smoke and a sudden flare of flames. *Id.* Ammons called the tippie to report the fire. *Id.*

After receiving Ammons's call, the miner at the tippie reported the fire to Gary Kennedy, who was in charge of the 16-M headgate, and to Kenny Stewart, the mine's dispatcher. *Id.* at 1196, 1201-02. While Kennedy was speaking with the tippie man, the heat sensor alarm at the tailpiece activated, confirming the occurrence of the fire on the beltline. *Id.* at 1196. Kennedy turned off the alarm, disconnected the power at the longwall face, and telephoned Ronald Griffin, the shieldman on the section, and informed him that there was a fire on the belt drive and to assemble the crew members at the headgate. *Id.* at 1197, 1198-99.

Dispatcher Stewart activated flashing lights above the mine telephones in the 16-M and 17-M sections, and contacted Mine Superintendent John Straface, and Assistant Superintendent Samuel McLaughlin, among others, and informed them of the fire. *Id.* at 1190, 1202, 1223. Superintendent Straface ordered Robert Welch, a foreman who was coordinating with the dispatcher, to take charge of the situation. *Id.* at 1190, 1217, 1220. Welch told the dispatcher to turn on other emergency lights and to send a water car to the area. *Id.* at 1218. Assistant Superintendent McLaughlin traveled to the site of the fire. *Id.* at 1222-23.

At approximately the time that Ammons had discovered smoke and flames on the beltline, Tim Nester, the 16-M foreman, noticed the 16-M belt slowing and coming to a stop. *Id.* at 1204. About the time that the belt stopped, Nester observed smoke coming through the box check near the regulator, and down the return to the regulator. *Id.* He then saw Ammons, and the two traveled down the track entry and back to the box check near the belt drive. Tr. 313-15. Nester and Ammons put on self rescue devices and walked through the set of airlock doors in the box check. 18 FMSHRC at 1203, 1204. Nester and Ammons observed that one of the sprays of the fire suppression system was spraying water and that there were no flames.⁶ *Id.* Nester walked up the left side of the belt to the box check near the regulator, walked through the box check, looked up the belt, crossed the belt, walked through the door on the other side, and walked back to the

⁶ The exact duration of the fire is disputed. Ammons estimated that the fire lasted for approximately three minutes. Tr. 296; *see also* Tr. 690, 840-41 (Consol's witnesses' testimony regarding the brief duration of the fire). Inspector Shriver testified that the CO monitor print-out indicated that there had been enough CO to activate the alarm from 11 to 17 minutes. Tr. 375, 416-17. Consol's expert, Donald Mitchell, testified that the fire was of a short duration, lasting approximately three minutes, and explained that the high CO reading was a by-product of the wetness of the wood, belting and coal in the area of the fire, and the CO collecting at a point in the ceiling above the belt where the airflow was restricted and the CO sensor was located. Tr. 961-62, 981-88, 1017-1019.

belt drive. 18 FMSHRC at 1204; Tr. 316-17. Nester called Mine Superintendent Straface and told him that the fire was out and that everything was okay. 18 FMSHRC at 1204.

Meanwhile, after receiving Headgatemanager Kennedy's call, Shieldman Griffin, Shear Operator Harold Zupper, Jr., and Harold McClure, the shear operator's helper, left the face and met Kennedy at the headgate. *Id.* at 1197, 1199, 1201. Kennedy and the crew members discussed the route they would take to evacuate. *Id.* at 1197. Kennedy noticed that Gerald Freeland, the 16-M longwall coordinator, was missing, and Kennedy left to go find him. *Id.* at 1197, 1199; Tr. 162. During this time, Foreman Welch spoke with the crew members by telephone, instructing them to gather together. 18 FMSHRC at 1199, 1230. Zupper telephoned Welch to inform him of the route that they would be taking to evacuate. *Id.* at 1199, 1200; Tr. 221-22. Welch informed him that the fire was out, and that the crew should stay together on the section. 18 FMSHRC at 1199-1201, 1219. The crew remained on the 16-M section and did not evacuate the mine. *Id.* at 1199, 1200. In addition, miners were not evacuated from the 17-M section of the mine. *Id.* at 1230.

On March 17, miner representatives informed Spencer Shriver, an inspector with the Department of Labor's Mine Safety and Health Administration (MSHA), of the circumstances surrounding the fire. *Id.* at 1206. Inspector Shriver relayed the information to Richard McDorman, an MSHA inspector who regularly inspected the mine. *Id.* at 1210. Inspectors Shriver and McDorman investigated the incident. *Id.* As a result of the investigation, the inspectors issued four orders, including the order alleging an S&S and unwarrantable violation of section 75.1101-23(a) for Consol's failure to evacuate miners from the 16-M and 17-M sections of the mine after the beltline fire. *Id.* at 1190. In addition, a special investigation of the fire resulted in the issuance of orders under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), to Foreman Welch, Superintendent Straface, and Assistant Superintendent McLaughlin for their conduct related to the alleged violation of section 75.1101-23(a). *Id.* at 1190-91.

Consol, Welch, Straface, and McLaughlin challenged the orders and the matter proceeded to hearing before Judge Barbour. *Id.* at 1191. At the hearing, the parties settled three of the four orders issued to Consol, leaving at issue only the order alleging a violation of section 75.1101-23(a). *Id.* at 1244-45. In addition, the Secretary moved to dismiss the section 110(c) allegations against McLaughlin, and the judge granted the motion. *Id.* at 1238-39.

As to the remaining orders, the judge concluded that Consol had violated section 75.1101-23(a), that the violation was not S&S, although it was caused by Consol's unwarrantable failure, and that Welch and Straface were individually liable for the violation. *Id.* at 1229-37, 1239-44. The judge based his S&S determination on his finding that the Secretary had failed to prove that there was a reasonable likelihood that the three hazards contributed to by the violation, that is, fire intensification, fire rekindling, and suffocation by smoke and fumes, would result in injury. *Id.* at 1233-34. The judge first reasoned that it was not reasonably likely that the fire at the belt drive would intensify if normal mining conditions had continued because the fire was either out when the miners on the 16-M and 17-M sections had not been withdrawn or was extinguished shortly thereafter. *Id.* at 1233. Second, he explained that, even if the fire had rekindled up the belt, it

was not reasonably likely that the fire would result in injury because there were heat sensors and CO monitors along that belt that would have detected the presence of another fire, and made its rapid extinguishment likely. *Id.* Finally, the judge concluded that, given the mine's ventilation system, it was not reasonably likely that the smoke and fumes would have gone to the face, suffocating miners. *Id.* at 1233-34. Although he concluded that the violation was not S&S, the judge determined that it was very serious and assessed a civil penalty of \$4,000, rather than the penalty of \$5,000 proposed by the Secretary. *Id.* at 1238.

The Secretary filed a petition for discretionary review, challenging the judge's S&S determination, which the Commission granted.

II.

Disposition

The Secretary argues that the judge erred in finding that Consol's violation of section 75.1101-23(a) was not S&S. First, she contends that the judge failed to apply the correct legal standard for determining whether a violation is S&S.⁷ S. Br. at 9-13. Specifically, the Secretary asserts that the judge erred in relying upon his finding that the fire was extinguished quickly, and that the correct question was not whether the fire was in fact extinguished quickly but, whether in all of the circumstances, it was reasonably likely that it would be extinguished quickly. *Id.* at 11-13. Second, the Secretary argues that the judge erred by failing to address or inadequately addressing material evidence that established the violation as S&S, and erred by relying upon evidence relating to the fire detection, fire suppression, and ventilation systems which the court in *Buck Creek Coal Co. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995), determined was improper for consideration. *Id.* at 13-19. The Secretary requests that the Commission vacate the judge's S&S determination and remand for analysis of all relevant evidence under the correct standard. *Id.* at 19.

Consol responds that the judge correctly determined that the violation was not S&S. C. Br. at 10. It argues that the judge was correct in considering the rapid extinguishment of the fire because the failure to evacuate after a brief fire did not pose the hazards associated with active fires of greater duration and intensity. *Id.* at 13-14. In addition, Consol contends that the judge addressed all material evidence and that the Secretary is, in effect, requesting that the Commission reweigh the evidence. *Id.* at 9, 20, 24. It asserts that *Buck Creek* is distinguishable from the present case and that the judge did not err in considering the existence of the safety measures in place. *Id.* at 15-16. Accordingly, Consol requests that the Commission affirm the judge's S&S determination. *Id.* at 24-25.

In assessing the reasonable likelihood of injury to miners who had not been evacuated from the mine, the judge considered, among other things, the risk of harm posed by the potential

⁷ In her petition for discretionary review, the Secretary argues that when a violation causes conditions which have the potential for resulting in catastrophic results for miners, the Secretary's burden for establishing the likelihood of injury should be substantially less. PDR at 10. The Secretary did not address this argument in her brief. Accordingly, because the Secretary abandoned the argument, we need not reach it. *RNS Servs., Inc.*, 18 FMSHRC 523, 526 n.6 (Apr. 1996).

of the extinguished fire to rekindle a new fire along the belt line. The judge concluded that there was no risk of injury because, even if burning embers from the original fire had rekindled a fire further up the belt line, the heat sensors and CO monitors along that belt would have detected the presence of another fire and made its rapid extinguishment likely. 18 FMSHRC at 1233.

Assuming arguendo that a judge may properly consider a mine's fire detection and fire suppression system as factors mitigating the hazards associated with a mine fire, the judge erred when he relied on the systems here to discount the likelihood of harm from a rekindling fire. In reaching his conclusion the judge ignored evidence that the heat sensor system, which activates the fire suppression system and had been damaged during the fire, had been turned off after the fire and had not been turned on until the midnight shift on March 16. Tr. 68, 378-79, 507, 1010-12. In addition, the judge failed to address testimony that the CO sensor at the regulator had been placed at an incorrect location so that it would have failed to detect any fire between the belt drive area and the regulator in by the belt drive area. Tr. 354, 356, 378, 434-35, 483. The judge also failed to address evidence that there had been a programming error with the CO sensor located at the belt drive so that there may have been no CO monitoring at the belt drive between March 15 and March 23. Tr. 379-81, 387, 424-26, 432-33.

In light of this evidence, it was unreasonable for the judge to conclude that the presence of these systems eliminated the risk of harm from a fire that might rekindle up the belt line. We therefore vacate the judge's S&S determination and remand for the judge to reconsider whether there was a reasonable likelihood that the hazard of rekindling a fire would result in injury.

On remand, the judge shall set forth his findings on the likelihood of rekindling occurring out by the belt drive, where the belt had been damaged (Tr. 297, 746-47, 868-69) and the direction in which the belt had been moving (Tr. 59-61; Gov't Ex. 3, 5; 18 FMSHRC at 1193). In addition, the judge shall not consider evidence of Consol's fire detection and fire suppression systems as factors mitigating the hazard.⁸

⁸ In light of our disposition of this issue, we do not address the Secretary's argument that the court's decision in *Buck Creek*, 52 F.3d at 135, precludes a judge from ever considering evidence of a mine's fire detection, fire suppression, and ventilation systems in making an S&S determination. S. Br. at 17-19. Furthermore, as there was not a majority of Commissioners who either agreed or disagreed with any of the other points of error raised by the Secretary in this appeal, with one minor exception, we do not address them. As to that exception, we conclude that the judge did not err in failing to rely upon evidence of fires at other mines.

III.

Conclusion

For the foregoing reasons, we vacate the judge's determination that Consol's violation of section 75.1101-23(a) was not S&S and remand for further consideration consistent with this decision.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Commissioner Verheggen, dissenting:

I disagree with the result my colleagues reach. Rather than order a remand as they do, I would affirm as supported by substantial evidence the judge's determination that Consol's violation of section 75.1101-23(a) was not S&S. I therefore dissent.

1. Rapid extinguishment of the fire

I disagree with the Secretary's argument that the judge erred in relying upon his finding that the fire was extinguished quickly in making his S&S determination. *See* S. Br. at 11-13; PDR at 12. In *Lion Mining*, the Commission held that an S&S determination must be based on the particular facts surrounding the violation.@ 18 FMSHRC 695, 699 (May 1996). Here, the violation at issue was the failure to evacuate miners in accordance with the mine's evacuation plan after the belt entry fire had ignited and been extinguished. Rapid extinguishment of the fire was one of the particular facts surrounding the violation that had an important bearing on the likelihood that injury was reasonably likely to result to miners remaining in the mine.

2. Fire detection, fire suppression, and ventilation systems

Citing the *Buck Creek* decision of the Seventh Circuit (52 F.3d at 135), and Commission cases following it, the Secretary argues that the judge erred in relying upon the presence of fire detection, fire suppression, and ventilation systems as support for his conclusion that the violation was not S&S. S. Br. at 13-19. I find *Buck Creek* and its progeny distinguishable, however, because those decisions involved accumulations where the focus is on whether a confluence of factors exists to create an ignition or explosion in the first instance. *See Buck Creek*, 52 F.3d at 134; *Amax Coal Co.*, 18 FMSHRC 1355, 1359 n.8 (Aug. 1996); *Amax Coal Co.*, 19 FMSHRC 846, 849-50 (May 1997). The focus here, however, where an evacuation violation is at issue, is on the reasonable likelihood of injury to miners who had not been evacuated from the mine after an ignition had occurred and been extinguished. The mine's fire detection, fire suppression, and ventilation systems are clearly relevant to such a determination because they could affect whether a secondary fire would be of a limited nature and readily contained, and whether smoke and fumes would migrate to miners remaining in the mine.

3. Consideration of material evidence

The Secretary also argues that the judge erred by failing to address or by inadequately addressing material evidence that she asserts proved that the violation was S&S. S. Br. at 13-17. Specifically, she points to evidence relating to fires at other mines where miners had not been evacuated, and the hazards of fire intensification, suffocation from smoke and fumes, and fire rekindling. *Id.* I begin by noting that A[i]t would be inappropriate for the Commission to reweigh the evidence in [any] case or to enter de novo findings based on an independent evaluation of the record.@ *Island Creek Coal Co.*, 15 FMSHRC 339, 347 (Mar. 1993). When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the

Mine Act to apply the substantial evidence test. 30 U.S.C. ' 823(d)(2)(A)(ii)(I). ASubstantial evidence@means A>such relevant evidence as a reasonable mind might accept as adequate to support [the judge=s] conclusion.=@ *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989). In this case, I find that, in general, the judge properly weighed the evidence, and that, more importantly, his S&S determination is amply supported by the record.

I agree with my colleagues Athat the judge did not err in failing to rely upon evidence of fires at other mines.@ Slip op. at 6 n.8. Contrary to the Secretary=s assertions, the judge considered evidence regarding fires at other mines where miners had not been evacuated. *See* 18 FMSHRC at 1196, 1210-11. Nor did he err in declining to give this evidence any weight when making his S&S determination because the Secretary failed to demonstrate the similarity in circumstances between those fires and the fire here. For instance, MSHA Inspector Raymond Strahin testified that during the fire at the Marianna Mine, the fire suppression devices were not operational and the fire burned out of control. Tr. 50-51, 89-90. In contrast, here there can be no dispute that the fire never approached being out of control. *See* Tr. 981-82 (testimony of Donald Mitchell, Consol=s expert, that here, Athere was hardly any fire,@and what fire there was was of short duration and low intensity). The fire at the Blacksville One mine also differed markedly from the fire at issue here. The Blacksville One fire ignited in a track entry, rather than a belt entry, which would have affected the manner in which smoke migrated to areas where miners remained. Tr. 53-55, 95; *see* C. Br. at 19 n.6.

I also find that the judge did not err by failing to address the Secretary=s evidence regarding the possibility of the fire intensifying. Such evidence regarding the potential nature of the fire was irrelevant to the judge=s determination in view of his finding that A[t]he fire either was out when the miners on the 16-M and 17-M [sections] were not withdrawn or was extinguished shortly thereafter.@ 18 FMSHRC at 1233. Nor do I find in error the manner in which the judge addressed evidence regarding the effect of the mine=s ventilation on the smoke and fumes resulting from the fire. Contrary to the Secretary=s assertions, the judge made direct reference to MSHA Supervisory Engineer Harry Verakis= testimony that smoke and gases could have leaked into adjacent entries. *Id.* at 1212-13. The judge specifically discredited such testimony, however, and credited the testimony of Inspector McDorman and Consol=s expert, Donald Mitchell, that the ventilation system would have carried smoke and toxic fumes away from the section and out the return. *Id.* at 1234. In addition, although the judge did not directly refer to MSHA Supervisory Engineer Verakis= testimony that, given the velocity of air at the belt transfer point, the fire in this case had the potential to reverse airflow, allowing smoke to roll back against the flow of ventilation (S. Br. at 15), the judge indirectly referred to such testimony and rejected it in view of Mitchell=s contrary testimony that smoke would not have reversed and moved from the belt entry to the face barring a fire of major intensity lasting up to 10 hours. 18 FMSHRC at 1234; Tr. 971-73. The Secretary has provided no basis for overturning the judge=s credibility determination. *See Metric Constructors, Inc.*, 6 FMSHRC 226, 232 (Feb. 1984) (when judge=s finding rests on credibility determination, Commission will not substitute its judgment for that of judge absent clear indication of error), *aff=d*, 766 F.2d 469 (11th Cir. 1985).

My colleagues direct the judge to reconsider whether there was a reasonable likelihood that the hazard of rekindling a fire would result in injury, and to make findings on the likelihood of rekindling occurring out by the belt drive. Slip op. at 6. I have reviewed the record, however, and find that the Secretary failed to establish either that the fire rekindled or that there was any likelihood of the fire rekindling. She did not, for instance, establish the existence of any combination of combustible materials and incendiary materials left from the fire (i.e., an ignition source). Indeed, there is no evidence in the record that any incendiary materials were present in the general vicinity of where the fire occurred after it had been extinguished. Moreover, the belt shut down soon after the fire started (18 FMSHRC at 1204; Tr. 138, 272), and there is no evidence that any incendiary materials were transported out by the area of the fire before the belt stopped.

Even had the fire rekindled, I find no evidence in the record that any persons were outside the area where firefighting took place who could have been endangered. In light of the judge's findings with respect to the mine's ventilation, only persons in entries ventilated with return air out by the area of the fire would have been endangered by rekindling, yet the Secretary introduced no evidence that any miners were in such areas.

I agree with my colleagues that the judge erred by basing his finding regarding rekindling solely on the presence of heat sensors and CO monitors. See 18 FMSHRC at 1233; slip op. at 6. This finding is clearly erroneous since the record indicates that neither the heat sensor system nor any CO monitors would have detected rekindling.¹ Slip op. at 6. I find the judge's error harmless, however, in light of the Secretary's failure to adduce any evidence, as noted above, that rekindling could have occurred in the first instance.

Accordingly, I would affirm the judge's finding that Consol's violation of the cited standard was not S&S, and thus dissent from my colleagues' remand order.

¹ The record is unclear, however, as to whether the mine's fire suppression system was also inoperable after the initial fire. See Tr. 1011 (describing the mine's sprinkler system as controlled by a type of sensor that is not too unlike a thermo-tech sensor except it is a far more rapid responding device); Tr. 280 (Ammon's testimony that he replaced fire sensors on sprinklers after the fire); Tr. 400, 408 (the sprinkler system was fully operational two days after the fire).

Theodore F. Verheggen, Commissioner

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