

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

March 30, 1998

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. WEVA 94-377
	:	WEVA 94-379
CONSOLIDATION COAL COMPANY,	:	WEVA 94-380
ROBERT G. WYATT, and	:	
DANNY E. CRUTCHFIELD	:	

BEFORE: Jordan, Chairman; Marks, Riley and Verheggen, Commissioners¹

DECISION

BY: Jordan, Chairman; Riley and Verheggen, Commissioners

¹ Commissioner Beatty recused himself in this matter and took no part in its consideration.

In these consolidated civil penalty proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994) (AMine Act@), the Secretary of Labor has sought review of Administrative Law Judge George Koutras=decision in which he found that Consolidation Coal Company (AConsol@) did not violate 30 C.F.R. ' ' 75.334(b)(1)² and 75.364(a)(2) and that Consol employees Robert Wyatt and Danny Crutchfield were not individually liable under section 110(c) of the Mine Act for knowing violations of section 75.334(b)(1). 17 FMSHRC 1982 (November 1995) (ALJ). The Commission granted the Secretary=s petition for discretionary review. For the reasons that follow, the Secretary=s request for remand of the judge=s section 75.364(a)(2)³ determination is denied and the judge=s conclusion that the Secretary failed to establish a violation of section 75.334(b)(1) stands as if affirmed.

I.

² Section 75.334(b)(1) provides:

During pillar recovery a bleeder system shall be used to control the air passing through the area and to continuously dilute and move methane-air mixtures and other gases, dusts, and fumes from the worked-out area away from active workings and into a return air course or to the surface of the mine.

³ Section 75.364(a)(2) provides:

At least every 7 days, a certified person shall evaluate the effectiveness of bleeder systems required by ' 75.334 as follows:

- (i) Measurements of methane and oxygen concentrations and air quantity and a test to determine if the air is moving in its proper direction shall be made where air enters the worked-out area.
- (ii) Measurements of methane and oxygen concentrations and air quantity and a test to determine if the air is moving in the proper direction shall be made immediately before the air enters a return split of air.
- (iii) At least one entry of each set of bleeder entries used as part of a bleeder system under ' 75.334 shall be traveled in its entirety. Measurements of methane and oxygen concentrations and air quantities and a test to determine if the air is moving in the proper direction shall be made at the measurement point locations specified in the mine ventilation plan to determine the effectiveness of the bleeder system.
- (iv) In lieu of the requirements of paragraphs (a)(2)(i) and (iii) of this section, an alternative method of evaluation may be specified in the ventilation plan provided the alternative method results in proper evaluation of the effectiveness of the bleeder system.

Factual and Procedural Background

On December 29, 1992, a methane ignition or explosion⁴ occurred during retreat mining on the back part of the 2-1/2 section of Consol's Amonate No. 31 Mine, an underground coal mine in McDowell County, West Virginia. 17 FMSHRC at 1986; Gov't Ex. 1. Five miners suffered serious burns as a result of the accident and had not yet returned to work as of the time of the June, 1995, hearing below. 17 FMSHRC at 1986.

⁴ The Secretary contended below that the incident was an explosion, while Consol argued that it was an ignition. 17 FMSHRC at 1986. The judge did not make a finding on the issue, and it is not determinative of any issue on appeal.

A. Events Leading to the Accident

Following a period of inactivity, Consol resumed mining of the 2-1/2 section in 1992 after approval by the Department of Labor's Mine Safety and Health Administration (MSHA) of a supplement to Consol's ventilation plan for the mine. *Id.* at 1993. The supplement, approved by MSHA on April 21, 1992 (the April supplement), showed how Consol intended to ventilate the back part of the 2-1/2 section, first as it drove five entries using advance mining to the absolute back of the section, and then as it went back over the same area pulling pillars during retreat mining (pillaring). 17 FMSHRC at 1993; Tr. VI 64; Gov't Ex. 40.

Before mining towards the back of the 2-1/2 section progressed very far, Consol submitted another ventilation plan supplement for the section, which was approved by MSHA on September 30, 1992 (the September supplement). Tr. VI 65-73; Gov't Ex. 42. The September supplement showed how Consol intended to ventilate the left side of the section during advance and retreat mining. 17 FMSHRC at 1996-98, 2022.

With approval of the September supplement, Consol changed directions and began to mine the left side of the 2-1/2 section. *Id.* at 2022. Before it began retreat mining on that side, and consistent with the September supplement, Consol installed two regulators on the left side (the left side regulators). *Id.*⁵ Those regulators were part of the bleeder system for the 2-1/2 section,⁶ serving as the points by which air leaving the gob created by the retreat mining on the left side of the section was routed to a return aircourse.

⁵ A regulator is [a] ventilating device, such as an opening in a wall or door; [it is] usually placed at the return of a split of air to govern the amount of air entering that portion of a mine. American Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 451 (2d ed. 1997) (ADMMRT).

⁶ While the *DMMRT* does not include a definition of a bleeder system, it states that bleeder entries are [w]idely used for draining methane in coal mines . . . where the room-and-pillar method is employed, and defines them as panel entries driven on a perimeter of a block of coal being mined and maintained as exhaust airways to remove methane promptly from the working faces to prevent buildup of high concentrations either at the face or in the main intake

Upon completion of retreat mining on the left side, Consol resumed advance mining on the back part of the 2-1/2 section. *Id.* at 1999. Beyond the back of the 2-1/2 section was a worked-out area of the mine which already was being used as part of the return air course, connected by the left side regulators to the 2-1/2 section. *Id.* at 1994. After Consol had driven one of the back entries to within about 10 feet of that return aircourse, mine superintendent Robert Wyatt ordered a series of holes drilled through the remaining barrier of coal separating the back of the 2-1/2 section from the return aircourse. *Id.* at 1986-87, 1999, 2027-28. The holes, drilled at the location specified in the April supplement (*see* Gov't Ex. 40), constituted the back regulator or drilled hole regulator. Consol originally had intended to construct a regulator, consistent with the normal practice, out of cinder block or other material. *Id.* at 1993-94, 1998-99. The alternate method utilized to install the back regulator was not, standing alone, deemed by the Secretary to be violative of the ventilation plan.

Assistant mine superintendent Mark Hrovatic supervised the drilling. *Id.* at 1998-99. Consol planned to drill approximately 25 holes, each 1-1/2 inches in diameter, in the hope that a total of at least 10,000 cubic feet of air per minute (cfm) would flow through the holes. *Id.* at 1999, 2027. After 20 holes had been drilled to a diameter of 1-1/2 inches each, Hrovatic used an anemometer that, by his calculations, showed approximately 6,000 cfm of air exiting the holes. *Id.* at 1999. Wyatt and Hrovatic then decided that the drilled holes would be expanded to a diameter of 3 inches to ensure that more than 10,000 cfm of air would pass through the holes. *Id.*

After only five holes had been expanded, Hrovatic took another measurement with his anemometer which he interpreted as showing that total airflow through the holes had increased to between 6,000 and 7,000 cfm. *Id.* Believing that the goal of more than 10,000 cfm would be accomplished by expanding all of the holes to 3 inches, Hrovatic instructed the evening shift crew to do so. *Id.* at 1999-2000. The next night he was told that his instructions had been carried out. Tr. III 82-83. By the time Hrovatic next visited the section, however, pillaring had commenced and the area between the pillar line and the holes was gob. Tr. III 83. Consequently, Hrovatic could get to within no closer than 150 feet of the area where the holes had been drilled, too far away for him to see them or measure the amount of air flowing through them. Tr. III 83-85. Hrovatic learned the evening after the accident that the holes had never been enlarged as he had instructed. 17 FMSHRC at 2000.

Airflow through the back regulator could not be measured from the return side because Consol used that worked-out area as part of the return air course and it was not generally accessible. *Id.* at 1999, 2020. As a result, and in order to comply with the bleeder system effectiveness evaluation requirements of section 75.364(a)(2), as part of the April supplement approval process Consol requested and received permission from MSHA to calculate airflow through the drilled holes by a cross-sectional method. *Id.* at 1995-96. Under the cross-

airways. *DMMRT* at 55.

sectional method, instead of traveling to and taking air quantity measurements at the back regulator, Consol would determine the amount of air exiting through the back regulator by deducting from the amount of air entering the gob the amount of air that was exiting the 2-1/2 section at other points. *Id.* at 1995. A handwritten notation on the April supplement provided that Upon retreat mining the bleeder system will be evaluated by the difference in the intake and return readings on the section. Gov't Ex. 40. In addition, methane measurements were taken not as the air was exiting through the back regulator, but on a daily basis at Bleeder Evaluation Point (ABEP) 10, where the air had already mixed with air from other parts of the mine. 17 FMSHRC at 1997, 2025-27, 2061.

Retreat mining on the back part of the 2-1/2 section began sometime in the two weeks preceding the accident, resulting in an area of gob extending approximately 2-1/2 acres. *Id.* at 1989, 2017; Tr. IV 216. On the morning of the accident, mining of the pillar between the Nos. 3 and 4 entries was taking place in and around the No. 4 entry when the remote control continuous miner shut down or gasged-off several times. 17 FMSHRC at 1986, 1989; Resp. Ex. 25. The first gas-offs were thought by the miners to be due to a malfunctioning methane monitor on the continuous miner. 17 FMSHRC at 1989, 1991. Upon the final gas-off, however, Bill Bandy, the section shift foreman, was alerted, as it was unusual to have methane problems on the 2-1/2 section. *Id.* at 1988, 1991, 1993, 2000-01, 2023. The continuous miner was programmed to shut down at 1.5% methane. *Id.* at 1988. Miner Jackie Whittaker saw a reading above 2% on the methane monitor at the time of the final gas-off. Tr. I 147. Also around that time foreman Bandy detected 1% methane coming out of the gob into the area of the No. 5 entry, which, at that stage, was being used as a right return. 17 FMSHRC at 2001.

Methane readings taken around the miner and in the No. 5 entry minutes later revealed no further methane accumulations and the miner automatically restarted. *Id.* at 1988; Tr. III 112-13. An electrician summoned to test the methane monitor on the miner soon thereafter determined that it was in proper working order. 17 FMSHRC at 1988. When further methane readings showed any methane to have dissipated, mining of the pillar resumed and was quickly completed. Tr. I 152-53.

Before mining subsequently began from the No. 5 entry, Consol made ventilation changes to direct intake air into the entry. 17 FMSHRC at 2001. Bandy measured 17,000 cfm going over the miner, into the gob. *Id.* at 2002. Meanwhile, mine foreman Danny Crutchfield, who had been notified by Bandy of the earlier elevated methane readings, arrived and confirmed with his own measurements that methane in the area had dissipated. *Id.* at 2002, 2023.

While Whittaker, who operated the continuous miner in the No. 5 entry, was mining a rib of the No. 5 entry, he observed the roof cracking and shifting, and saw it drop 2 to 3 inches in one location. *Id.* at 1988; Tr. I 159-60, IV 62; Resp. Ex. 26. Whittaker ceased mining until the roof seemed to settle, and then resumed within five to ten minutes. Tr. I 160. Shortly thereafter he heard loud noises from the roof in the gob and, fearing that the roof would fall on him, he tried to run out of the entry. Tr. I 160-62. He testified that the had gone 5 to 10 feet when he looked

over his shoulder and saw a large fireball coming out of the middle of the gob. Tr. I 162-63. Whittaker and four miners closest to the working face suffered serious burns. Tr. I 168-70, II 29, 107-08, 169, V 35.

B. Post-Accident Investigation, Enforcement, and Analysis

Following an investigation, MSHA concluded that the accident was caused by: (1) an inadequate bleeder system, which allowed methane to accumulate in the gob in the explosive range; and (2) Consol's failure to properly examine the bleeder system to determine its effectiveness. Gov't Ex. 1 at 37. Consequently, on March 3, 1993, MSHA cited Consol for a significant and substantial (S&S) and unwarrantable violation⁷ of section 75.334(b)(1), alleging that A[a]n adequate bleeder system was not provided to control the air passing through the worked-out area of the 2-1/2 section . . . to continuously dilute and move away methane-air mixtures from the active workings and into a return aircourse.@ 17 FMSHRC at 1987. MSHA also cited Consol for an S&S and unwarrantable violation of section 75.364(a)(2), based on MSHA's allegation that Adequate weekly examinations were not being made to determine the effectiveness of the 2-1/2 section bleeder system.@ *Id.* Wyatt and Crutchfield were each charged under section 110(c) with knowingly authorizing, ordering or carrying out the section 75.334(b)(1) violation. *Id.* at 1983-84.

MSHA asserted at trial that the body of methane was ignited in the gob area during a roof fall by either frictional heating, such as that resulting from rock rubbing against rock, or by Piezoelectric@discharges, which are discharges of electrical energy that can result when crystalline structures, such as quartz, fracture and break apart. *Id.* at 2035; Tr. III 199-200. MSHA's primary witness on how the bleeder system was functioning on the day of the accident was Gary Wirth, an MSHA mining engineer who was accepted as a mine ventilation expert. 17 FMSHRC at 2004-05. Wirth conducted a post-accident ventilation survey of the 2-1/2 section that included calculations of airflow amounts, directions, and pressure differentials. *Id.* at 2005. He concluded that only 2,037 cfm of air was exiting the drilled hole regulator following the accident, and that no more than 2,828 cfm of air could have been going through the holes prior to the accident. *Id.*; Gov't Ex. 1 at 35. He took issue with Hrovatic's earlier measurements on the ground that Hrovatic had used an improper measurement methodology. Tr. IV 37-39. Wirth opined that the remaining volume of air in the gob was exiting through the left side regulators, but he was unable to calculate the amounts that had been flowing through each because they remained inaccessible after the accident. 17 FMSHRC at 2005-06; Tr. IV 41-42.

⁷ The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), which distinguishes as more serious in nature any violation that Acould significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.@ The unwarrantable terminology is also taken from section 104(d) of the Act and refers to more serious conduct by an operator in connection with a violation.

Wirth testified that the Consol bleeder system, with only 2,000 to 3,000 cfm of air flowing through the back regulator, was inadequate under the circumstances. Tr. IV 85-88. He described the gob area near the back regulator as higher than the other side of the 2-1/2 section, and opined that lighter-than-air methane would tend to migrate to that area. 17 FMSHRC at 2006. He theorized that, because there was limited airflow through the drilled holes, there was insufficient airflow to dilute and render harmless the methane that was accumulating in the area of gob that had resulted up to that point from pillaring in the back part of the section. *Id.*; Tr. IV 216-17.

Wirth assumed that, when the continuous miner was shutting down in the No. 4 entry, the location of the miner and the timbers that had been set were such that the intake air, after it went over the miner, instead of penetrating the gob area, was taking Apath[s] of least resistance.@ Tr. IV 58-59. He described paths of very low resistance as being to the left of the No. 4 entry and eventually through the other regulators on the section, as well as towards the right of the miner on the way to the No. 5 return entry. Tr. IV 60. Wirth further claimed that such airflows and the restricted airflow through the drilled holes allowed a body of methane to accumulate in the gob area, and that the continuous miner shut down because that body of methane migrated down to the working section. 17 FMSHRC at 2006-07; Tr. IV 60. Wirth theorized that Bandy's 1% methane measurement at the time of the final gas-off, which was a level higher than normally found on the section but lower than that which caused the miner to shut down, was an indication that the airflow to the right of the miner had swept the methane that had migrated from the gob into the right return. 17 FMSHRC at 2006-07.

Wirth went on to explain that, before the continuous miner moved to the No. 5 entry, Consol made ventilation changes, including directing 17,000 cfm of intake air into the No. 5 entry and eliminating the No. 5 entry as a right return. Tr. IV 62. Wirth indicated he believed such an airflow pushed back into the gob area the body of methane that had previously migrated down to the working area, which prevented the methane from being detected. Tr. IV 62-63. He theorized that, while 2,000 to 3,000 cfm of air was passing through one side of the gob area and taking some of the methane with it as it exited the drilled hole regulator, the remaining intake air continued to skirt the fringe of the gob as it took a path of least resistance to the other regulators. Tr. IV 86-88.

MSHA Inspector William Uhl, the lead coordinator in the accident investigation, testified that it was Acommon sense@that, the way the bleeder system was set up, the air directed into the gob, regardless of its amount, was going to skirt its edges and leave a dead air space in which methane would accumulate. 17 FMSHRC at 2012; Tr. IV 280-81. It was the Secretary's contention at trial that MSHA did not understand from the ventilation plan supplement approval process that Consol would mine the left side of the 2-1/2 section, and thus in the process install the left side regulators, before it finished mining the back part of the section. 17 FMSHRC at 2013-14. According to the Secretary, the addition of the left side regulators provided additional airflow exit points when mining of the back part of the section eventually occurred. *Id.* at 2007-08. The Secretary maintained at trial that the left-side regulators, which were generally

inaccessible, prevented Consol from knowing from its cross-sectional readings the amount of air that was flowing through the gob and out the back regulator. *Id.*

Consol's primary witness was Donald Mitchell, who also conducted a post-accident investigation of how the 2-1/2 section was ventilated and was also accepted as a ventilation expert at trial. *Id.* at 2029-30. Mitchell agreed with MSHA that the ignition source was frictional heating during a roof fall. *Id.* at 2032. However, Mitchell concluded that the methane that burned came not from any accumulation in the gob area, but rather was methane that was occluded in overlying sandstone strata and released upon the breaking of that strata during that roof fall. *Id.* at 2032. He opined that there was no ventilation or bleeder system in the United States that could be designed to handle such a sudden release of methane. *Id.*

Mitchell also testified that the measurement of air passing through the back regulator was not dispositive of the adequacy of the bleeder system because there were other regulators through which air directed into the section could exit. *Id.* He stated his belief that, at the time of the accident, in addition to the air that was flowing through the drilled holes, the remaining air was going through the back gob area, keeping any methane away from the working face and diluting that methane on its way to exiting through the other regulators. *Id.*; Tr. 241. Mitchell claimed that his theory of the airflows, in contrast to MSHA's theory, took into account additional air entering the gob through the gob curtains, the positive pressure observed on those curtains, and the air pressure differential readings between the active face and the various bleeder system entries. 17 FMSHRC at 2033.

Mitchell also ascribed the earlier gas-offs to outflows of methane from cracks in the overlying sandstone strata. Tr. VI 246-48. He testified that his airflow theory explained why the methane that caused the gas-offs dissipated, and that if MSHA's theory regarding the gas-offs was correct, there would have been no such dissipation, and Bandy's methane reading in the No. 5 entry would have been higher than 1% percent, consistent with the higher level that caused the gas-offs. Tr. VI 243-44, 246-48. He opined that the 1% reading was instead consistent with a properly functioning bleeder system as well as with his airflow theory that, while mining was taking place at the time of the gas-offs, the great majority of air was heading to the right return entry, after having provided a great dilution to any methane in the gob. Tr. VI 244-45.

3. Judge's Decision

Discussing only the evidence presented by the Secretary, the judge concluded that the Secretary had not satisfied her burden of proving that Consol violated section 75.334(b)(1). 17 FMSHRC at 2047-57.⁸ Addressing the testimony of MSHA's ventilation expert, Wirth, the judge

⁸ The judge also concluded that "[i]n my view, both parties presented speculative causation theories based on after-the-fact 'best guesstimates,' assumptions, and opinions based on information that I find conjectural, contradictory, or unreliable. Under the circumstances, I can only conclude that the cause of the accident remains unknown." 17 FMSHRC at 2048. That

stated that A[a]fter careful scrutiny of Mr. Wirth's testimony, I have serious reservations and doubts concerning the accuracy, consistency, and credibility of the information he relied on in support of his opinions and conclusions concerning the inadequacy of the bleeder.@ *Id.* at 2051. The judge cited a number of instances in which he believed that Wirth's testimony was internally contradictory or conflicted with the testimony of other witnesses presented by the Secretary. *Id.* at 2051-54. The judge asserted that Wirth's A'inconsistent and contradictory testimony' could neither be reconciled nor accepted Aas reasonable evidentiary support for any conclusion that there was in fact a lack of sufficient air in the gob to dilute and carry away methane through the return. Indeed, the evidence, including Mr. Wirth's testimony, establishes otherwise.@ *Id.* at 2054.

In concluding that the Secretary had failed to establish a violation of section 75.334(b)(1), the judge described what he found to be the most persuasive testimony as follows:

Mr. Uhl believed that with only 2,000 cfm of air passing through the regulator, a methane-air mixture was exiting through the regulator holes and into the return air course. Mr. Wirth believed that methane was exiting the gob through the regulator, and, as noted earlier, he acknowledged that the air flow pattern was sweeping the gob gas and reducing it to one percent and diluting it with the air leaving the mine, and that the air sweeping the gob was diluting and dissipating the methane that caused the miner machine to gas-off. This is precisely what a bleeder system is designed to do, as required by cited section 75.334(b)(1). Under all of these circumstances, I remain unconvinced that the amount of air that MSHA assumed was passing through the regulator, a factor that is but one component of the total bleeder system, supports a conclusion that the bleeder was inadequate and failed to provide a means for controlling the air passing through the cited gob area to continuously dilute and move away methane-air mixtures from the active workings and into a return air course.

Id. at 2057.

Based on his conclusion that Consol did not violate section 75.334(b)(1), the judge also dismissed the citations issued to Wyatt and Crutchfield under section 110(c). *Id.* at 2063. He stated that Aeven if I were to find a violation of the cited standard, I would not conclude that the evidence adduced by MSHA established a Aknowing' violation by Mr. Crutchfield or Mr. Wyatt, within the intent and meaning of section 110(c) of the Act.@ *Id.*

conclusion is not a subject of the Secretary's appeal.

The judge was also not swayed by the Secretary's case in support of her allegation that Consol violated the bleeder system effectiveness evaluation regulation, section 75.364(a)(2). He found that the Secretary had failed to satisfy the burden of proving that Consol's weekly examinations of its 2-1/2 section bleeder system using cross-sectional readings were inadequate. *Id.* at 2062-63.

II.

Disposition

A. Section 75.364(a)(2) Citation

The Secretary's original theory of Consol's violation of section 75.364(a)(2) was that Consol's cross-sectional readings were not an adequate substitute for traveling the bleeder system on a weekly basis to examine its effectiveness, as that regulation requires in the absence of an effective alternate method of evaluation. S. Br. at 40-41. The Secretary has chosen to not appeal the judge's determination that the Secretary did not establish such a violation. *Id.* at 41. Instead, the Secretary claims remand is necessary because the judge failed to address whether a violation of section 75.364(a)(2) was established by evidence adduced at trial allegedly showing that the last weekly cross-sectional reading taken before the accident was incomplete, in that it included measurements of intake and belt air, but not return air. *Id.* at 41-43. The Secretary also requests that remand include the issues of whether the alleged violation was S&S and unwarrantable. S. Pet. at 25 n.7; S. Br. at 43-47. Consol objects to what it characterizes as the Secretary's reformulation on appeal of the issue of the section 75.364(a)(2) violation. C. Br. at 15. Consol argues in the alternative that, because there was evidence of only one incomplete reading, the judge's conclusion that Consol was in substantial compliance with the regulation is supported by substantial evidence. *Id.* at 16.

We do not think that the original citation can be read to include an allegation that Consol violated section 75.364(a)(2) by taking an incomplete cross-sectional reading, and the Secretary has never moved to amend the citation, even in her brief, to include the alleged incomplete reading. Mine Act section 104(a) requires that a citation describe with particularity the nature of the violation. 30 U.S.C. § 814(a). However, under Rule 15(b) of the Federal Rules of Civil Procedure,⁹ in certain circumstances amendments to pleadings can be made at any stage, including

⁹ Commission Procedural Rule 1(b), 29 C.F.R. § 2700.1(b), incorporates the Federal Rules of Civil Procedure, so far as practicable, on any procedural question not regulated by the Mine Act, the Commission's Procedural Rules, or the Administrative Procedure Act. Rule 15(b) provides in pertinent part:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the

after judgment, and are not even necessary for a valid judgment when the non-pleaded issues have been tried by express or implied consent of the parties. Nevertheless, with respect to post-hearing consideration of an issue not raised by the pleadings, the Commission has recognized Rule 15(b)'s emphasis upon the parties' understanding that the unpleaded claim is, in fact, being litigated. *Magma Copper Co.*, 8 FMSHRC 656, 659 n.6 (May 1986).

While the issue of the incomplete reading was raised in the Secretary's Post-Hearing Brief (*see* S. Post-Hearing Br. at 46-47), the trial record does not reflect that Consol understood, or should have understood, that the allegation of an incomplete cross-sectional reading was being litigated as a violation. The Secretary's witness, Uhl, repeatedly characterized any failure by Consol to make the last weekly return air reading before the accident as irrelevant to the Secretary's case, because it was the Secretary's position that even a complete cross-sectional reading was, under the circumstances, a violation of section 75.364(a)(2). *See* 17 FMSHRC at 2017; Tr. IV 222, 243-44, 257, 259, 314-15. As the Secretary failed to either timely plead the allegation as a revised or alternate theory or demonstrate the parties' understanding below that it was being litigated, we deny the Secretary's request for a remand to the judge for a decision on the issue.

B. The Section 75.334(b)(1) Citations

The Secretary contends that the judge's finding that she failed to establish a violation of section 75.334(b)(1) by Consol is not supported by substantial evidence and does not accord with the law. S. Br. at 17-40. The Secretary argues that remand is necessary because the judge misunderstood both the requirements of the mandatory standard and the issue he was required to decide, in that he improperly focused on the cause of the explosion. *Id.* at 17-23. The Secretary contends that her evidence established that Consol failed to maintain an adequate bleeder system to control the air passing through the worked-out area of the 2-1/2 section. *Id.* at 24-29. The Secretary also cites eight errors the judge made in discrediting the Secretary's ventilation expert, Wirth. *Id.* at 29-40. The Secretary requests that remand include the issues of whether the alleged section 75.334(b)(1) violation was S&S and the result of Consol's unwarrantable failure, as well as the Section 110(c) charges against the two individual respondents. S. Pet. at 25 n.7; S. Br. at 43-48.

pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues.

Consol responds that the judge only considered the cause of the accident because it was an integral part of the Secretary's theory of the section 75.334(b)(1) violation. C. Br. at 6. Consol argues that the judge demonstrated complete comprehension of the regulation and the issue presented to him for decision. *Id.* at 7. Consol claims that the judge's decision to discredit the conclusions drawn by the Secretary's primary witnesses was the result of considering not only the testimony of those witnesses, but also Consol's evidence and the testimony of its witnesses, particularly its ventilation expert, Mitchell. *Id.* at 10-14. Consol also contends that the Secretary is improperly using litigation to implement new requirements regarding bleeder system functioning and evaluation. *Id.* at 16-19. Consol argues for upholding the judge's conclusions that none of the alleged violations resulted from unwarrantable or aggravated conduct. *Id.* at 20-25.

Commissioners Riley and Verheggen would affirm the judge's decision. Chairman Jordan and Commissioner Marks would vacate and remand the judge's decision. Under *Pennsylvania Elec. Co.*, 12 FMSHRC 1562, 1563-65 (August 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992), the effect of the split decision is to allow the judge's decision on this issue to stand as if affirmed.

III.

Separate Opinions of the Commissioners

Commissioners Riley and Verheggen, in favor of affirming the finding of the administrative law judge that MSHA failed to prove a violation of 30 C.F.R. ' 75.334(b)(1):

In determining whether Judge Koutras properly found that the Secretary failed to meet her burden of proving a violation of section 75.334(b)(1) (*see* 17 FMSHRC at 2057), we are guided by several well established principles. First is the fundamental principle that the Mine Act imposes on the Secretary the burden of proving an alleged violation by a preponderance of the credible evidence. *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (November 1989). A logical corollary to this rule of law is that if the trier of fact finds such proof lacking, that is the end of the matter. He or she is under no obligation to go any further to examine the case of the alleged wrongdoer C any such exercise would be a waste of time and resources the end result of which would be mere dicta.

Second is the substantial evidence test by which the Commission is statutorily bound when reviewing an judge=s findings of fact. 30 U.S.C. ' 823(d)(2)(A)(ii)(I); *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994). When reciting this test, the Commission customarily states merely that Asubstantial evidence@ means A>such relevant evidence as a reasonable mind might accept as adequate to support [the judge=s] conclusion.=@ *See, e.g., Jim Walter Resources, Inc.*, 19 FMSHRC 1761, 1767 n.8 (November 1997) (citing *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989)). But in practice, the test involves more than this simple formulation conveys. It means that the Commission may not A>substitute a competing view of the facts for the view [an] ALJ reasonably reached.=@ *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983). The Fourth Circuit recently explained the test when it overturned a Commission decision reversing a judge=s determination that a company did not discriminate against an independent contractor, Billy McClanahan. *Wellmore Coal Corp. v. FMSHRC*, No. 97-1280, 1997 WL 794132 (4th Cir. Dec. 30, 1997). The court stated:

The fact that evidence exists in the record to support McClanahan=s position is not determinative. Rather, the Commission=s review was statutorily limited to whether the ALJ=s findings of fact were supported by substantial evidence. The A>possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency=s finding from being supported by substantial evidence.=@

Id. at *3 (citations omitted).

The Commission must exercise a great degree of deference when considering a judge's credibility determinations. *In re: Contests of Respirable Dust Sample Alteration Citations*,

17 FMSHRC 1819, 1878 (November 1995) (*Dust Cases*), appeal docketed sub nom. *Secretary of Labor v. Keystone Coal Mining Corp.*, No. 95-1619 (D.C. Cir. December 28, 1995). The Commission has noted that the general rule [is] that, absent exceptional circumstances, appellate courts do not overturn findings based on credibility resolutions. *Id.* at 1881 n.80. The sorts of exceptional circumstances that would warrant overturning a judge's credibility findings are where such findings are self-contradictory, based on irrational criteria, or contradict the evidence. *Id.* As the Eleventh Circuit has explained, [s]ince the ALJ has an opportunity to hear the testimony and view the witnesses he is ordinarily in the best position to make a credibility determination. *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984). In light of this, the *Ona* court concluded that as a general rule courts are bound by the credibility choices of the ALJ, even if they might have made different findings had the matter been before [them] . . . de novo. *Id.* at 719 (quoting *Gulf States Mfrs., Inc. v. NLRB*, 579 F.2d 1298, 1329 (5th Cir. 1978)); cf. *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 266 (1987) (Final assessments of the credibility of supporting witnesses are appropriately reserved for the administrative law judge, before whom an opportunity for complete cross-examination of opposing witnesses is provided).¹

We set forth these principles at some length because our colleagues appear to have lost sight of them in their haste to vacate the judge's finding of no violation. Our colleagues argue at some length that Judge Koutras misunderstood key testimony and failed properly to consider all the testimony and evidence.² Slip op. at 17-25 (separate opinion of Chairman Jordan, joined by Commissioner Marks in his separate opinion). We disagree.

¹ See also *Metric Constructors, Inc.*, 6 FMSHRC 226, 232 (February 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); *Wellmore*, 1997 WL 794132 at *3 ([T]he ALJ has sole power to make credibility determinations and resolve inconsistencies in the evidence.) (citations omitted).

² We note that Judge Koutras, though recently retired, sat as a Commission judge from

After carefully reviewing the record, Judge Koutras concluded that the agency's allegation of a violation of section 75.334(b)(1) was based on two principal factors, namely, the occurrence of the ignition, and the assumption that there was insufficient air flow through the drill hole regulator to dilute and render harmless the body of methane that MSHA assumed was accumulating in the gob area. 17 FMSHRC at 2056. Regarding the first factor, the judge properly concluded that the occurrence of the ignition is not, in and of itself, evidentiary proof of an inadequate bleeder system. *Id.*; see *Mar-Land Indus. Contractor, Inc.*, 14 FMSHRC 754, 758 (May 1992); *Old Ben Coal Co.*, 4 FMSHRC 1800, 1804 n.4 (October 1982) (As we have repeatedly emphasized in our decisions, the fact of an accident or injury does not by itself necessarily prove or disprove the existence of a violation. . . . A violation may occur absent an accident, and an injury or death does not *ipso facto* make out a violation.).

Regarding the second factor, the judge opined:

I remain unconvinced that the amount of air that MSHA assumed was passing through the regulator, a factor that is but one component of the total bleeder system, supports a conclusion that the bleeder was inadequate and failed to provide a means for controlling the air passing through the cited gob area to continuously dilute and move away methane-air mixtures from the active workings and into a return air course.

the agency's inception. In fact, he authored the first judge's decision to be reported in a Commission Blue Book. See *Western States Coal Corp.*, 1 FMSHRC, Docket No. DENV 78-521-P (March 1, 1979). Moreover, during his long tenure, he presided over several complex proceedings involving issues pertaining to mine ventilation, as did this case. See, e.g., *Island Creek Coal Co.*, 13 FMSHRC 592 (April 1991); *Greenwich Collieries*, 8 FMSHRC 1535 (October 1986). We believe that Judge Koutras had a complete grasp of the facts of this case, and considered all the testimony and evidence necessary to a determination of whether the Secretary carried her burden of proof.

17 FMSHRC at 2057. MSHA's case rested primarily upon the testimony of two experts, MSHA mining engineer Gary Wirth and MSHA Inspector William Uhl, Jr.³ The judge found the testimony of these two witnesses lacking in credibility.

³ As to the adequacy of Consol's bleeder system, the judge essentially discounted as irrelevant the testimony of MSHA's expert witness Clete Stephan, noting that MSHA's counsel conceded at trial that Stephan *was not a ventilation expert* and that his expertise did not extend to the issue of whether the bleeder system was adequate. 17 FMSHRC at 2050.

After a thorough review of Wirth's testimony, the judge found it inconsistent and contradictory. *Id.* at 2050-54. The judge noted, for instance, that Wirth relied upon a ventilation survey he took after the accident as being representative of conditions existing at the time of the accident, even though he was told that the accident had altered the area's ventilation. *Id.* at 2051. The judge had other problems with Wirth's survey, including his inability to perform and develop a complete air quantity balance of the bleeder system. *Id.* at 2052-53. The judge also noted that portions of MSHA's accident report authored by Wirth were at odds with the testimony of eyewitnesses on a miner crew. *Id.* at 2051. Regarding Wirth's failure to review any examination records from before the accident because he did not believe they were relevant, the judge noted: "Since Mr. Wirth acknowledge[d] that intake air is a component of a bleeder system, I fail to understand why such air readings would not be relevant to a survey taken to evaluate such a system." *Id.* at 2053. Nor did Wirth familiarize himself with the relevant ventilation plan in formulating his opinion. *Id.* at 2051-52. Although Wirth took a series of bottle samples to evaluate the air exiting the gob, samples which indicated that methane was exiting the gob through the drill holes, this potentially exculpatory information was left out of MSHA's accident report. *Id.* at 2052. These and other aspects⁴ of Wirth's testimony led the judge to conclude that he could not accept it as reasonable evidentiary support for any conclusion that there was in fact a lack of sufficient air in the gob to dilute and carry away methane through the return. *Id.* at 2054. The judge similarly found Uhl's testimony confusing and contradictory, noting among other things Uhl's lack of relevant experience. *Id.* at 2054-55.⁵

The judge summed up his assessment of MSHA's case when he characterized it as an attempt[] to establish an inadequate bleeder system through post-ignition investigative assumptions, theories, and conclusions based on conjecture, speculation, and contradictory information and testimony that I find lacking in credible evidentiary support. *Id.* at 2055. We conclude that the judge's credibility findings as to Wirth and Uhl, and the rest of the Secretary's case, are not self-contradictory [or] based on irrational criteria, nor do they contradict the

⁴ For example, the judge noted that Wirth testified . . . that he was "somewhat" familiar with this case. 17 FMSHRC at 2050. The Secretary argues that the judge plainly took Wirth's statement out of context and that Wirth's response was clearly facetious. *S. Br.* at 38-39. Considered in context, we find nothing to indicate that Wirth's comment should have been treated differently by the judge. *Tr.* IV 182. Moreover, if Wirth was in fact being facetious, as the Secretary argues, we would find such a response disrespectful and inappropriate, one which would cast very serious doubt on Wirth's credibility.

⁵ Our colleagues fault us for relying solely on the judge's own decision . . . without any independent review of the record in drawing our conclusion that the judge's credibility determinations do not contradict the evidence. *Slip op.* at 22 n.6. We would like to reassure our colleagues that we have, in fact, carefully reviewed the record in this case. We cite only to the judge's opinion in the foregoing discussion because it, in turn, is so thoroughly based on the record evidence. Nor have we found evidence in the record that would lead us to take the extraordinary step of overturning the judge's credibility findings.

evidence. *Dust Cases*, 17 FMSHRC at 1881 n.80. In short, we find nothing in the record or in the judge's opinion that would lead us to take the extraordinary step of overturning the judge's credibility findings.⁶ We thus defer to his findings and affirm his ultimate conclusion that the Secretary failed to meet her burden of proving a violation of section 75.334(b)(1) by a preponderance of the evidence.

At several points in their opinion, our colleagues refer to the Secretary's theory that the lighter-than-air methane . . . was accumulating from pillaring in the back part of the section. Slip op. at 18. The judge, however, explicitly rejected this theory of the Secretary. The judge noted that MSHA believed that an explosive body of methane that was allowed to accumulate in the gob, whereas Consol believed that a spontaneous and unpredictable outburst [of methane occurred] from a sandstone roof crack. 17 FMSHRC at 2048. Finding that both parties presented speculative causation theories based on after-the-fact best guesses, assumptions, and opinions based on information I find conjectural, contradictory, or unreliable, the judge concluded that neither party has proven their theory with any reasonable degree of evidentiary certainty. *Id.*

In other words, the judge concluded that MSHA failed to prove that there was an accumulation of methane that led to an explosion. We find this conclusion amply supported by record evidence. Our colleagues, however, appear to accept the Secretary's theory as if proven. For example, they state: The judge was therefore mistaken in interpreting Wirth's testimony as establishing the adequacy of the bleeder system, for, as Wirth stated, a large body of methane remained in the gob area, unaffected by the intake airflow. Slip op. at 22. The point they miss is that the judge rejected the Secretary's theory that a large body of methane remained in the gob area.

We are, of course, aware that the record could be read very differently, as do the Secretary and our colleagues. But our standard of review dictates that we may not substitute a

⁶ The Secretary's response is, in essence, that the judge did not understand this case. She alleges, for instance, that the judge was unfocused and confused. S. Br. at 22. A close reading of the trial transcript and judge's opinion, however, indicates he was very thorough and clearly understood MSHA's case. He asked numerous pointed questions during the hearing, showing a complete understanding of a complicated case. In light of the record of this case and the long experience of Judge Koutras (*see* note 2, *supra*), we find the Secretary's criticisms of the judge inappropriate and disingenuous.

competing view of the facts for the view [an] ALJ reasonably reached.@ *Phelps Dodge*, 709 F.2d at 92. Instead, we are limited to determining whether the judge's decision is supported by such relevant evidence as a reasonable mind might accept as adequate.@ *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC at 2163 (quoting *Consolidation Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Under this deferential standard, and the even more deferential standard governing our review of credibility determinations, the judge's decision here more than passes muster.

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Chairman Jordan, in favor of vacating the decision of the administrative law judge that MSHA failed to prove a violation of 30 C.F.R. ' 75.334(b)(1):

To comply with section 75.334(b)(1), the Consol bleeder system on the 2-1/2 section had to ensure that any pillared area was ventilated in such a manner that methane did not accumulate but instead was diluted and the resulting methane-air mixtures moved to a return air course and away from active workings. Consequently, an understanding of airflow direction and amounts, and how various factors impacted airflow direction and amounts, is necessary to a proper determination of whether the Consol bleeder system was adequate. The judge based his determination that the standard was not violated on his conclusion that the Secretary did not establish that the Consol bleeder system was inadequate. 17 FMSHRC at 2057. Because I believe the judge did not properly analyze the Secretary's evidence, and even misinterpreted key portions of that evidence, I would vacate and remand the judge's determination of no violation.

The Secretary's theories regarding air direction and amounts in the 2-1/2 section on December 29, 1992, fully support her position that the Consol bleeder system was inadequate. The genesis of the problem was Consol's decision to mine the left side of the section before it finished mining the back part of the section. MSHA had approved Consol's use of cross-sectional readings in lieu of measurements taken at the back regulator, which would become generally inaccessible once pillaring began. *Id.* at 2007, 2013-14. In mining the left side of the section first, however, Consol constructed two other regulators, which were also inaccessible. *Id.* at 2007, 2014. Consol does not dispute that those regulators provided additional airflow exit points when

mining of the back part of the section eventually occurred, nor that its cross-sectional readings did not permit it to know the amount of air that was flowing through the back regulator and the amount of air that was exiting through the left side regulators. *Id.* at 2024-25.

Consol also does not dispute the other major component of the Secretary's case **C** that only a small fraction of the air that Consol intended to be channeled by the back regulator into the return aircourse ever actually flowed through that regulator. Consol's assistant mine superintendent, Mark Hrovatic, unequivocally testified that Consol constructed the back regulator under the assumption that, once completed, between 10,000 and 12,000 cfm of air would flow through the drilled holes which constituted the regulator. *Id.* at 1999-2000. However, MSHA's mining ventilation expert, Gary Wirth, concluded from his ventilation survey that only 2,037 cfm of air was exiting the drilled hole regulator following the accident, and that no more than 2,828 cfm of air could have been going through the holes prior to the accident. *Id.* at 2005, 2057. Wirth also concluded that the remaining volume of air in the gob was exiting through the left side regulators, but he was unable to calculate the amounts that had been flowing through each because they remained inaccessible after the accident. *Id.* at 2005-06. Importantly, Consol does not contest Wirth's conclusions on this subject, and its expert actually confirmed that Wirth's methodology was in accordance with the best engineering principles. *Id.* at 2034; Tr. VI 231.

Those two uncontested facts **C** that only a limited amount of air was flowing through the back regulator, and that the remainder was exiting elsewhere on the section **C** provided MSHA the framework in which to analyze the adequacy of the Consol bleeder system. MSHA found the bleeder inadequate under the circumstances, on the theory that the lighter-than-air methane, which was accumulating from pillaring in the back part of the section, migrated to the gob area near the back regulator because that area was higher than the other side of the 2-1/2 section. 17 FMSHRC at 2006. According to Wirth, with most of the intake air taking paths of least resistance to the alternative exit points provided by the left side regulators, the remaining limited airflow through the back regulator was insufficient to dilute and render harmless the methane accumulating in the gob. *Id.*; Tr. IV 85-88. William Uhl, MSHA's lead coordinator in the accident investigation, agreed, stating that it was "common sense" that, given how the bleeder system had been set up, the intake air would skirt the edges of the gob, leaving dead air space in the gob in which methane could accumulate. Tr. IV 280-81. Thus, the Consol bleeder system was not accomplishing its intended purpose of diluting and removing the methane from the pillared area of the 2-1/2 section.

The judge, however, never analyzed the totality of the evidence to determine whether the Consol bleeder was inadequate under the circumstances. Instead, he separately analyzed each individual action taken by Consol leading up to the incident and ruled on whether Consol had violated the Act or any regulation in taking each of those actions. Having found none of these actions violative when taken in isolation, the judge discarded them as irrelevant to his analysis of whether section 75.334(b)(1) was violated. The judge failed to take into account the extent to which the change in direction of mining negatively impacted the adequacy of the bleeder system. While that change in direction was not foreseen when Consol received approval of the April

supplement showing how it intended to ventilate the back part of the section (17 FMSHRC at 2022), its importance to the ventilation of the 2-1/2 section cannot be doubted, for it resulted in the construction of the two left side regulators, and thus two additional inaccessible exit points for the air on the section. The judge, however, simply focused on the lack of a ventilation plan provision prohibiting Consol from changing direction in mining the 2-1/2 section, and found that silence dispositive on the issue of whether the change in direction led to an inadequate bleeder system. 17 FMSHRC at 2055. He reasoned that because the plan did not prohibit a change in direction, the change could not have contributed to an inadequate bleeder system. *Id.*

I find the narrowness of the judge's inquiry disturbing. It is comparable to exonerating a driver charged with reckless driving in severe weather merely because the driver had not exceeded the posted speed limit. Regardless of whether the change in direction in mining was a separate offense in and of itself, it clearly is relevant in determining whether Consol's bleeder system was adequate *under the circumstances*, which is what section 75.334(b)(1) requires. Consequently, I would specifically instruct the judge to consider the negative impact posed by the change in mining direction on the adequacy of the Consol bleeder system.

Even more disturbing is how the judge treated the testimony concerning the amount of air that was passing through the drilled hole regulator prior to the accident. Wirth calculated that no more than 2,828 cfm of air could have been flowing through that regulator prior to the accident (17 FMSHRC at 2005), while Hrovatic testified that he had calculated that approximately 6,000 to 7,000 cfm was passing through the drilled holes before pillaring made them inaccessible. *Id.* at 1999. The judge did not resolve this apparent conflict,¹ and simply relied on Hrovatic's different calculation as a reason to discredit Wirth because both used an anemometer in making their respective surveys. *Id.* at 2057. In addition, after noting that there was no minimum amount of air required by the ventilation plan, the judge dismissed the airflow through the back regulator as simply being a factor that is but one component of the total bleeder system. *Id.* at 2056-57. While true, this statement represents a profound misunderstanding of the Secretary's position in this case.

The judge erred in several respects in his treatment of this very central issue. Most importantly, he erred in failing to consider the significance of the amount of air passing through the back regulator to the issue of whether the Consol bleeder system was adequate under the circumstances. According to MSHA, at the time of the accident, the only air that was ventilating the gob, and not just skirting it, was the air passing through the back regulator. Moreover, the record is clear that it was not MSHA that determined the amount of air that should have been flowing through that regulator, but Consol. Prior to the pillaring of the back part of 2-1/2 section, Consol thought it important that the back regulator be constructed in a manner that permitted 10,000 or more cfm of air to pass through the drilled holes. *See id.* at 1999-2000,

¹ The judge described Wirth's measurements as being the amount of air that MSHA assumed was passing through the regulator (*id.* at 2057), but failed to directly address whether or not that assumption was correct.

2028; Tr. V 93-94. The judge should have taken into account this evidence showing what the operator believed was necessary for the bleeder system to be adequate under the circumstances.

The judge also failed to recognize that by the time of the trial, there no longer was a disagreement between MSHA and Consol regarding the amount of air that was flowing through the back regulator at the time of the accident, for Consol had abandoned any contention that Hrovatic's measurements were correct, and did not contest the accuracy of Wirth's measurements. Consol's ventilation expert, Mitchell, agreed with Wirth's measurements and described Wirth's methodology as *in accordance with the best engineering principles.* *Id.* at 2034; Tr. VI 231. Consol's defense at trial was not that a higher amount of air was passing through the drilled hole regulator, but that the bleeder system was adequate even with only 2,000 cfm passing through that regulator, because, contrary to MSHA's assertion, the gob was also being ventilated by the air that would then exit the other regulators. 17 FMSHRC at 2032; *see also* Tr. VI 115 (Wyatt agreeing that only 2,000 to 2,500 cfm was going through drilled holes prior to accident). Thus, the judge used airflow calculations on which even Consol no longer relied as a reason to discredit conclusions reached by Wirth with which Consol agrees.² The Commission simply should not ignore this blatant error in the judge's analysis.³

In addition to failing to recognize the factual underpinnings of the Secretary's charge that the Consol bleeder system was inadequate, the judge clearly erred in concluding that the testimony of the Secretary's own witnesses established that the Consol bleeder system satisfied the requirements of section 75.334(b)(1). He also erred in finding that the Secretary's ventilation expert, Wirth, was not credible. The judge's failure to correctly state significant aspects of the testimony of those witnesses is yet further reason why I decline to affirm his ruling that no violation occurred.

² Hrovatic was called as a witness not by Consol, but by the Secretary, and primarily for the purpose of discussing the drilling of the holes. *See* Tr. III 64-91. No party has cited Hrovatic's measurements as authoritative evidence of the amount of air that was flowing through the holes prior to the accident.

³ In addition, after the judge pointed out that Wirth's measurements were contradicted by Hrovatic's, he should have attempted to resolve the conflict and make a reasoned finding regarding the amount of air passing through the back regulator prior to the accident. There was ample evidence on which to draw. The judge was clearly mistaken in believing that Hrovatic's measurement methodology was identical to that employed by Wirth. *See* 17 FMSHRC at 2057. The record reveals that Wirth was more thorough than Hrovatic in measuring airflow through the drilled holes. While both did use an anemometer to make their respective measurements, Hrovatic used his to only measure one individual hole, while Wirth measured both inby and outby the exit point of the drilled holes. *Id.* at 2005; Tr. IV 38. In addition, Wirth, but not Hrovatic, used a pitot tube and magnahelic gauge to confirm and refine his measurements. Tr. IV 26-28. The judge entirely ignored this evidence.

Without relying on Consol's evidence, the judge found that the testimony of two of the Secretary's primary witnesses, Wirth and Uhl, established that the Consol bleeder system was doing precisely what a bleeder system is designed to do, as required by cited section 75.334(b)(1), i.e., diluting methane with intake air and carrying the mixture away from active workings and into a return aircourse. 17 FMSHRC at 2057. The judge, however, made a number of significant errors in interpreting that testimony. When read in its proper context, the testimony does not establish the adequacy of the Consol bleeder system. Rather, the testimony supports the Secretary's contention that the bleeder system was inadequate.

It is plain that the judge erred in relying on Wirth's belief that methane was exiting the gob through the regulator as evidence that the bleeder system was functioning properly. 17 FMSHRC at 2057. First, Wirth clearly indicated his belief that, at the time of the accident, only part of the gob gas was mixing with the intake air and exiting through the back regulator. See Tr. IV 85-88; Gov't Ex. 59. As that testimony is not inconsistent with the Secretary's theory that the remaining methane was permitted to accumulate in gob area, it does not establish that the bleeder system was performing in accordance with section 75.334(b)(1).

Second, the judge mistakenly relied on Wirth's testimony regarding the relatively low levels of methane moving through the back regulator a week after the accident as evidence that methane was sufficiently diluted before it entered the regulator prior to the accident. 17 FMSHRC at 2054. Wirth made it plain that, in his view, post-accident methane levels were not indicative that the bleeder system was working properly prior to the accident, because much of the previously accumulated methane had burned off as a result of the ignition, and methane was not reaccumulating as quickly afterward because mining did not take place on the 2-1/2 section during the intervening week. Tr. IV 124-30. The judge entirely failed to take this testimony into account.⁴

The judge also misconstrued that part of Wirth's testimony in which Wirth explained why a gas-off of the continuous miner while it was in the No. 4 entry was an indication of an inadequate bleeder system. Wirth testified that, at the time the miner was in the No. 4 entry, the location of it and the timbers that had been set were such that the intake air, after it went over the miner, instead of penetrating the gob area, was taking the path of least resistance. Tr. IV 59. He specifically identified one such path as being towards the right of the miner on the way to the No. 5 return entry. Tr. IV 60. Wirth stated that Bandy's 1% methane measurement around that

⁴ The judge also incorrectly analyzed the testimony of Uhl on a similar point. The judge cited Uhl as believing that with only 2,000 cfm of air passing through the [back] regulator, a methane-air mixture was exiting through the regulator holes and into the return air-course. 17 FMSHRC at 2057. However, Uhl merely testified that if pillaring had ceased for a period of a weekend or more, 2,000 cfm exiting the back regulator may have been sufficient to dilute any methane that was accumulating *at that time*. Tr. IV 216-17. He clearly was not conceding that 2,000 cfm through the back regulator was sufficient to dilute the methane that was constantly accumulating while pillaring *was occurring*.

time, because it was a level higher than normally found on the section but lower than that which would cause the miner to shut down, was an indication that the airflow to the right of the miner resulted in part of the methane from the gob being swept into the right return. 17 FMSHRC at 2006-07.

It is from this testimony that the judge erroneously concluded that Wirth had acknowledged that the air flow pattern was sweeping the gob gas and reducing it to one percent and diluting it with the air leaving the mine, and that the air sweeping the gob was diluting and dissipating the methane that caused the miner machine to gas-off.@ 17 FMSHRC at 2057. The record is plain that Wirth was testifying about only part of the methane accumulating in the gob area. Tr. IV 59-67; Gov't Ex. 60. Wirth's statement was made in response to the judge's question about the 1% methane found in the No. 5 entry at the time of the final gas-off, and clearly referred to the methane that had migrated from the gob to the miner, causing it to gas-off. Wirth explained that the right air flow pattern was picking up *the part of this body of methane* and bringing it down into the return. It was sweeping *that* body of gob gas.@ Tr. IV 61 (emphasis added). The judge was therefore mistaken in interpreting Wirth's testimony as establishing the adequacy of the bleeder system, for, as Wirth stated, a large body of methane remained in the gob area, unaffected by the intake airflow. Tr. IV 64-65; Gov't Ex. 60.⁵ Wirth never acknowledged that the airflow pattern was sweeping the gob gas. Rather, Wirth steadfastly maintained that the airflow pattern was resulting in most of the air skirting the edge of the gob. *See* Tr. IV 60-62, 65-66, 85-88. Clearly, Wirth was not describing an adequate bleeder system, but one that was inadequate.

In light of the foregoing, the judge erred in concluding that the Secretary's witnesses, by their testimony, established that the Consol bleeder system was adequate under section 75.334(b)(1). For that reason alone I would remand this case to the judge for proper consideration of the testimony and evidence.

The judge's determination of no violation is also based on his finding that Wirth was not credible. The judge discredited Wirth without comparing Wirth's testimony to the testimony of Consol's expert, Mitchell. In fact, the judge never addressed Mitchell's testimony concerning the adequacy of the bleeder system. While the judge gave a number of reasons in support of his credibility finding, his primary concern was that he found Wirth's testimony to be inconsistent and contradictory. 17 FMSHRC at 2051, 2054, 2057.⁶

⁵ Contrary to my colleagues' contention (slip op. at 16), I refer to Wirth's statement not to indicate my acceptance of the Secretary's methane accumulation theory, but to emphasize that Wirth's testimony is consistent with the Secretary's hypothesis. The judge may, on evidentiary grounds, properly reject the Secretary's theory that a body of methane accumulated in the gob. Here, however, the judge claimed to reject it on the basis of testimony that he incorrectly considered to be inconsistent with the Secretary's views. *See* 17 FMSHRC at 2054, 2057.

⁶ Remarkably, my colleagues conclude, relying solely on the judge's own decision and without any independent review of the record, that his credibility determination does not

contradict the evidence.

While the Commission usually defers to judges on matters of credibility, it has also recognized that there are exceptions to that general rule. See *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1881 n.80 (November 1995), *appeal docketed sub nom., Secretary of Labor v. Keystone Coal Mining Corp.*, No. 95-1619 (D.C. Cir. Dec. 28, 1995) (*Dust Cases*). Because A[c]redibility involves more than a witness's demeanor and comprehends an overall evaluation of testimony in the light of its rationality or internal consistency and the manner which it hangs together with other evidence,⁷ the Commission has recognized one such exceptional circumstance to be where a credibility determination is contradicted by the evidence. *Dust Cases*, 17 FMSHRC at 1881 n.80 (citing *Medline Indus., Inc. v. NLRB*, 593 F.2d 788, 795 (7th Cir. 1979); *NLRB v. Huntington Hospital, Inc.*, 550 F.2d 921, 924 (4th Cir. 1977)). Similarly, there is no reason to defer to a credibility finding based on an improper understanding of testimony or evidence. See *Irving v. United States*, 49 F.3d 830, 835-36 (1st Cir. 1995) (setting aside credibility-based finding of trial judge because of A little confidence in judge's finding that reviewing court found to be based on testimony that judge A fundamentally misconstrued); *Consolidation Coal Co. v. NLRB*, 669 F.2d 482, 488 (7th Cir. 1982) (noting that deference not necessarily owed to credibility determination based on judge's flawed analysis of evidence).

Many of the reasons the judge gave for discrediting Wirth were based on aspects of Wirth's testimony and conclusions which the judge found to be inconsistent with Wirth's ultimate opinion that the Consol bleeder system was inadequate. See 17 FMSHRC at 2051, 2054. Because the judge clearly misinterpreted Wirth's testimony, I would vacate the judge's credibility determination and remand the case for reexamination in light of a proper analysis of Wirth's testimony.⁸

⁷ 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* ' 2586 (2d ed. 1995) (citing cases).

⁸ Remand is also warranted because the judge's discussion of Wirth's credibility exhibits an incomplete consideration of the evidence presented. For instance, one reason the judge gave for discrediting Wirth as a witness was that Wirth, in conducting his post-accident ventilation study, had not determined the amount of air that was exiting each of the inaccessible left side regulators. *Id.* at 2052-53. The judge apparently assumed that Wirth needed to do so to ensure the accuracy of his conclusions. However, there is nothing in the record on which to base such an assumption; indeed, Wirth testified that as long as he could estimate the total amount of air exiting those regulators, the exact amount that was exiting each regulator was irrelevant. Tr. IV 145-46. The judge should explain why Wirth needed to ascertain the amount of air exiting each regulator to guarantee the accuracy of his conclusions.

The judge also discredited Wirth's post-accident ventilation study because certain conditions on the 2-1/2 section were different prior to the accident. 17 FMSHRC at 2051. Given the nature of the accident, that is not surprising, but it hardly constitutes sufficient reason to doubt the accuracy of the post-accident study. If it did, most post-accident surveys would be irrelevant in Commission proceedings, regardless of their overall probative value. I would therefore have

the judge explain how the specific differences in conditions on the 2-1/2 section negatively impacted the reliability of the post-accident survey.

The judge also discredited Wirth based on Wirth's conceded failure to examine section weekly examination books or the pre-shift or on-shift books for intake air readings for the days preceding the ignition. *Id.* at 2053. The judge failed to explain what additional information, if any, Wirth would have gained from those readings, given that Wirth had accepted Consol's statement of the amount of intake air at the time of the accident. *See* Tr. IV 150-51.

In sum, the judge examined the evidence presented by the Secretary (while failing to discuss the evidence presented by Consol) but, in so doing, misconstrued its significance. In fact, the evidence on which he relied does not support his conclusion that the bleeder system was adequate.⁹ I believe that the case should be remanded to allow the judge to evaluate the evidence, in light of the concerns expressed above, and to ensure that all relevant record evidence is analyzed.¹⁰

⁹ Although the Commission ~~do~~[es] not lightly overturn a judge's factual findings and credibility resolutions, neither will [it] affirm such findings if there is . . . dubious evidence to support them. *Consolidation Coal Co.*, 11 FMSHRC 966, 974 (June 1989). While I fully agree that the Commission is precluded from substituting its own analysis of the record ~~for~~ the ALJ's reasonable factual determinations (*Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 94 (D.C. Cir. 1983)), a reading of the record demonstrates that the judge's factual findings were not reasonable. Rather, as I have discussed above, they were based on fundamental errors made in reviewing the evidence.

¹⁰ 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); *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994). That standard of review requires that a fact finder weigh all probative record evidence and that a reviewing body examine the fact finder's rationale in arriving at his decision. *See Wyoming Fuel*, 16 FMSHRC at 1627; *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-89) (1951)). A judge must analyze and weigh the relevant testimony, make appropriate findings, and explain the reasons for his decision. *Wyoming Fuel*, 16 FMSHRC at 1627; *Mid-Continent*, 16 FMSHRC at 1222 (citing *Anaconda Co.*, 3

The judge also stated that, even if he were to find that Consol violated section 75.334(b)(1), he would not conclude that it had been established that the two individual respondents cited for violating that regulation had knowingly done so. *Id.* at 2063. However, he gave no reasoning in support of that conclusion. A judge is required to state his rationale for reaching findings and conclusions. *Mid-Continent Resources*, 16 FMSHRC at 1222. Given that the judge misinterpreted the testimony presented on the alleged violation of section 75.334(b)(1),

I would vacate his section 110(c) determinations and remand to the judge with instructions to set forth his reasoning.¹¹

Mary Lu Jordan, Chairman

¹¹ Similarly, I would include in the remand the issues of whether any violation of section 75.334(b)(1) by Consol was S&S or due to unwarrantable failure. Having found that the Secretary failed to establish that Consol violated section 75.334(b)(1), the judge had no reason to address these issues in his decision.

Commissioner Marks, concurring with the separate opinion of Chairman Jordan and dissenting:

I concur and join with Chairman Jordan in concluding that the judge's determination to dismiss the section 75.334(b)(1) citation should be vacated and that the matter should be remanded for an appropriate analysis.

With regard to the citation charging a violation of section 75.364(a)(2), I conclude that the judge's dismissal of the citation should be vacated and that the matter should be remanded for an analysis consistent with the below discussed conclusions. Therefore, I dissent from my colleagues' conclusion to affirm the judge.

The judge based his dismissal of the violation on the conclusion that cross-sectional readings and daily monitoring at the BEP-10 location [i]s a reasonably proper method for evaluating the cited bleeder in question. @ 17 FMSHRC at 2062-63. In so concluding, the judge rejected *one* of the theories argued by the Secretary C that the cross-sectional method of inspection itself was not compliant with the cited standard. See S. Post-Hearing Br. at 45-51. However, the judge's analysis did not reach the Secretary's alternative theory. Having determined that cross-sectional inspection of the bleeder was an acceptable method under the standard, the judge failed to then examine whether that *method C* cross-sectional inspection C was in fact being *adequately* completed as charged by the Secretary.¹ See 17 FMSHRC at 2058-63.

¹ The citation included the following:

Based on evidence obtained during this accident investigation, it is determined that *adequate weekly examinations were not being made* to determine the effectiveness of the 2-1/2 section bleeder system. Statements given by company officials, Bob Wyatt, superintendent, and Danny Crutchfield, mine foreman, were that no

My colleagues have determined to affirm the judge's dismissal of the citation, concluding that the Secretary did not charge Consol with a failure to make a *complete* cross-sectional inspection of the subject bleeder system. Slip op. at 10. Apparently, my colleagues conclude that the *only* basis for violation charged in the citation was the prohibited *use* of a cross-sectional inspection. I do not agree with that narrow interpretation of the scope of the citation.

It is quite clear from the wording of the subject citation that Consol was on notice that the Secretary concluded a violation occurred because ~~A~~adequate weekly examinations were not being made.¹⁷ FMSHRC at 1987. Indeed, the disputed method of inspection ~~C~~ ~~Across-sectional~~ ~~C~~ is not even stated in the text of the citation. However, my colleagues have concluded that the citation can only be interpreted to charge one theory of liability ~~C~~ that the *use* of a cross-sectional method of inspection was not permissible. Slip op. at 10-11. I do not agree. I have no difficulty in concluding that the citation, as written, served to clearly place Consol on notice that the Secretary found Consol's inspection of the bleeders to be ~~A~~inadequate.¹⁷ As such, an adequately represented operator would be on notice that a successful defense to the charge would certainly include, not only that the cross-sectional method was permissible, but also, that such an inspection was being ~~A~~adequately¹⁷ or completely performed! As such, I reject the notion that Consol was not placed on notice of such liability because of the wording of the citation.

Beyond the wording of the citation, my colleagues further attempt to support their conclusion to affirm the dismissal of the citation because ~~A~~the trial record does not reflect that Consol understood, or should have understood, that the allegation of an incomplete cross-sectional reading was being litigated as a violation.¹⁷ Slip op. at 10. I do not agree.

An examination of the transcript of the testimony of MSHA Inspector Uhl clearly establishes that MSHA's prosecution of this violation was based on the theory that a cross-sectional inspection did not satisfy the requirements of the standard and, alternatively, if a cross-sectional inspection was deemed to be in compliance, Consol had failed to adequately perform

one was examining the bleeder regulator and the area was inaccessible. The approved ventilation map indicates that the back side of the 2-1/2 section, MMU 015, can be examined. This is a contributing factor to the methane explosion which occurred on 2-1/2 section, MMU 015, December 29, 1992.

¹⁷ FMSHRC at 1987 (emphasis added).

such inspection. Moreover, careful review of the transcript also establishes that Consol's counsel recognized during the hearing that the issue of whether the cross-sectional inspections were being conducted in a complete and adequate manner was in dispute. On the cross-examination of Inspector Uhl, Consol's counsel posed the following questions, which indicate that he recognized that the adequacy of the cross-sectional inspections was also in issue:

Q Now, was it your testimony earlier that readings were not being done on the Two-and-one-half Section, cross-sectional readings were not being done?

....

Q Would it be fair to say that this book will indicate that a fellow named Jay Browning did some readings on the Two-and-one-half on 12/21/92?

....

Q Would you agree that the reading on 12/9/92 is a full cross-sectional reading for the Two-and-one-half?

....

Q Now, Mr. Uhl, would you agree that on 12/21/92, it appears that a Mr. Browning did a partial cross-sectional reading?

....

Q Were there full cross-sectional readings being done prior to this one that is partially incomplete on 12/21/92?

....

Q This is not a trick question. I just want to know if, during this investigation, did you come up with any pattern or indication that there was a pattern at the mine to not perform full C now, you can argue about whether they are adequate C but full cross-sectional readings there on the Two-and-one-half?

....

Q The only [cross-sectional inspection] that was not full was the last one, right?

Tr. IV 312-16.

Beyond the foregoing, which is sufficient to establish that Consol certainly recognized, or should have recognized, that the Adequacy of the cross-sectional inspections was in issue, the Secretary's post-trial brief confirms the same point:

However, even assuming that cross sectional readings was (sic) an approved and effective method, the operator was not even taking proper cross sectional readings. Proper cross sectional readings require that air readings be taken in the intake, return and belt entries. (T-V-116) However, the most recent entry in the weekly examination book, dated December 21, 1992, shows that readings were taken only in an intake entry and in the belt entry. (GX-47, p. 10) Mr. Crutchfield testified that these readings alone do not provide the necessary information for determining how much air was entering the gob. (T-V-118)

S. Post-Hearing Br. at 46-47.

In consideration of the foregoing, I cannot conclude that the trial record does not reflect that Consol understood, or should have understood, that the allegation of an incomplete cross-sectional reading was being litigated as a violation. Slip op. at 10.

Accordingly, I find that the dismissal of this citation by the judge should be vacated and that the matter should be remanded for an analysis and determination of whether Consol was performing adequate cross-sectional inspections.

Marc Lincoln Marks, Commissioner

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