FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20006

March 3, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 92-798
CONSOLIDATION COAL COMPANY	:	

BEFORE: Jordan, Chairman; Doyle and Holen, Commissioners

DECISION

BY: Doyle and Holen, Commissioners

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"), presents the issue of whether a violation of 30 C.F.R. § 70.201(d) by Consolidation Coal Company ("Consol") was significant and substantial ("S&S").[1] Administrative Law Judge Jerold Feldman determined on cross motions for summary decision that the violation was not S&S. 15 FMSHRC 904 (May 1993) (ALJ). For the reasons that follow, we affirm the judge in result.

I.
Background

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[1] 30 C.F.R. § 70.201(d) provides:

> During the time for abatement fixed in a citation for violation of § 70.100 . . . , the operator shall take corrective action to lower the concentration of respirable dust to within the permissible concentration and then sample each production shift until five valid respirable dust samples are taken.

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

A. Factual Background

Consol operates the Blacksville No. 2 Mine, an underground coal mine in West Virginia. During December 1991, inspectors from the Department of Labor's Mine Safety and Health Administration ("MSHA") inspected the mine pursuant to MSHA's "Spot Inspection Program" (the "Program"). Under the Program, inspectors were instructed to issue a citation alleging a violation of section 70.100(a) whenever the results of a respirable dust sample taken during a single shift equaled or exceeded the level set forth in an MSHA table.[2] S. Mot. for Sum. Dec. at 5. A citation was to be issued if a single-shift sample at the No. 2 mine showed a dust concentration of 2.5 or more milligrams of respirable dust per cubic meter of air ("mg/m^3"). *Id.* at 5, 7.

On December 9 and 10, 1991, inspectors took samples over single shifts that showed the longwall jack setter had been exposed to dust concentrations of 2.5 mg/m^3 and 3.1 mg/m^3. 15 FMSHRC at 905 n.5. On December 11, Inspector Theodore Betoney issued to Consol a citation alleging an S&S violation of section 70.100(a) for excessive concentrations of respirable dust. The citation stated: "[t]he mine operator shall take corrective action immediately to lower the amount of respirable dust at 041 non-designated occupation [longwall jack setter], and then sample each consecutive shift until five (5) valid samples are obtained." S. Mot. for Sum. Dec. Ex. C. The abatement time was set for December 16 and was later extended to December 18. 15 FMSHRC at 905 n.3.

On December 12, Consol informed Inspector Betoney that it would decide on the appropriate corrective action after five samples were taken. S. Mot. for Sum. Dec. at 8. Those samples showed excessive dust concentration. On December 19, Inspector Betoney issued a withdrawal order, pursuant to section 104(b) of the Act, 30 U.S.C. § 814(b), alleging that Consol had failed to lower the dust concentration within the time for abatement set forth in the underlying citation. Later that day, he issued another withdrawal order, pursuant to section 104(d)(2) of the Act, 30 U.S.C. § 814(d)(2), alleging an S&S violation of section 70.201(d), caused by Consol's failure to take corrective action. That order, subsequently modified to a citation, is the enforcement action at issue. 15 FMSHRC at 904 n.1.

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[2] 30 C.F.R. § 70.100(a) provides:

> Each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings . . . is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air . . . .

Before the Program's initiation in July 1991, MSHA determined compliance with section 70.100(a) on the basis of dust samples taken during multiple shifts. The Commission considered the procedural validity of the Program in *Keystone Coal Mining Corp.*, 16 FMSHRC 6 (January 1994), discussed infra.

On December 23, Consol submitted to MSHA a plan to lower respirable dust levels, which was implemented following MSHA's approval. On December 26 and 27, Consol collected samples showing an average dust concentration of 0.9 mg/m^3. S. Mot. for Sum. Dec. at 9. The section 70.201(d) citation as well as the section 104(b) failure to abate order were then terminated. *Id.*; S. Mot. for Sum. Dec. Ex. E.

B. Procedural Background

Consol challenged both citations. The section 70.100(a) citation was assigned to Administrative Law Judge Avram Weisberger as part of Docket No. WEVA 92-761; the instant citation, which alleged a violation of section 70.201(d), came before Judge Feldman.

1. Citation alleging Consol's violation of section 70.100(a)

Judge Weisberger stayed the proceedings in Docket No. WEVA 92-761, based on his determination in *Keystone Coal Mining Corp.*, 14 FMSHRC 2017, 2024-29 (December 1992) (ALJ), that the Program was procedurally invalid because the Secretary had not engaged in notice-and-comment rulemaking prior to implementing it. The Commission granted the Secretary's petition for discretionary review in *Keystone* and Judge Weisberger continued the stay in Docket No. WEVA 92-761, pending decision by the Commission in *Keystone*.

The Commission affirmed the judge's decision in *Keystone*, concluding that the Program was invalid because it constituted a legislative-type rule that had been adopted without the required notice-and-comment rulemaking. 16 FMSHRC at 10-16. The Commission's decision was not appealed. Judge Weisberger subsequently dismissed the section 70.100(a) citation based on the Commission's ruling in *Keystone*. Unpublished Order dated April 1, 1994. The Secretary did not petition for review of the judge's order and it became a final decision of the Commission. 30 U.S.C. § 823(d)(1).

2. Citation alleging Consol's violation of section 70.201(d)

In the present proceeding, the parties moved for a stay pending final resolution of *Keystone.* Judge Feldman stayed the proceedings only until Judge Weisberger issued his decision. After the Commission directed *Keystone* for review, the Secretary moved for continuance of the stay, pending the Commission's decision. The judge, however, denied the Secretary's motion. He subsequently permitted the parties to proceed on cross motions for summary decision. Unpublished Order at 2 (March 26, 1993).

Because Consol conceded the violation of section 70.201(d), the only issue before the judge was whether that violation was S&S. 15 FMSHRC at 906. In his summary decision, issued before the Commission's *Keystone* decision, the judge concluded that doubts regarding the validity of the Program and, hence, the validity of the underlying citation alleging a violation of section 70.100(a) warranted the deletion of the S&S designation. *Id.* at 907. The judge rejected the Secretary's argument that the violation of section 70.201(d) was presumptively S&S because it arose from the failure to abate an S&S violation of section 70.100(a). *Id.* at 907-08. The judge

also stated that application of the Commission's S&S test set forth in *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), independently supported his determination that the violation was not S&S. *Id.* at 907. Accordingly, the judge deleted the S&S finding. He assessed a civil penalty of $100. The Commission granted the Secretary's petition for discretionary review.

II.
Disposition

A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825-26 (April 1981). The general test for determining whether a violation is S&S is set forth in *Mathies*, 6 FMSHRC at 3-4. In *Consolidation Coal Co.*, 8 FMSHRC 890 (June 1986), *aff'd*, 824 F.2d 1071 (D.C. Cir. 1987), however, the Commission held: "when the Secretary proves that a violation of [section] 70.100(a) . . . has occurred, a [rebuttable] presumption that the violation is a significant and substantial violation is appropriate." *Id.* at 899.

In his petition for review, filed before issuance of the Commission's decision in *Keystone*, the Secretary asserts, as he did before the judge, that the failure to timely correct a presumptively S&S dust violation is also presumptively S&S.[3] PDR at 4. He asserts further that the judge determined that a short exposure to excessive respirable dust should not be considered presumptively S&S and that such a determination conflicts with *Consolidation. Id.* at 7. The Secretary urges the Commission to reject any attempt to carve out an exception to the presumption for even short periods of exposure to excessive dust. S. Br. at 10-13 & n.11. Incorporating by reference his arguments to the Commission in *Keystone*, the Secretary asserts that the judge erred in relying on his "doubts regarding 'the procedural and substantive merits of the Secretary's single shift sampl[ing] procedure.'" *Id.* at 5. He contends that the judge's doubts regarding the validity of the Program pertain only to the fact of violation and are immaterial to the S&S issue. *Id.* at 6-7. The Secretary asks the Commission to reverse the judge and remand for assessment of an appropriate civil penalty.

[3] The Secretary does not argue for application of the *Mathies* test.

Consol argues that the judge was correct in his determination that the violation was not S&S. It argues further that MSHA's enforcement actions improperly imposed duplicative S&S sanctions for the same violation, an issue not reached by the judge because he deleted the S&S designation. Consol Br. at 3-6.

With regard to the Secretary's argument that the judge erred in concluding that the violation was not presumptively S&S, we note that, on its face and as found by the judge, the instant citation was based solely on the operator's failure to take timely action to correct the conditions underlying the December 11 citation. Order No. 3720751; 15 FMSHRC at 905, 907.[4] Consequently, determination of whether the instant citation is presumptively S&S depends upon the validity of the underlying citation. The Secretary conceded this before the judge:

> Resolution of . . . whether the violation should be designated S&S, is directly dependent on the validity of the single sample method. If the single sample method is invalidated, then the current citation for failure to take corrective action to lower the respirable dust concentration . . . cannot be S&S because there would be no judicially acceptable proof that the respirable dust concentration was violative.[5]

S. Mot. for Stay at 3. The underlying citation was dismissed based on the Commission's ruling in *Keystone.* Consequently, the judge did not err in determining that the violation was not presumptively S&S. To the extent that he erred in deleting the S&S designation based on uncertainty regarding the underlying violation, that error is harmless because the Commission, in *Keystone*, invalidated that citation. *See Great W. Elec. Co.*, 5 FMSHRC 840, 842 (May 1983).

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[4] Our dissenting colleague relies on the affidavit of Inspector Betoney in an attempt to establish that the citation, which rests explicitly on the earlier test results, was issued not only as a result of the operator's failure to take corrective action but also as a result of subsequent dust sampling. Slip op. at 8. There is no indication in the judge's decision that he credited the inspector's statement in this regard. Rather, it appears that he discredited the statement: he found that the citation was issued "for the respondent's failure to take corrective action" (15 FMSHRC at 907) and that the violation "allegedly occurred because the respondent failed to take remedial action" (15 FMSHRC at 905). Moreover, the inspector's affidavit is not appropriately construed in the Secretary's favor to support his motion *for* summary decision and application of the S&S presumption, as our colleague suggests. She erroneously relies on the law regarding construction of evidence *in opposition to* summary decision to support her position, which, in essence, is to grant the Secretary's motion for summary decision.

[5] This concession served as the basis for the judge's stay order. 15 FMSHRC at 906. The dissent discounts this concession (Slip op. at 10) because it was made in a Motion for Stay, which also set forth the terms under which the case would be settled following the Commission's decision in *Keystone*. The statement was part of a legal argument made by the Secretary in support of his motion. The statement was not a factual admission made during settlement negotiations. *See* Fed. R. Evid. 408.

We also reject the Secretary's argument that violations of section 70.201(d) are presumptively S&S under *Consolidation.* In that case, the Commission determined that a rebuttable S&S presumption applies when the Secretary proves a violation of section 70.100(a). 8 FMSHRC at 899. Contrary to the Secretary's assertions, the Commission has not extended that presumption to violations of section 70.201(d) or to any other respirable dust or mandatory health standard. *See Union Oil Co. of Cal.*, 11 FMSHRC 289, 297 (March 1989).

A motion for summary decision is not the appropriate means for pursuing extension of the S&S presumption. We decline to decide on the present record whether violations of section 70.201(d) should also be considered presumptively S&S. In moving for summary decision, the Secretary foreclosed his opportunity to develop the type of record necessary to demonstrate the appropriateness of such a presumption. *See Union Oil*, 11 FMSHRC at 297. *Cf. Consolidation*, 8 FMSHRC at 892-94.

We conclude that the Secretary has failed to articulate persuasive legal grounds for overturning the judge's determination. To the extent the judge suggested that short periods of exposure to respirable dust are exempt from the presumption established in *Consolidation*, we agree with the Secretary that he erred. We do not reach the issue, raised by the operator, that the Secretary's S&S sanctions were duplicative.

III.
Conclusion

For the reasons set forth, we affirm in result the judge's determination that Consol's violation of section 70.201(d) was not S&S.

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Jordan, Chairman, dissenting:

Unlike my colleagues, I consider *Consolidation Coal* Co., 8 FMSHRC 890 (June 1986), *aff'd*, 824 F.2d 1071 (D.C. Cir. 1987), to be dispositive of the S&S issue in this case. Accordingly, I conclude that the judge erred in failing to apply *Consolidation*, and in granting summary decision in favor of the operator.

In *Consolidatio*n, the Commission was confronted with the question whether a violation of 30 C.F.R. § 70.100 based on "a single incident of overexposure" to respirable dust in an underground mine is S&S. *Id*. at 898. The Commission, modifying the general test for determining whether a violation is S&S set forth in *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), concluded that such violations are presumptively S&S.

The present case involves the conceded violation of 30 C.F.R § 70.201(d), which requires that "[d]uring the time for abatement fixed in a citation for violation of § 70.100 . . . , the operator shall take corrective action to lower the concentration of respirable dust to within the permissible concentration . . ." In refusing to apply *Consolidation*, my colleagues rely on the fact that the violation at issue here involves section 70.201(d) rather than the section 70.100. I view this as a distinction without a difference since the operator's failure to comply with the section 70.201(d) resulted in the same hazard, overexposure to respirable dust, which formed the basis of the S&S presumption in *Consolidation*. That the citation involves a failure to abate a dust violation, rather than a failure to comply with the dust standard in the first instance, does not change the fact that miners in the affected area were exposed to higher levels of dust than permitted under section 70.100.

In *Consolidation* the Secretary submitted testimony by medical experts who explained why it was not possible to assess the precise contribution of a particular instance of overexposure to the development of pneumoconiosis or the other disease induced by respirable dust. *See Consolidation Coal Co.*, 5 FMSHRC 378, 379-82 (March 1983) (ALJ). The medical evidence established that "the development and progress of respiratory disease is due to the cumulative dosage of dust a miner inhales, which in turn depends upon the concentration and duration of each exposure . . ." *Consolidation*, 8 FMSHRC at 898. The Commission concluded that "the present state of scientific and medical knowledge, as exemplified by the present record, do not make it possible to determine the precise point at which the development of chronic bronchitis or pneumoconiosis will occur or is reasonably likely to occur." *Id*. However, given the fact that reducing the incidence of these diseases was one of the fundamental purposes of the Mine Act and recognizing that "each unit of overexposure is an important factor in contributing to either [chronic bronchitis or pneumoconiosis]," id. at 894, the Commission determined that a departure from the typical S&S analysis was justified:

> [W]e hold that if the Secretary proves that an overexposure to respirable dust in violation of section 70.100(a) . . . has occurred, a presumption arises that the third element of the significant and substantial test – a reasonable likelihood that he health hazard contributed to will result in an illness – has been established.

Id. at 899.

In the instant case, there is no dispute that the sampling conducted by the operator between December 12 and 16 showed the average concentration of respirable dust to be 2.9 mg/m³. S. Mot. for Sum. Dec. at 7-8; Aff. of Theodore Betoney ¶¶ 11-14. Inspector Betoney relied on these sampling results when he issued the citation at issue here. *Id*. The Secretary has proved, therefore, that an overexposure to respirable dust occurred. Because the operator had previously been cited under section 70.100, and had failed to take immediate steps to lower the dust level, the instant citation referred to section 70.201 as the standard violated. S. Mot for Sum. Dec. at 8-9; Betoney Aff. ¶14. In light of this, my colleagues have determined that we should not apply the S&S presumption for respirable dust violations in this case and should instead require the Secretary "to develop the type of record necessary to demonstrate the appropriateness of such a presumption." Slip op. at 6. As the record does not contain evidence of a medical breakthrough permitting precise prediction of the likelihood of contracting lung disease on the basis of a single instance of overexposure to respirable dust, I fail to see the purpose of requiring the Secretary to "prove anew" that such overexposure endangers miners' health and satisfies the four S&S elements set forth in *Mathies*. *See Consolidation*, 8 FMSHRC at 899.

The judge's decision does not even refer to *Consolidation*. Explaining he deleted the S&S designation because, inter alia, the operator's "failure to take remedial action was cited shortly after the abatement period expired, " the judge concluded that "respondents' failure to timely correct the alleged underlying violation one day after the time established for abatement does not constitute a significant and substantial violation." 15 FMSHRC at 908. Even accepting the one day time frame relied upon by the judge, Consolidation does not indicate that an exception to the S&S presumption should apply.[1]

The Commission's decision in *Consolidation* recognized that the development and progress of respiratory disease is due to the cumulative dosage of dust a miner inhales, which in turn depends upon "the concentration and duration of *each* exposure . . . ." 8 FMSHRC 989

[1] The judge's one-day time frame does not appear to be supported by substantial evidence. The judge computed the relevant time period from the December 18 deadline for abating the section 70.100 citation to December 19, the date the operator received the citation alleging a violation of section 70.201(d). Although the operator received the failure-to-abate citation on December 19, the record reflects that it did not abate the violation until December 23 at the earliest, when respondent submitted a plan of corrective action to MSHA. Betoney Aff. Ex. E at 2.

(emphasis added). *Consolidation* emphasized the importance that Congress placed on the fixed ceiling for respirable dust exposure levels. The Commission noted:

> The respirable dust standard . . . is taken directly from section 202 of the Mine Act, 30 U.S.C. § 842, which, in turn, was carried over without significant change from the [Federal] Coal [Mine Health and Safety] Act [of 1969].

Id. at 896. The Commission stressed that:

> [I]n all cases, the standard is keyed to each individual miner. The air he breathes, wherever he works in the mine, *must not contain* more respirable dust during any working shift than the standard permits.

8 FMSHRC at 897 (emphasis in original), *quoting* Conference Report reported at 1 *Legislative History of the Federal Coal Mine Health and Safety Act of 1969* at 1606 (1975). Because it is undisputed that the miners here were exposed to "more respirable dust . . . than the standard permits," I would find the violation to be S&S under *Consolidation*.

My colleagues' decision is also based on the dismissal of the underlying section 70.100 citation by a different judge in a separate proceeding. Slip op. at 5. That dismissal was predicated on the Secretary's use of a single-shift method for collecting dust samples. The Commission later determined that the single-shift method was procedurally invalid because the Secretary had not engaged in formal rulemaking prior to implementing it. *Keystone Coal Mining Corp*., 16 FMSHRC 6, 10-16 (January 1994). In his ruling below, handed down prior to the Commission's decision in *Keystone*, Judge Feldman concluded that "the uncertainties associated with the underlying respirable dust standard violation . . . create mitigating circumstances warranting the deletion of the significant and substantial characterization in [the citation]." 15 FMSHRC at 907.

The dismissal of the underlying section 70.100 citation precludes the Secretary from relying on the dust samples which precipitated that citation to prove that overexposure occurred in this case. But the citation involved here does *not* rely on those invalid samples. Inspector Betoney explained that he issued the section 70.201(d) citation because the operator failed to take steps to abate the previous citation issued under section 70.100, *and* because subsequent dust samples taken between December 12 and December 16 also showed a violative average dust concentration of 2.9 mg/m³. These samples were taken by the operator using the traditional multi-shift approach, and there is no dispute about their validity. Given that the operator has conceded a violation of section 70.201(d), and that samples show the violation resulted in

exposure to illegal levels of respirable dust, we should resolve the S&S issue by applying the presumption articulated in *Consolidation*.[2]

Because the 70.201(d) citation only refers to the operator's failure to take corrective action and does not make specific reference to the operator samples confirming the existence of illegal levels of respirable dust between December 12 and 16, my colleagues question whether these samples can properly be considered in assessing the S&S nature of the failure to abate the violation at issue here. Suggesting that the judge "discredited" the portion of Inspector Betoeny's affidavit which refers to these samples, they maintain that the S&S nature of the instant citation must depend upon the validity of the underlying citation. Slip op. at 5 & n.4.

The judge's decision indicates that he considered the dust samples taken between December 12 and 16 as "*not dispositive* of whether there was a basis for the issuance of [the underlying] Citation . . . [issued] on December 11, 1991." 15 FMSHRC at 907 n.9 (emphasis supplied). The judge failed to address whether Inspector Betoney's evidence provided an independent basis for concluding that the operator's failure to abate the earlier citation resulted in exposure to excessive levels of respirable dust. The judge's finding that Inspector Betoney's evidence did not cure the defective single shift sampling that had been conducted on December 11 is not the same as discrediting that evidence for purposes of showing that miners were overexposed to dust on subsequent days. Indeed, the judge would have committed error had he "discredited" the inspector's testimony.

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[2] My colleagues rely on an asserted concession by the Secretary that the *Keystone* decision dictates dismissal of the S&S designation here. Slip op. at 5. I attach little weight to the Secretary's statement cited by the majority, given that the statement appeared in a Motion to Stay that was explicitly predicated on an offer to settle the matter based on the *Keystone* result. The settlement apparently fell through. Mot. for Stay at 5-6; Unpublished Order at 2 (March 26, 1993). In any case, the Secretary subsequently modified his position on the connection between *Keystone* and the S&S issue here, stating:

> In the instant case, the five samples that the company collected on December 12, 13 and 16, 1991, prior to taking corrective action, revealed an average concentration of 2.9 mg/m³. *Thus, these samples, independent of the two single samples that were collected on December 9 and 10, 1991*, demonstrate that the respirable dust concentration for the long wall jack setter far exceeded the permissible maximum of 2.0 mg/m³.

S. Mot. for Sum. Dec. at 20 (emphasis supplied). Significantly, on review the respondent has not even cited the Secretary's earlier statement mentioned by my colleagues purporting to link the *Keystone* outcome and the instant S&S issue.

While a question of credibility may be sufficient to *forestall* entry of summary decision, a judge may not "discredit" record evidence as a means of *granting* summary decision, particularly in view of the judge's inability to assess the witness's demeanor. *See* 10A Wright et al., Federal Practice and Procedure § 2726 (2d ed. 1983). If the judge believed that Inspector Betoney's affidavit was inconsistent with the face of the citation, as my colleagues speculate, then he should have denied summary decision and proceeded to trial on this material factual issue. *See*, e.g. *Leonard v. Dixie Well Serv. & Supply, Inc*., 828 F.2d 291 (5th Cir. 1987). As the court noted in *Leonard*, "the Supreme Court has not . . .approved summary judgements that rest on credibility determinations."[3] *Id*. at 294.

Accordingly, I would vacate the judge's decision and remand for application of *Consolidation*.[4]

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Mary Lu Jordan, Chairman

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[3] My colleagues, misapprehending the dissent, conclude that I rely on the law requiring construction of the evidence in favor of the party opposing summary judgment to support my purported "position, *which, in essence, is to grant the Secretary's motion for summary decision.*" Slip op. at 5 n.4 (emphasis supplied). The issue before the Commission is *not* whether summary judgment was improperly denied to the Secretary, but whether the judge erred by refusing to apply the S&S presumption of *Consolidation*. PDR at 1. The judge was not required to enter summary decision in favor of the Secretary. *See* Wright, *supra*, at § 2720. However, if the judge erred by not applying *Consolidation*, as I conclude, then his grant of summary decision *in favor of the operator* must be vacated. The filing of cross-motions for summary decision does not relieve the judge of the obligation to resolve all doubts against the operator before granting that party's motion for summary decision. *Id*. at § 2727. "The court must rule on each party's motion on an individual and separate basis, determining, in each case, whether a judgment may be entered in accordance with the [summary judgment] standard." *Id*. at § 2720 (citations omitted). Thus, in considering whether the judge properly granted the operator's summary judgment motion, the Secretary must be treated as the party opposing entry of summary decision, and the record evidence must be construed in his favor.

[4] I am not persuaded by the operator's argument that upholding MSHA's enforcement action imposes on respondent "two S&S special findings . . . for the very same violative condition . . . ." Consol Br. at 6. The citation in the present case was for Consol's refusal to timely abate the underlying citation, not for the underlying citation itself.

Marks, Commissioner, not participating:

I assumed office after this case had been briefed and considered at a Commission decisional meeting. In light of these circumstances, I elect not to participate in this case.

Marc Lincoln Marks, Commissioner