

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

April 1, 1998

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
 :
v. : Docket Nos. WEVA 93-146-A
 : WEVA 93-81-R
 :
 :
CONSOLIDATION COAL COMPANY :

BEFORE: Marks, Riley, and Verheggen, Commissioners¹

DECISION

BY THE COMMISSION:

¹ Chairman Jordan and Commissioner Beatty recused themselves in this matter and took no part in its consideration. Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

This is a consolidated contest and civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977 (the Mine Act or Act), 30 U.S.C. § 801 et seq. (1994). The Department of Labor's Mine Safety and Health Administration (MSHA) issued a citation against Consolidation Coal Company (Consol) charging it with violating section 103(j) of the Mine Act, 30 U.S.C. § 813(j),² and proposed a penalty of \$50,000. Administrative Law Judge Gary Melick dismissed the citation. 18 FMSHRC 363 (March 1996) (ALJ). For the reasons that follow, we affirm the judge's decision.

I.

Factual and Procedural Background

On March 19, 1992, an explosion occurred at Consol's Blacksville No. 1 Mine in Monongalia County, West Virginia. 18 FMSHRC at 365; Tr. 156. Four miners, including Consol environmental engineer Ronald Baird, were killed in the explosion. 18 FMSHRC at 365; Gov't Ex. 1. On March 20, representatives of MSHA, led by chief investigator Jim Rutherford, arrived at the mine site to begin an investigation into the explosion. 18 FMSHRC at 368; Tr. 156, 157-58. Rutherford was a senior MSHA employee in charge of a ten-person investigating team and responsible for producing MSHA's accident report and determining whether violations were committed. Tr. 155-56. On March 20, Rutherford discussed with MSHA investigator Joseph Vallina the need to inventory vehicles on the surface and placed him in charge of that project. 18 FMSHRC at 368; Tr. 84-85, 198-99. Under Vallina's supervision, teams consisting of state and federal investigators and mine personnel were assigned the responsibility of inventorying vehicles. Tr. 87.

On the morning of March 21, Consol's vice-president for safety, Ronald Wooten, and company counsel, Walter Scheller, arrived at the mine to participate in the investigation. 18 FMSHRC at 365. Local mine officials notified Scheller that Baird's widow had requested that his

² Section 103(j) provides:

In the event of any accident occurring in any coal or other mine, the operator shall notify the Secretary thereof and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof. In the event of any accident occurring in a coal or other mine, where rescue and recovery work is necessary, the Secretary or an authorized representative of the Secretary shall take whatever action he deems appropriate to protect the life of any person, and he may, if he deems it appropriate, supervise and direct the rescue and recovery activities in such mine.

30 U.S.C. § 813(j).

personal effects be retrieved from his company vehicle. *Id.*; Tr. 225. At MSHA's request, Scheller was also trying to locate training records pertaining to subcontractors at the mine that were thought to be in Baird's vehicle. 18 FMSHRC at 365; Tr. 7-8, 226.

Scheller, accompanied by Wooten and John Morrison, safety supervisor at the mine, approached chief investigator Rutherford and requested permission to enter Baird's vehicle to look for his personal effects and the training records. 18 FMSHRC at 365, 366. Rutherford gave them permission to search the vehicle. *Id.* at 365-66. Also, in uncontested testimony, Wooten stated that at the time permission was granted, he told Rutherford, A[W]e would like to bring these materials back to this office . . . and put them on [the] desk for anyone, anyone involved in the investigation, to see.@ Tr. 264.

At around 10:00 a.m., Scheller and Morrison went to Baird's vehicle. *Id.* at 366. Because of the ongoing investigation into the mine explosion, there were many people in the area affiliated with either Consol, MSHA, the union, or the state mine authority. *Id.* Baird's vehicle, which was parked near the mine entrance, had its windows blown out when the explosion occurred and was covered by a tarp. *Id.* Scheller and Morrison removed the tarp, and Scheller entered the vehicle. *Id.* Scheller found a metal clipboard with papers relating to a wrestling team that Baird had coached. *Id.* at 366-67. Morrison placed the clipboard along with other personal items, including a Bible and keys in a small cloth duffle bag that he had brought with him. Tr. 230. In the vehicle's middle console, Scheller located Baird's wallet along with a hand-held methane detector and charger. Tr. 230-31. Scheller removed the wallet from the console and handed it to Morrison who put it in the cloth bag. Tr. 231. He then told Morrison to remember where the methane detector had been found. 18 FMSHRC at 366-67; Tr. 11, 231.

Shortly thereafter, Vallina, who along with MSHA Inspector Teaster was standing about 25 feet away from Baird's vehicle and watching Scheller and Morrison, came up to them and asked them what they were doing. 18 FMSHRC at 366-67. Scheller responded that Rutherford had authorized them to look for Baird's personal effects and training records. *Id.* Scheller also told Vallina that he found a methane detector. *Id.* Vallina told Scheller to return the detector to where he had found it. *Id.* Scheller did so and then reattached the tarp over the vehicle. *Id.* at 366. Vallina did not search the cloth bag, nor did he ask what was in it. *Id.*; Tr. 138. Teaster accompanied Scheller and Morrison back to the mine office. 18 FMSHRC at 366. At the office, Rutherford confirmed that he had given Scheller permission to go into Baird's vehicle. *Id.* Scheller emptied the contents of the duffle bag on a table in the presence of Rutherford. *Id.* at 366-67. Scheller asked Rutherford whether there was a problem, and Rutherford answered, ANo.@ *Id.* at 366.

On November 9, 1992, MSHA issued a citation against Consol,³ which stated:

³ MSHA issued several other citations and orders against Consol as a result of the investigation, including one that charged it with failing to conduct methane tests in a coal silo near the mine entrance. *Consolidation Coal Co.*, 18 FMSHRC 357 (March 1996) (ALJ). That

The mine operator altered evidence which would assist in the accident investigation of the fatal methane explosion A Consol vehicle assigned to Rod Baird . . . was located in the blast area . . . and was damaged by the explosion. This vehicle contained items related to the work area that would assist the investigation. Specifically, a methane detector and a Consol . . . metal clipboard, which Baird reportedly used to attach routine work notes and records, were in the subject vehicle.

On March 21, 1992, Consol employees Walter Scheller and John Morrison entered Baird's vehicle and took Baird's assigned methane detector and clipboard without permission along with a cloth bag of other items. Scheller and Morrison had obtained MSHA's permission to retrieve only training records and Baird's personal effects from the vehicle. Upon being observed and stopped by MSHA accident investigation team member Joseph Vallina, Scheller returned the methane detector to the vehicle.

Id. at 364; Gov't Ex. 1.

Consol contested the citation and the matter went to hearing. At the hearing, the Secretary's counsel clarified that the citation only charged a violation with regard to the methane detector but not as to the clipboard or cloth bag. 18 FMSHRC at 364. The judge initially held that, based on the language of the citation, it must be dismissed as a matter of law because it failed to charge a violation of section 103(j) of the Act. *Id.* In addition, the judge found that, even if the citation alleged a violation of section 103(j), the credible evidence established that Scheller had been given permission to search the Baird vehicle and remove specific articles and that he had been told that MSHA was through with the vehicle. *Id.* at 367. The judge credited Scheller's explanation that he intended to turn over the methane monitor to Rutherford as possible material evidence. *Id.* He concluded that the Secretary failed to carry her burden in proving that Consol failed to take appropriate measures to prevent the destruction of evidence. *Id.* at 365, 367-68.

II.

Disposition

The Secretary argues that the judge erred in determining that altering evidence by removing it from an accident scene was not a violation of section 103(j) of the Act. PDR at 1; S.

citation was dismissed by the judge. *Id.* at 362.

Br. at 7-8. The Secretary also contends that substantial evidence does not support the judge's determination that, even if removal of evidence from an accident scene were a violation, the Secretary did not establish a violation of section 103(j). PDR at 2; S. Br. at 15. The Secretary asserts that, because the judge did not base credibility determinations on his observation of witnesses, those determinations are not entitled to deference. S. Br. at 15-16. Finally, the Secretary argues that the judge failed to reconcile inconsistencies in the testimony of witnesses whom he credited. *Id.* at 16-24.

Consol argues that the Secretary's interpretation of section 103(j) is not entitled to deference because its language is clear and does not include "alteration" of evidence that was the basis of the citation. Consol Br. at 2-9. Scheller's actions in removing the methane monitor to take it to MSHA officials, Consol argues, were designed to ensure that the evidence was not overlooked or destroyed. *Id.* at 11-15. With regard to the factual findings, Consol contends that substantial evidence supports the judge and that he correctly resolved conflicts among witness testimony based on proper considerations. *Id.* at 15-19.

Section 103(j) of the Act requires operators to "take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause [of an accident]." The purpose of the provision is to preserve evidence that could disclose the reason for a mine accident. S. Rep. No. 181, 95th Cong., 1st Sess. 29, *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 617 (1977).

Witnesses for both the Secretary and Consol similarly testified that Consol counsel Scheller asked MSHA's chief investigator Rutherford for permission to enter Baird's vehicle and retrieve his personal effects and training records. Tr. 8-9, 161, 186, 227, and 260-61. The judge credited Scheller's and Consol vice-president Wooten's testimony that Rutherford also stated that MSHA was through with the vehicle. 18 FMSHRC at 365. Once inside the vehicle, Scheller located the methane detector, which he showed to inspector Vallina when he arrived. *Id.* at 366-67. The judge further credited Scheller's uncontroverted testimony that he intended to hand over the methane detector to Rutherford because it was material evidence. 18 FMSHRC at 367; Tr. 238.

A judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (September 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (December 1981). The Commission has recognized that, because the judge has an opportunity to hear the testimony and view the witnesses, he is ordinarily in the best position to make a credibility determination. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (November 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *appeal docketed sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, No. 95-1619 (D.C. Cir. Dec. 28, 1995). Nonetheless, the Commission will not affirm such determinations if there is no evidence or dubious evidence to

support them. *Consolidation Coal Co.*, 11 FMSHRC 966, 974 (June 1989) (citations omitted).

The Secretary contends that the Commission should not accord the judge's credibility resolutions the weight that such determinations are generally given because they were not based on witness demeanor and because the judge failed to consider other significant record testimony. S. Br. at 15-16. We disagree. Contrary to the Secretary's argument, there is nothing in the judge's decision to suggest that he did not consider his observation of witnesses in making his credibility determinations. See 18 FMSHRC at 365, 367 (general statements of credibility). We find the judge's reliance on witness demeanor in his credibility determinations is implicit. Cf. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951).

Moreover, in this proceeding the judge supported his credibility determinations by drawing inferences from largely undisputed facts. Thus, in crediting Scheller's and Wooten's testimony, the judge noted that it was reasonable to infer that, if anyone was going to destroy evidence, it is not likely that he would do so in broad daylight under the eyes of federal investigators. 18 FMSHRC at 367. Nor is it likely that one who was interested in destroying evidence would wait two days after the accident to search for evidence and seek the permission of the chief investigator to do so. *Id.* Rather, it would be more likely that such a person would seek out such evidence surreptitiously at night without permission during the early stages of an investigation. *Id.* Finally, as the judge noted, the presence of a methane detector in Baird's vehicle during the investigation of a methane explosion could be considered exculpatory; therefore, Consol officials would be motivated to preserve rather than destroy such evidence. *Id.* The inferences drawn by the judge based on record facts are reasonable, and the Secretary has offered no countervailing considerations that persuades us to overturn them.⁴

⁴ The Commission has held that the substantial evidence standard may be met by reasonable inferences drawn from indirect evidence. @ *Mid-Continent Resources, Inc.*, 6 FMSHRC 1132, 1138 (May 1984). The possibility of drawing either of two inconsistent inferences from the evidence [does] not prevent [the judge] from drawing one of them. @ *NLRB v. Nevada Consolidated Copper Corp.*, 316 U.S. 105, 106 (1942). The Commission has emphasized that inferences drawn by the judge are permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred. @ *Mid-Continent*, 6 FMSHRC at 1138 (citations omitted).

In crediting the testimony of Scheller and Wooten, the judge also weighed the contrary testimony of MSHA chief investigator Rutherford. The judge noted that Rutherford was busy and, therefore, his recollection of the conversation may not have been as clear as otherwise could be expected. *Id.* at 368. Thus, on the morning of March 21, Rutherford was engaged in trying to get a team of investigators underground for the first time since the mine explosion. Tr. 161-62. In addition, the judge found that notes that Rutherford wrote after incident, Resp. Ex. 4, were inconsistent with his trial testimony and omitted significant parts of his conversation with Scheller and Wooten that he later recalled. 18 FMSHRC at 368. The judge further noted that Rutherford was a senior skilled investigator who would not likely have given Consol officials permission to search Baird's vehicle unless he believed that its contents had been inventoried. *Id.* Lastly, the judge considered that Rutherford had instructed his investigators to inventory all vehicles in the blast area on the previous day, suggesting that he believed that the vehicle had been inventoried.⁵ *Id.* Contrary to the Secretary's argument, S. Br. at 18-19, the judge's analysis of Rutherford's testimony is logical and consistent with other record evidence and, therefore, we decline to disturb his credibility resolutions. *See also Ona*, 729 F.2d at 719 (reviewing court not bound by judge's credibility resolutions where inherently unreasonable or self-contradictory, or based on inadequate or no reason).

The Secretary finally argues that the judge failed to address inconsistencies in witness testimony with regard to Rutherford's granting permission to enter Baird's vehicle. S. Br. at 22-24. However, the differing versions of the conversation given by Scheller, Wooten, and Morrison do not provide a basis for overturning the judge. Unlike Scheller and Wooten, who testified that Rutherford said that MSHA was through with the vehicle (Tr. 227, 261), Morrison's testimony was silent on that point (Tr. 8-9). Given that there was only a direct conflict between the testimony of Rutherford, Scheller and Wooten, the judge reasonably limited his discussion to the inconsistencies in their testimony on this issue. The judge found it more significant that Morrison corroborated that Rutherford had given permission to enter and search the vehicle. 18 FMSHRC

⁵ Commissioners Riley and Verheggen note additionally as follows: We are perplexed by the Secretary's proposed penalty in this case, which our colleague properly characterized as outlandish at oral argument (Oral Arg. Tr. at 35). As to the gravity of the alleged violation, Secretary's counsel admitted that the methane monitor on which this case is based had absolutely no bearing on the accident investigation (*id.* at 32-36), which was completed when MSHA issued the citation some nine months after the accident investigation. Nor can we find in the circumstances of this case any indication that any of the Consol officials involved acted negligently; to the contrary, we agree with the judge's observation that they were attempting to preserve evidence rather than destroy it. 18 FMSHRC at 365 (emphasis added). As to other penalty factors, we find nothing in the record that would justify a \$50,000 penalty. We thus view with no small amount of skepticism the Secretary's arguments in this case. We believe that MSHA should not have sought to so severely penalize Consol for its own failure to properly secure and inventory the accident scene. C after all, this case would not be before the Commission had MSHA's investigation proceeded as Rutherford apparently assumed it had.

at 368. We agree.

When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C.

' 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (January 1997) (quoting *Universal Camera*, 340 U.S. at 488).

Based on the testimony credited by the judge, we conclude that substantial evidence supports the judge's determination that the actions of Consol officials did not contravene section 103(j). As the judge concluded, "the actions of Consol officials in removing the . . . methane detector from the Baird vehicle may reasonably be construed, under all the circumstances, to have been an effort to preserve evidence rather than destroy it." 18 FMSHRC at 365.

III.

Conclusion

For the foregoing reasons, we affirm the judge's decision dismissing the citation against Consol.⁶

Marc Lincoln Marks, Commissioner

⁶ In light of our decision, we do not reach the Secretary's argument that section 103(j) of the Act proscribes alteration of evidence or its removal from an accident scene.

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

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