FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET N.W., 6TH FLOOR
WASHINGTON, D.C. 20006

January 15, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. PENN 94-259
	:	PENN 94-400
ENLOW FORK MINING COMPANY	:	

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners[1]

DECISION

BY: Jordan, Chairman; Riley, Commissioner

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@ or AAct@), involve two accumulation violations of 30 C.F.R. ' 75.400[2] and related preshift violations of 30 C.F.R.

[1] **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.**

[2] Section 75.400, entitled AAccumulation of combustible materials,@ provides:

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

' 75.360 (1993)[3] by Enlow Fork Mining Company (AEnlow@) on November 15 and December 8, 1993. At issue is whether Administrative Law Judge Avram Weisberger correctly determined that the November accumulation violation was not significant and substantial (AS&S@)[4] and not the

[3] Former section 75.360, entitled APreshift examination,@ provided in part:

> (a) Within 3 hours preceding the beginning of any shift and before anyone on the oncoming shift, other than certified persons conducting examinations required by this subpart, enters any underground area of the mine, a certified person designated by the operator shall make a preshift examination.
>
> (b) The person conducting the preshift examination shall examine for hazardous conditions, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction . . . .

Current section 75.360 applies to preshift examinations and expands these requirements.

[4] 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 Acould significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard . . . .@

result of unwarrantable failure,[5] and that Enlow did not violate the preshift regulation by failing to record the accumulation. 17 FMSHRC 563 (April 1995) (ALJ). Also at issue is whether the judge properly concluded that the December accumulation violation was the result of unwarrantable failure and that Enlow violated the preshift requirement. *Id*. For the reasons that follow, we vacate and remand the judge=s S&S and unwarrantable failure determinations for the November accumulation violation and affirm his other determinations.

I.

Factual and Procedural Background

A. November Inspection (Order No. 3660021 and Citation No. 3659960)

On November 15, 1993, at 9:00 a.m., Joseph Hardy, an inspector with the Department of Labor=s Mine Safety and Health Administration (AMSHA@), inspected the B-3 Longwall Section of the Enlow Fork Mine, an underground coal mine located in Greene County, Pennsylvania. 17 FMSHRC at 563-64. At the tailgate area, he observed an accumulation of packed float coal dust and loose coal mixed with hydraulic oil on and around the tailgate gear case, fluid coupler, and electric drive motor. *Id*. He also observed oil-soaked rags on top of the fluid coupler. *Id*. at 564. An accumulation of hydraulic oil under the motor fluid coupler and gear box measured 4 feet by 10 to 15 feet. *Id*. In addition, he observed an accumulation of coal and float coal dust between shields 148 and 152, the shields closest to the tailgate. *Id*.

Hardy issued a withdrawal order pursuant to section 104(d)(1) of the Mine Act alleging a violation of section 75.400, and closed down the area. *Id*. The order was terminated at 11:30 a.m. after the area was cleaned. Gov=t Ex. 2; Tr. 99.

After seeing the accumulations, Hardy checked to see if a preshift examination had been performed and learned that William Young had preshifted the area that morning at 5:00 a.m. 17 FMSHRC at 564, 566-67. Upon determining that the accumulations were not recorded in the preshift report, Hardy issued a section 104(d)(1) citation for failing to report them. *Id.* at 564.

B. December Inspection (Order No. 3660375 and Citation No. 3660374)

On December 8, 1993, at 9:00 a.m., as part of a spot inspection conducted pursuant to section 103(i) of the Mine Act, 30 U.S.C. ' 813(i), MSHA Inspector Joseph Reid observed, at the

[5] The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, which establishes more severe sanctions for any violation that is caused by Aan unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards . . . .@

2N belt entry, an area of accumulations of coal dust starting at the belt feeder and extending 200 feet outby. 17 FMSHRC at 570-71. The accumulations were black in color and dry, and consisted of loose coal, float coal dust, and fine coal on and around the belt feeder unit. *Id.* The accumulations included fine float coal dust on the mine floor inby the feeder in a deposit 16 feet long, 4 feet wide, and up to 5 inches deep, and a pyramid-shaped pile of fine float coal dust that, at its deepest point, was 18 inches deep, 2 feet long, and 3 feet wide. *Id.* The inspector also noted coal dust between 1/8 inch to 2 inches deep on cross members of the belt and the belt structure itself. *Id.*

Inspector Reid issued a section 104(d)(1) withdrawal order alleging a violation of section 75.400. Gov=t Ex. 13. Enlow abated the violation at 10:30 a.m. by satisfactorily cleaning the area. *Id.* Reid then checked the preshift examination records, which indicated that a preshift had been made of the area between 5 and 7 a.m. that morning. 17 FMSHRC at 570. Because the accumulations were not reported in those records, the inspector issued a citation under Mine Act section 104(a), 30 U.S.C. ' 814(a), alleging a violation of section 75.360(b)(1). *Id.* The citation was terminated when the area was cleaned up and an adequate preshift examination was performed. Gov=t Ex. 14.

Enlow contested the citations and orders, and the matters were consolidated for hearing before Judge Weisberger. With respect to the November inspection, the judge determined that an accumulation of coal dust, loose coal, and oil existed in violation of section 75.400. 17 FMSHRC at 565-66. He rejected the charge that there had been a preshift violation under section 75.360(b)(1), concluding that the Secretary of Labor had not established that violative accumulations existed at the time of the preshift examination. *Id.* at 566-67. The judge also concluded that the accumulation violation was not the result of unwarrantable failure. *Id.* at 567-68. In addition, he determined that the violation was not S&S, concluding that the Secretary failed to establish that a fire or ignition was reasonably likely to have occurred because of the violative accumulation. *Id.* at 568-69. Finding the gravity of the accumulation violation high, the judge assessed a penalty of $2,000. *Id.* at 569.

With respect to the violations of December, the judge concluded that Enlow violated section 75.400 because of the existence of accumulations of coal dust. *Id.* at 570-71. Due to the extent of the accumulations, the judge ruled that at least some of the accumulations existed during the preshift examination and concluded that Enlow violated section 75.360(b)(1) by failing to report them. *Id.* at 572. He also determined that the accumulation violation was the result of unwarrantable failure because Inspector Reid had previously issued a citation for an accumulation violation and had discussions with management concerning the hazards of accumulations and inadequate preshift examinations. *Id.* at 572-73. As the judge found no reasonable likelihood of a fire or explosion resulting from the accumulations, he determined that the accumulation violation was not S&S. *Id.* at 573-74. The judge found a high level of gravity and assessed a penalty of $5,000 for the accumulation violation and $500 for the preshift violation. *Id.* at 574.

The Commission granted cross-petitions for discretionary review filed by the Secretary challenging the judge=s determinations regarding the November violations, and by Enlow challenging the judge=s determinations regarding the December violations.

II.

Disposition

A. November Inspection

1. S&S

The Secretary contends that the judge erred in failing to address material record evidence that established that the November accumulation violation was S&S, specifically pointing to Inspector Hardy=s testimony that the accumulations had packed around the gear box causing it to become too hot to touch. S. PDR at 5-6; S. Br. 1, at 4-6.[6] Enlow counters that the judge=s S&S determination is supported by substantial evidence,[7] asserting that the inspector=s testimony with regard to the gearbox was speculative, whereas the testimony of its witness William Stewart, the longwall maintenance coordinator, was accurate and reliable. E. Br. 2, at 4-9.[8]

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 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission further explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a

[6] The Secretary filed two briefs in this proceeding. The Secretary=s brief of June 28, 1995 is referred to as AS. Br. 1;@ his brief of August 1, 1995 is referred to as AS. Br. 2.@

[7] When reviewing a judge=s factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial test. 30 U.S.C. ' 823(d)(2)(A)(ii)(I). ASubstantial evidence@ means Asuch 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)).

[8] Enlow filed three briefs in this proceeding. Its brief of June 14, 1995 is referred to as AE. Br. 1;@ that of August 15, 1995 is referred to as AE. Br. 2;@ and its brief of August 25, 1995 is referred to as AE. Br. 3.@

> reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Id. at 3-4 (footnote omitted). *See also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988) (approving *Mathies* criteria).

At issue here is whether the Secretary proved the third element of *Mathies.* An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (August 1985). When evaluating the reasonable likelihood of a fire, ignition, or explosion, the Commission has examined whether a Aconfluence of factors@ was present based on the particular facts surrounding the violation. *Texasgulf, Inc*., 10 FMSHRC 498, 501 (April 1988). Some of the factors include the extent of accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area. *Utah Power & Light Co*., 12 FMSHRC 965, 970-71 (May 1990) (A*UP&L*@); *Texasgulf*, 10 FMSHRC at 500-03.

The substantial evidence 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 Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-89 (1951). In *Mid-Continent Resources, Inc*., 16 FMSHRC 1218, 1222-23 (June 1994), the Commission vacated the judge=s conclusion that an accumulation violation was not S&S because the judge failed to adequately address the evidentiary record on the reasonable likelihood of injury. In this case, we agree with the Secretary that the judge failed to adequately address the evidentiary record in determining that it was not reasonably likely that the hazard contributed to by the accumulation violation would result in an injury.

The judge failed to reconcile his finding that the Amine does liberate methane@ (17 FMSHRC at 569), with his determination that the violation was not S&S. As the Commission recognized in *Mid-Continent*, 16 FMSHRC at 1222, A[a]ccumulations, in conjunction with a methane ignition in the face area, could propagate and increase the severity of a fire or explosion.@ Enlow mine liberates more than 2,000,000 cubic feet of methane in a 24-hour period, subjecting it to a 5-day spot inspection under section 103(i) of the Mine Act. Tr. 79. The judge did not analyze the inspector=s uncontroverted testimony that, because any methane liberated from the face will pass through this area, the tailgate area was a likely spot for an explosion. Tr. 92-93. We therefore conclude that substantial evidence does not support the judge=s finding that there was no Aevidence that liberation of methane in explosive concentrations was reasonably likely to have occurred.@ 17 FMSHRC at 569.[9]

[9] To the extent the judge suggested that, before an accumulation violation is S&S, methane must be in the explosive range (17 FMSHRC at 569), he erred. In *National Gypsum*, the Commission explained that, to be cited as S&S, the conditions created by the violation need not

Further, the judge failed to address Awhether an injury would have been reasonably likely to occur if mining operations had continued without the inspector=s intervention.@ *U.S. Steel*, 7 FMSHRC at 1130. The inspector testified that the packing of accumulations on the outside of the gear case and fluid coupler caused them to build up heat. Tr. 28-29, 72-75. He stated that the gear case was too hot to touch and that, if the oil saturated coal dust and coal had continued to build and mining continued, the gear box would have grown progressively hotter, posing a serious danger of ignition. Tr. 25-28, 37, 73-75, 105; Gov=t Ex. 3, at 8-9. Although the judge determined that the gear box did not represent an ignition source in its present condition, he failed to address the danger of ignition if the packing of coal, oil, and oil-saturated coal dust around the gear box continued unabated. On remand, we instruct the judge to evaluate the effect of continued mining operations. *See Mid-Continent*, 16 FMSHRC at 1222 (remand appropriate when the judge failed to take into account continued normal mining operations).

Additionally, the judge made findings that are not consistent with his S&S determination. As the Secretary notes, his finding on gravity is incongruous with a negative S&S determination. S. Br. 1, at 6 n.4. The judge found, A[S]hould a fire or explosion have occurred, these persons could have suffered serious injuries . . . [and] the gravity of violation was relatively high.@ 17 FMSHRC at 569. Although the gravity penalty criterion and a finding of S&S are not identical, they are frequently based upon the same factual circumstances. *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1622 n.11 (September 1987). He also recognized a number of factors that, taken together, have been held to show a reasonable likelihood of fire or ignition. *See UP&L*, 12 FMSHRC at 970-71; *Texasgulf*, 10 FMSHRC at 500-03. For example, the judge found the existence of accumulations of coal dust, loose coal, and oil, the liberation of methane in the mine, the presence of rags over the top of the fluid coupler, dry coal dust on electrical boxes, and ignition sources including bearings on the drive shaft and gear case and a 4160-volt drive motor. 17 FMSHRC at 566, 569. The judge failed to reconcile these findings with his determination that the violation was not S&S.

Accordingly, we vacate the judge=s determination that the accumulation violation was not S&S and remand for his evaluation of all the material record evidence.

2. Unwarrantable Failure

The Secretary argues that the judge erred in reaching his unwarrantable failure determination by applying an incorrect legal standard and that, as a result, the judge failed to address material record evidence on the issue. S. Br. 1, at 7-9. Enlow counters that the judge applied the proper legal test and that his unwarrantable failure determination is supported by substantial evidence. E. Br. 2, at 9-17.

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be so grave so as to constitute an imminent danger. 3 FMSHRC at 828.

In *Emery Mining Corp.*, 9 FMSHRC 1997 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as Areckless disregard,@ Aintentional misconduct,@ Aindifference,@ or a Aserious lack of reasonable care.@ *Id.*; at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991); *see also Buck Creek*, 52 F.3d at 136 (approving Commission=s unwarrantable failure test). The Commission examines various factors in determining whether a violation is unwarrantable, including the extent of a violative condition, the length of time that it has existed, whether the violation is obvious, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator=s efforts in abating the violative condition. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (February 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (August 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984). Repeated similar violations may be relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Peabody*, 14 FMSHRC at 1263-64.

We agree with the Secretary that the judge employed an incorrect legal analysis with respect to the factor of repeated similar violations and past warnings. The judge, discounting the testimony of MSHA Inspectors Hardy and Robert Newhouse that they had met with mine management to discuss inadequate cleanup and preshift procedures, incorrectly characterized their testimony as Anot probative of the degree of [Enlow=s] negligence in allowing the *specific materials at issue* to have accumulated.@ 17 FMSHRC at 568 (emphasis in original). In evaluating evidence of prior warnings as part of the unwarrantable failure analysis, the Commission has not required the previous condition to involve materials identical to those involved in the condition at issue. *See Peabody*, 14 FMSHRC at 1263 (rejecting contention that only past violations involving same area may be considered for unwarrantable determination). Thus, to the extent that the inspectors= discussions with management placed Enlow on notice of its need for greater compliance efforts with section 75.400, those discussions were relevant to the unwarrantable failure evaluation and should have been considered by the judge.

The judge also failed to address Enlow=s claim that it attempted to correct its accumulation problem in response to the prior warnings and violations. Such pre-citation remedial efforts can be pertinent to an evaluation of whether the violative condition resulted from the operator=s unwarrantable failure to comply. *See UP&L*, 12 FMSHRC at 972. Additionally, the judge failed to consider that it took three to four miners 2**2** hours to clean up the accumulation, evidence relevant to the extensiveness of the violation. Tr. 72, 99.

On remand, the judge should evaluate all the evidence related to prior warnings, including the three citations for accumulations in other areas of the mine that were issued on October 6, 7, and 28, 1993, approximately 1 month prior to the violation (Gov=t Exs. 7, 8, 9), and Enlow=s 2-year violation history (Gov=t Ex. 12). He should also discuss all relevant evidence relating to the operator=s compliance efforts and the extensiveness of the violation.

Accordingly, we vacate the judge=s conclusion that the violation was not the result of unwarrantable failure and remand for reanalysis.

3. Preshift Violation

The Secretary argues that the judge overlooked material record evidence that proved a preshift violation, asserting that (1) Inspector Hardy provided compelling testimony that the accumulation formed before the preshift examination, and (2) contravening testimony was minimal. S. Br. 1, at 10-12. The Secretary also submits that the judge=s finding of no preshift violation is inconsistent with his determination of a violation of section 75.400. *Id.* at 9-10. Enlow responds that substantial evidence supports the judge=s determination to vacate the order because the judge properly credited three Enlow witnesses, including the preshift examiner, who denied that the conditions existed at the time of the preshift examination. E. Br. 2, at 17-19.

We agree with Enlow that substantial evidence supports the judge=s conclusion that Enlow did not violate the preshift standard. Section 75.360 essentially restates the requirements of section 303(d)(1) of the Mine Act, 30 U.S.C. ' 863(d)(1). Under section 75.360(a), a certified examiner must conduct a preshift examination within 3 hours before Athe beginning of any shift and before anyone on the oncoming shift . . . enters any underground area of the mine . . . .@ Subsections (b) through (g) of section 75.360 set forth the required elements of the examination. Under section 75.360(g), the results of the preshift examination must be recorded in a book at the surface before miners are permitted underground.

We are not persuaded by the Secretary=s assertion that the judge overlooked or inadequately addressed the testimony of Inspector Hardy as to duration of the accumulation. S. Br. 1, at 10-11. The judge discussed at length Hardy=s opinion that the accumulations took more than a shift to develop and weighed this testimony against the testimony of preshift examiner Young and the two shield men on the midnight shift before the inspection. 17 FMSHRC at 566-67. Young and the shield men testified they did not observe the cited accumulations and that they cleaned the area during the shift prior to the inspection. Tr. 213, 221-22, 226-27, 262, 301-04. They also testified that they saw some oil that was cleaned off during their shift. Tr. 200-04, 210, 227, 292-94, 317-18. The judge also relied on the preshift examiner=s written statement of November 16, 1993, which described cleaning the area during the preshift. 17 FMSHRC at 566 n.1; Ex. C-2. The judge, in holding that A[t]he record does not convincingly establish when the accumulations of oil observed by Hardy occurred@ (17 FMSHRC at 567), addressed and rejected the Secretary=s contention that the presence of oil and dried oil at the time of the inspection indicated that it was in existence at the time of the preshift.[10] The judge specifically credited the

[10] Our dissenting colleague claims we are Aimproperly raising the level of proof the Secretary must provide in order to establish a preshift violation.@ Slip op. at 15 (Commissioner Marks, concurring and dissenting). Since we agree with our colleague that the Secretary Adoes not have to prove *when* the accumulations occurred@ in order to establish a violation of section 75.360 (*id*. (emphasis in original)), he appears to misunderstand our position. We hold the

testimony of the preshift examiner (*id*.) and, absent extraordinary circumstances, we will not overturn a judge=s credibility findings on review. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1540-41 (September 1992); *Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21, 25 (January 1984).

Additionally, contrary to the Secretary=s contention, a finding of an accumulation violation is not inconsistent with a finding that Ait [was] . . . not established that [the preshift] examination was inadequate.@ 17 FMSHRC at 567. In finding the accumulation violation, the judge did not state how long the accumulations were in existence. *Id*. at 566. The judge simply held that at 9:00 a.m. on November 15, 4 hours after the preshift had been conducted, accumulations of coal dust, loose coal, and oil existed that had not been cleaned up. *Id.* Thus, we perceive no internal inconsistencies in the judge=s conclusions.

Accordingly, we affirm the judge=s determination that Enlow did not violate the preshift requirements on November 15, 1993.

B. December Inspection

Secretary to the standard articulated by the judge below, who simply required the Secretary to prove Athat it was more likely than not that the accumulations observed by Hardy were in existence at the time of Young=s preshift examination.@ 17 FMSHRC at 567.

Moreover, our colleague, contending that the record contains substantial evidence to support the Secretary=s charge, would reverse the judge. However, even if the record permits us to draw a different conclusion than the one drawn by the fact-finder, this does not mean the judge=s finding lacks substantial support and should be reversed. A[T]he possibility that two inconsistent conclusions may be drawn from the evidence does not mean that the [fact-finder=s] findings are unsupported by substantial evidence, considering the record as a whole.@ *NLRB v. Vincent Brass & Aluminum Co.*, 731 F.2d 564, 567 (8th Cir. 1984). Accordingly, we decline to overturn the judge=s finding that no violation occurred.

1. Preshift Violation

Enlow claims that, because the December 8 accumulations did not present a hazard and were not found to be S&S,[11] the judge erred in finding a violation of the preshift standard. E. Br. 1, at 4-5. Enlow also asserts that substantial evidence does not support a finding of violation. *Id.* at 7-9. The Secretary counters that accumulations of combustible materials are hazards that preshift examiners must report. S. Br. 2, at 6-11. He further responds that Enlow=s argument amounts to an improper attempt to engraft onto the preshift standard the S&S requirement that an injury be reasonably likely to occur. *Id.* The Secretary also submits that the accumulation at issue presented a hazard and the judge=s determination of violation is supported by substantial evidence. *Id.* at 11-16.

Section 75.360(b) requires that a preshift examiner Aexamine for hazardous conditions.@ We reject Enlow=s argument that, because the judge concluded the December accumulations were not S&S, they were not Ahazardous@ within the meaning of section 75.360(b). The plain language of section 75.360(b) does not support Enlow=s construction. Section 75.360(b) does not specify that hazardous conditions are only those reasonably likely to result in serious injury, nor does that section repeat the S&S language from section 104(d) of the Act, requiring that the conditions be Aof such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard . . . .@

Section 75.360(b) does not define the phrase Ahazardous condition.@ However, the Commission recognized in *National Gypsum* that, based on its dictionary definition, a Ahazard@ denotes a measure of danger to safety or health. 3 FMSHRC at 827 & n.7. The Commission has approved the definition of Ahazard@ as Aa possible source of peril, danger, duress, or difficulty,@ or Aa condition that tends to create or increase the possibility of loss.@ *Id.* (citing *Webster=s Third New International Dictionary* 1041 (1971)). Accumulations of combustible materials have been recognized by Congress and this Commission as representing hazardous conditions. S. Rep. No. 411, 91st Cong., 1st Sess. 65 (1969), *reprinted in* Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 191 (1975) (A*Coal Act Legis. Hist.*@) (Athe operator [must] not allow coal dust, loose coal, float coal dust or other combustible materials to accumulate . . . . Tests, as well as experience, have proved that inadequately inerted coal dust, float coal dust, loose coal, or any combustible material when placed in suspension will enter into and propagate an explosion.@); *Old Ben Coal Co.*, 2 FMSHRC 2806, 2807 (October 1980) (there exists a Adanger of fire or explosion posed by the presence of dangerous quantities of combustible materials@). The Senate committee report on the 1969 Coal Act stated that A[t]he presence of . . . coal dust and loose coal must be kept to a minimum through a regular program of cleaning up . . .@ and further noted the dangers posed by mine fires along belt conveyors and the necessity for careful preshift examinations of belts. *Coal Act Legis. Hist.* at 183, 191.

[11] The Secretary did not appeal this ruling.

The preshift examination requirement Ais of fundamental importance in assuring a safe working environment underground.@ *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (January 1995). Congress explicitly acknowledged the importance of the preshift inspection by making it a longstanding statutory mandate, dating back to the Federal Coal Mine Safety Act of 1952, 30 U.S.C. ' 471 et seq. (1955). These provisions were strengthened in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. ' 801 et seq. (1976), and carried over in identical fashion to the Mine Act. The preshift examination is intended to prevent hazardous conditions from developing. Enlow=s proposed interpretation of section 75.360(b) would restrict the attention of the preshift examiner to only S&S conditions. This is antithetical to the purpose of the preshift requirement which is to Aprevent loss of life and injury.@ *Coal Act Legis. Hist.* at 183.

Thus, we agree with the Secretary that accumulations of combustible materials qualify as hazardous conditions that should be recorded by a preshift examiner when found. We turn next to Enlow=s assertion that substantial evidence does not support the judge=s conclusion that Enlow violated section 75.360(b).

The inspector testified that he based his determination that the accumulations had been in existence during the preshift examination upon the extensiveness of the accumulations and the heavy concentrations he encountered. Tr. 474-75, 496-97. The inspector=s conclusion is supported by the presence of one accumulation measuring 4 feet by 16 feet by 5 inches in depth, and another measuring 2 feet by 3 feet by 18 inches at its deepest point. Tr. 446-52. In addition, he observed that the air current had picked up coal dust and that it settled on top of the electrical box in a layer up to 2 inches deep, also indicating that coal dust had been left to accumulate for more than one shift. Tr. 474-75.

Although there was some countervailing testimony about whether the accumulations existed at the time of the preshift examination (Tr. 548, 552, 625-26), the judge specifically credited the inspector=s testimony over that of Enlow=s witnesses. We decline to disturb his credibility determinations. *See Farmer*, 14 FMSHRC at 1540-41; *Hollis*, 6 FMSHRC at 25.[12]

[12] We are also unmoved by Enlow=s assertion that the inspector did not consider the cited accumulations to be hazardous at the time the order was issued. E. Br. 1, at 4-5. This argument is belied by the fact that the inspector issued a section 104(d)(1) order alleging an S&S violation of section 75.400 (Gov=t Ex. 13), and testified that the accumulations could either start or add to a fire (Tr. 460, 462).

In sum, we conclude that substantial evidence supports the judge=s determination of a violation of the preshift requirement. Accordingly, we affirm the judge=s finding that Enlow conducted an inadequate preshift examination, thereby violating section 75.360(b).

2. Unwarrantable Failure

Enlow argues that, because the judge improperly relied on testimony by the inspector that he issued a prior section 75.400 citation and had discussions with management about the accumulation problem, the judge=s determination that the December violation resulted from unwarrantable failure is not supported by substantial evidence. E. Br. 1, at 9-12. It further claims that the judge failed to consider the operator=s prompt cleanup measures. *Id.* at 11-12. The Secretary counters that substantial evidence supports the judge=s determination that the accumulation violation was a result of Enlow=s unwarrantable failure. S. Br. 2, at 16-24.

With respect to the extent and obviousness of the violation, the judge accepted the inspector=s testimony that the violative accumulations were visible for a distance of approximately 200 feet from the belt feeder to the main belt, over the contrary testimony of Enlow=s witnesses. 17 FMSHRC at 571-72. Absent a compelling reason, we will not disturb this credibility determination. *Farmer*, 14 FMSHRC at 1540-41. As to the duration of the violative condition, the judge also credited the inspector=s testimony that the accumulations had existed for more than one shift, and implicitly rejected the testimony of the preshift examiner that the accumulations were not present during the preshift. 17 FMSHRC at 572. Again, Enlow has not demonstrated the extraordinary circumstances necessary for overturning this credibility determination.

With respect to repeated similar violations and past warnings, Inspector Reid testified he repeatedly wrote citations at this mine for violations of section 75.400 in the belt entries.[13] Tr. 467-68. Enlow=s violation history reveals approximately 60 citations for accumulations from December 8, 1991 through December 7, 1993. Gov=t Ex. 12. Inspector Reid testified that, upon issuing citations for such violations, he discussed with Enlow management the importance of cleaning the belts and keeping them free of accumulations. Tr. 468. He further testified that, on several occasions, he questioned the adequacy of the mine=s cleanup plan and discussed with management the need to control float dust, Awhich [was] generated pretty regularly at these crusher dump areas.@ Tr. 681. Thus, we conclude substantial evidence supports the judge=s

[13] We correct the judge=s misstatement that Inspector Reid had previously issued Aa citation@ for violation of section 75.400. 17 FMSHRC at 572. The inspector testified that he issued repeated citations for section 75.400 violations. Tr. 468. The operator=s history of violations confirms this testimony. Gov=t Ex. 12.

finding that Enlow had been placed on notice that greater compliance efforts were needed regarding accumulations around all of its belts.

We reject Enlow=s assertion that the Secretary did not introduce any past violations into evidence; the operator=s violation history was made a part of the record. Gov=t Ex. 12. We are also unconvinced by Enlow=s argument that the Secretary may not rely on that violation history to demonstrate unwarrantable failure because the judge admitted that exhibit for the limited purpose of penalty assessment, and because the exhibit fails to reveal the specifics of the prior violations. *See* E. Br. 1, at 10; E. Br. 3, at 6-7 & n.4. Although the judge stated that Enlow=s violation history was probative of penalty, he did not expressly limit its use for other relevant purposes. Tr. 429. In any event, the Commission may consider these past violations. *See Peabody*, 14 FMSHRC at 1263 (A[T]he Commission has not limited . . . the circumstances under which past violations may be considered by a judge in determining whether an operator=s conduct demonstrated aggravated conduct.@)

As to the operator=s abatement efforts, Inspector Reid testified without contradiction that no one was cleaning the accumulation when he arrived at the section. Tr. 473. Where an operator has been placed on notice of an accumulation problem, the level of priority that the operator places on the abatement of the problem is a factor properly considered in the unwarrantable failure analysis. *Peabody*, 14 FMSHRC at 1263-64; *U.S. Steel Corp.*, 6 FMSHRC 1423, 1437 (June 1984) (unwarrantable failure may be proved by a showing that the violative condition was not corrected or remedied prior to issuance of a citation or order). Although the judge did not mention this factor, the evidence on abatement supports his unwarrantable failure determination. We reject Enlow=s assertion that its prompt post-citation abatement efforts militate against an unwarrantable failure determination. In considering the abatement element, the Commission focuses on compliance efforts made prior to the issuance of the citation or order. *See, e.g.*, *Peabody*, 14 FMSHRC at 1263-64; *Utah Power & Light Co.*, 11 FMSHRC 1926, 1933-34 (October 1989). Post-citation efforts are not relevant to the determination whether the operator has engaged in aggravated conduct in allowing the violative condition to occur.

We conclude that evidence about all the unwarrantable failure factors, taken together, constitutes substantial evidence supporting the judge=s unwarrantable failure determination. Consequently, we affirm that determination.[14]

[14] We find no merit in Enlow=s other arguments on the unwarrantable failure issue.

III.

Conclusion

For the foregoing reasons, we vacate and remand the judge=s determinations that the November 15, 1993 accumulation violation set forth in Order No. 3660021 was not S&S and not the result of Enlow=s unwarrantable failure to comply with the standard. If the judge finds that the violation is S&S, the result of unwarrantable failure, or both, he shall assess an appropriate civil penalty. We affirm the judge=s dismissal of Citation No. 3659960. We also affirm his determinations that, as to Citation No. 3660374, Enlow violated the preshift standard and, as to Order No. 3660375, Enlow=s December 8, 1993 accumulation violation resulted from unwarrantable failure.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Commissioner Marks, concurring and dissenting:

I am in agreement with my colleagues= disposition regarding the two violations cited on December 8, 1993, and therefore I concur in the decision to affirm the judge.

With respect to the November 15, 1993, citation charging a violation of 30 C.F.R. ' 75.360, my colleagues have concluded that substantial evidence supports the judge=s conclusion that no violation occurred. I do not agree, and therefore I dissent.

My colleagues mistakenly contend that, in finding no violation, the judge adequately considered and relied upon the relevant testimony of Inspector Hardy, as well as the testimony of operator witnesses and the November 16, 1993, statement of the preshift examiner (Ex. C-2). Slip op. at 8-9. I do not agree.

The November 16th statement referenced and relied upon by the majority is not probative of the condition of the subject B-3 longwall section of the mine. In fact, the judge also found it to not be relevant. AIt does not set forth in any detail the conditions observed by him [section foreman William Young] on the shift, with the exception of some oil on the bottom mixed with water, and >oil film= on the toes of the shields.@ 17 FMSHRC 566 n.1. I agree with the judge=s assessment of that document.

By contrast, the testimony of MSHA Inspector Hardy describing the unreported accumulations is both detailed and specific. However, that testimony is rejected by the judge and the majority, apparently because A[t]he record does not convincingly establish when the accumulations of oil observed by Hardy occurred.@ Slip op. at 9 (citing 17 FMSHRC at 567). In affirming that legal conclusion, the majority is improperly raising the level of proof the Secretary must provide in order to establish a preshift violation.[1]

The Secretary does not have to prove *when* the accumulations occurred. He does, however, have to prove that the accumulations were in existence *when* the preshift was conducted. In this case, substantial evidence supports the Secretary=s charge that the conditions observed by Inspector Hardy had existed prior to the time the preshift inspection was conducted. However, if

[1] Notwithstanding their notation professing to agree that the Secretary does *not* have to prove *when* the accumulation occurred (slip op. at 9 n.10), my colleagues continue to affirm the judge=s conclusion which is based on, and infected by, his flawed legal analysis requiring the Secretary to Aconvincingly establish when the accumulations of oil observed by [Inspector] Hardy occurred.@ 17 FMSHRC at 567.

the judge and the majority require a higher level of proof, i.e., that the Secretary prove *when* the accumulations occurred, the Secretary will surely fall short in this case and most other cases. The reason is obvious, the Secretary does not have inspectors posted in the mine at all times observing the conditions. He must rely on circumstantial evidence regarding the physical appearance of the area and in the case of accumulations - the size, color, compaction, and other indices that provide a basis for the expert opinion of the inspector. Tr. 10-13, 160-63. In this case, Inspector Hardy=s detailed description of the conditions he observed was clearly and thoroughly set forth in the section 104(d)(1) citation, and equally reasserted in his testimony at hearing.

In support of his issuance of the subject section 104(d)(1) citation,[2] charging a violation of section 75.360, Inspector Hardy testified that at approximately 9:05 a.m. on November 15, 1993,

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[2] The condition or practice charged states, in part:

> The preshift examination that was conducted on the B-3 longwall section from 5:00 a.m. to 7:00 a.m. on 11/15/93, was not adequate. The preshift examination was called out to Steve Johnson at 7:50 a.m. and no dangers or hazardous conditions were reported. Also no violations were observed or reported or entered into the book provided. Upon traveling to the section and examining the face area the following hazardous conditions were found; the 4,160 V/AC tailgate drive motor, tailgate gear case and

he first observed the following conditions which were not recorded in the book containing the report of the preshift conducted 4 hours earlier. Tr. 31, 94.

- Accumulations of float coal dust on and around the legs and lemniscates of longwall shields 148 to 152 (Tr. 23-24, 33-34, 113-14, 122); loose coal scattered throughout the legs of the shields within an area of approximately 20 to 25 feet by 10 to 15 feet (Tr. 24, 31, 114-15); coal dust black in color and dry to the touch. Tr. 34, 120, 122.

- Heavy accumulations of float coal dust, hydraulic gear oil and coal on the tailgate gear case, fluid coupler and around the 4,160-volt drive motor causing the gear case to be very hot, hotter than normal, because the accumulation Aacts as an insulator, which doesn=t permit the heat to dissipate as readily as if it was maintained in a clean condition.@ (Tr. 24-25, 29, 37, 105, 107-08, 130); coal surrounding the gear case was saturated with hydraulic gear oil (Tr. 24-25, 27) and A[t]he coal that was packed in around the gear case was loose on top, but packed

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housing, were covered with float coal dust, loose coal, and hydraulic gear case oil (Dexron II oil); float coal dust and loose coal had also accumulated between the shields from #148 shield to #152 shield. The preshift examiner=s dates, times and initials were observed on the #150 shield which is immediately adjacent to the tailgate drive motor and gear case. These conditions evidenced are in plain view of a preshift examiner and management knew or should have reason to know these hazardous conditions existed. The evidence at this location also indicates the conditions were not recent; the loose coal was packed around the gear case and the hydraulic oil had saturated and penetrated the loose coal packed behind the gear case.

Gov=t Ex.1.

heavy in the bottom. This doesn=t happen in a short period of time. It takes time for coal to settle in and get compacted.@ Tr. 27. The accumulation had existed Adefinitely more than one shift with the conditions of the packed coal.@ Tr. 72; *see also* Tr. 175. The coal accumulated behind the gear case was approximately 2 **2** feet high and Avery visible.@ Tr. 63, 125, 157, 163.

C The oil underneath the gear case Awas apparent. You could see it without getting down on your hands and knees; very obvious,@ (Tr. 28, 128) and extended to a distance of Afour feet by maybe ten to fifteen feet.@ Tr. 71. AI also used my hand to swish some of the oil that was underneath [the gear case] and no water was evident under the oil as well.@ Tr. 97-98, 117, 133, 414, 424-25. The oil may have resulted from a blown soft plug on the fluid coupler which occurred on the preceding Friday (the inspection and citation occurred on Monday, November 15, 1993). Tr. 83, 156. There were oil saturated rags located on top of the fluid coupler. Tr. 30.

C ADue to the magnitude of the combustible materials I saw there, the float coal dust, the extent of the float coal dust and the extent of the loose coal and the visibility of this -- it was in plain view -- the pre-shift examiner had to have realized and seen these conditions when he was there putting his dates, times and initials.@ Tr. 94; *see also* Tr. 116-18, 416. Due to A[t]he magnitude of the accumulation and the magnitude of hydraulic fluid,@ the accumulation Acould not have occurred@ after the preshift was conducted. Tr. 94-95, 140-42, 164, 413, 415, 422. Dried hydraulic fluid observed on the machine components indicated that the oil had been there A[m]ore than a shift.@ Tr. 95, 151, 167-68, 175.

The judge, after hearing this testimony, and presumably reading the subject citation, concluded that Hardy Adid not elaborate@ upon his basis for concluding that the cited conditions had existed prior to the preshift examination. 17 FMSHRC 567. I find the judge=s conclusion astonishing. The charging citation, and the live testimony of the inspector was detailed, clear, and convincing. Of most significance, it was consistent and not impeached on cross-examination. I can only wonder what more the judge could have required to support this charge. However, if more was needed, more was provided by Enlow=s own witnesses!

The testimony of Enlow witness William Young, the section foreman who conducted the subject preshift inspection, includes important admissions that corroborate the testimony of Inspector Hardy. Young admitted that in inspecting the tail drive area he Ajust looked more or less down on what [he] could see there because the way the covers [of the tail drive] fit on there, there was just an inch or two of a gap. [He] didn=t look completely up under the covers.@ Tr. 222, 230, 247. A[He has] never gotten down on [his] hands and knees prior to that time and looked back in there.@ Tr. 223-25. Moreover, he conceded that he never had been concerned about coal accumulations behind the gear box. Tr. 227. He disclosed that he had never been told to inspect behind the motor and pan line, and that he only is Aconcerned about the material that collects in around the motors that are visible to [him].@ Tr. 249-50.

Enlow witness Terry Pozum, who was assigned to clean the subject area during the preceding midnight shift, testified on direct examination that he did not know if he had cleaned under the covers of the drive unit, and that he would only clean A[w]hat you can reach . . . like on the open side that is facing the shields.@ Tr. 264. He went further, conceding that his usual cleanup would not have included the junction box area, and that on the night in question, he was Apretty busy,@ because he has Aa short amount of time to do quite a lot of things. And you usually don=t have time to notice and look. Anything that you see really pops right out at you.@ Tr. 264-65, 268, 276-77, 279.

Enlow witness Timothy Ferrell, who was assigned as a shieldman in the subject B-3 section on the day shift, testified that during the inspection, when the tailpiece covers were removed A[w]e found materials, coal and rock, packed in on the face side of the gear box and the tailgate end.@ Tr. 323. He indicated that the cleanup took two or three men about 1**2** hours to complete. Tr. 324-25.

Further corroborating Inspector Hardy=s testimony, Enlow witness and mine foreman Robert Weaver testified that after Inspector Hardy=s inspection, Weaver suggested that the accumulated oil observed could have come from a soft plug blow on the torque converter, which had occurred on the preceding Friday, November 12. Tr. 400-01. However, after further investigation, Weaver opined that the oil source was from the Atensioning unit or on the gear case.@ Tr. 408.

Accordingly, I conclude that the record contains a more than adequate elaboration of evidence supporting the inspector=s conclusion that the violative conditions existed at the time of the subject preshift examination.

The only other basis offered by my colleagues= in support of their determination that no violation occurred, is found in their observation that A[t]he judge specifically credited the testimony of the preshift examiner and, absent extraordinary circumstances, we will not overturn a judge=s credibility findings on review.@ Slip op. at 9 (citation omitted).

Initially, I suggest that a close examination of the judge=s decision indicates that his credibility ruling only supports his conclusion that a preshift examination occurred - a point not even in dispute.[3] Moreover, in his discussion of the testimony offered, for the related section 75.400 violation, as well as the subject preshift violation, the judge expressly credited Hardy=s testimony and implicitly rejected conflicting testimony from Enlow witnesses:

[3] AI find Young=s testimony credible, based upon my observations of his demeanor, that he did perform a preshift examination at approximately 5:00 a.m., in the area in question on November 15.@ 17 FMSHRC 567.

> I note the conflict in the testimony between Hardy and Respondent=s witnesses who were present in the area in question at the time of the inspection on November 15, regarding the existence of the conditions testified to by Hardy. I observed Hardy=s testimony and found him to be a credible witness.

17 FMSHRC 565. However, beyond that point, I conclude that this case does not turn on credibility. Assuming *arguendo* that the Enlow witnesses are also credible, the record still contains substantial evidence supporting the inspector=s charge. That evidence is drawn not only from the inspector=s testimony, but also from the Enlow witnesses who professed not to have observed much of what the inspector observed. This is believable - because it is clear from their testimony that Inspector Hardy=s inspection was far more thorough and inclusive. Obviously if one doesn=t look very carefully, one can honestly testify that no violative conditions were observed!

For the foregoing reasons, I conclude the violation occurred as charged. Therefore, I would reverse the ruling of the judge and remand for analysis of the special findings charged and assessment of a civil penalty.

With regard to the related violation of section 75.400, cited on the same day, November 15, 1993, my colleagues have vacated the judge=s conclusions that the violation was neither unwarrantable nor S&S, and have remanded both issues for proper analysis. I agree with, and concur with, the disposition as it relates to the issue of unwarrantability. However, for reasons set forth below, I conclude that the violation was S&S and therefore, I would reverse the ruling of the judge.

Once again the issue is Awhether the Secretary proved the third element of *Mathies*.@ Slip op. at 5. As indicated in my concurring opinion in *U.S. Steel Mining Co.*, 18 FMSHRC 862, 868 (June 1996), I continue to believe that we must begin to find a way to stop the enforcement confusion that continues to flow from the *Mathies* test and, in particular, the third element. To that end, I again invite my colleagues, the Secretary, and affected operators to formally address this issue in future cases.

With respect to the issue of S&S in this matter, I conclude that the violation was S&S because the risk to miner health and safety was neither purely technical nor remote or speculative. Accordingly, I would reverse the judge on this issue and remand for a proper analysis on the issue of unwarrantability.

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Marc Lincoln Marks, Commissioner