FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

August 6, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. SE 91-97, etc.
FAITH COAL COMPANY	:	

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

DECISION

BY: Jordan, Chairman; and Marks, Commissioner

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994) (AMine Act@ or AAct@). At issue is whether Faith Coal Company (AFaith@) violated 30 C.F.R. ' 75.202(a) by failing to properly support the roof in an area where a person or persons worked or traveled; whether a citation alleging that Faith improperly operated a scoop loader with an inoperative methane monitor was properly vacated on the ground that the citation alleged a violation of the wrong standard and was never amended to allege a violation of the correct standard; whether Faith violated 30 C.F.R. ' 75.220 by failing to comply with a supplemental requirement of its roof control plan to set cribs prior to splitting a pillar; whether Faith=s violation of section 75.220, involving cuts of excessive length and a crosscut driven into an area of unsupported roof, was the result of its unwarrantable failure to comply with its roof control plan; and whether Faith violated 30 C.F.R. ' 75.203(b) by failing to use sightlines to control the direction of mining. Administrative Law Judge David Barbour concluded that the Secretary of Labor had not established a violation of section 75.203(b); that Faith had committed a violation of section 75.202(a); and that Faith had committed two significant and substantial (AS&S@) violations of section 75.220, one of which was also unwarrantable. 17 FMSHRC 1146, 1155-56, 1190-91, 1195-97, 1202 (July 1995) (ALJ). The judge also vacated the citation involving the inoperable methane monitor on the ground that it alleged a violation of the wrong standard. *Id.* at 1183, 1224. The Commission granted cross-petitions for discretionary review filed by the Secretary and Faith challenging these determinations.[1] For the reasons that follow, we affirm in part, reverse in part, and remand.

[1] In its petition for discretionary review, Faith also raised an issue with respect to a recommendation for settlement suggested by the judge concerning a reduction in the amount of

I.

Citation No. 3396045

1. Facts and Procedural Background

Faith formerly operated the No. 15 Mine, an underground coal mine in Sequatchie County, Tennessee. 17 FMSHRC at 1148-49; Gov=t Ex. 4 at 1. On March 2, 1992, Inspector Clyde Layne from the Department of Labor=s Mine Safety and Health Administration (AMSHA@) inspected an entry at the No. 15 Mine that was being cleaned for the installation of a belt conveyor. 17 FMSHRC at 1154. Layne observed an area of roof where the spacing of roof bolts exceeded the 5-foot limit specified in Faith=s roof control plan. *Id.* Several roof bolts were placed as far as 9 feet apart. *Id.*[2] Although the area had a low ceiling, and thus could only be traveled by crawling, Layne observed tracks on the floor indicating that people had traveled through the area.

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penalties assessed against it. 17 FMSHRC at 1207; F. Pet. at 1-5. The judge=s suggestion, which was gratuitous and not binding, was rejected by counsel for the Secretary as a basis for settlement. Accordingly, this issue is not before us and we decline to address it.

[2] These roof bolts had been installed by a previous operator of the mine. 17 FMSHRC at 1154. When Faith took over the operation of the mine, this area had been Agobbed out,@ making travel through it impossible. *Id*. Faith later cleared away the gob material, making the area passable. *Id.*

Id. Layne issued a citation alleging a violation of section 75.202(a).[3] *Id.*; Tr. III at 568-69; Jt. Ex. 16.[4]

The judge concluded that the Secretary had established a violation of section 75.202(a) by demonstrating that the roof was not properly supported in an area of the mine where a person or persons worked or traveled. 17 FMSHRC at 1155-56. The judge relied upon admissions by Lonnie Stockwell, Faith=s owner, that he traveled through the area and that the roof bolts in the area were not spaced as required by Faith=s approved roof control plan. *Id.*

B. Disposition

[3] Section 75.202(a) provides:

> The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs . . . .

[4] The hearing in these consolidated cases was conducted on May 23-26, 1994, and on August 9-10, 1994. The following references are used to refer to the transcripts from the designated hearing dates: ATr. I@ **C** May 23; ATr. II@ **C** May 24; ATr. III@ **C** May 25; ATr. IV@ **C** May 26; ATr. V@ **C** August 9; ATr. VI@ **C** August 10.

Faith contends that the judge erred in finding a violation of section 75.202(a) because Stockwell only traveled into the affected area on one occasion in order to comply with applicable MSHA preshift requirements. F. Br. II at 8-9.[5] The Secretary argues that the judge=s finding of a section 75.202(a) violation is supported by substantial evidence. S. Br. II at 18-19.[6]

We conclude that the judge=s factual findings are supported by substantial evidence,[7] and affirm his conclusion that Faith violated section 75.202(a). It is undisputed that the spacing of the roof bolts in this area of the mine exceeded the five foot limit specified in Faith=s roof control plan. Therefore, the dispositive issue is whether persons worked or traveled in the area. Stockwell testified that he crawled through this area on at least one occasion, when Faith began

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[5] AF. Br.@ refers to Faith=s brief concerning issues raised in the Secretary=s petition for discretionary review, which was received by the Commission on February 1, 1996. AF. Br. II@ refers to the brief filed by Faith on July 27, 1996, in response to the Secretary=s brief dated June 17, 1996. Faith had previously designated its petition as its brief on review. Faith is represented in this proceeding by its owner, Lonnie Stockwell, without the assistance of counsel.

[6] AS. Br.@ refers to the brief filed by the Secretary on October 18, 1995, involving issues raised in her petition for discretionary review. AS. Br. II@ refers to the brief filed by the Secretary on June 17, 1996, concerning issues raised by Faith in its petition.

[7] The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge=s factual determinations. 30 U.S.C. ' 823(d)(2)(A)(ii)(I). The term 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)).

rehabilitating the entry. 17 FMSHRC at 1155. Even assuming that, as Stockwell suggested, he was the only person to travel through this area, this admission is sufficient to establish a violation. The fact that Stockwell may have traveled through the area in order to comply with preshift inspection requirements does not create a basis for an exemption from the requirements of section 75.202(a).

II.

Citation No. 3202337

1. Factual and Procedural Background

On June 7, 1993, MSHA Inspector Johnny McDaniel observed that a scoop loader loading coal at the No. 15 Mine did not appear to have an operative methane monitor. 17 FMSHRC at 1182; Tr. II 412-14. When McDaniel tested the monitor with the test button, the loader did not deenergize, confirming that the monitor was not operating properly. 17 FMSHRC at 1182; Tr. II 413. Faith owner Stockwell later arrived on the scene and explained to McDaniel that the monitor had been Ajumped out,@ meaning that the monitor=s shut-off mechanism had been bypassed electronically to allow the loader to operate regardless of whether methane was present. 17 FMSHRC at 1182.

McDaniel issued a citation alleging that Faith used a scoop loader without a functioning methane monitor to load coal, in violation of 30 C.F.R. ' 75.313. *Id.* at 1181-82; Tr. II at 411-12; Jt. Ex. 62. This citation alleged a violation of the wrong standard, however, since section 75.313, which had previously applied to methane monitors (*see* 30 C.F.R. ' 75.313 (1991)), had been amended in November 1992 to apply to mine fan stoppages when persons are underground. At that time, MSHA renumbered the methane monitor provision as 30 C.F.R. ' 75.342(a).[8] This error in citing an inapplicable standard was not addressed at the hearing, and was perpetuated in the Secretary=s post-hearing brief to the judge. *See* S. Post-Trial Br. at 145.

[8] This change occurred in connection with the reorganization of Subpart D of the Secretary=s Part 75 regulations, dealing with ventilation issues, which took effect in November 1992 (delayed from August 1992). *See* 57 Fed. Reg. 34,683 (1992); 57 Fed. Reg. 20,868 (1992).

The judge vacated this citation on the ground that it alleged a violation of the wrong standard, and was never modified to allege a violation of the correct standard. 17 FMSHRC at 1183. The judge found that the Secretary had not established a violation of section 75.313, the mine fan stoppage standard referred to in the citation. *Id.* Noting that the citation was based upon an allegedly inoperable methane monitor on the loader, which falls within the coverage of section 75.342(a)(4),[9] the judge found the citation defective because it did not allege a violation of the proper standard. *Id.* The judge vacated the citation based upon the Aaxiom of due process that a respondent must be advised correctly of the standard it is alleged to have violated.@ *Id.*

B. Disposition

The Secretary asserts the judge erred because the record establishes that Faith had actual notice of the violative conduct and standard alleged and therefore it was not prejudiced. S. Br. at 17-21. The Secretary further asserts that Faith in effect conceded this violation when Stockwell testified that he deliberately Ajumped out@ the methane monitor on the scoop loader to permit the machine to operate. *Id.* at 18, 20-21.

Faith contends that the citation was properly vacated by the judge because it alleged a violation of the wrong standard, and the Secretary failed to amend the citation to cite the correct standard. F. Br. at 16-17. Faith also contends that its use of a scoop loader with an inoperable methane monitor did not violate section 75.342(a) because it was not using the scoop loader to load coal at the time the citation was issued. *Id.* at 16-20.

There is no question that the Secretary erred by failing to move to amend the citation to charge a violation of the correct standard either at trial or in a post hearing submission. We expect the Secretary and her counsel not only to know the content of regulations promulgated and enforced by the Department of Labor, but to submit only the most careful and accurate pleadings in litigation before this Commission. Here, the Secretary=s error is particularly egregious in light of the fact that renumbering of the regulation addressing methane monitors was announced in a final rule over *two and a half years* before the Secretary=s post-hearing brief was filed on December 7, 1994, a brief which, as noted above, perpetuated the error of citing an

[9] Section 75.342(a) provides in relevant part:

> (1) MSHA approved methane monitors shall be installed on all face cutting machines, continuous miners, longwall face equipment, loading machines, and other mechanized equipment used to extract or load coal within the working place.
>
> . . . .
>
> (4) Methane monitors shall be maintained in permissible and proper operating condition . . . .

inapplicable standard. *See* 57 Fed. Reg. 20,868 (May 15, 1992 publication of final rule amending Part 75, Subpart D); *see also* 57 Fed Reg. 34,683, 34,684 (August 6 notice announcing delay of effective date of final rule from August 16 until November 16, 1992 Ato ensure that mine operators can effectively plan and implement the necessary changes@).

The first indication in the record that anyone was aware of the Secretary=s error appears in the judge=s decision. When he discovered the Secretary=s error, the judge should have issued an order directing the Secretary to show cause why the citation should not be amended to conform to the evidence and charge a violation of the applicable standard. This would have afforded Faith the opportunity to show legally recognizable prejudice. More importantly, it probably would have resolved this question at an earlier stage of these proceedings, and thus, would have avoided the need for further proceedings and delay.

The judge=s failure to make this inquiry, however, does not require that we remand to correct this particular error. Instead, we conclude that Faith suffered no prejudice because the company fully understood the gravamen of the violation charged and knowingly litigated the citation on that basis, and we further conclude that the judge erred by vacating the citation on the basis of the Secretary=s pleading error.

This result is in accord with Rule 15(b) of the Federal Rules of Civil Procedure, which provides for conformance of pleadings to the evidence adduced at trial, and permits the adjudication of issues actually litigated by the parties irrespective of pleading deficiencies.[10] Here the record demonstrates that Stockwell, who represented Faith during most of the hearing, understood the nature of the violation charged and litigated the case on that basis. *See* Tr. II 412-28. Indeed, at the hearing, Stockwell sought to develop a defense **C** that the loader was not used to load coal while the methane monitor was not functioning **C** that is consistent with the language of section 75.342(a), the applicable standard. Tr. II 425-26. There is no indication in the record that Stockwell thought the citation related to mine fan stoppages, the subject of the amended version of section 75.313. Accordingly, we reverse the judge=s decision to vacate this citation on procedural grounds, and remand for a determination of whether Faith=s operation of the loader violated section 75.342(a)(4).

III.

[10] We have previously applied the provisions of Rule 15 in resolving issues relating to the amendment of citations. *See Wyoming Fuel Co.*,14 FMSHRC 1282, 1289-90 (August 1992); *Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (May 1990); *see also* 29 C.F.R. ' 2700.1(b) (providing that the Federal Rules of Civil Procedure shall apply Aso far as practicable@ on procedural questions not governed by the Commission=s procedural rules or the Mine Act). Specifically, we have recognized Rule 15(b)=s Aemphasis upon the parties understanding that the unpleaded claim is, in fact, being litigated@ in determining whether a posthearing amendment of a citation is warranted. *Magma Copper Co.*, 8 FMSHRC 656, 659 n.6 (May 1986).

Citation No. 3024814

1. Factual and Procedural Background

On March 17, 1993, during an inspection of the mine, MSHA Inspector Layne visited a crosscut on the right side of the belt line where five miners were working. 17 FMSHRC at 1186. Immediately adjacent to the crosscut, the beltline had been driven through a pillar, splitting the pillar, even though cribs had not previously been installed in that area as required by Faith=s roof control plan.[11] *Id.* at 1186-87. Stockwell told Layne that cribs were not installed in the area because, if they had been, there would not have been enough room to haul gob material and equipment through the area. *Id.* at 1187. Layne issued a citation to Faith alleging an S&S violation of section 75.220[12] for not complying with the requirement of the roof control plan that cribs be installed before splitting the pillar. *Id.* at 1186-87; Tr. VI 207-08; Jt. Ex. 51.

At the hearing, counsel for the Secretary moved to apply the doctrine of res judicata to establish this and two other alleged violations (Citation No. 3202244 and Order No. 3202245, discussed *infra*), and to bar Faith from raising any related defenses, based upon a decision issued by U.S. Magistrate Judge John Y. Powers of the U.S. District Court for the Eastern District of Tennessee in September 1993 in a probation revocation proceeding involving Stockwell. 17 FMSHRC at 1188-89. This proceeding was the byproduct of an earlier criminal case resolved in June 1992 in which Stockwell pled guilty to two counts of violating the Mine Act, and was sentenced to three years= probation and assessed a $1,500 fine. *Id.* at 1188 (citing *United States v. Lonnie Ray Stockwell*, No. 92-074M (E.D. Tenn. June 24, 1992)). As a condition of his probation, Stockwell was ordered to refrain from any Aserious unwarrantable@ violations of the Act pertaining to roof support and ventilation. 17 FMSHRC at 1188.

In May 1993, Stockwell was ordered to show cause why his probation should not be revoked. *Id.*; Tr. V at 22. The order was supported by a report from Stockwell=s probation officer stating that Stockwell had been cited for several unwarrantable violations. 17 FMSHRC at 1188. The report identified eight such violations, including this and two other alleged violations involved in this proceeding. *Id.*; Tr. V 22-25. Magistrate Powers held a probation revocation hearing at which MSHA inspectors testified. 17 FMSHRC at 1188. Following the hearing, the magistrate issued a memorandum and order which states:

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[11] The roof control plan provides that cribs are to be set no more than 5 feet apart and that, Awhere practical,@ cribs must be set before splitting the pillar. *Id.* at 1187.

[12] Section 75.220 provides in part:

> (a)(1) Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine.

> Having heard all of the witnesses and argument[s] of counsel . . . it is concluded and the [magistrate] finds serious life threatening violations of the [Mine Act] including but not limited to the conduct of mining well beyond the 12-foot limit beyond roof support were committed or caused to be committed by the defendant in late 1992 and early 1993 in . . . Faith Coal Company Mine # 15 . . . .

Id. at 1188-89 (quoting *United States v. Lonnie Ray Stockwell*, No. CR-1-92-33, slip op. at 3 (E.D. Tenn. Sept. 16, 1993)). As a result, the magistrate revoked Stockwell=s probation and sentenced him to six months in prison. 17 FMSHRC at 1189. Subsequently, the judge denied Stockwell=s motion for a new trial, and no further appeal was taken. *Id.*

At the hearing, the Secretary=s counsel argued that the magistrate=s decision in the probation revocation proceeding amounted to a finding that Faith had committed the three violations at issue here. Tr. V 35. In a bench ruling, the judge denied the Secretary=s res judicata motion, concluding that he could not determine from the memorandum and order that the magistrate had made a finding that the three alleged violations had occurred as charged. 17 FMSHRC at 1189. The judge also noted that the magistrate had apparently taken no evidence and made no findings with respect to negligence and gravity **C** factors relevant in determining whether the violation was unwarrantable or S&S. *Id.* at 1190.

In his decision, the judge reaffirmed his bench ruling denying the Secretary=s res judicata motion for the reasons he had provided at the hearing. *Id.* at 1189-90. The judge explained that, for the res judicata doctrine to apply, the issues for which preclusion is sought must be identical to the issues decided in the first action, in this case the probation revocation proceeding. *Id.* at 1190.

The judge then concluded that Faith had committed an S&S violation of section 75.220 by failing to comply with the requirement of its roof control plan that cribs be set, where practical, prior to splitting a pillar. *Id.* at 1190-91. The judge rejected Stockwell=s testimony that it was not practical for Faith to install cribs in this crosscut area because there would not have been sufficient clearance to use the area as a passageway for hauling gob and the crosscut could not have been used as an escapeway. *Id.* at 1190. The judge noted that Faith could have used other available areas to dump the gob and thereby avoided travel through this area and that, contrary to Faith=s contention, the crosscut could have been part of a valid escapeway even if cribs had been installed. *Id.*

B. Disposition

Faith asserts that the judge=s finding of a section 75.220 violation is not supported by substantial evidence because the record indicates that it did install cribs in the last open crosscut as required by the roof control plan and that additional roof support was not necessary in the area

of the split pillar referred to in the citation. F. Br. II at 4-5. Faith also contends that the judge properly denied the Secretary=s motion to apply the res judicata doctrine to establish this and two other alleged violations based upon the results of the probation revocation proceeding because the issues presented and decided in that proceeding were not the same as those involved here. *Id.* at 5-7.

The Secretary argues that substantial evidence supports the judge=s finding that Faith violated section 75.220 because the testimony of Inspector Layne establishes that Faith failed to install the cribs required by its roof control plan before mining through the pillar in the last open crosscut in the area. S. Br. II at 17-18. The Secretary also contends that the judge erred by refusing to give res judicata effect to the probation revocation determination because in that proceeding the District Court decided identical issues relating to this alleged violation. *Id.* at 13-17.

1. Res Judicata

Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or those in privity with them, based upon the same claim. *Nevada v. United States*, 463 U.S. 110, 129-30 (1983); *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981); *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 326 (1955); *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 986-87 (June 1982). Res judicata also prevents litigation of all grounds for, or defenses to, claims that were previously available to the parties, even if they were not actually asserted in a prior proceeding. *Brown v. Felsen*, 442 U.S. 127, 131 (1979); *Bradley*, 4 FMSHRC at 987. The crucial question is whether the claims involved in the two actions are identical; if not, res judicata is inapplicable. *Id.*; *Newport News Shipbuilding & Dry Dock Co. v. Director, Office of Workers= Compensation Programs*, 583 F.2d 1273, 1278 (4th Cir. 1978), *cert. denied*, 440 U.S. 915 (1979). The party asserting the doctrine must prove all the elements necessary to establish it. *Bradley*, 4 FMSHRC at 986.

As the judge noted, there was no indication in the magistrate=s memorandum and order that his decision was based upon a finding that the three alleged violations had occurred as charged. 17 FMSHRC at 1189. Given the eight alleged violations that the magistrate was asked to consider in that proceeding, there is no basis for concluding that his reference to Aserious life threatening violations@ necessarily referred to any of the three alleged violations at issue here. Indeed, given the generality and brevity of the probation revocation decision, it is impossible to draw any conclusions regarding the magistrate=s findings with respect to these three alleged violations. *See Bradley*, 4 FMSHRC at 989 (declining to apply res judicata doctrine based upon decision of state safety board that was Aextremely brief and conclusory@ and Acontain[ed] no findings of fact, credibility resolutions, or explanations for the conclusions reached@). In addition, as the judge explained, even if the magistrate in the criminal proceeding had expressly found that these three violations did occur, he did not consider or make any findings with respect to negligence and gravity. 17 FMSHRC at 1190. Accordingly, the judge correctly concluded

that the res judicata doctrine did not apply, and we affirm his denial of the Secretary=s motion to apply the doctrine to establish this and two other alleged violations.[13]

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[13] After detailing the basis for their conclusion that the federal magistrate=s ruling should not have res judicata effect in this case (a conclusion with which we agree), our colleagues then voice their disapproval of the testimony given by the MSHA inspectors in a probation proceeding before the magistrate Ato the extent that the Secretary=s actions . . . had the effect of circumventing an ongoing Commission proceeding.@ Slip op. 19. We find this charge to be without merit.

Although the record in this case does not indicate whether the MSHA inspectors were subpoenaed to testify, or whether they volunteered their testimony, the record does indicate that they testified before the magistrate and apparently detailed why they took enforcement action and presumably why they concluded that violations occurred. Tr. V 26-27, 31-33, 40, 43, 48, 62. The presiding magistrate, who is Afree to consider many factors in granting or revoking probation@ (*United States v. Miller*, 797 F.2d 336, 339 n.4 (6th Cir. 1986)), apparently considered their testimony to be relevant. Thus, it is clear from his action in revoking Mr. Stockwell=s probation

2. Violation

We conclude that substantial evidence supports the judge=s finding that Faith failed to install cribs in the crosscut area as required under its roof control plan, and therefore affirm his finding of a section 75.220 violation. The credited testimony of Inspector Layne establishes that Faith did not install cribs before splitting a pillar in the crosscut area in question. Therefore, as the judge noted, the only remaining question is whether it was practical to install cribs in this area. 17 FMSHRC at 1190. The judge=s finding that it was practical to do so, despite Faith=s arguments to the contrary, is supported by substantial evidence.

Faith=s argument that it had, in fact, installed cribs in the last open crosscut as required by its roof control plan is not supported by the record, and based upon a mischaracterization of Layne=s testimony. Contrary to Faith=s assertion (F. Br. II at 4-5), Layne did *not* testify that there were cribs in the last open crosscut; rather, he testified that cribs were installed in other nearby areas of the mine. *See* Tr. VI 269-70. Layne=s direct testimony, which was properly credited by the judge, establishes that when he inspected the area in question he found that cribs had not been installed as required by Faith=s roof control plan. Tr. VI 215-23.

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that the magistrate did not require a Commission adjudication and finding of violation in order to make his judgment. The idea that this lawful MSHA participation in a criminal proceeding amounts to an attempt by the Secretary to Acircumvent[] an ongoing Commission proceeding,@ is troubling to us because we find this charge to be unsupported and unfounded.

In any event, the probation revocation proceeding is a matter over which the Commission has no jurisdiction, and thus our colleagues= objections to actions at that hearing are not relevant to the instant case. In addition, we emphasize that the testimony and participation of the inspectors before the magistrate have had absolutely no impact upon this proceeding.

Accordingly, we take strong exception to our colleagues= criticism of the Secretary=s actions at the probation revocation hearing.

IV.

Citation No. 3202244

1. Factual and Procedural Background

On March 17, 1993, while conducting an inspection in the vicinity of Survey Station No. 114, MSHA Inspector Larry Anderson observed two working places that had been driven in excess of the 10-foot limit established by Faith=s roof control plan.[14] 17 FMSHRC at 1192. One place had been driven 24 feet beyond roof supports; the other place had been driven 27**2** feet beyond roof supports. *Id.* In the same area, Anderson observed a neck that had been driven 23 feet inby roof supports. *Id.* at 1193. The surfaces of the coal ribs in these areas were jagged, leading Anderson to conclude that they had been cut with conventional equipment, instead of a continuous miner. *Id.* at 1192-93. In an adjacent entry, Anderson observed an area where a crosscut had been driven into an unsupported area, also in apparent violation of Faith=s roof control plan.[15] *Id.* at 1193. This unsupported area was estimated by Anderson to be about 20 feet wide and 30 feet long. *Id.* Based on these observations, Anderson issued a citation to Faith alleging an S&S and unwarrantable violation of section 75.220. *Id.* at 1191-92; Tr. VI 295; Jt. Ex. 54.

After finding that Faith had violated section 75.220 (17 FMSHRC at 1195-96), the judge concluded that this violation was the result of Faith=s unwarrantable failure to comply with its roof control plan. *Id.* at 1196-97.[16] The judge found that the violation had existed for several months,

[14] Faith=s roof control plan provided that when coal was cut with conventional equipment, the cut could not exceed 10 feet in length. 17 FMSHRC at 1192.

[15] The roof control plan required that openings creating an intersection be permanently supported, or that at least one row of temporary supports be installed before any work or travel was permitted in the intersection. *Id.* at 1193.

[16] The judge also concluded that this violation was S&S. *Id.* at 1196. Faith does not challenge this finding. F. Br. II at 10, 12.

in an air intake course subject to daily inspection, and concluded that, given the generally unstable nature of the roof in the area, Faith had failed to meet a Ahigh standard of care to ensure that the roof was supported adequately.@ *Id.* at 1197.

B. Disposition

Faith contends that the judge erred in finding that this violation was the result of unwarrantable failure because it was neither intentional nor the result of a reckless disregard for the safety of miners. F. Br. II at 11-14. Faith argues that Stockwell, its owner, was not aware of the violation until it was brought to his attention by Inspector Anderson, that it subsequently took immediate action to abate the violation, and that the area with insufficient support was not as large as that estimated by Anderson. *Id.* Faith also asserts that the judge properly determined that the doctrine of res judicata was not applicable because the Secretary failed to establish that the probation revocation proceeding involved the same issues as those relating to this violation. *Id.* at 15.

The Secretary argues that substantial evidence supports the judge=s finding that this violation was the result of Faith=s unwarrantable failure, relying on Faith=s admission that miners traveled and worked under unsupported roof and evidence that the roof was in poor condition, that Faith failed to take the condition of the roof into account, that the areas at issue were in an air course that had to be examined on a daily basis, and that the violation had existed for several months prior to the issuance of this citation. S. Br. II at 21-22, 23-25. In addition, the Secretary argues that the judge erred by refusing to grant res judicata effect to the decision in the probation revocation proceeding with respect to the unwarrantable failure issue. *Id.* at 20-21, 22-23.

The unwarrantable failure terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. ' 814(d), and refers to more serious conduct by an operator in connection with a violation. 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 Corp.*, 13 FMSHRC 189, 194 (February 1991); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission=s unwarrantable failure test).

We conclude that substantial evidence supports the judge=s findings, and affirm his determination that this section 75.220 violation was the result of Faith=s unwarrantable failure to comply with requirements of its roof control plan. Based on Inspector Anderson=s credited testimony that the shale roof in the area was scaling and in poor condition, and that water made parts of the roof subject to sudden, unanticipated falls, the judge reasonably concluded that Faith was chargeable with a high degree of care to ensure that the roof was supported adequately, which it failed to meet. 17 FMSHRC at 1196-97. As the judge observed, A[e]xposing miners to

unsupported roof under such conditions was equivalent to requiring them to play Russian roulette.@ *Id.* at 1196. We have previously relied upon the high degree of danger posed by roof control plan violations as a basis for finding unwarrantable failure. *See Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1616 (August 1994) (allowing work under unsupported roof was result of unwarrantable failure where installation of temporary roof supports, as required under roof control plan, was Anecessary for safe mining practice@); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988) (finding unwarrantable failure where Aroof conditions were highly dangerous@); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011 (December 1987) (temporary roof support violation resulted from unwarrantable failure where prior history of roof falls Aplaced [operator] on notice that heightened scrutiny to assure compliance with its roof control plan was vital@). *See also Lion Mining Co.*, 18 FMSHRC 695, 700-02 (May 1996) (vacating judge=s finding that roof control plan violation was not unwarrantable).

In addition, the violations should have been obvious to Faith because they occurred in areas of an air intake course that had to be examined on a daily basis. *See Quinland*, 10 FMSHRC at 708-09 (obvious nature of lack of proper roof support); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC at 2010-11 (finding of unwarrantable failure where preshift examinations had been conducted but the roof control violations were not reported); *Eastern Associated Coal Corp.*, 13 FMSHRC 178, 187 (February 1991) (violations not reported following preshift examinations). As in *Quinland* and *Youghiogheny*, because Faith was on notice of poor roof conditions, its failure to comply with its roof control plan is indicative of a Aserious lack of reasonable care.@ *See* 10 FMSHRC at 708-09; 9 FMSHRC at 2011. The unwarrantable failure finding is also supported by the duration of the violation, which was found by the judge to have existed for several months. 17 FMSHRC at 1197. *See Quinland*, 10 FMSHRC at 709 (poor roof conditions associated with section 75.200 violation had existed Afor a considerable length of time@).

Given the judge=s finding that this violation had existed for several months, in an area of the mine subject to daily inspections, the record does not support Faith=s assertion that it was not aware of the violative conditions until it received a citation from Inspector Anderson. In addition, the mere fact that the violative conduct may not have been intentional does not preclude an unwarrantability finding. It is well established that intentional and deliberate conduct is not a condition precedent to a determination of unwarrantable failure. *See Emery*, 9 FMSHRC at 2003-04; *S&H Mining, Inc.*, 17 FMSHRC 1918, 1923 (November 1995).[17]

V.

Order No. 3202245

[17] We also conclude that the judge properly denied the Secretary=s motion to apply the res judicata doctrine to establish the unwarrantability of this violation based upon the decision in the probation revocation proceeding, for the reasons discussed *supra*, pp. 9-10.

1. Factual and Procedural Background

In reviewing a map of the No. 15 Mine, MSHA Inspector Anderson noticed irregular variations in pillar sizes. 17 FMSHRC at 1198. Accordingly, during his inspection of the mine on March 17, 1993, Anderson examined the areas that appeared irregular on the map, checked pillar sizes and shapes, and inspected entries to determine whether they were straight. *Id.* Based on his observations, Anderson concluded that Faith had been mining without the use of sightlines[18] for between 30 and 60 days. 17 FMSHRC at 1198-99. He therefore issued an order to Faith alleging a violation of section 75.203(a), which was amended at hearing to allege a violation of section 75.203(b).[19] *Id.* at 1197-98, 1200-01; Tr. VI 405; Jt. Ex. 55.

The judge concluded that the Secretary had failed to prove that sightlines were not used to control mining direction at the mine, and therefore vacated this order. 17 FMSHRC at 1201-02, 1223.[20] The judge found that Inspector Anderson had no first-hand knowledge of whether or not sightlines were used because he did not observe any surveying or mining being conducted at the mine. *Id.* at 1201. The judge also found that the evidence offered by the Secretary to support this violation, consisting primarily of Anderson=s testimony concerning the depiction of irregularly shaped entries and pillars on the mine map, was not convincing. *Id.* at 1201-02. The judge noted

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[18] Sightlines are a method of keeping on the correct mining course through the use of spads set in accordance with projections established by the operator on a mine site map. Tr. VI at 406-10.

[19] Section 75.203(b) provides:

> A sight line or other method of directional control shall be used to maintain the projected direction of mining in entries, rooms, crosscuts and pillar splits.

[20] At certain points in his decision, the judge inadvertently referred to this order as Order No. 3203325. *Id.* at 1197, 1223.

that the Secretary had not offered any evidence that spads used to establish sightlines were not in place, or testimony from miners that it was common practice not to follow sightlines at the mine. *Id.* at 1202. Instead, the judge credited Stockwell=s testimony that he intentionally deviated from projections in certain instances because of adverse roof conditions, and that even in such areas Faith had used sightlines. *Id.* at 1201-02. In crediting Stockwell=s testimony on this point, the judge explained that the record was replete with testimony concerning adverse roof conditions and that even Inspector Anderson admitted that the deviations observed could have been the result of roof problems. *Id.* at 1202.

B. Disposition

The Secretary contends that the judge erred in refusing to give res judicata effect to the decision of Magistrate Powers in the probation revocation proceeding, which she contends amounted to a finding that Faith had mined without the use of sightlines. S. Br. at 10-14. The Secretary also contends that the judge erred in concluding that substantial evidence did not establish a section 75.203(b) violation because that determination was based primarily upon his decision to credit Stockwell=s self-serving testimony that the deviations were intentional and made in response to adverse roof conditions. *Id.* at 10, 14-16. The Secretary contends that this credibility resolution is erroneous and should be overturned, because the judge provided no explanation for his determination and Stockwell was otherwise shown to be a noncredible witness. *Id.* at 14-16.

Faith contends that substantial evidence supports the judge=s finding that it did not violate section 75.203(b) because Stockwell=s credible testimony established that it followed sightlines to control mining direction, except where deviations were necessary because of adverse roof conditions. F. Br. at 5-12. Faith also contends that the judge properly denied the Secretary=s request to apply the res judicata doctrine to establish this alleged violation because there is no indication that the probation revocation proceeding involved issues identical to those presented here. *Id.* at 6, 8-11.

The Commission has long held that a judge=s credibility determinations are entitled to great weight and may not be lightly overturned. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (September 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (December 1981). We have recognized that since 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 Alterations Citations*, 17 FMSHRC 1815, 1878 (November 1995), *appeal docketed, Secretary of Labor v. Keystone Coal Mining Corp.*, No. 95-1619 (D.C. Cir. Dec. 28, 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)). Accordingly, Aas a general rule [we] are bound by the credibility choices of the [judge], even if [we] >might have made different findings had the matter been before [us] . . . de novo.=@ *Ona*, 729 F.2d at 719 (quoting *Gulf States Mfrs., Inc. v. NLRB*, 579 F.2d 1298, 1329 (5th Cir. 1978)). 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).

We conclude that the judge=s decision to credit Stockwell=s testimony regarding the use of sightlines is adequately explained and does not constitute an abuse of discretion. In explaining his decision to credit Stockwell, the judge indicated that Stockwell=s testimony was supported by considerable record evidence of adverse roof conditions, and noted that even Inspector Anderson admitted that the deviations could have been caused by roof problems. 17 FMSHRC at 1202. The judge also noted that the Secretary did not attempt to rebut Stockwell=s testimony by offering evidence that the required spads were not in place, or testimony from miners that it was common practice at the mine not to follow sightlines. *Id.*[21]

In addition, the fact that Stockwell=s testimony may have been less than fully credible with respect to other matters does not, in itself, provide a basis for disturbing the judge=s decision to credit him on this point. We have previously recognized that it is not uncommon, and certainly not reversible error, for the trier of fact to find a witness to be credible on some, but not other, matters. In *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981), the Commission explained:

> We do not subscribe to a Afalse in one, false in everything@ rule of testimonial evidence, and such rules are not applied inflexibly in any event. . . . If the remainder of a questionable witness= testimony is corroborated by other credible evidence . . . or is otherwise inherently believable, the judge is not foreclosed from accepting it.

Id. at 813 (citations omitted).

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[21] Contrary to the Secretary=s suggestion (S. Br. at 16 n.8), the judge=s decision to credit Stockwell on this point was not based on this ground alone; rather, it was one of several reasons mentioned by the judge as a basis for this credibility determination. Moreover, it was not improper, as the Secretary contends, for the judge to rely on the failure to produce relevant evidence both in evaluating the strength of the Secretary=s case and in deciding whether to credit Stockwell=s conflicting explanation of the presence of certain irregularities. Nor was the judge required, as the Secretary asserts, to engage in a detailed analysis of Stockwell=s demeanor on the witness stand.

The Secretary has failed to offer any evidence that warrants the Aextraordinary step@ of reversing the judge=s decision to credit Stockwell=s explanation that the deviations from projections were made intentionally in response to adverse roof conditions and not indicative of a failure to follow sightlines. *Hall v. Clinchfield Coal Co.*, 8 FMSHRC 1624, 1629 (November 1986). Accordingly, we conclude that the judge=s credibility-based determination that Faith did in fact utilize sightlines is supported by substantial evidence, and affirm his finding that the Secretary failed to establish a violation of section 75.203(b).[22]

[22] We also conclude that the judge properly denied the Secretary=s motion to apply the res judicata doctrine to establish this violation based upon the decision in the probation revocation proceeding, for the reasons discussed *supra*, pp. 9-10.

VI.

Conclusion

For the foregoing reasons, we affirm the judge=s findings with respect to each of the alleged violations of sections 75.202(a), 75.220, and 75.203(b) set forth in Citation Nos. 3396045, 3024814, 3202244, and Order No. 3202245. We also affirm his determination that the doctrine of res judicata was not applicable as a basis for establishing the violations alleged in Citation Nos. 3024814 and 3202244 and Order No. 3202245. We reverse the judge=s decision to vacate the violation alleged in Citation No. 3202337, concerning the use of a scoop loader without an operative methane monitor, and remand for a determination of whether Faith violated section 75.342(a)(4).

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

Commissioners Riley and Verheggen, concurring:

We agree with our colleagues= decision. We write separately to offer an additional rationale as to why the judge properly denied the Secretary=s motion to establish that the violations alleged in Citation Nos. 3024814 and 3202244 and Order No. 3202245 occurred as charged by application of the doctrine of res judicata based on the magistrate=s decision in Stockwell=s probation revocation proceeding. *See*, slip op. at 9-10, 13 n.17, and 16 n.22.

As pointed out by our colleagues, notwithstanding the Secretary=s assertion that the issues addressed by the U.S. District Court were identical to those addressed in these proceedings, the Secretary failed to prove that the magistrate based his decision upon a finding that the alleged violations occurred as charged. We also note that the Secretary, who carries the burden of proving all the elements necessary to establish res judicata (*Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 986 (June 1982)), made no effort to prove that the requisite privity existed between Stockwell and Faith. *See Nevada v. United States*, 463 U.S. 110, 129-30 (1983) (res judicata applies only to a second suit involving the same parties or those in privity with them); *In re Gottheiner*, 703 F.2d 1136, 1140 (9th Cir. 1983) (APrivity exists when there is >substantial identity= between parties, that is, when there is sufficient commonality of interest.@) (citation omitted).

We write separately, however, to highlight an even more fundamental basis upon which to reject the Secretary=s attempt to assert res judicata in these proceedings. We find that, in the first instance, a federal magistrate lacks the subject matter jurisdiction to make a finding of a civil violation of the Mine Act. In *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994) the Supreme Court held that Athe Commission and the courts of appeals have *exclusive jurisdiction* over challenges to agency enforcement proceedings@ brought under the Mine Act. *Id.* at 208 (emphasis added). To the extent that the federal magistrate=s revocation of Stockwell's probation was grounded upon his determination that civil violations of the Mine Act occurred, he had no such authority. Congress has vested this authority *exclusively* in the Commission and the courts of appeals. Thus, until proven by the Secretary before the Commission, the citations and order were mere *allegations* of violations. Only after a final adjudication before the Commission, with a finding of a violation, could the citations and order have been presented to the magistrate as evidence of civil violations of the Mine Act.

We also note that although the Secretary argued in her post-hearing brief that the magistrate specifically affirmed Order No. 3202245 (S. Post-Trial Br. at 129-30), Judge Barbour reached the opposite result and vacated the order, a decision which we affirm today. This apparent difference in the results reached by the magistrate and the Commission highlights the critical importance of the Commission guarding its jurisdiction over civil proceedings under the Mine Act, in which our agency can bring its expertise to bear on statutory and regulatory questions arising under the Act. *Thunder Basin*, 510 U.S. at 214-15.

We also write separately to voice our concern that at the time the probation revocation hearing was taking place before the federal magistrate during mid-September 1993, the citations and order were at issue before a Commission judge, and as such were *allegations* that the Mine Act was violated.[23] It appears from the record, however, that Stockwell=s probation officer, with the assistance of MSHA inspectors, represented to the magistrate that violations of the Mine Act as alleged in the citations and order did in fact occur. Tr. V 22-25, 45-49. That the Secretary then argued before Judge Barbour that the violations had been proven before the magistrate, an argument she has raised on appeal, demonstrates that she believes that the probation revocation proceeding was an acceptable substitute for an adjudication of the citations and order before the Commission. The Secretary has erred, however, by insisting that the federal magistrate had the power to render moot a Commission proceeding. To the extent that the Secretary=s actions in this regard had the effect of circumventing an ongoing Commission proceeding, we disapprove.

Accordingly, we conclude that the show cause hearing before a federal magistrate on the narrow question of whether Stockwell=s probation should have been revoked was not, and could not have been under *Thunder Basin*, a substitute for a proper determination on the merits of the Secretary=s allegations under the Mine Act, with appropriate review by the Commission and a court of appeals.

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

[23] Specifically, while the probation revocation hearing was taking place, the question of whether to enter a default judgment against Faith in these proceedings came before the judge. Tr. V 29-30.