FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

March 17, 1997

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. SE 94-74
	:	SE 94-84
JIM WALTER RESOURCES, INC.	:	SE 94-115

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

DECISION

BY: Jordan, Chairman; Marks, Commissioner

[1] Commissioner Holen participated in the consideration of this matter, but her term expired before issuance of this decision. 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.

These 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@), raise the issue of whether two violations of 30 C.F.R. ' 75.1725[2] and three violations of 30 C.F.R. ' 75.400[3] resulted from unwarrantable failure[4] by Jim Walter Resources, Inc. (AJWR@) to comply with those standards. Former Commission Administrative Law Judge Arthur J. Amchan concluded that the five violations were not a result of unwarrantable failure. 16 FMSHRC 2477 (December 1994) (ALJ). For the following reasons, we vacate and remand the judge=s unwarrantable failure determinations with respect to the section 75.1725 violations and we reverse his unwarrantable failure determinations as to the section 75.400 violations.

I.

Factual and Procedural Background

The five violations at issue stem from several inspections in 1993 of JWR=s No. 7 Mine in Tuscaloosa County, Alabama by the Department of Labor=s Mine Safety and Health Administration (AMSHA@). 16 FMSHRC at 2477. The violations concern JWR=s maintenance of conveyor belts and cleanup of coal dust accumulations. *Id.* In all five instances, JWR challenged MSHA=s enforcement actions and the matters were consolidated for hearing before Judge Amchan.

1. July 29, 1993 Belt Maintenance Violation (Order No. 3015087)

On July 29, 1993, MSHA Inspector Kirby Smith observed that the isolated portion of the East A conveyor belt was inadequately supported because the top rollers of the conveyor belt had

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[2] Section 75.1725, AMachinery and equipment; operation and maintenance,@ states in part:

> (a) Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

[3] Section 75.400, AAccumulation of combustible materials,@ states:

> 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.

[4] The unwarrantable failure terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. ' 814(d)(1), 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 . . . .@

slid together. 16 FMSHRC at 2484; Tr. 215-16. He also noted that the belt was misaligned due to missing bottom rollers, causing it to rub against its structure and fray. 16 FMSHRC at 2484. The flammable belt fibers became entangled in the rollers and created a friction point. *Id.*

The inspector issued an order under Mine Act section 104(d)(2), 30 U.S.C. ' 814(d)(2), charging a violation of section 75.1725(a), and characterized the violation as significant and substantial (AS&S@)[5] and a result of JWR=s unwarrantable failure. 16 FMSHRC at 2484-85.

The judge found a violation of the standard and determined that the violation was S&S. *Id*. He concluded that the violation was not unwarrantable because, in the absence of evidence indicating the measures that a reasonably prudent employer would have taken with regard to the East A belt, the Secretary failed to establish JWR=s aggravated conduct, a necessary element of the unwarrantable failure determination. *Id.* The judge found that, because JWR had received complaints from the union about the poor condition of the belt, JWR=s violation was the result of Aat least ordinary negligence.@ *Id.* The judge assessed a civil penalty of $2,000. *Id.*

2. August 16, 1993 Accumulation Violation (Order No. 3182957)

MSHA Inspector Oneth Jones inspected the West B conveyor belt on August 16, 1996, at 8:05 a.m., and discovered a buildup of wet, damp and fine dry coal dust at the tailpiece and beneath the bottom belt. 16 FMSHRC at 2486; Gov=t Ex. 1-B. Three rollers were turning in this accumulation, which measured 19 inches deep, approximately 20 feet long and extended wider than the belt. 16 FMSHRC at 2486; Gov=t Ex. 1-B; Tr. 237-38. One of the rollers had heated to the extent that it was Ahot to the touch.@ 16 FMSHRC at 2486. The inspector issued an order under section 104(d)(2) for a violation of section 75.400, alleging that the violation was S&S and a result of unwarrantable failure. *Id.*

The judge concluded that an S&S violation of section 75.400 had occurred, but that the violation was not a result of JWR=s unwarrantable failure because the accumulation was not of sufficient extent. *Id*. at 2486-87. He also found it Aunclear how long the condition cited had existed prior to Inspector Jones= arrival at the scene.@ *Id.* at 2486. The judge recognized that JWR had 192 violations in the preceding two years but determined that the number of past violations, Astanding alone,@ did not establish JWR=s aggravated conduct. *Id.* at 2486-87. He also found that although JWR had not initiated cleanup by the time Inspector Jones arrived, this failure did not amount to aggravated conduct. *Id.* at 2487. He assessed a penalty of $1,000. *Id.*

[5] The S&S terminology is taken from section 104(d)(1) of the Act, 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 . . . .@

3. August 17, 1993 Belt Maintenance Violation (Order No. 3015093)[6]

On August 17, 1993, at 3:50 p.m., while inspecting the East A conveyor belt, Inspector Smith noticed that the belt was out of alignment, running from side to side, and cutting into the metal support structure in several places. 16 FMSHRC at 2477-78; Gov=t Ex. 1. Inspector Smith also observed that a number of rollers on which the belt moved were dislodged, damaged or stuck in a mud-like mixture of coal dust and water. 16 FMSHRC at 2478. He issued a section 104(d)(2) order for a violation of section 75.1725(a), designating the violation as S&S and unwarrantable. *Id.* at 2477-78.

The judge affirmed the violation, concluded that it was S&S, but determined that it was not a result of JWR=s unwarrantable failure because the Secretary failed to Aestablish the standard of care from which the cited operator departed.@ *Id.* at 2479-80. Concluding that the violation was of high gravity due to the number of defective rollers and the methane liberation of No. 7 Mine, the judge assessed a civil penalty of $2,000. *Id.* at 2480.

4. August 17, 1993 Accumulation Violation (Order No. 3015095)

[6] The judge inadvertently referred to this order as ANo. 3015993.@ 16 FMSHRC at 2477.

At 4:00 p.m. on the same day, Inspector Smith arrived at the section 4 belt feeder[7] and found accumulations of loose coal and coal dust 6 to 42 inches in depth, 20 feet wide and 15 feet long. *Id*. at 2483; Gov=t Ex. 3. The Section 4 belt feeder had been improperly positioned so that some of the coal from the ram cars was being dumped on the ground. 16 FMSHRC at 2483. The inspector issued a section 104(d)(2) order alleging an S&S and unwarrantable violation of section 75.400. *Id.*

The judge determined that JWR had violated section 75.400, and that the violation was S&S but not the result of unwarrantable failure. *Id.* He reasoned that, although the condition was noted in the preshift examination book, the evidence fell short of that necessary to establish more than ordinary negligence. *Id.* The judge assessed a $500 civil penalty for the violation. *Id.*

5. September 2, 1993 Accumulation Violation (Order No. 3183157)

On September 2, 1993, at 7:50 a.m., Inspector Jones observed loose coal and coal dust, including float coal dust that had accumulated beneath the East A tailpiece. *Id*. at 2487; Gov=t Ex. 2-B. The tailpiece was turning in the accumulation for a distance of three feet and generating airborne fine dry coal dust that was clearly visible. *Id.* The inspector, who had issued a citation for the same condition two weeks earlier, issued a section 104(d)(2) order, alleging an S&S and unwarrantable failure violation of section 75.400. 16 FMSHRC at 2487.

The judge determined that the violation occurred and that it was S&S. *Id.* He concluded that the violation was not a result of JWR=s unwarrantable failure because he was not persuaded that the buildup occurred before the preshift examination, and because the record failed to establish Aconduct sufficiently worse than ordinary negligence.@ *Id.* The judge assessed a penalty of $1,000. *Id.*

The Commission granted the Secretary=s petition for discretionary review challenging the judge=s determinations that the five violations were not the result of JWR=s unwarrantable failure.

[7] The belt feeder transfers the freshly mined coal from ram cars coming from the working face to a belt conveyor. 16 FMSHRC at 2483.

II.

Disposition

A. Belt Maintenance Violations

The Secretary asserts that the judge applied an erroneous unwarrantable failure analysis by requiring the Secretary to establish the standard of care violated by the mine operator and detail what measures a reasonably prudent operator would have taken in order to prove aggravated conduct. S. Br. at 7. The Secretary argues that nothing in Commission law requires him to prove what behavior would not have constituted aggravated conduct, and that he need only prove that the operator=s behavior amounted to aggravated conduct. *Id.* at 8. The Secretary submits that the judge also failed to adequately address evidence that demonstrated unwar-rantable failure. *Id.* at 10-17, 20-23. JWR responds that the judge applied the proper analysis and that the Secretary erroneously seeks to equate unwarrantable failure with ordinary negligence. JWR Br. at 8-13, 17-19.

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 2003-04. Unwarrantable failure is characterized by such conduct as Areckless disregard,@ Aintentional misconduct,@ Aindifference@ or a Aserious lack of reasonable care.@ *Id.*; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (February 1991). 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 to prevent or remedy the violative condition. *See Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (February 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (August 1992) (citations omitted); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984). Repeated similar violations are 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 1261, 1263-64.

We agree with the Secretary that, under Commission precedent, the Secretary is not required to prove what behavior would *not* have constituted Aaggravated conduct.@ Therefore, we reject the judge=s proposed test that A[t]o establish aggravated conduct, the Secretary must establish the standard of care from which the cited mine operator departed.@ 16 FMSHRC at 2480. In addition, with respect to the two belt maintenance violations, the judge failed to discuss any of the factors that comprise the unwarrantable failure analysis. Accordingly, with respect to Order Nos. 3015087 and 3015093, we vacate the judge=s conclusion that these violations were not a result of JWR=s unwarrantable failure. We remand for application of all the factors of the unwarrantable failure analysis in light of the record evidence.

Because we conclude that the judge erred by failing to apply the correct unwarrantable failure test, we do not reach the additional evidentiary issues raised by the Secretary. We note, however, that the judge=s decision with respect to the July 29 and August 17 violations contains findings bearing on the unwarrantable failure factors. In both instances, the judge found that management had received complaints, prior to the violations, about the recurring belt problem. 16 FMSHRC at 2478, 2485. Whether an operator has been placed on notice that greater efforts are necessary for compliance is an element of the unwarrantable failure analysis. *Peabody*, 14 FMSHRC at 1261. As to the August 17 violation, the judge=s finding that there were 200 defective rollers on the belt bears on the extensiveness of the violation. 16 FMSHRC at 2478-80 & n.1. He also referred to a Anumber of defective rollers@ that caused the July 29 violation. *Id*. at 2485. In reaching a determination of whether JWR=s conduct was Aaggravated,@ the judge on remand should consider this evidence in conjunction with evidence relating to the other unwarrantable failure factors.

2. Accumulation Violations

The Secretary asserts that the judge applied the same improper legal test, requiring the Secretary to prove the operator=s standard of care, in the accumulation violations. S. Br. at 7 n.6. Alternatively, the Secretary contends that the judge failed to address or inadequately addressed record evidence that established that the violations were unwarrantable. *Id.* at 10-12, 17-20, 23-28. JWR disputes that the judge applied an incorrect legal analysis and contends that substantial evidence in the record supports the judge=s determinations. JWR Br. at 12-16, 19-23.

With respect to the accumulation violations, we disagree with the Secretary that the judge required him to prove the standard of care from which the operator departed. The judge did not use the standard of care language in his discussion of the accumulation violations. Additionally, when analyzing an accumulation violation, not under review, from Docket No. SE 94-74, the judge properly stated that Commission precedent requires consideration of a number of factors in reaching an unwarrantable failure determination. 16 FMSHRC at 2482 (citing *Peabody*, 14 FMSHRC 1258; *Mullins*, 16 FMSHRC 192). In his discussion of the August 16 accumulation violation, he expressly applied the unwarrantable failure criteria and cited to *Peabody*. 16 FMSHRC at 2486. He utilized the factors of extensiveness, duration and prior warnings when evaluating whether the three accumulation violations were unwarrantable. *Id.* at 2483, 2486-87.

We next turn to the question of whether substantial evidence supports the judge=s determination for each of the three violations. When reviewing the judge=s factual determinations as to unwarrantable failure, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. ' 823(d)(2)(A)(ii)(I). 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)). 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). We are guided by the settled principle

that, in reviewing the whole record, an appellate tribunal must also consider anything in the record that Afairly detracts@ from the weight of the evidence that supports a challenged finding. *Id.* at 488.

1. August 16, 1993 West B Accumulation (Order No. 3182957)

The Secretary asserts that the judge based his negative unwarrantable failure determination on three erroneous grounds: that the accumulation was not sufficiently extensive; that it was unclear how long the condition cited existed; and that the operator=s 192 violations of section 75.400 in the preceding two years, Astanding alone,@ were not sufficient to support a finding of aggravated conduct. S. Br. at 23 (citing 16 FMSHRC at 2486-87). JWR counters that the judge properly weighed the evidence and concluded that the accumulation was not of certain duration nor sufficiently extensive to support an unwarrantable failure finding. JWR Br. at 19-21.

As to the extensiveness of the accumulation, the judge disregarded evidence that it took 15 miners 45 minutes for its cleanup. Tr. 243. An accumulation that requires 11 man-hours to clean up is extensive. The buildup of wet, damp, and fine dry coal dust at the West B conveyor belt tailpiece measured 19 inches deep, approximately 20 feet long and extended wider than the belt. The Commission has affirmed unwarrantable failure determinations involving accumulations of similar size to the one here. *See Peabody*, 14 FMSHRC at 1259 (unwarrantable accumulations with measurements of 15 feet long and 30 inches high; 4 feet long, 4 feet wide and 30 inches high; 4 feet wide and 24 inches high); *New Warwick Mining Co.*, 18 FMSHRC 1568, 1573 (September 1996) (unwarrantable accumulations of float coal dust 1/4 inch deep along section, loose coal 6 inches deep and coal mixed with rock 22 inches deep); *cf. Doss Fork Coal Co.*, 18 FMSHRC 122, 125 (February 1996) (vacating negative unwarrantable failure determinations for accumulations up to 26 inches deep in ten crosscuts). The record does not support the judge=s finding that the accumulation was not extensive and we reverse that finding.

The judge did not make an express finding as to the obviousness of the violation, but noted that the accumulation was in an area adjacent to the manbus stop and the oncoming and outgoing shifts passed by the area. 16 FMSHRC at 2486; Tr. 248. We conclude that, because the extensive buildup was in a conspicuous location in the mine, it was obvious.

With respect to the factor of prior warnings, the judge stated that, Astanding alone,@ JWR=s citation history, which showed that JWR=s Mine No. 7 had incurred 192 violations of section 75.400 did not persuade him that the violation was due to an unwarrantable failure. 16 FMSHRC at 2487. The judge=s statement is incorrect for two reasons. First, the prior violations were not Astanding alone.@ As we indicated previously, other factors such as the extensiveness and obvious nature of the violation were also present. *See, e.g., Mullins*, 16 FMSHRC at 195; *Quinland*, 10 FMSHRC at 709. Second, the judge overlooked that, on July 7, 1993, at a preinspection conference, Inspector Smith discussed with JWR management the extensive history that JWR had with respect to accumulation violations. Tr. 112-13. The Commission has held that prior warnings and past enforcement actions concerning accumulations should engender in the operator a heightened awareness of a continuing problem. *Mid-Continent Resources, Inc.*, 16 FMSHRC

1226, 1232 (June 1994). On this record, it is undisputed, and we conclude, that JWR had been placed on notice that heightened scrutiny was necessary to prevent accumulations.

No miner was cleaning the accumulation at the time of the inspector=s arrival. 16 FMSHRC at 2487. Where an operator has been placed on notice of an accumulation problem, the level of priority that the operator places on addressing the problem is a factor properly considered in the unwarrantable failure analysis. *Peabody*, 14 FMSHRC at 1263; *see also 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). JWR had been placed on notice of the need to exercise greater cleanup efforts. Accordingly, we reverse the judge=s finding (16 FMSHRC at 2487), that JWR=s failure to start cleanup of the accumulation by the time of Inspector Jones= arrival did not constitute aggravated conduct.

The judge=s finding that it was unclear how long the cited condition existed (*id*. at 2486), rested on a credibility assessment of the testimony of JWR assistant foreman Phillips. Phillips, who accompanied Jones on the inspection, testified that a similar accumulation occurred quickly. Tr. 279-83, 286. Absent exceptional circumstances, the Commission will not disturb such credibility determinations. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1540-41 (September 1992); *Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21, 25 (January 1984), *aff=d mem.*, 750 F.2d 1093 (D.C. Cir. 1984).

Although it may be unclear how long the accumulation at issue existed prior to the order, the undisputed evidence on the other unwarrantable factors establishes that JWR was on notice, through numerous prior cited violations and a warning, that greater efforts were necessary to control accumulations. Nevertheless, JWR permitted an obvious, extensive accumulation to build up at the West B conveyor belt and tailpiece and took no steps prior to the issuance of the order to abate the violative condition. Taken together, this evidence fails to support the judge=s determination that the violation did not result from JWR=s unwarrantable failure. Accordingly, we reverse, on substantial evidence grounds, the judge=s determination.

2. August 17, 1993 Feeder Accumulation (Order No. 3015095)

The Secretary asserts that the judge failed to address or inadequately addressed record evidence on the unwarrantable factors of prior warnings and violations, obviousness, extensiveness, duration and abatement of the accumulation. S. Br. at 17-20. JWR responds that the judge properly determined that its conduct did not amount to unwarrantable failure for the primary reason that the record failed to show how long the accumulation had built up. JWR Br. at 14-16.

The judge=s finding that the accumulation was not sufficiently extensive to support an unwarrantable failure finding (16 FMSHRC at 2483) is not supported by the record. At 20 feet by 15 feet and nearly 4 feet at its greatest depth, the accumulation was substantial and extensive. As to obviousness, the accumulation was in an area that was well-traveled and by which both the day and evening foremen passed. Tr. 85-86, 142-43. As to duration, the judge noted, but seems

to have placed no importance on, the fact that the preshift examiner recorded the condition. 16 FMSHRC at 2483. An operator=s failure to rectify a condition noted in the preshift book is a factor to be considered in the unwarrantable failure analysis. *Peabody*, 14 FMSHRC at 1262.

The judge failed to discuss JWR=s prior warnings and violations. It is undisputed, and we conclude, that JWR should have been placed on heightened awareness of its accumulation problem by the July 7 preinspection conference, the August 16 accumulation order issued just the day before, and the 192 prior citations for accumulations issued in the preceding two years. Further, as to abatement, the judge found Ano evidence of abatement measures when Smith observed the violation.@ 16 FMSHRC at 2483.

The overwhelming weight of record evidence on the unwarrantable failure elements of extensiveness, obviousness, duration, prior warnings and violations and abatement, taken together, establishes JWR=s aggravated conduct and renders unreasonable the judge=s conclusion that the violation of section 75.400 was not unwarrantable. Accordingly, we reverse that determination on substantial evidence grounds.

3. September 2, 1993 East A Tailpiece Accumulation (Order No. 3183157)

The Secretary argues that the judge failed to address material evidence pertaining to the factors of prior warnings and violations and the duration and extent of the accumulation. S. Br. at 26-28. In particular, the Secretary contends that the judge failed to consider that the inspector issued a citation for the identical condition only nine days earlier and that JWR had made no efforts to improve the condition since then. S. Br. at 26-27. JWR counters that the judge=s vacation of the unwarrantable failure designation is supported by the record which showed that this accumulation could have occurred rapidly and that JWR responsibly assigned miners to deal with accumulation problems. JWR Br. at 22.

As to extensiveness, the accumulation consisted of loose coal and coal dust, including float coal dust that had accumulated beneath the East A tailpiece. 16 FMSHRC at 2487; Gov=t Ex. 2-B. The bottom belt was running in the material for a distance of three feet and causing coal dust to become airborne. *Id.* The suspended dust was highly visible. 16 FMSHRC at 2487. Additionally, the judge failed to consider that the material had compacted to the degree that its cleanup required 10 to 15 miners utilizing pry bars and working for approximately 45 minutes. Tr. 256, 267, 272. On this record, we conclude that the accumulation was extensive. The violation was also obvious; the judge noted that miners, as well as management personnel, passed by the cited location while getting on and off the manbus at the beginning of their shifts. 16 FMSHRC at 2487.

The factor of prior warnings and violations is significant for this violation. As the judge found, an identical citation had been issued for the same problem at the same location less than two weeks earlier, on August 24, 1993. *Id.* Union representative Keith Plylar, who accompanied the inspector on the August 24 and September 2 inspections, testified without contradiction that when the earlier citation was issued, Ait was stated . . . that [JWR had] a problem with the area

and they [needed] to stay on top of it . . . .@ Tr. 274. The inspector and the union representative testified that management had not made efforts to improve the tailpiece condition at issue between the August and September violations. Tr. 257, 274. The judge failed to consider that this prior warning should have heightened JWR=s awareness that substantial effort would be necessary to prevent accumulations. *See New Warwick*, 18 FMSHRC at 1574; *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2010-11 (December 1987) (unwarrantable failure premised upon the fact that inspector issued a citation for a similar violation in the same area). The prior citation, combined with the two preceding orders in this case and JWR=s two-year history of accumulation violations, permits no other conclusion than that JWR was placed on notice that it had a serious accumulation problem.

JWR asserts that it took appropriate steps to prevent accumulations because one or two miners were assigned to clean up the area. JWR Br. at 22. The judge makes no finding on this issue (16 FMSHRC at 2487), nor do we. However, even if JWR had stationed miners to the area, the record established that such efforts were inadequate because extensive combustible materials were still permitted to accumulate. *See Peabody*, 14 FMSHRC at 1263 (operator=s efforts to effectively deal with accumulations insufficient when operator assigned only one miner to clear the area).

Although the record does not reveal precisely how long the accumulation was in existence, undisputed evidence regarding the extensive and obvious nature of the violation, and the operator=s history of prior warnings and violations, viewed as a whole, establishes JWR=s aggravated conduct and fails to support the judge=s conclusion that JWR=s violation of section 75.400 on September 2, 1993, was not the result of unwarrantable failure. Accordingly, we reverse that determination on substantial evidence grounds.[8]

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[8] Our dissenting colleague believes we should not determine here whether the three accumulation violations were unwarrantable, but should instead remand the issue to the judge because we do not have Athe benefit of knowing everything the fact-finder knew before he sat down to draft his opinion.@ Slip op. at 13. Thankfully, the Mine Act does not require the omniscience demanded by our colleague. It permits us to modify a judge=s opinion Ain conformity with the record,@ 30 U.S.C. ' 823(d)(2)(C), and does not require that we ascertain what the fact-

finder actually Aknew.@ The judge=s decision, like ours, can only be based on record evidence. Our review of this record as a whole **C** particularly the undisputed evidence regarding the prior warnings and the extensive and obvious nature of the violation **C** leads us to conclude that there is not substantial evidence to support the judge=s finding that no aggravated conduct occurred. In such a case, the proper course of action is reversal, not remand.

III.

Conclusion

We vacate the judge=s conclusion that the two belt maintenance violations in Order Nos. 3015087 and 3015093 were not a result of JWR=s unwarrantable failure and remand this matter to the Chief Administrative Law Judge for assignment to a judge for analysis consistent with this opinion.[9] If on remand the judge determines that the violations resulted from JWR=s unwarrantable failure, the judge should reassess the applicable civil penalties. As to the accumulation violations, we reverse the judge=s negative unwarrantable failure determinations, reverse his modification of Order Nos. 3182957, 3015095, 3183157 to section 104(a) citations, reinstate those orders under section 104(d)(2) of the Mine Act, and remand for reassessment of civil penalties.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

[9] Judge Amchan has since transferred to another agency.

Commissioner Riley, concurring in part and dissenting in part:

I concur with my colleagues with respect to the belt violations. I respectfully dissent with regard to their disposition of the accumulations violations.

While we agree that the judge failed to adequately develop and explain his conclusions, I believe that a remand and not a reversal is the appropriate response to an incomplete and insufficient evidentiary record.

In *Emery Mining Corp.*, 9 FMSHRC 1997 (December 1987), we determined that unwarrantable failure is aggravated conduct constituting more that ordinary negligence. *Id*. at 2002-04. Unwarrantable failure is characterized by such conduct as Areckless disregard,@ Aintentional misconduct,@ Aindifference,@ or a Aserious lack of reasonable care.@ *Id*.; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991). The Commission examines various factors in determining whether a violation is unwarrantable, including the extent of a violative condition, the length of time it had existed, whether the condition was obvious, whether the operator had 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); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984).

I am unable to uncover any case law which allows a judge to determine whether a violation is unwarrantable by analyzing Athe best three out of five@ criteria that he chooses to discuss in his decision. Judges cannot be permitted to Ashortchange@ the adjudicative process by discussing only the obvious and ignoring more subtle but nonetheless important distinctions. It is not enough to draw selective conclusions that each of the accumulations was or wasn=t large enough to literally trip over, or that each was wet or dry, or that each had been present for a day or an entire shift. In the absence of a proper application of all the factors which constitute a thorough unwarrantability analysis, disposition of this case comes down to the question of who is best equipped to complete the process.

When reviewing the Judge=s factual determinations as to unwarrantable failure, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. ' 823(d)(2)(A)(ii)(I). 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 reaching his decision. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-89 (1951). An appellate body reviewing a judge=s factual findings will not affirm his findings if they are unreasonable, incredible or if there is dubious evidence to support them. *See, e.g., Krispy Kreme Doughnut Corp. v. NLRB*, 732 F.2d 1288, 1293 (6th Cir. 1984); *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1263 (7th Cir. 1980).

After careful examination of the record, I cannot affirm the judge=s findings as to whether various accumulations were unwarrantable because his analysis is incomplete and his interpretation of the evidence is inconsistent with the record. However, while I am comfortable

vacating his initial decisions, I cannot make the leap of faith embraced by the majority which appears willing to bridge gaps in the record to find the crucial elements of aggravated conduct, even if it requires engaging in creative fact-finding to unequivocally determine that each violative condition was due to an unwarrantable failure.

I see no compelling reason for this Commission to do the judges= homework for them. As fact-finders, the judges control development of the evidentiary record. Consequently, they have more exposure to the testimony and exhibits than members of the Commission do from a careful review of that record on appeal. The judges also have singular access to witnesses. However, the opportunity for enhanced perspective arising from proximity may have been squandered in this case because the judge failed to consider every element and drew a series of premature and, in the minds of every member of this Commission, improper conclusions. When a judge fails to adequately address the evidentiary record before him, a remand is necessary for fuller evaluation. *Mid-Continent Resources, Inc*., 16 FMSHRC 1218, 1222-23 (June 1994).

Similarly, when a judge=s conclusion is insufficiently explained, the Commission is unable to exercise meaningful review as to whether the conclusion is legally proper and supported by substantial evidence. In such situations a remand is required. *U.S. Steel Corp.*, 6 FMSHRC 1908, 1916 (August 1984) (citing *The Anaconda Co.*, 3 FMSHRC 299, 299-302 (February 1981)). If I had the benefit of knowing everything the fact-finder knew before he sat down to draft his opinion, I might have been able to resolve the question of unwarrantability differently. The trouble is that no one knows exactly what he knows because the analysis on this issue is deficient. I am concerned that those hungry for guidance from the majority opinion, which finds unwarrantable failure, will find their plate as empty as those who might pick through morsels of wisdom offered by the judge who finds none.

After analyzing the facts and reviewing the record of this case, I have come to the conclusion that I can best do my job by allowing the judges to do theirs.

James C. Riley, Commissioner