FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20006

September 19, 2000

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. PENN 98-15-R
RAG CUMBERLAND RESOURCES CORPORATION[1]	:	

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

DECISION

BY: Jordan, Chairman; Riley, and Beatty, Commissioners

In this contest proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), Administrative Law Judge Jerold Feldman issued a Decision on Remand concluding that, between the time that the Department of Labor's Mine Safety and Health Administration ("MSHA") issued an order to Cyprus Cumberland Resources Corporation ("Cyprus") pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), and the time that it issued a subsequent section 104(d)(2) order, MSHA had conducted an inspection of the Cumberland Mine which disclosed no similar violations within the meaning of section 104(d)(2) of the Mine Act.[2] 21 FMSHRC 1112 (Oct. 1999) (ALJ). The

[1] Cyprus moved to amend the caption in this case to reflect the substitution of its new parent company, RAG Cumberland Resources Corporation. In an order dated June 15, 2000, we granted that motion. In this decision, we refer to Cyprus as the entity against whom enforcement action was taken, and as the party filing a response brief with the Commission.

[2] Section 104(d)(2) provides:

> If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations.

Commission granted the Secretary's petition for discretionary review challenging the judge's decision. For the reasons that follow, we reverse the judge's decision.

I.

Factual and Procedural Background

The background facts in this proceeding are fully set forth in the Commission's initial decision in this case, *Cyprus Cumberland Resources Corp.*, 21 FMSHRC 722 (July 1999) ("*Cumberland I*"), and are summarized here. Cyprus operates the Cumberland Mine, an underground bituminous coal mine near Waynesburg, Pennsylvania. *Id.* at 723. The mine receives four regular AAA inspections,[3] which are conducted quarterly beginning on October 1 of each year. *Id.* MSHA assigns two inspectors on a full-time basis to conduct each quarterly inspection, which usually takes the full quarter to complete. *Id.* The assigned inspectors are assisted by other inspectors. *Id.* As a result, there is essentially a continuous presence at the mine of at least two inspectors. *Id.*

On June 18, 1997, during the third quarterly inspection, MSHA Inspector Thomas McCort, assigned to conduct the regular inspection, issued to Cyprus a section 104(d)(1) order for a significant and substantial ("S&S") and unwarrantable violation of a preshift examination standard.[4] *Id*. On September 24, during the fourth quarter, Inspector Victor Patterson, who was assigned to conduct the regular inspection, issued a section 104(a) citation for a violation of a roof control standard, 30 C.F.R. § 75.202. *Id.* at 724. The next day, on September 25, Inspector Patterson issued a section 104(d)(2) withdrawal order alleging an S&S and unwarrantable violation of the same roof control regulation when he discovered that the hydraulic jack, which had been used to abate the cited condition, had been removed, and there were indications that miners had worked under an area of unsupported roof. *Id*. The fourth quarterly regular inspection concluded on the next day, September 26, when the 60 West Mains haulage was inspected. *Id*.

The 60 West Mains haulage is approximately 4,200 feet long and has been the primary route of travel into and out of the mine since 1983. *Id*. Between June 18 and September 25,

[3] A regular AAA inspection is a "[s]afety and [h]ealth [i]nspection of an entire mine." MSHA, U.S. Dep't of Labor, MSHA Handbook Series, *Coal General Inspection Procedures*, at 8-1 (Sept. 1995).

[4] The S&S terminology is taken from section 104(d)(1) of the Act, which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d)(1). The unwarrantable failure terminology is also taken from section 104(d)(1) of the Act, which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards." *Id.*

inspectors traveled through the area "many times," or approximately 60 or more round trips. *Id.* The inspectors traveled on the tracks by closed mantrips, which travel approximately 15 to 20 miles per hour ("mph"), and by open jeeps, or "crickets," which travel approximately 10 to 12 mph. *Id*.

Cyprus challenged the section 104(d)(2) order and the matter proceeded to hearing before Judge Feldman. During the hearing, Cyprus stipulated that it had violated the roof control standard on September 25, and that the violation was S&S and had been caused by its unwarrantable failure. *Id.* The parties also stipulated that the issue before the judge was whether an inspection disclosing no similar violations, i.e., an intervening "clean inspection" of the mine, had occurred between the time that the section 104(d)(1) order was issued on June 18, and the section 104(d)(2) order was issued on September 26. *Id.* They agreed that if the Secretary failed to prove the absence of an intervening clean inspection, the disputed section 104(d)(2) withdrawal order should be modified. *Id.*

In his initial decision, the judge concluded that there had been an intervening clean inspection between the issuance of the 104(d)(1) and 104(d)(2) orders. 20 FMSHRC 285, 294 (Mar. 1998). The judge reasoned that the purpose of an intervening inspection is to disclose whether additional violations caused by unwarrantable failure exist, and that such violations are generally more readily detectible. *Id.* He noted that, between the time that the 104(d)(1) and 104(d)(2) orders were issued, all areas of the mine had been inspected as part of a regular inspection except for the 60 West Mains haulage. *Id.* at 287. The judge determined that MSHA inspectors' repeated trips through the 60 West Mains haulage in addition to the regular inspection that had occurred prior to September 25 constituted a clean inspection within the meaning of the Act. *Id.* at 294. Accordingly, the judge modified the section 104(d)(2) order to a section 104(d)(1) citation. *Id.* at 295.

On review, a Commission majority vacated the judge's decision and remanded the case. 21 FMSHRC at 728. The Commission concluded that the judge erred by relying on the inspectors' travel through the haulageway rather than examining any evidence of inspection activity to determine whether the 60 West Mains haulage had been inspected. *Id.* at 727. The Commission rejected the judge's reasoning that the MSHA inspectors' frequent travel through the haulage constituted an inspection because it would disclose unwarrantable violations, which he considered more detectible. The majority found this was inconsistent with Commission precedent holding that a clean inspection must be thorough and complete, rather than designed to disclose only obvious violations. *Id*. The Commission also disagreed with the judge's underlying premise, reasoning that unwarrantable violations may not be more immediately apparent. *Id.* Consequently, the Commission remanded the case to the judge to determine whether the Secretary met her burden of proving the absence of an intervening clean inspection by examining evidence regarding any inspection activity in the haulage area during the relevant time period. *Id.* at 728. The Commission specifically instructed the judge to examine a log

maintained by Cyprus depicting all inspection activity at the mine, and to weigh it against other evidence. *Id*.[5]

On remand, the judge held that the Secretary failed to demonstrate that a clean inspection had not occurred. 21 FMSHRC at 1118. He found that the Secretary correctly asserted there were no entries in the log reflecting a regular or spot inspection of the 60 West Mains haulage. *Id.* at 1114. The judge also noted that Cyprus did not contend that the log contained any entries reflecting regular or spot inspections in that area, although it did state that the log showed that the inspectors were in the 60 West Mains haulage area. *Id.* The judge also found that the evidence was "equivocal" as to whether any inspector disembarked from a vehicle in the haulage during the relevant time. *Id.* at 1116. The judge then applied the "reasonable person test," and held that it was unreasonable to conclude that mine inspectors who are familiar with the hazards of mining would repeatedly travel through the haulage without ensuring that rib, roof, track and ventilation conditions were safe. *Id.* at 1116-17. Accordingly, the judge reinstated his modification of the section 104(d)(2) order to a section 104(d)(1) citation. *Id.* at 1118.

On review, the Secretary argues that the judge erred in finding that the Secretary conducted a clean inspection of the mine during the relevant time period. S. PDR at 2.[6] She contends the judge failed to follow the Commission's holding in *Cumberland I* that a clean inspection must encompass a thorough and complete inspection, not simply one that reveals obvious violations. *Id.* at 10. In addition, she argues that the judge's "reasonable person" approach is inconsistent with the Commission's prior holding. *Id*. at 14-15.

Cyprus responds that the Secretary failed to meet her burden of proving that a clean inspection did not occur between the issuance of the section 104(d)(1) order and the section 104(d)(2) order. C. Br. at 9. It maintains that the Secretary adduced no evidence of the specific activities of nine of the ten inspectors who inspected the mine, and that Cyprus' inspection log only indicates the ultimate inspection destination of inspectors and does not show that the inspectors did not inspect the 60 West Mains haulage. *Id*. at 10. Cyprus also contends that the judge properly applied the "reasonable person" standard in evaluating the credibility of the Secretary's witnesses who testified there was no clean inspection, and that it would be improper to overturn such credibility determinations. *Id.* at 14-18.

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[5] Commissioner Marks, concurring and dissenting in part, stated that he would have reversed the judge because, although he agreed that the judge had erred in concluding that an inspector's traveling through a haulageway constituted an inspection, he believed that the record supported only the conclusion that, under applicable court and Commission precedent, no clean inspection of the mine had occurred. *Id.* at 730. In his dissenting opinion, Commissioner Verheggen would have affirmed the judge in result because he believed the Secretary failed to meet her burden of proof. *Id.* at 735-37.

[6] The Secretary designated her petition for discretionary review as her brief.

II.

Disposition

A. General Principles

Section 104(d) creates a "chain" of increasingly severe sanctions that serve as an incentive for operator compliance. *See Naaco Mining Co.*, 9 FMSHRC 1541, 1545-46 (Sept. 1987). Under section 104(d)(1), if an inspector finds a violation of a mandatory standard during an inspection, and finds that the violation is S&S and that it is also caused by unwarrantable failure, he or she issues a citation under section 104(d)(1). That citation is commonly referred to as a "section 104(d)(1) citation" or a "predicate citation." *See Greenwich Collieries, Div. of Pa. Mines Corp.*, 12 FMSHRC 940, 945 (May 1990). If, during the same inspection or any subsequent inspection within 90 days after issuance of the predicate citation, the inspector finds another violation caused by unwarrantable failure to comply with a standard, he or she issues a withdrawal order under section 104(d)(1), sometimes referred to as a "predicate order." *Wyoming Fuel* Co., 16 FMSHRC 1618, 1622 n.7 (Aug. 1994). If an inspector "finds upon any subsequent inspection" a violation caused by unwarrantable failure, he or she issues a withdrawal order for the violation under section 104(d)(2). 30 U.S.C. § 814(d)(2). The issuance of withdrawal orders under section 104(d)(2) does not cease and an operator remains on probation "until such time as an inspection of such mine discloses no similar violations." *Id.*; *see Naaco*, 9 FMSHRC at 1545.

Before the judge, the Secretary was required to prove the absence of a clean inspection by a preponderance of the evidence. *See Garden Creek Pocahontas Co.,* 11 FMSHRC 2148, 2152 (Nov. 1989); *Consolidation Coal Co.,* 11 FMSHRC 966, 973 (June 1989). In describing the preponderance of the evidence standard, the Commission has stated: "[t]he burden of showing something by a 'preponderance of the evidence,' the most common standard in the civil law, simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence.'" *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998), *quoting Concrete Pipe and Prod. of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993).

The Commission has determined that, in order to prove the absence of a clean inspection, the Secretary need not prove a negative. *Kitt Energy Corp.*, 6 FMSHRC 1596, 1600 (July 1984), *aff'd sub nom. UMWA v. FMSHRC*, 768 F.2d 1477 (D.C. Cir. 1985). Instead, we have suggested that the Secretary may prove that an area remains to be inspected during the relevant time period by presenting records of all inspections at the mine and the extent of those inspections. *Id.*

Contrary to Cyprus' assertion, in meeting her burden of proving the absence of a clean inspection, the Secretary was not required to submit "evidence from *all* of the inspectors who traveled the haulage" that they did not inspect the 60 West Mains haulage. C. Br. at 11

(emphasis added). Although in *Cumberland I* we noted that the Secretary may rely upon inspectors' direct or hearsay testimony in attempting to meet her burden of proving the absence of a clean inspection, we did not suggest that the Secretary must prove her case by producing the testimony of every inspector in the mine. 21 FMSHRC at 728 n.7. Rather, we explicitly stated that the Secretary may rely upon a log depicting all inspection activity at the mine, such as that admitted by Cyprus, and instructed the judge to consider Cyprus's log as the central piece of evidence in considering whether the Secretary met her burden.[7] *Id.* at 728. Thus, the Secretary's burden was to persuade the judge that it was more likely than not that a clean inspection did not occur in the 60 West Mains through a combination of direct and circumstantial evidence.

B. Whether the Judge Erred in Finding that a Clean Inspection Had Occurred

Although the Commission instructed the judge on remand to consider all the record evidence regarding inspections in the haulage including Cyprus' log, and determine whether the Secretary met her burden of proving the absence of an intervening clean inspection, the judge failed to do so. Rather, the judge applied the "reasonable person test" to hold that, because the inspectors traveled through the haulage numerous times, they must have made sure that certain hazards did not exist. 21 FMSHRC at 1116. We reject this approach, which is inconsistent with the Commission's remand instructions.

The judge's analysis in his remand decision is almost identical to his reasoning in the initial decision, which the Commission did not accept. In his first decision he noted that "MSHA inspectors had an opportunity to observe the rib and roof conditions and experience the track conditions in the 60 West Mains haulage on a daily basis hundreds of times." 20 FMSHRC at 294. Although the Commission made clear in *Cumberland I* that the judge erred by failing to examine evidence of inspection activity in the haulage, and that an intervening clean inspection must be "thorough and complete" (21 FMSHRC at 727), on remand the judge again neglected to weigh all of the pertinent record evidence, and simply surmised that "it is unreasonable to conclude that MSHA mine inspectors . . . would repeatedly travel an entry without ensuring there are no hazardous rib, roof, or track conditions." 21 FMSHRC at 1116.

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[7] As the Commission indicated in *Kitt Energy*, the Secretary maintains records of all mine inspections in order to fulfill her statutory duties. 6 FMSHRC at 1600. Indeed, in *Kitt* the Commission emphasized that "proper administration of the Mine Act requires that the Secretary maintain a workable mine inspection record keeping system." *Id.* at 1601. Although the Secretary "[c]uriously" did not submit such records into evidence (*see Cumberland I,* 21 FMSHRC at 728 n.7), Cyprus introduced its own log, which, fortuitously for the Secretary, in this case serves the same evidentiary purpose. *See* 29 Am Jur 2d Evidence § 158 at 185 (1994) ("[A] party may be relieved of its burden of production if the necessary proof is introduced by his adversary, and if such proof is sufficiently convincing and uncontroverted, the burden of persuasion as well.").

Cyprus incorrectly asserts that the judge applied the "reasonable person" standard in evaluating the credibility of the Secretary's witnesses, and that the Secretary is effectively requesting the Commission to overturn credibility findings by the judge. C. Br. at 17. The judge made no credibility findings regarding the statements of the ten inspectors and their supervisor, nor could he, as most of the inspectors did not testify. *See* 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2586, at 578 (2d ed. 1995) ("At a trial without a jury it is for the trial judge to determine the credibility of the *oral* testimony given by the witnesses and the weight to be accorded it" (emphasis added)).

Cyprus more accurately characterizes as an inference the judge's conclusion that the haulage was inspected. C. Br. at 15. As noted by Cyprus, in order to establish an inference there must be a "rational connection between the evidentiary facts and the ultimate fact inferred," and the evidence must be evaluated for the reasonableness of the inference. *Garden Creek Pocahontas*, 11 FMSHRC at 2152-53; *Midwest Minerals, Inc.*, 12 FMSHRC 1375, 1378-79 (July 1990); C. Br. at 15. However, the judge's inference that the inspectors' frequent travel through the haulage must have resulted in a clean inspection is not reasonable because it finds no support in the record.

The judge simply theorized that "inspectors *could* have left their vehicles at any time if they had observed any conditions that caused concern," but points to no evidence that they actually did so. 21 FMSHRC at 1116. Cyprus also fails to cite evidentiary support for the judge's conclusion. C. Br. at 14-16.

As we noted in *Cumberland I,* a thorough and complete inspection consists of several components which the judge did not find were covered by the inspectors during their numerous trips down the haulageway. For example, the Commission recognized that in order to inspect the haulage, inspectors must examine, inter alia, any electrical installations in the area, cables, wiring, switches, fire-fighting equipment, and manholes. 21 FMSHRC at 727 n.6. Furthermore, in affirming the Commission's *Kitt Energy* decision, the D.C. Circuit held that to find an intervening clean inspection had occurred, all areas of a mine must have been thoroughly inspected for violations, obvious or otherwise, and of any kind. 768 F.2d at 1480. In support, the court keenly observed that:

> many, if not most, safety hazards in a mine are neither obvious nor even visible.
>
> To cite some examples: To determine whether a mine is complying with its roof control plan, an inspector generally must consult a copy of that plan - merely walking through the mine tells him nothing. To determine whether there are unsafe concentrations of gases or dust an inspector must employ special monitoring equipment. Likewise, an electrical inspector may notice a mechanical violation that

> is out in the open, but an inspector examining a mine's roof support system is unlikely to open an electrical junction box to see whether the wiring inside is safe.

Id. at 1479-80.

Consistent with the D.C. Circuit's reasoning, we emphasize that mere travel through an area of a mine, without evidence of a thorough and complete inspection, does not suffice to support a finding that a clean inspection occurred. Thus, an inspector's frequent travel through an area may not be used as the sole basis to support an inference that he or she concluded that no hazards existed and that, consequently, a clean inspection took place. Instead, evidence of inspection activity in the haulage area during the relevant time period must be considered. Our review of the record demonstrates that substantial evidence does not support the judge's finding that the haulage had been inspected.[8] Of special significance is the judge's finding, which is undisputed on review, that the log entries do not indicate that any regular or spot inspections took place in the 60 West Mains. 21 FMSHRC at 1114; C. Br. at 10-12. Thus, this case comes to us in a different stance than when it was first before the Commission, as the record now contains this material finding that the Commission had requested the judge to make.

The relevance of this finding is apparent from the function of the log. In *Cumberland I*, the Commission stated that Cyprus' log "depict[ed] *all* inspection activity at the mine, including both state and federal inspections." 21 FMSHRC at 728 (emphasis added). That conclusion is supported by the testimony of Robert Bohach, Cyprus safety manager, that the log provides "a day-to-day running total of the number of inspectors. Basically what area of the mine or the operations they have inspected." Tr. 774-75. He stated that the log would show the inspector visits from June 2, 1997 through September 29, 1997. Tr. 775. When asked what the "area inspected" category on the log signified, Bohach replied that "[i]t's just a brief generalization as to what area of the mine the inspection party traveled to and did some portion of their inspection." Tr. 781-82. In light of this testimony, we disagree with Cyprus' later assertion, in its brief on appeal, not supported by any citation to the record, that the log "only indicates the ultimate inspection destination of inspectors on particular days . . . [and] cannot be read to show that the inspectors who traveled through the haulage did not inspect it." C. Br. at 10-11.

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[8] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.,* 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Midwest Material Co*, 19 FMSHRC 30, 34 n. 5 (January 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

Supporting the judge's finding regarding Cyprus' log, Inspector McCort made clear that he had not inspected the haulage while traveling through it (Tr. 476), and that he did not inspect the haulage after the May 5 third quarterly inspection. Tr. 501. Furthermore, although the judge relied on the statement of Inspector Patterson that "it's possible" he left his vehicle for closer observation (21 FMSHRC at 1116), it is important to consider that testimony in context. Patterson testified that before September 25, he had not conducted an inspection of the haulage area. Tr. 287. Furthermore, when questioned about the difference between traveling through the haulage and inspecting it, he stated "I didn't stop and I didn't do the things necessary to inspect the haulage. I just traveled across it." Tr. 288. When asked why the haulage was inspected on September 26, he replied "[i]t's what was left to do . . . It hadn't been done yet." Tr. 294-95. Subsequently, the following interchange occurred on cross-examination:

> Q: And all your trips into --- along the 60 west main's haulage in July, August and September, did you ever stop them to inquire about any conditions that you saw as you came in?
>
> A. I can't remember doing that, sir.
>
> Q. You might have done that?
>
> A. It's possible.

Tr. 301. Considered in its totality, the testimony of Inspector Patterson refutes the judge's conclusion that a clean inspection took place.[9]

Finally, we disagree with Cyprus' assertion that the Secretary "cannot prevail because the evidence does not preponderate in her favor; instead it is 'equivocal'" as to whether any MSHA inspector disembarked from a cricket or mantrip in the 60 West Mains haulage during the time in question." C. Br. at 13. Although the judge found that evidence regarding whether the inspectors disembarked from their vehicles was equivocal (21 FMSHRC at 1116), this statement is not the same as a finding that the totality of the Secretary's evidence regarding the absence of a clean inspection was equivocal. In any event, even if the evidence showed that an inspector disembarked, this by itself would be insufficient to rebut the Secretary's claim that no complete and thorough inspection had occurred. *See UMWA v. FMSHRC,* 768 F.2d at 1479-80 (inspector's mere physical presence does not qualify as a "clean inspection.").

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[9] In this regard, this case is distinguishable from *U.S. Steel Corp.*, 6 FMSHRC 1908 (Aug. 1984), in which the Commission reversed the judge's decision finding the absence of an intervening clean inspection. In that case, the inspector offered testimony which the judge acknowledged was "possibly conflicting," including the statement that "I have covered the entire facility, yes." *Id.* at 1914.

Taking into account Cyprus' log and the inspectors' testimony, we hold that substantial evidence does not support the judge's finding that the 60 West Mains haulage was inspected between June 18 and September 25.

III.

Conclusion

For the foregoing reasons, we reverse the judge's decision and reinstate the section 104(d)(2) order.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Robert H. Beatty, Jr., Commissioner

Commissioner Verheggen, dissenting:

In my dissent in *Cyprus Cumberland Resources Corp.*, I concluded that "the Secretary failed to meet her burden of proof," and I affirmed in result the judge's finding of no violation. 21 FMSHRC 722, 735 (July 1999) ("*Cumberland I*"). I find nothing has changed now that this case has returned to the Commission after being remanded to the judge. Nevertheless, my colleagues have decided to reverse the judge. I disagree with their decision, and therefore dissent.

I based my dissent in *Cumberland I* on the fact that the Secretary failed to adduce "proof that an intervening clean inspection [had] not occurred" in the 60 West Mains, as required by *Kitt Energy Corp.*, 6 FMSHRC 1596, 1600 (July 1984), *aff'd sub nom. UMWA v. FMSHRC*, 768 F.2d 1477 (D.C. Cir. 1985). As I stated before, "under *Kitt*, the Secretary is required to maintain detailed records of inspections, and to adduce these records in some fashion when defending the validity of a section 104(d)(2) order." 21 FMSHRC at 735. Never in these proceedings has the Secretary adduced any such records. *See id.*, majority opinion at 728 n.7 ("Curiously, the Secretary failed to admit any records depicting how much of the Cumberland Mine had been subject to inspections, other than regular inspections, since issuance of the section 104(d)(1) order on June 18.").

In reversing the judge, my colleagues seize on the judge's finding that entries made in an inspection log maintained by Cyprus "do not indicate that any regular or spot inspections took place in the 60 West Mains." Slip op. at 8, citing 21 FMSHRC at 1114. I find, however, that the Cyprus log is irrelevant to the issue of whether an inspection occurred along the 60 West Mains. As I stated in my dissent in *Cumberland I*:

> After examining this log, and in light of statements made by Cyprus' counsel at oral argument, it is abundantly clear to me, however, that no inferences can be drawn from the log that the 60 West Mains were not inspected. All the log shows is the areas to where inspectors traveled to conduct inspections. *It does not indicate what any inspectors did in transit.* Given the extensive amount of travel in the 60 West Mains, I find that it was incumbent upon the Secretary to establish that none of her inspectors examined the track haulage for hazards, a point on which Cyprus' log is silent.

21 FMSHRC at 736 (emphasis added). My colleagues' statement that the Cyprus log, "fortuitously for the Secretary, in this case serves the same evidentiary purpose" as any records of inspections kept by the Secretary (slip op. at 6 n.7) is just plain wrong. The log simply did not serve as a record of inspections. As Mr. Bohach, the Cyprus safety manager, testified, the log shows "the area of the mine the inspection party traveled to and did some portion of their

inspection" (Tr. 782) — no more and no less. The log does not show whether inspections occurred in the areas through which inspectors traveled. The log is thus no substitute for the "clear, unequivocal evidence that the track haulage 'remained to be inspected'" (21 FMSHRC at 735) which, under *Kitt*, the Secretary was obligated to adduce at the hearing.

My colleagues' claim that "this case comes to us in a different stance than when it was first before the Commission, as the record now contains this material finding" (slip op. at 8), i.e., the judge's observation that the log did not indicate that the 60 West Mains were inspected. There is a significant difference, however, between the judge's observation and the majority's conclusion that no regular or spot inspections took place in that area.

In this regard, try as they might to obfuscate their holding, the majority does in fact conclude that the 60 West Mains were not inspected. My colleagues state that "substantial evidence does not support the judge's finding that the 60 West Mains haulage had been inspected" in the relevant time period. Slip op. at 8. They then set forth their reading of the evidence and conclude by reversing the judge. *Id*. at 8-10. In effect, my colleagues have concluded, without explicitly saying so, that the record compels the conclusion that the haulage had not been inspected. I do not, however, find that the record in this case compels *any* conclusion, one way or the other.

Indeed, the judge concluded that "[t]he evidence is equivocal as to whether any MSHA inspector disembarked from a cricket or mantrip in the 60 West Mains haulage during the time in question." 21 FMSHRC at 1116. I find that this conclusion is supported by substantial evidence,[1] including Inspector Patterson's testimony in which he admitted that it was "possible" that he might have stopped in the 60 West Mains "to inquire about any conditions that he saw as [he] came in" (Tr. 301), testimony which casts doubt on his other testimony that he did not inspect the haulage entry.[2] Notably, Patterson was but one of many inspectors to travel the haulageway — all but two of whom the Secretary did not bother to have testify. The Secretary

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[1] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support the judge's conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

[2] The majority infers that "in its totality, the testimony of Inspector Patterson refutes the judge's conclusion that a clean inspection took place." Slip op. at 9. Given its equivocal nature, and the fact that it involves but one of many inspectors who traveled the haulage entry, I find that Patterson's testimony can support neither the majority's conclusion nor the judge's conclusion that the 60 West Mains were inspected. Nevertheless, I am able to conclude from this record that the Secretary failed to prove that the haulage entry remained to be inspected.

failed to account for the actions of its other inspectors, an evidentiary gap at odds with *Kitt* which I find fatal to the Secretary's case.

The majority errs in my view by basing their reversal of the judge on the inference they in effect draw from the record that the 60 West Mains were not inspected, an inference which was within the province of the judge to draw, but which he refused to draw because he found the evidence "equivocal" (21 FMSHRC at 1116). In substituting its judgment for that of the judge on this matter, the majority has crossed the line from appellate review to de novo factfinding, contrary to settled principles of law. *Island Creek Coal Co.*, 15 FMSHRC 339, 347 (Mar. 1993) ("It would be inappropriate for the Commission to reweigh the evidence in [any] case or to enter de novo findings based on an independent evaluation of the record."); *Wellmore Coal Corp. v. FMSHRC*, No. 97-1280, 1997 WL 794132 at *3 (4th Cir. Dec. 30, 1997) ("'[T]he ALJ has sole power to . . . resolve inconsistencies in the evidence'") (citations omitted), *cert. denied,* 119 S. Ct. 600 (1998).

Accordingly, as I stated in *Cumberland I*, "I find that the Secretary failed to establish a prima facie case, *see U.S. Steel Corp.*, 6 FMSHRC 1908, 1914 (Aug. 1984) (Secretary failed to meet burden of proving validity of section 104(d)(2) order where evidence was 'entirely too vague and uncertain'), and on this ground alone, I affirm the judge's decision in result." 21 FMSHRC at 736.

Theodore F. Verheggen, Commissioner

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