

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

August 10, 2004

SECRETARY OF LABOR,	:	Docket Nos.	PENN 2000-181-R
MINE SAFETY AND HEALTH	:		PENN 2000-182-R
ADMINISTRATION (MSHA)	:		PENN 2000-183-R
	:		PENN 2000-207-R
v.	:		PENN 2000-208-R
	:		PENN 2000-209-R
RAG CUMBERLAND RESOURCES LP	:		PENN 2000-210-R
	:		PENN 2001-63-A
	:		

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, Commissioners

DECISION

BY: Duffy, Chairman; Suboleski and Young, Commissioners

In these consolidated contest and civil penalty proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act” or “Act”), RAG Cumberland Resources LP (“Cumberland”) has petitioned for review of Administrative Law Judge Jerold Feldman’s determination that Cumberland’s bleeder system was not functioning as required by 30 C.F.R. § 75.334(b)(1),¹ and that Cumberland took insufficient action with respect

¹ 30 C.F.R. § 75.334(b)(1) provides:

During pillar recovery a bleeder system shall be used to control the air passing through the area and to continuously dilute and move methane-air mixtures and other gases, dusts, and fumes from the worked-out area away from active workings and into a return air course or to the surface of the mine.

to the bleeder condition in violation of 30 C.F.R. § 75.363(a).² 23 FMSHRC 1241, 1252-54, 1256-59 (Nov. 2001) (ALJ). As to its alleged violation of section 75.363(a), Cumberland further challenges the judge's determination that the violation resulted from its unwarrantable failure³ to comply with the standard and the judge's assessment of a civil penalty. *Id.* at 1259-61. For the reasons that follow, we affirm in part, reverse in part, and vacate and remand in part.

I.

Factual and Procedural Background

Cumberland operates the Cumberland Mine, an underground coal mine in Waynesburg, Pennsylvania. Resp. to Mot. to Stay, Ex. A. The mine liberates approximately 12 million cubic feet of methane per day and is subject to spot inspections pursuant to section 103(i) of the Mine Act, 30 U.S.C. § 823(i). 23 FMSHRC at 1244.

A. Bleeder System

Cumberland ventilates the subject area of its Cumberland mine with a bleeder system. The bleeder system is designed to dilute methane coming from the gob,⁴ as well as from the development entries between the mined-out panels, with fresher air coursing through bleeder

² 30 C.F.R. § 75.363(a) provides in pertinent part:

Any hazardous condition found by the mine foreman or equivalent mine official . . . shall be posted with a conspicuous danger sign where anyone entering the areas would pass. A hazardous condition shall be corrected immediately or the area shall remain posted until the hazardous condition is corrected. If the condition creates an imminent danger, everyone except those persons referred to in section 104(c) of the Act shall be withdrawn from the area affected to a safe area until the hazardous condition is corrected.

³ The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), 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.”

⁴ “Gob,” in the context of this case, refers to the area from which coal has been extracted from successive longwall panels. RAG Ex. 5 (detailed mine map).

entries. 23 FMSHRC at 1244; Tr. 189-91.⁵ Air containing higher levels of methane exits the gob and enters the bleeder entries through a number of regulators, several of which were designated as bleeder evaluation points, or “BEPs.” 23 FMSHRC at 1245. The horizontal bleeder entries carry the methane-air mixture to a vertical bleeder shaft, which in turn carries the methane-air mixture to the surface. Tr. 189-91, 405.

The alleged violations occurred in connection with Cumberland’s longwall mining section 42 (also referred to as the 90 butt longwall panel). 23 FMSHRC at 1245. Section 42 was located at the northern end of the gob. *Id.* at 1244. The gob was bounded on the eastern side by a set of bleeder entries and on the western side by a set of main entries, and on the southern side by a set of bleeder entries referred to as the 1B Right bleeders. *Id.*; RAG Ex. 5 (detailed mine map). The No. 1 bleeder shaft was located in the southeastern corner of the bleeder system. 23 FMSHRC at 1244. Air from the 1B Right bleeder entries met air from the eastern perimeter bleeder entries and was transported out of the mine through the No. 1 bleeder shaft. *Id.* at 1258; RAG Ex. 5. A second bleeder shaft, referred to as the No. 2 or 2A bleeder shaft, located in the northeastern portion of the bleeder system, was placed “on-line” on June 6, when longwall mining began on section 42. 23 FMSHRC at 1245; Tr. 1553.

Air entered the eastern bleeder entries from the northern end at the headgate of the 90 butt panel through regulators referred to as the No. 1 and No. 2 sweeteners. 23 FMSHRC at 1245. In addition, air entered the eastern bleeders from the tailgate (also referred to as the 82 butt entries) through a regulator referred to as “Fred’s Hole.”⁶ *Id.* Air traveling through the Nos. 1 and 2 sweeteners and Fred’s Hole moved in a southward direction until it reached a split at BEPs 18 and 18A. 23 FMSHRC at 1245. At the split, some of the air traveled north to the No. 2A bleeder shaft, while the remainder traveled south to the No. 1 bleeder shaft. *Id.*

Before July 3, 2000, section 42 was ventilated by intake air coursing down the headgate entries and across the longwall face. *Id.* Intake air also coursed through the tailgate (the No. 1 entry of 82 butt). *Id.* The air in the tailgate joined the air that had swept the face and traveled into the eastern perimeter bleeders through Fred’s Hole or outby through the No. 2 entry of the 82 butt. *Id.* Between June 6 and July 5, 2000, BEPs 6, 7, and 8 were adjusted to their most closed positions. *Id.*

On July 3, 2000, Cumberland made an air change affecting the ventilation of the longwall face. 23 FMSHRC at 1247. The velocities of the air ventilating the face had decreased due to

⁵ References to the transcript of the hearing (“Tr.”) are to the “condensed” version of the transcript because of errors in the “full-size” version.

⁶ The BEPs in the eastern bleeder entry were designated by numbers in descending order from north to south, specifically, BEPs 21, 20, 18, 18A, 8, 7, 6, and 5A. 23 FMSHRC at 1245; RAG Ex. 5. Generally, each BEP was located near a regulator which controlled the amount of methane leaving the gob. Tr. 1686-87.

increased resistance in the mine. *Id.* In order to increase the velocity of air ventilating the face, Cumberland changed the air in the tailgate (the No. 1 entry of 82 butt) from intake air to return air. *Id.* At the end of the face, the air split at a point referred to as a “T-split.” *Id.* at 1247; Tr. 1802. At the T-split, some of the air from the face traveled into the eastern bleeders through Fred’s Hole. 23 FMSHRC at 1246. The remaining air that had been directed across the face traveled outby through the No. 2 entry of 82 butt to the main entries on the western perimeter. *Id.*

B. Events of July 5 and 6, 2000

During the day shift on July 5, 2000, an inspector with the Department of Labor’s Mine Safety and Health Administration (“MSHA”), Ronald Hixson, inspected the mine. 23 FMSHRC at 1247. Hixson was accompanied by Mike Konosky, a Cumberland safety representative, and Tom Sedmack, a United Mine Workers of America (“UMWA”) miners’ representative. *Id.*; Tr. 181. In his review of the weekly mine records, Hixson noticed that the methane levels recorded at the No. 1 bleeder fan had been higher than normal during the preceding two weeks. 23 FMSHRC at 1247. For instance, while the No. 1 bleeder fan showed readings of 1.4% methane on June 6, there were readings of 1.8% to 1.9% from June 14 to July 3. *Id.* In examining the fan installations on the surface, methane readings were taken at the No. 1 bleeder fan. *Id.* Using a methane detector (an “Exotector”), Konosky obtained methane readings at the No. 1 fan of 1.8% to 2.2%.⁷ *Id.*; Tr. 207-09. Hixson took bottle samples, the results of which, when subsequently received on July 13, showed 3.6% methane. 23 FMSHRC at 1247.

In addition, on July 5, Fred Evans, the general mine foreman at the mine, convened a meeting to discuss the increase in water gauge pressure at the No. 1 bleeder fan.⁸ *Id.* at 1248; Tr. 1132-33. Sometime after June 29, the water gauge readings at the No. 1 fan began to increase. Tr. 548, 550, 1032. Evans was concerned that the increase in pressure would cause too much methane to be drawn out of the gob at too fast a rate, thus increasing the concentration of methane in the bleeder. 23 FMSHRC at 1248. Evans dispatched Jason Hustus, a Cumberland engineer, to obtain a methane reading at the No. 1 bleeder fan. *Id.* Hustus obtained a methane

⁷ Methane can be measured by using detectors that give an immediate reading, such as an Exotector, which uses a pump and hose to draw an air sample, or by using a detector such as the Explorer or CMX 270, which continuously monitors the atmosphere for three gases without drawing a sample through the use of a pump and hose. Tr. 1212-13, 1221. In addition, methane can be measured by taking a bottle sample, the results of which typically are not available until one to two weeks later. Tr. 365, 1214-15. In order to get an immediate reading of methane from the shaft, the operator used an Exotector to pump a sample from the fan housing. Tr. 207-09.

⁸ Each bleeder shaft was equipped with an exhaust fan on the surface. Tr. 500-01. The bleeder shaft fans were monitored by water gauge pressure readings, which provided a measure of the degree of resistance in the mine that had to be overcome to pull air through the mine. 23 FMSHRC at 1247; Tr. 379, 1570-71.

reading of 3.6% using an Exotector. *Id.*; Tr. 1134-36. When Evans sent Hustus back to take another reading with a recalibrated Exotector, Hustus returned with another reading of 3.6%. 23 FMSHRC at 1248.

Evans informed Gary DuBois, the manager of engineering, and Robert Bohach, the safety manager at the mine, about the elevated methane readings. *Id.* At approximately 6:00 p.m., DuBois and Bohach went to the No. 1 bleeder shaft and obtained several methane readings of 3.6%. *Id.*; Tr. 1137-38, 1777-78. They then traveled to the 32-1 surface gob vent hole near the No. 1 shaft and found that the vent hole was closed. 23 FMSHRC at 1248. As the pump connected to the bore hole was not functioning, they immediately opened the gob vent and called an electrician to repair the pump. *Id.*

During the afternoon shift of July 5, there were approximately 100 miners working underground, 12 of whom worked on the longwall section. *Id.* Beginning at approximately 7:00 p.m., the longwall experienced intermittent power shut downs when the methane sensor at the tailgate detected more than 1% methane and automatically de-energized the equipment. *Id.* The miners there could not determine the source of the problem because the methane would dissipate within minutes, allowing power to be restored. *Id.* at 1249. Timothy Hroblak, a UMWA safety committeeman, went to the face and took methane and air velocity readings, which were all within normal limits and described by him as “textbook.” *Id.* at 1248-49; Tr. 111-12.

DuBois and Bohach returned to the No. 1 shaft where they took more readings indicating the presence of 3.6% methane. 23 FMSHRC at 1248. They decided to evaluate the No. 1 bleeder fan periodically for the remainder of the afternoon shift and then effect some ventilation changes during the midnight shift. Tr. 1146-47. They also decided that if methane levels at the No. 1 fan reached 4%, they would withdraw miners from the mine. 23 FMSHRC at 1249. At approximately 7:30 p.m., DuBois took a reading at the No. 1 bleeder shaft that indicated the presence of 3.6% methane and then left the mine. Tr. 1784. No further readings were taken at the No. 1 bleeder shaft until DuBois returned to the mine and took a reading at approximately 10:30 p.m., which indicated the presence of 3.6% methane. Tr. 1784-85, 1827-28. At approximately 8:00 p.m. on July 5, the miners on the longwall were informed that there would be no “hot seat” changes because miners on the midnight shift were being held on the surface to effectuate a ventilation change.⁹ 23 FMSHRC at 1249.

At midnight, at the end of the July 5 afternoon shift, DuBois and Bohach had a meeting with the UMWA safety committee members who were leaving the mine or arriving for work. *Id.* They informed the safety committee members that they had obtained readings of 3.6% methane at the No. 1 bleeder fan. *Id.* After the meeting, Hroblak telephoned Inspector Hixson and informed him about the conditions at the mine. *Id.*

⁹ A “hot seat” change requires a miner to remain at his position until he is relieved by a miner on the following shift. 23 FMSHRC at 1249.

The midnight shift was not permitted to enter the mine because of the ventilation changes that were to be made. *Id.* On the surface, DuBois changed the louvers on the No. 1 fan and back-up fan to reduce the amount of pressure that the fan was pulling. *Id.* at 1250. He also obtained another methane reading of 3.6%. *Id.* In addition, Robert Kimutis, Cumberland's ventilation foreman, and Roger Peelor, a senior mining engineer for Cumberland, opened the regulators at the Nos. 2 and 3 sweeteners, adjusted the regulator at Fred's Hole to a more closed position, and adjusted the regulator near the No. 2A bleeder shaft to direct more air to the No. 1 shaft. *Id.*

At approximately 1:30 a.m., Inspector Hixson arrived at the mine while the ventilation changes were being made. 23 FMSHRC at 1250. Bohach met Hixson at the surface and informed him that the last reading at the No. 1 fan was 3.6%. *Id.* Methane readings were being telephoned to Bohach every 15 to 20 minutes. *Id.* Shortly after Inspector Hixson arrived at the mine, Bohach was informed that methane at the No. 1 fan had risen to 3.8%. *Id.* Bohach subsequently received information that a reading at the fan taken at approximately 2:30 a.m. revealed that methane had increased to 4.2%. *Id.*

Inspector Hixson telephoned his supervisor, Robert Newhouse, to inform him of the conditions at the mine. *Id.* at 1251. Newhouse in turn telephoned Acting District Manager Kevin Strickland. *Id.* In accordance with Newhouse's subsequent instructions, at approximately 3:10 a.m., Hixson verbally issued an imminent danger order regarding conditions existing on the midnight shift that required Cumberland to cease the ventilation changes and withdraw all of the miners from the mine. *Id.* After the imminent danger order was issued, readings at the fan dropped from 4.2 to 3.8% methane. *Id.* The next methane reading at the No. 1 fan, which occurred at about 6:00 a.m. on July 6, revealed that methane had fallen to 2.8%. *Id.* The last miners exited the mine at approximately 6:30 a.m. *Id.*

Inspector Hixson issued the written imminent danger order at approximately 9:00 a.m. on July 6. *Id.* At approximately 4:30 p.m. that day, Inspector Hixson issued Citation No. 3657290 alleging a significant and substantial ("S&S")¹⁰ violation of section 75.323(e), which was modified on July 7 to allege a violation of section 75.334(b)(1). *Id.* In addition, at 6:00 p.m. on July 6, he issued Citation No. 3657291 alleging an S&S and unwarrantable violation of section 75.363(a). *Id.* On July 20, 2000, Inspector Hixson issued Order No. 3657297, pursuant to section 104(b) of the Mine Act, alleging that the operator failed to abate Citation No. 3657290 because the bleeder system was not yet functioning properly. Tr. 338-47.

In order to abate the section 104(b) order, the operator submitted to MSHA a ventilation plan which described a method for directing more bleeder air out of the gob directly to the No. 2A fan. Tr. 594-95. On July 29, overcasts in the gate entries of BEPs 18, 20, and 21 were

¹⁰ The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

installed, which redistributed bleeder air between the Nos. 1 and 2A shafts. Tr. 1920-22, 1964. On July 30, MSHA inspected the bleeder system, determined that methane levels had been reduced, and terminated the order. Tr. 595.

C. Proceedings Before the Judge

The operator challenged in part Citation Nos. 3657290 and 3657291 and the imminent danger order, and the matter proceeded to hearing before Judge Feldman. The hearing was conducted in two sessions from April 3 through April 6, 2001, and from July 24 through July 25, 2001. 23 FMSHRC at 1242. After the hearing recess in April 2001, the parties settled various matters, including section 104(b) failure to abate Order No. 3657297. Tr. 1545-47. In addition, Cumberland stipulated that, if the judge concluded that it had violated the standards set forth in Citation Nos. 3657290 and 3657291, it would concede that those violations were S&S. 23 FMSHRC at 1254, 1259.

The judge affirmed Citation Nos. 3657290 and 3657291, as well as the associated special findings.¹¹ As to Citation No. 3657290, the judge determined that the operator had violated section 75.334(b)(1) based on his findings that the bleeder system was not adequately diluting and carrying away methane from working areas. *Id.* at 1254. The judge further concluded that the violation was S&S and had resulted from a moderate degree of negligence. *Id.* at 1255-56. Accordingly, the judge assessed a penalty of \$5,000, rather than the penalty of \$6,000 proposed by the Secretary. *Id.* at 1256. As to Citation No. 3657291, the judge determined that Cumberland violated section 75.363(a) because conditions existed in the bleeder system that required Cumberland to remove all personnel except those necessary to evaluate and correct the bleeder condition. *Id.* at 1257-59. The judge affirmed the S&S designation, and concluded that the violation was also unwarrantable because the violation was obvious, dangerous, and was allowed to exist for an extended period of time, and because the bleeder problem was not disclosed to hourly employees. *Id.* at 1260. The judge subsequently assessed a civil penalty of \$10,000, rather than the penalty of \$5,000 proposed by the Secretary. *Id.* at 1260-61.

D. Proceedings on Review

Cumberland filed a petition for discretionary review which the Commission granted. In addition, Cumberland filed a Motion for Order Taking Judicial Notice. The Secretary filed an opposition to Cumberland's motion and a motion to strike. The Commission issued an order denying Cumberland's motion to take judicial notice and granting the Secretary's motion to

¹¹ The judge vacated the imminent danger order regarding conditions existing during the midnight shift beginning on July 6. 23 FMSHRC at 1261-64. The Secretary did not challenge that determination.

strike.¹² The Commission also granted Cumberland’s motion requesting oral argument, and oral argument was heard on March 11, 2004.

II.

Disposition

A. Citation No. 3657290

1. Interpretation of Section 75.334(b)(1)

Cumberland argues that the judge erred in finding a violation of section 75.334(b)(1) because he misinterpreted the standard by reading it to require an “adequate” dilution of methane in a bleeder system and erroneously relied upon an incorrect interpretation of 30 C.F.R. § 75.323(e) to set a 2% limit for methane in the bleeder shaft.¹³ RAG Br. at 11-18. Cumberland submits that the plain language of section 75.334(b)(1) does not address the adequacy of the bleeder system or dilution of methane, but simply requires that methane-air mixtures be continuously diluted and moved away from active workings. *Id.* at 12-13; RAG Reply Br. at 3-4. Cumberland argues that other standards address the functioning of bleeder systems. *Id.* The Secretary responds that the plain meaning of the standard supports the judge’s interpretation. S. Br. at 13-14.

Section 75.334, entitled, “Worked-out areas and areas where pillars are being recovered,” sets forth, in part, ventilation requirements for such areas, the circumstances under which such areas must be sealed, and ventilation plan requirements. 30 C.F.R. § 75.334. Section 75.334(b)(1) requires that during pillar recovery, a bleeder system shall be used “to *control* the air passing through the area and to *continuously* dilute and move methane-air mixtures . . . from the worked-out area away from active workings and into a return air course or to the surface of the mine.” 30 C.F.R. § 75.334(b)(1) (emphasis added).

¹² We declined to grant judicial notice on the basis that Cumberland failed to establish good cause for the Commission to consider evidence which the judge was not afforded an opportunity to consider. Unpublished Order dated Feb. 20, 2004; *see Twentymile Coal Co.*, 15 FMSHRC 941, 946 (June 1993); *Union Oil Co.*, 11 FMSHRC 289, 301 (Mar. 1989) (“[I]t is the obligation of the parties to prove their case *before the judge*, not on review by reference to detailed material not presented to the judge and not subject to the rigors of cross-examination”) (emphasis in original).

¹³ 30 C.F.R. § 75.323(e) provides in part that “[t]he concentration of methane in a bleeder split of air immediately before the air in the split joins another split of air . . . shall not exceed 2.0 percent.”

Section 75.334 is derived from section 303(z)(2) of the Mine Act, which in turn was carried over unchanged from the Federal Coal Mine Health and Safety Act of 1969 (“Coal Act”). Section 303(z)(2) of the Mine Act requires that all abandoned areas and areas from which pillars have been extracted must be ventilated by bleeder systems or be sealed off from the rest of the mine. 30 U.S.C. § 863(z)(2). It further provides that when ventilation of such areas is required, “such ventilation shall be maintained so as continuously to dilute, render harmless, and carry away methane . . . within such areas and to protect the active workings of the mine from the hazards of such methane” *Id.* The legislative history of the Coal Act reveals Congress’s recognition that pillared and abandoned areas, which are not tested as frequently as working places, “represent a great potential source of explosions, which can lead to widespread underground destruction with attendant loss of life.” H.R. Rep. No. 91-563, at 21 (1969), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 1051 (1975) (“*Legis. Hist.*”). The House Report explains that this problem was addressed in part by standards, including the predecessor to section 303(z), which require that “when bleeder entries or systems or equivalent means are permitted instead of sealing, they shall be effective.” *Legis. Hist.* at 1052. Thus, the purpose of section 303(z)(2) is to require bleeder systems continuously to dilute, render harmless, and carry away methane effectively within the bleeder system and to protect active workings from the hazards of methane accumulations.

The Commission has repeatedly recognized that a regulation must be interpreted so as to harmonize and not to conflict with the objective of the statute it implements. *Lodestar Energy, Inc.*, 24 FMSHRC 689, 692 (July 2002); *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 997-99 (June 1997). Although section 75.334(b)(1) does not literally set forth a requirement that a bleeder system shall function effectively, such a requirement is implicit in the standard’s language and underlying purpose.¹⁴ See *Western Fuels-Utah*, 19 FMSHRC at 998-99 & n.6 (interpreting regulation to require functional equipment based on standard’s plain meaning and underlying purpose); *Consolidation Coal Co.*, 20 FMSHRC 227, 238-52 (Mar. 1998) (considering whether bleeder system adequately diluted and carried away methane). Thus, consistent with its underlying statutory purpose, we read section 75.334(b)(1) to require a bleeder system to control air passing through the area and continuously to dilute and move methane-air mixtures away from active workings and into a return or to the surface in an effective manner. That is, a bleeder system must effectively ventilate the area within the bleeder system and protect active workings from the hazards of methane accumulations.

¹⁴ Cumberland did not argue that it failed to receive adequate notice that section 75.334(b)(1) applied in the subject circumstances, but merely submits that reading the standard to require adequate dilution could “potentially deprive operators of due process notice.” RAG Reply Br. at 5 n.3. Because Cumberland did not effectively raise lack of notice as a defense, we need not address the issue.

Under Cumberland's literal reading, an operator would comply with section 75.334(b)(1) if its bleeder system continuously diluted methane-air mixtures to any level of dilution, and moved such mixtures away from active workings out of the mine. RAG Br. at 12. That reading could lead to unwanted results in that a bleeder system could be in compliance with the standard if it diluted methane from a higher level to a lower level, even as the methane becomes more explosive.¹⁵ Such a result would thwart the underlying purpose of the standard and must be avoided. See *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993) (rejecting literal interpretation of regulation that led to absurd result contrary to underlying statutory purpose). Thus, we reject Cumberland's argument that the judge misinterpreted section 75.334(b)(1) by reading the standard to require adequate dilution of methane in the bleeder system.¹⁶

2. Whether Substantial Evidence Supports Section 75.334(b)(1) Violation

The standard requires that a bleeder system control air passing through the area and continuously dilute and move methane-air mixtures away from active workings and out of the mine in an effective manner. We find that substantial evidence exists in the record to support the conclusion that Cumberland's bleeder system did not do so, thereby violating section 75.334(b)(1).

First, the judge's determination that Cumberland violated section 75.334(b)(1) is supported by evidence that Cumberland's bleeder system failed to control air passing through the affected area. MSHA Assistant District Manager Stricklin testified that John Demechei, the vice president of operations for Cumberland, informed Stricklin that there were two separate ventilation systems in the area: the No. 2A fan ventilated the active 42 longwall panel, and the No. 1 fan ventilated the "mined-out" area. Tr. 730, 764. However, witnesses for both parties agreed that, in fact, the two fans actually competed for air, which affected how the methane-air mixtures moved through the bleeder system. 23 FMSHRC at 1245; Tr. 899, 971-72, 1973. For example, before the No. 2A bleeder shaft fan went online on June 6, the volume of air circulating past BEP 5A was approximately 80,000 to 90,000 cubic feet per minute ("CFM"), and methane

¹⁵ Methane is explosive in the range of 5 to 15% depending upon the concomitant level of oxygen. 23 FMSHRC at 1244.

¹⁶ We do not reach Cumberland's argument that the judge relied upon an incorrect interpretation of section 75.323(e) in concluding that the operator violated section 75.334(b)(1). RAG Br. at 14-18. Although the judge considered the effect of section 75.323(e) in relation to Cumberland's alleged violation of section 75.334(b)(1), he did so in order to respond to the argument advanced by Cumberland in its post-hearing brief that section 75.323(e) does not apply to bleeder shafts. 23 FMSHRC at 1252; RAG Post-Hr'g Br. at 23-27. The judge did not rely upon his discussion of section 75.323(e) in concluding that Cumberland violated section 75.334(b)(1). 23 FMSHRC at 1253-54. In any event, we note that, regardless of the applicability of section 75.323(e) to bleeder shafts, MSHA may impose a 2% limit on the amount of methane in bleeder shafts through the mine ventilation plan approval process.

levels at BEP 5A were approximately 1.5% or 1.6%. Tr. 551, 553. After the No. 2A bleeder shaft fan went online, the volume at BEP 5A dropped to 35,000 to 45,000 CFM, and methane levels increased to between 3% and 3.8%. Tr. 551-53. Witnesses for both parties explained that there was a failure in proper distribution of methane-air mixtures between the No. 1 and 2A bleeder fans, whereby the No. 1 bleeder shaft received a disproportionately greater share of methane than the No. 2A fan.¹⁷ Tr. 1376, 2027.

In addition, repeated readings at the No. 1 bleeder shaft showing elevated methane levels indicated that the bleeder system was not controlling air passing through the area or continuously diluting methane as required by the standard. MSHA Inspector/Ventilation Specialist Anthony Guley testified that the purpose of taking methane readings at a bleeder shaft fan is to evaluate how the bleeder system is operating. Tr. 538-39, 559-60. The Secretary's witnesses explained that a bleeder system should be designed so that air exiting the bleeder system contains 2% or less methane, and that the effectiveness of the bleeder system is questioned if more than 2% methane is exhausting at the bleeder shaft. Tr. 406, 951. It is undisputed that during the afternoon shift of July 5, Cumberland repeatedly discovered 3.6% methane at the No. 1 bleeder shaft. 23 FMSHRC at 1248-49. The methane levels at the No. 1 bleeder shaft climbed to 4.2% at 2:40 a.m. on July 6, after Cumberland had effected some ventilation changes.¹⁸ Tr. 240, 346. The Secretary's witnesses testified that such levels of methane exiting a bleeder shaft are unheard of except for after an explosion, or when a mine is reopened after being sealed. 23 FMSHRC at 1258; Tr. 713, 1009. Cumberland Safety Manager Bohach also conceded that the readings of 3.6% were atypical and that he would have expected a reading of 1.8% methane at the No. 1 bleeder shaft. Tr. 1328. Senior Mining Engineer Roger Peelor and Engineering Manager DuBois testified that having 3.6% methane exiting from the No. 1 bleeder revealed a problem in the bleeder system that needed to be addressed.¹⁹ Tr. 1665, 1726-28, 1736, 1824.

¹⁷ The belief that improper distribution of methane between the two fans was the problem with the bleeder system appears to be supported by the manner in which the operator abated the situation. The installation of overcasts or tubes at BEPs 18, 20, and 21 resulted in air moving directly from the gob toward the No. 2A fan. Tr. 594-95, 1920-22. As soon as the tubes were installed, methane levels at the No. 1 fan dropped. Tr. 1928-29, 1931. In addition, methane levels at BEP 5A dropped from between 3.5% and 3.8% to 1.2%. Tr. 1931-32.

¹⁸ We do not consider the reading of 4.2% taken on July 6 in our consideration of Citation No. 3657291, which pertains to conditions existing during the afternoon shift of July 5. Gov't Ex. 5; *see also* RAG Br. at 26 n.5.

¹⁹ By considering such evidence, we do not suggest that a 2% methane limit applied to the bleeder shaft. *See* n.16, *supra*. Rather, we view such evidence as supporting the conclusion that, regardless of whether a methane limit applies to the bleeder shaft, all parties agreed that, during the afternoon shift of July 5, the methane levels exhausting from the No. 1 bleeder shaft were elevated.

Substantial evidence supports the judge's conclusion that the bleeder's ventilation design provided a reasonable basis for concluding that there were higher levels of methane underground in the travelable bleeder entry than were exhausting from the No. 1 bleeder fan. 23 FMSHRC at 1243; Tr. 497-505, 522-23, 718-19. In the mine, air that traveled in a southern direction down the eastern bleeder entry was diluted by air in the 1B right entry before it entered the No. 1 bleeder shaft. Tr. 407, 505. The air in the 1B right entry contained less methane than air in the eastern bleeder entry. Tr. 497-98. Once air entered the bleeder shaft, there was no other air to dilute it. Tr. 407. Thus, air in the eastern bleeder entry likely had higher methane levels before it was diluted by air in the 1B right entry and exited from the mine through the No. 1 bleeder shaft. Tr. 505, 522-23.

In addition, substantial evidence supports the judge's finding that comparison readings at the No. 1 bleeder shaft and in the travelable bleeder entry indicated that there were higher levels of methane underground than were exhausting from the No. 1 bleeder shaft. 23 FMSHRC at 1243. On June 14, Cumberland obtained an Exotector reading of 1.8% methane at the No. 1 bleeder shaft while it obtained readings of 3.5 % in the travelable bleeder at BEP 5A. Tr. 558-59; Gov't Ex. 7 at 64. In addition, on June 30, Cumberland obtained an Exotector reading of 1.89% at the No. 1 bleeder fan and a reading of 3.5% at BEP 5A. Tr. 560-61, 1321-22; Gov't Ex. 7 at 68, 70. On July 3, Cumberland took an Exotector reading at the No. 1 bleeder shaft of 1.8% or 1.9%, and a reading at BEP 5A of 3.8%. Tr. 1215, 1217-18, 1221; Gov't Ex. 7, at 71. Given this history of methane level readings between the No. 1 bleeder shaft and BEP 5A, the operator had reason to believe that, while there were readings of 3.6% at the No. 1 bleeder shaft, there were likely to be higher methane levels in the travelable bleeder at BEP 5A.²⁰ Tr. 140-42, 562-64, 718-19, 721, 2005-08. Such elevated methane readings and evidence of methane-air mixture distribution problems demonstrate that the bleeder system failed to control air passing through the area and failed to continuously dilute methane-air mixtures from the worked-out area in violation of the requirements of section 75.334(b)(1).

²⁰ Cumberland claims that, during the afternoon shift of July 5, there was a 1:1 ratio in methane levels between the No. 1 bleeder fan and BEP 5A, and that, as a result, there was not an explosive mixture of methane in the travelable bleeder. RAG Reply Br. at 9. The results relied upon by Cumberland to support the purported 1:1 ratio in methane readings on July 3 were based in part on bottle samples taken at the No. 1 bleeder shaft and an Exotector reading at BEP 5A. Tr. 1213; RAG Ex. 7; Gov't Ex. 7. As noted above, a comparison of non-bottle sample readings taken on July 3 shows 3.8% methane at BEP 5A and 1.8% or 1.9% methane at the No. 1 bleeder shaft, revealing readings that were closer to a 2:1 ratio. Tr. 1215, 1217-18, 1221; Gov't Ex. 7, at 71. The results of the bottle samples taken at the No. 1 bleeder shaft were not made available to the operator until July 13, and were not relied upon by the operator on July 5. RAG Ex. 7; Tr. 1314-16. We also reject Cumberland's comparison of the readings of 3.6% methane taken at the No. 1 bleeder fan on July 5 and 6 with the reading taken at BEP 5A on July 3. RAG Reply Br. at 9. The readings of the two locations were taken on different days and are inappropriate for comparison.

Cumberland's violative conduct is compounded by evidence indicating that, although its personnel had reason to believe that the bleeder system was not functioning as it was designed to, they failed to take methane readings that would have provided information regarding the amount of methane that was present in the travelable bleeder entries and the extent to which methane was being moved away from the active workings. It is undisputed that Cumberland did not take any methane readings in the travelable bleeder entry during the afternoon shift of July 5. Tr. 530-31; Oral Arg. Tr. 17-18. Notwithstanding its knowledge that methane readings underground were likely to be higher than those at the No. 1 bleeder fan, the operator chose to monitor the methane levels at the No. 1 bleeder fan, and decided to withdraw miners only if readings at the fan reached 4%. Tr. 1146-47, 1152, 1351. Even under its plan to monitor conditions by taking readings at the No. 1 bleeder shaft, the operator chose to leave the No. 1 bleeder fan unmonitored for approximately three hours during the afternoon shift on July 5. Tr. 1784-85, 1828-29. Accordingly, we affirm the judge's determination that the operator violated section 75.334(b)(1).²¹

B. Citation No. 3657291

1. Violation of Section 75.363(a)

Section 75.363(a) sets forth posting and correction requirements for a hazardous condition, providing in part that “[a]ny hazardous condition . . . shall be posted with a conspicuous danger sign where anyone entering the areas would pass. A hazardous condition shall be corrected immediately or the area shall remain posted until the hazardous condition is corrected.” 30 C.F.R. § 75.363(a). The standard also requires withdrawal of certain miners for an imminent danger, providing in part that “[i]f the condition creates an imminent danger, everyone except those persons referred to in section 104(c) . . . shall be withdrawn from the area affected to a safe area until the hazardous condition is corrected.” *Id.*

²¹ As Cumberland asserts (RAG Br. at 14-15), the judge erroneously concluded that the air in the eastern perimeter bleeders and the air in the 1B right bleeders constituted splits of air and that the No. 1 bleeder shaft could be considered a return air course. 23 FMSHRC at 1252. The Secretary's witnesses testified that those bleeder entries were not considered separate splits of air but, rather were considered part of the same bleeder system. Tr. 374, 826-27. Moreover, “return” is a term of art applicable to specific ventilation designs described in the regulations and does not include the No. 1 bleeder shaft. *See, e.g.*, 30 C.F.R. §§ 75.323(c), 75.333. We also conclude that the judge erred in finding that here the rise in water gauge pressure indicated an increase in the water accumulation in by BEP 5A or that the bleeder system was malfunctioning. 23 FMSHRC at 1246, 1254. Consistent with Cumberland's assertions (RAG Br. at 20), there is no evidence that there was a change in the accumulation of water in by BEP 5A after June 29 when the water gauge at the No. 1 fan began to rise. Tr. 383, 638. Furthermore, a rise in water gauge pressure indicates a change in resistance, and a change in resistance may or may not indicate a problem with the bleeder system. Tr. 379-81, 1133-34. Nonetheless, we consider these errors by the judge to be harmless.

In concluding that Cumberland violated section 75.363(a), the judge reasoned that it was not feasible to use a danger-off sign because the hazardous bleeder conditions affected the entire mine. 23 FMSHRC at 1257. Accordingly, he stated that the question was whether the bleeder conditions during the afternoon shift of July 5 were a hazard that had to be corrected immediately because they constituted an imminent danger. *Id.* The judge answered that query in the affirmative. *Id.* at 1257-59.

The Secretary argues that Cumberland violated the posting, correction, and withdrawal requirements of section 75.363(a). S. Br. at 28-35. She agrees with the judge's conclusion that Cumberland violated the standard because there was an imminent danger during the afternoon shift of July 5, and miners were not withdrawn from affected areas. *Id.* at 29, 33-35. The Secretary also submits that, regardless of whether there was such an imminent danger, Cumberland violated section 75.363(a) because there was a hazardous condition that was not posted or immediately corrected. *Id.* at 29-33. The Secretary disagrees with the judge's reasoning that, because the entire mine was affected by the hazardous conditions and posting was not feasible, the Secretary was required to prove that the hazard constituted an imminent danger. *Id.* at 30 n.10. The Secretary asserts that the plain language of the standard provides that when there is a hazardous condition, the operator is required to post the affected area of the mine or immediately correct the condition, and that if posting is impractical, the operator is required to correct the condition immediately. *Id.*

Cumberland disputes the judge's conclusion that constructive knowledge of an imminent danger is sufficient to establish a violation. RAG Br. at 25-28. Cumberland further argues that the judge failed to adequately define the extent of the area affected by any alleged imminent danger. *Id.* at 28-29. Cumberland also asserts that the Secretary is impermissibly attempting to advance before the Commission the alternate theory that Cumberland violated the posting and correction requirements of section 75.363(a). RAG Reply Br. at 12-13.

Preliminarily, we disagree that the Secretary has advanced an argument outside of the Commission's scope of review. The Commission has explained that an appellee

may urge in support of the *judgment* below any matter or issue appearing in the record, even if it involves an objection to some aspect of the judge's reasoning or some issue resolution, so long as the appellee does not seek to attack the judgment itself or to enlarge its rights thereunder, in which case it would be obliged to file a cross-petition for discretionary review.

Sec'y of Labor on behalf of Price v. Jim Walter Resources, Inc., 12 FMSHRC 1521, 1529 (Aug. 1990) (emphasis in original). Here, the Secretary does not seek to attack the judge's conclusion that the citation should be affirmed or to enlarge her rights under that judgment. Although the Secretary disagrees with the judge's reading of the standard (S. Br. at 30 n.10), it is settled that an appellee may, without taking a cross-appeal, urge any matter appearing in the record even if the

argument advanced ““involve[s] an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.”” 20 James Wm. Moore et al., *Moore’s Federal Practice* § 304.11[3][b] at 304-29 (3d ed. 1997) (“*Moore’s*”) (quoting *United States v. American Ry. Express Co.*, 265 U.S. 425, 435 (1924)).²²

We agree with the Secretary that the record supports the conclusion that Cumberland violated section 75.363(a). First, it is undisputed that, during the afternoon shift of July 5, the bleeder conditions were hazardous. Senior Mining Engineer Peelor acknowledged that the operator could not allow a 3.6% methane concentration at the No. 1 bleeder shaft to continue because of the potential of methane to rise to the explosive range if unchecked. Tr. 1725-28. He agreed that the condition needed to be corrected as soon as possible. Tr. 1725-28, 1730-31. He further explained that production was stopped on the midnight shift and ventilation changes were made because “the problem was detected and it had to be addressed” immediately. Tr. 1736. Safety Manager Bohach also acknowledged that, although Cumberland officials did not believe they had an imminent danger, they believed they had “a situation that [they] had to address.” Tr. 1343. The Secretary’s witnesses uniformly testified that the level of methane exhausting from the No. 1 bleeder reflected dangerous levels of methane at the mine. Tr. 127-28, 285, 562.

Second, we agree with the Secretary that the operator failed to correct the hazardous bleeder conditions immediately, as required by section 75.363(a).²³ Cumberland recognized that, in conformance with the requirements of section 75.324, all miners except those making ventilation changes had to be withdrawn from the mine before ventilation changes could be made to address the elevated methane levels. 23 FMSHRC at 1249. At approximately 6:30 p.m. on July 5, Safety Manager Bohach and Engineering Manager DuBois confirmed the methane readings of 3.6% at the No. 1 bleeder fan. Tr. 1567. However, the operator decided that it would wait until the midnight shift to make ventilation changes, and that it would evacuate miners before then only if methane readings at the No. 1 bleeder shaft reached 4%. Tr. 1150-52. Miners were not withdrawn so that ventilation changes could be made until after the end of the afternoon

²² The Secretary’s argument that Cumberland violated the standard’s posting and correction requirements was sufficiently raised before and passed upon by the judge, so it is reviewable by the Commission. *See* S. Post-Hr’g Br. at 34, 37-38; Tr. 303-04 (Secretary’s arguments that the standard requires that a hazardous condition be corrected immediately, that the operator failed to correct the hazardous condition of high methane in the bleeder system immediately and that, even if the hazardous condition did not amount to an imminent danger, miners should have been withdrawn so that the operator could have taken steps to correct the condition immediately by making ventilation changes); 23 FMSHRC at 1257 (judge concluded that the standard “requires hazardous conditions to be corrected immediately or to be dangered-off,” but that posting was not feasible).

²³ The parties do not dispute that posting was impractical under the circumstances and that, in any event, the operator did not post any area. S. Br. at 32 n.11; Oral Arg. Tr. 71; RAG Reply Br. at 12.

shift, at approximately midnight. Tr. 1511-12. Thus, the operator did not “immediately correct” the bleeder conditions but, rather, delayed taking some measures required to more fully correct the violative conditions until the midnight shift.

We therefore disagree with Cumberland’s assertion that its actions during the afternoon shift were sufficient to bring it into compliance with section 75.363(a). RAG Reply Br. at 13-14. After verifying the elevated methane levels at the No. 1 bleeder shaft, the operator opened the 32-1 borehole, and arranged for a electrician to fix the pump at that borehole. Tr. 1138-41. While we credit Cumberland for finding the problem with the 32-1 borehole and solving it in a timely fashion, even Cumberland concedes that it did not expect correction of the problem would significantly affect the methane levels. Tr. 1818-20. DuBois clarified that a functioning pump at the borehole might have reduced methane from 3.6% to 3.4%. Tr. 1814-15. In fact, after opening the borehole and allowing methane to flow freely from the borehole, methane readings from the No. 1 shaft continued to measure 3.6% throughout the remainder of the shift. Tr. 1778-79. The operator also decided to evaluate the No. 1 bleeder fan periodically for the remainder of the afternoon shift and to withdraw miners if the methane level reached 4%. Tr. 1146, 1152. Nonetheless, there was a three-hour period between approximately 7:30 and 10:30 p.m. when the No. 1 fan was not monitored. Tr. 1827-28.

Furthermore, as discussed above, given the past ratio of methane levels at the No. 1 bleeder fan and at BEP 5A, the operator had information upon which to conclude that if 3.6% methane was exhausting at the No. 1 bleeder fan, higher levels would be presumed to exist in the travelable bleeder entries. Tr. 2005-08. MSHA considered 4.5% methane in a travelable bleeder to constitute an imminent danger. 23 FMSHRC at 1245. Safety Manager Bohach agreed that during active mining, MSHA’s 4.5% limit was reasonable. Tr. 1465-67. He conceded that if the operator had obtained a methane reading in the travelable bleeder at BEP 5A in the explosive range, the operator would have stopped production and evacuated the mine. Tr. 1400-02.

Given the information available to Cumberland at that time, it should have sent someone on the afternoon shift of July 5 to the bleeder entry in question to determine if the imminent danger level had been reached at BEP 5A.²⁴ Cumberland’s counsel stated during oral argument that it would have taken up to three hours for an individual from the surface to reach BEP 5A and obtain methane readings there. Oral Arg. Tr. 19-20. We do not find this argument persuasive. The record suggests that miners underground might have been able to accomplish this more rapidly. For example, Cumberland had a longwall foreman underground on the afternoon shift (Tr. 1615-16) who could have reached the travelable bleeder entries in a much more reasonable

²⁴ The operator apparently took a methane reading immediately upon reaching BEP 5A on the midnight shift, but after it had begun making ventilation changes on the midnight shift, although documentary evidence of that reading was not introduced at the hearing or at any other time in the proceedings. Tr. 1208-09, 1345-49, 1701-03, 1786-87, 1845-46. A methane reading at BEP 5A during the afternoon shift would seem necessary as baseline information to determine whether the ventilation changes made during the midnight shift were effective.

period of time to take methane readings. Cumberland's failure to utilize this person or some other person already in the general underground area to take methane readings at BEP 5A has not been satisfactorily explained and, in the absence of any justification, is not indicative of a prudent operator who was taking the *immediate* corrective action required by the regulation. Accordingly, we affirm, in result, the judge's conclusion that Cumberland violated section 75.363(a).²⁵

2. Unwarrantable Failure

The Commission has determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence and encompasses conduct characterized as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Emery Mining Corp.*, 9 FMSHRC 1997, 2001, 2003-04 (Dec. 1987); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). The Commission has recognized that whether conduct is "aggravated" in the context of unwarrantable failure is determined by considering the facts and circumstances of each case to determine if any aggravating or mitigating circumstances exist. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) ("*Consol*"). Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consol*, 22 FMSHRC at 353.

Although the judge correctly set forth the Commission's standard for considering whether violative conduct is caused by unwarrantable failure, he erred in its application. 23 FMSHRC at 1259-60. The judge concluded that Cumberland's violation of section 75.363(a) was unwarrantable on the basis of four findings, which we conclude are not supported by substantial evidence.

First, the judge concluded that the operator's failure to withdraw miners was aggravated because general mine foreman Evans knew on the morning of July 5 that there were problems with the bleeder system based on the increase in water gauge pressure at the No. 1 bleeder shaft fan, but miners were allowed to continue production until the midnight shift. 23 FMSHRC at

²⁵ The judge erroneously concluded that "[a]bnormally high concentrations of methane at BEP 5A [were] an indication that methane from the gob [was] migrating back toward the working face rather than being diluted and carried away to the surface." 23 FMSHRC at 1258. An increase in methane in the bleeder entries is not necessarily an indication that methane is migrating back towards the face. Rather, because the volume of air exiting the mine did not significantly change (Tr. 1370), one would conclude that more methane was leaving the gob and exiting the mine. Tr. 1363-64. Nonetheless, we consider the judge's finding as it relates to the violation of section 75.363(a) to be harmless.

1259. As noted earlier, the rise in pressure at the fan was not evidence of a methane problem, but indicated a change in resistance in the mine. Tr. 203-04, 1133-34. It is undisputed that such a change in resistance could occur as a result of normal mining practices. Tr. 379-82, 1913.

Second, the record controverts the judge's finding that the aggravated nature of the operator's violation was demonstrated by evidence that the activation of the methane sensor at the tailgate indicated that the bleeder system was not moving methane from the working face. 23 FMSHRC at 1259. UMWA Safety Committeeman Hroblak confirmed that on the afternoon shift of July 5, ventilation of the longwall appeared "textbook." Tr. 104-06, 112; *see also* RAG Ex. 8 at 26-28. In addition, the Secretary's ventilation expert, John Urosek, testified that the methane sensor on the longwall was located to measure methane in the airflow that crosses the longwall, rather than the methane adjacent to the shields or coming from the gob. Tr. 2009. He stated that there was sufficient air quantity at the longwall face to maintain methane levels at or below 1.5% and that there was enough volume to dilute methane coming from the bleeder system or from the gob directly behind the longwall. Tr. 2009. Urosek explained that, unless there were a massive roof fall causing methane to be propelled from the gob to the longwall, gob methane would not likely be picked up by the longwall sensors. Tr. 2015. MSHA Inspector Guley also testified that he believed that the methane monitor problem at the face was not caused by problems with the bleeder system. Tr. 630. Moreover, it appears that the methane monitor may have been activated because the monitor's cable was "shorting-out." Tr. 1238, 1469-70. There also were no findings of excessive methane at the face during the afternoon shift of July 5. Tr. 111-12, 1238; S. Br. at 8. We therefore hold that the judge's finding on this issue is unsupported by substantial evidence.

Third, we conclude that substantial evidence does not support the judge's finding that there was a significant possibility that rising methane levels in by BEP 5A could accumulate in the bleeder system and back up to the longwall face. 23 FMSHRC at 1260. The Secretary's witnesses testified that they were unsure of the extent to which the methane had backed up and characterized the problem with the bleeder system as presenting only a potential to cause a methane back up at the face. Tr. 619-23, 661-62, 714, 719, 724. The judge himself concluded that, contrary to the Secretary's assertion that the closure of BEPs 6, 7, and 8 had bottled up methane in the gob and could eventually have resulted in methane backing up to the face, the closure of BEPs 6 and 7 was not a significant cause of the bleeder malfunction.²⁶ 23 FMSHRC at 1246, 1256.

Fourth, we conclude that the judge erred in determining that other aggravating factors existed, including that the violation was obvious, was allowed to exist for an extended period of time, and was not disclosed to Cumberland's hourly employees. 23 FMSHRC at 1260. While the operator obtained repeated readings of 3.6% methane, the cause of the elevated methane readings was not obvious. Tr. 989-91, 1139-40, 1196-97, 1231, 1358-60, 1818-19. In fact, the bleeder problem was not fully abated until July 30. Tr. 594-95, 1920-22. In addition,

²⁶ The Secretary has not challenged that finding on review.

Cumberland on its own initiative took repeated methane readings at the No. 1 bleeder shaft rather than relying on MSHA's readings taken earlier that day showing methane within normal limits. 23 FMSHRC at 1247-48. As soon as it confirmed that its own readings indicated elevated levels of methane, the operator formulated a plan for correction and began gathering the necessary skilled manpower to carry out that plan. Tr. 1730-31, 1780-82. Moreover, although the operator did not inform the hourly employees of the initial elevated readings, it informed miners at 8:00 p.m. that there would be a ventilation change during the midnight shift and informed safety committee members at the end of the afternoon shift of the circumstances that had occurred. 23 FMSHRC at 1249; Tr. 110, 113-15, 122-23.

Although Cumberland's actions did not "immediately correct" the violative condition as required by section 75.363(a), we must view the company's actions and their effects in the context of the cited violation. As a preliminary matter, section 75.363(a) establishes alternative means of compliance. The operator shall *either* immediately correct the hazardous condition *or* post the area. We note that, in addition to serving as mitigating factors that should have been considered by the judge in his unwarrantable failure analysis, Cumberland's corrective actions also must be considered as attempts to comply with section 75.363(a). First, Cumberland identified the problem through proactive investigation. It then attempted to correct the problem. Although those attempts were not effective in "correcting" the methane accumulation in the bleeder shaft, the operator's belief that its course of action constituted an alternative means of compliance does not rise to the level of unwarrantable failure. *See Florence Mining Co.*, 11 FMSHRC 747, 753-54 (May 1989) (a unanimous Commission, relying on a review of the record as a whole and all of the circumstances, reversed a judge's unwarrantable failure finding where the operator relied upon an alternative means of evacuation). In this case, the Judge similarly did not analyze all of the circumstances, nor did he consider that compliance with the regulatory requirement was at least attempted through immediate, albeit ineffective, corrective action.

Moreover, the judge failed to give adequate weight to Cumberland's prior experience with elevated methane readings at the No. 1 bleeder shaft as a mitigating factor. In 1996, Cumberland had been cited for a non-significant and substantial violation of section 75.323(e) because more than 2% methane was detected exhausting from the No. 1 bleeder shaft. Tr. 1151-54; RAG Ex. 6. From December 1996 to October 1997, methane readings were taken at the No. 1 bleeder shaft that exceeded 2.7% methane and ranged as high as 3.4%, yet MSHA allowed Cumberland to operate. Tr. 232, 1157, 1490. Cumberland relied on this prior experience with MSHA in concluding that it could continue operations during the afternoon shift of July 5 and communicated that reliance to safety committee members at the end of the afternoon shift, and to Inspector Hixson when he arrived at the mine during the midnight shift of July 6. Tr. 122, 231-32; RAG Br. at 30. Thus, Cumberland relied upon MSHA's past actions as a basis for continuing operations while it formulated and implemented a plan that allowed for the orderly withdrawal of miners. Such circumstances preclude characterizing Cumberland's conduct as

unwarrantable.²⁷ See *Utah Power & Light Co.*, 12 FMSHRC 965, 972-73 (May 1990) (confusion about agency policy founded on inconsistency of previous MSHA actions militates against finding of aggravated conduct). Based on the foregoing, we reverse the judge's unwarrantable failure determination.

3. Civil Penalty

The judge assessed a civil penalty that was twice the amount proposed by the Secretary for Cumberland's violation of section 75.363(a). 23 FMSHRC at 1260-61. Cumberland argues that the judge erred in his assessment of the penalty. We agree.

The Commission's judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). Such discretion is not unbounded, however, and must reflect proper consideration of the penalty criteria set forth in section 110(i) and the deterrent purposes of the Act. *Id.* (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984)). The Commission has further recognized that judges have discretion to assign differing weight to the various factors according to the circumstances of the case. *Lopke Quarries, Inc.* 23 FMSHRC 705, 713 (July 2001) (citing *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997)). The Commission has explained, however, "that a judge may not go beyond the criteria set forth in section 110(i)." *Jim Walter Res., Inc.*, 19 FMSHRC 498, 501 (Mar. 1997); *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1565 (Sept. 1996) (concluding that the judge erred when he considered deterrence as a separate factor warranting increase in penalty); see also *Dolese Bros. Co.*, 16 FMSHRC 689, 695 (Apr. 1994) (concluding that the judge had considered a factor not applicable under section 110(i) when he considered mental anguish in his assessment of penalty). Assessments "lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal." *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984).

Although the judge purportedly considered the operator's failure to disclose conditions as part of his negligence and gravity criteria analyses, he further characterized this failure as a breach of a fundamental Mine Act purpose: that miners and operators must work together to identify and eliminate unsafe conditions. 23 FMSHRC at 1261. He concluded his discussion by stating, "Cumberland's failure to disclose the bleeder conditions during the afternoon shift on July 5, 2000, is an aggravating factor that warrants an increase in civil penalty." *Id.* Thus, the judge impermissibly increased the penalty by relying on the operator's breach of a Mine Act purpose, a factor outside of the section 110(i) penalty criteria. See *Ambrosia*, 18 FMSHRC at 1565; *Dolese*, 16 FMSHRC at 695 (concluding that judge erred by considering factors outside of

²⁷ We further note that the operator made continuing efforts to adjust and monitor the ventilation within its bleeder system by, for instance, adding the 2A bleeder shaft and fan, making the air change on July 3, and monitoring water gauge pressure and methane readings. 23 FMSHRC at 1245-48.

section 110(i) when assessing a penalty). Accordingly, we vacate the penalty and remand the matter to the judge. The judge shall reassess the penalty without considering breach of a Mine Act purpose as a separate factor bearing on the amount of the penalty. In addition, the judge shall take into account our reversal of his unwarrantable failure finding.

III.

Conclusion

For the foregoing reasons, we affirm the judge's conclusion that Cumberland violated section 75.334(b)(1). We affirm, in result, the judge's determination that Cumberland violated section 75.363(a) and reverse the judge's determination that the violation was caused by Cumberland's unwarrantable failure. We vacate the civil penalty associated with Citation No. 3657291 and remand for reassessment consistent with the instructions in this decision.

Michael F. Duffy, Chairman

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

Commissioners Beatty and Jordan, concurring and dissenting:

We concur with the conclusion of our colleagues in the majority that Cumberland violated the two regulations at issue. However, we disagree with their decision to reverse the judge's ruling that the violation of 30 C.F.R. § 75.363(a) resulted from Cumberland's unwarrantable failure to comply with that standard.

In addition to requiring operators to post and immediately correct a hazard, section 75.363(a) provides that if a hazardous condition creates an imminent danger, "everyone except those persons referred to in section 104(c) of the Act shall be withdrawn from the area affected to a safe area until the hazardous condition is corrected." 30 C.F.R. § 75.363(a). We believe the record amply supports the judge's conclusion that methane readings obtained by Cumberland on the afternoon of July 5 signaled an imminent danger, 23 FMSHRC 1241, 1259 (Nov. 2001) (ALJ), and that Cumberland's failure to withdraw the miners amounted to aggravated conduct. *Id.* at 1260.

Imminent danger is defined in section 3(j) of the Mine Act as "the existence of any condition or practice in a coal or other mine *which could reasonably be expected* to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C.

§ 802(j) (emphasis added). Although the regulations do not specify an upper limit for methane in the underground travelable bleeders, MSHA considers a 4.5% level an imminent danger. 23 FMSHRC at 1257; Tr. 820-21; RAG Ex. 3. Cumberland does not disagree with this enforcement policy. 23 FMSHRC at 1249. Indeed, Cumberland maintains that prudence requires the miners' withdrawal when methane reaches 4.0% in the bleeder shaft. RAG Br. at 30-31; Tr. 1152, 1351. Methane is explosive when it is in the 5 to 15 percent range. 23 FMSHRC at 1243.

The record indicates that during the two-week period leading up to July 5, Cumberland's methane readings at the No.1 bleeder shaft fan had been elevated. Tr. 183-85. Moreover, as the judge found, during that same period, the higher readings underground at bleeder evaluation point (BEP) 5A indicated that there was a two-to-one ratio of methane between the two locations. 23 FMSHRC at 1258. For example, on June 14, Cumberland obtained an Exotector reading of 1.8% methane at the No.1 bleeder fan, while measuring 3.5% methane at BEP 5A. Tr. 558-59, 1321-22; Gov't Ex. 7 at 64. On June 30, the Exotector detected only 1.89% methane at the No. 1 bleeder fan, but 3.5% at BEP 5A. Tr. 560-61, 1321-22; Gov't Ex. 7 at 68, 70. On July 3, Cumberland took an Exotector reading at the No. 1 bleeder shaft of 1.8% or 1.9% methane. Tr. 1215. The reading at BEP 5A was 3.8%. Tr. 1217-18; Gov't Ex. 7 at 71.

On July 5, Cumberland personnel obtained methane readings of 3.6% at the No. 1 bleeder fan. Tr. 1133-37, 1311-12, 1326-27, 1563-64, 1890-92. According to MSHA, such high readings were unheard of at a fan in an active mine. MSHA stated that levels such as those detected by Cumberland were usually detected only after an emergency such as an explosion or when a mine was reopened after having been sealed. Tr. 713. Indeed, Cumberland's general mine foreman found it difficult to believe the reading at the fan was that high, and he sent the

mine engineer back to take another measurement with a recalibrated Exotector. 23 FMSHRC at 1248, 1260. The engineer returned with another reading of 3.6%. *Id.* at 1248.

The judge determined that, given the conditions present on July 5, Cumberland was obliged to err on the side of caution. *Id.* at 1259. We agree. In light of the record evidence supporting the judge's finding of a recent 2:1 ratio between the underground methane levels at BEP 5A and the levels detected at the No. 1 bleeder fan, there was a substantial likelihood of dangerously high levels of methane in the underground bleeder entries. Tr. 562-64; 718-19. Nonetheless, as our colleagues note, it is undisputed that Cumberland failed to take any methane readings in the travelable bleeder entry during the afternoon shift of July 5. Slip op. at 11. Given the information available to it at the time, Cumberland should have sent someone to BEP 5A to determine if the imminent danger level had been reached there. *Id.* at 16. Furthermore, the judge determined that Cumberland's failure to withdraw miners on the shift was unreasonable and constituted aggravated conduct, 23 FMSHRC at 1259-60, and substantial evidence supports that conclusion.¹

Cumberland conceded that it would have withdrawn miners if methane levels had reached 4% at the No. 1 surface fan. *Id.* at 1257. The record indicates, however, that Cumberland did not continuously monitor the methane readings from that No.1 bleeder fan on July 5. In fact, the record states that there was a three-hour time period on July 5 when the No. 1 bleeder fan was not monitored at all. Tr. 1784, 1827-29. Thus, Cumberland would have no idea if readings during those three hours reached 4 or 5 or 10 percent.

The Commission has also recognized that whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). These factors include the length of time the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *Id.* All of the relevant facts and circumstances of each case must be

¹ The operator relies on tests showing that on July 3, there was a 1:1 ratio of methane between the No. 1 bleeder fan and the BEP 5A. RAG Reply Br. at 9. However, Cumberland did not have the bottle sample results which were the basis for the contention until July 13, several days after the citation in this matter was issued. RAG Ex.7. In addition, Cumberland relies upon evidence that there was 3.6% methane at the No. 1 bleeder fan on July 5 and 6 until ventilation changes were made, and that the only methane reading taken at BEP 5A revealed that there was 3.6% methane at that location also. RAG Reply Br. at 9 (citing Tr. 1582). However, the methane reading relied upon by Cumberland depicting a methane reading of 3.6% at BEP 5A was taken on July 3, not on July 5 or 6 (Tr. 1582), and it is therefore not appropriate to use it as a basis for comparison.

examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Id.*

Substantial evidence supports the judge's determination that Cumberland's violation of section 75.363(a) was of an aggravated duration. 23 FMSHRC at 1260. As previously mentioned, over the two-week period prior to July 5, the water gauge pressure at the No. 1 bleeder fan had been increasing. Tr. 548. In fact, the mine foreman stated that on June 29, the water gauge pressure had a "substantial increase." Tr. 1970. The Secretary's ventilation expert, Urosek, stated at that point, the operator should have taken any necessary steps to correct it. Tr. 1032.

However, it was not until July 5 that the mine foreman convened a meeting to discuss the rise in water gauge readings and problems with the bleeder system. Tr. 1132-33, 1891. Even then, when Cumberland became aware at approximately 4:00 p.m. that day that there was elevated methane exiting from the No. 1 bleeder shaft, it waited until the midnight shift to begin significant ventilation changes underground. 23 FMSHRC at 1249-50; Tr. 1146-47, 1569, 1780-81.²

Substantial evidence also supports the judge's finding that the violation posed a high degree of danger. 23 FMSHRC at 1260. As discussed above, there were concentrations of methane in the bleeder system that were potentially in excess of 4%, given the 2:1 ratio between the No. 1 bleeder fan and BEP 5A. As noted above, Cumberland had agreed that at 4%, the mine would need to be evacuated.

Substantial evidence also supports the judge's determination that the condition was obvious. *Id.* As the judge found, Cumberland employees took multiple readings that indicated elevated methane was exhausting from the No. 1 bleeder fan. Tr. 1137-38, 1146, 1784-85. The operator had actual knowledge of the increased water gauge readings and met to discuss their effect on the bleeder system. Tr. 1132-33, 1891.³

Our colleagues in the majority argue that the judge failed to consider mitigating circumstances in making his unwarrantable failure determination. Slip op. at 19-20. This argument is not persuasive. The majority agrees with Cumberland's assertion that its decision

² Prior to that, Cumberland had made slight changes, such as opening the 32-1 surface gob vent hole, without affecting the levels of methane found at the No. 1 fan. 23 FMSHRC at 1248.

³ Without supporting authority, the majority cites the fact that the *cause* of the elevated readings was not obvious as a reason to reverse the judge's unwarrantable failure finding. Slip op. at 18. If anything, this argues in favor of concluding that the failure to withdraw miners was unwarrantable. Lack of knowledge as to what was causing the problem should have heightened Cumberland's caution in this instance.

not to withdraw the miners was reasonable because in the past MSHA permitted it to continue operating when methane levels at the No. 1 fan reached 3.4%. *Id.*; RAG Br. at 30. However, the circumstances surrounding the earlier event were quite different, significantly lessening its relevancy to the events in question here.

In the earlier situation at the No. 1 bleeder fan, MSHA issued a citation alleging a violation of section 75.323(e) because more than 2% methane was detected in the No. 1 bleeder shaft. Tr. 1153-54; RAG Ex. 6. From December 1996 to October 1997, methane readings were taken at the No. 1 bleeder shaft fan that exceeded 2.7% and ranged as high as 3.4%, yet Cumberland was allowed to operate. Tr. 232, 1157, 1490. At that time, however, unlike during the afternoon shift of July 5, 2000, there was no evidence indicating that methane readings at a BEP were twice the levels at the fan. In addition, in 1996 and 1997, even though MSHA had allowed the operator to continue working, state officials and MSHA knew about the situation, and MSHA had in place various guidelines and controls. Tr. 122, 232.

We agree with the judge that on July 5 an imminent danger existed, and Cumberland was obliged under the regulation to withdraw its miners before attempting to abate the hazardous condition.⁴ For the foregoing reasons, we believe that its failure to do so constituted an unwarrantable failure.⁵

Robert H. Beatty, Jr., Commissioner

Mary Lu Jordan, Commissioner

⁴ Our colleagues' argument that the judge should have considered as a mitigating factor that Cumberland "at least attempted" to comply with the regulation "through immediate, albeit ineffective, corrective action," slip op. at 19, is misplaced. The existence of an imminent danger required withdrawal of the miners before abatement efforts proceeded. Cumberland failed to comply with this section of the regulation.

⁵ In addition to vacating and remanding the judge's penalty determination in light of the majority's reversal of his unwarrantable failure finding, slip op. at 21, our colleagues vacate and remand the penalty because the judge took one of the purposes of the Mine Act into account in making his determination. *Id.* Commissioner Beatty joins the majority in vacating and remanding the judge's penalty determination on this ground. Commissioner Jordan would affirm the judge's penalty determination on this point. In his penalty discussion, 23 FMSHRC at 1261, the judge acknowledged language from section 2(e) of the Mine Act, in which Congress declared that "the operators of . . . mines with the assistance of the miners have the primary responsibility to prevent the existence of [unsafe and unhealthful] . . . conditions and practices in such mines. 30 U.S.C. § 801(e). Commissioner Jordan fails to see why a judge cannot keep this global purpose in mind while applying the more specific penalty criteria set forth in section 110(i). 30 U.S.C. § 820(i). Moreover, she believes that Cumberland's failure to disclose the bleeder conditions to the miners during the afternoon of July 5 rightly falls under the negligence criterion of section 110(i), as it relates to the operator's duty of care to avoid a violation. *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). Commissioner Jordan believes that Cumberland's failure to notify its miners of potentially dangerous conditions in the bleeder system breached the duty of care inherent in section 75.363(a), providing for the posting of violations and withdrawal of miners in the event there is an imminent danger.

Distribution

Robin A. Rosenbluth, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor West
Arlington, VA 22209-2247

R. Henry Moore, Esq.
Jackson Kelly, PLLC
Three Gateway Center
401 Liberty Avenue, Suite 1340
Pittsburgh, PA 15222

Administrative Law Judge Jerold Feldman
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021