FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 26, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) and	:	
	:	Docket Nos. PENN 2002-116
UNITED MINE WORKERS OF AMERICA, LOCAL 1248, DISTRICT 2, SUBDISTRICT 5	:	PENN 2003-54
	:	PENN 2003-55
	:	PENN 2003-56
v.	:	
MAPLE CREEK MINING, INC.,	:	
STEVE BROWN, employed by MAPLE CREEK MINING, INC.,	:	
ALVY WALKER, employed by MAPLE CREEK MINING, INC., and	:	
GREG MILLER, employed by MAPLE CREEK MINING, INC.	:	

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

DECISION

BY: Duffy, Chairman, and Young, Commissioner

In these consolidated 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"), Administrative Law Judge Jacqueline Bulluck affirmed an order issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Maple Creek Mining, Inc. ("Maple Creek"), alleging a significant and substantial ("S&S") violation of 30 C.F.R. § 75.380(d)(1), which requires that each designated escapeway in an underground coal mine "be maintained to always assure passage

of anyone, including disabled persons." 26 FMSHRC 539, 543-48 (June 2004) (ALJ). The judge further found that the violation was due to the operator's unwarrantable failure and that Maple Creek employees Steve Brown, Alvy Walker, and Greg Miller were also liable for the violation under section 110(c) of the Mine Act, 30 U.S.C. § 820(c). 26 FMSHRC at 548-53. Maple Creek and the three employees jointly filed a petition for discretionary review of the judge's decision, which the Commission granted. For the reasons that follow, we affirm in part and reverse in part.

I.

Factual and Procedural Background

Maple Creek owns and operates the Maple Creek Mine, an underground bituminous coal mine in Washington County, Pennsylvania. 26 FMSHRC at 541. Undulations in the coal seam and the steady infiltration of water by percolation through the mine floor and seepage from the coal seam and the mine roof cause accumulations of water at low points in the mine's entries. These conditions are such that between 1.2 and 2 million gallons of water are pumped from the mine daily. *Id.*

In the 4 West section of the mine, the track entry, ventilated with intake air, was the primary escapeway. *Id.*; MCM Exs. 1 & 2. The adjacent travelway, ventilated with return air, was designated as a secondary escapeway. 26 FMSHRC at 541; Tr. 385. In late July and early August 2001, the track in the primary escapeway ended at crosscut 15 or 16. 26 FMSHRC at 541. Scoops delivered supplies from there to the working face, which was at or near crosscut 30. *Id.*

On July 30, 2001, Mine Inspector Dennis Walker of the Pennsylvania Department of Environmental Protection's Bureau of Deep Mine Safety conducted a regular state quarterly inspection of the mine. *Id.* at 542; Tr. 32-33. He issued a state compliance order for water accumulation in the 4 West section to midnight shift section foreman Greg Miller. 26 FMSHRC at 542, 546. The compliance order stated that between crosscuts 24 and 25, in an area 40 to 50 feet in length, there was water 12 inches deep from rib to rib that created slippery walking conditions. *Id.* at 542; Gov't Ex. 1 at 1. The order required that Maple Creek remove the water or pump it to a reasonable depth by 8:00 a.m. the next day, July 31. 26 FMSHRC at 542; Gov't Ex. 1 at 1. Dennis Walker did not return to the mine in the following days, but was told a few days later by Steve Brown, the 4 West section coordinator who had accompanied him on at least part of the inspection, that the water had been removed by pumping. 26 FMSHRC at 542; Tr. 58; Gov't Ex. 2.

On August 9, 2001, MSHA Inspector James Dickey was at the mine to conduct a regular Triple-A inspection. 26 FMSHRC at 542. He was still above ground when he came upon MSHA Inspector George Rantovich in a discussion with miners Thomas Sutton and Jim Constable, UMWA safety committeemen at Maple Creek. *Id.*; Gov't Ex. 3. They were

discussing water in the mine. 26 FMSHRC at 542. Sutton told the inspectors that the water problem had existed for some time, that it was not being recorded consistently in the preshift examination book, and that nothing was being done about it. *Id.*; Gov't Ex. 3. Dickey thereafter reviewed the preshift (Gov't Ex. 8) and onshift record books for the 4 West section back to at least July 31, 2001. 26 FMSHRC at 542.

While traveling through the section, Dickey encountered an accumulation of water that he considered extensive, deep, "mucky," and very difficult to walk in. *Id.* Dickey informed the two men accompanying him, day shift assistant general mine foreman Paul Henry and miner Robert Maust, that he would be issuing a withdrawal order pursuant to section 104(d) of the Mine Act, 30 U.S.C. § 814(d). 26 FMSHRC at 542. Dickey later issued such a withdrawal order,[1] charging a violation of 30 C.F.R. § 75.380(d)(1). 26 FMSHRC at 542. To abate the violation, Maple Creek built a 6-foot-wide bridge over the entire length of the accumulation, and the order was terminated early the following morning. 26 FMSHRC at 543; Gov't Ex. 9 at 3.

A hearing was held on the order, at which the United Mine Workers of America, Local 1248, District 2, Subdistrict 5 ("UMWA"), participated as an intervenor. 26 FMSHRC at 540. In her decision following the hearing, the judge concluded that the primary escapeway on the 4 West section was not maintained in a safe condition that would permit passage of all persons, and therefore that Maple Creek had violated section 75.380(d)(1). *Id.* at 547. The judge also found the violation was S&S, because a hazardous condition resulted from the violation and because there was a reasonable likelihood that it would result in injuries of a reasonably serious nature. *Id.* at 548. Based on her finding that Maple Creek's actions with respect to the hazardous escapeway conditions reflected indifference and a serious lack of reasonable care, the judge also concluded that the violation was attributable to Maple Creek's unwarrantable failure. *Id.* at 548-51. The judge also found that Brown, Alvy Walker, and Miller were each liable under section 110(c) for the section 75.380(d)(1) violation. *Id.* at 551-53.

II.

Disposition

Maple Creek contends that the evidence establishes that the area of the escapeway at issue was passable, both with respect to the miners who would walk it and those who might need to carry a disabled miner on a stretcher. MCM Br. at 10. The operator asserts that the conditions in the escapeway, when viewed properly in context, were not as poor as the judge's decision makes them appear, so that the judge's finding of violation is unsupported by substantial

[1] Maple Creek was already on the "D chain" as a result of an unchallenged citation and order from 6 weeks prior. 26 FMSHRC at 543 n.3. The "D chain" refers to the increasingly severe sanctions provided by section 104(d) of the Mine Act, 30 U.S.C. § 814(d), which are intended to serve as an incentive for operator compliance. *See Nacco Mining Co.*, 9 FMSHRC 1541, 1545-46 (Sep. 1987); *Cyprus Cumberland Res. Corp.*, 21 FMSHRC 722, 725 (July 1999).

evidence in the record. *Id*. at 11. Maple Creek also argues that, because the condition of the escapeway did not rise to the level of a hazard and it was unlikely that it would contribute to a serious injury, the judge's S&S determination should be reversed. *Id*. at 12. Maple Creek further maintains that the judge's unwarrantable failure finding is not supported by substantial evidence, and that the evidence shows that Maple Creek was actively maintaining its escapeways by, among other things, diligently working on pumping water from the area in question. *Id*. at 13. Maple Creek also contends that the section 110(c) charges filed against its three employees are arbitrary and an abuse of agency discretion in light of the agency's decision not to file a section 110(c) case against the mine foreman. *Id*. at 16. Maple Creek concludes that, in any event, substantial evidence does not support the judge's finding of liability for any of the three men because all of them had been actively involved in the operator's extensive efforts to address the water accumulation in the escapeway. *Id*. at 15.

In response, the Secretary urges affirmance of the finding of violation, citing evidence she maintains supports the judge's determination that the escapeway was not safe for persons during an emergency evacuation of the mine. S. Br. at 15-20. The Secretary also submits that the judge's finding that the violation was S&S is supported by substantial evidence. *Id*. at 21-23. The Secretary argues that Maple Creek does not dispute many of the findings the judge made in support of the unwarrantable failure conclusion, that those findings support the unwarrantable failure determination, and that the Commission should affirm the judge's finding that Maple Creek's efforts to abate the condition of the escapeway were "woefully ineffective." *Id*. at 23-30. Intervenor UMWA agrees with the Secretary, asserting that it is not enough for an operator to engage in some action related to a mine hazard, but rather an operator's actions must be effective. UMWA Br. at 5-6. The Secretary maintains that her decision not to file section 110(c) charges against the mine foreman is unreviewable, and that the judge's section 110(c) findings are all supported by substantial evidence. S. Br. at 31-35.

All four Commissioners affirm the judge's findings that Maple Creek violated section 75.380(d)(1) and that the violation was S&S. Chairman Duffy and Commissioner Young, joined by Commissioner Jordan, also affirm the judge's findings that the violation was unwarrantable and that Steve Brown is individually liable for the violation under section 110(c). Chairman Duffy and Commissioner Young, joined by Commissioner Suboleski, reverse the judge's findings that Alvy Walker and Greg Miller are individually liable for the violation under section 110(c).

A. Violation

Section 75.380 requires that underground coal mine operators designate "at least two separate and distinct travelable passageways" as escapeways, that "[e]scapeways shall be provided from each working section," and that "[e]ach escapeway shall be . . . [m]aintained in a safe condition to always assure passage of anyone, including disabled persons." 30 C.F.R.

§ 75.380(a), (b)(1) & (d)(1).[2] The judge determined that the escapeway here failed to meet the standard because from the time the state compliance order was issued until the issuance of the withdrawal order by Inspector Dickey, work crews were routinely forced to use the narrow walkway or "cow path" along the right rib in order to avoid the 6 to 17-inch-deep muck that had accumulated in the escapeway between crosscuts 24 and 27. 26 FMSHRC at 547. The judge found that the conditions created a slip and fall hazard that precluded swift passage through that portion of the escapeway. *Id*. She further found that a team of miners carrying a stretcher would have to negotiate the slippery rutted bottom of the center of the escapeway, thus endangering the safety of those carrying the stretcher and delaying medical attention to the injured miner. *Id*.

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 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)). Under the substantial evidence test, the Commission may not "substitute a competing view of the facts for the view [an] ALJ reasonably reached." *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983).

The judge's finding of violation here is supported by substantial evidence. Prior to trial, the parties by stipulation established the conditions of the escapeway to a significant extent. They agreed that, on the day the withdrawal order issued, water was present in the intake escapeway of the 4 West section in varied depths and extended for approximately 420 feet. 26 FMSHRC at 541. Moreover, Maple Creek's assistant mine foreman Henry conceded that, as a result of equipment tramming through the fire clay bottom, the water/clay mixture soon became dark, thick, soupy "mud and slop" that at some points extended from rib to rib. Tr. 747, 770-71, 776.

Maple Creek takes issue with the measurements taken by Inspector Dickey that persuaded the judge to find that the water was as much as 17 inches deep. *See* 26 FMSHRC at 547. Stating that the deeper measurements were taken in ruts created by the passage of scoops delivering supplies to the face, the operator argues that the depth of the water should be considered in the context of the mine area, where the roof was over 9 feet high. MCM Br. at 11. While Maple Creek is correct regarding the method of measurement, that does not necessarily detract from the judge's finding that there was a hazard. In the words of section foreman Alvy Walker, the water

[2] Section 75.380 was originally derived from section 317(f) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) ("Coal Act"), which was carried over without change to the Mine Act, 30 U.S.C. § 877(f)(1).

had "slurried up" (Tr. 659-60), and the mine floor and the drop-offs could not be seen by the miners, who could suddenly step off from an area of 6-inch water into 12 to 17 inches of water. Tr. 126. Moreover, there was testimony that the floor beneath the mud was littered with coal that had sloughed off the ribs. Tr. 158-59. The ample headroom provided by the high roof thus did little to mitigate the hazards on the floor which unnecessarily impaired the utility and safety of the escapeway.

Maple Creek also cites the ability of its miners to make it through the area to and from their work places each day as evidence that the escapeway was passable and, thus, in compliance with the regulation. MCM Br. at 10. In so doing, Maple Creek ignores the fact that at those times the miners were not using the route as an escapeway to evacuate the mine. During an emergency evacuation, miners would likely need to move expeditiously through the area in order to seek safe passage away from what could be a dangerous underground environment. *See* 61 Fed. Reg. 9764, 9810 (Mar. 11, 1996) (preamble to section 75.380).[3] Assistant mine foreman Henry admitted that the condition of the escapeway would slow the evacuation of miners, as they would have to be more cautious in the area. Tr. 788.

Of particular importance in determining whether an escapeway is adequate under section 75.380 is the ability of miners to transport an injured miner on a stretcher through it. Maple Creek does not take issue with the judge's finding that the cow path was too narrow to accommodate a team with a stretcher (26 FMSHRC at 547), but instead argues that it presented sufficient evidence to establish that a stretcher carrying an injured miner could have passed through the area off of the cow path, and that there was an alternate escapeway available in any event. MCM Br. at 10. The evidence to which Maple Creek refers is the testimony of Brown and Alvy Walker. *Id.* Brown testified that he could have carried a stretcher through the area, but went on to state that he would have used the alternate escapeway. Tr. 497. Alvy Walker testified that two miners could have walked ahead of the stretcher team to show them where the holes in the floor were located. Tr. 661.

That testimony does not support the notion that the requirements of section 75.380(d)(1) were being met with respect to safe passage by a stretcher team. Alvy Walker would have required two additional miners to remain behind with the stretcher team, thus delaying their exit from the mine. The judge properly rejected this idea when she stated that "miners [should] not be confronted with risking life and limb to come to the aid of each other." *See* 26 FMSHRC at 547.

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[3] Moreover, Maple Creek's reference to the daily passage of miners through the escapeway is not to their use of the escapeway through the water, but rather to the narrow cow path walkway along its right rib, which at points was as narrow as 12 inches. 26 FMSHRC at 541; MCM Br. at 10; Tr. 620-21. Reliance on such a narrow route to serve as an escapeway clearly runs counter to the requirement of section 75.380(d)(4) that escapeways be maintained at a width of 6 feet, except in circumstances not applicable here.

We also reject Maple Creek's suggestion that the judge erred in ignoring the existence of an alternate escapeway. The regulation is clear that the maintenance requirement of section 75.380(d)(1) applies to "each" escapeway. More than one escapeway is required, not in recognition that conditions routine to the mine might prevent use of one of the escapeways, but rather because the emergency condition that causes the need to evacuate the mine may prevent use of one of the escapeways. The Senate Committee which was responsible for drafting the Coal Act explained the two-escapeway requirement in the following manner:

> Many mines have only one regular travelway from the working sections and the completely blocks the regular travelway from the working sections and the surface, thus cutting off escape in an emergency unless an alternate route is provided to the surface. As recently as March 1968, 21 men at a salt mine lost their lives because a travelable second escapeway was not provided.

S. Rep. No. 91-411, at 83 (1969), *reprinted in* Senate Subcomm. on Labor, Comm. on Labor and Public Welfare, 94th Cong., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 209 (1975).

Lastly, Maple Creek contends that the judge improperly rejected its contention that a scoop could have been used to transport an injured miner through the water. MCM Br. at 10. Maple Creek's evidence consisted of the testimony of Brown, Alvy Walker, Miller, and Maust. The judge credited the testimony of Inspector Dickey over those witnesses on the issue of whether using a scoop would be a safe method of transportation. 26 FMSHRC at 547. A judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). The Commission has recognized that, because the judge "has an opportunity to hear the testimony and view the witnesses[,] he [or she] is ordinarily in the best position to make a credibility determination." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff'd sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998).

We see no basis to overturn the judge's credibility determination. The witnesses cited by Maple Creek testified that a scoop was an available means of transport through the escapeway, but they did not address how safely an injured person can be carried in one. Tr. 127, 507, 630, 671. In contrast, both Dickey and miner John Baluh testified about the further harm that traveling in a scoop could cause to an injured miner. Tr. 216, 302-04.

In summary, substantial evidence supports the judge's determination that Maple Creek violated section 75.380(d)(1).

B. S&S

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard — that is, a measure of danger to safety — contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Id. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). Resolution of whether a violation is S&S must be based "on the particular facts surrounding the violation." *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2012-13 (December 1987). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *See U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

Maple Creek contends that the conditions at issue here did not rise to the level of a hazard, and thus takes issue with the judge's finding that the section 75.380(d)(1) violation satisfied the second *Mathies* element. MCM Br. at 12. The judge based her hazard findings in part on the testimony of the miners who walked through the area each day. 26 FMSHRC at 548. There was extensive testimony that if they chose to pass through the water, miners were subject to slippery walking conditions, given the uneven bottom obscured by the muddy water. *Id*. at 545; Tr. 202. Inspector Dickey stepped into several holes while walking through the center of the escapeway and, when he did so, the water level was over the top of his 15-inch boots. 26 FMSHRC at 544. The coal that had sloughed off the ribs and was concealed on the floor posed an added tripping risk. *Id*. at 545; Tr. 158-59.[4]

[4] While the cow path may have provided an arguably safer route than the remainder of the escapeway, it was not without its own hazards. Miner Maust testified that caution was necessary because a person walking on the cow path could slip from it into the water and the holes in the bottom. 26 FMSHRC at 544; Tr. 103.

In arguing that the condition was not hazardous, Maple Creek essentially ignores the judge's finding attributing the injuries suffered by roof bolter John Gargala to the condition of the escapeway. *See* 26 FMSHRC at 548. On the shift immediately preceding the shift during which Dickey issued the withdrawal order, Gargala had slipped and fallen while walking on the cow path, spraining his wrist and straining his back. *Id.*; Tr. 138-42; Gov't Ex. 16. Thus, there is evidence that the hazard observed created not only the potential for injury but had actually contributed to a miner's injury.

Maple Creek also believes that the judge erred in finding that the fourth *Mathies* element — the reasonable likelihood that an injury resulting from the hazard contributed to by the violation will be of a reasonably serious nature — was satisfied. Maple Creek would have the Commission reject the judge's finding that it was likely that the condition of the escapeway would contribute to a serious injury on the basis of miners having passed through the area daily without sustaining serious injury. MCM Br. at 12. However, the Secretary is not required to show that a violation has resulted in an accident or injury in order to establish S&S. *See Arch of Kentucky*, 20 FMSHRC 1321, 1330 (Dec. 1998); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 678 (Apr. 1987).[5]

At the hearing, evidence of the seriousness of the injuries that could result from the condition of the escapeway was provided by Inspector Dickey,[6] who testified that it was reasonably likely that slips and falls in the muck would result in leg and back injuries. Tr. 257-58. *Cf. Southern Ohio Coal Co.*, 13 FMSHRC 912, 918 (June 1991) (recognizing that miners could suffer serious injuries from stepping into unseen openings in surface they were traversing). MSHA assistant district manager Thomas Light further noted that any delay in miners evacuating the mine in an emergency increased the danger posed by the emergency, as the delay could prevent miners from getting out alive. Tr. 338-39, 373.

While Maple Creek relies heavily on the existence of alternative escapeways as a means by which miners could avoid the conditions of the primary escapeway, the judge found, and Maple Creek does not dispute, that the mine had been experiencing methane and ventilation problems when the withdrawal order issued. *See* 26 FMSHRC at 548; Gov't Ex. 17 at 2. The

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[5] In so arguing, Maple Creek again ignores that the miners making their way through the area were not using the route as an escapeway, but rather merely as a travelway to their jobs. As discussed above, use of the route as an escapeway is an entirely different matter; in those circumstances miners would be seeking quick exit from the mine in an emergency. The potential for slips and falls would therefore be even greater during a mine evacuation. Consequently, the miners' everyday travel over the escapeway route is of little relevance to the fourth *Mathies* element.

[6] In *Mathies*, the Commission specifically noted that an inspector's judgment is an important consideration in the Commission's determination of whether a violation is S&S. 6 FMSHRC at 5.

judge specifically noted the danger posed if miners were deprived of their fastest means of evacuation, the primary escapeway ventilated with intake air. 26 FMSHRC at 548.

In light of the foregoing, substantial evidence supports the judge's conclusion that Maple Creek's violation of section 75.380 was S&S.

C. Unwarrantable Failure

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id*. at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id*. at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. MSHA*, 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. 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 were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) ("*Consol*"); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material*, 19 FMSHRC at 34; *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353.

The judge addressed the relevant aggravating factors, and many of her findings are undisputed by Maple Creek or have been already addressed herein. Maple Creek clearly knew that it had a problem with water in that area of the 4 West section intake escapeway and that greater efforts were necessary for compliance. That area usually had only 2 or 3 inches of water (Tr. 665), but on July 30 Maple Creek was issued the compliance order by the state inspector that

described a 12-inch accumulation of water in the numbers 24 and 25 crosscuts that was causing slippery walking conditions. Gov't Ex. 1 at 1.[7]

Maple Creek also does not take issue with the judge's finding that the condition of the escapeway was obvious. *See* 26 FMSHRC at 551. The judge noted that "muck" 12 to 17 inches deep in places is, "of course," obvious. *Id*. That miners used the cow path to avoid walking through the muck further demonstrates that the condition in question was obvious.

As for the danger posed by the condition of the escapeway, much of the judge's reasoning rests on the same grounds which support her S&S finding. In addition to the slip and fall hazard posed by the condition, the judge specifically examined the consequences of a stretcher team having to navigate through the escapeway. *Id*. She found that not only would a stretcher team be subject to the same slip and fall hazard to which the other miners using the escapeway would be exposed, but the condition of the escapeway could delay the team's evacuation of the mine. *Id*. This could delay the provision of critical medical treatment to the injured miner. *Id*. The judge also noted that in the event of a fire or explosion, impeded evacuation of the mine could result in the death of miners. *Id*. As we have found with respect to her S&S finding, substantial evidence amply supports the judge's conclusion regarding the danger posed by the condition of the escapeway.

The parties dispute the duration of the violation and the import of the actions Maple Creek was taking to combat the water accumulation. At trial, Brown testified that the intermittent notations in the preshift examination records about the water problem in the area at issue provided an indication that Maple Creek successfully pumped much of the excess water out, only to have it soon accumulate again. 26 FMSHRC at 550; Tr. 486-87. On appeal, Maple Creek contends that the judge ignored this evidence that it was attempting to correct the condition, which it believes mitigates the violation's unwarrantability. MCM Br. at 14.

As her decision shows, the judge did consider Maple Creek's evidence. *See* 26 FMSHRC at 549-50. She rejected it, however, and concluded that, from the time the state compliance order was issued until the MSHA withdrawal order was issued, the water accumulation remained at a

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[7] Even if Commissioner Suboleski's dissenting position on the preshift records is accepted (*see* slip op. at 22-23), any error by the judge is harmless. The records themselves indicate that the escapeway was occluded by significant water for five consecutive shifts, from July 31 to August 1 and again from August 7 to August 9. Gov't Ex. 8. This evidence, combined with the record's indication that Maple Creek has been cited 18 times in the previous 2 years for violations of the escapeway standard in section 75.380(d)(1), provides substantial support for the judge's conclusion and indicates a repeated, if not chronic, failure to *always* ensure the escapeways are travelable. 26 FMSHRC at 553; Stip. 13 (Tr. 17); Gov't Ex. 13. Taking the evidence as a whole, it is reasonable for the judge to have inferred from those circumstances indifference to the seriousness and persistence of the problem, given the ineffectiveness of the operator's efforts to control it.

level that continuously prevented safe travel by all persons through the primary escapeway. *Id*. at 549. The judge based her conclusion on the testimony of miners that the water was present at a high level for at least a week, as well as on her finding, drawn from the testimony of Maple Creek management officials, that the company did not approach the water problem with the seriousness it deserved. While the judge's conclusion is contradicted to a degree by the preshift records, which show that high water levels were only noted during the July 31-August 1 and August 7-August 9 time frames (Gov't Ex. 8), that is not a sufficient basis to vacate her unwarrantable failure finding.

We agree with the judge that the testimony of the Maple Creek management officials indicates a lack of seriousness on the part of Maple Creek with respect to water accumulation in the escapeway. Brown testified that before he would consider the conditions hazardous, as opposed to a "condition" to be managed, the water would have to be waist high in the escapeway, and that even then if a secondary escapeway were open, he would not be worried because the second escapeway would provide another way out of the mine. Tr. 550. Brown's standard for the water's depth becoming a hazard was similar to that of Alvy Walker, who testified that so long as the water in the escapeway in question did not exceed 20 inches and prevent a miner from moving his legs through it, he would not consider the conditions hazardous. Tr. 635-36. Miller was also of the opinion that the water would have to be higher than that measured in this case for him to consider the conditions hazardous, as in this instance miners could get through it if necessary. Tr. 692-94. Similarly, section foreman Richard Cline believed the water would have to be over the top of his 16-inch boots before it would be hazardous. Tr. 598.

We believe that this testimony of the Maple Creek supervisors provided ample grounds for the judge to infer that Maple Creek management did not approach the water problem in the section with the seriousness it deserved. "[T]he substantial evidence standard may be met by reasonable inferences drawn from indirect evidence." *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984). Inferences drawn by the judge are "permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred." *Id*. In our view, it was eminently reasonable for the judge to infer from the foregoing testimony that Maple Creek simply did not view the condition of the escapeway as hazardous and therefore was not putting a high priority on bringing the escapeway into compliance with section 75.380(d)(1).

In light of the evidence, we agree with the judge that Maple Creek's actions reflect a threshold level of indifference and serious lack of reasonable care sufficient to establish an unwarrantable failure to comply with section 75.380(d)(1).

D. Section 110(c) Liability

Section 110(c) of the Mine Act provides that whenever a corporate operator violates a mandatory health or safety standard, a director, officer, or agent of such corporate operator who knowingly authorized, ordered, or carried out the violation shall be subject to an individual civil

penalty. 30 U.S.C. § 820(c). The proper legal inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); *accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997). To establish section 110(c) liability, the Secretary must prove that an individual knew or had reason to know of the violative condition, not that the individual knowingly violated the law. *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)). A knowing violation occurs when an individual "in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Kenny Richardson*, 3 FMSHRC at 16. Section 110(c) liability is predicated on aggravated conduct constituting more than ordinary negligence. *BethEnergy*, 14 FMSHRC at 1245.

Maple Creek requests that the Commission consider the Secretary's failure to charge the mine foreman as a ground to overturn the judge's findings of liability on the part of the three supervisory personnel who were charged under section 110(c). MCM Br. at 16. Maple Creek cites no law in support of this extraordinary request, and we are aware of none. We are thus left to review the judge's findings regarding their individual liability under the substantial evidence standard.

1. Steve Brown

In concluding that Steve Brown was individually liable for the section 75.380(d)(1) violation, the judge relied on Brown's familiarity with the conditions of the escapeway during the 10 days preceding the issuance of the withdrawal order. 26 FMSHRC at 551-52. The judge found that Brown was well aware of the conditions, yet failed to take expeditious, effective remedial action to protect the safety of miners who traveled through the primary escapeway daily, as well as those miners who would have to evacuate the mine in an emergency. *Id*. There is substantial record evidence to support the judge's conclusion. As 4 West section coordinator, Brown oversaw operations on the section, including the pumping operations and maintenance of the pumps. Tr. 378, 391-93, 538-39. Brown traveled with the state inspector who issued the compliance order on July 30, and was responsible for abating that order. Tr. 535-36. Brown walked the section at least once a day, including the cow path, conducted some of the preshift examinations of the section, and reviewed the preshift and construction logs. Tr. 482-84, 553-54.

Most importantly, and as the judge found, Brown was aware that the pumping he was responsible for overseeing was ineffective in removing the muck. 26 FMSHRC at 552. Inspector Dickey explained that the pumps Maple Creek was using, because they were air pumps, were incapable of removing muck and mud, so that the use of the pumps would not have changed his designation of the violation as unwarrantable. Tr. 325-26. Brown conceded that while the air pumps were sufficient to remove water, they could not remove muck. Tr. 402, 408, 480-81. Moreover, Brown explained that scoops running by the pumps would create the muck which

would clog the pumps, and in some instances, as happened during the time in question, run into a pump and put it out of service. Tr. 393, 407, 414, 415, 481-82, 493. This was a serious problem, since the pumping system Maple Creek was using for the escapeway was interconnected, so that when one pump shut down the other pumps in the system would also shut down. Tr. 389-90, 411-12, 513, 555.

Brown nevertheless did not think additional steps were necessary to deal with the expanding accumulation of water in the area in question. Tr. 507-08, 537-38, 553-54, 561-62, 564-65. Because the evidence is overwhelmingly to the contrary, and because Brown was in a position to protect employee safety yet failed to act on the basis of information that gave him reason to know that the escapeway's condition violated the standard, we affirm the judge's finding that Brown should be held liable under section 110(c) for the section 75.380(d)(1) violation.

2. Alvy Walker and Greg Miller

Alvy Walker was a day shift section foreman, and Greg Miller was a midnight shift section foreman. 26 FMSHRC at 552. Their crews passed through the area in question on the way to the face. *Id*. at 552-53. Each was also occasionally responsible for conducting a preshift examination that included the area in question. *Id*; Gov't Ex. 8. The judge held each liable for the section 75.380(d)(1) violation because each knew of the violative conditions and failed to take effective remedial action to address the water accumulation problem. 26 FMSHRC at 552-53.

A review of the record indicates a lack of evidence regarding the judge's findings that Alvy Walker and Miller engaged in aggravated conduct that is more than ordinary negligence. *Compare Austin Powder Co.*, 21 FMSHRC 18, 26-27 (Jan. 1999) (affirming section 110(c) finding where foreman was standing near miners who lacked the fall protection they should have been wearing). As Brown explained, the primary responsibilities of Alvy Walker and Miller were at the face, so that is where they spent as much of their time as possible. Tr. 474. If they were having any problems in their section or in getting to their section, they would report it to Brown. Tr. 539. There is no allegation that they withheld information from Brown or that they otherwise kept Maple Creek management in the dark regarding the conditions of the escapeway during the time in question. In fact, the preshift reports show that both reported the water accumulations. Gov't Ex. 8 at 17, 40.

As was established by more than one witness at the hearing, different outby foremen were responsible for dealing with areas outby the face, including the water problem. One foreman, along with his two-man crew, did nothing but work on the lines and pumps designed to remove the water. Tr. 392-93, 413-17, 474, 640, 680, 725. However, Miller explained:

> I was not assigned specifically on the outby area. I was strictly assigned to the face boss. At that particular time due to the length of travel, the nature of the

> water we had in that area, we had outby foremen and people assigned to maintain the pumps. That wouldn't have been my specific job to know anything about it or to do anything about it as far as being assigned by the company to direct out a work order to get this taken care of.

Tr. 724-25.[8]

We agree with the judge that Brown is liable under section 110(c) for the section 75.380(d)(1) violation, because the water accumulation was expanding while the same ineffective pumping system was being used under Brown's direction. The same rationale does not apply to Alvy Walker and Miller, however. While the two face foremen may have had views similar to Brown regarding the point at which the water accumulation would become a hazard, that does not establish that either possessed the power to take remedial action to eliminate the potential escapeway hazard involved here, i.e., neither was authorized to redesign the pumping system or to construct an alternative walkway. The two foremen had taken certain actions to address the problem of excess water in the escapeway such as consistently reporting the water accumulations and (in the case of Walker) sending two miners to repair a malfunctioning pump. Tr. 623-24, 650-51; Gov't Ex. 8 at 17, 40. On balance, we conclude that the two foremen's lack of authority to take necessary remedial action is a significant factor in this case and that their failure to take further action under these circumstances did not constitute aggravated conduct that amounts to more than ordinary negligence under section 110(c).[9]

Moreover, the Secretary made no attempt at the hearing to establish the actions of Alvy Walker and Miller that were lacking, and her trial brief is entirely silent on this point. *See* Sec'y's Proposed Findings of Fact, Conclusions of Law, and Supporting Memorandum at 25-27.

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[8] Brown did state that all foremen, when they passed by pumps during their travels through the section, were expected to check whether the pumps were working. Tr. 393, 417-18. However, there was no evidence presented that either Alvy Walker or Miller failed to do so. Indeed, when Alvy Walker learned of a pump down on his way to the face on August 9, he sent two men from his crew to try to repair it once they had retrieved their tools from the face area. Tr. 623-24, 650-51.

[9] We disagree with Commissioner Jordan, who in her dissent suggests that we have changed the standard that guides imposition of liability under section 110(c). Slip op. at 17-18. Contrary to her statement, in determining whether a corporate agent has engaged in aggravated conduct under section 110(c), the Commission has examined the agent's authority to take remedial action in the face of unsafe conditions. *E.g.*, *Kenny Richardson*, 3 FMSHRC at 17 ("Richardson, in view of his position as day shift master mechanic with general supervisory authority over the dragline, . . . should have removed it from service."). Nothing in *Kenny Richardson* nor any other Commission decision requires that, to avoid section 110(c) liability, Alvy Walker and Miller had to do more to eliminate the hazard where they lacked authority to do so.

This is a fatal flaw, given that the Secretary has the burden of proof, including proof that the conduct at issue was aggravated. *See Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987) (in an enforcement action before Commission, Secretary bears burden of proving any alleged violation); *Peabody Coal Co.*, 18 FMSHRC 494, 498 (Apr. 1996) (Secretary bears burden of proving conduct is unwarrantable). Given the lack of any evidence on this prerequisite to a finding of individual liability, we reverse the judge's section 110(c) determinations with respect to foremen Alvy Walker and Greg Miller.

III.

Conclusion

For the foregoing reasons we affirm the judge's determinations that Maple Creek violated section 75.380(d)(1), that the violation was S&S, that the violation was due to Maple Creek's unwarrantable failure, and that Steve Brown was liable for the violation under section 110(c). We reverse the judge's determinations that Alvy Walker and Greg Miller were liable for the violations under section 110(c).

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Michael F. Duffy, Chairman

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Michael G. Young, Commissioner

Commissioner Jordan, concurring and dissenting:

I agree with my colleagues in the majority that Maple Creek violated section 30 C.F.R. § 75.380(d)(1), that the violation was significant and substantial and constituted an unwarrantable failure, and that Steve Brown is liable for the violation under 110(c) of the Mine Act, 30 U.S.C. § 820(c). However, I disagree with their conclusion that Alvy Walker and Greg Miller are not individually liable.

The judge held that Walker and Miller were liable under section 110(c) of the Mine Act, finding that they knew of the violative condition and that their failure to take effective remedial action constituted aggravated conduct. 26 FMSHRC 539, 552-53 (June 2004) (ALJ). We review her findings by applying 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)). My review of the record evidence leads me to conclude that the judge's finding that Walker and Miller engaged in aggravated misconduct was eminently reasonable.

Neither my colleagues nor the operator dispute that Walker and Miller were "corporate agents" of Maple Creek, an initial prerequisite for section 110(c) liability. 30 U.S.C. § 820(c). Furthermore, the majority does not challenge the judge's finding that Walker and Miller had knowledge of the violative condition, yet refused to consider the high water level to be hazardous. 26 FMSHRC at 552-53. There is ample record evidence, including his own admission, that Walker had received complaints from miners about the water problem. Tr. 104, 134-35, 157, 645-46. Nonetheless, he testified repeatedly that the water was not a hazard, Tr. 631, 639, and although the water conditions were characterized by the inspector as having the consistency of "pig slop," Tr. 243, Walker contended that muck was only a hazard if a miner could not move his or her legs through it. Tr. 635. Miller, who traveled through the primary escapeway daily, Tr. 696, also asserted that the water was not a hazard, Tr. 670-71, and that it would have to have been at "roof depth" before he would not have been able to get through it "for survival." Tr. 690-91.

In spite of the unassailable evidence demonstrating Walker's and Miller's knowledge of the water accumulation and their cavalier attitude regarding it, the majority reverses the judge's finding of liability, concluding that there was insufficient record evidence showing that Walker and Miller "possessed the power to take remedial action." Slip op. at 15. I find it significant that this claim was never raised by Walker or Miller as a defense to the section 110(c) charges, and that the majority cites not one Commission case declining to find 110(c) liability on this basis. *Cf. BethEnergy Mines, Inc.*, 14 FMSHRC 1232 (Aug. 1992) (finding shift foreman liable under section 110(c) because he was aware of hazardous conditions even though the shift foreman was carrying out instructions of his superiors). This is a subtle, yet meaningful, sleight-of-hand transformation of the longstanding section 110(c) case precedent that to establish the liability of an individual who fails to act, he or she must simply be "in a position to protect employee safety

and health," *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983), which does not necessarily require the authority to make extensive structural changes, contrary to the majority's suggestion. Slip op. at 15.

In fact, Walker testified that he could have protected his miners from the danger of the high water level and mucky mine floor — had he acknowledged that these conditions posed a hazard:

> Q. Now, Mr. Walker, if you came across an area that your crew would have to go through and you considered it perhaps to be somewhat hazardous for them to go through, as the shift foreman, would you have the right to say, I'm not going to take my crew through here, I'm going to take them somewhere else.
>
> . . . .
>
> A. Certainly. That's my discretion.

Tr. 646. Nonetheless, the record indicates that he took his crew through the rising water of the primary escapeway every day.

Contrary to the majority's conclusion that Walker did not possess "the power to take remedial action," slip op. at 15, the record reflects (and the operator's arguments emphasize) that he did. As the majority acknowledges, slip op. at 15 n.8, Walker testified that he sent two men from his crew to try to repair a broken pump:

> There were three pumps in that area. I physically saw water seeping through from the return area into this track area. I did not want that to compound the problem in this hole so I sent them [the men] back immediately to take care of this situation and let me know immediately what they needed, if they needed additional parts. . . . I wanted to get someone on this situation right away, so I sent my people back at that point.

Tr. 650-52. This is not the testimony of a foreman incapable of taking steps to protect his crew from the water accumulation problem at this mine, as my colleagues' opinion would suggest.

There is also record evidence that under the Commission's traditional section 110(c) standard requiring that the individual be "in a position to protect employee safety and health," Miller is liable under section 110(c). When asked at trial what he would have done if he thought the conditions in the escapeway constituted a hazard, he testified that "I wouldn't stick my crew through there and I would have notified my immediate foreman which would have been the shift

boss on that particular shift." Tr. 673-74. Nothing in the record indicates that he took either action.

Furthermore, the judge found Miller liable based in part on the fact that "[i]n terminating the Compliance Order, Inspector Walker lists Brown and Miller as having reported that the water had been pumped off the section, although Miller did not recall making such report." 26 FMSHRC at 552 (citing Gov't Ex. 1 & Tr. 722-23). And indeed, Miller indicated at trial that he could have taken steps to remedy the water situation if he believed the mine was not obeying the state compliance order:

> Q. Did you feel you had — you were out of compliance with this compliance order?
>
> A. If I had I would have took immediate action. What I'm saying is I don't know the depth, I didn't measure it, that's number one.

Tr. 713.

Perhaps most persuasive is Miller's own admission that he was in part responsible for the elevated water level:

> [Q. Judge Bulluck:] In terms of your being responsible for this condition, do I understand from your testimony that you're saying if there was some violation that it wasn't your responsibility?
>
> A. No ma'am. I'm just one of many. . . . I in no way imagine take away any obligation on my part. I'm in it with everybody else. That's the way it has to be. . . . .

Tr. 729-30.

Notably, Maple Creek, in its brief, argues vigorously that Walker and Miller were significantly engaged in the efforts to ameliorate the water level. Indeed, the operator states that they "had been actively involved in the substantial efforts taken by Maple Creek to address the water condition in the cited area. These facts are uncontroverted." MCM Br. at 15. The operator also contends that "the undisputed evidence presented was that all three of these men [Brown, Walker, and Miller] were addressing the water condition, as each had been actively involved in the substantial efforts taken by Maple Creek to address the water." MCM Reply Br. at 7 (emphasis in original). These assertions make it difficult for me to adopt the majority's view that it was questionable whether Walker and Miller "possessed the power to take remedial action." Slip op. at 15.

For the foregoing reasons, I would affirm the section 110(c) violations of Walker and Miller, and therefore respectfully dissent from the majority's ruling reversing the judge's finding of liability against them.

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Mary Lu Jordan, Commissioner

Commissioner Suboleski, concurring and dissenting:

I agree with the majority regarding the merits of the violation and that the violation was significant and substantial. I also agree with the majority's disposition of the section 110(c) liability of Alvy Walker and Gregg Miller. However, I disagree with the majority and the administrative law judge that Maple Creek's violation of the regulation was a result of its unwarrantable failure. I believe that the judge failed to fully consider the facts leading up to the August 9 citation and order,[1] as well as mitigating circumstances surrounding the violation. For this reason, I would remand the unwarrantability determination to the judge for further consideration.

It is undisputed that Maple Creek is a wet mine with depressions frequently filling up with water. 26 FMSHRC 539, 541 (June 2004) (ALJ). As the judge found, Maple Creek had an extensive pumping system in place at the mine, pumping out between 1.2 to 2 million gallons of water daily.[2] *Id.* Clearly, this was an operator that could not ignore the problem of water in its mine if it intended to produce coal. The parties stipulated that water was in the intake escapeway of the 4 West section in varied depths on August 9, 2001, and had been there for approximately 2 weeks previously. *Id*. And the Commission has concluded that the water was of sufficient depth that it affirmed the citation for violating 30 C.F.R. § 75.380(d)(1), which requires that escapeways be maintained in safe condition, that was issued on August 9. I fully concur in that determination and that the violation was S&S.

The judge's unwarrantability determination is premised on Maple Creek's actions in response to the state compliance order that issued on July 30. I believe that the judge ignored or did not sufficiently consider largely undisputed testimony concerning Maple Creek's efforts to combat the wet conditions in the 4 West section following the July 30 order. In this regard, foreman Steve Brown testified that he brought in four pumps to the 4 West section to address the water accumulation that had been cited by the state inspector. Tr. 390-91. Maple Creek's actions appear to have been productive as evidenced by inspections of the area between August

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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)). 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 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

[2] The fact that Maple Creek's pumping system removed this amount of water from a wet mine belies the judge's description of Maple Creek's pumping system between July 30 and August 9 as "woefully ineffective." 26 FMSHRC at 550.

1and 7. Tr. 578-81; Gov't Ex. 8. A foreman and a crew of two miners were responsible for maintaining pumps in the 4 West section and worked in this area on the shift preceding the August 9 order. Tr. 415-17.

While miner testimony established that they generally used the "cow path" adjacent to the ribs to avoid the deepest water, this alone does not establish that the water level in the escapeway was consistently high throughout the period after July 30. Unlike the judge, I do find an inherent inconsistency between the preshift log and the miner testimony regarding conditions in the escapeway.[3] While miner complaints about the condition of the escapeway continued after the July 30 order, this is not inconsistent with the presence of residual water and muck that could not be pumped out, despite Maple Creek's good faith efforts.[4] Moreover, it is not apparent that miner grumbling about conditions in the escapeway resulted in either formalized complaints to MSHA or to Maple Creek under the collective bargaining agreement.

In discrediting evidence from Maple Creek regarding water in the escapeway, the judge relied heavily on the operator's witnesses' referring to it as a "condition," rather than as a problem or hazard. It appears to me that the reference to the water as a "condition" by all of Maple Creek's witnesses was a product of over zealous preparation for trial. Nevertheless, for whatever the reason the term was used, I cannot conclude that it is a reasonable or logical factual basis upon which to premise a credibility resolution. *See Consolidation Coal Co.*, 11 FMSHRC 966, 974 (June 1989) (the Commission will not affirm credibility determinations if there is dubious evidence to support them). Whether the water in the escapeway was viewed as a

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[3] The judge's characterization of the log as reflecting "scattered notations of water accumulation" indicates a fundamental misunderstanding of the log. The log shows a consistent pattern of reporting the presence or absence of water, and a pattern that shows improved conditions in the escapeway following July 30, including 15 consecutive shifts with no reports of water accumulations in the escapeway. *See* Gov't Ex. 8. The breakdown of two pumps just prior to the August 9 mine inspection coincided with the reappearance of water in sufficient depths to again appear in the preshift log. *Id*. For this reason alone, I would remand this case to the judge to reexamine the evidence regarding unwarrantability.

[4] The testimony of the hourly workers can be reconciled with the preshift records. The water level could be pumped down without the mud drying up – i.e., without changing appearance much. In the darkness, walking along the "cow path," the miners would not be looking over the entire entry; they would be concentrating only on their next step. The testimony is that the water extended rib-to-rib for about half the distance at the time of the violation. Whether they would be walking one-fourth of the distance or one-half of the distance in water, and what the depth of that water was, would not be readily memorable months or years later to those who traveled every day – they recall only walking in and out of water and alongside muck. Indeed, the miners' (and foreman Walker's) testimony that it was much the same everyday contradicts the record that it was twice as long on August 9 as it was on July 30 – evidence of the unreliability of years-old memory.

"condition" or a "problem," it is apparent from the record that Maple Creek had dedicated pumps and personnel to removing the water from the area, and I conclude that the judge inadequately weighed that evidence in making her unwarrantability determination.[5] *Compare Eagle Energy, Inc.*, 23 FMSHRC 829, 836 (Aug. 2001) ("Despite the chronic water accumulation problems in the escapeway, the operator made no attempt to abate accumulations in the escapeway.").

In addition to the foregoing, it is not apparent that the judge sufficiently considered mitigating circumstances, as well as aggravating factors, that indicated Maple Creek was making a good faith effort to minimize the water accumulation in the escapeway. *See id.* at 834-40. The events that aggravated the water accumulation in the escapeway and preceded the citation and order on August 9 were the collision of a scoop with one pump and the breakdown of a second pump, which needed a new diaphragm. Tr. 407-14, 500. The nearest replacement pump was some 15 miles away. Tr. 412. Thus, at the time the inspector observed the escapeway, no pumps were running and water was seeping into the area. Tr. 499-500, 650. Maple Creek took immediate steps to repair the broken pump. Tr. 648-50.

In addition to the efforts of Maple Creek to address the extraordinary events in the escapeway on August 9, uncontradicted testimony in the record also shows that Maple Creek foremen were aware of the presence of a nearby, alternate escapeway as a means of avoiding the water in the primary escapeway. Tr. 454, 506-07, 631, 735. While this mitigating factor does not affect the violation itself, it weighs on the determination of indifference and serious lack of reasonable care and whether this violation involves ordinary negligence or aggravated misconduct. *See Florence Mining Co.*, 11 FMSHRC 747, 753-54 (May 1989).

In sum, I would remand this proceeding to the judge for further consideration of whether the violation was due to Maple Creek's unwarrantable failure.

While I agree with the majority of my colleagues regarding the dismissal of section 110(c) charges against Alvy Walker and Greg Miller, I disagree with the affirmation of the judge's determination of section 110(c) liability against section coordinator Steve Brown. For

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[5] The majority asserts that it is harmless error for the judge to have misconstrued the preshift reports that, when properly read, indicate that the water in the entry was pumped down during the period between the state citation and the citation at issue. However, the failure to abate the state order and the truthfulness of the report to the state inspector are at the heart of the lengthy MSHA investigation into what would otherwise have been a routine, low-risk-of-injury violation. The preshift reports, as the only contemporaneous, official, written record, go to the heart of the issues at hand here – and essentially refute them. The judge's error in misconstruing them is not harmless, given her conclusion that "Maple Creek's actions to [fail to] abate" the earlier state order constitute an unwarrantable failure to comply. 26 FMSHRC at 551. I believe that a clear understanding of these reports would allow the judge to properly decide whether this is a case of aggravated misconduct and callous disregard, or simply a case of two malfunctioning pumps and scoop problems foiling a good-faith effort by Maple Creek to comply.

reasons similar to my conclusion regarding the need to remand the judge's unwarrantable failure determination, I am compelled to conclude that the judge must reconsider her conclusion regarding Brown's liability.

The judge's determination with regard to Brown was premised on her finding that, after the state compliance order, he failed "to take expeditious, effective remedial action to protect the safety of miners who traveled daily through the primary escapeway, as well [as] those miners who would have to evacuate the mine in an emergency." 26 FMSHRC at 552. The judge concluded that Brown's conduct "amounted to an aggravated lack of care that was more than ordinary negligence." *Id*.

As I have noted above, slip op. at 21, the judge ignored undisputed testimony regarding Maple Creek's actions directly in response to the July 30 order. Brown was instrumental in setting up the four pumps in the 4 West section that led to the apparent improvement in conditions in the section up until August 9. *Id.* This response to the water accumulation problem in the section stands in marked contrast to the inaction of officers or agents that has characterized Commission decisions finding section 110(c) liability. *Compare Sunny Ridge Mining Co.*, 19 FMSHRC 254, 274 (Feb. 1997) (company president was aware of violations but failed to take any measure to correct them); *Prabhu Deshetty*, 16 FMSHRC 1046, 1051 (May 1994) (mine foreman was aware of ongoing accumulation problem but failed to take measures to remedy the problem). The events that led to the water accumulation on August 9 were not due to Brown's inaction, let alone an aggravated lack of care. Rather, the immediate cause of the water accumulation problem on August 9 was due to the breakdown of two of the four pumps, which caused all pumping to cease. In light of these extenuating factual circumstances, I would ask the judge to further consider whether Brown knowingly violated section 75.380(d)(1).

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Stanley C. Suboleski, Commissioner

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