FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 30, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) and	:	
UNITED MINE WORKERS OF AMERICA	:	Docket No. SE 2003-160
v.	:	
JIM WALTER RESOURCES, INC.	:	

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

DECISION

BY THE COMMISSION:

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act" or "Act"), was brought by the Secretary of Labor against Jim Walter Resources, Inc. ("JWR"). This proceeding followed an extensive investigation into two explosions that occurred on September 23, 2001, at JWR's No. 5 Mine in Tuscaloosa County, Alabama, resulting in the deaths of 13 miners and injuries to several others. The Department of Labor's Mine Safety and Health Administration ("MSHA") issued two citations and six orders for violations of mandatory safety standards. All of the eight violations were alleged to be significant and substantial ("S&S"), and seven of the violations were alleged to be due to JWR's unwarrantable failure to comply with the applicable standard. The Secretary proposed penalties totaling $435,000.

The case was assigned to Administrative Law Judge David Barbour. The United Mine Workers of America (UMWA), which represents JWR miners, intervened in the proceeding. The parties engaged in extensive pretrial discovery. Prior to trial, JWR filed a motion for summary decision, which was denied. 26 FMSHRC 623 (July 2004) (ALJ). The judge presided over a 24-day trial during which 65 witnesses testified, and 396 exhibits were admitted into evidence. Thereafter, the judge issued a decision, 27 FMSHRC 757 (Nov. 2005) (ALJ), in which

he dismissed six of the eight violations and affirmed, but modified, the remaining two orders. The judge's dismissal and modification of the citations and orders resulted in a reduction in the proposed penalties to $3,000.

Both the Secretary and JWR filed petitions for review with the Commission. The Secretary sought review of: (1) the judge's dismissal of the order alleging a violation of 30 C.F.R. § 75.1101-23(a) for JWR's failure to evacuate miners after the first explosion; (2) the judge's rejection of the S&S designation of the order charging a violation of section 30 C.F.R. § 75.1101-23(c) for JWR's failure to conduct fire drills; and (3) the judge's reduction of penalties for the two violations that he found. The Secretary did not seek review of the judge's dismissal of violations relating to inadequate roof support and inadequate rock dusting, both of which were alleged to have led directly to the deaths of the 13 miners.

JWR sought review of: (1) the judge's determination that JWR violated the fire drill requirement in section 75.1101-23(c); (2) the judge's determination that JWR violated section 30 C.F.R. § 75.360(b)(3) by failing to conduct a preshift examination in an area of the mine where work was scheduled; and (3) the judge's determination that the violation of the preshift examination requirement was S&S and due to JWR's unwarrantable failure. The Commission granted both the Secretary's and JWR's petitions for review.

For the reasons that follow, the judge's decision on the violations and associated special findings on review is affirmed. However, we vacate his decision with regard to the penalties imposed as a result of the two violations found and remand for further explanation.

I.

Factual and Procedural Background

The No. 5 Mine ("the mine"), located approximately two miles north of Brookwood, Alabama, is one of several underground bituminous coal mines JWR operates in that area. 27 FMSHRC at 758; Gov't Ex. 10 (MSHA Investigation Report) at 2. In 2001, before the explosions, the mine was producing slightly more than 500,000 tons of coal per quarter and employed 318 contract miners and 70 salaried miners. *Id*. Miners worked on three shifts: (1) the 11:00 p.m. to 7:00 a.m. midnight shift; (2) the 7:00 a.m. to 3:00 p.m. day shift; and (3) the 3:00 p.m. to 11:00 p.m. afternoon or evening shift. 27 FMSHRC at 760 n.5; Tr. III 380.

JWR mined the No. 5 Mine using a single longwall for most coal removal. 27 FMSHRC at 758-59. The longwall began producing coal on the H panel approximately a week before the accident. Gov't Ex. 10 at 2. To develop longwall panels, JWR used continuous mining machines, and in September 2001 the development units were the Nos. 4 and 6 Sections. 27 FMSHRC at 759; Gov't Ex. 10 at 2. Coal was mined from the Blue Creek Seam, an extremely soft seam that tends to liberate high quantities of methane. 27 FMSHRC at 759. As a result, the mine is considered to be very gassy. *Id*.

During the day shift on Friday, September 21, water was observed coming from the roof in the No. 4 Section near Survey Station ("SS") No. 13333, which was located three crosscuts outby the face. *Id*. at 760; Gov't Ex. 10 at 4. Supplemental roof support was added there. *Id*. On the following shift, power was advanced and the belt was moved up to the second crosscut outby the face. *Id*. At that time, the scoop battery charging station was moved up to the third crosscut outby the face, adjacent to the SS 13333 intersection. *Id*.

Mining resumed for the next two shifts (September 22 midnight and day), and water was again observed dripping at the SS 13333 intersection. *Id.* Coal was not mined during the following two shifts — the September 22 afternoon maintenance shift and the September 23 midnight shift. 27 FMSHRC at 760-61; Gov't Ex. 10 at 4. The mine foremen did not detect any deterioration in roof conditions on those shifts. *Id*.

A. September 23 Midnight and Day Shifts

Albert "Jack" Dye, Jr., was assigned to conduct the preshift examination of the No. 4 Section for the incoming September 23 day shift. *Id*. at 761. Dye's supervisor that night was Randy Hagood. *Id*. at 806. Because of a fan check, Dye could not go underground during his shift at first, but he nevertheless began his preshift examination by 4:00 a.m. *Id*.; Tr. III 447.

Dye was to examine, among other areas of the mine, the Nos. 4 and 6 Sections. Tr. III 382-83. According to Dye, when he asked Hagood whether he should completely examine those sections, Hagood told him to examine the electrical installations, which included power centers and scoop chargers. 27 FMSHRC at 806; Tr. III 383-84. Consequently, Dye's examination terminated at the power center on each section, and he did not examine the face of either section. 27 FMSHRC at 806; Tr. III 384-90, 395; Gov't Ex. 83-C. Dye did not examine further because, with the power remaining off after the fan check, no work could occur inby the power centers on the next shift until power was restored. 27 FMSHRC at 806; Tr. III 384, 447-49, 486-88. When he went underground, Dye believed that no one would be working on the No. 4 Section during the shift. 27 FMSHRC at 806. Upon exiting the mine around 6:30 a.m., Dye completed his written preshift report, which indicated that no hazards were found in the areas examined, including the power center and scoop battery charger on the No. 4 Section. *Id*.; Gov't Ex. 36-C.

No production was scheduled for the Nos. 4 and 6 Sections on the oncoming day shift, but miners were to perform general maintenance work there. 27 FMSHRC at 806; Gov't Ex. 10 at 5; Tr. IV 127. Upon his arrival at the mine, maintenance foreman John Puckett checked Dye's preshift report and learned that Dye had not examined beyond the power center on the No. 4 Section. 27 FMSHRC at 806 & n.56; Tr. IV 126-27, 131-32, 195.

There were eight men working under Puckett during that day shift. Electricians Ray Milam and Don Coleman were to work on the No. 6 Section, while electricians Jeff Gerald and Ike Smith would work on the No. 4 Section, along with roof bolters David Terry and Johnny Sealy. Tr. IV 132-33. Also on the crew were scoop operator Larry Jessee and general laborer

Joe Phillips. Tr. IV 133. While Jessee and Phillips went to retrieve roof bolts they would deliver to the No. 4 Section, Puckett took the other six men on a man trip to the No. 4 Section. Tr. IV 134-35. Milam and Coleman waited on the bus while Puckett took the other four crew members to the power center, where he had them wait at a nearby dinner hole while he examined the face area of the No. 4 Section. Tr. IV 135-36.

Puckett considered the inspection to be both a supplemental preshift examination to Dye's examination, as well as an onshift examination. 27 FMSHRC at 807 n.57; Tr. IV 162-66, 202-06. When Puckett called to report the results of his inspection, those results were recorded only as an onshift examination. 27 FMSHRC at 807 n.57; Tr. IV 231; JWR Ex. 111.

Because power had not yet returned to the No. 4 Section, Puckett, upon completing his examination, directed the two electricians to make repairs on a continuous miner and told the two roof bolters to move supplies up from an outby supply hole. Tr. IV 206.[1] Puckett thereafter left the No. 4 Section for the No. 6 Section with the two other electricians, and conducted a similar examination there. Tr. IV 206-09. The maintenance work on the No. 6 Section occupied Puckett until he performed a preshift examination of the No. 6 Section for the oncoming shift and then returned to the No. 4 Section to examine it. Tr. IV 209-29. During his examination of the No. 4 Section, Puckett noticed that the roof problem was getting worse, so plans were made for greater roof control measures to be taken on the next shift before mining resumed. 27 FMSHRC at 761-62; Tr. IV 227-29; Gov't Ex. 10 at 5-6.

B. September 23 Afternoon Shift

At the start of the September 23 afternoon shift, around 3:00 p.m., 28 hourly miners and four supervisors went underground for a shift devoted to maintenance work. 27 FMSHRC at 762; Gov't Ex. 10 at 6. One production foreman for the shift was to supervise work in and around the longwall, while the other, Tony Key, was responsible for supervising the Nos. 4 and 6 Sections. 27 FMSHRC at 762; Gov't Ex. 10 at 6. Also underground were a belt foreman and outby foreman Dave Blevins. 27 FMSHRC at 762 & n.6; Gov't Ex. 10 at 6. The Communications Officer ("CO") at the mine, Harry House, supervised the communications room on the mine's surface for the 12-hour period that would begin around 5:00 p.m. Tr. V 337; Gov't Ex. 10 at 6.

When Key and members of his crew arrived shortly after 4:00 p.m. at the No. 4 Section, it was apparent that the roof problems Key had been alerted to earlier by Puckett's preshift exam were getting even worse. 27 FMSHRC at 762-63; Gov't Ex. 10 at 7. After some preparatory work, Key and two miners, Gaston "Junior" Adams and Michael McIe, began to build cribs in the No. 2 entry, starting about 50 feet outby the SS 13333 intersection where the roof was

[1] Electrical power did not return to the section during the shift to allow work to be done at the face. As a result, the alternative assignments occupied the miners on the No. 4 Section for almost the entire shift. Tr. IV 206-07; Gov't Ex. 10 at 5.

deteriorating, while another crew member, motorman Jim "Skip" Palmer, delivered the supplies they needed. 27 FMSHRC at 763; Gov't Ex. 10 at 8-9. Before that work progressed very far, however, a large rock fell, and then the entire roof in that intersection collapsed. 27 FMSHRC at 763; Gov't Ex. 10 at 8. A scoop battery, which was hung from roof bolts and connected to the battery charger by cables that were not energized, was in the area where the roof collapsed. 27 FMSHRC at 763; Gov't Ex. 10 at 7-8.

With Adams and McIe nearby, Key started walking outby the fall. 27 FMSHRC at 763; Gov't Ex. 10 at 8. He intended to de-energize the section and to telephone a report of the fall to the communications room so that MSHA could be contacted, when the first explosion occurred at around 5:20 p.m. *Id.* This detonation blew Key, McIe, and Palmer, who was at the end of the track, further outby, while Adams was pinned under debris. 27 FMSHRC at 763-64; Gov't Ex. 10 at 8-9. Key's back was injured while McIe suffered from burns and back and rib injuries. 27 FMSHRC at 763; Gov't Ex. 10 at 8. Key, McIe, and Adams were separated by the explosion, and had a hard time seeing each other in the dusty atmosphere, especially given that Key and McIe had lost their hard hats and lamps. 27 FMSHRC at 764; Gov't Ex. 10 at 9. After McIe took Adams' hat and lamp, Key found McIe. *Id*. The two concluded that Adams could not be moved because of his injuries, and they began their journey out of the mine. *Id*. Many of the other miners underground felt effects from the explosion immediately or soon thereafter. 27 FMSHRC at 764; Gov't Ex. 10 at 9-10.

As a result of ventilation disruptions caused by the first explosion, another, much larger explosion occurred approximately 55 minutes later. 27 FMSHRC at 769 & n.14; Gov't Ex. 10 at 16. As set forth in great detail in the judge's decision, the 12 miners who, in addition to Adams, perished in the second explosion had come from other areas of the mine and entered or approached the No. 4 Section. Most if not all of the 12 miners were responding to assist in bringing Adams out after learning of his situation from Key and the other injured members of his crew, or from communications with CO House (after he had spoken with Key). In addition, some of the miners may have believed that miners other than Adams needed assistance, and some may have believed there was a fire that needed to be extinguished. *See* 27 FMSHRC at 764-70; *see also* Gov't Ex. 10 at 9-17.

C. Rescue and Recovery Operations and Subsequent Investigation

After it was determined that 13 miners were missing, extensive rescue efforts were undertaken by three mine rescue teams. 27 FMSHRC at 770-71; Gov't Ex. 10 at 17-20. Four miners were found in the 4 East Section, three of whom were dead and a fourth who died the next day. 27 FMSHRC at 771; Gov't Ex. 10 at 18-19. The rescue team's findings regarding the damage and conditions in the No. 4 Section led to the conclusion that no other miners could have survived. 27 FMSHRC at 771; Gov't Ex. 10 at 20. The mine was flooded in order to put out a fire, and in early November 2001 a team was able to locate and recover the bodies of Adams and eight other miners near SS 13333. 27 FMSHRC at 771-72; Gov't Ex. 10 at 20-21.

Following its investigation into the explosions at the No. 5 Mine, MSHA issued eight citations and orders in this proceeding. As noted, only three of these orders are presently before the Commission.

Order No. 7328082 charges JWR with violating section 75.1101-23(a) for failing to follow, after the first explosion, the evacuation procedures in its "Fire Fighting and Evacuation Plan," dated July 15, 1999 (Gov't Ex. 34 at 2-7, hereafter "FFEP"). The violation was alleged to be S&S and due to JWR's unwarrantable failure. Gov't Ex. 2.

Order No. 7328085 charges JWR with violating section 75.1101-23(c) by failing to conduct fire drills at 90-day intervals for all miners. The violation was alleged to be S&S and due to JWR's unwarrantable failure. Gov't Exs. 4, 4A.

Order No. 7328105 charges a violation of section 75.360(b)(3) because JWR improperly limited the September 23 preshift examination of the No. 4 Section, prior to the oncoming day shift, to areas from the beginning of the section up to and including the power center, and excluded the areas inby the power center, *e.g.*, the working section, where work was scheduled. The violation was alleged to be S&S and caused by JWR's unwarrantable failure. Gov't Ex. 7 at 1.[2]

D. Judge's Decision[3]

With regard to Order No. 7328105, the judge found that JWR had scheduled miners to perform maintenance work on the No. 4 Section prior to Dye's preshift examination on September 23. 27 FMSHRC at 808. Based on that finding, the judge concluded that Dye's failure to inspect all areas in the No. 4 Section, including "working places," violated section 75.360(b)(3). *Id.* He further concluded that the violation was S&S, based in part on finding that Puckett and his crew had entered an area in the No. 4 Section that had not been inspected. *Id.* at 809-10. He also concluded that the violation was due to JWR's unwarrantable failure because Puckett took his crew into an area that had not been examined, indicating a serious lack of reasonable care. *Id.* at 811.

In addressing Order No. 7328082, the judge reviewed his prior decision on JWR's motion for summary decision (27 FMSHRC at 623-28), and again concluded that JWR could be cited

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[2] Initially, the order also alleged that during the preshift examination, Dye failed to identify that the section of the mine he inspected was inadequately rock dusted. Gov't Ex. 7 at 2. The judge dismissed that portion of the order, and it has not been appealed.

[3] We describe herein only those portions of the judge's decision that are before us on appeal. We do not attempt to summarize the judge's analysis of his dismissal of the alleged violations relating to inadequate roof support and rock dusting because that analysis has no bearing on the issues presently before the Commission.

under section 75.1101-23(a) because the standard applied to explosion-related emergencies. 27 FMSHRC at 814-15. However, because the standard was not restricted to fires, the judge then examined the applicable plan to determine whether it implicitly or explicitly included provisions relating to explosions. *Id.* at 815. On the record before him, the judge concluded that JWR's FFEP applied only to "fires" and, therefore, JWR was not in violation for having failed to follow the evacuation procedure in the FFEP after the first mine explosion. *Id.* at 815-17.

With regard to Order No 7328085, the judge concluded that the language of the governing regulation, section 75.1101-23(c), is clear in requiring that all miners must participate in fire drills at least every 90 days. *Id*. at 819. The judge held that the regulation is also clear in requiring a "simulation" of actions required in an operator's firefighting and evacuation plan. *Id*. The judge further concluded that the record indicated that JWR violated the standard by failing to ensure that all miners had participated in simulated fire drills at least every 90 days. *Id.* at 820-24. The judge determined that the violation was not S&S because JWR regularly instructed its miners in firefighting practices and techniques. *Id.* at 824-25. Finally, the judge rejected the unwarrantability designation because JWR "honestly believed" that it was in compliance with the standard based on the Secretary's previous failure to cite it and its reliance on the Secretary's Program Policy Manual ("PPM"). *Id.* at 826.

II.

Disposition

A. Section 75.1101-23(a)

Order No. 7328082 charged JWR with violating section 75.1101-23(a) after the first explosion by failing to follow the evacuation procedures set forth in the FFEP adopted pursuant to that standard. Gov't Ex. 2. In ruling upon JWR's pre-trial motion for summary decision, the judge held that, as a matter of law, an operator could be cited under section 75.1101-23(a) for failing to comply with its approved fire fighting and evacuation plan in the case of an explosion. 26 FMSHRC at 627-28. In other words, he concluded that the regulation could be interpreted to authorize MSHA to require that operators' plans address explosion-related emergencies as well as fire-related emergencies. *Id*. However, he further ruled that material facts were in dispute and that the Secretary had the burden of showing at trial that JWR had actually contravened the requirements of the FFEP. *Id*. at 628. He did not decide whether the FFEP actually covered explosion-related emergencies. The judge subsequently denied JWR's motion for reconsideration or certification of his ruling to the Commission for interlocutory review. 26 FMSHRC 734 (Aug. 2004) (ALJ). The Commission denied JWR's petition for interlocutory review. 26 FMSHRC 754 (Sept. 2004).

Following the hearing, the judge again denied JWR's request to reconsider his decision, reaffirming his earlier ruling. 27 FMSHRC at 814-15. The judge went on to hold, however, that according to the FFEP's explicit and implicit terms, the only event that would trigger the

evacuation requirements of the plan was a fire that could not "be extinguished or brought under positive control." *Id*. at 815-17 (quoting FFEP, sect. V.a.8). Because the FFEP contained no reference to evacuation in the event of explosion, the judge vacated the order. *Id*. at 816-17, 827.

1. Interpretation of Section 75.1101-23(a)

Before addressing the applicability of the FFEP to evacuations following explosions, we first decide whether the regulation governing the FFEP in this case, section 75.1101-23(a), applies to explosions and, therefore, whether JWR could be cited under the regulation. Based on the language of the regulation and the principles governing mine plans, we conclude that section 75.1101-23(a) did provide general authority for MSHA to require that emergency plans cover explosion-related emergencies. In section A.2, infra, we address the separate question of whether the FFEP did, in fact, cover explosion-related emergencies.

At the time of the explosions, section 75.1101-23(a) provided:

> Each operator of an underground coal mine shall adopt a program for the instruction of all miners in the location and use of fire fighting equipment, location of escapeways, exits, and routes of travel to the surface, and proper evacuation procedures to be followed in the event of an emergency. Such program shall be submitted for approval to [MSHA].
>
> (1) The approved program of instruction shall include a specific fire fighting and evacuation plan designed to acquaint miners on all shifts with procedures for:
>
> (i) Evacuation of all miners not required for fire fighting activities;
>
> (ii) Rapid assembly and transportation of necessary men, fire suppression equipment, and rescue apparatus to the scene of the fire; and,
>
> (iii) Operation of the fire suppression equipment available in the mine.
>
> (2) The approved program of instruction shall be given to all miners annually, and to newly employed miners within six months after the date of employment.

30 C.F.R. § 75.1101-23 (2001).[4]

[4] Initially by emergency temporary standard ("ETS") (*see* 67 Fed. Reg. 76,658 (Dec. 12, 2002)), and later in a final rule (*see* 68 Fed Reg. 53,037 (Sept. 9, 2003)), due in part to the two explosions in this case (68 Fed. Reg. at 53,038), MSHA moved section 75.1101-23 to the renamed "Subpart P–Mine Emergencies." In Subpart P, new 30 C.F.R. § 75.1501 requires operators to designate, for each shift that miners are underground, a responsible person who will

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989). It is only when the meaning is ambiguous that deference to the Secretary's interpretation is accorded. *See Udall v. Tallman*, 380 U.S. 1, 16-17 (1965) (finding that reviewing body must "look to the administrative construction of the regulation if the meaning of the words used is in doubt") (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945)).

JWR contends that section 75.1101-23(a) was directed only at fire-related emergencies, and thus should not be read to extend to explosion-related emergencies. JWR Resp. Br. at 2-9. Here, the judge read the standard's requirement that an operator's fire fighting and evacuation program include instruction in the "proper evacuation procedures to be followed in the event of an *emergency*" to authorize MSHA to require that the program cover not only fire-related emergencies, but responses to other emergency situations as well, such as explosions. 30 C.F.R. § 75.1101-23(a) (2001) (emphasis added); 26 FMSHRC at 626-28; 27 FMSHRC at 814-15.

The language of section 75.1101-23(a) provides MSHA sufficient latitude to require that emergency plans approved under that section address explosion-related emergencies. If MSHA had intended the standard to apply only to fires, MSHA could have easily used the term "a fire" instead of "an emergency." It did not. Given MSHA's use of the broad term "emergency" in section 75.1101-23(a), we reject the argument that the order here should have been vacated on the ground that section 75.1101-23(a) could not apply to explosion-related emergencies.[5] We, therefore, conclude that the regulation, by its terms, applies to all types of emergencies, including those caused by explosions.

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take charge during mine emergencies involving a fire or explosion or gas or water inundation, and obligates that person to initiate and conduct an immediate mine evacuation when such emergencies present an imminent danger to miners. New 30 C.F.R. § 75.1502 amends former section 75.1101-23 by, among other things, adding a requirement that operators adopt and follow a mine emergency and firefighting program.

[5] JWR would also have the Commission read "emergency" in section 75.1101-23(a) to refer to only a fire emergency because the regulation appeared in Subpart L, entitled "Fire Protection," whereas MSHA regulations elsewhere addressed emergency situations in general. JWR Resp. Br. at 3-6. We do not read Subpart L as narrowly as JWR does and further note that the emergency-related regulations JWR cites are located throughout Part 75 and were not confined to any one subpart. Indeed, the Secretary had previously published a description of the regulation as being one that required an operator to "adopt a program for mine evacuation in the event of an emergency, such as fire or *explosion*." 60 Fed. Reg. 23,567 (May 8, 1995) (MSHA Semi-Annual Unified Agenda) (emphasis added).

JWR also contends that Order No. 7328082 was invalid because section 75.1101-23(a) only required that an operator obtain MSHA's approval for a training program covering elements listed in the regulation, which it had done. JWR Resp. Br. at 12-16. According to JWR, section 75.1101-23(a)(2) specifies only when and how often the program of instruction must be given to miners; nothing more was required of JWR, including that it adhere to the program in emergencies. *Id*. at 13, 16. It points out that, in contrast, other MSHA regulations imposing a plan obligation require operators to follow the plan. *Id*. at 17-20 (citing 30 C.F.R. §§ 75.370 (ventilation control), 75.220(a)(1) (roof control), and 71.301(c) (respirable dust control)).

We conclude that JWR's interpretation of section 75.1101-23(a) would contravene the clear Congressional intent that plan provisions be enforced as mandatory standards.[6] JWR's suggestion that all the standard required of it in this instance was to adopt a training plan and provide training with respect to emergency responses, with no obligation whatsoever to follow the plan during a fire or other emergency, is an overly literal construction that is inconsistent with the regulation's purpose. Moreover, the absence of explicit language in section 75.1101-23(a) requiring an operator to follow the plan's provisions does not excuse an operator's failure to do so. In *Ziegler Coal Co. v. Kleppe*, 536 F.2d 398, 409 (D.C. Cir. 1976), a decision cited with approval in the legislative history of the Mine Act, the court held that approved ventilation plans under the Mine Act's precursor, the Federal Coal Mine Health and Safety Act of 1969, are enforceable even though its enforcement provisions were, as a literal matter, triggered only by violations of mandatory standards.

In summary, we conclude that section 75.1101-23(a) provided general authority for MSHA to require that emergency plans approved under that regulation contain provisions

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[6] The legislative history of the Mine Act states:

> [I]n addition to mandatory standards applicable to all operators, *operators are also subject to the requirement set out in the various mine by mine compliance plans required by statute or regulation. The requirements of these plans are enforceable as if they were mandatory standards*. . . . The Committee notes with approval that individual mine plan adoption and implementation procedures have been sustained by the federal Court of Appeals for the District of Columbia circuit (*Ziegler Coal Company v. [Kleppe]*, 536 F.2d 398 (1976)). Thus, the Committee fully expects the individual mine plan technique to continue to be utilized by the Secretary in appropriate circumstances.

S. Rep. No. 95-181 at 25 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 613 (1978) ("*Legis. Hist.*") (emphasis added).

addressing evacuations in case of explosions. Below we address the issue of whether the FFEP approved by MSHA did, in fact, impose evacuation procedures in the case of explosions.

2. Interpretation of the FFEP[7]

The parties agree that the FFEP does not contain a provision that expressly addresses JWR's obligation to evacuate the mine in the event of an explosion. According to the Secretary, she intended under section 75.1101-23(a) that documents such as the FFEP would govern evacuations not just during fires but during any emergency. S. Br. at 10-11. The Secretary argues that JWR, having drafted the plan's provisions and having obtained MSHA's approval pursuant to the terms of the standard, cannot claim that the evacuation provisions do not apply to emergency situations other than fires. *Id*. at 11-12. In essence, the Secretary is requesting the Commission to supply a provision that could have been included in the FFEP but was not.

Commission precedent does not support the Secretary's approach. In *Jim Walter Resources, Inc.*, 9 FMSHRC 903 (May 1987), the Commission addressed the process by which mine plans are adopted by operators and their provisions enforced by the Secretary, including cases in which the plan is ambiguous on an issue. The Commission held that "[i]n an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation. *In plan violation cases the Secretary must establish that the provision allegedly violated is part of the approved and adopted plan* and that the cited condition or practice violates the provision." *Id*. at 907 (emphasis added). The Commission further held that, while "'it should not be presumed lightly that terms [in an approved] plan do not have an agreed upon meaning,'" in the event a plan provision is found to be ambiguous, the Secretary must "dispel the ambiguity" by establishing the intent of the parties on the issue through credible evidence as to the history and purpose of the provision and evidence of consistent enforcement. *Id*. (quoting *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981)).[8]

The Secretary made no attempt below to meet her burden under *JWR* by establishing, through testimony of those involved in drafting and approving the FFEP, the intent of the

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[7] Commissioner Jordan dissents from her colleagues' decision in this part (Sec. II.A.2). *See* slip op. at 32-37.

[8] As an alternative to applying the *JWR* standard of review to the FFEP, the Secretary urges the Commission to defer to any reasonable interpretation she offers of an ambiguous plan or provision of a plan, citing as authority the Commission's decision in *Energy West Mining Co.*, 17 FMSHRC 1313, 1317 (Aug. 1995). S. Br. 14-15. Subsequent case law demonstrates that *Energy West* did not alter the *JWR* standard of review with respect to ambiguous plan provisions. *See Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1280 (Dec. 1998) ("[w]hen a plan provision is ambiguous, the Secretary may establish the meaning intended by the parties by presenting credible evidence as to the history and purpose of the provision, or evidence of consistent enforcement.").

Secretary or JWR with respect to JWR's evacuation obligations under the plan after an explosion. Neither did the Secretary rely upon the manner in which the plan was implemented or enforced as a mandatory standard.

We agree with the judge that neither JWR nor the Secretary appeared to have considered how the FFEP applied in the event of an explosion. *See* 27 FMSHRC at 816 n.63. Moreover, as the judge discussed, the scant enforcement history on the issue tends to contradict the Secretary's position. *See id*. (citing 1993 explosion resulting in injuries and damaged ventilation controls in which actions similar to those taken by miners in this case were not cited despite a plan similar to the FFEP being in effect). Finally, we agree with JWR that the broadening of the successor plan to the FFEP so that explosions would be covered by evacuation orders indicates that the Secretary, as well as JWR, recognized that the FFEP simply did not apply to the situation that followed the first explosion. JWR Resp. Br. at 30; JWR Ex. 266 (successor plan to FFEP adopted before promulgation of ETS, discussed supra n.4).

Instead of presenting evidence of MSHA's and JWR's understanding of JWR's obligations to evacuate under the FFEP in the case of an explosion, the Secretary relies upon other provisions in the FFEP to establish that the plan was violated. In particular, the Secretary contends that the judge erred by failing to consider the FFEP provision that stated that "[a] supervisor or designated person will assemble all men promptly and lead the way during the evacuation" (hereinafter referred to as the "assemble and lead" provision). S. Br. at 13-21 (citing FFEP at 3).[9] According to the Secretary, that provision applied generally to any evacuation the operator undertook, not just to evacuations in response to a fire. *Id*. at 14-15, 17-18. The Secretary argues that the "assemble and lead" provision is written without "limiting language" and therefore cannot be limited to evacuations undertaken in response to a fire. *Id*. at 18.

We do not agree with the Secretary that the "assemble and lead" provision establishes the parties' intent with respect to post-explosion evacuations. The language of the provision does not address what events trigger its operation. FFEP at 3. The judge properly ruled that the first question that must be answered is whether the FFEP required an *evacuation* in the event of an explosion. 27 FMSHRC at 816-17. The only triggering events for an evacuation that were directly addressed in the document are carbon monoxide monitor alarms and fires which cannot be brought under control. FFEP at 2, 5. In short, the "assemble and lead" provision established *how* evacuations were to be carried out in the event of an emergency, but other provisions of the FFEP must be read to determine *when* an evacuation was required.

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[9] We agree with the judge that the FFEP was poorly drafted and is confusing. *See* 27 FMSHRC at 821 & n.70. For example, it was divided into five sections, but some of the section numbers were repeated, and the titles given to the sections do not necessarily accurately describe their substance. The "assemble and lead" provision is contained in the second Section II in the document (FFEP at 2-3), and inexplicably uses the term "the evacuation" despite there being no previous reference to the need to evacuate.

In *United Mine Workers of America v. Dole*, 870 F.2d 662 (D.C. Cir. 1989), the court held that MSHA always retains final responsibility for deciding what must be included in a plan and quoted from legislative history indicating that final mine plans result from the Secretary's "exercise [of] judgment with respect to the content of such plans." *Id*. at 669 n.10 (quoting S. Rep. No. 95-191 at 25, *Legis. His.* at 613). It follows that the Secretary ultimately bears responsibility for a mine plan's silence on a subject. We thus do not agree with the Secretary that, because under section 75.1101-23(a) she *could* have withheld approval of the FFEP for its failure to set forth evacuation procedures to be followed in all emergencies, the evacuation provisions that were included in the approved FFEP must be interpreted to include all emergencies.

We conclude that, except for carbon monoxide alarms or fires that could not be controlled, the FFEP was silent with respect to the circumstances that would trigger the evacuation of the mine. Consequently, absent evidence establishing the intent of JWR and the Secretary that the FFEP would apply to explosion-related evacuations, we cannot conclude that the FFEP was violated in this instance by JWR.[10] The judge correctly concluded that, while "a provision requiring miners to evacuate in the event of an explosion . . . may have been highly desirable . . . [and] necessary to fully effectuate miner safety[,] . . . the Secretary cannot at this late date supply through an administrative law judge's decision something she wishes she had insisted on more than 6 years ago." 27 FMSHRC at 817.

Accordingly, we affirm the judge's dismissal of Order No. 7328082.

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[10] The Secretary attempts to raise one final argument, contending that an evacuation was, in fact, occurring after the first explosion, but that JWR failed to adhere to the assemble and lead provision in carrying out the evacuation, and thus violated the FFEP. S. Br. at 21-33. The claim that an evacuation was occurring, which is based solely on the testimony of two JWR employees regarding what they believed occurred underground (S. Br. at 21-22 (citing Tr. V 382-83, XII 223-24, 265)), contradicts the underlying order and is inconsistent with the Secretary's theory of the case below. *See, e.g.,* Order No. 7328082 (alleging violation when "[m]iners were *not evacuated* from the mine after an explosion damaged critical ventilation controls.") Gov't Ex. 2 (emphasis added). To the extent the Secretary's argument could be viewed as an alternative theory of the violation, it is one that the judge never had an opportunity to address. The issue has therefore not been adequately preserved for review under the Mine Act, and we decline to consider it. *See* 30 U.S.C. §113(d)(2)(A)(iii) ("[e]xcept for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass); *see also* Commission Procedural Rule 70(d), 29 C.F.R. § 2700.70(d).

B. Section 75.1101-23(c)

Order No. 7328085 charges JWR with violating section 75.1101-23(c) by failing to conduct fire drills at 90-day intervals before the events of September 23, 2001. Gov't Exs. 4, 4A. At the time of the explosions, section 75.1101-23(c) required in pertinent part:

> Each operator of an underground coal mine shall require all miners to participate in fire drills, which shall be held at periods of time so as to ensure that all miners participate in such a drill . . . at intervals of not more than 90 days . . . .
>
> (1) The operator shall certify by signature and date that the fire drills were held in accordance with the requirements of this section. Certifications shall be kept at the mine and made available on request to an authorized representative of the Secretary.
>
> (2) For purposes of this paragraph (c), a fire drill shall consist of a simulation of the actions required by the approved fire fighting and evacuation plan described in paragraph (a)(1) of this section.

30 C.F.R. § 75.1101-23(c) (2001).

The judge held that the training conducted by JWR did not satisfy its obligation under section 75.1101-23(c) to conduct for "all" miners "a simulation of the actions required by the" FFEP. 27 FMSHRC at 819-24. The judge concluded that a violation was established by the testimony of eight JWR miners that they had not participated in an on-site simulation of the actions required in the FFEP, and that the records that JWR had provided MSHA to meet the certification requirements of the standard were insufficient to demonstrate otherwise. *Id*. at 822-24.[11] Citing *Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997), the judge further found that the plain meaning of section 75.1101-23(c) provided JWR with adequate notice of the standard's requirements in this instance. *Id*. at 819 n.68.

The judge affirmed the order but not the allegations that the violation was S&S and attributable to JWR's unwarrantable failure, and reduced the Secretary's proposed penalty from $55,000 to $500. *Id*. at 819-26. We address below whether a violation was established, whether

[11] At trial, copies of fire and emergency response training records for many JWR miners were submitted, and miners and JWR officials testified that such training included periodic escapeway walks, hands-on training and demonstration of fire fighting equipment, safety meetings, group discussions, role playing and putting out mock fires, using a self-contained self-rescuer ("SCSR"), instruction on the danger of methane, and first aid training. *See* 27 FMSHRC at 823, 825 & n.73. The Secretary, however, noted an absence of documentation establishing participation by many miners. Gov't Ex. 4, 4A.

JWR had adequate notice of what was required by the standard, and whether the judge properly determined that the violation was not S&S and was of moderate gravity.[12]

1. Violation

JWR argues that the judge erred in interpreting section 75.1101-23(c) to require that operators must certify that simulations were conducted for "all" miners. JWR Br. at 20, 26-30. JWR also contends that such an interpretation is contrary to the Commission's decision in *Southwestern Illinois Coal Corp.*, 5 FMSHRC 1672 (Oct. 1983). *Id*. at 27-28. The Secretary maintains that the judge correctly interpreted the standard according to its plain meaning to require that all miners participate in fire drills. S. Resp. Br. at 35-39.

Below, the judge held that "'all miners' means exactly what it says" in section 75.1101-23(c) and that the standard was not satisfied when only some miners participated in the required fire drills. 27 FMSHRC at 820-21. We agree with that plain meaning interpretation of the regulation.[13]

JWR does not dispute the evidentiary basis for the judge's finding "that there was a general lack of on-site simulations at the mine," and his finding is supported by substantial evidence.[14] *See* 27 FMSHRC at 822-23. The judge carefully read the FFEP to find the specific

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[12] The Secretary did not appeal the judge's unwarrantable failure determination.

[13] Contrary to JWR's position, the Commission's decision in *Southwestern* does not foreclose interpreting section 75.1101-23(c) to find that JWR violated the standard here because not "all" miners were found to have participated in the required fire drills. In *Southwestern*, the Commission held that the requirement of 30 C.F.R. § 77.1710(g) that each miner wear a safety belt and line did not make an operator a guarantor that miners would do so, but instead only obliged operators to require miners to wear such equipment. 5 FMSHRC at 1675. However, the Commission pointedly stated that its holding was limited to the language of section 77.1710(g). *Id.* The obligation imposed upon JWR to require that "all" miners participate in fire drills is distinguishable from the operator's obligation at issue in *Southwestern* because, among other things, JWR was in complete control of the scheduling and documentation of those exercises.

[14] 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)). Under the substantial evidence test, 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)).

duties that miners and supervisors were required to perform under that plan and thus needed to be simulated during the fire drills required by section 75.1101-23(c). *See* 27 FMSHRC at 821-22. The judge then credited the testimony of eight miners, none of whom could recall having participated in a "hands on" fire drill or fire fighting simulation in the months, or even, in the case of some of the miners, years preceding the explosions. *Id*. at 822. 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). We see no basis to overturn the judge's credibility findings in this instance.

Moreover, based on those miners' similar accounts, the judge inferred that there had been a general lack of on-site simulations at the mine. 27 FMSHRC at 823. "[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*. Based on the foregoing evidence, the judge reasonably inferred that JWR generally failed to conduct the required simulations. Consequently, we conclude that substantial evidence supports the judge's determination that not all miners had participated in the simulated actions required by section 75.1101-23(c). Thus, a violation of that standard was established.

2. Notice

Where the imposition of a civil penalty is at issue, considerations of due process prevent the adoption of an agency's interpretation "from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986) (citations omitted). An agency's interpretation may be permissible but nevertheless may fail to provide the notice required to support imposition of a civil penalty. *See General Electric Co. v. EPA*, 53 F.3d 1324, 1328-34 (D.C. Cir. 1995); *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982).

JWR contends that it lacked fair notice here because the series of exercises in which it required its miners to participate under the FFEP were, in effect, approved in MSHA's Program Policy Manual ("PPM") in effect at the time,[15] and through the agency's enforcement policy, as sufficient to satisfy the quarterly drill requirement of section 75.1101-23(c). Accordingly, JWR argues that the judge erred when he concluded that JWR could be penalized for failing to recognize that only simulations satisfied the standard. JWR Br. at 22-25, 31-35.

As the judge found and we agree, section 75.1101-23(c) clearly required operators to conduct quarterly fire drills in which "all" miners are to participate. In addition, by its plain

[15] JWR Ex. 146 (excerpt of V MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 75, at 105-06 (1994)).

terms the regulation stated that such fire drills were to be simulations of the actions required by the applicable fire fighting and evacuation plan, which here was the FFEP. 30 C.F.R. § 75.1101-23(c)(2) (2001). "The Commission has held that, where 'the meaning of a standard is clear based on its plain language, it follows that the standard provided the operator with adequate notice of its requirements.'" *Nolichuckey Sand Co.*, 22 FMSHRC 1057, 1061 (Sept. 2000) (quoting *LaFarge Constr. Materials*, 20 FMSHRC 1140, 1144 (Oct. 1998)).

Moreover, the PPM is consistent with section 75.1101-23(c). Although the PPM states that "various types of training will constitute a fire drill," that language applied only to those drills conducted pursuant to the fire fighting and response program of instruction under section 75.1101-23(a), which applied to training of new miners and annually training of experienced miners. The PPM language was not directed at the requirement of subsection (c) that a fire drill be conducted quarterly, an additional requirement of that subsection. The only language of the PPM that was directed at subsection (c) does not establish that MSHA considered JWR's piecemeal method of fire response instruction to constitute a fire drill under section 75.1101-23(c).[16] We therefore affirm the judge's determinations that JWR violated section 75.1101-23(c) and had adequate notice of its requirements.

3. S&S and Gravity of the Violation

In deciding whether the violation of section 75.1101-23(c) was S&S, the judge noted the record evidence showing JWR's No. 5 mine to be one of the gassiest in the country and one which had experienced occasional fires. 27 FMSHRC at 824. The judge concluded, however, that because JWR regularly instructed its miners in fire fighting practices and techniques, it was not reasonably likely that the failure to conduct fire drills that met the requirements of section 75.1101-23(c) would result in an injury. *Id.* at 825. Accordingly, he found that the violation was not S&S. *Id*. The judge further held that, while none of the fatalities in this case was due to JWR's failure to comply with former section 75.1101-23(c), it is conceivable that the failure to conduct on-site, hands-on fire drills for all miners could have serious consequences in the event of a fire. *Id*. Therefore, he found that the violation of the standard was moderately serious for penalty assessment purposes. *Id*.

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:

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[16] Significantly, the title for this part of the PPM was limited to include only "75.1101-23(a) and (b)." The title thus generally indicates that the guidance to be provided by the PPM was restricted to those first two subsections of section 75.1101-23, and was not directed at the third and final subsection, (c), which JWR is alleged to have violated here.

> 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). 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).

The Secretary asserts that the judge erred in his determination that the third *Mathies* element was not established because he did not consider the testimony of MSHA official Kenneth Murray regarding the critical importance of on-site simulations. S. Br. at 40, 43 (citing Tr. IX 81-82).[17] We do not agree.

The judge's decision reflects that he fully considered the importance of JWR miners being trained in various fire response measures. At the outset of his S&S analysis, the judge recognized that

> [i]f JWR had failed to train its miners to fight a fire, the likelihood of the miners exhibiting ineptitude in fire suppression techniques when confronted with a fire, the likelihood of their confusion in how to respond to a fire, and even the likelihood of panic in the event of a fire would be increased.

27 FMSHRC at 824-25. Consequently, the judge concluded that, although JWR did not provide all miners on-site simulated fire drills, JWR regularly instructed its miners in firefighting practices and techniques. *Id*. at 825 & n.73. Moreover, the judge credited the testimony of six of the supervisors who signed JWR's fire drill records stating that the drills the company considered compliant with section 75.1101-23(c) were conducted each quarter. *Id*. In light of the foregoing, the judge concluded that it was not reasonably likely that the lack of training specified in the

[17] The Secretary does not explain why, if compliance with section 75.1101-23(c) were so critically important, MSHA's inspectors previously failed to check JWR's records to ensure simulations were conducted quarterly for all miners. JWR Ex. 203 at 59.

standard would result in an injury and therefore the violation was not S&S[18] Substantial evidence supports the judge.

We also find unavailing the Secretary's argument that JWR's failure to conduct simulations resulted in its miners not understanding the limitation of an SCSR. S. Br. at 40-41, 43-44. In particular, the Secretary contends that if two of the deceased miners, Wendell Johnson and Joseph Sorah, had participated in simulations, they would have been more likely to follow the lead of miner Robert Tarvin, and thus would not have volunteered in response to supervisor Blevins' request for three men who did not mind using an SCSR to accompany him into the No. 4 Section. *Id*. According to the Secretary, Johnson and Sorah would have recognized, as Tarvin did, that an SCSR is not designed to contain enough oxygen for the task at hand. *Id*. This account of events does not demonstrate that the judge's S&S determination should be overturned. There is no evidence that Tarvin knew the limitations of an SCSR better than Johnson or Sorah (or Blevins for that matter), or that the two miners were unaware of the limitations of the SCSR. Nor has it been shown that these limitations would have been taught as part of a hands-on firefighting simulation, given that SCSR training was separately being given to its miners by JWR.

Accordingly, we conclude that the judge's determination that the violation of section 75.1101-23(c) was not S&S and associated finding of moderate gravity are supported by substantial evidence and affirm both.

C. Section 75.360(b)(3)

Order No. 7328105 charges a violation of section 75.360(b)(3) and alleges that, during the September 23 day shift, miners were scheduled to work at a location within the No. 4 Section that was admittedly not included in the examination conducted prior to the shift. Gov't Ex. 7 at 1.[19] The pre-shift examination standard provides in pertinent part:

> (a)(1) . . . a certified person designated by the operator must make a preshift examination within 3 hours preceding the

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[18] Citing the decision in *Buck Creek*, 52 F.3d at 133, the Secretary argues that it was improper for the judge to consider in his S&S analysis that miners had received firefighting training under other standards. *See* S. Br. at 42. However, nothing in the court's decision precludes the judge from considering that JWR miners had much of the same training that they would have received if JWR had conducted quarterly fire drills. *See Buck Creek*, 52 F.3d at 136 (fact that operator had in place firefighting measures required by MSHA regulation simply indicates "the significant dangers associated with coal mine fires").

[19] Initially the order also alleged that during the pre-shift examination Albert Dye failed to identify that the section was inadequately rock dusted. The judge dismissed that portion of the order, and the Secretary did not appeal that ruling.

> beginning of any 8-hour interval during which any person is scheduled to work or travel underground. No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval. The operator must establish 8-hour intervals of time subject to the required preshift examinations.
>
> * * * *
>
> (b) The person conducting the preshift examination shall examine for hazardous conditions, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction at the following locations:
>
> * * * *
>
> (3) *Working sections and areas where mechanized mining equipment is being installed or removed, if anyone is scheduled to work on the section or in the area during the oncoming shift.* The scope of the examination shall include the working places, approaches to worked-out areas and ventilation controls on these sections and in these areas, and the examination shall include tests of the roof, face and rib conditions on these sections and in these areas.

30 C.F.R. § 75.360(a)(1) & (b)(3) (2001) (emphasis added).

The Commission has recognized that the preshift examination requirements are "of fundamental importance in assuring a safe working environment underground." *Buck Creek Coal Co*., 17 FMSHRC 8, 15 (Jan. 1995); *see also* 61 Fed. Reg. 9764, 9790 (Mar. 11, 1996) ("The preshift examination is a critically important and fundamental safety practice in the industry. It is a primary means of determining the effectiveness of the mine's ventilation system and of detecting developing hazards, such as methane accumulations, water accumulations, and bad roof.").

1. Violation

The judge found that, because maintenance foreman John Puckett's crew was "scheduled" to work on the No. 4 Section since the previous Thursday, Dye, the pre-shift examiner, should have conducted a preshift examination on the entire No. 4 Section. 27 FMSHRC at 808. The judge concluded that Dye's failure to do so constituted a violation of section 75.360(b)(3). *Id*.

JWR contends that there is not substantial evidence to support either the judge's finding that work had been scheduled on the No. 4 Section since the previous Thursday or that the location of the work for Puckett's crew had been assigned. JWR Br. at 8-10; JWR Reply Br. at 2-5. JWR further submits that the schedule for maintenance and roof bolting on the No. 4 Section was not operative when Dye conducted his preshift examination. JWR Br. at 10-11.

Section 75.360(b)(3) states that the preshift examination is to include "working sections," which are defined as "[a]ll areas of the coal mine from the loading point of the section to and including the working faces." 30 C.F.R. § 75.2. Puckett's crew included roof bolters Terry and Sealy, and Puckett testified that their original assignment "was to bolt the faces up," as the faces had been "left unbolted until the weekend." Tr. IV 132-34. Puckett further explained that two other miners on his crew, scoop operator Jessee and laborer Phillips, would have serviced the faces once the faces had been bolted. Tr. IV 133-35. In short, there is substantial record evidence that prior to the power outage, maintenance work was scheduled inby the power center for the No. 4 Section, including the face, and thus within the working section.[20]

JWR does not dispute this evidence, but argues that the continuing power outage caused the work schedule for the mine, including the No. 4 Section, to change. JWR Br. at 11. JWR thus defends the incompleteness of Dye's preshift examination on the narrow ground that, during that 3-hour window Dye had to conduct his examination, Dye believed that no work at the face on the No. 4 Section would take place during the day shift because of the power outage. However, the only support for JWR's position is Dye's hearsay testimony that Hagood told him not to do a full preshift and Dye's "understanding" that he was told this because no one on the incoming shift was going to be "up there." Tr. III 382-84, 390-95, 447-49.[21] This testimony is insufficient to establish that miners were not scheduled to work on the No. 4 Section during the shift.

Moreover, as JWR recognizes in its brief, by the time the day shift began, Puckett learned that his crew would be assigned to bolt the unbolted faces. JWR Br. at 8. Puckett testified that he had miners Jessee and Phillips deliver roof bolts to Section 4. Tr. IV 134. The evidence further shows that miners were scheduled to work on the No. 4 Section, that JWR planned to resume roof bolting at the face once the power returned during the day shift, and that it took a number of steps in advance to be able to immediately do so. Puckett testified that power could return at anytime during the shift and that it was his "hope that power would be restored fairly early in the shift." Tr. IV 199, 152-53. The record also indicates that, at the outset of the shift, Puckett took part of his crew into Section 4 as far as Dye had preshifted, up to the power center,

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[20] We thus need not address whether the judge was correct in concluding that the work had been scheduled as early as the previous Thursday.

[21] Puckett also testified that when a preshift examiner did not know where miners would be assigned to work, the examiner would frequently limit the preshift to "the power center areas, any place that power is going to be restored." 27 FMSHRC at 807 (quoting Tr. IV 131).

and he then proceeded alone inby to complete the examination started by Dye, including at the face. 27 FMSHRC at 807; Tr. IV 199-206.

Given the weight of the evidence, we cannot agree that evidence shows that JWR changed the existing work schedule, including the expectation that work would occur at the face sometime during the shift.[22] Thus, we find that substantial evidence supports the judge's finding of a violation.

We reject JWR's argument that Puckett's examination of the area inby the power center qualified as a supplemental preshift examination made under section 75.361(a).[23] JWR Br. at 8, 11-12. Supplemental examinations are limited to those circumstances in which miners already underground are dispatched during the shift to an idle or abandoned area of the mine, which had not been subject to preshift examination because no miners were originally scheduled to work there. The violation of section 75.360(b)(3) occurred when Dye failed to conduct a complete preshift examination of a section where work was scheduled prior to miners entering the mine on the oncoming shift. Puckett could not undo the violation once the shift had begun.

The 1992 preamble to section 75.361 stated that "MSHA anticipates that under this rule, supplemental examinations will be conducted during working shifts just before persons are sent to perform *unscheduled tasks in remote areas* that have not been preshifted." 57 Fed. Reg. 20,868, 20,895 (May 15, 1992) (emphasis added). Because the record here shows that work was scheduled inby the power center in the No. 4 Section when Dye performed his preshift examination, section 75.361 is inapplicable. *Accord Buck Creek*, 17 FMSHRC at 12 (emphasis

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[22] JWR faults the Secretary for not calling Hagood to testify. JWR Reply Br. at 3-4. However, because all of the other evidence tends to show work was "scheduled" in the working section of the No. 4 Section, it was incumbent upon JWR to better explain, through Hagood, why, at the time Dye conducted the incomplete preshift, Hagood believed such work would *not* take place during the oncoming shift. The record establishes that the Secretary met her burden of proof with respect to the scheduling issue, and JWR failed to present sufficient evidence rebutting the Secretary's case.

[23] Section 75.361(a) states that:

> (a) Except for certified persons conducting examinations required by this subpart, within 3 hours before anyone enters *an area in which a preshift examination has not been made for that shift*, a certified person shall examine the area for hazardous conditions, determine whether the air is traveling in its proper direction and at its normal volume, and test for methane and oxygen deficiency.

30 C.F.R. § 75.361(a) (emphasis added).

added) (section 75.361 only provides "for a supplemental examination of *idle and abandoned areas* whenever miners who are underground are dispatched to an area of the mine that was not *required* to be examined as part of the preshift examination.").[24] Thus, we affirm the judge's finding that JWR violated section 75.360(b)(3).

2. S&S and Gravity of the Violation[25]

The judge found the violation of section 75.360(b)(3) to be S&S. He based this determination on his findings that: (1) had normal mining operations continued, power would have been restored and miners would have been sent forward to the face to roof bolt or to other areas of the section to perform maintenance work; and (2) miners already had advanced well into the section before the Puckett examination began. 27 FMSHRC at 809-10. Taking into account the gassy nature of the mine, the presence of electric and diesel power equipment, and the fact that JWR was working to restore power, the judge determined that the hazard was reasonably likely to result in an injury-causing event, and that the type of injuries suffered would be reasonably serious if not fatal. *Id*. at 810. The judge also concluded that the same evidence established that the level of gravity of the violation would be serious for purposes of assessing a penalty. *Id*. at 810-11.

JWR contends that the judge erred in basing his S&S determination on the assumption that normal mining operations would have resumed without a complete preshift examination, and that he misunderstood exactly where on the No. 4 Section Puckett's crew traveled and waited while Puckett completed his examination. JWR Br. at 15-20. The Secretary points to evidence regarding the nature of the mine and the violation that she believes supports the conclusion that the violation was S&S. S. Resp. Br. at 27-31. The Secretary also requests that the Commission use the opportunity this case presents to adopt a presumption that a violation of the preshift examination standard is S&S and to shift the burden of production to operators on the issue in such cases. *Id*. at 25-27.

We find that substantial evidence supports the judge's determination that JWR's violation of the preshift standard was S&S.[26] In so doing, we once again apply the *Mathies* test, slip op. at

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[24] Contrary to JWR's assertion (JWR Reply Br. at 7-8), our holding in *Buck Creek* has not been voided by the subsequent amendment to certain subsections of section 75.360(b), as only sections 75.360(b)(1) and 75.360(b)(10), and not section 75.360(b)(3), were amended. 61 Fed. Reg. at 9793, 9796.

[25] Commissioner Suboleski dissents from his colleagues' decision in this part. *See* slip op. at 38-45.

[26] In general, we agree with JWR that the judge misunderstood exactly where on the No. 4 Section the four members of Puckett's crew traveled to and waited during Puckett's examination of the area inby the power center. While the judge was correct in describing the

17-18. To determine whether the second *Mathie*s criterion was met[27] — a discrete safety hazard contributed to by the violation — it is important to understand the duration of the violation. As concluded above, the violation began when Dye failed to complete the preshift examination he was charged with conducting by excluding the working section of the No. 4 Section from the scope of his examination. Furthermore, according to the terms of the preshift standard, section 75.360, "[n]o person other than certified examiners may *enter or remain in any underground area* unless a preshift examination has been *completed*" for the upcoming shift. 30 C.F.R. § 360(a)(1) (emphasis added).[28]

JWR's contention that any hazard to miners was ameliorated by the fact that miners waited outside the working section of the No. 4 Section while Puckett examined it provides no basis for reversing the judge's S&S determination. JWR ignores the fact that miners, both those who accompanied Puckett and those who did not, were working in and traveling through a section that should have been entirely preshifted before they entered it but was not. Moreover,

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power center to have been located "well inby the mouth of the section" (it was over five crosscuts inby), it appears the judge did not realize that the power center was nevertheless *not* located within the working section of the mine. The power center was slightly outby the loading point for the section at that time, given that the belt had been recently extended inby the second crosscut outby the face. 27 FMSHRC at 760; Gov't Exs. 16, 83C, 83D. Thus, contrary to the judge's finding, Puckett's testimony did not establish that the four miners had accompanied Puckett to the unexamined working section. *See* 27 FMSHRC at 810. The power center and the area outby had been preshifted by Dye during his earlier examination. Nonetheless, the judge's misunderstanding on this point does not invalidate his S&S analysis. *See U.S. Steel Mining Co.*, 6 FMSHRC 2305, 2310 n.7 (Oct. 1984) (finding error judge made in considering evidence to be harmless where S&S finding is supported on alternative grounds).

[27] Of the four *Mathies* factors, only the second and third are at issue here.

[28] Section 75.360(a)(1) imposes the general preshift examination requirement while section 75.360(b) sets forth the scope of the examination in different circumstances. *See Sec'y of Labor v. Spartan Mining Co.*, 415 F.3d 82, 84-85 (D.C. Cir. 2005); *see also Enlow Fork Mining Co.*, 19 FMSHRC 5, 12 (Jan. 1997). Consequently, unlike our dissenting colleague, we do not rigidly read section 75.360(b)(3) in isolation from the rest of the preshift standard. *See* slip op. at 41-42. That the Secretary specifically referred to section 75.360(b)(3) in the order charging the violation does not prevent us from reading "these interconnected provisions" of the preshift standard together. *See Spartan*, 415 F.3d at 83-85 (operator cited for violating section 75.360(a)(1) when it failed to examine areas containing energized trolley wires, as required by section 75.360(b)(7)). Section 75.360(b) simply defines what constitutes a complete preshift examination under section 75.360(a)(1). Indeed, the order states that JWR's failure to comply with section 75.360(b)(3) rendered the preshift examination "incomplete" (Gov't Ex. 7 at 1), which also directly violates section 75.360(a)(1)'s requirement that preshift examinations are to be "completed."

Puckett's examination did not occur immediately at the start of the shift, or even before miners entered the No. 4 Section, but rather only after Puckett traveled to the face area of the section. Thus, miners were on the section for a significant amount of time before it had been entirely preshifted.

During that time, miners were in a section of the mine that had not been fully preshifted prior to their entering it, so it was proper for the judge to consider the nature of the hazards to miners that a complete preshift would have disclosed. As the judge took into account, the men were in a gassy mine, which prior to the shift lacked ventilation due to the fan check. 27 FMSHRC at 810. Given that the detection of methane buildups is one of the reasons a preshift examination is required, the mine's history as a gassy mine and the recent ventilation disruption in the mine constitute substantial evidence to support the conclusion that the Secretary has established the second *Mathies* criterion.

As for ignition sources, the judge provided extensive record citations regarding the mine's history of fires and ignitions, including on the No. 4 Section. Some had occurred as recently as two weeks before the explosion. *See* 27 FMSHRC at 824-25 n.72. There is also record evidence of roof falls that very week on the No. 4 Section, both at the face which was unbolted and remained so during the shift (Tr. V 65-66), and immediately outby the working section.[29] Roof falls pose another hazard that a preshift examination is intended to detect, and the potential for them to occur in a gassy mine supports our finding that the second *Mathies* criterion has been met. *See Buck Creek*, 17 FMSHRC at 13.

In terms of the third *Mathies* factor — whether there was a reasonable likelihood that the hazard would result in an injury causing event — the fact that the area outby the power center had been examined by Dye is not inconsistent with the conclusion that the violation in this instance was S&S. In *Buck Creek*, the Commission concluded that the third *Mathies* element had been proven when miners were allowed to work in a preshifted area even though another area of the mine that should have been examined was not. There, the Commission found that "hazards in an unexamined portion of the mine could affect" the area in which miners were working. *Id*. at 14.[30] Moreover, here there was the risk that one or more of the miners waiting by the power center could enter the unexamined area before Puckett completed his examination. Indeed, the testimony of one member of Puckett's crew, roofbolter Terry, can be read to indicate that he may have done so. Tr. V 24.

Furthermore, the fact that Puckett discovered no hazards in his supplemental examination of the working section during the next shift does not establish that the violation was not S&S.

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[29] We thus cannot agree with our dissenting colleague's characterization of these conditions as simply "general conditions" at the mine. Slip op. at 41 n.5.

[30] Commissioner Young would hold the instant case to be materially indistinguishable from *Buck Creek*.

The Commission, in determining whether a violation is S&S, considers circumstances assuming that normal mining operations continue without the intervention of an inspector. *U.S. Steel*, 7 FMSHRC at 1130. The dissent maintains that we should take the results of Puckett's examination into account, because here the assumption does not apply in that there was no inspector's intervention, and thus there is record evidence of what actually transpired after the violation. Slip op. at 40. We reject that argument for the following reasons: first, because the violation occurred before Puckett completed his examination of the working section, it is improper to rely only upon later circumstances to find that the violation was not S&S. *Bellefonte Lime Co.*, 20 FMSHRC 1250, 1255 (Nov. 1998). Second, because preshift examinations have a prophylactic purpose and because certain mine conditions are transitory in nature, later examinations are not sufficiently indicative of the conditions that may have existed at the time the area should have been examined. *Manalapan Mining Co.*, 18 FMSHRC 1375, 1382 (opinion of Commissioners Holen and Riley), 1396 (opinion of Chairman Jordan and Commissioner Marks) (Aug. 1996).

In summary, we agree with the judge's conclusion that the Secretary has met her burden of proving that it is reasonably likely that the hazards posed by the failure to conduct a complete preshift in this instance would result in an injury-causing event. We therefore affirm the judge's S&S determination and related finding that the section 75.360(b)(3) violation was of serious gravity.[31]

3. Unwarrantable Failure and Negligence

The judge concluded that JWR's failure to ensure that the No. 4 Section was completely examined before miners were sent to work on the section was indicative of a serious lack of reasonable care. *Id.* at 811. The judge found that two supervisors, Puckett and Hagood, were responsible for miners being knowingly sent down into the mine before it had been completely preshifted, placing the miners in harm's way. *Id*. Relying on that same evidence, the judge found JWR to be highly negligent. *Id*.

JWR contends that the conduct of neither Puckett nor Hagood justifies the judge's conclusion that the violation in this instance resulted from JWR's unwarrantable failure. JWR Br. at 12-13, 14-15; JWR Reply Br. at 16-18. JWR also argues that the judge failed to consider all the factors germane to this case in reaching his conclusion. JWR Br. at 13-14.

[31] We decline to address in this case the Secretary's request that we adopt the presumption that preshift violations are S&S. Before the judge, the Secretary specifically disavowed the need for the adoption of such a presumption in this case. *See* S. Post-Trial Br. at 67-68 (discussing previous cases raising issue of whether there should be a presumption that preshift violations are S&S but stating that the judge "does not need to find such a presumption in this case").

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. These factors include the length of time that the violation 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). 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. *Id*.

The Commission is evenly divided regarding whether the judge correctly determined that the violation of section 75.360(b)(3) was attributable to JWR's unwarrantable failure. Commissioners Jordan and Young would affirm the determination while Chairman Duffy and Commissioner Suboleski would reverse. The effect of the split decision is to allow the judge's decision to stand as if affirmed. *See Pennsylvania Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501, 1505 (3d Cir. 1992). The separate opinions of the Commissioners on this issue are included in Part III below.

D. The Penalty Assessments

The Secretary proposed penalties of $55,000 for each of JWR's violations at issue here.[32] 27 FMSHRC at 812, 826. After finding violations, the judge assessed a penalty of $2,500 for the section 75.360(b) violation and assessed a penalty of $500 for the section 75.1101-23(c) violation. *Id*. The Secretary petitioned for review of both penalty assessments.

The Secretary maintains that the judge erred in drastically reducing the proposed penalties and failed adequately to explain his reasons for doing so. S. Br. at 33-34, 46. With regard to the penalty for the violation of section 75.360(b)(3), the Secretary argues that the judge's finding that the violation did not contribute to the fatalities was not a proper explanation for reducing the

[32] Shortly after MSHA proposed penalties in this case, the maximum penalty for a violation was increased from $55,000 to $60,000. 68 Fed. Reg. 6609, 6611 (Feb. 10, 2003).

penalty because even if true, it does not detract from the seriousness of the violation. *Id*. at 36. The Secretary further alleges that with respect to both assessments, the judge erred by taking into account a document purporting to show previous penalties that had been assessed against JWR. *Id*. at 36-38, 46. In response, JWR contends that the reductions were justified by the judge's decision to vacate the section 75.360(b)(3) violation in part and his conclusion that the section 75.1101-23(c) violation was neither S&S nor unwarrantable. JWR Resp. Br. at 36, 46-47.

While Commission judges are accorded broad discretion in assessing civil penalties under the Mine Act, such discretion is not unbounded and must reflect proper consideration of the penalty criteria set forth in section 110(i) and the deterrent purpose of the Act.[33] *Westmoreland Coal Co.,* 8 FMSHRC 491, 492 (Apr. 1986) (citing *Sellersburg Stone Co.,* 5 FMSHRC 287, 290-94 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984)). In reviewing a judge's penalty assessment, the Commission determines whether the penalty is supported by substantial evidence and is consistent with the statutory penalty criteria. *Hubb Corp.*, 22 FMSHRC 606, 609 (May 2000). While "a judge's assessment of a penalty is an exercise of discretion, 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). Furthermore, as the Commission stated in *Sellersburg*:

> When . . . it is determined that penalties are appropriate which substantially diverge from those originally proposed, it behooves the Commission and its judges to provide a sufficient explanation of the bases underlying the penalties assessed by the Commission. If a sufficient explanation for the divergence is not provided, the credibility of the administrative scheme providing for the increase

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[33] Section 110(i) states in pertinent part:

> The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

> or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness.

5 FMSHRC at 293; *see also Unique Electric*, 20 FMSHRC 1119, 1123 & n.4 (Oct. 1998) (concluding that judge failed to explain the wide divergence between the penalty of $400 assessed and the Secretary's proposed penalties of $8,500); *Thunder Basin Coal Co*., 19 FMSHRC 1495, 1504 (Sept. 1997) (concluding that judge failed to provide adequate explanation for 95% reduction in penalty assessed); *Dolese Bros. Co.*, 16 FMSHRC 689, 695 (Apr. 1994) (finding that the judge was required to explain a 60% increase in his civil penalty assessment).

Clearly, the penalties assessed by the judge in this case "substantially diverge" from those originally proposed by the Secretary. In setting the penalties, the judge relied upon the parties' stipulations with respect to four of the six criteria, and incorporated his earlier findings with respect to the other two criteria, gravity and negligence. *See* 27 FMSHRC at 812, 826. The judge also noted that his penalties were consistent with the amounts included on a printout of JWR's history of violations submitted with the stipulations. *Id*. at 812 n.58, 826 n.74. He also noted that the violation of section 75.360(b)(3) did not contribute to the fatalities in this case. *Id*. at 812 n.58.

Such a terse analysis is not sufficient to explain the judge's substantial penalty reductions. Therefore, we vacate and remand the penalty assessments in this case. A more detailed analysis is particularly needed with respect to the section 75.360(b)(3) violation, in light of the judge's findings that it was serious and due to high negligence. 27 FMSHRC at 812.[34] While it may not have necessarily been improper for the judge to have considered the lack of causation between the preshift violation and the fatalities to be a mitigating factor in assessing the penalty, such a determination must be made within the context of the gravity of the violation. Moreover, other factors that potentially lead to a finding of high gravity must be considered; but it appears that the judge may have permitted the lack of causation to negate his other findings regarding the seriousness of the violation. Therefore, on remand, the judge should clarify how he views the lack of causation within the context of the other factors relevant to his finding of high gravity.

On remand, the judge should also clarify the extent to which, in setting both penalties, he relied upon the dollar amounts appearing as penalties in the stipulated printout of JWR's

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[34] The order was only partially upheld in that the judge vacated the part alleging that Dye should have detected inadequate rock dusting. *See* 27 FMSHRC at 805-06. Consequently, the judge may have considered the violation to have simply become another of the many violations cited as a result of the MSHA investigation that were not viewed as contributing to the explosions, most of which were settled prior to the hearing. *See id*. at 758 n.2. However, the judge did not indicate in his penalty discussion whether this was a factor in his decision to reduce the penalty for that violation. Similarly, he did not indicate in setting the penalty for the section 75.1101-23(c) violation whether he substantially reduced it from the amount proposed by the Secretary because, while affirming the violation, he vacated the special findings.

previous history of violations. While it was not error for the judge to "note" the equivalency between the penalties he assessed and those figures, it is impermissible to use those figures to arrive at the penalties to be assessed in this case. Penalty assessment figures in other cases are not a factor recognized as relevant by section 110(i) of the Mine Act, 30 U.S.C. § 820(i). The Commission has consistently ruled that, in assessing penalties, a judge may take into account only the six criteria listed in section 110(i). *See RAG Cumberland Res., LP*, 26 FMSHRC 639, 658 (Aug. 2004) (citing cases), *aff'd sub nom. Cumberland Coal Res., LP v. FMSHRC*, No. 04-1427, 2005 WL 3804997 (D.C. Cir. Nov. 10, 2005) (unpublished).

III.

Separate Opinions of the Commissioners

Commissioner Young, in favor of affirming the judge's determination that JWR's violation of section 75.360(b)(3) was attributable to its unwarrantable failure:

JWR asserts that Puckett's subsequent examination prevents a finding that JWR's violation of section 75.360(b)(3) was attributable to its unwarrantable failure. I cannot agree. The examination occurred well after Puckett's crew began working in or traveling to the area just outby the unexamined working section of the No. 4 Section. JWR would credit Puckett for acting with requisite care (JWR Br. at 12-13), but it fails to recognize that it was well within Puckett's power to examine the working section before the men entered the No. 4 Section, where they were exposed to the hazards, discussed above, of a work area that had not been completely examined.

JWR's argument that Hagood was blameless in this instance is similarly unavailing. JWR Br. at 14; JWR Reply Br. at 16-17. It was Hagood who, as Dye's supervisor, instructed him to cut short his examination, apparently on the conviction that at that point in time no one would be working during any part of the next shift on the working section of Section 4 due to the power outage. As shown earlier, however, the evidence demonstrates that JWR planned for that work to eventually occur, despite the power outage, and JWR chose not to call Hagood as a witness to explain the discrepancy.

Section 75.360 requires "mine operators to design preshift examinations around the best information available at the time the preshift begins" (61 Fed. Reg. at 9793), and it can be reasonably concluded that Hagood was not using the best information available in supervising Dye. As discussed, Puckett testified that sometime prior to his arrival at the mine for the upcoming shift, part of his crew was assigned to work at the face of the No. 4 Section, so he immediately completed Dye's examination. The Commission has stated that section 75.360(a) does not authorize such piecemeal examinations of a mine. *Buck Creek Coal Co.*, 17 FMSHRC 8, 12 n.7 (Jan. 1995). The involvement of supervisors Hagood and Puckett in the violation support the judge's determination that the violation was attributable to JWR's unwarrantable failure. *See Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011 (Dec. 1987).

While the judge did not address all of the factors the Commission considers in determining whether a violation is unwarrantable, this deficiency does not lead to the conclusion that it is not supported by substantial evidence. To the contrary, other circumstances surrounding the violation, when considered in light of the requirements of section 75.360, provide additional substantial evidence in support of the judge's determination that the violation was unwarrantable.[1]

As the Commission discussed with respect to upholding the judge's S&S determination, the violation posed a high degree of danger in this particular instance. Undisputed evidence established that this is one of the gassiest mines in the nation. Tr. IX 16. There is also ample record evidence of ignitions and roof falls occurring in and around the unexamined area contemporaneous to the time in question. In short, this mine was plagued with the sorts of *per se* deadly hazards which the pre-shift examination is intended to combat. This degree of danger significantly reduces the threshold for finding, in this context, a serious lack of reasonable care on JWR's part. *See Midwest Material Co.*, 19 FMSRHRC 30, 34 (Jan. 1997).

The extent of the violation was also significant. The entire working section of the No. 4 Section was not inspected as part of Dye's preshift examination, so Puckett had to complete it upon arriving at the No. 4 Section. Tr. IV 200-05. The violation can also be considered extensive because at least eight miners (Puckett's entire crew) entered the No. 4 Section before it was completely preshifted. Moreover, as discussed, the exposure of the miners was not momentary, but continued until Puckett completed his examination of the area inby the power center. In addition, any claim by JWR that the violation was not obvious or that it did not know of the existence of the violation runs counter to *Buck Creek*, where the Commission warned operators they could not rely upon the supplemental examination provisions of section 75.361 to complete preshift examinations that should have been previously completed.

Accordingly, I would find that substantial evidence supports the judge's determination that the violation of section 75.360(b)(3) was attributable to JWR's unwarrantable failure, as well as his conclusion for penalty assessment purposes that JWR was highly negligent, and affirm both findings.

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Michael G. Young, Commissioner

[1] The operator has global responsibility for actions or omissions of its agents, and for the supervision, coordination, and control of all operations. *See, e.g., Asarco, Inc. v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989) (holding that under the Mine Act an operator can be held liable without fault for its employee's violative conduct). This responsibility includes liability for the inadequate communications and coordination here.

Commissioner Jordan, concurring in part and dissenting in part:

I agree with the Commission opinion in this matter, except with regard to the violation of 30 C.F.R. § 75.1101-23(a).[1] In its discussion of that violation, the majority correctly affirms the judge's ruling that the regulation governing JWR's Fire Fighting and Evacuation Plan (the "FFEP"), 30 C.F.R. § 75.1101-23(a) (2001), applied to explosion-related emergencies. Slip op. at 8-11. However, unlike my colleagues, I would also hold that the FFEP itself applied to all emergencies, and was not limited to evacuations due to fires. Consequently, I would reverse the judge's determination on this question, and remand the issue to him for further proceedings.

The threshold issue in this matter is to identify the method we will use to interpret the plan provision in question. As we recently noted, "[i]t is well established that plan provisions are enforceable as mandatory standards." *Martin County Coal Corp.*, 28 FMSHRC 247, 254-55 (May 2006) (citing *UMWA v. Dole*, 870 F.2d 662, 671 (D.C. Cir. 1989)); *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 409 (D.C. Cir. 1976); *Energy West Mining Co.*, 17 FMSHRC 1313, 1317 (Aug. 1995); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987) ("*JWR*"). Consequently, as discussed in greater detail below, we should apply the same tools of regulatory construction when interpreting plan provisions as we do when construing regulations promulgated by MSHA. Because we are treating both as mandatory standards, we should discern their meaning in a consistent manner.

Commission precedent providing guidance on regulatory interpretation is clear; where the language of a regulatory provision is plain, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). If, however, a standard is ambiguous, courts have deferred to the Secretary's reasonable interpretation of the regulation. *See Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994). The Secretary's interpretation of a regulation is reasonable where it is "logically consistent with the language of the regulation and . . . serves a permissible regulatory function." *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citation omitted). The Commission's review, like the courts', involves an examination of whether the Secretary's interpretation is reasonable. *See Energy West*, 40 F.3d at 463 (citing *Sec'y of Labor v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1435, 1439 (D.C. Cir. 1989)); *see also Consolidation Coal Co.*, 14 FMSHRC 956, 969 (June 1992) (examining whether Secretary's interpretation was reasonable).

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[1] I also concur in the separate decision of Commissioner Young affirming the judge's finding that the violation of 30 C.F.R. § 75.360(b)(3) was attributable to the operator's unwarrantable failure.

Because the plan provision at issue is ambiguous (as it does not clearly state whether it applies to explosions), I would apply the standard set forth above and determine whether the Secretary's interpretation of the plan — i.e., that it applies to explosions — is reasonable and should be accorded deference. In contrast, my colleagues, holding that JWR's plan was limited to fire-related events, decline to apply our longstanding rules of regulatory interpretation to plan provisions. Relying on the 1987 *JWR* opinion, they require the Secretary to "'dispel the ambiguity'" in the plan "by establishing the intent of the parties on the issue." Slip op. at 11 (citation omitted).[2] They hold that the citation cannot stand because the Secretary failed to present evidence regarding the parties' understanding as to what the operator's obligations to initiate an evacuation were under the FFEP. *Id*. at 11-12. They reach this conclusion despite agreeing with the judge that the parties did not appear to have considered how the plan applied in the event of an explosion. *Id*. at 12. Thus, they fault the Secretary for failing to produce evidence on the parties' intent when they acknowledge that the parties did not even consider the question.

Given the fact that underground mine operators are required to adopt many plans containing numerous provisions,[3] it is unlikely that extensive negotiations will take place regarding all aspects of every plan approved by MSHA. Accordingly, in many instances it would be impossible for the Secretary to produce the evidence the majority insists it offer here: "establish[ ] through testimony of those involved in drafting and approving the FFEP, the intent of the Secretary or *JWR* with respect to *JWR's* evacuation obligations under the plan after an explosion." Slip op. at 11-12. This would be especially true for plans approved on a routine basis, without discussion or debate.

My colleagues' approach has the effect of limiting the agency's ability to enforce plan provisions to only those situations where the agency can demonstrate that both negotiation and a meeting of the minds occurred. This view, however, is contrary to *C.W. Mining Co.*, 18 FMSHRC 1740, 1746-47 (Oct. 1996), which recognized the Secretary has the ultimate say in

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[2] The language in *JWR* relied on by the majority is technically dicta, as the Commission declined to reach the question of whether the provision at issue was part of the approved plan, because it found that, even if it was, the Secretary did not prove that it was violated. 9 FMSHRC at 907. The majority's reliance on *Harlan Cumberland Coal Co.,* 20 FMSHRC 1275 (Dec. 1998), slip op. at 11 n.8, is also misplaced. In that case, we were guided by the fact that "the Secretary's argument in this case is actually at odds with the broad purpose of the plan to protect miners from dangerous roof conditions," 20 FMSHRC at 1281, and that "[t]he procedure suggested by the inspector who filed the citation, considering that he was a roof control specialist, astonishes us. . . . [T]he logical outgrowth of [his] interpretation of the plan, would have required miners to enter an unpredictable and highly unstable area to commence mining, and would have been extremely dangerous." *Id*. at 1282.

[3] *See e.g.*, 30 C.F.R. § 48.3 (training plans); 30 C.F.R. § 75.220 (roof control plans); 30 C.F.R. § 75.370 (mine ventilation plans).

whether a plan provision is included. In that case, we stated that although "[t]he plan approval process involves good faith discussions between MSHA and the mine operator," we did not mean to suggest:

> that the Secretary is in the same position as a private party conducting arm's length negotiations in a free market. Ultimately, absent bad faith or arbitrary action, the Secretary retains the discretion to insist upon the inclusion of specific provisions as a condition of the plan's approval.

Id. at 1746 (citing *UMWA v. Dole*, 870 F.2d at 667). Quoting the decision of the D.C. Circuit in *UMWA v. Dole*, the Commission in *C.W. Mining* recognized that:

> [W]hile the mine operator had a role to play in developing plan contents, MSHA always retained final responsibility for deciding what had to be included in the plan. In 1977 Congress "caution[ed] that while the operator proposes a plan and is entitled, as are the miners and representatives of miners to further consultation with the Secretary over revisions, the Secretary must independently exercise [her] judgment with respect to the content of such plans in connection with his final approval of the plan."

18 FMSHRC at 1746 (quoting *UMWA v. Dole*, 870 F.2d at 669 n.10, quoting S. Rep. No. 181, 95th Cong., 1st Sess. 25 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 613 (1978)).

When a mandatory standard is promulgated under the Mine Act, the Secretary notifies the mining community of a proposed requirement, considers the comments filed in response, and then exercises her judgement as to what the final content of the regulation should be. Similarly, while the operator can propose plan provisions and may be entitled to further consultation over revisions, the Secretary must "'independently exercise [her] judgment with respect to the content of such plans'" and "always retain[s] final responsibility for deciding what [has] to be included in the plan.'" *UMWA v. Dole*, 870 F.2d at 669 n.10 (citation omitted). Therefore, I fail to see how the Secretary can be held to a more difficult standard of proof when attempting to enforce a plan provision than the standard she must meet to enforce a regulation that is the result of notice and comment rulemaking.

In fact, the Commission has stated recently that the Secretary is not held to two different standards of proof. In *Martin County Coal,* we explained:

> It is well established that plan provisions are enforceable as mandatory standards. As such, the law governing the interpretations of regulatory standards is applicable to plan provisions. *Energy West*, 17 FMSHRC at 1317.

28 FMSHRC at 254–55 (other citations omitted). *Martin County* relied on *Energy West*, which had applied controlling Commission case law on regulatory interpretation to the interpretation of a ventilation plan. 28 FMSHRC at 255 n.11 (citing *Energy West*, 17 FMSHRC at 1317). In *Energy West* we concluded that the disputed plan provision was unclear, and that accordingly a remand was necessary to determine whether the Secretary's interpretation of the provision was reasonable, noting that "[a]n agency's reasonable interpretation of its regulations is entitled to deference." 17 FMSHRC at 1317 & n.6 (citation omitted).

Applying the legal standard we traditionally use to interpret mandatory standards, I find that the Secretary's interpretation — that JWR's Firefighting and Evacuation Plan applied to evacuations prompted by explosions — is reasonable. The relevant plan provision stated that "[a] supervisor or designated person will assemble all men promptly and lead the way during the evacuation." FFEP at 3. That provision appeared under a general heading in the FFEP that stated "Program of Instruction - Underground Emergencies." *Id.* Section II of the plan, where this requirement was located, was entitled "Location of Escapeways, Exits and Routes of Travel to the Surface and Evacuation Procedures." *Id*.[4] Significantly, the language of the FFEP is not expressly limited to fire-related incidents.

The Secretary's interpretation of the plan provision — that it applies to explosions — is clearly consistent with the purpose of section 75.1101-23(a), which governed emergency plans. This regulation required in pertinent part that an operator was to adopt a program to instruct all miners:

> in the location and use of fire fighting equipment, location of escapeways, exits, and routes of travel to the surface, and proper evacuation procedures to be followed in the event of an emergency.

30 C.F.R. § 75.1101-23(a) (2001). I find it notable that the governing regulation required plans for evacuations due to an "emergency," and was not limited to a fire-related emergency.[5] I also

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[4] The Secretary correctly notes that none of the provisions in Section II, which concerned escapeways and evacuations, used the word "fire." S. Br. at 18-20 (citing Gov't Ex. 34 at 3-4).

[5] I do not believe that subsequent revisions to the plan, covering "general evacuation procedures," JWR Ex. 266, undermines the reasonableness of the Secretary's interpretation here.

note that, prior to the explosion, MSHA had announced that it required "each operator of an underground coal mine to adopt a program for mine evacuation in the event of an emergency, such as fire *or explosion*." 60 Fed. Reg. 23567 (May 8, 1995) (MSHA Semi-Annual Unified Agenda) (emphasis added).[6]

Moreover, safety issues involving fires and explosions are often interrelated. Although the judge ultimately concluded that the plan did not apply to this evacuation, in his order denying JWR's motion for summary decision he stated:

> I find JWR's attempt to differentiate between a fire and an explosion to be a distinction without difference. I concur with the Secretary's statement that "explosions and fires are similar in nature and present similar hazards to miners underground." I agree with the Secretary that "it is reasonable to anticipate that a fire could create an explosion risk and an explosion could create a fire risk." This is because fires and explosions are fundamentally interrelated. . . . These two events are so intertwined, I conclude it is eminently reasonable to view the "emergency" referred to in the standard as inclusive of an explosion. In other words, it is reasonable to apply the standard to both occurrences.

26 FMSHRC 623, 627-28 (July 2004) (ALJ) (citations omitted).[7] Consistent with this view, I note that section 311 of the Mine Act, 30 U.S.C. § 871, entitled "Fire Protections," also contains a requirement pertaining to explosions, as it restricts the amount of methane that may be present during welding activities. 30 U.S.C. § 871(d); *see also* 30 C.F.R. § 75.1106.

The final inquiry regarding this citation is whether the operator violated the provision of the plan requiring that a supervisor or other designated person "assemble and lead" miners during an evacuation. The judge's decision barely touched upon this issue (*see* 27 FMSHRC 757, 817 n.66 (Nov. 2005) (ALJ)), and JWR has argued that the actions of the miners who did not vacate the mine but instead traveled towards the area of the first explosion did not necessarily do so in contravention of the FFEP. *See* JWR Resp. Br. at 31-34. Resolution of such issues are best left to the judge in the first instance, and, accordingly, I would remand this question to him.

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[6] Because this announcement alerted operators that the regulation required plan provisions to cover explosion-related evacuations, I reject JWR's claim, JWR Resp. Br. at 30-31, that it lacked notice that the plan provision covered emergencies caused by explosion.

[7] The judge also noted that the similarity between a fire and an explosion was acknowledged in a report created by JWR's expert, who stated that "[i]t is probable that [the] second ignition of methane resulted in the propagation of flaming" and "[t]he flame would then accelerate into a gas explosion." 26 FMSHRC at 628 n.6 (citing Pet'r's Br. Ex. J. at 46).

For the foregoing reasons, I would vacate and remand the judge's determination that JWR did not violate section 75.1101-23(a).

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Mary Lu Jordan, Commissioner

Commissioner Suboleski, concurring and dissenting:

I concur with my colleagues that JWR violated section 75.360(b) when it failed to adequately preshift the Number 4 section for the September 23 day shift. However, I depart with them in affirming the judge that the violation was significant and substantial ("S&S") and occurred because of JWR's unwarrantable failure to comply with the regulation.

1. Significant and Substantial

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).

Here, as in many cases where the S&S determination is challenged, it is the application of the third *Mathies* element that is at issue. "[T]he question [of whether the violation is S&S] must be resolved on the basis of the circumstances as they existed at the time the violation was cited and as they might have existed had normal mining operations continued." *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). The Commission added that the operator's response in abating the citation does not obviate the need to determine "whether an injury would have been reasonably likely to occur *if mining operations had continued without the inspector's intervention*." *Id.* (citation omitted) (emphasis added); *see also Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989). In the present proceeding, the violation stands in contrast to the S&S cases that have generally come before the Commission because the order was issued "after the fact," over one year after an accident investigation that was triggered by the tragic, but unrelated, explosions. Gov't Ex. 7.

Section 75.360(b)(3) requires that a preshift examination be conducted in "[w]orking sections and areas where mechanized mining equipment is being installed or removed, if anyone is scheduled to work on the section or in the area during the oncoming shift[,]" and further states that "[t]he scope of the examination shall include the working places." 30 C.F.R. § 75.360(b)(3). Section 75.2 defines "working section" as, "All areas of the coal mine from the loading point of the section to and including the working faces." 30 C.F.R. § 75.2. "Working place" is further defined as, "The area of a coal mine inby the last open crosscut." *Id.*

The definitions in section 75.2, when read in conjunction with section 75.360(b)(3), make clear that the preshift examination requirement applies to specific areas of the mine, depending on their location and miner presence. Any remaining doubt about the carefully circumscribed nature of section 75.360(b)(3) can be resolved by the Federal Register preamble to this rule. There, the Secretary explained, in rejecting a commenter's suggestion that all areas of the mine, including idle areas, be examined during a preshift examination, "There is no need to require areas of the mine where persons are not scheduled to work or travel to be examined." 57 Fed. Reg. 20868, 20893 (May 15, 1992); *see also* 61 Fed. Reg. 9764, 9793 (Mar. 11, 1996) ("The preshift examination requirements in the final rule are intended to focus the attention of the examiner in critical areas."). As more fully explained below, the violation here turns on whether work was scheduled in the working section of the No. 4 Section when Dye was instructed to conduct the preshift examination on September 28.

The order charges JWR with a violation of section 75.360(b)(3) because:

> an adequate preshift examination was not conducted in 4 Section where persons were scheduled to perform maintenance work and install roof bolts during the oncoming day shift on September 23, 2001. The examination was incomplete in that an examination of the working places was not conducted where miners were scheduled to roof bolt the unsupported face areas.

Gov't Ex. 7 at 1.[1] The theory of violation of section 75.360(b)(3) is that miners were scheduled to work at a particular location within the No. 4 Section that was not examined when Dye conducted his preshift examination. 27 FMSHRC at 807, citing S. Br. at 63-64. As the judge stated, "[I]f anyone was 'scheduled to work on the section' prior to Dye's examination, the standard was violated." 27 FMSHRC at 808. In short, the essence of the violation is the inadequacy of the preshift examination. *See* S. Resp. Br. at 11.

[1] The remainder of the order, alleging Dye's failure to recognize inadequate rockdusting, was not upheld by the judge. A close examination of the order indicates that the hazard recognition training required by MSHA for abatement appears to pertain only to the alleged failure to recognize deficient rockdusting, and not to examining all scheduled work places.

Were it not for the scheduling of maintenance in the No. 4 working section, prior to Dye's examination, there would be no violation. Thus, a bookkeeping entry that occurred prior to the Sunday day-shift determined whether JWR is found to have violated the regulation. Due to the strict liability nature of the Mine Act, once Dye performed an examination of the No. 4 Section that did not include the areas where miners were scheduled to roof bolt and do other maintenance work, the violation of section 75.360(b)(3) was complete. Once the day shift had begun, neither Dye nor Puckett could undo the violation

In analyzing the S&S designation, the judge reasoned:

> Given the propensity of the mine to liberate methane, and the fact that electric and diesel equipment was in place and that the power would have been restored *had normal operations continued*, I find that it was reasonably likely the failure to conduct a complete preshift examination significantly and substantially contributed to the danger of the miners being involved in a methane-related ignition or explosion.

27 FMSHRC at 810 (emphasis added). However, contrary to the judge's analysis, we do not have to guess as to what occurred after the violation. There was no intervening action by an inspector that requires the application of the legal fiction, "assuming continued normal mining operations." Rather, the record clearly shows that, when Puckett took his crew into the mine, he proceeded no further than the power center and other outby areas that had been preshifted. He then performed a supplemental examination in unexamined areas of the No. 4 Section before miners proceeded further.[2] 27 FMSHRC at 807. The judge's analysis cannot be sustained in light of the undisputed testimony as to what actually occurred after Dye inadequately preshifted the area in violation of section 75.360(b)(3).[3]

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[2] In agreement with the majority, I also conclude that the judge was incorrect when he found that the power center, where Puckett's crew went in the No. 4 Section, was in the working section. Slip op. at 23-24 n.26. Accordingly, when the miners were at the power center and other areas outby that had been preshifted, there was no violation and no hazard as a result of their presence in the those areas of the No. 4 Section.

[3] The majority rejects the position that there is no need to apply the legal fiction, "continued normal mining conditions," but cannot cite any case to support the analysis when it is known exactly what happened in the hours after Dye's failure to preshift the entire No. 4 Section. That is especially so here because the order issued months after the violation. In this regard, in addition to relying on general conditions in the mine to support its S&S determination, the majority also speculates that miners on Pucketts's crew "could enter the unexamined area before Puckett completed his examination." Slip op. at 25. Even under the majority's approach to the violation, such an assumption of miner disobedience, in the absence of record support, is unwarranted. *See Cougar Coal Co.*, 25 FMSHRC 513, 519 (Sept. 2003) (conduct of rank-and-

The only "hazard" that the miners were exposed to by their presence in areas of the mine that had been preshifted was the same conditions that miners would have been exposed to if no work had been scheduled in the working areas of the No. 4 Section.[4] Thus, I cannot conclude, based on the particular facts surrounding the violation (*Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988)), that there was a reasonable likelihood that the hazard contributed by the violation would result in an injury.[5]

In an effort to sustain the S&S designation, the majority transforms the order MSHA issued from one charging a violation of section 75.360(b)(3) to one charging a violation of section 75.360(a)(1), which provides, in part, "No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval." 30 C.F.R. § 75.360(a)(1). *See* slip op. at 24-25. However, the majority's effort to explain "the duration of the violation," slip op. at 24, is simply contrary to the language of the order, which is set out on page 39, supra, and the Secretary's theory of violation

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file miner in disobeying instructions of supervisor cannot support unwarrantability designation where there no evidence to suggest miner had disregarded instruction of a supervisor).

[4] If no work had been scheduled, there would be no violation. As a comparison consider that Puckett, after leaving the No. 4 Section, took two men to the No. 6 Section, which had been preshifted in the same manner as the No. 4 Section. There is no allegation that a violation was committed and no assertion that Puckett and his crew, by their presence in the No. 6 Section, were exposed to hazards from the unexamined areas of that section.

[5] While I have focused my attention to the third *Mathies* element, the judge's determination with regard to the second element — a discrete safety hazard contributed to by the violation — is suspect. In this regard, the judge erred when he analyzed this element assuming "continued normal mining operations." 27 FMSHRC at 809. The Commission has generally applied that assumption only to analyzing the third element of *Mathies*. *See, e.g., Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989). Further, the judge erred when he found, in analyzing the second element, that Puckett and his crew had traveled in unexamined areas of the No. 4 Section before he performed the supplemental examination. 27 FMSHRC at 810. The majority acknowledges this factual error and indicates that it is deciding the case on grounds different than those considered by the judge. Slip op. at 23-24 n.26. However, the majority subsequently indicates that it is affirming the judge's findings on the second *Mathies* element on substantial evidence grounds, *id*. at 24-25 — a position I find difficult to reconcile with its alternative approach. Finally, general conditions at the mine cannot suffice to establish a hazard without a connection to the violation. *See Texasgulf, Inc.*, 10 FMSHRC at 500. In this regard, the majority cites to general conditions at the mine, which even the judge did not rely on in his S&S analysis of the section 75.360(b)(3) violation, to bolster his hazard analysis. Slip op. at 25, citing 27 FMSHRC at 824-25 n.72. However, as *Mathies* requires, the hazard must be *contributed to* by the violation. *Sec'y of Labor v. FMSHR*C, 111 F.3d 913, 917-18 (D.C. Cir. 1997).

before the Commission. S. Resp. Br. at 11-24. It is also evident from the majority's analysis of the violation of section 75.360(b)(3), in which I concur, that Puckett and the miners who accompanied him *were not* in a "working section" or a "working place" and *were* in an area of the No. 4 Section that had been properly examined. Thus, the majority's attempt to expansively apply the narrowly drafted section 75.360(b)(3) to prohibit miners from going into *any* area of the No. 5 mine until the entire No. 4 Section had been examined, slip op. at 24-25, is contrary to the plain language of the regulation and its regulatory history.[6]

Finally, the majority relies on *Buck Creek Coal Co., Inc.*, 17 FMSHRC 8 (Jan. 1995), to support its S&S determination. However, that case is readily distinguishable in several key aspects. First, at Buck Creek the mine had been idle for the weekend and the examiners had begun the required preshift examination prior to the first working shift. *Id.* at 9. The violation occurred when miners entered the mine while the preshift examination was ongoing, that is, before the examiners had completed their inspection. *Id.* Here, there is no allegation that the miners entered an unexamined mine; the charge is that the preshift examination, which had been completed, was, on one section only, inadequate.

Second, in *Buck Creek* the Commission concluded that the operator violated section 75.360(a) when it allowed, prior to an oncoming shift, miners into an area of the mine before a preshift examination had been completed. *Id.* at 9-11. In contrast, the violation in this case stems from the inadequacy of the preshift examination, not from the presence of the Puckett's crew at the electrical center in the No. 4 Section. MSHA does not allege that a violation of section 75.360(a) occurred.[7] Most significantly, in *Buck Creek* the operator had shut down the mine over a weekend, thus giving rise to the dangers attendant to an idle mine. *Id.* at 14. Here, JWR scheduled a maintenance crew to work on the day shift following an owl shift in ongoing operations. Thus, I cannot agree that *Buck Creek* is applicable to the facts of this case.

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[6] The majority's suggestion that an allegation of a violation of section 75.360(b)(3) cannot stand by itself, but must be read to include a general violation of section 75.360(a)(1), slip op. at 24 n.28, is at odds with Commission cases. *See, e.g., Eagle Energy, Inc.*, 23 FMSHRC 1107, 1118 (Oct. 2001); *Enlow Fork Mining Co.*, 19 FMSHRC 5, 14-16 (Jan. 1997). In reading and interpreting regulations, the Commission has examined the context in which a regulation appears. *RAG Shoshone Coal Corp.*, 26 FMSHRC 75, 80 (Feb. 2004); *see also Sec'y of Labor v. Spartan Mining Co.*, 415 F.3d 82, 84-85 (D.C. Cir. 2005). However, here the majority seeks to read into its S&S analysis a general violation of the pre-shift examination requirement in section 75.360(a)(1), and I can find no basis for doing that.

[7] Unlike my colleagues, I believe that the Secretary is quite capable of distinguishing between a violation of section 75.360(a)(1) and a violation of section 75.360(b)(3), *see Eagle Energy, Inc.* and *Enlow Fork Mining*, supra, and I am confident that, if she believed a violation of section 75.360(a)(1) had occurred, she would have alleged it as she did in the *Spartan Mining* case that my colleagues cite.

In summary, in the absence of any allegation that JWR's action was an effort to subvert the preshifting requirements, and given that the only difference between the occurrence of a violation or not is whether, midway through the midnight shift, the work continued to be scheduled, I am unable to find the violation to be S&S. If work was not scheduled in the No. 4 Section at that time, there is no violation; if it was scheduled, there is a violation. When the only difference between what is or is not a violation is a "yes" or "no" on a written schedule or in the thoughts of a foreman, then a discrete safety hazard reasonably likely to contribute to a reasonably serious injury simply cannot be found.

2. Unwarrantable Failure

I would also reverse the judge with regard to his unwarrantability determination. 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 judge's unwarrantability determination is brief but premised on the incorrect finding made in the judge's S&S determination that the power center was in an uninspected area of the No. 4 Section. 27 FMSHRC at 810-11. The judge's unwarrantable failure analysis turns on Puckett's conduct and having "plac[ed] miners on the section and thus in harm's way before the preshift examination was completed." *Id.* at 811. Thus, the judge erred as a matter of law when he relied on this crucial erroneous factual finding. I further conclude that largely uncontroverted record testimony supports only one conclusion on this issue — that the violation of section 75.360(b)(3) was not due to JWR's unwarrantable failure.

The Commission has recognized that a number of factors are relevant in determining whether a violation is the result of an operator's failure, such as the extensiveness of the violative condition, the length of time that the violative condition has existed, the operator's efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992). The Commission also considers whether the violative condition is obvious , or poses a high degree of danger. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug.1992) (finding unwarrantable failure where unsaddled beams "presented a danger" to miners entering area); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992) (finding violation aggravated and unwarrantable based on "common knowledge that power lines are hazardous, and . . . that precautions are required when working near power lines with heavy equipment"); *Quinland Coals, Inc.*, 10 FMSHRC

705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984) (conspicuous nature of the violative condition supports unwarrantable failure finding).

The violation occurred here when Dye failed to examine all areas in the No. 4 Section. Based on the record testimony, it is apparent that Dye's failure to examine all areas of the No. 4 Section, including those areas where maintenance work was scheduled but had no power, was of short duration. There are no allegations that any similar violations had occurred elsewhere in the mine.[8] Thus, there is no charge that JWR was on notice that greater efforts were necessary to avoid violations of the preshift examination requirement.[9] Further, Puckett quickly remedied Dye's failure to completely preshift the No. 4 Section by performing a supplemental examination prior to permitting his crew to go beyond the electrical center. *Compare Enlow Fork Mining Co.*, 19 FMSHRC at 17 (Commission rejected assertion that prompt post-citation efforts to abate violation should be considered in an unwarrantable failure determination, noting that focus is on compliance efforts prior to the issuance of citation).

Most significantly, the violation did not pose a high degree of danger to miners. As noted above, JWR violated section 75.360(b)(3) when Dye failed to preshift the No. 4 Section in its entirety when work was scheduled to be performed there on the next shift. The violation did not turn on the presence of miners at the electrical center. Instead, the focus of consideration is Dye's conduct and the conditions at the time of the violation. *See Quinland Coals, Inc.*, 10 FMSHRC at 708-09. Given that the violation stemmed from the advanced planning of work in the No. 4 Section, I cannot conclude that the dangers arising from Dye's inadequate preshift examination were materially different, indeed not at all different, from those conditions that would have been present if no work had been scheduled.[10]

Finally, I cannot conclude that JWR's actions can be characterized as caused by "reckless disregard" or "intentional misconduct." In this regard, Dye conducted his preshift examination at a time when power was down in the No. 4 Section, and he assumed that, if power was not

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[8] My colleague's statement that the violation was "extensive," slip op. at 31, is based on the erroneous assumption that no miner could go in the No. 5 mine as long as any area of the No. 4 Section was unexamined. That assumption, however, ignores the carefully drafted words of the citation, alleging an inadequate preshift examination in some areas of the No. 4 Section – under section 75.360(b)(3), not under section 75.360(a).

[9] Dye's testimony that he had been performing preshift examinations since 1996 and never been cited for an inadequate preshift exam, Tr. III 409-10, was uncontradicted.

[10] My colleague's plenary review of the record to glean facts relating to general conditions at the mine does not resolve whether the Dye's inadequate examination was due to JWR's unwarrantable failure because these conditions, even if characterized as "*per se* deadly hazards," slip op. at 31, must somehow relate to the operator's violative conduct. *See* cases cited, slip op. at 42 n.5.

restored, no maintenance work would be performed in the section. Tr. III 447-48. The preamble to section 75.360(b)(3) contemplates this sort of exigent circumstance to relieve operators of the obligation to preshift areas where miners would otherwise be scheduled to work:

> Preshift examinations, by their nature, must be completed before the start of the shift. Changes in conditions, however, such as a breakdown of equipment, can alter planned work schedules. To accommodate these circumstances, the final rule requires mine operators to design preshift examinations around the best information available at the time the preshift begins. If changes must be made, § 75.361 specifies that areas not preshift examined be covered by a supplemental examination . . . before miners enter the area.

61 Fed. Reg. at 9793. While I have affirmed a violation of the regulation, because substantial, though circumstantial, evidence supports the judge's conclusion that JWR had not rescheduled when the preshift was conducted, 27 FMSHRC at 808, nevertheless I cannot conclude that JWR's conduct was indicative of reckless disregard in light of the lack of danger and the mitigating circumstance of the power outage. *See Cougar Coal Co*, 25 FMSHRC at 518-19

In sum, I cannot conclude that JWR's violation of section 75.360(b)(3) was due its unwarrantable failure.

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Stanley C. Suboleski, Commissioner

Chairman Duffy, concurring and dissenting:

While I find that JWR violated the preshift examination requirement in section 75.360(b) and that the violation was significant and substantial in nature, I join with Commissioner Suboleski in finding that the violation was not caused by JWR's unwarrantable failure to comply with the standard.

The key to the degree of culpability attributable to JWR with respect to this violation is the motivation of Hagood in directing Dye not to preshift beyond the power center in the No. 4 section. The problem is that Hagood did not testify, so we can only speculate as to that motivation.

> Preshift examinations, by their nature, must be completed before the start of the shift. Changes in conditions, however, such as a breakdown in equipment, can alter planned work schedules. To accommodate these circumstances, the final rule requires mine operators to design preshift examinations around the best information available *at the time the preshift begins.*

Preamble to section 75.360, 61 Fed. Reg. at 9793 (emphasis added).

It may well be that Hagood believed at the time he spoke to Dye that the power outage would preclude any work being performed inby the power center during the day shift, thus making a preshift of that area unnecessary. On the other hand, he may have decided to take a chance on avoiding a full preshift on the premise that the unexamined areas could be picked up on a supplemental examination. Without his testimony, we simply do not know his state of mind at the time the preshift began. The lack of this crucial evidence precludes, in my view, a finding of unwarrantable failure.

Likewise, I agree with Commissioner Suboleski that the judge's finding may have been colored by his erroneous view that the miners were permitted to enter an area of Section No. 4 that had not been preshifted. If that were the case, the violation might well be characterized as unwarrantable. Since that was not the case, however, I do not believe that JWR's conduct rises to the level of "reckless disregard," intentional misconduct," indifference," or a "serious lack of reasonable care." *Emery Mining Corp.,* 9 FMSHRC 1997, 2000-04 (Dec. 1987).

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Michael F. Duffy, Chairman

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