FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

July 27, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. WEVA 94-381
	:	WEVA 95-100
CANNELTON INDUSTRIES, INC., CHARLES PATTERSON, and GEORGE RICHARDSON	:	WEVA 95-101

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

DECISION

BY: Riley, Verheggen, and Beatty, Commissioners

These consolidated civil penalty proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994) (AMine Act@ or AAct@), involve a citation issued to Cannelton Industries, Inc. (ACannelton@) alleging an unwarrantable and significant and substantial (AS&S@) violation of 30 C.F.R. ' 75.400[1] for failure to clean up an accumulation of coal under a conveyor belt, and related allegations that Charles Patterson and George Richardson, shift foremen for Cannelton, were personally liable under section 110(c) of the Mine Act, 30 U.S.C. ' 820(c), for knowingly authorizing the violation. Administrative Law Judge T. Todd Hodgdon concluded that Cannelton violated section 75.400 and that the violation was S&S and the result of unwarrantable failure. 18 FMSHRC 651, 654-59 (Apr. 1996) (ALJ). He also concluded that Patterson and Richardson knowingly authorized the violation by not taking steps to have the accumulation cleaned up. *Id*. at 659-61. For the reasons that follow, we affirm the judge=s finding of violation, vacate his unwarrantable failure and section 110(c) findings, and remand for further proceedings.

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[1] Section 75.400 states:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

I.

Factual and Procedural Background

On March 1, 1994, Michael Hess, an inspector with the Department of Labor=s Mine Safety and Health Administration (AMSHA@), conducted a quarterly inspection of Cannelton=s Stockton Mine (Portal Nos. 1 and 130), an underground coal mine in Kanawha County, West Virginia. 18 FMSHRC at 652; Gov=t Ex. 1. At that time, Cannelton was constructing a new section to reroute its No. 3 conveyor belt, and coal was being mined at the face, loaded into shuttle cars, and dumped into a temporary feeder on the conveyor belt. 18 FMSHRC at 652; Tr. 250-52, 259, 325-27. While inspecting the conveyor belt, Hess found an accumulation of dry, loose coal and coal dust that measured approximately 10 feet square and 4 feet deep, which was in contact with the belt and roller. 18 FMSHRC at 652-53; Tr. 41-44, 49-50; Gov=t Exs. 1 & 5 at 3. The accumulation was located under the V-scraper, a device that removes coal from the bottom, or return, belt. 18 FMSHRC at 652-53 & n.1; Tr. 60, 181-82, 256-57, 325, 384. Upon reviewing the preshift-onshift mine examination reports, Inspector Hess found that, under the section entitled AViolations and other Hazardous Conditions Observed and Reported,@ the No. 3 belt V-scraper had been reported as Adirty@ or Aneeds clean[ing]@ on every shift during the previous 2 weeks with no indication that any corrective action had been taken. 18 FMSHRC at 653; Tr. 45-46, 50, 53, 66; Gov=t Exs. 1, 9 & 15. As shift foremen, both Patterson and Richardson had reviewed and countersigned the preshift-onshift reports. 18 FMSHRC at 658, 660; Gov=t Exs. 9 & 15.

Based on the foregoing, Inspector Hess issued Cannelton Citation No. 4195028,[2] pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. ' 814(d)(1), alleging an unwarrantable and S&S violation of section 75.400 for failure to clean up the accumulation. 18 FMSHRC at 653. Subsequently, the Secretary of Labor proposed a civil penalty assessment of $3,600 against Cannelton. *Id.* at 661; Gov=t Ex. 6. In addition, following a special investigation, the Secretary proposed civil penalty assessments of $2,000 each against Patterson and Richardson, pursuant to section 110(c) of the Mine Act, alleging that, by countersigning the preshift-onshift reports and

[2] Citation No. 4195028 states:

> Management showed a high degree of negligence by allowing loose dry coal to accumulate under the No. 3 belt conveyor to a point where the loose coal was in contact with the belt. The coal accumulation measured approximately 10 feet in width, 10 feet in length and 4 feet in height. This condition was reported in the pre-shift mine examination report since 2/15/94 on each shift with no corrective actions taken. A fire hazard is present with a moving conveyor belt running in loose dry coal.

Gov=t Ex. 1.

failing to take corrective action, they knowingly authorized the violation. 18 FMSHRC at 653, 659-61; Gov=t Exs. 11 & 12. Cannelton, Patterson, and Richardson challenged the proposed assessments.

Following an evidentiary hearing, the judge concluded that Cannelton violated section 75.400, that the violation was S&S, and that it resulted from Cannelton=s unwarrantable failure to comply with the standard. 18 FMSHRC at 654-59. He also concluded that Patterson and Richardson knowingly authorized the violation by not taking steps to have the accumulation cleaned up. *Id.* at 659-61. In analyzing the issue of violation, the judge found that Athere is no dispute that an accumulation of coal, as described by Inspector Hess, existed in the area of the V-scrapper [sic] on the No. 3 belt.@ *Id.* at 654. The judge further found that the accumulation had grown over a 2-week period of time. *Id.* at 654-55. He based this finding on the testimony of Dwight Siemiaczko, Lee Tucker, and Sheldon Craft, the belt examiners who had noted that the No. 3 belt V-scraper was dirty in the preshift-onshift reports throughout the 2-week period. *Id.* The judge discredited the testimony of Patterson, Richardson, and Mickey Elkins, the shift foremen, that the accumulation had happened a short time before the inspector arrived. *Id.* at 655-56. In crediting the testimony of the belt examiners over that of the shift foremen, the judge stated:

> The three foremen theorized that the accumulation discovered by Hess was the result of a shuttle car hitting the spill board at the belt feeder which in turn knocked the belt out of alignment and caused most of the coal to fall directly onto the bottom belt where it remained until it was removed by the V-scrapper [sic]. They believed that this must have happened a short time before the inspector arrived.
>
> I find that the accumulation developed over a two week period as described by Siemiaczko, Tucker and Craft. There is no evidence that any of them had any reason not to tell the truth. Nor was there any indication at the hearing that they were not credible.
>
> On the other hand, Richardson and Patterson not only have the responsibility for defending the company, but face personal liability as well. Their self-serving statements are not persuasive when compared with the other evidence in the case. Furthermore, there is no evidence to corroborate their speculation.

Id. at 655. With regard to the issues of unwarrantable failure and section 110(c) liability, the judge found that, because Patterson and Richardson had countersigned the preshift-onshift reports, Cannelton had been placed on notice that greater efforts were necessary for compliance and Patterson and Richardson had known about the accumulation. *Id.* at 658-61. He also found that Cannelton, Patterson, and Richardson did not make any effort to clean up the accumulation.

Id. at 658-61. The judge assessed civil penalties of $3,600 for Cannelton and $500 each for Patterson and Richardson. *Id.* at 661-62. The Commission granted the petition for discretionary review (APDR@) subsequently filed by Cannelton, Patterson, and Richardson challenging the judge=s decision.

II.

Disposition

Cannelton, Patterson, and Richardson argue that the judge=s determinations are contrary to law and not supported by substantial evidence. PDR at 1; CP&R Br. at 1. The contestants assert that the judge erred in crediting the belt examiners based solely on their Aemployment status.@ PDR at 5-7; CP&R Br. at 5-9; CP&R Reply Br. at 1-6. They also assert that the judge failed to address the testimony of Elkins, a former foreman who testified that, 3**2** hours prior to the inspection, the accumulation was smaller than when the inspector cited it. PDR at 6, 8; CP&R Br. at 7, 10-11 (citing Tr. 321-24). In addition, the contestants assert that the judge erred in finding that no evidence supports the foremen=s Aspeculation@ as to the cause of the accumulation. PDR at 6-7; CP&R Br. at 7-8; CP&R Reply Br. at 5-6 n.3. They further contend that the judge erred in finding that the notations in the preshift-onshift reports were sufficient to provide notice of the accumulation and that the judge confused the testimony of Elkins and Patterson regarding cleanup efforts. PDR at 8-9; CP&R Br. at 8-9; CP&R Reply Br. at 6-15.[3]

[3] Section 113(d)(2)(A)(iii) of the Mine Act, 30 U.S.C. ' 823(d)(2)(A)(iii), and Commission Procedural Rule 70(f), 29 C.F.R. ' 2700.70(f), provide that Commission review is limited to the questions raised in a granted petition for discretionary review. In their petition for discretionary review, Cannelton, Patterson, and Richardson focus on the judge=s factual findings on which he based his ultimate conclusions regarding the issues of violation, unwarrantable failure, and section 110(c) liability, without expressly challenging those conclusions. *See* PDR at 4-9. The contestants merely request that the Commission reverse the judge=s Adecision.@ *Id.* at 6, 9. We construe the contestants= petition to request reversal of the judge=s conclusions regarding the issues of violation, unwarrantable failure, and section 110(c) liability. However, we admonish

The Secretary responds that substantial evidence supports the judge=s determinations. S. Br. at 5-19. She asserts that the judge did not credit the testimony of the belt examiners based only on their Aemployment status,@ but that his determination is buttressed by the foremen=s personal interests in the outcome of the case. *Id.* at 5-12. The Secretary also maintains that the judge considered Elkins= testimony but gave greater credence to the testimony of the belt examiners that the accumulation had developed during the 2 weeks prior to the inspection. *Id.* at 11-12 n.4. Similarly, she asserts that the judge considered evidence supporting the foremen=s Aspeculation@ as to the cause of the accumulation but gave it little credence because it was uncorroborated. *Id.* The Secretary further contends that the notations in the preshift-onshift reports, along with the foremen=s observance of some amount of accumulation prior to the inspection, provided the contestants sufficient notice of the violative condition and that their failure to ensure that it was cleaned up amounted to aggravated conduct. *Id.* at 14-18.

A. Violation

The Commission has held that section 75.400 Ais violated when an accumulation of combustible materials exists.@ *Old Ben Coal Co.*, 1 FMSHRC 1954, 1956 (Dec. 1979). Although the Commission has recognized that Asome spillage of combustible materials may be inevitable in mining operations@ (*id.* at 1958), we have held that a violative accumulation exists Awhere the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary, it likely could cause or propagate a fire or explosion if an ignition source were present.@ *Old Ben Coal Co.*, 2 FMSHRC 2806, 2808 (Oct. 1980) (footnotes omitted).

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petitioners and counsel to adhere to the requirements of the Mine Act and the Commission=s procedural rules. Because the contestants do not challenge the judge=s findings related to his S&S conclusion, that issue is not before the Commission. *See id.* at 4-9.

Here, the contestants do not dispute that a sizable accumulation was present when the citation was issued. The accumulation measured approximately 10 feet in length, 10 feet in width, and 4 feet in depth. Tr. 41. Moreover, Inspector Hess testified that this amount of loose coal and coal dust would likely cause a fire because the belt and roller running in contact with the coal was a potential source of ignition. Tr. 43, 49-52. The fact that the coal was damp beneath the surface did not render it incombustible because, as the judge noted, it could dry out and ignite. 18 FMSHRC at 657 (citing *Utah Power & Light Co., Mining Div.*, 12 FMSHRC 965, 969 (May 1990); *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1120-21 (Aug. 1985)). In light of the quantity of the accumulation at the time the citation was issued, we conclude that substantial evidence[4] supports the judge=s finding that Cannelton violated section 75.400. Accordingly, we affirm the judge=s conclusion.

B. Unwarrantable Failure

The unwarrantable failure terminology is taken from section 104(d) of the Mine 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 Areckless disregard,@ Aintentional misconduct,@ Aindifference,@ or a Aserious 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. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission=s unwarrantable failure test). The Commission Ahas recognized that a number of factors are relevant in determining whether a violation is the result of an operator=s unwarrantable failure, such as the extensiveness of the violation, 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) (citing *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992)).

Substantial evidence supports the judge=s finding that the accumulation was extensive. *See*

[4] 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). ASubstantial evidence@ means A>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)).

18 FMSHRC at 653-54. Inspector Hess testified the accumulation measured approximately 10 feet square and 4 feet deep. Tr. 41. Substantial evidence also supports the judge=s finding that Cannelton, through its foremen, had been placed on notice by the preshift-onshift reports that greater efforts were necessary for compliance with the regulation. *See* 18 FMSHRC at 658-59. Such reports are relevant in demonstrating that an operator had notice that greater efforts were necessary to assure compliance with section 75.400. *See Peabody*, 14 FMSHRC at 1262. On virtually every shift during the 2 weeks prior to the inspection, the No. 3 belt V-scraper had been reported in the preshift-onshift reports as Adirty@ or Aneeds clean[ing]@ under the section entitled AViolations and other Hazardous Conditions Observed and Reported.@ Gov=t Exs. 9 & 15. Patterson, Richardson, and Elkins reviewed and countersigned the preshift-onshift reports during this period and they acknowledged that the notations indicated that an accumulation existed. *Id.*; Tr. 315-16, 333, 335-36, 366, 379, 395, 402, 425-26. Thus, although the belt examiners did not notify the foremen orally of the accumulation, we conclude that Cannelton received notice that greater efforts were necessary to keep the No. 3 belt V-scraper clean.

With regard to the length of time the violative condition existed, however, we believe that the judge failed to address relevant testimony in finding, based on his credibility determination, that the accumulation had grown for 2 weeks prior to the inspection. *See* 18 FMSHRC at 653-56, 658. A judge=s credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). The Commission has recognized that, because the judge has an opportunity to hear the testimony and view the witnesses, he is ordinarily in the best position to make a credibility determination. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (A*Dust Cases*@) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)). Nonetheless, the Commission will not affirm such determinations if there is no evidence or dubious evidence to support them. *Consolidation Coal Co.*, 11 FMSHRC 966, 974 (June 1989).

Initially, we find unavailing the contestants= argument that the judge=s consideration of the foremen=s personal interests was inappropriate in making his credibility determination. A judge may evaluate numerous factors in determining witness credibility, including the motivation of and relationship between witnesses. *Huston v. Secretary of Health and Human Servs.*, 838 F.2d 1125, 1132 (10th Cir. 1988); *NLRB v. Pyne Molding Corp.*, 226 F.2d 818, 819 (2d Cir. 1955); *Defosse v. Secretary of Health and Human Servs.*, 670 F. Supp. 1078, 1080-81 (D. Mass. 1987). However, the judge may not reject testimony strictly on the basis of a relationship between a witness and a party to the proceeding. *Breeden v. Weinberger*, 493 F.2d 1002, 1010 (4th Cir. 1974). In this case, we conclude that the judge did not reject the foremen=s testimony solely on the basis of their employment relationship with Cannelton. Although the judge recognized that ARichardson and Patterson not only have the responsibility for defending the company, but face personal liability as well,@ he found their testimony Anot persuasive when compared with the other evidence in the case.@ 18 FMSHRC at 655. Therefore, we conclude that the judge=s consideration of the foremen=s personal interests is not a basis on which to overturn his credibility determination.

Nevertheless, we agree with the contestants that the judge failed to address Elkins= testimony that, 3½ hours prior to the inspection, the accumulation was smaller than when the inspector cited it. *See id.* In considering the foremen=s theory that the accumulation had developed a short time before the inspector arrived, the judge recognized that Elkins Ahad walked the belt about [3½] hours before the citation was issued and although he observed a fairly large accumulation, it was not the size of the one found by Hess and it was not touching the belt or rollers.@ *Id.* However, the judge rejected the foremen=s theory, in part, due to their self-interest, a basis not applicable to Elkins, who had since left the company and, therefore, was not responsible for defending it, and who was not facing personal liability. *See id.*; Tr. 317-18. The judge specifically discredited the testimony of Patterson and Richardson without supplying any reasons for discounting Elkins= testimony.

The substantial evidence standard of review requires that a fact finder weigh all probative record evidence and that a reviewing body examine the fact finder=s rationale in arriving at his decision. *Amax Coal Co.*, 18 FMSHRC 1355, 1358 n.7 (Aug. 1996). In order for the Commission to effectively perform its review responsibility, a judge must analyze and weigh the relevant testimony, make appropriate findings, and explain the reasons for his decision. *Secretary of Labor on behalf of Hyles v. All Am. Asphalt*, 18 FMSHRC 2096, 2101 (Dec. 1996). Commission Procedural Rule 69(a) also requires that a judge=s decision Ainclude all findings of fact and conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record.@ 29 C.F.R. ' 2700.69(a). In light of the judge=s failure to address Elkins= testimony, we cannot effectively review his finding, based on his credibility determination, that the accumulation had grown for 2 weeks prior to the inspection. Thus, we vacate the judge=s finding and remand the matter for further consideration. We direct the judge to consider Elkins= testimony and make a credibility determination with respect to Elkins.

We also agree with the contestants that the judge erred in finding that there is no evidence to corroborate the foremen=s Aspeculation@ as to the cause of the accumulation. In discrediting the foremen=s testimony, the judge stated A[n]o one testified . . . that the belt was out of alignment, that coal was observed traveling from the feeder to the V-[scraper] on the bottom belt or that the belt was re-aligned after the accumulation was discovered.@ *See* 18 FMSHRC at 655-56. However, the record indicates that both Richardson and Inspector Hess observed coal coming off the belt at the time they discovered the accumulation. Tr. 46-47, 62, 273-74. Hess acknowledged that Athe only way that [he] could conceive of the coal getting on the bottom belt@ was from the No. 3 belt feeder. Tr. 63-64. The belt examiners also corroborated this view. Siemiaczko testified that he assumed that the accumulation was caused by either a Afeeder misaligned on the belt@ or a splice in the belt. Tr. 136, 149. Tucker stated that he thought that the accumulation was caused by Aspillage from the feeders . . . onto the bottom belt.@ Tr. 194. Craft also stated that he thought that the accumulation was caused by Athe feeder dump[ing] on the belt. Tr. 226. Moreover, Richardson testified that, after discovering the accumulation, he telephoned the section boss, Steve Dean, and told him to shut down and reset the feeder. Tr. 274-75, 312. For the purpose of our unwarrantable failure analysis, a key question is the duration

of the violative condition, not its specific cause. However, evidence of the cause of the accumulation may corroborate Elkins= testimony that the accumulation was larger 3 **2** hours after he had observed it. We thus vacate the judge=s finding that no evidence supports the foremen=s Aspeculation@ as to the cause of the accumulation, and remand the matter for further consideration insofar as the cause of the accumulation may be relevant to the length of time that it had existed.

Finally, with regard to Cannelton=s cleanup efforts, the judge failed to mention relevant testimony in finding that Cannelton did not make efforts to eliminate the violative condition. *See* 18 FMSHRC at 658-59. Richardson testified that, on every shift, there were two men working on the belts who would shovel, rock dust, and clean up around the drives and V-scraper. Tr. 264-65, 270. He explained that, because the V-scraper was a problem area and it was reported as dirty in the preshift-onshift reports, his men automatically knew to clean it. Tr. 266, 270, 314. Richardson also stated that, upon learning that the V-scraper was dirty, he directed his men to stop there and, if excessive coal was present, to clean it up. Tr. 282, 298-99. Richardson remembered having to realign the feeder two or three times during the 2 weeks prior to the inspection in order to correct spillage problems, and he testified that the coal was cleaned up each time. Tr. 289-90. Elkins also testified that Cannelton employed men whose job was to keep the belt clean. Tr. 352. He testified that, when an accumulation at the V-scraper reached the height of the belt, he would send men with shovels to remove some of it and that, during the 2 weeks prior to the inspection, he directed his men to do so. Tr. 338-39, 344-45, 363. Patterson also testified that he had two men assigned to cleaning belts on every shift. Tr. 376-77, 387, 396. Patterson testified that, during the 2 weeks prior to the inspection, he observed three accumulations at the V-scraper, one of which he specifically assigned his belt cleaners to clean up and the others which he shoveled himself. Tr. 386-92, 396, 407-08. Patterson explained that his men attempted to get a scoop to the area to clean up the accumulation but that the area was extremely wet and muddy so they were unable to do so. Tr. 408-10. Then, he directed the men to shovel the accumulation and he saw them shoveling before he left. Tr. 410, 412. Patterson testified that the two men shoveled the area for approximately 2 **2** hours and then men working on the next shift, for whom Elkins was the foreman, finished cleaning and rock dusted the area. Tr. 412, 420-21, 423.

We conclude that the judge failed to consider the testimony of Patterson, Richardson, and Elkins regarding their efforts to clean up the accumulation.[5] Such remedial efforts are relevant to the unwarrantable failure evaluation and should have been considered by the judge. *See, e.g.*, *Peabody*, 14 FMSHRC at 1263-64; *Utah Power & Light Co.*, 11 FMSHRC 1926, 1933-34 (Oct. 1989). We therefore vacate the judge=s finding that Cannelton did not make efforts to eliminate the violative condition, and remand the matter for further consideration of the evidence adduced during the hearing on this issue. If, on remand, the judge determines that Cannelton made efforts to clean up the accumulation, he shall also evaluate such efforts insofar as they may be relevant to

[5] We note that, as the contestants point out (CP&R Reply Br. at 6-9), the judge appears to have confused the testimony of Elkins and Patterson regarding the unsuccessful attempt to clean up the accumulation. 18 FMSHRC at 658-59.

the length of time that the accumulation had existed.

Our decision to vacate the judge=s unwarrantable failure finding should not be construed as advocating or encouraging operators to allow accumulations of coal to exist on a belt line. We fully recognize the seriousness of this particular violation and do not wish to downplay its significance. At issue here, however, is not whether a violation of section 75.400 occurred, or if the violation was S&S. Instead, the issue on review is a more narrow one that requires us to focus on whether the operator=s conduct rises to the level of unwarrantable failure. On this point, we are guided by established precedent that, to properly make this determination, a judge must fully evaluate the operator=s conduct in accordance with certain factors identified by the Commission to determine whether a violation is unwarrantable. The factor that is particularly germane on this appeal is the operator=s efforts to eliminate the violative condition.

As discussed previously, the judge found that Richardson and Patterson did not make any specific attempts to have the accumulation cleaned up. 18 FMSHRC at 658. Based on our review of the record, this finding is contradicted by certain evidence adduced during the hearing. The judge appears to have failed to consider relevant testimony of Cannelton=s witnesses concerning their efforts to clean up the accumulation. Accordingly, we believe our responsibility is to vacate the judge=s decision, and remand the case with an instruction that the judge consider and evaluate this testimony and determine whether it influences his prior finding that this violation was unwarrantable.

Unlike our dissenting colleagues, we will not ourselves attempt to determine here whether the evidence of cleanup efforts by Cannelton was sufficient to warrant elimination of the unwarrantable failure designation, or whether aggravated or intentional misconduct occurred. In our view, the determination is more appropriately made by the judge, who, as the trier of fact, had a previous opportunity to observe the witnesses directly, and is therefore in the best position to evaluate this testimony and determine whether, if credited, it requires a reversal of his previous finding that this violation was unwarrantable. We believe this approach is preferable to that taken by the dissenters, who elect to invade the province of the judge and evaluate the record testimony on their own and conclude that the judge=s failure to consider it was mere Aharmless error,@ based on their opinion that, even if credited, the evidence did not reflect a cleanup effort Areasonably designed to eliminate the accumulation.@ Slip op. at 15 n.4.[6] We believe that our approach

[6] In concluding that any efforts taken by Cannelton to clean up the accumulation were unreasonable and ineffectual, and therefore cannot provide a basis for a finding that the violation was not unwarrantable, our colleagues cite to their separate opinion in *Peabody Coal Co.*, 18 FMSHRC 494, 501 (Apr. 1994) (Chairman Jordan and Commissioner Marks, concurring in part and dissenting in part). In their opinion in *Peabody*, however, while Chairman Jordan and Commissioner Marks agreed with the Commission majority that the judge failed to appreciate the significance of water as a dust control measure in finding that the operator=s respirable dust violation was unwarrantable, they indicated that they would have instead vacated the judge=s determination and remanded for further analysis, based upon their unwillingness to conclude that

ensures that due process of the law is afforded to all parties in making this crucial determination.

In sum, we vacate the judge=s determination that the violation was the result of Cannelton=s unwarrantable failure, and remand for findings of fact related to the length of time that the accumulation had existed and Cannelton=s cleanup efforts.[7] The judge shall also make new findings for any of the six penalty criteria set forth in section 110(i) of the Mine Act,

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the record could not support an unwarrantable failure finding. *Id.* In that case, our dissenting colleagues criticized the Commission majority for taking the type of approach they propose to follow here **C** declining to allow the judge the opportunity to determine, in the first instance, whether his analytical error warrants a reversal of his unwarrantability determination, based upon their conclusion that the record can only support one conclusion.

[7] In vacating the judge=s determination of unwarrantable failure we are not attempting to downplay the seriousness of a violation alleging an accumulation of coal or coal dust in an underground mining environment. Instead, our focus here is to determine if the operator=s conduct rises to the level of unwarrantable failure. To properly make this determination, the judge must evaluate this conduct in accordance with the factors utilized by the Commission to determine whether a violation is unwarrantable.

30 U.S.C. ' 820(i),[8] that are affected by his findings of fact and reassess the civil penalty against Cannelton.

C. Section 110(c) Liability

Section 110(c) of the Mine Act provides that, whenever a corporate operator violates a mandatory safety or health standard, an agent of the corporate operator who knowingly authorized, ordered, or carried out such violation shall be subject to an individual civil penalty. 30 U.S.C. ' 820(c). The proper legal inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff=d on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983). *Accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997). To establish section 110(c) liability, the Secretary must prove only that an individual knowingly acted, not that the individual knowingly violated the law. *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *United States v. Int=l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)). An individual acts knowingly where he is Ain a position to protect employee safety and health [and] fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition.@ *Kenny Richardson*, 3 FMSHRC at 16. Section 110(c) liability is predicated on aggravated conduct constituting more than ordinary negligence. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992). Here, we conclude that the judge erred in reaching his section 110(c) conclusions by failing to consider evidence regarding the foremen=s efforts to eliminate the violative condition.

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[8] Section 110(i) sets forth six criteria to be considered in the assessment of penalties under the Act:

> [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.

We have already concluded that the record supports the judge=s finding that Patterson and Richardson, agents of Cannelton,[9] possessed actual knowledge of the accumulation problem by way of the preshift-onshift reports. Slip op. at 6. However, as we have determined, the judge failed to consider Patterson=s and Richardson=s testimony regarding their efforts to clean up the accumulation. Because an agent=s actions following his awareness of a violative condition are critical to the section 110(c) analysis, we vacate the judge=s determination that Patterson and Richardson are liable under section 110(c) and remand for findings of fact related to the foremen=s cleanup efforts. In the event the judge finds section 110(c) liability, he shall reassess the civil penalty or penalties based on the section 110(i) criteria as they apply to individuals. *Ambrosia Coal and Constr. Co.*, 19 FMSHRC 819, 823 (May 1997); *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 272 (Feb. 1997).

III.

Conclusion

For the foregoing reasons, we affirm the judge=s determination that Cannelton violated section 75.400, vacate his determinations that the violation resulted from unwarrantable failure and that the foremen are liable under section 110(c), and remand for further consideration consistent with this opinion.

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

[9] At the hearing, the parties stipulated that Patterson and Richardson were agents of Cannelton. Tr. 18-19.

Robert H. Beatty, Jr., Commissioner

Chairman Jordan and Commissioner Marks, dissenting in part:

It is clear from the record in this case that an extensive accumulation of coal existed for at least 2 weeks at the Cannelton mine, in violation of 30 CFR ' 75.400.[1] It is also clear from the record that Cannelton officials were indifferent to this violation, simply because it was a smaller accumulation than those they personally considered dangerous. Because we agree with the judge=s conclusion that Cannelton=s conduct was Ainexcusable,@ 18 FMSHRC 651, 659 (Apr. 1996) (ALJ), we would affirm his finding that the violation was a result of the operator=s unwarrantable failure.

The majority does not dispute the judge=s finding that the accumulation was extensive, measuring approximately 10 feet square and 4 feet deep. Slip op. at 6. In fact, the inspector testified that when the violation was abated, *8 to 12 tons* of coal were removed. Tr. 54 (emphasis added). Even one of the Cannelton foremen estimated that 6 to 8 tons of coal were taken away to abate the violation. Testimony of Richardson, Tr. 306. The majority also agrees with the judge=s conclusion that Cannelton was placed on notice of the violation by preshift-onshift reports. Slip op. at 6. Nonetheless, despite overwhelming evidence provided by those same reports that the accumulation had existed for at least 2 weeks, and despite clear proof that any efforts to eliminate the accumulation were ineffectual at best and half-hearted at worst, the majority declines to affirm the judge=s finding of unwarrantable failure.

Our colleagues in the majority insist that a remand is necessary to permit the judge to make a credibility determination with respect to Elkins, slip op. at 7, to ascertain the duration of the violation. This is an unnecessary exercise for two reasons. First, the judge decided the

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[1] Although we agree with the majority that the judge properly found an accumulation violation, slip op. at 5, we fear that the majority=s discussion of the violation may create the incorrect impression that some level of accumulation is permitted under the standard. This is not consistent with Commission case law. In defining an accumulation in *Utah Power & Light Co., Mining Div.*, 12 FMSHRC 965, 968 (May 1990), the Commission emphasized that it was ACongress= intention to *prevent*, not merely to minimize, accumulations@ and that section 75.400 was Adirected at *preventing accumulations in the first instance*, not at cleaning up the materials within a reasonable period of time after they have accumulated.@ *Id.* (citing *Old Ben Coal Co.*, 1 FMSHRC 1954, 1957 (Dec. 1979) (emphasis added).

question of duration when he found that the accumulation existed for 2 weeks, crediting the testimony of the two fire bosses and a general laborer. 18 FMSHRC at 655. While explicitly crediting this testimony over that of Richardson and Patterson, in making this finding he also implicitly credited their testimony over that of Elkins. *See Fort Scott Fertilizer - Cullor, Inc.*, 19 FMSHRC 1511, 1516 (Sept. 1997) (concluding that the judge implicitly credited miner=s testimony that he was not aware of brake problems).

More importantly, a remand is unnecessary because of the staggering amount of evidence demonstrating that the accumulation had developed over a 2-week period. Thirty-five preshift reports written during that 2-week period indicated that the No. 3 belt V-scraper was Adirty@ or Aneed[ed] clean[ing].@ Gov=t Ex. 9. On 34 of those reports, the condition was reported as Acontinued,@ indicating that it had previously existed. Tr. 316, 335-36. After reviewing these reports (many of which he had countersigned) during the trial, Elkins was asked whether he denied Athat there was an accumulation at the No. 3 belt near the V-scraper from February 14th to march [sic] the 1st.@ Tr. 336. He replied, unequivocally, ANo, ma=am. I do not.@ *Id.*

In addition to the preshift reports, which we find compelling, the testimony of the preshift examiners makes clear that this accumulation increased over a period of 2 weeks, and was not suddenly created just before the inspection. Dwight Siemiaczko testified that Afrom February 14th, . . . it grew in size from that day to March 1.@ Tr. 130. Lee Tucker stated that the accumulation occurred A[o]ver the extended period of time . . . . I think the two weeks that we=re talking about that=s recorded in the book.@ Tr. 195.[2] Clearly, substantial evidence supports the judge=s finding that this accumulation slowly grew over a 2-week period, and did not suddenly emanate 3 hours before the inspection.[3]

In remanding the case for further consideration of Cannelton=s efforts to clean up the accumulation, the majority fails to recognize the deeply disturbing principle underlying Cannelton=s action (or inaction). The reigning operating procedure at this mine was that the foremen tolerated coal accumulations up to a certain amount. They were simply complacent about accumulations smaller than those they personally considered dangerous. This classic indifference to a dangerous ignition source is the prototype of an unwarrantable failure.

The testimony of the foremen illustrates their blase attitude. For example, Elkins, when asked what he considered a Amanageable@ amount of coal accumulation, stated A[t]welve inches or

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[2] The majority speculates that Siemiaczko=s and Tucker=s statements that the accumulation may have been caused by a problem with the feeder could corroborate Elkins= testimony about the size of the accumulation. Slip op. at 7-8. However, their testimony indicates that even if that was the cause, the accumulation nonetheless developed over a 2-week period.

[3] Although we need not reach the issue, we note that an unwarrantable failure designation for an accumulation of this size might be supported even if the duration were 3 hours instead of 2 weeks.

so.@ Tr. 363. He readily admitted passing by the relevant area 3**2** hours before the inspection and observing a 4 by 4 foot accumulation that was 18 to 24 inches deep. Tr. 322. When asked when he would require miners to go to the area to shovel, he stated A[o]nce it [the accumulation] got to a height that concerned me,@ which, he subsequently admitted, was when it was 6 to 8 inches from the belt. Tr. 338-39. A remand is not necessary to determine the credibility of this witness. Even accepting his testimony concerning the size of the accumulation, his failure to exert reasonable efforts to eliminate it supports the unwarrantable failure determination.

Richardson, when asked what he considered an excessive amount of coal requiring cleanup, stated, A[A]n excessive amount of coal, it could be anything. It=s according to how high your belt is,@ and suggested that it needed to touch the rollers. Tr. 283. He bluntly testified that:

> If there was a mound of coal there, [at the scraper] it presented no problem. . . . [Y]ou could have, like I told you, 14 to 16 inches of coal, I would think nothing of it if I had a place over here that had a coal spillage in it or something else wrote up that I needed the men to work on. That would be put on the last of my list. And if they got down to it, good. If not, it would be passed on.

Tr. 307.

Patterson testified that he only saw spillage two times at the No. 3 belt, and that both times it was 2 or 2**2** feet high, 4 feet by 6 feet. Tr. 389. When asked if he considered either of the 2 or 2**2** foot high accumulations hazardous, he stated that he did not. *Id.*

In sum, the operator=s baseline was that at least a foot of coal needed to accumulate before it made sense to worry about it. It is not surprising, therefore, that Cannelton=s cavalier attitude towards accumulations resulted in only the most perfunctory of efforts to eliminate it. The evidence cited by the majority in support of its decision to vacate the judge=s finding that Cannelton did not make efforts to clean up, slip op. at 8, reveals lackluster attempts more indicative of Cannelton=s nonchalant attitude about the accumulation than of a sincere effort to remove it. Even crediting the evidence on which the majority relies, substantial evidence indicates that Cannelton=s cleanup attempt was woefully inadequate.

First, foreman Richardson testified that he never asked for additional personnel to clean up the area. When asked if he thought he needed additional help, he replied: ANot until I got the violation >cause I never seen any problem there that I needed to shut down a section or anything to pull extra people in.@ Tr. 304. Although he asserted that men worked to remove the accumulation, he could not state how often or when this work was performed. Tr. 299.[4] In

[4] Patterson testified that he did shovel the accumulation once himself. Tr. 387. He also testified that he assigned two men to clean belts and that on one occasion he specifically assigned his belt cleaners to clean up the accumulation at the V-scraper, Tr. 386-92, although he failed to

addition, miners Siemiaczko and Craft testified that they were unaware of any effort to clean up the accumulation during the 2 weeks prior to the inspection. Tr. 140-41, 227-28. Also, the

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note these cleanup efforts in the examination books. Tr. 412, 422-23. Thus, the judge=s finding that Aneither Richardson nor Patterson . . . made any specific attempt to have it [the accumulation] cleaned up, 18 FMSHRC at 658, is an overstatement, but it constitutes harmless error in light of Cannelton=s overwhelming failure to initiate a cleanup reasonably designed to eliminate the accumulation.

inspector testified that nobody was cleaning up the accumulation when he arrived on the scene. Tr. 60.

The facts of this case are strikingly similar to those in the recent Commission case *Amax Coal Co.*, 19 FMSHRC 846 (May 1997), in which the Commission affirmed the judge=s decision upholding an unwarrantable failure designation on an accumulations violation. As in this case, *Amax* involved an extensive accumulation that existed for several shifts preceding the issuance of the order. We rejected Amax=s defense that because the day shift manager=s decision to send only one miner to clean up the accumulation was based on a good faith (although mistaken) belief that this would be effective, the violation should not be designated unwarrantable. *Id*. at 851. We emphasized that Athe operator=s good faith belief must be reasonable under the circumstances.@ *Id*. We held that the preshift examiner=s incorrect assessment of the spill was not reasonable in light of the size of the accumulation. Similarly, we find that here, Cannelton=s efforts **C** even including those cited by the majority as the basis for its remand **C** were clearly unreasonable and patently ineffectual. *See Peabody Coal Co.*, 18 FMSHRC 494, 501 (Apr. 1996) (Chairman Jordan and Commissioner Marks, dissenting in part) (A[T]he success or failure of an operator=s effort to achieve compliance is a factor that must be considered in deciding whether the operator acted reasonably and in good faith.@).

The Commission=s decision in *Peabody Coal Co.*, 14 FMSHRC 1258 (Aug. 1992) is also instructive. In that case, in which we affirmed an unwarrantable failure determination, the judge credited the inspector=s testimony that an extensive accumulation of coal had existed for up to 1 week. *Id*. at 1261-62. Entries for seven of the eight preshift examinations made prior to the inspection described problems with accumulations or spilling in the relevant area. *Id*. at 1262. The Commission noted that the preshift reports showed not only that the operator had prior notice of an accumulation problem, but also demonstrated Athat greater efforts were necessary to assure compliance with section 75.400.@ *Id*. In addition, we acknowledged that Peabody=s failure to remedy the spilling problem was a proper consideration in the unwarrantable failure determination, and that the judge was correct to consider the inspector=s testimony that, as in this case, at the time of the inspection no one was attempting to remove the accumulation. *Id*. Finally, in *Peabody*, the judge found that only one miner was assigned to clean the area, and she had other responsibilities. *Id*. at 1263. He concluded that this effort was not sufficient to effectively remedy the cited accumulation, a finding which the Commission agreed supported his determination that Peabody engaged in aggravated conduct. *Id*. Thus, substantial evidence amply supports the judge=s finding that Cannelton engaged in aggravated conduct constituting an unwarrantable failure.

We also agree with the judge=s determination that Patterson and Richardson are liable under section 110(c). The proper legal inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff=d on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983). The majority does not dispute the judge=s finding that these two foremen had *actual* knowledge of the accumulation, due to the preshift-onshift reports noting

such conditions, which they signed. Slip op. at 11. Foreman Richardson signed 35 reports at issue and foreman Patterson signed 9 of those reports. Gov=t. Ex. 9. Despite determining that these foremen had actual knowledge of a persistent accumulation, the majority incorrectly remands the section 110(c) issue for further findings related to the foremen=s cleanup efforts. Such a remand is unnecessary because the record is replete with references regarding their abject *failure* to adequately eliminate the accumulation. *Supra* at 13-14. No cleanup efforts were recorded in the examination books. Tr. 293-94. The inspector testified that he had no knowledge of any attempts by them to clean up the accumulation. Tr. 100-02. The only evidence of Patterson=s cleanup efforts is negligible, *see supra* at 14 n.3, and Richardson could not cite one specific instance in which his miners cleaned up the relevant area. Tr. 298-99. Thus substantial evidence supports the judge=s finding that these individuals knew of the violative condition and failed to take effective steps to remedy condition. When substantial evidence supports a judge=s finding, we are required under the Mine Act to affirm it. 30 U.S.C. ' 823(d)(2)(A)(ii)(I).[5]

In *Prabhu Deshetty*, 16 FMSHRC 1046 (May 1994), the Commission found a general mine foreman liable under section 110(c) under facts less egregious than those presented here. There, for 8 working days, the foreman signed the belt examiner=s report, which had indicated that the belt was dirty or needed cleaning, but took no steps to verify that the accumulations were cleaned up. *Id.* at 1050-51. Similarly, Patterson and Richardson failed to take effective steps to remedy the accumulation problem when they were made aware by the preshift reports, which they signed, that the problem existed.

[5] The majority has apparently overlooked the posture of this case as it stands before us **C** the judge determined that the operator engaged in unwarrantable failure and that Patterson and Richardson were liable under section 110(c). Accordingly, we have not invaded the province of the judge as our colleagues suggest, but, in accordance with Mine Act section 113, have only reviewed the record to see whether substantial evidence supports those determinations. Having satisfied ourselves that substantial evidence supports the judge=s determinations, we vote to affirm them.

Accordingly, we would affirm the judge=s determinations that the accumulation violation was a result of unwarrantable failure, and that Patterson and Richardson are liable under section 110(c) for knowingly authorizing, ordering, and carrying out the violation.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

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