

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

September 30, 1999

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
on behalf of DONALD E. ZECCO	:	
	:	
	:	
v.	:	Docket No. WEVA 97-82-D
	:	
CONSOLIDATION COAL COMPANY	:	

BEFORE: Jordan, Chairman; Marks, Riley, and Verheggen, Commissioners¹

DECISION

BY: Jordan, Chairman; Riley and Verheggen, Commissioners

In this discrimination proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”), Administrative Law Judge Gary Melick determined that Consolidation Coal Company (“Consol”) did not violate section 105(c) of the Act,² 30 U.S.C. § 815(c), when it reassigned Donald Zecco from a production section where he operated a continuous miner to a construction project where he did general inside laborer duties. 20 FMSHRC 497 (May 1998) (ALJ). The Commission granted the Secretary of Labor’s petition for discretionary review filed on behalf of Zecco challenging the judge’s decision. For the reasons that follow, we affirm the judge in result.

¹ Commissioner Beatty recused himself in this matter and took no part in its consideration.

² Section 105(c)(1) provides in pertinent part:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, [or] representative of miners . . . because of the exercise by such miner, [or] representative of miners . . . of any statutory right afforded by this Act.

I.

Factual and Procedural Background

Zecco worked for Consol at its Robinson Run No. 95 Mine in Marion County, West Virginia, and had 15 years experience as a continuous miner operator. 20 FMSHRC at 498; Tr. 26; Am. Compl. at 2. In October 1995, he was assigned as a continuous miner operator to the midnight shift on the 6D section. 20 FMSHRC at 498. The mining conditions on the 6D section were unfavorable due to high levels of methane, sulfur in the coal seam, water, and roof problems. *Id.* The methane level was so high that the 1 percent warning light on Zecco's continuous miner came on almost every time he started cutting coal. *Id.*; Tr. 33. When this occurred, he was required by 30 C.F.R. § 75.323(b)³ to deenergize the miner and check the methane level until it fell below 1 percent. 20 FMSHRC at 498. The sulfur in the seam caused sparks to fly off the barrel of the continuous miner, damaging cutting bits and, at times, causing a ring of fire at the head of the miner. *Id.*

According to Zecco, the combination of high methane levels, sparks caused by the sulfur, and dusty conditions created a serious risk of an explosion. *Id.*; Tr. 34-35. From October to mid-December 1995, he and his crew took additional safety measures to reduce the risk, including testing for methane with a handheld monitor more frequently than required by Department of Labor Mine Safety and Health Administration ("MSHA") safety standards (*see* 30 C.F.R. § 75.362(d)(1)(iii)); doing frequent ventilation tubing checks; hanging additional ventilation curtain to improve the air at the face; stopping to rock dust more frequently than required by MSHA safety standards (*see* 30 C.F.R. § 75.402); and washing down the continuous miner to minimize float coal dust. 20 FMSHRC at 498; Tr. 35-37, 599.

Zecco claimed that these additional safety precautions, and the maintenance delays caused by sulfur damage to the bits, slowed down the mining cycle. 20 FMSHRC at 498. The three shifts on the 6D section produced an average of 46.3 feet per shift in October 1995, while the 7D and 8D sections produced an average of 72.4 and 69.4 feet per shift, respectively. *Id.* at 498-99. During October through December 1995, Zecco's midnight shift on the 6D section produced an average of from 3.4 to 10 feet less per shift than the day or afternoon shifts working in the same location and using the same equipment. *Id.* at 499; Poland Tr. 39, 122; Tr. 354.

³ Section 75.323(b) provides in pertinent part:

(b) *Working places and intake air courses.* (1) When 1.0 percent or more methane is present in a working place . . . electrically powered equipment in the affected area shall be deenergized, and other mechanized equipment shall be shut off . . . [and n]o other work shall be permitted in the affected area until the methane concentration is less than 1.0 percent.

In early October 1995, Zecco checked the auxiliary fan in the 6D section because he believed it was not pulling enough air into the section. 20 FMSHRC at 499. He found that it was rated at 40 horsepower, whereas the other sections had 50 horsepower fans. *Id.* Zecco complained 10 to 12 times to mine management, including to assistant mine superintendent Rodney Poland, about the inadequate fan as well as methane and sulfur conditions on the 6D section. *Id.* at 499-500; Tr. 66.⁴ In mid-November, he told Poland that, as required by law, he would not run the continuous miner when the methane warning light was activated. 20 FMSHRC at 499.

In mid-December, there was a major workforce reduction and “realignment” at the mine due to the completion of a conveyor belt haulage system. *Id.* at 501. From a total of 450 miners, 75 were laid off and approximately 125 were reassigned to different shifts, portal assignments, and job classifications. *Id.* The portal assignment of many miners was changed from the Oakdale Portal to the Robinson Run Portal or vice versa. *Id.* Around this time, a construction project (the “seal construction project”) was started to seal off parts of the mine. *Id.*

At the same time, Consol decided to set up a longwall in the 6D section and needed to maximize mining progress in the section in order to begin installing the longwall on schedule. *Id.* at 502. Poland also wanted to improve production on the midnight shift on the 6D section. *Id.* At the time, Zecco, Rick Garcia, Jennings O’Dell, and John Belcastro were the continuous miner operators on the midnight shift at the mine. Poland Tr. 55. According to Poland, Garcia was an excellent continuous miner operator and he decided to replace Zecco and his crew on the midnight shift in the 6D section with Garcia and his crew in order to improve production. 20 FMSHRC at 502; Poland Tr. 67-68.

In December 1995, the mine was using two kinds of continuous miners at the Oakdale Portal: 12CM miners in the 6D section and 14CM satellite miners in the 7D and 8D sections. 20 FMSHRC at 502; Poland Tr. 39-40. The satellite miners were larger and harder to operate than the 12 CM miners, and it was difficult to move them between sections. 20 FMSHRC at 502. O’Dell, considered to be the best available satellite miner operator, was retained as the 7D section satellite miner operator. *Id.*; Tr. 602. Belcastro was reassigned from the Robinson Run Portal to the Oakdale Portal as the 8D section satellite miner operator because, according to Consol, he was a better satellite miner operator than Zecco. 20 FMSHRC at 500, 502. Zecco was reassigned to the seal construction project at the Robinson Run Portal as a continuous miner operator. *Id.* at 500.

Belcastro was the least senior and Zecco was the most senior continuous miner operator on the midnight shift. *Id.* On December 16, Zecco protested his reassignment to Poland. *Id.*

⁴ The fan was upgraded to 50 horsepower in January 1996, after Zecco had been transferred off the section, and 70 horsepower fans were later installed on all the sections. 20 FMSHRC at 500.

When his reassignment was not canceled, Zecco filed a grievance pursuant to Article 23(c) of the National Bituminous Coal Wage Agreement of 1993 (the “Contract”). 20 FMSHRC at 500, 502. Zecco claimed that he was being improperly reassigned because he had a seniority right under the Contract to remain as a continuous miner operator on an active production section. *Id.*; Tr. 105, 116, 128-29. After Zecco filed his grievance, Poland told him that he was reassigned because of his low productivity. Tr. 103-04.

Although Zecco was transferred to the Robinson Run Portal as a continuous miner operator, he did not operate a miner during his time there. 20 FMSHRC at 500-01; Tr. 129. Instead, he performed general inside laborer duties, including building cribs, shoveling belt spillage, carrying belt structure, dragging and setting posts, shoveling snow out of the mine entrance, and pumping water out of the seals. 20 FMSHRC at 500; Tr. 129-32. Zecco described this work as “a lot more physical” than his work at the Oakdale Portal and testified that it sometimes required bending and walking under low top for up to four miles, crawling and working in areas under two feet high, and working while standing in water. Tr. 129-32.

On January 11, 1996, Zecco filed the instant discrimination complaint with MSHA, claiming that he was reassigned to the Robinson Run Portal because he made protected safety complaints to Consol and because he shut down his continuous miner when the methane warning light was activated. 20 FMSHRC at 503; Am. Compl., Attach. A. In February 1996, when Consol realized it lacked enough miners at the Oakdale Portal to move the longwall to the 6D section, it transferred the seal construction project crews, including Zecco and his continuous miner crew, back to the Oakdale Portal to help with the move. 20 FMSHRC at 503; Poland Tr. 44. From February 20, 1996, when he returned to the Oakdale Portal, until October 1996, Zecco worked as a floater, substituting for other continuous miner operators, building cribs, helping with the longwall move, and operating other mining equipment. 20 FMSHRC at 501; Tr. 133. Zecco’s grievance was resolved in October 1996 when he was assigned full-time to a continuous miner and was paid for 75 hours of overtime lost as a result of not working exclusively on continuous miners. 20 FMSHRC at 501. Zecco’s discrimination claim subsequently proceeded to hearing before Judge Melick.

The judge found that Consol did not discriminate against Zecco in violation of section 105(c) of the Mine Act. *Id.* at 507. Although he found that Consol knew about Zecco’s protected safety complaints and assumed that adverse action (the transfer to the seal construction project) had occurred, *id.* at 503-04, he found that the Secretary had failed to show that the adverse action was motivated in any part by Zecco’s protected activity. *Id.* at 504. The judge held that no inference of improper motive could be drawn because there was a rational, objective, non-protected business rationale for Zecco’s transfer (his crew’s low productivity and his inadequate operation of the satellite miner). *Id.* at 506. He also determined that Zecco did not suffer disparate treatment when he was transferred because Consol planned to use him as a continuous miner operator on the seal construction project and because other continuous miner operators were also transferred to the project. *Id.* Alternatively, the judge found that, even if Consol was motivated in part by Zecco’s protected activity, Consol could have defended

affirmatively because it would have transferred Zecco based solely on his unprotected activity (his lower production and inadequate operation of the satellite miner). 20 FMSHRC at 507.

II.

Disposition

The Secretary argues that the judge erred in holding that Consol proved that it relied on rational, objective business reasons for Zecco's transfer. S. Br. at 32-34. She contends that the judge's finding that Zecco was a less capable satellite miner operator than Belcastro is not supported by substantial evidence. *Id.* at 33-38. She also argues that, because Zecco's lower production resulted directly from his protected safety measures, the judge should not have viewed Zecco's lower production as an objective business reason for the reassignment. *Id.* at 32-33.

Consol claims that substantial evidence supports the judge's finding that Zecco was not transferred in retaliation for his protected activities. C. Resp. Br. at 18-23. It argues that he was transferred because he was less able to operate the satellite miner than Belcastro, and because his crew had the lowest productivity of the three shifts on the 6D section. *Id.* at 23-26.

A complainant alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *See Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *See Robinette*, 3 FMSHRC at 818 n.20. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *See id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

It is undisputed that Zecco engaged in protected activity and that the transfer to the seal construction project subjected Zecco to more physically demanding work which was performed under harsher conditions. Assuming this transfer constituted adverse action sufficient to prevail

under section 105(c),⁵ the only issue raised in this case is whether Zecco's transfer was motivated in any part by his protected activity, or whether instead it was due to legitimate business reasons. The judge found that the transfer was not motivated by Zecco's protected activity because his complaints were not the kind to typically elicit hostility and retaliation from management. 20 FMSHRC at 505. The judge also noted that Consol replaced the 40 horsepower fan with a 50 horsepower fan after Zecco was transferred, and subsequently replaced all the 50 horsepower fans with 70 horsepower fans. *Id.* In addition, he took into account the fact that other miners complained about the fan and suffered no adverse action. *Id.* at 505-06. The judge also concluded that "even assuming, *arguendo*, that Zecco's transfer was motivated in part by his protected activity, . . . Consol would nevertheless have successfully defended affirmatively by proving that it would have transferred Zecco in any event, based on his unprotected activity (lower productivity and inadequacy in operating the satellite miner) alone." *Id.* at 507. Although we agree with the Secretary that the judge should have considered whether Consol's productivity defense was intertwined with Zecco's protected activity, our review of the entire record leads us to agree with the judge that there was no illegal motivation, and to affirm the judge's decision in result.

A. Zecco's relative lack of skill on the satellite miner

In reviewing the Secretary's claim of illegal motivation, we turn first to her assertion that substantial evidence does not support the judge's finding that Consol transferred Zecco in part for the legitimate, non-discriminatory business reason that he was a less able satellite miner operator than Belcastro.⁶ Although several miners testified that Zecco was a very good satellite

⁵ Adverse action "is not simply any operator action that a miner does not like." *Secretary of Labor on behalf of Price & Vacha v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521, 1533 (Aug. 1990). The judge did not directly discuss adverse action but implied in his decision that Zecco's transfer to the seal construction project met that element of the Secretary's case. *See* 20 FMSHRC at 503-04. In addition, Consol did not dispute that Zecco's transfer constituted adverse action.

⁶ The judge correctly declined to address the issue of whether the Contract precluded Consol from reassigning Zecco, despite his seniority, to the seal construction project because he was less experienced with the satellite miner than Belcastro. 20 FMSHRC 503 n.4. We have held that "[t]he Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2516 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). Even if the Secretary could demonstrate that Consol violated the Contract when it transferred Zecco, that in itself would not show that it discriminated against Zecco because Consol may apply the same contractual interpretation to all similar miner transfers. Indeed, as the judge noted, Consol claims to have a general right under

the Contract to transfer miners to different mine locations, irrespective of seniority. 20

miner operator or at least as good as Belcastro (Tr. 431-32, 480-81, 569, 906-07), the judge accepted Poland's testimony that "the general consensus of mine management [was] that Zecco had struggled with the satellite miner and Belcastro had performed well on the satellite miner." 20 FMSHRC at 502. The judge also noted that "Zecco's own witness, Albert Titus, recognized that Zecco was not as good at running the satellite miner as" Belcastro. *Id.*; Tr. 606. Even Zecco testified that, at the time of his reassignment, Belcastro was "[p]robably a little more" experienced than he at operating satellite miners. Tr. 227. We find that there is substantial evidence in the record to support the judge's conclusion that Zecco was a less able satellite miner operator than Belcastro, and that Consol in part based its decision to transfer him on this legitimate, non-discriminatory business reason.

B. Zecco's lower productivity

The Secretary also asserts that Consol's decision to transfer Zecco was motivated in part by the fact that he took certain safety measures which resulted in reduced production. S. Br. at 17-18. There is no dispute that Consol transferred Zecco out of the 6D section, at least in part, because of his lower productivity compared to the other shifts. 20 FMSHRC at 502, 505; Poland Tr. 58, 187-88. The Secretary contends that the judge erred in treating Zecco's low productivity as a neutral business justification because the low productivity resulted from Zecco's protected activity. S. Br. at 32-33.

The Commission has held that the Secretary may establish unlawful motivation through evidence that the operator took action based on an ostensibly neutral factor which was itself inextricably linked with the protected activity. *See Secretary of Labor on behalf of Glover v. Consolidation Coal Co.*, 19 FMSHRC 1529, 1535-36 (Sept. 1997). In *Glover*, the Commission ruled that Consol could not rebut the prima facie case with evidence that its transfer of complainants to a more dangerous job assignment was based on their absences, when the absences were themselves the direct result of the complainants' exercise of their protected activities (their walkaround rights). *Id.* at 1537. The Commission noted that Senate legislative history states that a finding of discrimination should be made whenever protected activities contribute "in any manner" to adverse action. *Id.* at 1535-36. We agree with the Secretary, therefore, that productivity loses its status as an objective business rationale if it is inextricably linked with protected activity. We must therefore determine if the record could reasonably allow one to conclude that such a link existed in this case.

The protected activity allegedly related to Zecco's productivity falls into two categories: (1) Zecco's refusal to operate the continuous miner while the methane warning light was on and (2) additional safety precautions taken by Zecco and his crew, which were over and above those required by MSHA's regulations. We address each of these categories separately.

1. Continuous Miner Shutdown

FMSHRC at 506 n.5; Poland Tr. 50-51.

Section 75.323(b) requires deenergizing electrically powered equipment and shutting down other mechanized equipment when 1.0 percent or more methane is present. Zecco made it clear to mine management, including Poland, that he would not mine with the methane warning light activated.⁷ 20 FMSHRC at 499. The Secretary argues correctly that such refusal is protected. S. Br. at 14-15. Heeding the command of a mandatory safety standard promulgated pursuant to the Mine Act is clearly the exercise of a protected right. An operator may not retaliate against a miner for invoking such a right (and in fact, Consol does not argue otherwise). If Zecco had demonstrated that his shift's lower productivity was a result of his compliance with the mandate of § 75.323(b), we agree with the Secretary that Consol could not rely on productivity levels to rebut the Secretary's prima facie case. In such circumstances, productivity would no longer be viewed as a legitimate business justification for Zecco's transfer.

We recognize that the judge did not utilize this analytical framework when he pronounced Zecco's low productivity to be a "rational, objective, non-protected business reason for Zecco's transfer" 20 FMSHRC at 506. While we would normally remand in such a case, our review of the record leads us to conclude that there is no need to do so here.

In order for Zecco to prove that his compliance with section 75.323(b) was the reason productivity suffered on the midnight shift, he had to either prove that more methane was emitted on his shift, and that therefore more shutdowns were necessary, or he had to prove that the miners on the other shifts were not always deenergizing their machines when the methane warning light was activated.

Zecco did not even allege, much less prove that the miners on the other shifts were failing to deenergize equipment as required by the regulation. Indeed when questioned on this point, Zecco asserted that he had no reason to believe that the miners on the other shifts were failing to deenergize the equipment as required. Tr. 261-62. Zecco attempted instead to prove that more methane was emitted on the midnight shift because of lower barometric pressure. 20 FMSHRC at 507. The judge considered this argument but concluded that the evidence failed to support it. "While Complainant maintains that lower productivity on the midnight shift may have been the result of lower barometric pressure there is no evidence that the actual barometric pressures were lower nor of the actual correlation between such pressure and methane emissions on the 6D Section." *Id.* We see nothing in the record that causes us to disturb the judge's findings on this issue.

Given the fact, therefore, that the record contains no evidence that methane levels for the 6D Section were different on any of the three shifts, and given the fact that the miners on all three shifts were presumably deenergizing their equipment when the methane warning light came on, our review of the record compels the conclusion that Zecco failed to demonstrate that his low productivity was inextricably linked to his protected refusal to operate equipment when the

⁷ We note that Poland agreed that if the warning light came on, Zecco was to stop the miner. Poland Tr. 125-27.

methane levels exceeded 1 percent.

2. Additional Safety Measures

Zecco also contends that the conditions in 6D necessitated his taking additional safety precautions and that these measures adversely affected production on the midnight shift. Tr. 32-37, 72-73, 120. These safety measures included: testing for methane with a hand held monitor every 10 minutes rather than every 20 minutes as required by MSHA, doing frequent ventilation tubing checks, hanging additional ventilation curtains to improve air at the face, stopping to rock dust every 20 feet rather than every 40 feet as required by MSHA standards, and washing down the continuous miner to minimize float coal dust. 20 FMSHRC at 498; Tr. 35-37, 599.

The question of whether these actions constitute protected activity is complicated by the fact that some of these additional safety measures involved precautions that were beyond the requirements of MSHA's regulations. For example, Zecco and his crew tested for methane and stopped to rock dust more frequently than required under MSHA standards. We recognize that at some point there is a line beyond which additional precautions over and above the regulations cease to be protected. Just where this line is drawn depends on the particular facts and circumstances of each case. The general principle, however, is that extra precautions should be protected when, like a protected work refusal, they are based on a miner's "good faith, reasonable belief" that such precautions are needed, and when the precautions themselves are reasonable. *Cf. Robinette*, 3 FMSHRC at 812 (enunciating the Commission's work refusal standard).

It would appear that the precautions taken by Zecco and his crew were conceded by Consol to be reasonable in light of the extremely hazardous conditions present in 6D. Zecco does not allege that Consol ever instructed him to cease taking these precautions. Indeed, as the judge observed, "management was well aware of the sulfur and methane problems on the 6D Section causing a recognized slowdown of production." 20 FMSHRC at 505. The judge also noted that "neither Zecco's foreman Albert Titus, who he called as his own witness, nor Zecco himself, ever testified that anyone ever suggested they mine unsafely or with the warning light activated." *Id.* Accordingly, we treat these activities as protected.

Even if these precautions are deemed protected, however, Zecco has failed to submit evidence from which one could conclude that these precautions were inextricably linked to his shift's relatively lower productivity. As is the case with his protected shutdowns, discussed above, Zecco does not allege that his coworkers on the other shifts in 6D were failing to take similar additional precautions over and above what might be required by MSHA's regulations.

Consol's witnesses attributed the lower production levels on the midnight shift to poor management by the section foreman. *Id.* at 502; Tr. 860-61. One witness explained that Poland "thought the midnight crew could bring its productivity up to the level of the other shifts on the 6D Section by such things as staggering lunch breaks and not permitting the crew to stay in the dinner hole too long." 20 FMSHRC at 505. Zecco's witness, mechanic Michael Smith,

confirmed this and “noted the efforts by Zecco’s foreman to increase productivity took such forms as prompting the crew to get to the dinner hole earlier.” *Id.* In sum, we find that the judge was correct in finding that no inference of an illegal motive could be drawn in the face of the reduced productivity, which constituted a legitimate business motivation.

III.

Conclusion

For the foregoing reasons, we affirm the judge in result.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Commissioner Marks, dissenting:

I would vacate the judge's determination that Consol did not discriminate against Zecco and remand so that the judge, who is the proper fact-finder, can apply the analytical framework announced by the Commission in its opinion. Therefore, I dissent.

While I agree with the Commission that "productivity loses its status as an objective business rationale if it is inextricably linked with protected activity" (slip op. at 7), and that Zecco's shutdown of the continuous miner and additional safety precautions were protected activities under the Mine Act (slip op. at 7-10), I strongly believe that the judge should have the first opportunity to pass on whether Zecco's protected activities diminished his productivity such that his productivity could not be used as a legitimate affirmative defense by Consol. The judge never even considered the Secretary's contention that Zecco's refusals to operate the continuous miner in unsafe conditions and the additional safety measures he performed constituted protected activity. 20 FMSHRC 497, 498 n.2. Here, the majority properly determines that the contention should have been considered, but instead of remanding for the judge to apply the analysis to the record, the majority improperly performs the analysis itself.

What makes the majority's error even more untenable is that the majority relies on slim record support to incorrectly conclude that Zecco's protected activity was not tied to his lower productivity. *See Secretary of Labor on behalf of Glover v. Consolidation Coal Co.*, 19 FMSHRC 1529, 1535-36 (Sept. 1997) (noting that a finding of discrimination should be made whenever protected activities contribute "in any manner" to adverse action). For example, the majority makes assumptions about the other shifts, such as "the miners on all three shifts were presumably deenergizing their equipment when the methane warning light came on" (slip op. at 8-9). This is pure imagination on the majority's part. The judge simply did not make this finding. The majority also overlooks evidence that supports Zecco's contention that he was a highly productive miner prior to encountering the very dangerous conditions on the 6D section midnight shift. Tr. 342, 413-14. The evidence should have been parsed by the judge, not the Commission.

For these reasons, I believe that the majority is wrong in affirming the judge and would instead vacate and remand.

Marc Lincoln Marks, Commissioner

Distribution

Stephen D. Turow, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Elizabeth Chamberlin, Esq.
Consolidation Coal Company
1800 Washington Road
Pittsburgh, PA 15241

Administrative Law Judge Gary Melick
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041