FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20006

September 30, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. WEVA 97-95
WINDSOR COAL COMPANY	:	

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

DECISION

BY: Jordan, Chairman; Marks, Riley, and Beatty, Commissioners

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). At issue is whether substantial evidence supports Administrative Law Judge George A. Koutras' determination that a violation by Windsor Coal Company ("Windsor") of 30 C.F.R. § 75.400[1] was not the result of its unwarrantable failure to comply with the standard. 19 FMSHRC 1694, 1726-28 (Oct. 1997) (ALJ). The Commission granted the Secretary of Labor's petition for discretionary review challenging the judge's determination of no unwarrantable failure. For the reasons that follow, we vacate the judge's unwarrantable failure determination and remand for further consideration.

I.

Factual and Procedural Background

[1] Section 75.400 provides, in pertinent part: "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 . . . ." 30 C.F.R. § 75.400.

Windsor operates the Windsor Mine, an underground coal mine near Wheeling, West Virginia. *Id.* at 1695; W. Post-Hearing Br. at 2-3. On September 19, 1996, Inspectors Lyle Tipton and James Jeffers of the Department of Labor's Mine Safety and Health Administration ("MSHA") completed a four day inspection of 12 of Windsor Mine's 14 belts, which measure a total of approximately 14 miles. 19 FMSHRC at 1724-25. Prior to the inspection, Inspector Tipton reviewed the September 18 to September 19 preshift and onshift reports for the mine's main No. 10 belt. *Id.* at 1698, 1725. He observed entries describing accumulations that were noted as reported and uncorrected. *Id.* at 1698. Inspector Tipton then inspected the No. 10 belt beginning at the belt's conveyor belt drive, and walked towards the No. 11 belt. *Id.* Company representative Jim Fodor and United Mine Workers of America safety committeeman Bill Cox accompanied Tipton on his inspection. *Id.* Tipton observed an "accumulation of combustible material consisting of float coal dust, . . . loose coal spillage, spillage of fine dry loose coal and coal dust in contact with the conveyor belt and bottom roller structure[.]" *Id.* at 1697. Tipton's order states that the "total distance of this 6,000 foot entry containing float coal dust was 3,600 feet" and that spillage of "coal and fine dry loose coal was present under the majority of the bottom belt and in contact with the bottom rollers." *Id.* The order indicates that Inspector Tipton observed accumulations of float coal dust from the belt drive (227 crosscut) to the 260 crosscut; accumulations of loose coal beneath the majority of the bottom belt and in contact with the bottom rollers; spillage in contact with rollers and visual signs that a roller had heated up at the 254 stopping; an 80-foot long, 1-foot wide, and 1-foot deep spillage at the 248 stopping; a 50-foot long, 1-foot wide, and 1-foot deep spillage at the 268 stopping; a 20-foot long, 3-foot wide, and 2-foot deep spillage at the 275 stopping; and a 10-foot long, 3-foot wide, and 2-foot deep spillage at the 276 stopping.[2] Ex. P-3 at 2. He concluded that the cited conditions "for the most part were being carried as reported in the mine record books and would have taken days to accumulate to the degree described in this action." 19 FMSHRC at 1698. The ensuing abatement effort took between 15 and 20 miners approximately 10 hours to complete. *Id.* at 1724; Tr. 209, 311.

Based on his observations of the spillages and accumulations along the No. 10 belt and his review of the preshift and onshift record books, Tipton issued Order Number 3501233 under

[2] Inspector Tipton observed and cited two types of accumulations: several individual areas of coal spillage, and float coal dust accumulations beneath the belt, which he termed coal "fines." Ex. P-3 at 1; Tr. 26-28. Fines accumulate when wet coal particles stick to the belt and subsequently dry and fall beneath the belt. Tr. 143.

section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), alleging a significant and substantial ("S&S")[3] violation of 30 C.F.R. § 75.400, and that the violation resulted from Windsor's unwarrantable failure to comply with the standard. 19 FMSHRC at 1699; Ex. P-3 at 1. Windsor contested the order and the matter proceeded to hearing before Judge Koutras.

The judge concluded that Windsor's uncontested violation of section 75.400 was S&S, but that it did not result from the operator's unwarrantable failure to comply with the standard. 19 FMSHRC at 1716, 1727-28. He found that the "cited coal accumulations . . . covered a rather extensive area of the No. 10 belt line." *Id.* at 1724. However, he also stated that, "[g]iven the large scope of this mining operation," which he viewed as a mitigating circumstance, he could not conclude "that the respondent's compliance record of ninety-eight section 75.400[] violations over a previous 24-month period[], is indicative of a 'special accumulations problem.'" *Id.* The judge further stated that he was "not totally convinced that Inspector Tipton actually knew how long the cited coal spillage conditions had existed" and that he was not convinced that the inspector "knew with any degree [of] reasonable certainty that the preshift entries that he reviewed prior to his inspection described the same spillage conditions at the same location that he observed during his inspection." *Id.* at 1725. Finally, the judge found that, "while it may be true that *all* of the cited coal accumulations may not have been cleaned up at the time of the September 19, 1996, inspection, . . . some of the conditions were corrected, and work was in progress to correct the remaining conditions." *Id.* at 1727 (emphasis in original). He assessed a penalty of $1,000. *Id.* at 1729.

II.

Disposition

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

The Secretary asserts that the total coal accumulation — loose coal spillage at the stopping locations noted in the order and coal dust and float coal dust covering over half of the length of the No. 10 belt — was extensive, and that this violation's extensiveness alone is sufficient to support an unwarrantable failure finding. PDR at 8-10.[4] She also contends that a review of Windsor's preshift and onshift reports shows that accumulations were present for at least an entire shift, and that the violation thus existed for a significant period of time. *Id.* at 10-13. She submits that the conditions reported in the preshift and onshift reports and Windsor's 98 section 75.400 violations in the preceding 2 years put the operator on notice of an accumulations problem at the mine. *Id.* at 13, 16-17. The Secretary maintains that the judge's reasons for discounting Windsor's history of previous accumulation violations lack merit and are inconsistent with Commission case law. *Id.* at 13-16. She argues that Windsor's failure to clean up a dangerous condition exhibits "aggravated conduct." *Id.* at 17-19. Finally, the Secretary asserts that Windsor's efforts to correct the violative condition were incomplete and ineffective. *Id.* at 19-21.

[4] Pursuant to Commission Procedural Rule 75(a), 29 C.F.R. § 2700.75(a), the Secretary designated her PDR as her brief.

Windsor responds that the judge's determination that the section 75.400 violation was not the result of Windsor's unwarrantable failure is supported by substantial evidence. W. Br. at 17.[5] The operator argues that the judge correctly considered all relevant factors, rather than making the extensiveness of the violation determinative. *Id.* at 8. The operator further contends that a failure to entirely eliminate a reported condition within a shift does not mandate an unwarrantable failure finding and that, in any event, not all the violative conditions had existed for a full shift before the inspector arrived. *Id.* at 9-10. Windsor submits that its efforts to comply with section 75.400, undertaken despite two roof falls which hindered its ability to abate, and its assignment of six miners to clean and rock dust along the No. 10 belt prior to the inspector's arrival, show that it did not ignore the belt conditions. *Id.* at 10-13. Windsor also asserts that the relatively large size of the Windsor mine; its recall of approximately 25 miners in 1996; the decrease in number of accumulation violations in the months prior to the instant order's issuance; and the fact that the Secretary designated only two of the 98 accumulation violations over the previous two years as unwarrantable, all support the judge's conclusion that Windsor was not on notice of a special accumulations problem. *Id.* at 13-15. The operator also maintains that, even if it was on notice of an accumulations problem, it took measures to correct that problem. *Id.* at 15. Finally, the operator contends that it did not fail to address a dangerous condition, and that the existence of a dangerous condition alone does not establish unwarrantable failure. *Id.* at 15-16.

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. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). The Commission has 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 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,

[5] Windsor does not contest the judge's S&S designation. W. Br. at 1; 19 FMSHRC at 1716, 1728.

and . . . that precautions are required when working near power lines with heavy equipment"); *Quinland Coals, Inc*., 10 FMSHRC 705, 709 (June 1988) (finding unwarrantable failure where roof conditions were "highly dangerous"); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984) (conspicuous nature of the violative condition supports unwarrantable failure finding).

A. Extensiveness

Windsor does not dispute that the cited accumulations were extensive (W. Br. at 7-8), and we affirm the judge's finding in this regard. Although the extensiveness of these accumulations merits significant consideration, we decline the Secretary's invitation to reverse the judge's finding of no unwarrantable failure based solely on the extensiveness of the violation. PDR at 10. The Seventh Circuit's decision in *Buck Creek*, 52 F.3d 133, relied on by the Secretary, does not stand for the proposition that an unwarrantable failure finding can be based solely on a finding that the violation was extensive. In affirming an administrative law judge's unwarrantable failure finding, the *Buck Creek* court found that, in addition to the accumulation's extensiveness, the violation had existed for at least one shift, the operator had undertaken no abatement efforts during the 90 minutes after the accumulation appeared in the preshift book on the day of the order, and the operator had received nine section 75.400 citations in the same month, including one citation for the cited area. *Id.* at 136. The court stated that, "contrary to Buck Creek's suggestion, the extent of accumulation was not the sole basis for the ALJ's decision." *Id.* Therefore, although we affirm the judge's finding that the violation was extensive, a determination of whether Windsor's violation was unwarrantable requires analysis of the other pertinent factors enunciated in Commission precedent. *See, e.g.*, *Mullins*, 16 FMSHRC at 195.

B. Duration

The judge rendered no explicit determination regarding the duration of the cited accumulations. *See* 19 FMSHRC at 1725. Nonetheless, the preshift and onshift reports compel a finding that at least two of the cited accumulations had existed for at least one shift. The preshift reports identify accumulations that needed cleaning or dusting by the crosscut where each accumulation was located. Ex. P-1. The preshift report for the September 19 midnight shift reflects that the area between crosscuts 227 and 253 needed dusting and that the area between crosscuts 230 and 257, under the rollers, needed cleaning. *Id.* The September 19 midnight shift onshift report does not indicate that these reported accumulations had been cleaned or dusted. *Id.* Belt coordinator Wayne Porter testified that an onshift report which shows no correction of an accumulation indicates that the accumulation was not abated. Tr. 313, 334. Windsor's work assignment sheets indicate that the accumulation between crosscuts 227 and 253 was worked on, but not finished. Ex. R-17. The September 19 day shift preshift report states that the same areas noted on the midnight shift preshift report still needed cleaning or dusting, although the notation on the day shift preshift report does not specify whether the accumulation between crosscuts 230 and 257 was under the rollers or on the side of the belt. Ex. P-1. While Windsor observes that

the length of the cited accumulation beneath the belt is somewhat greater than the distance of the same accumulations reflected in the preshift books (W. Br. at 10 n.4), the operator does not dispute that the accumulation between crosscuts 227 and 253 had been present for at least one shift. *Id.* at Attach. A (stating that the shift report notation that "253 to drive -- needs dusted [sic] . . . **first** appears in the preshift examiner's report for the midnight shift on September 19, 1996") (boldface in original). Windsor explains that it gave a work assignment for the September 19 midnight shift to dust between crosscuts 227 and 253, which was not finished. *Id.* at 10 & Attach. A (citing Ex. R-17).

The record also compels a finding that the spillage on the left side of stopping 276 existed for longer than one shift. The September 19 midnight preshift report lists an accumulation on both sides of stopping 276 which needed cleaning. Ex. P-1. While the September 19 midnight onshift report states that the right side of stopping 276 was cleaned, the left side of stopping 276 still needed cleaning by the time the day preshift report was written. *Id.* Windsor does not dispute that this spillage had existed for longer than one shift. W. Br. at Attach. A at No. 4 ("The first entry specifically referencing the walkway at cross-cut 276 is in the preshift exam for the midnight shift on September 19 . . . ."). While the order does not specify at which side of stopping 276 Tipton observed the cited spillage, the shift reports demonstrate that an accumulation on the left side of stopping 276 existed for one shift prior to the order's entry.

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)).[6] The evidence discussed above establishes that an accumulation and a spillage of coal existed for longer than one shift and "fairly detracts" from the judge's negative unwarrantable failure finding. *Id.*; *see also Buck Creek*, 52 F.3d at 136 (finding unwarrantable failure where cited accumulation must have been present since at least previous shift); *Old Ben Coal Co.*, 1 FMSHRC 1954, 1959 (Dec. 1979) (finding unwarrantable failure where accumulation had existed for less than one shift). Because the record compels a finding that these two accumulations existed for more than one shift, we need not remand the issue of the

[6] 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)).

duration of these accumulations to the judge. *See American Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (remand unnecessary where judge's reconsideration of issue would serve no purpose).

In addition to this type of direct evidence, the Commission has permitted duration to be established through the use of circumstantial evidence. *See, e.g., Enlow Fork Mining Co.*, 19 FMSHRC 5, 16 (Jan. 1997) (affirming judge's duration finding, which was based on judge's "credit[ing of] the inspector's testimony that the accumulations had existed for more than one shift"); *Mullins*, 16 FMSHRC at 196 (determining that cited accumulation had existed for at least two days based, inter alia, on the inspector's testimony as to the "quantity and nature of the accumulations"); *Peabody*, 14 FMSHRC at 1261-62 (affirming judge's duration finding which was based on inspector's observation of cited area). Here, Inspector Tipton asserted that, based on his experience and observations, all the cited accumulations took days to accumulate. Tr. 45, 52, 108, 116-17; Ex. P-3. Tipton also testified that the shift books supported his opinion that the cited accumulations had been present for several days (Tr. 108-09, 117), and that it was not possible that the accumulations he observed had amassed in one shift. Tr. 45. It is not evident from the judge's decision whether he analyzed this testimony of Inspector Tipton regarding duration.[7] In accordance with Commission precedent, he should do so explicitly on remand.

[7] Commission Procedural Rule 69(a) requires that a Commission judge's decision "include 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). *See also Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994). As the D.C. Circuit has emphasized, "[p]erhaps the most essential purpose served by the requirement of an articulated decision is the facilitation of judicial review." *Harborlite Corp. v. ICC*, 613 F.2d 1088, 1092 (D.C. Cir. 1979). Without findings of fact and some justification for the conclusions reached by a judge, the Commission cannot perform its review function effectively. *Anaconda Co.*, 3 FMSHRC 299, 299-300 (Feb. 1981). The Commission thus has held that a judge must analyze and weigh all probative record evidence, make appropriate findings, and explain the reasons for his decision. *See Mid-Continent Resources*, 16 FMSHRC at 1222.

The dissent claims that the judge's statement that he was not convinced "Inspector Tipton *actually knew* how long the cited coal spillage conditions had existed" (19 FMSHRC at 1725 (emphasis added)) served to discredit Inspector Tipton's testimony as to duration. Slip op. at 16. In fact, Inspector Tipton never testified that he "actually knew" the duration of the violation, nor was such testimony necessary because the Commission does not require an inspector to possess "actual knowledge" of the duration of a violation. *See, e.g.*, *Mullins*, 16 FMSHRC at 196. It is not clear to us what the judge meant when he ruled that he was "not totally convinced . . . Inspector Tipton *actually knew* how long the cited coal spillage conditions had existed." 20 FMSHRC at 1725 (emphasis added). We therefore remand for a more complete explanation of the analysis of the circumstantial evidence regarding duration, including a clearer evaluation of the inspector's testimony, in a manner consistent with Commission precedent. *See Enlow Fork*, 19 FMSHRC at 16; *Mullins*, 16 FMSHRC at 196; *Peabody*, 14 FMSHRC at 1261-62.

Furthermore, the judge should have analyzed the testimony of Cox and longwall helper Jimmy Welch, both of whom corroborated Tipton's opinion as to the duration of the accumulation. Tr. 144, 178-79, 187. Cox testified that the fines accumulated "[o]ver a period of shifts," (Tr. 141) and Welch stated that the accumulation would have developed over "a few shifts." Tr. 187. Also, while the judge paraphrased the testimony of Porter that accumulations under the belt can occur in a short period of time (Tr. 345-46), and quoted Welch's opinion that the accumulations under the belt occurred "just coming back on the take-up; coming back on the bottom rollers" (Tr. 184), he did not credit or discredit this testimony, nor did he reconcile Porter's testimony with the contrary assertions of Tipton, Cox, and Welch. *See* 20 FMSHRC at 1725; Tr. 45, 141, 187, 313. Finally, the judge should have analyzed Tipton's testimony that he observed rock dust beneath some of the cited accumulations. Tr. 31, 219. Tipton testified that the presence of rock dust beneath accumulations is evidence that the coal spillage was not recent. Tr. 218. The judge should have analyzed the abundant circumstantial evidence that the cited accumulations had existed for longer than one shift.

In sum, we conclude that the record compels the conclusion that the accumulation from crosscut 227 to 257 and the spillage at crosscut 276 existed for longer than one shift, and we remand for consideration and analysis of evidence relevant to a determination of how long the other cited accumulations existed, and whether the duration of these accumulations, together with the other unwarrantable factors, is sufficient to support an unwarrantable failure finding.

C. Notice of Need for Greater Efforts For Compliance

The judge's finding that Windsor was not on notice that greater efforts were necessary for compliance with section 75.400 is not supported by substantial evidence because it fails to account for annotations in the preshift books for the No. 10 belt reflecting that coal accumulated along the belt, and that some of the reported accumulations remained for several shifts without abatement. For example, the preshift reports for the September 16 midnight shift through the September 18 day shift establish that the No. 10 belt between crosscuts 241-249 and between crosscuts 257-278 needed cleaning and dusting over a span of at least five shifts. Ex. P-1. Also,

an accumulation between crosscuts 274 and 287 which was noted in the September 17 midnight preshift report was worked on once during the September 17 day shift, but was not corrected until the September 18 day shift. *Id.* As we have previously held, shift book reports of accumulations are "relevant in demonstrating that [the operator] had prior notice that a problem with coal . . . accumulations in the cited area, and that greater efforts were necessary to assure compliance with section 75.400." *Peabody*, 14 FMSHRC at 1262. Accordingly, we remand for an evaluation of this evidence relevant to whether Windsor was on notice.

In addition, we are troubled by the judge's suggestion that 98 section 75.400 citations in a 2-year period was not enough to place Windsor on notice of a greater need for compliance. The problem with this conclusion, however, is that it appears to assume that *all* 14 miles of the belt lines were either being constantly monitored, or being inspected by MSHA each week, facts that are not in evidence here. We are concerned by the reliance of the judge solely on the length of the belt lines to conclude that such a high number of violations during this time period did not put Windsor on notice of an accumulations problem. On remand, we direct that all the record evidence concerning accumulation problems at the Windsor mine be considered to determine whether Windsor was on notice that it had a recurring safety problem in need of correction. *See Peabody*, 14 FMSHRC at 1263-64 ("A history of similar violations at a mine may put an operator on notice that it has a recurring safety problem in need of correction.").[8]

4. Efforts to Eliminate the Violative Conditions

The judge described various efforts undertaken by Windsor to correct belt conditions on the No. 8, 9, and 10 belts between September 3 and the September 19 inspection of the No. 10 belt. 19 FMSHRC at 1726-27. Some evidence in the record supports the judge's factual findings.

The shift reports for the days preceding the September 19 order reflect that Windsor corrected reported accumulations between crosscuts 274 and 287, 269 and 272, 262 and 270, 238 and 271, and 260 and 282, at crosscuts 276 and 278, and the belt tail, as well as a spillage at the belt drive. Ex. P-1. Windsor superintendent Joseph Matkovich testified that during "the three days previous to the [19th], nine of our belt lines were walked by Mr. Tipton and Mr. Jeffers, and any of the items that they found . . ., we had to direct people in those directions and follow up on everything that was pointed out to us there." Tr. 250. Windsor also introduced evidence of two roof falls which hindered abatement efforts, and required belt employees to work to repair the roof. Tr. 249-50, 257, 260-62, 296-99, 300. The record further shows that six miners were

[8] Commissioner Marks concludes that the 98 section 75.400 violations that Windsor incurred in the 2-year period preceding the subject order placed Windsor on notice, as a matter of law, that it had a problem with accumulations at its mine. It is beyond doubt that this extremely large number of section 75.400 violations put Windsor on notice that it had a recurring safety problem in need of correction. *See Peabody*, 14 FMSHRC at 1263-64.

assigned to correct various conditions along the No. 10 belt during the September 18 day shift and the September 19 midnight shift — although those assignments are listed on the work assignment sheet as incomplete. Tr. 321-22; Exs. R-16, R-17. Thus, the record contains evidence of Windsor's abatement efforts on the No. 10 belt and elsewhere in the mine prior to the order's issuance.

We nevertheless conclude that the judge erred in failing to determine whether Windsor's abatement efforts were adequate in light of the extensive accumulations that existed prior to the inspection. *Id.* In *Peabody*, we held that the operator did not take adequate measures to remedy the spilling problems where the cited accumulation was extensive. *Peabody*, 14 FMSHRC at 1261, 1263-64; *see also Jim Walter Resources, Inc.*, 19 FMSHRC 480, 489 (Mar. 1997) (stating that the operator's abatement efforts "were inadequate because extensive combustible materials were still allowed to accumulate").[9] Here, the evidence is undisputed that an extensive area of accumulation was present in the areas cited by Tipton. *See* 19 FMSHRC at 1724.

Porter testified that Windsor employs four belt workers per shift on each of the mine's two sides, and assigned six miners to clean accumulations along the belt for the two shifts prior to the order's issuance. Tr. 315; Exs. R-16, R-17. Charles Kellam, Windsor's human resources manager, testified that Windsor employed approximately 140 workers underground. Tr. 221, 224. The judge should have discussed whether, considering the accumulations along the No. 10 belt, Windsor placed sufficient priority on abating the condition by assigning four or six miners per shift to the No. 10 belt.

The judge also failed to address Tipton's testimony regarding the four miners he observed rock dusting on top of the accumulations. Tipton testified that manually spreading stripes of rock dust several feet apart on top of accumulations — as the four miners he observed during his inspection were doing — is not an effective method of abatement. Tr. 40-41. Tipton elaborated that effective abatement would require the operator to shovel the accumulations away from the rollers before the area is rock dusted. Tr. 41. In *Mullins*, we held that rock dusting is not an alternative method of complying with the clean-up requirements of section 75.400. 16 FMSHRC at 197. Thus, the judge's consideration of miners rock dusting on top of accumulations as abating the operator's accumulation violation contravenes our precedent and constitutes error.

[9] Contrary to the dissent's suggestion, our holding here does not imply that any efforts to comply by an operator are irrelevant if a violation ultimately is found. Slip op. at 17 n.7. Rather, in addressing the question of compliance efforts, we ask simply whether the operator's efforts to comply with safety standards and to correct conditions that could lead to violations were taken with sufficient care under the circumstances, even if ultimately unsuccessful in completely preventing a violative condition. *See Utah Power & Light Co.*, 11 FMSHRC 1926, 1933 (Oct. 1989).

In sum, we remand for consideration of evidence concerning whether Windsor's abatement efforts were adequate under the circumstances. *See Peabody*, 14 FMSHRC at 1263-64.

E. Danger and Obviousness

The Commission has relied upon the obviousness of, and the high degree of danger posed by, a violation to support an unwarrantable failure finding. *See Jim Walter Resources, Inc.*, 19 FMSHRC 1377, 1379 (Aug. 1997) (in remanding whether accumulation violation resulted from unwarrantable failure, Commission directed judge to consider, inter alia, whether the condition posed a high degree of danger); *Jim Walter*, 19 FMSHRC at 486-89 (obviousness of accumulation supports unwarrantable finding); *Drummond Co.*, 13 FMSHRC 1362, 1365, 1368-69 (Sept. 1991) (visible nature of accumulations and evidence of belt running in accumulations relevant to unwarrantable failure determination).

There is record evidence in this case that indicates the accumulations here were dangerously high. While the operator introduced testimony that there were no hazardous conditions along the No. 10 belt (Tr. 267, 326, 331), several witnesses testified to observing coal in contact with rollers on the No. 10 belt on September 19. Tipton testified that "[t]he fines under the belt were in contact with the bottom rollers . . . . The spillage along the belt would be in contact with the ends of the bottom rollers." Tr. 30. Tipton further testified that "some of this spillage had been ground up by the bottom rollers" (Tr. 27) and that "[with r]egular maintenance, you would have had those [accumulations] shoveled away from there long before they had built up to where they were in contact with the bottom belt and bottom rollers." Tr. 46. Cox testified that rollers "were frozen from fine coal being packed around them[.]" Tr. 142. Welch also testified that accumulations under the belt were in contact with the bottom rollers. Tr. 184, 186.

Belts or rollers running in a coal accumulation present an ignition source. *Amax Coal Co.*, 19 FMSHRC 846, 849, 851 (May 1997); Tr. 38 (Tipton testifying that there was enough accumulated coal on the No. 10 belt to propagate a fire). We have recognized that "ignitions and explosions are major causes of death and injury to miners." *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1120 (Aug. 1985). Moreover, two weeks prior to the inspection, Kellam and Cox observed evidence of a coal fire caused by a roller rolling in coal accumulations beneath the No. 10 belt. Tr. 140, 175, 239. On remand, we direct the judge to determine whether any of the cited accumulations were in contact with belt rollers and, if so, whether this supports an unwarrantability finding.

In addition, the Secretary asserts that the extensive accumulations were in conspicuous locations. S. Br. at 10 n.9. The judge should also have addressed whether the accumulations were obvious. *See Jim Walter*, 19 FMSHRC at 486; *Quinland*, 10 FMSHRC at 709. On remand, we direct that this factor be analyzed as well.[10]

[10] Our dissenting colleague's contention that our approach is inconsistent with our

decision in *Lafarge Constr. Materials*, 20 FMSHRC 1140, 1145-48 (Oct. 1998) misses the mark on two counts. First, in *Lafarge*, rather than upholding an unwarrantability finding on the sole basis of the danger factor, as the dissent claims (slip op. at 17), we acknowledged that the judge's decision also reflected his view that the violation was obvious. 20 FMSHRC at 1147. In addition, we found that the operator's failure to recognize the danger presented by loose overhead rock and its failure to undertake adequate safety measures reflected a serious lack of reasonable care and supported an unwarrantability finding. *Id.* at 1146-47. Second, our substantial evidence analysis here does not resemble "heightened scrutiny," as the dissent claims (slip op. at 18), but rather is faithful to our holding in *LaFarge* that "only those factors that are relevant to the facts of this case" should be applied. *Lafarge*, 20 FMSHRC at 1147. Thus, while our analysis in *Lafarge* focused substantially on the danger element because that element was highly salient under the facts of that case, our analysis in the present matter focuses on extent, duration, notice, abatement, danger and obviousness because these factors are relevant to the facts of this case.

In sum, we remand for consideration of the possible danger presented by the coal accumulations in contact with rollers as well as the obviousness of the accumulations at issue.[11]

[11] Commissioner Beatty notes that Commissioner Verheggen also argues, citing *Lafarge Construction* and *Capitol Cement Corp.*, 21 FMSHRC 883 (Aug. 1999), *petition for review docketed*, No. 99-2264 (4th Cir. Sept. 23, 1999), that the majority has "failed to consider exculpatory evidence . . . that was clearly relevant to determining the operator's degree of negligence." Slip op. at 18. Commissioner Beatty believes that this statement is flawed for two reasons. First, he notes that in *Lafarge* the Commission reaffirmed its well-established case law concerning the factors that are relevant in determining whether a particular violation is the result of unwarrantable failure on the part of the operator. Second, Commissioner Beatty notes that in *Capitol Cement*, the only evidence that the majority arguably "failed to consider" was that concerning safety training previously provided to miners which the operator attempted to introduce into the unwarrantable failure analysis through application of the *Nacco* defense. In *Capitol Cement*, the Commission specifically affirmed its established precedent that the extensiveness of the violative condition, which would include the number of persons exposed to resulting harm or injury, is relevant and entitled to consideration in determining whether a violation is the result of an operator's unwarrantable failure. 21 FMSHRC at 891. While respecting Commissioner Verheggen's position on these matters, Commissioner Beatty takes issue with his colleague's suggestion that we "pick and choose among the facts of a case for what might be relevant to upholding a certain view." Slip op. at 18. To the contrary, he firmly

III.

Conclusion

For the foregoing reasons, we vacate the judge's determination that Windsor's violation of section 75.400 was not the result of its unwarrantable failure, and remand to the Chief Administrative Law Judge for reassignment,[12] further analysis consistent with this opinion, and reassessment of the civil penalty, if appropriate.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Robert H. Beatty, Jr., Commissioner

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believes that the rulings of the Commission majority in these cases are the product of a well-reasoned analysis predicated entirely on existing Commission case law with respect to the factors to be utilized and the evidence that is *relevant* in the unwarrantable failure analysis.

[12] Judge Koutras has retired.

Commissioner Verheggen, dissenting:

I find that substantial evidence supports the judge's finding that Windsor's violation of section 75.400 was not the result of its unwarrantable failure. I would affirm his decision, and therefore respectfully dissent.

The record contains ample evidence, much of which the majority acknowledges, to support the judge's decision.[1] In his consideration of the various factors analyzed to determine whether an operator's conduct is unwarrantable, the judge made key findings that Windsor was not on notice that greater efforts were necessary for compliance, and that the company had undertaken extensive measures to eliminate the violative condition. These key findings led the judge to conclude that Windsor's conduct was not aggravated.[2] 19 FMSHRC at 1724-1727. Both findings are supported by substantial evidence.

The judge found that, given the mine's extensive 14-mile belt system, Windsor's 98 section 75.400 violations in the prior 24-month period were not sufficient to place Windsor on

[1] The Commission is statutorily bound to apply the substantial evidence test when reviewing a judge's findings of fact. 30 U.S.C. § 823(d)(2)(A)(ii)(I); *Wyoming Fuel* Co., 16 FMSHRC 1618, 1627 (Aug. 1994). When reciting this test, the Commission customarily states merely that "substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *See, e.g.*, *Jim Walter Resources, Inc.*, 19 FMSHRC 1761, 1767 n.8 (Nov. 1997) (citations omitted). But in practice, the test involves more than this simple formulation conveys. It means that the Commission may not "substitute a competing view of the facts for the view [an] ALJ reasonably reached." *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983).

[2] The judge also found that the cited accumulations were extensive. 19 FMSHRC at 1724. The judge noted he was "not totally convinced" by the Secretary's evidence on the duration of the accumulations. *Id*. at 1725.

notice of any greater need for compliance. *Id*. at 1724-25. The majority expresses concern over "the reliance of the judge . . . solely on the length of the belt lines to conclude that [Windsor's accumulations] violations during [the relevant] time period did not put Windsor on notice of an accumulations problem." Slip op. at 8. The length of the belt lines is not, however, the *sole* piece of record evidence that supports the judge's conclusion. The majority fails to mention Windsor's improved compliance with section 75.400 in the months prior to the issuance of the citations, which I find further supports the judge's conclusion that Windsor was not on notice that greater compliance efforts were needed. MSHA's Assessed Violation History Report for the Windsor Mine reflects a marked improvement in compliance with section 75.400 for July through September 1996. *See* Ex. P-12. That report shows that Windsor was received only five section 75.400 violations in that period, a quarterly number comparable to that of a nearby mine that MSHA Inspector Tipton testified had "one of our best compliance records on 75.400 of any of our local mines." Tr. 351; *see* Tr. 347, 350; Ex. P-12.

Windsor's improvement in compliance is analogous to that of the operator's compliance with the dust standard involved in *Peabody Coal Co.*, 18 FMSHRC 494 (Apr. 1996). In *Peabody*, the Commission noted that the operator had been in compliance with the applicable dust standard for the several months preceding issuance of the citation at issue, and concluded that the operator's "remedial measures clearly demonstrate a good faith, reasonable belief that it was taking the steps necessary to solve its dust problems." *Id.* at 499. Here, the significant decrease in the incidence of section 75.400 violations at the Windsor Mine shows that the company had substantially alleviated the extent of the accumulation problems it may previously have had along its belts, and further supports the judge's finding that the operator was not on notice of a special accumulations problem necessitating greater efforts for compliance with section 75.400.

Regarding abatement efforts, the judge describes at some length Windsor's efforts to address belt conditions at the mine prior to the September 19 inspection of the No. 10 belt, findings which are amply supported by the record. On September 3, 1996, a union "safety run" was performed on the No. 8, 9, and 10 belts in response to the safety committee's letter concerning the condition of these belts. 19 FMSHRC at 1703-04, 1708; Tr. 148, 197-98; Ex. P-10. After that, Windsor employees Matkovich and Cox met daily to discuss work that needed to be finished on the belts up until the day the order was issued. 19 FMSHRC at 1704, 1709-10, 1726; Tr. 151, 203-04. The meetings specifically addressed the No. 10 belt, resulting in corrective action, including cleaning and rock dusting, that continued up until September 19. 19 FMSHRC at 1726; Tr. 151-152; Ex. P-10. The letter which prompted the safety run was later rescinded. 19 FMSHRC at 1726; Tr. 197. As my colleagues themselves acknowledge:

> The shift reports for the days preceding the September 19 order reflect that Windsor corrected reported accumulations between crosscuts 274 and 287, 269 and 272, 262 and 270, 238 and 271, and 260 and 282, at crosscuts 276 and 278, and the belt tail, as well as a spillage at the belt drive. Ex. P-1. Windsor superintendent Joseph Matkovich testified that during "the three

> days previous to the [19th], nine of our belt lines were walked by Mr. Tipton and Mr. Jeffers, and any of the items that they found along those belt lines, we had to direct people in those directions and follow up on everything that was pointed out to us there." Tr. 250. Windsor also introduced evidence of two roof falls which hindered abatement efforts, and required belt employees to work to repair the roof. Tr. 249-50, 260-62, 257, 296-99, 300.

Slip op. at 9 (alteration in original).

My colleagues further acknowledge that six miners were assigned to correct various conditions along the No. 10 belt during the afternoon shift on September 18 and the midnight shift on September 19. *Id.* The record also shows that four miners were spreading rock dust manually at the time the inspector arrived. Tr. 35, 321-22; Exs. R-16, R-17. Finally, as the judge noted, a bulk duster assigned to dust along the No. 10 belt never arrived due to its derailment. 19 FMSHRC at 1727; Tr. 278-79, 318; Ex. R-19.[3] Thus, the record contains abundant evidence supportive of the judge's finding and shows that Windsor undertook a variety of abatement efforts on the No. 10 belt and elsewhere in the mine.

Based on the judge's findings as to Windsor's lack of notice and their abatement efforts, both of which have ample record support, I find that a reasonable trier of fact could conclude that the Secretary failed to meet her burden in proving Windsor engaged in aggravated conduct.[4] Put another way, given Windsor's continuing improvement in compliance with section 75.400 and the company's considerable and ongoing corrective action, it was not unreasonable for the judge to conclude that Windsor did not exhibit reckless disregard, indifference, or a serious lack of reasonable care[5] with respect to the accumulations on the No. 10 belt.

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[3] Additional evidence cited by the judge in support of Windsor's efforts include a report prepared by Windsor based on work assignment sheets and foremen's reports showing additional cleaning and dusting of a number of areas along the No. 10 belt line between September 10 and the midnight shift on September 19. Ex. R-4; *see* Tr. 234-35.

[4] I believe this to be the case notwithstanding the extensiveness of the accumulations or the fact, as my colleagues maintain, that certain of the accumulations may have existed for longer than one shift. Slip op. at 5-8. The standard is not whether the judge could have reached a different conclusion under these facts, but whether there is sufficient evidence in the record to support the judge's conclusion. *See Wellmore Coal Corp. v. FMSHRC*, No. 97-1280, 1997 WL 794132 at *3 (4th Cir. Dec. 30, 1997) ("[T]he Commission's review [is] statutorily limited to whether the ALJ's findings of fact [are] supported by substantial evidence. The 'possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'" (citation omitted)).

[5] Unwarrantable failure is characterized by such conduct as "reckless disregard," "indifference," or a "serious lack of reasonable care." *Rochester & Pittsburgh Coal Co.*, 13

My colleagues, however, subject the judge's opinion to the most exacting and detailed scrutiny, then ascribe to him a variety of errors. Their exercise in faultfinding is without merit. First, my colleagues criticize the judge for failing to "analyze" various pieces of evidence in the record, evidence that both tends to support and contradict the judge's decision. *See, e.g.*, slip op. at 7-8, 10. In general, I believe this criticism is misplaced. I agree with my colleagues that a judge must render "a decision that constitutes [a] final disposition of the proceedings," and that his or her decision must be "in writing" and must include "all findings of fact and conclusions of law, and the reasons or bases for them, on all material issues of fact, law or discretion presented by the record." 29 C.F.R. § 2700.69(a); *see* slip op. at 7 n.7. But it does not follow from this that a judge must discuss each and every bit of evidence ― in a case such as this, the judge need not make an explicit finding in his opinion with respect to every piece of evidence or every aspect of the testimony of every witness. He need only make findings necessary to support his decision, and explain his reasons therefor. Here, the judge has done so.

FMSHRC 189, 194 (Feb. 1991).

More importantly, the judge did in fact analyze much of the contrary evidence the majority claims he ignored. For example, although the majority states that it is not clear whether the judge analyzed circumstantial evidence regarding the duration of the accumulation[6] (slip op. at 7), in fact, he did consider this evidence — and essentially discredited the Secretary's key witness, Tipton. 19 FMSHRC at 1725; *see also id*. at 1698-1702, 1704, 1706, 1719-21 (points in judge's decision where he discusses at some length the evidence adduced by the Secretary on the duration of the accumulation). The judge specifically found that he was not convinced that "Inspector Tipton actually knew how long the cited coal spillage conditions had existed." 19 FMSHRC at 1725. This is as close as a judge can get to discrediting a witness's testimony without being explicit, and we have found implied credibility determinations where judges have said far less. *See Fort Scott Fertilizer—Cullor, Inc.*, 19 FMSHRC 1511, 1516 (Sept. 1997) (recognizing implicit credibility finding of judge); *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 261, 265, 267 (Feb. 1997) (same).

The majority also concludes that "the judge erred in failing to determine whether Windsor's abatement efforts were adequate in light of the extensive accumulations that existed prior to the inspection." Slip op. at 9. I regard this statement as something of a legal non sequitur. Of course Windsor's efforts were not "adequate" — had they been, there would have been no violation. The question is rather whether Windsor's efforts were *so* inadequate that the company's conduct rose to a reckless, aggravated level of negligence. The judge concluded they were not, and substantial evidence supports this conclusion.

Moreover, contrary to the majority's assertion that the judge failed "to determine whether Windsor's abatement efforts were adequate" (slip op. at 9), the judge did, in fact, analyze the operator's efforts. Any fair reading of the judge's opinion, given his extensive description of Windsor's efforts to address and correct the cited conditions, followed immediately by his conclusion that Windsor's conduct was not aggravated (19 FMSHRC at 1726-1727), leads to the conclusion that he found Windsor's efforts not so inadequate that the company's conduct rose to a reckless, aggravated level of negligence:

> On the facts of the case at hand, while it may be true that *all* of the cited coal accumulations may not have been cleaned up at the time of the September 19, 1996, inspection, the respondent's credible evidence establishes that the belt conditions were not ignored and

[6] Even if certain accumulations existed for longer than one shift, Windsor offered evidence explaining why it was unable to complete all of its intended corrective actions. *See, e.g.*, Tr. 249-50, 257, 260-62, 278-79, 296-99, 300, 318 (testimony regarding a roof fall and rock duster derailment that interfered with Windsor's corrective actions).

> that the men were assigned to take corrective action, men were working rock-dusting the belt, some of the conditions were corrected, and work was in progress to correct the remaining conditions. Under all of these circumstances, I . . . cannot conclude that the petitioner has established a case of aggravated conduct supporting the inspector's unwarrantable failure finding.

Id. at 1727-28 (emphasis in original). Rather than explicitly find Windsor's efforts "adequate," he more appropriately found that, given Windsor's efforts, the Secretary failed to prove Windsor conduct was aggravated.[7]

My colleagues also fault the judge for failing to consider the high degree of danger and obviousness of the accumulations in reaching his unwarrantable failure determination.[8] While

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[7] In support of their conclusion that the judge needed to determine the adequacy of Windsor's abatement efforts, the majority cites *Jim Walter Resources, Inc.*, 19 FMSHRC 480, 489 (Mar. 1997). Slip op. at 9. In that case, however, the judge made no finding whatsoever with regard to abatement efforts, and the Commission explicitly declined to reach the issue: "[The operator] asserts that it took appropriate steps to prevent accumulations because one or two miners were assigned to clean up the area. The judge makes no finding on this issue, *nor do we*." 19 FMSHRC at 489 (citations omitted, emphasis added). The passage the majority relies upon is thus dicta. *See* slip op. at 9 (quoting from the following passage, 19 FMSHRC at 489: "even if [the operator] had assigned miners to the area, the record established that such efforts were inadequate because extensive combustible materials were still permitted to accumulate"). I find this dicta troubling, since it appears to suggest that no matter what efforts are undertaken to avoid a violation, any such efforts are irrelevant for purposes of determining unwarrantable failure if a violation is ultimately found to have existed.

the Commission generally considers a variety of factors in determining whether an operator's conduct is aggravated, including danger and obviousness, explicit consideration of all the factors is not required. *Jim Walter Resources, Inc.*, 19 FMSHRC 1377, 1379 (Aug. 1997) ("[t]he judge is to consider these accumulations . . . in light of the other factors that the Commission *may* examine in determining whether a violation is unwarrantable," emphasis added); *Lafarge Construction Materials*, 20 FMSHRC 1140, 1147 (Oct. 1998).

The majority's numerous findings of various purported errors in the judge's decision in this case stands in stark contrast to the Commission's majority decision in *Lafarge*, from which I also dissented. In *Lafarge*, the judge's finding of unwarrantable failure was based upon his consideration of but a single factor which he treated as dispositive ─ danger. A majority of my colleagues affirmed this finding despite the fact that the record contained substantial probative evidence relating to other factors, including potentially exculpatory evidence. But where the *Lafarge* majority affirmed a judge's finding of unwarrantable failure based on but a single factor, here, a similar majority subjects a finding of no unwarrantable failure to heightened scrutiny. They find fault where a judge has failed, in their view, to do what the judge clearly failed to do in *Lafarge*. Here, my colleagues state that their decision "is faithful to our holding in *Lafarge* that 'only those factors that are relevant to the facts of this case' should be applied." Slip op. at 11 n.10. But as I point out, one of the problems in *Lafarge* was that the judge and the majority ignored evidence relevant to determining the operator's negligence. *See* 20 FMSHRC at 1155-58 (Comm'r Verheggen, dissenting). This was also the problem in the recent case *Capitol Cement Corp.*, 21 FMSHRC 883 (Aug. 1999), *petition for review docketed*, No. 99-2264 (4th Cir. Sept. 23, 1999), a case in which I also dissented. There, the majority failed to consider exculpatory evidence introduced by the operator, evidence that was clearly relevant to determining the operator's degree of negligence. 21 FMSHRC at 899-900 (Comm'r Verheggen, dissenting) ("the operator introduced exculpatory evidence as to (1) the extent of the violative condition by alleging that [a supervisor's violative] actions placed no one else in harm's way, and (2) Capitol's good faith efforts to be in constant compliance and to avoid the sort of accident that occurred here, as evidenced by what the judge found to be their 'responsible training program,' as well as the company's work rules and measures taken to discipline [the supervisor]"). There, too, the majority cited *Lafarge* for the proposition that we may pick and choose among the facts of a case for what might be relevant to upholding a certain view, as opposed to weighing all the facts and circumstances relevant to the particular issue at hand. *Id*. at 893 n.13. I reject the former proposition because it represents a double standard, the net effect of which is to make it more difficult for operators to prove their innocence, an approach that is inconsistent with the established allocation of the burden of proof. *Peabody*, 18 FMSHRC at 499 ("Commission precedent has established that the Secretary bears the burden of proving that an operator's conduct, as it relates to a violation, is unwarrantable.").

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[8] In fact, the judge amply considered the danger posed by the cited conditions in concluding that the violation was S&S. 19 FMSHRC at 1714-1716.

For the foregoing reasons, I would affirm the judge's finding that Windsor's violation was not unwarrantable.[9]

Theodore F. Verheggen, Commissioner

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[9] I also note that, given the retirement of Judge Koutras, a new judge must be appointed to consider the majority's remand order. Assignment of a new judge raises two problems: first, if no new trial is called, the new judge must make factual findings solely on the basis of a cold record with no opportunity to acquaint him or herself with the demeanor of the witnesses on whose testimony he or she must base his or her findings; and second, if a new trial is held, witnesses will be forced to recollect events that occurred three years ago. I find both of these scenarios unfair to both parties.

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