FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

June 28, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 98-148
CONSOLIDATION COAL COMPANY	:	

BEFORE: Jordan, Chairman; Riley and Verheggen, Commissioners[1]

DECISION

BY THE COMMISSION:

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 Administrative Law Judge Jerold Feldman correctly determined that violations of 30 C.F.R. §§ 75.400[2] and 75.360(a)(1)[3] (1997) were not a result of Consolidation Coal Company's

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

[2] Section 75.400, entitled "Accumulation of combustible materials," provides:

> 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 diesel-powered and electric equipment therein.

[3] Section 75.360(a)(1), entitled "Preshift examination," provides in part:

> [A] certified person designated by the operator shall make a preshift examination within 3 hours preceding the beginning of any shift during which any person is scheduled to work or travel underground.

("Consol") unwarrantable failure to comply with the standards.[4] 22 FMSHRC 455 (Mar. 2000) (ALJ). For the reasons that follow, we reverse, vacate and remand in part the judge's determinations.

I.

Factual and Procedural Background

In May 1998, Consol operated the Loveridge No. 22 Mine, an underground coal mine in Marion County, West Virginia. The 9 South section of the mine was undergoing construction in preparation for the start-up of the new 1D section, which branched off of the 9 South. 22 FMSHRC at 456. The construction consisted of: trenching for the installation of a belt drive in the No. 5 entry; grading the floor in that belt entry; installing overcasts[5] across the entries in the 9 South; and "bumping" corners of coal pillars to widen new haulage roadways.[6] *Id.* at 456, 461. To cut the overcasts and trench, Consol used the common industry method of allowing material cut from the roof to build up on the mine floor in order to create a ramp. *Id.* at 457. The continuous miner then mounted the ramp to achieve a deeper cut into the mine roof as well as to allow the roof bolting machine to access the elevated roof in order to install permanent roof support. *Id.* Cutting the trenches and overcasts generated large quantities of dark gray dust. *Id.*

At the time, the 9 South housed its own mining equipment, located outby the construction, as well as the equipment for the new 1D section, located inby the tailpiece. *Id.* at 456. This equipment included three continuous miners, each equipped with 1000 feet of trailing cable, and two sets of mining equipment, a loading machine with 800 to 900 feet of trailing cable, shuttle cars and a roof drill. *Id.* at 456, 468-69. Trailing cables were placed along the ribs to keep the cables clear of the haulage roads. *Id*. at 456.

Because of the construction, mining had been periodic in the 9 South section since approximately mid-May 1998. *Id.* at 456-57. On May 20 at midnight, mining was idled, although miners remained on the section. *Id.* at 456.

On that same day at approximately 10:00 a.m., Department of Labor's Mine Safety and Health Administration ("MSHA") Inspector Kenneth Tenney arrived at the 9 South section for

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[4] 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.

[5] An "overcast" is a groove cut in a mine roof allowing one air current to pass over another. Tr. 63.

[6] Bumping a corner, also described as cutting a turn, refers to cutting a corner of a coal pillar so as to widen a haulageway. 22 FMSHRC at 456; Tr. 478-79.

the purpose of continuing an ongoing regular inspection. *Id.* at 457. Danny Kuhn, Consol's Safety Inspector, accompanied Inspector Tenney. *Id.* at 457, 461. Inspector Tenney observed accumulations of coal spillage and pulverized rib sloughage throughout the No. 3 through the No. 7 entries, from the first crosscut inby the section tailpiece to the face, an area approximately 600 feet in length. *Id.* at 458. Tenney testified that the spillage and sloughage was in the haulageways, and that mobile equipment had run over the material grinding it into fine coal and dust. *Id.* at 458-59; Tr. 46-47, 65-67. He testified that most of the accumulations were powder dry. Tr. 47, 125. In addition, some of the cables had pulverized sloughage on top of them. 22 FMSHRC at 456; Tr. 69-70, 628.

As a result of his observations, Inspector Tenney issued Order No. 4889944 citing a significant and substantial ("S&S") and unwarrantable violation of section 75.400. Gov't Ex. 1. In addition to describing the general accumulation conditions of the 9 South section, the order cited the following specific areas of accumulations: (1) coal spillage that was 20 inches deep, 8 inches wide and 12 feet long from a bulldozed corner in the No. 7 crosscut between entry Nos. 6 and 7; (2) coal accumulations 10 inches deep in the center of the mine floor in the No. 5 crosscut between entry Nos. 2 and 3; and (3) ground-up coal from sloughage that was run over by mobile equipment 10 to 14 inches deep and 36 inches wide running along the full length of the No. 4 crosscut between entry Nos. 3 and 4. 22 FMSHRC at 458-59. The order also cited coal "wind rowed"[7] along the sides of the entries up to 12 inches deep. *Id.* at 459.[8]

In entry Nos. 4 through 8, Inspector Tenney observed no visible rock dust at the base of the ribs or on the mine floor. *Id.* As a consequence, the inspector issued an order, alleging a rock dusting violation of 30 C.F.R. § 75.403. *Id.* at 460. Inspector Tenney also issued Order No. 4889946, alleging an S&S and unwarrantable violation of section 75.360(a)(1) for failure to conduct adequate preshift examinations. *Id.* at 461; Tr. 196-97, 203-06, 420-21; Gov't Ex. 4. The order stated that the accumulation and rock dusting conditions were "obvious to even the most casual observer," appeared to have existed for several shifts, and had not been reported in the preshift examination book. Gov't Ex. 4.

Consol utilized all of its crews to clean up and rock dust the conditions in the 9 South section. 22 FMSHRC at 468-69. After nearly three shifts and 20 hours of work, the

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[7] The inspector's notes explained that drags, or bars underneath shuttle cars, acted to "wind row" the coal spillage near each rib. Tr. 60-61; Gov't Ex. 5, at 8. A "wind row" is a "row heaped up by or as if by wind." Webster's Third New International Dictionary 2620 (1993).

[8] Consistent with MSHA practice, the inspector did not include rib sloughage, that is, coal pieces or lumps that fell off the ribs, in his accumulation measurements. 22 FMSHRC at 456. The inspector, however, cited sloughage that was transformed from its lump form into fine coal and dust by being pulverized by mobile equipment. *Id.* at 458; Tr. 65-67. In addition, he did not consider ramp material cut from the roof and left on the ground as prohibited accumulations. Tr. 287.

accumulations cited in Order No. 4889944 were abated at 7:00 a.m. on May 21. *Id.* at 455, 468-69. Order No. 4889946 was terminated at the same time after all of the preshift examiners on the section had been re-instructed on the requirements of preshift examinations. Gov't Ex. 4.

Consol challenged the orders and a hearing was held. The judge concluded that Consol violated section 75.400. 22 FMSHRC at 464. He reasoned that "widespread accumulations" resulting from ground sloughage that was spread by shuttle cars existed for a "minimum of several shifts." *Id.* at 463. The judge found that the accumulations were "extensive" and that Consol had "subordinat[ed] its cleanup responsibility to its desire to complete construction." *Id.* at 464. The judge next determined that the violation was S&S because the "cited extensive accumulations" were a source of propagation in the event of a methane fire or explosion in any part of the mine and posed a specific fire or explosion hazard on the 9 South section due to the presence of several potential ignition sources. *Id.* at 465.[9] He concluded that the accumulation violation was not a result of Consol's unwarrantable failure, however, largely because Consol was engaged in construction, not active mining, at the time of the inspection. *Id.* at 468-69. The judge found that Consol had an "obvious awareness" that it needed to promptly clean up accumulations, but was not persuaded that either Consol's notice of its cleanup responsibility or its past history of section 75.400 violations elevated Consol's behavior to aggravated conduct sufficient for unwarrantable failure. *Id.* at 469-70. He also stated that, while not dispositive, it was noteworthy that MSHA investigated the matter and decided not to pursue an action under section 110(c) of the Mine Act, 30 U.S.C. § 820(c). *Id.* at 469.

In addition, the judge concluded that Consol's failure to note the hazardous accumulations in the preshift examination book in the three-hour period preceding the day shift on May 20, amounted to a violation of section 75.360. *Id.* at 467. He also determined that the violation was S&S because Consol's failure to note existing coal dust accumulations in the preshift examination book contributed to the continuing presence of a hazardous condition. *Id.* However, the judge stated that the failure to record the conditions was not attributable to Consol's unwarrantable failure because construction on the section was not yet complete. *Id.* at 470.[10]

The Secretary of Labor filed a petition for discretionary review challenging the judge's negative unwarrantable failure determinations, which the Commission granted.

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[9] Loveridge No. 22 Mine releases more than one million cubic feet of methane during a 24-hour period and is subject to a five-day examination under Mine Act section 103(i), 30 U.S.C. § 813(i). 22 FMSHRC at 465.

[10] The judge vacated the order alleging a rock dusting violation of section 75.403 (22 FMSHRC at 467), and the Secretary has not appealed the ruling.

II.

Disposition

The Secretary argues that the judge's unwarrantable failure determinations were legally erroneous and not supported by substantial evidence. PDR at 8, 17.[11] As to the accumulation violation, she asserts that the judge erred in concluding that the construction and the consequent difficulty in cleaning up the 9 South section mitigated Consol's negligence. *Id.* at 9. The Secretary also challenges the judge's conclusion that notice to the operator and Consol's previous violations of section 75.400 were not factors supporting an unwarrantable failure finding. *Id.* at 12-15. She further contends that the judge erred by relying on the Secretary's decision not to pursue a section 110(c) action. *Id.* at 15. The Secretary argues that the preshift violation was caused by unwarrantable failure because, although Consol was on notice that it needed to make greater efforts to clean up accumulations, and the accumulations were extensive, obvious, dangerous and had been allowed to exist over at least several shifts, Consol failed to record the accumulations. *Id.* at 18. She also asserts that construction and difficulty in cleanup do not prevent an operator from recording conditions in a preshift log and therefore do not mitigate a preshift unwarrantable finding. *Id.* at 18-19.

Consol responds that the judge's negative unwarrantable failure determinations are correct and should be affirmed. Preliminarily, Consol argues that it did not violate sections 75.400 and 75.360 because the Secretary failed to establish that the accumulated materials were combustible as shown by the judge's vacation of the section 75.403 violation. C. Br. at 9-10. Consol submits that, if there were violations, they were not a result of unwarrantable failure because construction impaired cleanup of the section. *Id.* at 10-12. It submits that the decision to delay cleanup, as it had under a former MSHA field office, was not aggravated conduct because cleanup would have involved moving heavy machinery, which could have posed a safety risk to miners. *Id.* at 13 & n.4.

A. Violations

We reject Consol's argument that, because the judge concluded that the Secretary failed to prove that the accumulations were combustible under section 75.403, we should vacate the violations of sections 75.400 and 75.360(a)(1). *See* C. Br. at 9-10, 19. Under the Mine Act, review is limited to the questions raised sua sponte by the Commission, or in a petition for discretionary review filed by "[a]ny person adversely affected or aggrieved by a decision of an administrative law judge." 30 U.S.C. § 823(d)(2). Here, Consol did not file a petition for discretionary review challenging the judge's finding that the company violated sections 75.400 and 75.360(a)(1). The violations are thus not before us, and we accordingly decline to reach them.

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[11] The Secretary designated her petition for discretionary review ("PDR") as her brief.

B. Unwarrantable Failure

In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the extent of the violative condition, the length of time that it has existed, the operator's efforts in abating the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's knowledge of the existence of the violation, and whether the violation is obvious or poses a high degree of danger. *See Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984). These factors need to be viewed in the context of the factual circumstances of a particular case, and some factors may be irrelevant to a particular factual scenario. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000), *appeal docketed*, No. 01-1228 (4th Cir. Feb. 20, 2001). Nevertheless, all of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether the level of the actor's negligence should be mitigated. *Id.*

1. Order No. 4889944

With respect to the accumulation violation, the judge made findings on many of the factors relevant to whether an operator's conduct amounts to unwarrantable failure. Regarding the extent of the violative condition, the judge stated that the accumulations in the 9 South were "extensive" and "widespread" in his discussion of violation. 22 FMSHRC at 463-64. More specifically, the judge found there was a coal accumulation from a bulldozed corner in the No. 6 entry at the No. 7 crosscut measuring 20 inches deep, 12 feet long, and 8 feet wide. *Id.* at 463. That finding was supported by the testimony of all witnesses. Tr. 56, 478-79, 604-05, 607; Gov't Exs. 1, 5. In addition, the inspector testified that the section had accumulation areas that were six, eight, ten, or twelve inches deep and that most of the area had more than one inch of accumulation of coal dust. Tr. 47-60, 389-92; Gov't Ex. 5. He also observed accumulation conditions in entry Nos. 3 through 7, an area approximately 600 feet in length. Tr. 46-60, 147-48, 387-88; Gov't Exs. 1, 5. The inspector further stated in the order that "coal wind rowed along the sides of the entries up to 12 inches deep." Gov't Ex. 1; *see* n.7 supra. Thus, the

judge's finding that the accumulations were extensive is supported by substantial evidence.[12]

Regarding the length of time that the violative condition existed, the judge determined that it was undisputed that the accumulations existed for "several shifts." 22 FMSHRC at 468. The inspector testified that it would take many shifts for the cited accumulations to have amassed. Tr. 203. He based his opinion on the magnitude of the accumulations, his discussions with miners indicating that the section had been in this condition for several shifts, and his experience as a mine inspector for ten years. Tr. 37, 145-46, 203. Also supporting the judge's finding, the inspector's contemporaneous notes state that the "severity of the coal accumulation indicates that it has taken several shifts and days to get this bad." Gov't Ex. 5, at 11. As to one of the cited accumulations, the inspector and Consol witnesses testified that accumulations resulting from bumping work on the midnight shift of May 20 had not been cleaned up by the time of the inspection, approximately two hours into the day shift. 22 FMSHRC at 463; Tr. 56-58, 479, 604-09. On review, Consol has not provided any evidence disputing the judge's duration finding.

As to the operator's efforts to eliminate the violative condition, the judge found Consol "subordinated[ed] its cleanup responsibility to its desire to complete construction" by allowing the conditions to exist for several shifts. 22 FMSHRC at 464. The Commission has previously determined that an operator's decision to avoid or subordinate compliance responsibility in order to continue mining activities may be aggravated conduct. *Jim Walter Res., Inc.*, 19 FMSHRC 1761, 1770 (Nov. 1997) (providing that aggravated conduct shown when an operator decided to avoid compliance with the standard in order to continue production); *Consolidation Coal Co.*, 22 FMSHRC 328, 333 (Mar. 2000) (same).

We conclude that substantial evidence supports the judge's determination that Consol subordinated its cleanup responsibility to its interest in finishing construction. It is undisputed that when the inspector arrived at the section, no cleanup of the cited accumulations was underway. Tr. 58-59; *see* C. Br. at 13 (acknowledging that cleanup was not underway, but stating that delay was justified). The inspector testified that no instructions had been given to the miners even though it was approximately two hours into the shift. Tr. 58-59. The miners had been instructed to change the ventilation system so as to clean up one of the construction projects, rather than to clean up the cited accumulations. 22 FMSHRC at 457; Tr. 58. The inspector further testified that the miners on the section exhibited an indifferent attitude towards cleaning up the section, indicating that they did not feel the conditions were so bad; that this was a normal condition; and that their shift was the only shift to ever clean up the section. Tr. 58-59,

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[12] 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)).

135-38. Although Consol Foreman Zapach testified that some cleanup work had been done on the midnight shift before the inspection, consisting of 30 minutes of cleaning gob with a scooter (Tr. 475-76; Gov't Ex. 6), Zapach did not know where the cleanup occurred, including whether any part of the cited area had been cleaned. Tr. 475-76. In any event, even if Consol had cleaned any of the cited area for 30 minutes, such evidence would not detract from the judge's finding that Consol had subordinated its cleanup responsibilities, particularly when termination of the violation required 20 hours of cleanup, with the afternoon shift alone loading 14 cars of material. 22 FMSHRC at 468-69; Gov't Ex. 6.[13]

There is also undisputed evidence Consol received actual notice that greater efforts were necessary to achieve compliance with section 75.400. The Commission has recognized that past discussions with MSHA about an accumulation problem serve to put an operator on heightened scrutiny that it must increase its efforts to comply with the standard. *Enlow Fork Mining Co.,* 19 FMSHRC 5, 11-12 (Jan. 1997). Likewise, a high number of past violations of section 75.400 serve to put an operator on notice that it has a recurring safety problem in need of correction and the violation history may be relevant in determining the operator's degree of negligence. *Peabody*, 14 FMSHRC at 1263-64. *Cf. Deshetty employed by Island Creek Coal Co.*, 16 FMSHRC 1046, 1051 (May 1994) (providing that 45 citations in the prior year and prior discussion with MSHA about accumulation problem at mine "should have engendered . . . a heightened awareness of a serious accumulation problem"). Recent citations further serve to place an operator on notice of the need to increase its efforts to come into compliance. *Youghiogheny & Ohio Coal Co.*, 12 FMSHRC 2007, 2011 (Dec. 1987). Here, in January 1998, MSHA warned Consol that its cleanup and rock dusting efforts at the mine were "borderline to substandard" and needed to be improved. 22 FMSHRC at 457; Tr. 47-48, 300-01. During the previous two years, the operator received 88 citations alleging violations of section 75.400. 22 FMSHRC at 470; Gov't Ex. 15. MSHA issued four citations to the mine alleging section 75.400 violations two days before the subject order was issued. Tr. 339-41; Gov't Ex. 15; Resp. Ex. 1.

Although the judge correctly concluded that Consol had an "awareness . . . that operators are responsible for promptly cleaning dust accumulations" (22 FMSHRC at 469), the judge misstated Commission precedent when he distinguished Consol's previous violations on the basis that they were not also caused by unwarrantable failure or sufficiently similar to the subject violation. *Id*. at 470. In evaluating an operator's history of violations for unwarrantable failure purposes, the Commission does not require past violations to also be caused by unwarrantable failure and has declined to limit "the circumstances under which past violations may be considered by a judge in determining whether an operator's conduct demonstrated aggravated conduct." *Peabody*, 14 FMSHRC at 1263 (rejecting contention that only past violation involving

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[13] Although Consol witnesses testified that Consol planned to clean up the section once construction was finished (Tr. 479, 605-06, 674), the Commission has recognized that such intentions generally do not demonstrate the vigilance required to detract from an unwarrantable failure finding. *See Consolidation Coal*, 22 FMSHRC at 332 (providing that future intention is insufficient to shield an operator from unwarrantable failure determination).

the same area may be considered for unwarrantable determination); *Enlow Fork*, 19 FMSHRC at 11 (providing that "[i]n evaluating evidence of prior warnings as part of the unwarrantable failure analysis, the Commission has not required the previous condition to involve materials identical to those involved in the condition at issue"). The case on which the judge relies, *Greenwich Collieries*, 12 FMSHRC 940, 945 (May 1990), to support his theory that to be relevant for unwarrantable analysis previous violations must also be unwarrantable, is inapposite. That case involved the Mine Act's graduated enforcement scheme where a section 104(d) order may be issued only after a second unwarrantable violation occurs in 90 days, and did not discuss the notice factor included in the evaluation of unwarrantable failure.

In addition, under the circumstances of this case, we conclude that the judge erred in determining that Consol's construction activities precluded an unwarrantable failure determination.[14] The Commission has explained that "when an operator believed in good faith that the cited conduct was the safest method of *compliance* with applicable regulations, even if they are in error, such conduct does not amount to aggravated conduct exceeding ordinary negligence." *Utah Power & Light Co.*, 12 FMSHRC 965, 972 (May 1990) (emphasis in original). Here, Consol was not attempting to comply with section 75.400. No cleanup was underway of the cited accumulations. Nor did Consol introduce evidence that it had taken actions to increase its cleanup efforts in response to MSHA's January admonition, such as a special assignment of miners to cleanup, or an initiation of a regular cleanup program. *See* Tr. 82-83; *compare Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997) (reasoning that assigning one miner to cleanup was insufficient to address accumulation problem) *with Peabody Coal Co.*, 18 FMSHRC 494, 498-99 (April 1996) (providing that extensive remedial efforts may militate against unwarrantable failure). Furthermore, Consol made no effort to minimize the effects of construction on its cleanup of accumulations. A significant portion of the cited accumulations were in places other than inby the tailpiece and outby the construction activities, where heavy equipment was located. *See* 22 FMSHRC at 456; Gov't Ex. 7. Although removal of such accumulations would not have required moving equipment, Consol made no effort to remove even the most accessible accumulations. Moreover, in areas where equipment would have interfered with cleanup efforts, Consol failed to show that the equipment could not be moved to other locales in the mine, which would have allowed cleanup of the entire cited area.[15]

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[14] To the extent the judge relied upon the Secretary's decision not to pursue an action under section 110(c) of the Mine Act as an additional mitigating factor in his unwarrantable failure analysis, he erred. The Secretary's decision to not bring a section 110(c) case is not subject to review by this Commission and its judges. *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985). Moreover, the Secretary may decide not to bring a section 110(c) action for numerous reasons (including tactical and logistical concerns) not related to the level of negligence of the operator. Accordingly, it is not appropriate to draw any inferences from the Secretary's decision not to pursue a 110(c) case.

[15] We are not persuaded by Consol's assertion that its conduct was not aggravated because it was following a cleanup procedure that was done in the past "apparently" with the

In sum, substantial evidence supports the judge's findings that the accumulations were extensive and that Consol subordinated its cleanup responsibilities to its desire to complete construction. In addition, undisputed testimony reveals that the accumulations existed for several shifts and that Consol had actual knowledge that it needed to increase its efforts to comply with section 75.400. Given these findings and our conclusion that Consol's construction activities in this case cannot be viewed as a mitigating factor, we conclude that the record supports only the determination that Consol's accumulation violation was caused by its unwarrantable failure. *Am. Mine Serv., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (holding that remand unnecessary when evidence could justify only one conclusion). Accordingly, we reverse the judge's determination that Consol's violation of section 75.400 was not unwarrantable and remand for the reassessment of a civil penalty. In his reassessment of a civil penalty, we instruct the judge to set forth his findings and conclusions on the six penalty factors set forth in section 110(i) of the Mine Act, 30 U.S.C. § 820(i).

2. Order No. 4889946

At the conclusion of his unwarrantable failure analysis of the accumulation violation, the judge stated, without further explanation, that Consol's failure to record the cited accumulations was not a result of unwarrantable failure because of the construction occurring on the section. 22 FMSHRC at 470. We conclude that the judge erred in failing to separately consider the alleged unwarrantability of Consol's violations of sections 75.400 and 75.360, which require separate and distinct duties of an operator. Section 75.400 prohibits the accumulation of combustible materials, while section 75.360 sets forth requirements for preshift examinations. The analyses for whether Consol's violations of these sections were caused by unwarrantable failure are not interchangeable, although such analyses may rely upon some of the same factual findings. The judge failed to set forth sufficient findings of fact, conclusions of law, and the bases for them, relevant to the consideration of whether Consol's violation of section 75.360 was aggravated. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222 (June 1994). We also reject the judge's conclusion that Consol's construction activities served as a mitigating factor in his determination that Consol's preshift violation was not caused by unwarrantable failure. Even if we were to assume that the difficulty imposed by construction prevented Consol from cleaning up accumulations, such difficulty would not prevent Consol from recording the accumulations in a preshift examination log. Accordingly, we vacate the judge's conclusion that Consol's violation of section 75.360 was not unwarrantable, and remand for further analysis and

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acquiescence of another MSHA district. C. Br. at 13 n.4. Consol introduced no evidence that the prior MSHA office was aware of, or approved of, its procedure of delaying cleanup of accumulations while construction was underway. Likewise, Consol failed to introduce any record evidence supporting its argument that cleaning up before construction was complete would have posed a danger to miners. *Id.* at 13. Contrary to that assertion, the judge found that the accumulation violation was S&S, i.e., that it significantly and substantially contributed to a hazard (22 FMSHRC at 465), a finding which Consol did not appeal.

reassessment of civil penalty.

On remand, in analyzing the unwarrantable failure issue, we instruct the judge to consider the inspector's undisputed testimony that there were no notations of the accumulation conditions for the preceding seven shifts before the inspection, and that all preshift examiners of the subject area were foremen. Tr. 413-16, 420-21; Gov't Ex. 16. *See Midwest Material Co.*, 19 FMSHRC at 35 (in evaluating unwarrantable failure, foremen are subject to a high standard of care). All findings concerning the facts and circumstances surrounding the unwarrantability of Consol's violation of section 75.400 that we have affirmed become law of the case. We direct the judge to consider these facts and circumstances, insofar as they may be relevant, in considering whether Consol's violation of section 75.360(a)(1) was unwarrantable. Finally, in his reassessment of a civil penalty, we instruct the judge to consider the penalty factors set forth in section 110(i) of the Mine Act, as they separately relate to the preshift violation, and to set forth his findings and conclusions.

III.

Conclusion

For the foregoing reasons, we reverse the judge's determination that Consol's violation of section 75.400 was not caused by its unwarrantable failure, reinstate Order No. 4889944 under section 104(d)(2) of the Mine Act, and remand for reassessment of an appropriate penalty. As to Order No. 4889946, we vacate the judge's negative unwarrantable failure determination and remand for an analysis consistent with this decision and for the reassessment of an appropriate civil penalty.

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