FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 30, 2001

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket Nos. WEVA 98-72-R
ADMINISTRATION (MSHA)	:	WEVA 98-73-R
	:	WEVA 98-123
v.	:	
	:	
EAGLE ENERGY, INC.	:	

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

DECISION

BY: Verheggen, Chairman; Riley and Beatty, Commissioners

This contest and civil penalty proceeding involves two orders issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Eagle Energy, Inc. ("Eagle") under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). Administrative Law Judge Jerold Feldman affirmed the violations charged in the orders, concluded that the violations were the result of Eagle's unwarrantable failure, and imposed penalties greater than those assessed by the Secretary. 22 FMSHRC 860 (July 2000) (ALJ). The Commission granted Eagle's petition for review in which it challenged the judge's findings and conclusions with regard to those issues. For the following reasons, we affirm the judge's conclusion that violations of the cited regulations occurred, and vacate and remand the unwarrantability determination and penalty assessments.

I.

Factual and Procedural Background

On February 26, 1998, Eagle maintenance foreman James Kerns was fatally injured when a rib roll occurred in the 2 North section at the No. 1 mine. 22 FMSHRC at 862. In the ensuing investigation, MSHA and West Virginia mine investigators and Eagle officials gathered at the 2 North section dumping point in the No. 2 entry at the 26th crosscut. *Id.* MSHA personnel included inspectors Thurman Workman and Vaughn Gartin and supervisory inspector Terry

Price. *Id*. Federal and state investigators were accompanied by Eagle vice-president Larry Ward, superintendent Terry Walker, and night shift foreman Roger Lovejoy. *Id.* Government and company personnel divided into teams to go to the accident site in smaller groups. *Id.* While one group waited, another proceeded to the accident scene. *Id.*

At about 6:50 p.m., while waiting to go to the accident site, Price walked from the dumping point through the 26th crosscut towards the No. 3 entry. *Id.* Price heard sounds that he attributed to "mountain bumping." *Id.* Mountain bumping is a geological condition in the mine caused by shifting rock due to the mining out of coal; the result is sloughage that falls from the roof and ribs. *Id.* at 870. While Price was walking toward the No. 3 entry, Workman headed in the direction of the No. 1 entry through the 26th crosscut. *Id.* at 862. Workman then doubled back through the 26th crosscut towards the No. 3 entry when he saw a kettle bottom with a roof bolt through the center of it. *Id.*

A kettle bottom is the oblong or cylindrical fossilized remains of a tree trunk that consists of "slickensided"[1] material that may be surrounded by a ring of coal. Kettle bottoms are primarily found in mine roofs consisting of shale.[2] *Id.* at 862-63. Kettle bottoms were a frequent occurrence at the Eagle mine. *Id*. at 863. When they were encountered, foremen usually

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[1] "Slickenside" is defined in *Dictionary of Mining, Mineral, and Related Terms*, 1025 (1968) (U.S. Dept. of Interior, Bureau of the Mines) as follows, "A polished and sometimes striated surface on the walls of a vein, or on interior joints of the vein material or rock masses. Produced by rubbing during faulting, on the sides of fissures, or on bedding planes."

[2] The *Dictionary of Mining, Mineral, and Related Terms*, 297 (2d ed. 1997) (American Geological Institute) defines "kettle bottom" as follows,

> A smooth, rounded piece of rock, cylindrical in shape, which may drop out of the roof of a mine without warning, sometimes causing serious injuries to miners. The surface usually has a scratched, striated, or slickensided appearance and frequently has a slick, soapy, unctuous feel. The origin of this feature is thought to be the remains of the stump of a tree that has been replaced by sediment so that the original form has been rather well preserved.

A publication issued by the Department of the Interior described a kettle bottom as follows: "Kettle bottoms . . . are the fossilized remains of trees that grew in ancient peat (coal) swamps . . . . Kettle bottoms can be found in either shale or sandstone roof rock. . . . Normally, kettle bottoms are highly slickensided and surrounded by a 0.25- to 0.75-in.'ring' of coal." Bureau of Mines, *Information Circular/1992*, "Preventing Coal Mine Groundfall Accidents: How to Identify and Respond to Geologic Hazards and Prevent Unsafe Worker Behavior," 8 (1992). Gov't Ex. 17.

identified them with spray paint or chalk to signal the roof bolters that additional roof support was needed, or dangered them off until they could be bolted. *Id.*; Tr. II 558; Tr. II 850-51.[3] When support was added to a kettle bottom, generally a roof bolt was placed just to the side of the kettle bottom with a half header or roof bolting plate overlapping the kettle bottom to hold it in place and ensure that it would not separate from the surrounding roof material. 22 FMSHRC at 863.

Price also observed the kettle bottom that Workman saw. *Id.* Because the kettle bottom was roof bolted in the center, rather than at the side with a supporting half header, Price and Workman concluded that the kettle bottom was not properly supported, and therefore they considered it to be a hazardous condition. *Id*.

Workman returned to the dumping point at the No. 2 entry, where he encountered Pete Hendricks, president of Eagle's parent company, Massey Coal Services. *Id.* Miners' representative Keith Casto was also present. *Id.* at 862-63. Workman, Price, and Casto proceeded to walk approximately 27 feet inby the dumping point where they observed a cluster of three kettle bottoms that were marked with orange paint. *Id.* at 863; *see* Gov't Ex. 11 A-E. Workman pointed out the painted kettle bottoms to Hendricks, who, according to Workman, stated that he paid his people to support the kettle bottoms. 22 FMSHRC at 863. After Workman pointed out the kettle bottoms, Eagle vice-president Larry Ward had the area dangered off until he had an opportunity to inspect them. *Id.* at 864. Workman had MSHA inspector Gartin photograph the painted cluster of kettle bottoms.[4] *Id*. At the completion of his conversation with Hendricks, Workman traveled into the 26th crosscut towards the No. 1 entry. *Id.* He saw an unsupported egg-shaped kettle bottom in the crosscut about midway between the No. 2 and No. 1 entries. *Id.*

Workman then joined an investigative team that went to the accident site. *Id.* After inspecting the accident site, Workman returned to the dumping point, and he was instructed to

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[3] "Tr." references are to the transcript of the hearing held before the administrative law judge. Cumulatively, there were 10 days of hearing, which convened on three separate occasions. "Tr. I" refers to the pages of the transcript volumes from the hearing on September 14-17, 1999; "Tr. II" refers to the pages of the transcript volumes from the hearing on December 7-9, 1999; and "Tr. III" refers to the pages of the transcript volumes from the hearing on February 15-17, 2000.

[4] Gartin ran out of film after he photographed the painted cluster of kettle bottoms, and he could not photograph any of the other kettle bottoms that were observed on February 26. 22 FMSHRC at 864. Months later, on November 21, 1998, shortly before the No. 2 section of the mine was to be abandoned, Eagle had photographs taken of many of the kettle bottoms at issue in this proceeding. *Id.* By that time, many of these areas of the roof were partially obscured by spray painting, rock dusting, and roof bolting plates and headers. *See* Jt. Ex. 1.

conduct a Triple A inspection in the No. 2 section inby the dumping point to the working faces. *Id.* Workman was accompanied by a West Virginia mine inspector. *Id.* Workman initially traveled up the No. 1 entry and observed a roundish oblong kettle bottom about six to nine inches in diameter, inby spad 2669. *Id.* Workman then walked through the 27th crosscut from the No. 1 entry to the No. 2 entry. *Id.* At the intersection of the 27th crosscut and the No. 2 entry, inby spad 2668, Workman saw a sunflower-shaped kettle bottom with jagged edges that was approximately six to nine inches in diameter. *Id.*

Workman next walked inby spad 2668 in the No. 2 entry. About 25 feet inby spad 2668, Workman noticed a kettle bottom that was similar in size to the prior kettle bottoms that he had observed. *Id.* In returning through the No. 3 entry, outby spad 2666, Workman saw a round kettle bottom that was about 6 to 10 inches in diameter.[5] *Id.* at 864-65. Workman walked through the 27th crosscut and went outby the No. 1 entry. In the entry, outby the 26th crosscut near spad 2664, Workman saw an unsupported kettle bottom that was round and about 6 to 10 inches in diameter. *Id.* at 865. In total, Workman saw ten kettle bottoms, nine of which were cited. *Id.*

At the completion of the inspection, Workman traveled to the mine surface and at 11 p.m, along with MSHA inspectors Gartin and Price, met with Massey Coal president Hendricks and Eagle officials to discuss the results of the investigation. *Id.* At the meeting, Workman issued a section 104(a) citation charging Eagle with a violation of section 30 C.F.R. § 75.202(a),[6] as a result of inadequate roof and rib support in the 2 North section.[7] *Id.* Workman based the citation

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[5] This kettle bottom was not cited in either of the orders that subsequently issued. *Id.* at 865.

[6] Section 75.202(a) provides:

> The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.

[7] The citation specified the following condition as a violation:

> The mine roof and coal ribs were not supported adequately to control the mine roof and ribs to protect persons from hazards related to falls of the roof or ribs in the 2 North section MMU 013-0. Beginning at spad line 2662 and 2661 and extending inby to face line of No. 1 entry, a distance of 350' and a distance of 370' in No. 2 and No. 3 entries the following condition [sic] were present in several locations, kettle bottoms present with no support, loose

on his observation of the unsupported kettle bottoms, loose and broken coal in the roof, unsupported coal ribs, and entry widths exceeding the 20 feet specified in Eagle's approved roof control plan. *Id.* MSHA did not issue any citations as a result of the investigation into the fatal accident. *See* Tr. I 232.

To abate the citation, Eagle vice-president Ward instructed safety director Jeffrey Bennett to paint any area of the roof that appeared slickensided. 22 FMSHRC at 865. Thereafter, Bennett used orange spray paint that was similar to what had been used to paint the three kettle bottom cluster near the dumping point. *Id.* The areas that were painted were bolted subsequently by installing roof bolts and half headers around the perimeters of the painted areas. *Id.* *See* Jt. Ex. 1. Ward considered these areas to be non-hazardous roof irregularities that were supported only to abate the citation. The citation was abated on March 2, 1998. 22 FMSHRC at 865. Eagle paid the penalty assessed as a result of the citation. *Id.* at 866.

On February 27, the day after the citation was issued, MSHA inspectors Workman and Price returned to the mine and inspected the preshift and onshift examination reports. *Id.* Based on a mine advancement map for the working faces in the 2 North section, which was prepared by Eagle vice-president Ward, Workman concluded that the area where the painted cluster of kettle bottoms was located had been mined during the day shift on February 24. *Id.* The inspectors looked at the examination reports for the preceding three days, February 24 through February 26. *Id.* During this period, the section foremen, Saunders, Fisher, and Miles, had performed collectively 17 examinations. *Id.* None of the roof conditions that Workman had identified as kettle bottoms on February 26, including the orange painted cluster, had been included in the reports. *Id.* On March 11, 1998, Workman issued two section 104(d)(2) orders to Eagle for performing "perfunctionary"(sic) preshift and onshift examinations in violation of 30 C.F.R. §§ 75.360(b)[8] and 75.362(a)(1),[9] respectively. *Id.* at 867. He designated each of the violations as

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> coal broken, and hanging, cracks present along the coal ribs with no support, No. 1 entry had been mined 22'10" wide to 23' wide with no additional supports installed.

Gov't Ex. 14.

[8] Section 75.360(b) provides, in pertinent part:

> (b) The person conducting the preshift examination shall examine for hazardous conditions . . . at the following locations:
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> (1) Roadways, travelways and track haulageways where persons are scheduled, prior to the beginning of the preshift examination, to work or travel during the oncoming shift.

significant and substantial ("S&S") and attributed them to Eagle's unwarrantable failure. *Id.* *See* Gov't Exs. 1 and 2.

Eagle contested the proposed penalties and a hearing was held. Before the judge, Eagle's primary defenses were that the roof conditions cited by MSHA in the orders were not kettle bottoms and, alternatively, that they were not exposed until mountain bumping and roof sloughage occurred on February 26, shortly before MSHA's investigation. 22 FMSHRC at 867.

The judge first noted that Eagle had made "two damaging admissions." *Id.* at 870. The first was a statement made by the president of Eagle's parent company, Pete Hendricks, to MSHA inspector Workman in which Hendricks acknowledged the presence of the painted cluster of kettle bottoms in the No. 2 entry. *Id.* *See* Tr. I 297-98. The second was Eagle's failure to

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> (2) Belt conveyors that will be used to transport persons during the oncoming shift and the entries in which these belt conveyors are located.
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> (3) Working sections and areas where mechanized mining equipment is being installed or removed, if anyone is scheduled to work on the section or in the area during the oncoming shift. The scope of the examination shall include the working places, approaches to worked-out areas and ventilation controls on these sections and in these areas, and the examination shall include tests of the roof, face and rib conditions on these sections and in these areas.
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> . . . .
>
> (10) Other areas where work or travel during the oncoming shift is scheduled prior to the beginning of the preshift examination.

[9] Section 75.362(a)(1) provides, in pertinent part:

> At least once during each shift, or more often if necessary for safety, a certified person designated by the operator shall conduct an on-shift examination of each section where anyone is assigned to work during the shift and any area where mechanized mining equipment is being installed or removed during the shift. The certified person shall check for hazardous conditions, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction.

contest the section 104(a) citation, which cited a number of hazardous roof conditions including kettle bottoms. 22 FMSHRC at 870. The judge also found that the record evidence, including the credited testimony of MSHA's inspectors and exhibits, amply supported the presence of kettle bottoms. *Id.* at 871.

The judge further found that the presence of continuous miner bit marks, which indicated that the areas where the kettle bottoms were seen were exposed when they were mined, tight roof plates, no roof sloughage, and painted center line (drawn through the three painted clustered kettle bottoms), provided a rational basis for inferring that the painted kettle bottoms were exposed during the mining cycle on February 24, 1998. *Id.* at 872. With regard to the remaining unpainted kettle bottoms, the judge held the same facts, with the exception of the painted center line, supported the conclusion that the kettle bottoms were exposed during the normal mining cycle between February 24 and 26. *Id.* The judge rejected Eagle's defense that mountain bumping could have exposed the kettle bottoms on February 26. *Id.* at 873. The judge further applied the "missing witness" evidentiary rule to draw the inference adverse to Eagle that had it presented a witness to testify concerning the painting of the center line that ran through the painted cluster of kettle bottoms, that witness would have testified that the kettle bottoms were painted contemporaneously with the center line on February 24. *Id.* at 874. The judge continued that Eagle cannot escape application of the rule by denying that it knew the identity of the witness who painted the line. *Id.*

The judge affirmed the inspector's designation of the violations in the orders as significant and substantial ("S&S").[10] *Id.* at 874-76. The judge also concluded that the evidence reflected "the requisite unjustifiable conduct to support an unwarrantable failure" determination. *Id.* at 878.

In addressing the proposed penalties, the judge noted that the evidence suggested that Eagle acted with reckless disregard of the hazardous roof conditions in the heavily traveled No. 2 entry. *Id.* at 879. Relying on the painted cluster of kettle bottoms in the No. 2 entry, the judge noted that the cited violations were of extremely serious gravity. *Id.* The judge found that Eagle had an extensive history of violations. *Id.* The judge increased the proposed penalties from $3000, which had been initially proposed by MSHA, to $6000 for each order for a total penalty of $12,000. *Id.* at 880.

II.

Disposition

Eagle argues that substantial evidence does not support the judge's determination that it failed to observe and report the kettle bottoms. E. Br. at 7. In support, Eagle contends that the

[10] Eagle has not appealed the S&S determination to the Commission.

judge ignored testimony favorable to Eagle or failed to reconcile conflicting testimony, including the unrefuted testimony of the foremen and rank-and-file miners that they did not see any unsupported kettle bottoms from February 23 to 26. E. Br. at 9-11; E. Reply Br. at 1-6. Eagle argues alternatively that the conditions cited were not kettle bottoms, or that they were not observable prior to mountain bumping that occurred on February 26, which allowed obscured areas of the mine roof to become visible. E. Br. at 7. Eagle attacks the basis for the judge's discrediting the testimony of Scovazzo, who testified that the painted roof conditions cited were not indications of kettle bottoms but rather represented "doodling." *Id.* at 8-9. Further, Eagle challenges the judge for giving "preclusive effect to an uncontested citation" that Eagle settled for economic reasons. *Id.* at 11. Eagle argues that the citation was not litigated and did not involve the same issues as the section 104(d) orders in this proceeding. *Id.* at 11-12; E. Reply Br. at 6-7.

Eagle argues that the Commission should reverse the judge's unwarrantable failure findings because he based them entirely on the painted cluster of alleged kettle bottoms while ignoring the testimony concerning the other alleged kettle bottoms that were the basis for the orders. E. Br. at 9-16. Eagle attacks the judge's use of the "missing witness" rule that led him to infer, in light of Eagle's failure to present the witness who painted the center line, that the witness would have testified that the adjacent kettle bottoms were painted contemporaneously with the center line during the mining cycle on February 24.[11] *Id.* at 17-18. In particular, Eagle notes that the judge applied the rule even though the identity of the witness was not known to Eagle. *Id.* at 18-19. Finally, Eagle challenges the judge's imposition of a civil penalty of $12,000 because of aggravated conduct when the only evidence on which the judge relied was Eagle's failure to observe and bolt the painted cluster.[12] *Id.* at 19-20.

The Secretary argues that substantial evidence supports the finding of violations, because kettle bottoms existed in the mine and were visible, and Eagle failed to identify them in the preshift and onshift examination reports. S. Br. at 7-9. The Secretary contends that doctrines of res judicata or collateral estoppel did not bar the judge from relying on Eagle's prior payment of penalties in an uncontested citation that included an allegation of unsupported kettle bottoms. *Id.* at 9-10. The Secretary argues that Eagle failed to show that the judge abused his discretion in

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[11] Although Eagle addresses the use of the "missing witness" rule in relation to the judge's unwarrantability determination (E. Br. at 12) the judge applied the rule in rejecting Eagle's defense to the violation charged – that mountain bumping exposed the kettle bottoms shortly before the MSHA inspection on February 26. 22 FMSHRC at 873-74.

[12] While Eagle initially included in its petition for review the argument that the judge engaged in persistent questioning of witnesses that demonstrated bias and partiality and interfered with Eagle's presentation of its defense, it subsequently moved to withdraw that issue from the Commission's consideration. E. Mot., dated May 23, 2001. The Commission grants Eagle's motion.

crediting the Secretary's witnesses over Eagle's expert regarding the existence of kettle bottoms. *Id.* at 11-13. The Secretary asserts that there is no basis for overturning the judge's credibility resolutions and the inferences that he drew from the record, including his application of the "missing witness" rule. *Id.* at 14-24. With regard to unwarrantable failure, the Secretary contends that the judge's determination is supported by the record. *Id.* at 24-26. Finally, in support of the judge's penalty assessment, the Secretary states that the standard of review is abuse of discretion, and asserts that none of Eagle's arguments establish an abuse of discretion. *Id.* at 26-29.

A. Violation

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 *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). 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)).

We begin our consideration of the violations alleged in the orders by rejecting the judge's reliance in finding violations on Eagle's payment of the proposed penalty that arose from a prior section 104(a) citation. The prior citation charged Eagle with several hazardous roof conditions, including a nonspecific reference to kettle bottoms. Gov't Ex. 14. The orders at issue in this proceeding, on the other hand, specifically cited kettle bottoms by location that were not included in the preshift and onshift examination reports. Gov't Exs. 1 and 2. Thus, it is apparent from comparing the uncontested citation and the contested orders in this proceeding that there is a lack of identity of issues.[13] Therefore, the citation is not of any probative or precedential value to any aspect of the pending orders at issue here.

[13] Neither the res judicata nor collateral estoppel doctrines would require that the payment of the penalty arising from the citation control the outcome of the litigation over the subsequent orders. "Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or those in privity with them, based upon the same claim. . . . The crucial question is whether the clams involved in the two actions are identical; if not, res judicata is inapplicable." *Faith Coal Co.*, 19 FMSHRC 1357, 1365 (Aug. 1997) (citations omitted). As for collateral estoppel, "a judgment on the merits in a prior suit may preclude the relitigation in a subsequent suit of any issues actually litigated and determined in the prior suit. . . . Identity of issue is a fundamental element that must be satisfied before collateral estoppel may be applied." *Bethenergy Mines, Inc.*, 14 FMSHRC 17, 26 (Jan. 1992) (citations omitted).

Further, the other "admission" on which the judge relied, Massey president Hendrick's statement to Workman, when shown the painted cluster, that he paid his people to support kettle bottoms, was merely a response to Workman's calling his attention to the painted cluster and not probative of the presence of kettle bottoms throughout the 2 North section. Thus, Hendrick's statement is of limited evidentiary value to our consideration of the existence of the kettle bottoms in the 2 North section that were included in the orders.

Despite our rejection of the judge's reliance on these "admissions," we nevertheless conclude that there is substantial evidence that establishes the presence of kettle bottoms. The major difference in the testimony of the Secretary's witnesses and Eagle's witnesses concerned whether a kettle bottom included a rim of coal separating it from the surrounding rock. The Secretary's position was that no rim of coal was necessary for the existence of a kettle bottom, while Eagle's position was that a rim of coal was an essential part of a kettle bottom.[14] The definition of kettle bottom adopted by the judge does not require the presence of a ring of coal.

A judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). The Commission has recognized that, because the judge "has an opportunity to hear the testimony and view the witnesses[,] he [or she] is ordinarily in the best position to make a credibility determination." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998).

The judge credited the testimony of MSHA investigators Workman and Price, who had 45 and 27 years of experience, respectively, that the kettle bottoms cited in the orders existed. 22 FMSHRC at 871. The judge further noted that kettle bottoms were common in this geographical area and, in particular, in the Eagle No. 1 mine. *Id.* The judge also found it significant that Workman and Price viewed the areas of the mine roof cited in the orders before abatement, thereby allowing them to observe the conditions in the roof prior to the areas being spray painted, roof bolted and supported with plates or headers, which obstructed all or a portion of the outer perimeters. *See Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 372-73 (Mar. 1993) (judge was warranted in crediting MSHA's expert because conditions observed by the operator's expert were different from those in existence at time of citation). In addition to the testimony of the witnesses, the judge also found support for the existence of kettle bottoms from the photographic

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[14] *Compare* Tr. I 110-16 (Workman), Tr. I 1108-10 (Price), Tr. II 181-83 (Price), Tr. II 203-04 (Casto), and Tr. III 81-82, 91-93 (Bias) *with* Tr. II 367-68 (Saunders), Tr. II 554 (Walker), Tr. II 885-86 (Miles), Tr. III 381-82 (Lovejoy), and Tr. III 515, 536 (Scovazzo).

evidence submitted at trial.[15] Jt. Ex. 1; Gov't Ex. 11.

The judge's final basis for discrediting Eagle's expert, Dr. Scovazzo, was his statement that the painted cluster was nothing more than "doodling."[16] 22 FMSHRC at 871. Scovazzo's doodling explanation conformed to the explanation given by Eagle vice-president Larry Ward that the painted cluster was graffiti. However, the judge was persuaded by the testimony of other witnesses that Eagle foremen used orange or red spray paint to designate kettle bottoms that were to be bolted. Tr. III at 281-82 (Bias); Tr. III at 1195-1198 (Ward). In these circumstances, it was not unreasonable for the judge to conclude that Scovazzo's doodling theory negatively impacted on his credibility as a witness.

Having found that the kettle bottoms that were the basis for the order existed, the judge addressed the issue of the duration of the cited conditions and Eagle's defense that the kettle bottoms were obscured by slate and that mountain bumping exposed them shortly before MSHA's inspection on February 26. The duration of the unsupported kettle bottoms is significant because the orders cited Eagle for performing perfunctory preshift and onshift examinations between February 24 and 26, when the areas were mined thereby exposing the kettle bottoms. The 17 examination reports that were written over this 3-day period did not have any reference or notation relating to the unsupported kettle bottoms that the MSHA inspectors observed on February 26. *See* Gov't Ex. 13 A-W. Therefore, key to establishing the violations charged in the orders is verifying that the kettle bottoms observed by the MSHA inspectors on February 26 went unobserved and unsupported by Eagle as the areas were mined during the period from February 24 to 26.

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[15] Eagle contends that one area of the roof, which it conceded possibly could have been categorized as a kettle bottom, was nevertheless adequately supported with a bolt through the center because the bolt was driven into a "rider seam" that was above the kettle bottom. E. Br. at 8 & n.5. Eagle argues that the judge ignored Scovazzo's explanation that the kettle bottom was adequately supported. *Id.* at 8. The judge failed to make any findings on whether the kettle bottom was adequately supported, although he should have. But this error is harmless because, even if the bolted kettle bottom was adequately supported and therefore not a hazard for purposes of per-shift and on-shift inspections, the various other kettle bottoms that Eagle failed to record in its examination books amply support the judge's findings of violations.

[16] Eagle argues that Scovazzo's response was "coerced." E. Br. at 9. However, Scovazzo's testimony was consistent with other Eagle witnesses who testified portions of the painted roof represented "graffiti." *E.g.*, Tr. II 785 (Fisher); Tr. III 1137-38 (Ward). Moreover, the testimony appears to be consistent with Eagle's position taken throughout the hearing. *See* Tr. I 825 (cross-examination of Workman). Therefore, we cannot conclude that the judge coerced this particular answer from Eagle's expert.

The judge noted that the statements by Eagle foremen that they failed to see unsupported kettle bottoms did not lead him to conclude that they were not observable. 22 FMSHRC at 870. The judge further noted the self interest of Eagle personnel in denying the existence of unsupported kettle bottoms in light of the fatal roof accident that had occurred at the mine. *Id.* at 872. With regard to the painted cluster of kettle bottoms in the No. 2 entry, the judge found that the kettle bottoms would have been exposed and then painted just minutes before the fatal accident on February 26, if mountain bumping exposed them — a theory the judge rejected as "implausible." *Id.*

In the absence of direct credited evidence on the issue of duration of the kettle bottoms, the judge looked to circumstantial evidence "to establish a violation by inference." *Id.* The Commission has held that "the substantial evidence standard may be met by reasonable inferences drawn from indirect evidence." *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984). The Commission has emphasized that inferences drawn by the judge are "permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred." *Id*.

We find that substantial evidence supports the judge's rejection of Eagle's defense that mountain bumping exposed the previously obscured kettle bottoms on February 26, just before the MSHA inspection. We note in particular that the judge relied on the presence of continuous miner bit marks that would have been obliterated if the roof had sloughed; tight roof plates that would have loosened if sloughing had occurred; and no evidence of roof sloughage on the mine floor to indicate that conditions had been recently exposed because of mountain bumping. 22 FMSHRC at 872.[17]

Further, based on these facts, it was reasonable for the judge to infer that the cluster of kettle bottoms was exposed when that section was mined during the normal mining cycle on February 24. *See Windsor Coal Co.*, 21 FMSHRC 997, 1002 (Sept. 1999) (Commission has permitted duration to be established through the use of circumstantial evidence). For the same reasons, it was appropriate for the judge to conclude that the remaining unpainted kettle bottoms were exposed during the normal cycles between February 24 and February 26, 1998. Given the repeated failure of the preshift and onshift examiners to observe and report the visible kettle bottoms between February 24 and 26 (*see* Gov't Exs. 13 A-W), substantial evidence supports the judge's conclusion that Eagle violated sections 75.360(b) and 75.362(a)(1) governing preshift and onshift examinations.

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[17] We find that the judge's reliance on what he characterized as a painted centerline (a line that is generally drawn by a foreman just after an area is mined) to be problematic in light of Eagle's testimony that the lines were drawn later to guide the installation of belt hangers. But this problem does not sufficiently detract from the evidence in support of the judge's finding for us to disturb it.

B. Unwarrantable Failure

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

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 length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000), *appeal docketed*, No. 01-1228 (4th Cir. Feb. 21, 2001) ("*Consol*"); *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). All of the relevant facts and circumstances of each case must be examined to determine if an actors's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353.

Eagle's primary argument on review is that substantial evidence does not support the judge's unwarrantability determination and that he improperly applied the missing witness rule. Relying on testimony of Eagle witnesses concerning when the dumping point at the No. 2 entry was mined, thereby exposing the cluster of three kettle bottoms, the judge found that Eagle could have called as a witness the individual who painted the cluster of three kettle bottoms (22 FMSHRC at 873), or the centerline that ran through one of the painted kettle bottoms. *Id.* at 874. Its failure to call that witness led the judge to infer that the witness would have testified that the cited conditions were painted contemporaneously with the centerline during the mining cycle on the day shift on February 24, 1998. *Id.*

Generally, the missing witness rule provides that the failure to call an available witness who is within one party's control and has knowledge pertaining to a material issue may, if not satisfactorily explained, lead to an inference or presumption that the witness' testimony would have been adverse to the party. 75B Am Jur 2d § 1315. Application of the rule is within the sound discretion of the trial judge. *Wilson v. Merrell Dow Pharmaceuticals, Inc.*, 893 F.2d 1149,

1150 (10th Cir. 1990). Many courts consider the following factors when determining whether an inference is appropriate: (1) the party against whom the inference is sought has the power to produce the witness; (2) the witness is not one who would ordinarily be expected to be biased against the party; (3) the witness' testimony is not comparatively unimportant, or cumulative, or inferior to what is already utilized; and (4) the witness is not equally available to testify for either side. *York v. AT&T*, 95 F.3d 948, 955 (10th Cir. 1996). If these criteria are satisfactorily proven, the fact finder may draw an inference against the party who failed to call the material witness.[18]

The judge found that Eagle did not present any evidence when and by whom the kettle bottoms were painted to support its argument that the painted kettle bottoms were exposed by mountain bumping and painted only minutes before the February 26 accident and MSHA's investigation. 22 FMSHRC at 872-73. The judge concluded that Eagle's failure to call the employee responsible for painting the kettle bottoms to testify about the matter created an adverse inference that the alleged witness would testify unfavorably to Eagle. *Id.* at 874. The judge reasoned that Eagle knew or should have known who painted the kettle bottoms, because under its normal operating procedures, the centerline and kettle bottoms were painted either by the foreman or at the foreman's direction. *Id.*

The identity of the witness who painted the kettle bottoms apparently was not known to either party.[19] Eagle called as witnesses the foreman on each of the three shifts who was responsible for performing inspections and marking the mine roof for bolting during the period February 24 to 26, as well as other foremen who worked in the 2 North section. Each of the foremen denied painting the cluster of three kettle bottoms or the centerline.[20] Tr. II 368, 378-79, 386-87, 441-42, 540-41 (Saunders); Tr. II 784, 850-51 (Fisher); Tr. II 865-66, 911-14 (Miles); Tr. III 459-62 (Lovejoy). The judge's inference is based on his finding that Eagle had actual or constructive knowledge of who painted the kettle bottoms. 22 FMSHRC at 873-74. We conclude that, in the circumstances of this case, the judge's application of the adverse inference was unreasonable. *See, e.g.*, *Strong v. United States*, 665 A.2d 194, 197 (D.C. App. 1995) ("if a

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[18] The burden of demonstrating that these criteria are satisfied rests with the party requesting application of the inference. *Id.* (citing *Wilson*, 893 F.2d at 1151). Here, the issue of the use of the missing witness rule was raised at trial (by the judge) and briefed by the parties.

[19] No witness called either by the Secretary or Eagle testified that he saw the painted kettle bottoms prior to the accident investigation on February 26.

[20] If, as the Secretary alleges, the kettle bottoms were painted during the day shift on February 24, the foreman during that shift would be the best person to testify about that matter. *See* 22 FMSHRC at 874. Larry Saunders, the day shift foreman during the relevant time period (Tr. II. 350-51), denied painting the centerline or the kettle bottoms. Tr. II 368, 378-79, 386-87, 441-42, 540-41.

party has made reasonable efforts to produce the witness without success, no adverse inference will be permitted"); *see also United States v. Blakemore*, 489 F.2d 193, 195 (6th Cir. 1973) ("'Availability' of a witness to a party must take into account both practical and physical considerations.").

Moreover, the Secretary bears the burden of proving by a preponderance of the credible evidence that an operator's conduct, as it relates to a violation, is unwarrantable. *Peabody Coal Co.*, 18 FMSHRC 494, 499 (Apr. 1996). Here, the judge improperly allocated the burden of proof on Eagle to establish when the kettle bottoms were painted, a finding pivotal to the judge's unwarrantable failure conclusion.

Because the judge's application of the missing witness rule was unwarranted, his resultant finding that the three kettle bottoms were painted since the area was mined on February 24, 1998 (and therefore more obvious) must be reexamined. On remand, the judge must reexamine the record and any reasonable inferences[21] drawn from it to determine whether the Secretary has established by a preponderance of the evidence that the kettle bottoms were painted as early as February 24, whether they were painted later, or whether there is no evidence in the record as to when they were painted.[22] If the Secretary failed to establish when the cluster of kettle bottoms was painted, the judge must nevertheless also consider whether any miners saw or should have discovered the kettle bottoms.

In three of the four factors that the judge considered in relation to unwarrantability, he placed primary reliance on the existence of the cluster of kettle bottoms. We find, however, that the judge examined the violations too narrowly in focusing almost exclusively on the three painted kettle bottoms in the No. 2 entry to the exclusion of the other six kettle bottoms. *See* 22 FMSHRC at 877-78. *See also Emery Mining Corp.*, 9 FMSHRC at 2004-05 (roof support violation not unwarrantable where four roof bolts, among different, hundreds, had popped their

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[21] Our colleague errs in drawing several inferences from the record. See, e.g., slip op. at 21-22. The Commission has long held that judges may draw inferences from record facts so long as those inferences are "inherently reasonable and there [exists] a rational connection between the evidentiary facts and the ultimate fact inferred." *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2153 (Nov. 1989). While it is possible that inferences could have been drawn from the record, it is for the trier of fact to decide between reasonable inferences in the first instance. *See generally* 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2528 (2d ed. 1995).

[22] Commissioner Jordan suggests that the judge made a finding, independent of his use of the missing witness rule, that the kettle bottoms were painted on February 24. Slip op. at 23. We disagree. The judge's finding on this issue follows his use of the rule in his decision, and our colleague only reaches this finding after drawing several inferences that the judge did not. Slip op. at 21-22.

plates). The other cited kettle bottoms present circumstances that require full consideration in making an unwarrantability determination. On remand, the judge thus must consider the obviousness of *all* the kettle bottoms and the overall extent of the violative conditions.

For all these reasons, we must vacate and remand the judge's unwarrantable failure determinations.[23]

C. Penalties

The Commission's judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). Such discretion is not unbounded, however, and must reflect proper consideration of the penalty criteria set forth in section 110(i) and the deterrent purpose of the Act.[24] *Id.* (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984)). The judge must make "[f]indings of fact on each of the statutory criteria [that] not only provide the operator with the required notice as to the basis upon which it is being assessed a particular penalty, but also provide the Commission and the courts . . . with the necessary foundation upon which to base a determination as to whether the penalties assessed by the judge are appropriate, excessive, or insufficient." *Sellersburg,* 5 FMSHRC at 292-93. Assessments "lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal." *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984). "An explanation is particularly essential when a judge's penalty assessment substantially diverges from the Secretary's original penalty proposal." *Douglas Rushford Trucking*, 22 FMSHRC 598, 601 (May 2000) (citing *Sellersburg*,

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[23] Our colleague's suggestion that the judge's unwarrantability determination could somehow "be attributed to the implausible theories Eagle put forward," slip op. at 23, finds no support in Commission caselaw. It cannot be seriously questioned that the Secretary bears the burden of affirmatively proving the elements of unwarrantable failure without regard to the merits of an operator's defense.

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

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

5 FMSHRC at 293). In reviewing a judge's penalty assessment, the Commission must determine whether the judge's findings with regard to the penalty criteria are in accord with these principles and supported by substantial evidence.

Eagle asserts that substantial evidence does not support the judge's findings on gravity and negligence.[25] With regard to these two penalty criteria, the judge appears to have focused exclusively on the painted cluster of kettle bottoms. 22 FMSHRC at 879. Because we have concluded that the judge's inference that the cluster of kettle bottoms was painted on February 24 was unwarranted, the primary basis for his analysis of two of the penalty criteria is no longer valid. Additionally, in a final wrap-up analysis in which he considered the penalty criteria in their entirety, the judge again relied upon "the highlighted hazardous roof conditions in close proximity to the dumping point." *Id.* at 880.

Thus, it appears that the painted kettle bottoms, which the judge inferred were in existence since February 24, played a major part in the judge's assessment of penalties, which he doubled from $3000 to $6000 for each order. In light of our prior analysis concerning the use of the missing witness rule and the inference that the cluster of kettle bottoms was painted on February 24, we conclude that the judge's penalty assessment must be vacated and remanded for further consideration in light of our opinion. In addition to the erroneous inference that the cluster of kettle bottoms was painted on February 24 based on misapplication of the missing witness rule, the judge must consider all the kettle bottoms, not just the painted cluster, in his consideration of penalties.

[25] The judge's analysis on the remaining criteria appears adequate, 22 FMSHRC at 879, and Eagle does not argue otherwise. *Compare Hubb Corp.*, 22 FMSHRC 606, 612-13 (May 2000).

III.

Conclusion

For the foregoing reasons, we affirm the judge's conclusion that Eagle violated the Mine Act but vacate and remand his conclusions with regard to unwarrantability and penalties.

Theodore F. Verheggen, Chairman

James C. Riley, Commissioner

Robert H. Beatty, Jr., Commissioner

Commissioner Jordan, concurring in part and dissenting in part:

This case involves the failure of three foremen to note hazardous roof conditions in preshift and onshift reports for a period of at least two days. The judge concluded that "unsupported portions of roof that could fall at any moment, located in a heavily traveled area of the mine, were permitted to exist even after they had been identified by orange spray paint." 22 FMSHRC at 879. He determined that Eagle Energy's inadequate mine examinations amounted to an unwarrantable failure to comply with the requirements of 30 C.F.R. §§ 75.360(b) and 75.362(a)(1). Because, as I explain below, that determination is supported by substantial evidence,[1] I would affirm his decision.[2]

The underlying condition prompting the issuance of the two orders under review was Eagle's failure to disclose, in its preshift or onshift books, a single one of the nine hazardous roof conditions (known as kettle bottoms) observed by MSHA inspectors during their investigation on February 26. In finding the violations unwarrantable, the judge properly applied the factors the Commission has considered in analyzing a charge of unwarrantable failure, which include the extent of the violative condition, the length of time that it has existed, whether the violation is obvious, and the degree of danger it poses. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992). Also pertinent to this analysis is whether the operator had been placed on notice that greater efforts were necessary for compliance, *Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997), and the operator's efforts at abating the violative condition, *New Warwick Mining Co.*, 18 FMSHRC 1568, 1574 (Sept. 1996). Applying these considerations to the violations at issue, the judge concluded that "the evidence clearly reflects the requisite unjustifiable conduct to support an unwarrantable failure." 22 FMSHRC at 878.

According to my colleagues, the judge's unwarrantable failure finding stems from his conclusion that the cluster of three kettle bottoms inby the dumping point had been circled with reflective paint since February 24, making the omission of any reference to this condition during the subsequent seventeen examinations particularly egregious. Slip op. at 15. Since they consider the February 24 date to have been reached only by inappropriately applying the missing witness rule, my colleagues conclude that the judge's unwarrantable failure determination cannot

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[1] 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 Consolidation Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)).

[2] I concur in the majority's ruling affirming the judge's finding of violations of the two regulations.

stand. *Id*. They are mistaken. First, as my colleagues concede, the judge applied the missing witness rule when he rejected Eagle's mountain bumping defense, but did not utilize it in his unwarrantable failure analysis. Slip op. at 8, n.11, *citing* 22 FMSHRC at 873-74. In any event, there is ample evidence in the record to support the judge's conclusion that the kettle bottom cluster was painted on February 24, without resorting to inferences based on a missing witness rule. Therefore, even assuming arguendo that the judge's application of the missing witness rule was inappropriate, that mistake would amount to harmless error.

Underlying the question of when the kettle bottoms were painted is the issue of when they became visible. Eagle contends that eight of the nine kettle bottoms may not have been observable until after the mountain bumping, shortly before the MSHA inspector saw them on February 26. E. Br. at 7. I concur with my colleagues' determination that the judge appropriately rejected this theory, slip op. at 12, and that substantial evidence supports his finding that the cluster of three kettle bottoms inby the dumping point of the No. 2 entry was exposed (and therefore visible) during the normal mining cycle of this entry on February 24. *Id.*[3]

Turning to the painting of the kettle bottom cluster, my colleagues contend that the judge "improperly allocated the burden of proof on Eagle to establish when the kettle bottoms were painted,"[4] a finding they claim is "pivotal to the judge's unwarrantable failure conclusion." Slip op. at 15. My colleagues are wrong. In his unwarrantable failure analysis, the judge concluded that evidence pertaining to the bit marks and centerline showed that the kettle bottoms were revealed and painted during the February 24 day shift. 22 FMSHRC at 877. The judge did not shift the burden of proof — he simply drew rational connections from the evidence.

The record indicates a centerline is typically painted on the roof as an entry is mined, to guide the continuous miner in making the next cut. *Id.* at 863, 872; Tr. II 387; Tr. II 704-705. Evidence was introduced in this case that showed two painted lines on the roof of the No. 2 entry. 22 FMSHRC at 878, n.6, Gov't Ex. 11A. The judge determined that one line was drawn as a centerline, and the other line was drawn as a belt hanger line. 22 FMSHRC at 878, n.6. Given that the relevant part of the entry was mined on February 24, the judge concluded that the centerline was also drawn on that date. *Id.* at 872.

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[3] I also agree with the majority's conclusion that the judge properly determined that the remaining five unpainted kettle bottoms were exposed during the normal mining cycles between February 24 and February 26. Slip op at 12.

[4] My colleagues provide no explanation for this assertion. Their statement is somewhat puzzling because in the judge's sole reference to burden of proof he confirms that "the burden of proof that the kettle bottoms were visible and should have been noted by the preshift and onshift examiners remains with the Secretary." 22 FMSHRC at 872.

The centerline the judge found was drawn on February 24 extended through the middle of one of the three kettle bottoms inby the dumping point. *Id.* at 863, citing Gov't Ex. 11A; 22 FMSHRC at 872. It is reasonable to infer that a person who paints a line right over a kettle bottom would notice this hazardous condition. As my colleagues acknowledge, when kettle bottoms are encountered at Eagle's mine, foremen usually use chalk or spray paint to signal the roof bolters that additional support is needed, or they danger them off. Slip op at 2-3. Indeed the judge pointed out this was how Eagle highlighted roof irregularities while abating a citation for inadequate roof support and ribs. 22 FMSHRC at 865. Finally, it is undisputed that, at the time MSHA observed them on February 26, each of the three kettle bottoms inby the dumping point had been circled in the same orange paint that was used to draw the centerline. *Id.* at 863.

Since the kettle bottom cluster denoted hazardous roof conditions that needed additional support, and since the person painting the centerline would have noticed at least one of the kettle bottoms in the cluster as he or she painted the centerline right over it, and since the record reflects that the three kettle bottoms in the cluster were each circled with the same paint used to draw the centerline, it is reasonable to infer that whoever painted the centerline on February 24 observed these kettle bottoms and, consistent with the practice at the mine, circled the hazardous conditions at that time. Therefore, substantial evidence supports the judge's conclusion that the kettle bottom cluster was painted (and therefore obvious) on February 24.[5]

Although supported by substantial evidence, the determination that the kettle bottom cluster was painted on February 24 is not a finding pivotal to the judge's unwarrantable failure ruling, as my colleagues would have us believe. Slip. op at 15. Regardless of when they were painted or who painted them, the fact remains that on February 26, when they were observed by MSHA, three kettlebottoms, in close proximity, were each highlighted with a circle of reflective orange paint. 22 FMSHRC at 863. While the evidence can support the conclusion that they were painted as early as February 24, the fact that they might have been painted later does not undermine the judge's unwarrantability determination. Once they were painted with the reflective orange paint, the conditions were so obvious that, as the judge noted, "even the failure to note hazardous conditions that were marked for remedial action during the course of *one* preshift or onshift examination may constitute unwarrantable conduct." *Id.* at 877 (emphasis in original).[6]

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[5] My colleagues agree that the substantial evidence standard may be met by reasonable inferences taken from indirect evidence. Slip op. at 12, citing Mid-Continent Res., Inc., 6 FMSHRC 1132, 1138 (May 1984). Here, there is a "rational connection between the evidentiary facts and the ultimate fact [the date the cluster was painted] inferred." Garden Creek Pocahontas Co., 11 FMSHRC 2148, 2153 (Nov. 1989).

[6] The last preshift exam at issue here took place on February 26 between 1:30 p.m. and 2:40 p.m. Gov't Ex. 13W. Thus, unless one accepts Eagle's argument that the kettle bottoms were painted minutes before the fatal accident, which occurred at approximately 2:50 p.m. on

In addition, it would be reasonable to conclude that the person who painted the centerline through one of the kettle bottoms was a foreman, since the record reflects that this is the employee who usually does that job. Tr. II 248, Tr. III 62, 445. Although the three foreman denied painting this particular centerline (indeed they denied even seeing it), the judge indicated he did not find their testimony credible: "In addressing the issue of duration, I note that it is not surprising that Eagle Energy's section foreman and other management personnel have denied knowledge of unsupported kettlebottoms, including those painted inby the dumping point, given the fact that a fatal roof accident had just occurred." *Id.* at 872.[7]

A foreman observing a hazardous roof condition on February 24, and the preshift and onshift books making no mention of the condition during seventeen subsequent inspections, justifies the conclusion that mandatory inspections were being carried out in such perfunctory manner as to indicate indifference worthy of the unwarrantable failure label. In other words, an unwarrantable failure determination is supported by the evidence in this case, without even relying on the fact that the cluster of kettle bottoms had been circled with paint.

Moreover, the question of when the kettle bottoms were painted goes to only one of the many factors in an unwarrantable failure analysis — the issue of whether the violations were obvious. Substantial evidence supports the judge's determination that the Secretary met her burden of proof regarding several other factors pertinent to the unwarrantable failure analysis as well. For example, the judge's finding that the duration of Eagle's failure to note the hazards was indicative of unwarrantable failure is clearly supported by the record evidence. Regardless of when the three kettle bottoms inby the loading point were painted to draw attention to the need for remedial action, they were, as my colleagues agree, visible as of February 24. Slip op. at 12. Furthermore, as the judge pointed out, at least three kettle bottoms must have been observed prior to MSHA's inspection by the person who painted them. 22 FMSHRC at 872.

In terms of the degree of danger created by these violations, the judge found that the kettle bottoms were repeatedly overlooked by the foremen conducting the examinations, and that this created an extremely dangerous situation due to the unpredictable nature of kettle bottoms. *Id.* at 877. This is consistent with his determination that the violation was significant and substantial ("S&S"), a finding that Eagle did not appeal. In his S&S analysis, the judge found

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February 26, one would have to conclude that the kettle bottoms were painted, and therefore obvious, during at least one preshift exam.

[7] As my colleagues note, a judge's credibility determinations are entitled to great weight and should not lightly be overturned. Slip op. at 10. *See also Metric Constructors, Inc.,* 6 FMSHRC 226, 232 (Feb. 1984) (when judge's finding rests on credibility determination, Commission will not substitute its judgement for that of judge absent clear indication of error). *aff'd*, 766 F.2d 469 (11th Cir. 1985).

that "there was a reasonable likelihood that the roof hazard contributed to by Eagle Energy's repeated inadequate preshift and onshift examinations will result in injury, and, that that injury will be reasonably serious, if not fatal, in nature." *Id.* at 876. In making this finding, he relied on abundant record evidence demonstrating the potential dangers of kettle bottoms, including a coal geology atlas introduced into evidence by Eagle which stated that kettle bottoms can fall without warning, causing injuries and fatalities, and that "'identification [of kettlebottoms] and subsequent support during mining is critical.'" 22 FMSHRC at 875, citing Resp't Ex 3 at 2. Roger Lovejoy, Eagle's evening shift foreman, testified that a kettle bottom is a hazardous condition because it can fall without any warning. Tr. III at 373. Inspector Workman testified that the kettle bottoms "could kill anyone at any time." Tr. I at 668. Substantial evidence thus supports the judge's finding that the foremen's repeated oversights in failing to note these hazardous conditions in their reports were "extremely dangerous." 22 FMSHRC at 877.[8]

The judge's unwarrantability determination can more appropriately be attributed to the implausible theories Eagle put forward, rather than to an erroneous application by the judge of a missing witness rule or burden of proof. Eagle maintained that none of the nine areas MSHA cited were kettle bottoms – they were instead "roof irregularities" that appeared as a result of mountain bumping, on February 26. *Id.* at 867. Coincidentally, between the time the mountain bumping allegedly caused these roof irregularities, and the time of the fatal accident, Eagle would have us believe that someone decided to doodle with spray paint. *Id.* at 873. According to Eagle, the circles that were painted around three of the irregularities, did not indicate a need for additional roof support, they were merely the way the graffiti artist decided to express him or herself. E. Br. at 16. Attempting to be charitable, the judge indicated he found Eagle's theories "unavailing." 22 FMSHRC at 871.

The majority's remand instructions charge the judge with making three discrete findings — two of which I may add, he has already made. First the majority requires him to review the record and any reasonable inferences drawn from it to determine whether the Secretary established when the kettle bottoms were painted. Slip op. at 15. But, as noted above, the judge has already found that "[t]he bit marks and centerline reflect the kettle bottoms were revealed and painted during the mining cycle on the day shift of February 24, 1998." 22 FMSHRC at 877.

Second, the majority instructs him to consider whether any miners saw or should have discovered the kettlebottoms. Slip op. at 15. However, he has already found that the kettle bottoms existed as early as February 24, and that the preshift and onshift examiners repeatedly failed to note them from February 24 through February 26. 22 FMSHRC at 872. Thus he has already determined that the kettle bottoms should have been discovered.

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[8] An additional factor relevant to an unwarrantable failure determination is the extensiveness of the hazardous conditions. *Quinland Coals, Inc.,* 10 FMSHRC 705, 709 (June 1988). The judge found the conditions extensive because there were nine cited kettle bottoms. 22 FMSHRC at 877.

The majority's third and final remand order directs the judge to consider "the obviousness of all the kettle bottoms and the overall extent of the violative conditions." Slip op. at 15. I must take issue with the premise of this instruction, which is that the judge "examined the violations too narrowly in focusing almost exclusively on the three painted ketttlebottoms in the No. 2 entry to the exclusion of the other six kettlebottoms." *Id.* It is one thing for the Commission to vacate an unwarrantability determination that fails to take mitigating evidence into account, but here the majority finds fault because the judge relied on the most egregious aspect of the cited condition, and failed to discuss additional, *culpable* behavior on the part of the operator. Surely my colleagues do not think lesser violations should mitigate more serious ones.[9] Such an approach would certainly turn the unwarrantable failure provision on its head. Their decision, however, may well give readers the mistaken view that an operator, attempting to defend itself against the charge that its failure to report obvious roof hazards amounted to unwarrantable conduct, should point out that it also neglected to report less obvious conditions.

The persistent failure of Eagle's foremen to thoroughly conduct preshift and on-shift examinations so that the kettle bottoms could be detected, noted, and supported, establishes aggravated conduct constituting unwarrantable failure. Accordingly, I would affirm the judge, and thus respectfully dissent.

Mary Lu Jordan, Commissioner

[9] In *Emery Mining Corp.,* 9 FMSHRC 1997, 2004-05 (Dec. 1987), the case relied on by the majority for the proposition that the judge erred by focusing on three kettle bottoms to the exclusion of six others, the operator was cited for violating a roof control standard. The judge's finding of unwarrantable failure was based on his conclusion that four roof bolts did not have bearing plates and that they should have been detected by preshift or onshift examiners. 9 FMSHRC at 2004. However, the Commission, in reversing the judge's unwarrantable failure determination, noted that Emery was not indifferent to roof support in that area of the mine, and described in detail the herculean efforts of the operator to adequately support the roof, including actions that exceeded the requirements of its roof control plan. *Id.* It was thus making a comparison between a small number of conditions in violation of the roof control standard, and a large area where there was attempted compliance. Here, in contrast, the majority is instructing the judge to consider the three painted kettle bottoms along with evidence of six other violative conditions, not evidence of compliance with the regulations.

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