FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

May 9, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. YORK 2000-65-M YORK 2000-66-M
VERMONT UNFADING GREEN SLATE COMPANY, INC.	:	

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

DECISION

BY: Verheggen, Chairman; Beatty, Commissioner

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq. ("Mine Act"), Administrative Law Judge T. Todd Hodgdon affirmed five citations, modified and affirmed two citations, and vacated four citations issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Vermont Unfading Green Slate Company ("Vermont Slate"). 23 FMSHRC 310, 320 (Mar. 2001) (ALJ). Vermont Slate filed a petition for discretionary review ("PDR") challenging the judge's decision on procedural grounds and requesting that the Commission vacate the judge's findings of six violations. PDR at 1-5. The Commission subsequently granted Vermont Slate's petition. For the reasons that follow, we vacate the judge's decision with respect to one citation, and affirm the judge's decision in all other respects.

I.

Summary Factual and Procedural Background

Vermont Slate operates the Blissville Quarry and Mine, a slate quarry in Rutland County, Vermont. 23 FMSHRC at 310. On January 19, 2000, Inspector Brett Budd and Inspector-trainee Robert Tango arrived at the Blissville Quarry to conduct a semi-annual inspection. *Id.* After completing the inspection, the inspectors issued 11 citations to the operator. *Id.*

Vermont Slate contested all 11 violations and penalties. *Id.* at 311-18. MSHA subsequently filed a petition for assessment of penalties in the amount of $904. *Id.* at 310. On December 14, 2000, a hearing was held in Rutland, Vermont. *Id.* Vermont Slate Supervisor Shawn Camara represented the operator at the hearing. In his decision, the judge concluded, inter alia, that the operator had committed the six violations at issue here, and assessed penalties totaling $470. *Id.* at 319-20.

II.

Disposition

A. Citation No. 7720771

1. Contest of Violation

MSHA issued Citation No. 7720771 to Vermont Slate for an unguarded v-belt drive on the slate trimmer, alleging a violation of 30 C.F.R. § 56.14107(a).[1] 23 FMSHRC at 313. The citation stated that "[a] machine guard was not provided to prevent accidental contact with the v belt drive system, exposing the pinch points that are about 5 feet from ground level, located on the left side of the slate trimmer." *Id.*; G. Ex. 5. The trimmer was about three to four feet high and three feet wide, and was located in the garage on a stack of pallets about four to five feet high. 23 FMSHRC at 313; Tr. 64-66, 70-71. A wheelbarrow was located on the ground below the trimmer to catch chips of slate from the machine. Tr. 65, 163, 167. Budd testified that the operating station on the trimmer had a drive wheel which turned the blade to trim the slate, and that below the drive wheel was an electrical motor that drove the pulley to operate the machine. 23 FMSHRC at 313; Tr. 67. He also testified that the v-belt drive was not guarded, exposing a miner standing on the platform to operate the trimmer to two pinch points. Tr. 67. According to Budd, the upper pinch point was located where the v-belt drive contacted the upper drive pulley, which was about three to four feet above the platform, and the lower pinch point was located where the v-belt came in contact with the drive pulley onto that system, which was about one foot above the platform. Tr. 67-69.

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[1] Section 56.14107 provides in pertinent part:

> (a) Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head tail and takeup pulleys . . . and similar moving parts that can cause injury.
>
> (b) Guards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces.

30 C.F.R. § 56.14107.

Camara admitted that the v-belt was not guarded, but testified that the pulley had a guard on the front. Tr. 165, 169. He also testified that a person would not be standing on the platform while the trimmer was running, and that the only way a person could get caught in the moving parts was if he was standing on the ground pointing a stick into the belt drive or was nine feet tall. Tr. 164, 166, 168-69. On cross-examination, Camara admitted that a miner operating the machine would stand on the pallets, but testified that "where the guy sits or where the guy stands, that's where it's guarded." Tr. 165, 167. Camara also testified that the exposed moving parts were towards the back on the side of the trimmer, but did not pose a hazard because benches on both sides of the machine prevented access from the platform. Tr. 163-65, 167-68. He also testified that the moving parts did not pose a hazard to someone standing on the ground because it was about eight feet off the ground. Tr. 163-64.

The judge found that the exposed moving parts on the trimmer were not properly guarded, posing a hazard to the machine operator standing on the pallet platform. 23 FMSHRC at 314. He dismissed Camara's testimony as irrelevant because it addressed whether the exposed moving parts posed a hazard to a person standing on the ground. *Id.* The judge concluded that the violation was not significant and substantial,[2] and assessed a penalty of $55. *Id.* at 313-14, 319.

On review, Vermont Slate asserts that the evidence does not support a finding of a violation because Budd testified that the hazard existed to someone standing on top of the pallets next to the machinery, but Tango's notes and the citation indicate that the hazard exists to someone standing beneath the machinery. PDR at 3. It contends that the v-belt is adequately guarded and that "a worker on top operating the machine would [not] be exposed to any danger." *Id.* The Secretary argues that Budd testified that a miner standing on top of the pallets is subject to the hazard and that he had explained this to Camara during the inspection. S. Br. at 13-14. She asserts that the citation states that "pinch points are about 5 feet from ground level," which corroborates Budd's testimony that the hazard was to a miner standing or working on the platform. *Id.*

The judge's characterization of Camara's testimony as "irrelevant" because it dealt "only" with "someone standing on the ground" is incorrect. Some of Camara's testimony was an attempt to refute the danger posed by the pinch points to a miner standing on the pallets. Specifically, the judge did not consider Camara's testimony that the exposed moving parts did not pose a hazard because benches on the side of the trimmer prevented access from the platform.

Commission Procedural Rule 69(a) requires that a Commission judge's decision "shall include all findings of fact and conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record." 29 C.F.R. § 2700.69(a). As

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

the D.C. Circuit has emphasized, "[p]erhaps the most essential purpose served by the requirement of an articulated decision is the facilitation of judicial review." *Harborlite Corp. v. ICC*, 613 F.2d 1088, 1092 (D.C. Cir. 1979). Without findings of fact and some justification for the conclusions reached by a judge, we cannot perform our review function effectively. *Anaconda Co.*, 3 FMSHRC 299, 299-300 (Feb. 1981). We thus have held that a judge must analyze and weigh all probative record evidence, make appropriate findings, and explain the reasons for his or her decision. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222 (June 1994).

Camara's testimony regarding the hazard to miners on the platform is clearly relevant. Because the judge did not consider this testimony, he erred by failing to analyze and weigh all the probative record evidence to determine whether the moving parts posed a hazard to miners on the platform.

Our dissenting colleague appears to agree with our conclusion that the judge erred when he dismissed Camara's testimony based on irrelevance. Slip op. at 11. However, our colleague makes the mistake of evaluating Camara's testimony here as "muddied and inconsistent" and suggests that remanding to the judge is not necessary.[3] *Id.* It is for the judge in the first instance, not the Commission on review, to evaluate testimony and make findings of fact. *See Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096 (4th Cir. 1993) (ALJs have "sole power to make credibility determination and resolve inconsistencies in the evidence") (citation ommitted).

2. Tango's Testimony

In conjunction to its challenge to the citations, Vermont Slate argues that the judge erred when he refused to allow it to call Tango to testify about his notes and the citations written on the date of the inspection. PDR at 1. At the hearing, when Camara cross-examined Budd about Tango's notes, he stated, "Mr. Baskin [the Secretary's counsel] said on the phone that Mr. T[a]ngo and Mr. Budd was [sic] going to be here, and Mr. T[a]ngo is not here. Now I would think that maybe possibly he should be here." Tr. 114. The judge responded, "that's up to Mr. Baskin or you, not — if he's [Tango] not here, he's not here." Tr. 114. At another point during the hearing, Camara stated, "I would like Mr. T[a]ngo to be here during these questions. He's obviously not here." Tr. 132. The judge responded, "Well it may be, but the Government chose

[3] Our dissenting colleague relies on the Commission's decision in *Arch of Kentucky*, 20 FMSHRC 1321 (Dec. 1998), to support her opinion that remanding this matter to the judge is unnecessary. In *Arch*, the Commission held harmless the judge's error in sustaining the Secretary's objection to the operator's questioning of her witness on cross-examination, effectively excluding evidence the operator sought to submit. *Id.* at 1328-29. However, *Arch* is distinguishable because in that case, the judge had the opportunity to consider the value of the excluded evidence in light of the Secretary's objection and the parties' arguments at the hearing. Unlike *Arch*, here, Vermont Slate did not know at the hearing that the judge would not consider Camara's testimony and thus did not have an opportunity to present alternative evidence or its arguments below.

not to call him." Tr. 132. Camara then asked the judge, "Can I call him?" Tr. 132. The judge replied, "To get him here, we're going to have to continue the case." Tr. 132. He explained to Camara that he doesn't "tell the parties who they have to present as witnesses, they decide," and that it was "up to the solicitor [what witnesses to call], and they are not calling him [Tango]." Tr. 132-33. Camara asked "What do I do?" Tr. 133. The judge explained that he could "tell us your versions of all these citations." Tr. 133. The judge then recessed for 15 minutes, and upon resuming, asked Camara "[w]hat would you like to do?" Tr. 133-34. Camara responded that he wanted to call Carl Onder and proceeded with the presentation of his case. Tr. 134. After Camara questioned Onder, he stated that he did not want to testify and attempted to rest his case. Tr. 147-48. The judge persuaded Camara to take the stand to testify about each citation. Tr. 148.

On review, Vermont Slate contends that it did not subpoena Tango because counsel for the Secretary indicated that Tango would be present at the hearing. PDR at 1. The operator points out that much of the testimony of Budd, the inspector who accompanied Tango on the inspection, was inconsistent with Tango's notes, and that it was more appropriate for Tango to testify about his notes. *Id*. at 1-2. Vermont Slate thus contends that it was prejudiced by Tango's absence. *Id*. The Secretary responds that the record does not support Vermont Slate's assertion that she indicated Tango would be at the hearing, and also denies that the operator made a showing of prejudice. S. Br. at 5-9.

While the judge did provide a measure of guidance to Camara, a pro se litigant, we find he sent mixed signals to Camara in response to his request to call Tango as a witness. For example, when Camara asked the judge whether Tango should be present, the judge did not inform Camara that he could call Tango, or of the procedure for doing so. In fact, when Camara specifically asked the judge whether he could call Tango, the judge responded that the case would have to be continued, and did not directly respond to Camara's question. The judge's response may have confused Camara, because he again asked the judge what he could do, and ultimately did not pursue calling Tango in spite of his insistence that the inspector's testimony would be key to Vermont Slate's case.

We do not suggest that the judge abused his discretion. However, as a matter of fairness and in the interest of justice, Vermont Slate should be given an opportunity to present Tango's testimony in support of its case, particularly in light of the fact that the company is proceeding pro se. Based on the record, the company clearly expressed its intention to call Tango to testify and offered an explanation for its failure to subpoena him. It also points to inconsistencies in Tango's inspection notes, the citations, and Budd's testimony as a basis for its allegation of prejudice. In light of these circumstances and the judge's dismissal of Camara's testimony, Tango's absence from the hearing may have prejudiced Vermont Slate.

Accordingly, we vacate the judge's finding of a violation and remand to him with instructions that he reopen the record and permit Vermont Slate to present Tango's testimony relating to the guarding hazard on the trimmer. At the same time, the judge must reconcile any

conflicting evidence and determine if the guarding was adequate to protect a miner standing or working on the platform next to the trimmer.[4]

B. Citation No. 7720768

MSHA issued Citation No. 7720768 to Vermont Slate for insufficient lighting in an area of the garage where the control panels were located, alleging a violation of 30 C.F.R. § 56.17001.[5] Budd described the area as a "dark closet," a two foot by seven foot open space next to the garage entrance. Tr. 34. The electrical control panel boxes and first aid supplies were located in this space. Tr. 34. Budd testified that in order to read the panel boxes, "you had to get right up in front of them and really look," which he asserted was unsafe if the power needed to be shut down to a piece of equipment in an emergency. Tr. 35-36. Budd admitted that he could read the tag on the fire extinguisher which was the subject of Citation No. 7720767 and was kept in this area, but explained that the extinguisher was located immediately next to the doorway where there was more natural light from the garage. Tr. 38-40. The Secretary contends that the area's lighting was "not sufficient to provide safe working conditions" as required by the standard because in an emergency, a miner could mistakenly switch the wrong electrical box off due to the lack of light. S. Br. at 12.

The judge found that the space in question had no artificial lighting and that the only lighting in the area was natural light which came into the area through the garage door. 23 FMSHRC at 312. He found that the lighting was insufficient to illuminate the interior space where the switch panels were located. *Id.* The judge concluded that Vermont Slate violated the regulation, affirmed the citation, and assessed a penalty of $55. *Id.* at 312, 319.

On review, we first note that the judge credited Budd's testimony that the natural light in the control panel area was not adequate to permit a person to read the labels on the panels.[6] A

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[4] We agree with the Secretary that the record does not support Vermont Slate's assertions that the judge refused to allow it to call Okey Reitter, MSHA's Assistant District Manager, to testify. First, contrary to the operator's suggestion, there is no indication in the record that at any time before the hearing, Vermont Slate requested that Reitter be present at the hearing, or that the Secretary objected to its request, or that the judge considered the matter and sustained the Secretary's objection. In fact, the record indicates that at the hearing, Camara did not attempt to call Reitter to testify. Moreover, Reitter's absence from the hearing did not prejudice Vermont Slate, because Reitter was neither present at the inspection nor a party to the post-inspection telephone conference between MSHA and the operator.

[5] Section 56.17001 provides in pertinent part: "Illumination sufficient to provide safe working conditions shall be provided in and on all . . . switch panels." 30 C.F.R. § 56.17001.

[6] We also note that it is undisputed that the only light in the control panel area was natural light coming from the garage, and that the panels faced the interior of the space, away

judge's credibility determinations are entitled to great weight. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992). The Commission has noted that "the general rule [is] that, absent exceptional circumstances, appellate courts do not overturn findings based on credibility resolutions." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1881 n.80 (Nov. 1995), *aff'd sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998). Here, we find nothing in the record that would warrant us taking the extraordinary step of reversing the judge's credibility determinations with regard to this citation.[7] Accordingly, we affirm the judge's finding of a violation.

C. Citation No. 7720772

Vermont Slate received Citation No. 7720772 for failing to provide a safe means of access to the trimmer, allegedly in violation of 30 C.F.R. § 56.11001.[8] This is the same trimmer that was the subject of Citation No. 7720771, located on a stack of pallets about five-feet high. 23 FMSHRC at 315. Budd testified that Camara told the inspectors that an operator accessed the trimmer by climbing the pallets. *Id.* Budd also testified that a miner had to stick his feet in the holes between the pallets and pull himself up. Tr. 79-80. There were no handrails, steps, or ladder provided for miners accessing the trimmer. 23 FMSHRC at 315. Camara's testimony corroborated Budd's description of this arrangement. *Id.*; Tr. 170-71. The judge found that the pallets, without steps or handrails, failed to provide a safe means of access to the trimmer. 23 FMSHRC at 315. He concluded that Vermont Slate violated the standard, affirmed the citation, and assessed a penalty of $55. *Id.* at 315, 319.

Notwithstanding Vermont Slate's assertion that the pallets were a safe means of access to the trimmer (PDR at 3-4), the judge's conclusion that, in the absence of steps or handrails, the pallets were an unsafe means of access is both reasonable and amply supported by the record. *See Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983) (the Commission may not "substitute a competing view of the facts for the view [an] ALJ reasonably reached"). Accordingly, we affirm the judge's finding of a violation.

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from the doorway.

[7] Vermont Slate asserts that the judge's decision to vacate another citation at issue at the hearing (No. 7720769) based on his decision to credit Camara over Budd undermines Budd's credibility with respect to Citation No. 7720768. PDR at 2. The Commission has rejected, however, the "false in one, false in everything" rule of testimonial evidence, noting that "it is not uncommon, and certainly not reversible error, for the trier of fact to find a witness to be credible on some, but not other, matters." *Ankrom v. Wolcottville Sand & Gravel Corp.*, 22 FMSHRC 137, 145 n.7 (Feb. 2000), *aff'd*, No. 00-3374 (6th Cir. Dec. 4, 2000). We thus reject Vermont Slate's argument.

[8] Section 56.11001 provides: "Safe means of access shall be provided and maintained to all working places." 30 C.F.R. § 56.11001.

D. Citation No. 7720773

MSHA issued Citation No. 7720773 to Vermont Slate for allegedly violating 30 C.F.R. § 56.15004[9] because the slate saw operator was not wearing eye protection. The saw was "a radial saw arm" with a circular blade about 28 inches in diameter and a half hood over the blade. 23 FMSHRC at 315; Tr. 87-88. The saw operator worked at the control station with the saw in front of him and positioned the slate between himself and the blade. 23 FMSHRC at 315. The blade cut through the slate moving towards the sawyer while water sprayed onto the saw to keep the dust down. *Id.* Budd testified that chips of slate could fly off the block posing a hazard of eye injury while a miner positioned the slate with a crowbar, which could slip, and while a miner operated the saw. Tr. 91-92.

It is undisputed that the saw operator was not wearing eye protection. 23 FMSHRC at 315. Camara testified that the common practice at most quarries was not to wear eye protection. Tr. 158. However, he also admitted that most of the miners at the quarry put on eye protection whenever inspectors visited the site. Tr. 158, 180. He testified that there was no risk of eye injury because the saw had a hood over the blade and sprayed water, and denied that chips would fly off the block of slate. Tr. 178-79.

The judge credited Budd's testimony and found that the saw posed a hazard of eye injury, and concluded that Vermont Slate violated the standard by not requiring the saw operator to wear eye protection. 23 FMSHRC at 316. He also found that the evidence was insufficient to support a finding that the violation was significant and substantial and modified the citation, deleting the S&S designation. *Id.* The judge affirmed the citation as modified and assessed a penalty of $55. *Id.* at 316, 319.

First, we find no reason to disturb the judge's crediting Budd's testimony that the saw posed a hazard that required eye protection. *Farmer*, 14 FMSHRC at 1541. As for whether Vermont Slate violated the standard, while the operator argues that it was not aware of the requirements of section 56.15004, the record reveals that saw operators at the mine did wear eye protection. In fact, Camara admitted that saw operators would wear eye protection when MSHA inspectors visited the site. Tr. 158, 180. Accordingly, we affirm the judge's finding of a violation.

[9] Section 56.15004 provides: "All persons shall wear safety glasses, goggles, or face shields or other suitable protective devices when in or around an area of a mine or plant where a hazard exists which could cause injury to unprotected eyes." 30 C.F.R. § 56.15004.

E. Citation No. 7720775

MSHA issued Citation No. 7720775 to Vermont Slate for failing to provide a safety lock on the hose to a jack hammer, alleging a violation of 30 C.F.R. § 56.13021.[10] Budd testified that the hose connected to the jack hammer was making a hissing sound and concluded that it was bleeding air. 23 FMSHRC at 317; Tr. 105. He also testified that he saw slate and other materials in the area that are used in conjunction with hammering. 23 FMSHRC at 317; Tr. 105. Budd testified that although the hammer was not being used at the time of the inspection, because the hammer could be used, the lack of a safety device on the hose to prevent it from coming apart and causing a whipping action was a violation of the standard. 23 FMSHRC at 317; Tr. 104-05. In support of the S&S designation on the citation, Budd testified that it was likely that during use the hose would disconnect if no safety lock was in place, and that if it disconnected, the hose would whip around out of control and potentially inflict serious of even fatal injuries. 23 FMSHRC at 317. Camara admitted that the hose did not have a safety device, but testified that the hammer was not in use on the day of the inspection. Tr. 182-83. The judge credited Budd's testimony and found that Vermont Slate violated the standard. 23 FMSHRC at 317. He also found that the violation was significant and substantial and assessed a penalty of $140. *Id.* at 317, 319.

On review, there is no dispute that the connection between the hose and the jack hammer had no safety lock. We also find nothing in the record that would lead us to overturn the judge's crediting of Budd's testimony regarding his observations that he heard air hissing out of the hose and saw materials used in connection with hammering activities lying in the same area as the jack hammer. *Farmer*, 14 FMSHRC at 1541. Finally, the judge's conclusion that the hammer had recently been used was a reasonable inference for him to draw from Budd's testimony. *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984) (emphasizing 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."). Accordingly, we affirm the judge's finding of a violation.

F. Citation No. 7720778

MSHA issued Citation No. 7720778 to Vermont Slate for failing to provide a miner trained in first aid at the site during the work shift, alleging a violation of 30 C.F.R. § 56.18010.[11] The individual trained in first aid was sent to another site because there was not enough work at

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[10] Section 56.13021 provides: "Except where automatic shutoff valves are used, safety chains or other suitable devices shall be used at connections to machines of high pressure hose lines . . . and between high-pressure hose lines . . . where a connection failure would create a hazard." 30 C.F.R. § 56.13021.

[11] Section 56.18010 provides in pertinent part: "An individual capable of providing first aid shall be available on all shifts." 30 C.F.R. § 56.18010.

the Blissville Quarry. 23 FMSHRC at 318; Tr. 128-29. The judge found that the evidence regarding this citation was undisputed, that the miner trained in first aid was sent to another location, and that there was no one at the quarry trained in first aid. 23 FMSHRC at 318. He rejected Vermont Slate's argument that the absence of a first aid miner was not a violation of the regulation because the medical center was only 1.3 miles from the quarry, and concluded that Vermont Slate violated section 56.18010. *Id.* The judge assessed a penalty of $55. *Id.* at 319.

The record evidence clearly supports the judge's finding that Vermont Slate failed to provide a miner trained in first aid at the Blissville Quarry on the date of the inspection. Accordingly, we affirm the judge's finding of a violation.

III.

Conclusion

For the foregoing reasons, we vacate and remand Citation No. 7720771, and affirm the judge's decision with respect to Citation Nos. 7720768, 7720772, 7720773, 7720775, and 7720778.

Theodore F. Verheggen, Chairman

Robert H. Beatty, Jr., Commissioner

Commissioner Jordan, concurring in part, and dissenting in part:

I join the majority in affirming the judge's decision with respect to five of the citations at issue in this case. However, I would also affirm the judge's finding that the operator failed to adequately guard the trimmer, in violation of 30 C.F.R. § 56.14107(a).[1] Inspector Budd presented detailed testimony regarding the lack of guarding of the moving parts of the v-belt drive of the trimmer. Tr. 64-69. As my colleagues note, slip op. at 2, the inspector clearly delineated the location of the two pinch points. He testified that the trimmer was unguarded and that the machine operator would stand within a foot of the v-belt, and "about arm's reach, maybe a little less" from the pinch points. Tr. 64, 67, 69. He stated that because the v-belt areas were not guarded, an individual could possibly stick a hand in the v-belt drive or be drawn in from clothing, possibly resulting in the loss of fingers or a hand. Tr. 64. Consequently, I would hold that substantial evidence supports the judge's determination, as a reasonable person could certainly find this testimony adequate to support the judge's conclusion that the trimmer was not adequately guarded.

My colleagues in the majority find that the judge erred by failing to properly analyze all of the probative evidence to determine whether the moving parts on the v-belt drive posed a hazard to miners on the platform who were operating the trimmer. Slip op. at 4. Specifically, the majority faults the judge's conclusion that the evidence Camara presented on that issue was irrelevant because the testimony addressed only whether the exposed moving parts on the equipment were hazardous to a person standing on the ground. *Id.* at 3-4.

While the judge characterized Camera's evidence (which consisted solely of his testimony and a drawing of the trimmer) as irrelevant, I would call it muddied and inconsistent. It was not clear from his statements whether he actually ever confronted MSHA's concern about the dangers of the v-belt to a trimmer operator, because he spent a lot of time discussing how impossible it would be to reach the pinch points from the ground. Tr. 164, 166, 168-69. He never clearly explained how a machine operator would be protected from contact with the pinch point areas. Tr. 162-70. In fact, when asked about the v-belt, Camera testified: "Was not guarded." Tr. 169.[2]

This case is in a procedural posture similar to that of *Arch of Kentucky*, 20 FMSHRC 1321 (Dec. 1998). There, the Commission found that the judge had improperly sustained an objection by the Secretary, thus excluding evidence the operator had tried to have admitted. *Id.* at 1328. However, a unanimous Commission held that although the judge's evidentiary ruling

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[1] Section 56.14107(a) requires that moving machine parts be guarded to protect persons from moving parts that may cause injury.

[2] Camara did initially insist that the trimmer was guarded, but apparently only in the front. Tr. 163-65. The inspector clarified that there was a guard on the trimmer itself, but not on the v-belt drive. Tr. 72-73.

was incorrect, his error was harmless, in part because the excluded testimony could not have overcome the credited testimony of some of the other witnesses (together with other evidence). *Id*. at 1328-29. Thus the Commission did not find it necessary to remand the case to the judge so that he could take into account the improperly excluded testimony. Here as well, it is a needless exercise to remand the case to the judge to review Camara's testimony once again.

In a perplexing procedural move, my colleagues also vacate and remand this case based in part on the operator's argument that the judge erred by refusing Camera's request to allow Tango to testify.[3] At the same time, they admit that the judge "did not directly respond to Camara's question." Slip op. at 5. I am hard pressed to think of another case where the Commission (or any appellate body) vacated a decision without even deciding whether the claimed error occurred.[4]

It appears as if my colleagues are actually vacating and remanding this case because they believe the judge failed to provide the operator, who was appearing pro se, with adequate guidance about its right to call the witness. *Id.* This flies in the face of the well-accepted precept that matters relating to the orderly and expeditious conduct of a trial are within the sound discretion of the trial judge. Jane C. Avery, Annotation, *Propriety and Prejudicial Effect of Federal District Judge's Granting or Denying Brief Recess During Trial*, 21 A.L.R. Fed. 948, 950 (1974); *see also* 75 Am. Jur. 2d Trial § 180 (1991) (court has supervisory power to control proceedings at trial, and its authority to control the overall direction of the trial will only be overturned when it abuses its discretion by acting in an unreasonable, arbitrary, or unconscionable manner); *In re: Contests of Respirable Dust Sample Alternation Citations*, 17 FMSHRC 1819, 1843 (Nov. 1995) (under an abuse of discretion standard, a trial judge's decision will not be disturbed unless it made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances). Given that my colleagues agree with my conclusion that the judge did not abuse his discretion, slip op. at 4, (the applicable standard of review, with which they do not quarrel), I fail to understand the legal basis for their ruling.

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[3] The operator based its request on its assertion that counsel for the Secretary had told Camera that Tango would be at the hearing. PDR at 1. No evidence in the record supports this contention, and the Secretary's witness list on her Preliminary Statement does not include Tango. S. Pre-Hearing Statement.

[4] Even if the judge had issued an outright denial when the operator requested Tango's presence at the hearing, the operator made no showing that it had attempted to produce the witness itself. Most courts have concluded that a party who relies on its adversary to produce a witness has not demonstrated the diligence required to the granting of a continuance and that therefore the trial court acts within its discretion in denying the continuance. Annotation, *Prejudicial Effect, in Civil Case, of Denial of Continuance to Call Nonappearing Witness Whom Adversary had been Expected to Call*, 39 A.L.R. 2d 1445, 1446 (1955); *see also* 17 Am. Jur. 2d Continuance § 14 (1991) (request for a continuance based on absence of a witness is properly refused when applicant has not used due diligence to procure the attendance of the witness).

My colleagues also suggest that "Tango's absence from the hearing *may* have prejudiced Vermont Slate," slip op. at 4 (emphasis added), but stop short of making a finding that prejudice actually occurred. Thus it appears that Vermont Slate has failed to convince any of us that its inability to call Tango resulted in substantial prejudice to its case. *See Capitol Cement Corp.*, 21 FMSHRC 883, 889-890 (Aug. 1999) (operator failed to provide convincing evidence that its inability to question a witness resulted in substantial prejudice). Accordingly, because I conclude that the judge's actions regarding the request to call Tango as a witness did not constitute an abuse of discretion, I decline to join my colleagues in vacating and remanding this case with instructions to the judge to permit the operator to present Tango's testimony.

For the foregoing reasons, I would affirm the judge's finding that the operator failed to adequately guard the v-belt drive, in violation of 30 C.F.R. § 56.14107(a).

Mary Lu Jordan, Commissioner

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