FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20004-1710

JAN 18 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. LAKE 2014-0746
MACH MINING, LLC	:	

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

DECISION

BY: Jordan, Young, and Cohen, Commissioners

This proceeding, which arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"), involves two citations issued to Mach Mining, LLC, by the Secretary of Labor's Mine Safety and Health Administration ("MSHA"). The first citation alleges that the operator violated 30 C.F.R. § 75.400 because loose coal had accumulated along the side of the slope coal belt. The second citation alleges that Mach failed to record the nature and location of the hazardous conditions along the slope coal belt in the mine's examination book as required by 30 C.F.R. § 75.363(b).

After a hearing on the citations, the Judge issued a written decision affirming both violations[1] and finding that the violations were significant and substantial ("S&S")[2] and the result of Mach's high negligence. 38 FMSHRC 2229 (Aug. 2016) (ALJ).

Mach filed a petition to review the Judge's decision, which we granted. On review, Mach contends that the Judge erred in affirming the S&S and high negligence designations associated with the violation of section 75.400. Mach also asserts that the Judge erred in finding a violation of section 75.363(b) and that it lacked notice of the Secretary's interpretation of that safety standard. In addition, Mach maintains that the Judge erred in finding the violation of section 75.363(b) to be S&S and the result of high negligence. For the reasons that follow, we affirm the decision of the Judge.

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[1] Mach did not contest before the Judge that it violated section 75.400.

[2] The S&S terminology is taken from section 104(d)(1) of the Act, 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." 30 U.S.C. § 814(d)(1).

I.

Factual and Procedural Background

The citations were issued at the Mach Number One Mine, an underground coal mine located in Illinois. The citations concern the approximately 3,500 foot beltline known as the "slope coal belt," which runs down into the mine between a 12-foot wide travelway and a four-foot wide walkway. The conveyor belt itself is about seven feet wide.

On July 14, 2014, sometime after 8:00 a.m., MSHA Inspector Bernard Reynolds and a Mach foreman, Guy Webster, started to drive down the travelway to conduct a regular quarterly inspection. Almost immediately upon their entrance, a miner approached the truck and informed Webster of hazardous conditions near the slope belt. Inspector Reynolds left the vehicle and walked to the belt, where he saw extensive accumulations of coal. He decided to walk the length of the belt to check for additional problems. Along the way, he documented his observations, noting that coal was generally more prevalent on the far side of the belt (along the walkway).[3] He observed six discrete locations where coal had piled in extensive enough quantities to contact the belt and its component parts. These six locations totaled about 105 feet of beltline and involved 14 rollers contacting coal. Tr. 99-100.

Based on the quantity of coal he observed, Inspector Reynolds believed that the accumulations had existed for several shifts. He also noted where a misaligned portion of the belt had cut about one-eighth of an inch into a steel beam supporting the roof. The damage suggested that the belt had been misaligned for several shifts. Tr. 78-79. Although Reynolds witnessed approximately six miners shoveling coal at the top of the belt, the areas where he had seen coal in contact with the belt were not being addressed at the time of the inspection.

Inspector Reynolds issued Citation No. 8450924 alleging a violation of 30 C.F.R. § 75.400, which provides that "loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate . . . ." Reynolds designated the violation as S&S and resulting from high negligence. After the issuance of the citation, a total of 27 miners were dispatched to address the beltline. Tr. 107-08.

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[3] Specifically, at 100 feet inby Inspector Reynolds observed accumulations measuring about 12 inches deep. Tr. 65. At 200 feet, he observed coal measuring approximately 14 inches deep and at 250 feet, about 16 inches. Tr. 66. At 570 feet, coal up to 30 inches deep was contacting three idle rollers. Tr. 69-70, 72. From 650 feet to 1050 feet, accumulations were eight to 20 inches deep. Tr. 79. In addition, there were three hot bottom roller brackets. Tr. 74. At 1100 feet, about 50 feet of the belt and five rollers were running in coal. Tr. 80. Reynolds testified that he saw dust in the air near this location, which led him to believe that the area was fairly dry. Tr. 82-84. From 1600 feet to approximately 2000 feet, 15 feet of belt and two rollers were turning in coal. Tr. 87-88. From 2000 to 2200 feet, accumulations up to 30 inches deep were contacting two rollers and ten feet of belt. Tr. 88. At 2300 feet, a roller and ten feet of belt were turning in accumulations. Tr. 89. At the bottom portion of the belt accumulations ranged up to 24 inches deep. Tr. 90.

When Inspector Reynolds returned to the surface, he reviewed the mine's examination book, including the examiner's records for each belt. Inspector Reynolds considered the most recent notation for the slope coal belt — "needs cleaned - work in progress" — to be insufficient to address the nature and location of the hazardous conditions that he recently observed. Accordingly, he issued Citation No. 8450926, alleging a violation of the examination recording requirements of 30 C.F.R. § 75.363(b). Reynolds designated the citation as S&S and resulting from high negligence.

Earlier that morning, at around 6:00 a.m., David Adams had performed an examination for Mach while driving up the travelway in a vehicle. He testified that he observed some coal accumulated along both sides of the belt, but did not observe any coal in contact with the belt or its components. Adams noted that the panel being mined at the time was very wet. As a result, water would often accumulate on the belt, causing a large quantity of coal to spill off both sides in a short period of time — a phenomenon he referred to as "washback."[4] Tr. 227. He wrote the subject recording in the examination book, and testified that the entire belt needed to be cleaned. The mine manager, Shane Rorer, testified that he too drove the travelway earlier that morning, around 7:15 a.m., and did not observe coal in contact with the belt. Tr. 340-42.

II.

Disposition

A. Citation No. 8450924 (The Accumulations Violation)

1. The Significant and Substantial Designation

a. Commission Case Law

The Commission has recognized that a violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, the Commission further explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

[4] Guy Webster likened the occurrence of a "washback" to the occurrence of "a small tsunami." Tr. 290, 300.

6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *accord Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

Under the Commission's *Mathies* test, it is the contribution of the violation at issue to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984). In evaluating that contribution, it is assumed that normal mining operations will continue. *See U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574-75 (July 1984); *see also U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). The second step of *Mathies* requires a determination of whether, based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037-38 (Aug. 2016).[5]

In cases that involve violations which may contribute to the hazard of an ignition or explosion, the likelihood of an injury resulting depends on the existence of a "confluence of factors" that could trigger the ignition or explosion. *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1992 (Aug. 2014). Factors include any potential ignition sources, the presence or potential for presence of methane, float coal dust accumulations, loose coal or other ignitable substance, and the types of equipment operating in the area. *See Utah Power & Light Co., Mining Div.*, 12 FMSHRC 965, 971 (May 1990); *Texasgulf*, 10 FMSHRC 498, 501-03 (Apr. 1988).

b. The Judge's Decision

The Judge concluded that the Secretary had demonstrated that a confluence of factors was present and thus the accumulations violation was S&S. Specifically, the Judge found that the second step of *Mathies* was satisfied in that the violation contributed to the hazard of a belt fire.[6] Coal was in contact with the belt and rollers in numerous locations, which was an ignition source. 38 FMSHRC at 2242. Furthermore, three of the bottom roller brackets were hot to the touch. *Id.* The Judge recognized that wet coal remains a danger because frictional heat sources, like the rollers rolling in coal and the "frozen" rollers at issue, can cause the coal to dry out. 38 FMSHRC at 2242 (citing *Consolidation Coal Co.*, 35 FMSHRC 2326, 2329-30 (Aug. 2013) (citations omitted)); Tr. 60. In addition, the mine was on a five-day spot inspection because of the mine's excessive liberation of methane and, therefore, accumulations in contact with the belt represented a "dangerous combination that was reasonably likely to cause an ignition." 38 FMSHRC at 2243.

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[5] Commissioners Jordan and Cohen reiterate their belief that the proper standard of proof under *Mathies* Step 2 is an "at least somewhat likely" standard. *See Newtown,* 38 FMSHRC at 2051-53 (Comm'rs Jordan and Cohen concurring in part and dissenting in part). In contrast, Commissioner Young believes that *Newtown* was correctly decided.

[6] The Judge repeatedly stated that the Secretary demonstrated that "the accumulations were reasonably likely to ignite" and, accordingly, concluded that the violation contributed to the hazard of a belt fire. 38 FMSHRC at 2242; *see also id.* at 2243 ("ignition would likely result") ("the reasonable likelihood of an ignition risk remained"). Accordingly, his *Mathies* Step 2 analysis was consistent with *Newtown*, 38 FMSHRC at 2033.

The Judge further concluded that a belt fire was reasonably likely to result in serious injuries such as smoke inhalation or burns. The Judge rejected the operator's claim that its redundant and required safety measures would prevent any serious injury. *See Buck Creek Coal* v. *FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (treating redundant mandatory safety protections as a defense to S&S findings would lead to the anomalous result that every protection would have to be nonfunctional before a S&S finding could be made).

c. Analysis

On review, Mach contends that the Judge's decision lacks the support of substantial evidence and that the Judge's analysis regarding the confluence of factors is flawed. For the reasons that follow, we conclude that the Judge's decision is supported by substantial evidence[7] and that Mach's other arguments lack merit.

We find that the record is sufficient to demonstrate that the coal accumulations here substantially contributed to the hazard of a belt fire and reasonably serious injuries.[8] It is undisputed that the coal that accumulated around the beltline was extensive at the time of the inspection and was in contact with the belt and 14 rollers at six locations, totaling 105 feet of beltline. Three of the rollers contacting coal were hot to the touch. The Judge credited Inspector Reynolds' testimony that an ignition would likely result if the accumulations were left unabated and in contact with ignition sources. The likelihood of an ignition was compounded because the mine had a history of methane liberation. Although the coal was wet at the time of inspection, friction through contact with the beltline can cause wet coal to dry. Tr. 70, 100. In fact, the inspector testified that he observed visible coal dust in the air in at least one location (around the 1000-foot mark), which indicated that the coal was fairly dry there. At least six miners were working along the slope belt at the time of the inspection, and would be at risk of injuries associated with a belt fire such as smoke inhalation or burns.

We also reject Mach's contentions that the Judge's analysis was otherwise flawed. For instance, Mach argues that the Judge failed to consider that the loose coal was intermixed with a large amount of rock and, therefore, it was unlikely that the coal would ignite. However, Mach previously did not contest that the material that fell from the beltline was combustible and thus prohibited from accumulating in active workings. M. Post-Hearing Br. at 15. Therefore, Mach has conceded that although the coal was mixed with some rock, it was capable of igniting in conditions which could propagate a fire or explosion.

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[7] The Commission requires that "[a] judge must analyze and weigh the relevant testimony of record, make appropriate findings, and explain the reasons for his decision." *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222 (Jun. 1994). When reviewing a Judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the Judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

[8] Acting Chairman Althen joins the majority in concluding that the Judge's decision on S&S is supported by substantial evidence.

Mach further argues that because the coal that was present was wet, the likelihood of a fire was further reduced. Yet, the Commission has long held that "wet coal accumulations pose a significant danger in underground coal mines." *Consolidation Coal Co.*, 35 FMSHRC at 2329-30; *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1120-21 (Aug. 1985) (rejecting the argument that wet coal does not pose a dangerous combustible risk because wet coal can dry out and fuel or propagate a fire or explosion). Accordingly, wet coal accumulations in the presence of ignition sources may be found to be a S&S violation. *See Mid-Continent Res. Inc.*, 16 FMSHRC 1226, 1230-32 (June 1994) (affirming a S&S determination and holding that "accumulations of damp or wet coal, if not cleaned up, can dry out and ignite"). Mach has ignored this established Commission jurisprudence in its argument that the Judge erred. We find that the Judge's analysis was consistent with the Commission's approach to wet coal accumulations.[9]

Mach also contends that the Judge erred when he failed to assume that the conditions would be soon addressed because miners were shoveling in the area. We disagree. An S&S determination must be made at the time the citation is issued "without any assumptions as to abatement"' and in the context of "continued normal mining operations." *Paramont Coal Co.*, 37 FMSRHC 981, 985 (May 2015); *U.S. Steel Mining Co.*, 6 FMSHRC at 1574.

We recognize that a violation of section 75.400 may not contribute to the hazard of a belt fire if active abatement of those accumulations is underway. *See generally Knox Creek Coal Co. v. Sec'y of Labor*, 811 F.3d 148, 165-66 (4th Cir. 2016). However, the evidence in this case clearly establishes that the miners shoveling the belt at the time of the inspection were but a small fraction of the manpower required to effectively abate the violation. No more than ten miners were shoveling the belt when the inspector arrived. It took 27 miners up to three days to completely abate the violative conditions. 38 FMSHRC at 2249 (citing Sec'y Ex. 2). Therefore, the miners shoveling the belt at the time of the inspection would not and could not have abated the violation on their own. Given the paucity of the efforts underway at the time of the inspection, as compared to the abatement efforts ultimately required, substantial evidence supports the Judge's finding.

Mach maintains that due to the location of the accumulations and the strength of the ventilation system, smoke from a belt fire would be carried out of the mine and miners would not be exposed to the associated hazards. This argument has no merit. The slope coal belt is proximate to a designated escapeway. Therefore, in the event of a fire, miners working along the slope coal belt or exiting via that escapeway would be exposed to smoke.

Finally, Mach asserts that the Judge's finding that the mine's history of methane liberation compounded the risk of ignition is not supported by substantial evidence. We conclude that the recurrent five day spot inspections conducted by MSHA pursuant to 30 U.S.C. § 813(i)[10] support a finding that the mine is at heightened risk for dangerous methane liberation.

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[9] Further, some of the coal was indeed dry, as shown by the inspector's testimony that he saw coal dust in the air at the transfer point of the belt. Tr. 81-85.

[10] "Whenever the Secretary finds that a coal . . . mine liberates excessive quantities of methane . . . or that a methane or other gas ignition or explosion has occurred in such mine

Accordingly, for the aforementioned reasons, we affirm the Judge's decision that the violation was S&S.

2. High Negligence

a. Commission Case Law

The Commission evaluates the degree of negligence associated with a violation using "a traditional negligence analysis." *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir. 2016) (citation omitted). The operator has a duty of care to avoid violations of mandatory standards, and the failure to do so can lead to a finding of negligence when a violation occurs. *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). To determine whether an operator has met its duty of care, the Commission considers what actions a reasonably prudent person who is familiar with the mining industry and the protective purpose of the regulation would have taken under the same circumstances. *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015). High negligence "suggests an aggravated lack of care that is more than ordinary negligence" and "an operator's intentional violation constitutes high negligence for penalty purposes." *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998) (internal quotation omitted).

b. The Judge's Decision

The Judge concluded that Mach was highly negligent. Mach "failed to address serious and largely self-imposed accumulations hazards that developed over the course of several shifts." 38 FMSHRC at 2245. The Judge credited Inspector Reynolds' testimony that the extent of the accumulations should have led mine examiners and managers to recognize and ameliorate the problem. *Id.* at 2244.

The Judge determined that Mach failed to take adequate measures to keep the area clear. The crew of miners assigned to shovel the belt was clearly insufficient. Furthermore, Mach was using the belt to dewater the mining face and, as a result, coal frequently washed off the steeply inclined slope coal belt. Despite the foreseeability of these "washbacks," Mach failed to take actions that were consistent with those of a reasonably prudent mine operator to address the situation. Mach finally installed an adequate dewatering system about two months after the issuance of the subject citation. The Judge characterized this action as "belated," as Mach was aware of "washbacks" along the slope belt since at least 2011. *See Mach Mining, LLC*, 33 FMSHRC 763, 769 (Mar. 2011) (ALJ). Furthermore, in the 15 months preceding the issuance of the present citation, Mach had a history of 58 violations of section 75.400. Sec'y Ex. 1. The Judge noted that the mine received yet another section 75.400 citation for the slope belt only two weeks later (July 28). 38 FMSHRC at 2244. Based on the totality of the circumstances the Judge concluded that Mach did not take measures consistent with those of a reasonably prudent mine operator.

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which resulted in death or serious injury at any time during the previous five years, or that there exists in such mine some other especially hazardous condition, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine during every five working days at irregular intervals." 30 U.S.C. § 813(i).

c. Analysis

We conclude that the Judge's high negligence determination is supported by substantial evidence. The operator had actual notice of a longstanding condition that produced violative and potentially hazardous accumulations, and failed to take appropriate actions.[11]

Although Mach maintains that the Judge erred in concluding that the accumulations had been present for several shifts, we find that the Judge appropriately exercised his discretion in crediting the testimony of the inspector. 38 FMSHRC at 2246.[12] In part, the Judge relied on the depth of the cut into the steel beam to corroborate the inspector's likely timeline of the conditions. The Judge credited the testimony of Inspector Reynolds, corroborated by Mach foreman Webster, that it would take at least 24 hours for the rubber belt rubbing into the steel I-beam to cause a cut into the steel of one-eighth of an inch. *Id.* at 2233-34 n.10, 2246. While Mach argues that the overwhelming majority of the coal accumulations occurred after 7:15 a.m. (the time when the mine manager last drove the travelway), we, like the Judge, find it unlikely that such extensive amounts of coal would have accumulated over the next hour, just prior to the arrival of an MSHA inspector.

Mach also argues that the Judge erred in relying on a prior decision, *Mach Mining, LLC*, 33 FMSHRC 763 (Mar. 2011) (ALJ), to establish that the operator was on notice that the slope belt was prone to accumulated coal as a result of "washbacks." We disagree. The prior case involved almost the exact same factual circumstances: At the same mine the slope coal belt had been running in accumulations which occurred as a result of "washbacks." The operator was aware of the "washback" issue at this mine.

Mach also asserts that the Judge failed to explain how any of the noted prior citations placed Mach on notice that greater efforts were necessary for compliance. We conclude that 58 violations in a 15-month period is enough to put a reasonable mine operator on notice that greater efforts to comply with the standard were required.

Mach argues that the Judge erred in concluding that only about six miners were shoveling the belt at the time of the inspection. Mach asserts that in addition to the five to seven miners who Reynolds saw shoveling near the top of the slope belt, Reynolds also encountered another miner at the 570 foot mark. Additionally, Webster saw another two or three miners at 2700 to 2900 feet, and another two or three miners at the bottom. PDR at 3, 27; Tr. 289. But even if there were more than six miners shoveling along the belt at the time of the inspection, none of these miners (except possibly for one at 570 feet) were shoveling in the six separate locations — the most hazardous locations — where Reynolds encountered 14 rollers turning in coal. Tr. 69-89, 100. In any event, the number of miners who Mach had shoveling at the time of the inspection was grossly inadequate given that it took 27 miners up to three days to completely clean up the accumulations. Tr. 107-08; Sec'y Ex. 2.

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[11] Acting Chairman Althen joins the majority in affirming the decision of the Judge with respect to negligence.

[12] The Commission has recognized that 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 (Sep. 1992); *Penn Allegh Coal Co.*, 3 FMSRHC 2767, 2770 (Dec. 1981).

Mach additionally contends that the Judge erred in finding that a reasonably prudent mine operator would have installed an alternative dewatering system earlier. We conclude that the Judge's determination is grounded in the facts and is reasonable. The slope coal belt had experienced problems with coal accumulations caused by "washbacks" since at least 2011. The panel currently being mined was particularly wet. Parker Phipps, the general manager, testified that the existing dewatering system was insufficient to control the water, which was constantly transferred to the belt. Tr. 385. Mach maintains that it would have been unsafe and impractical to shut the longwall down to install a new dewatering system. Yet, Phipps himself testified that a new dewatering system was installed over a long weekend (while the longwall was shut down), and that the new system virtually eliminated the "washback" problem. Tr. 389.

Mach asserts that the Judge erred when he considered that the mine received an additional citation alleging a violation of section 75.400 for the slope coal belt two weeks later (July 28) as part of his negligence analysis. We agree with Mach on this point. The July 28 citation is irrelevant for purposes of the operator's negligence on July 14. While a history of violations of a safety standard can place an operator on notice that a greater effort at compliance is necessary (*see Big Ridge, Inc.*, 35 FMSHRC 1525, 1536 (Jun. 2013)), the Commission does not consider the particular factual circumstances of a subsequently issued citation when evaluating negligence for past conduct. On balance, however, we consider this error to be harmless. The Judge's erroneous consideration of the July 28 citation does not detract from the weight of the other evidence.

Accordingly, we affirm the Judge's high negligence decision as supported by substantial evidence. The water problems that contributed to the coal accumulations were foreseeable, yet Mach took inadequate measures to ensure that the requirements of section 75.400 were complied with.

B. Citation No. 8450926 (The On-Shift Recording Violation)

1. The Violation

The Judge ruled that Mach failed to comply with the recording requirements of section 75.363(b)[13] which provides that the operator must identify "the nature and location of the hazardous condition . . . ." 38 FMSHRC at 2249. The Judge concluded that Adams' recording — "slope [belt] - needs cleaned - work in progress" — failed to convey the nature of the hazardous conditions that were present, such as accumulations contacting a potential ignition

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[13] The standard states that:

> A record shall be made of any hazardous condition and any violation of the nine mandatory health or safety standards found by the mine examiner . . . . The record shall be made by the completion of the shift on which the hazardous condition or violation of the nine mandatory health or safety standards is found and shall include *the nature and location of the hazardous condition* or violation and the corrective action taken . . . .

30 C.F.R. § 75.363(b) (emphasis added).

source like the beltline, and their respective locations. *Id.* at 2247. The Judge also concluded that Adams' vague notation undermined the purpose of the safety standard, which includes the right of miners to review examination books to discover the nature and location of underground hazards. *Id.* at 2250.

Mach contends that its recording complied with the standard. It maintains that there is no additional requirement in the language of the standard requiring any degree of specificity.

We categorically reject this argument and agree with the Judge that Mach violated the standard. Section 75.363(b) requires an examiner to record "the nature and location of the hazardous condition[s]." At a minimum, the examination notation at issue — "slope [belt] - needs cleaned - work in progress" — fails to comply with the standard's mandate to state the "nature" of the hazards and where these hazards are located along the beltline.

There is no reference in the examination book to the multiple locations where coal was contacting ignition sources. Over the 3,500 feet of the slope belt, extensive accumulations of coal were in contact with the belt in six separate locations for a total distance of 105 feet, which included 14 rollers, three of which were hot to the touch. It is well established that coal in contact with an ignition source is a particularly serious hazard. In addition, the belt was misaligned and was contacting a steel I-beam. 38 FMSHRC 2233-34, 2242. There is no mention of this hazard in the report.

The mine examiner's attempt to account for these conditions, which included particular and localized hazards, was to summarily write that the slope belt "needs cleaned" in the examination book. This generic notation communicates nothing regarding the locations of the ignition hazards, and provides no useful information about the hazard except that it involved coal, especially considering that the slope belt suffered known frequent problems with coal spillage. This examination record failed to meet the "reasonably prudent miner" test.

The Commission has consistently applied this test to broadly worded standards. *See U.S. Steel Mining Co.*, 27 FMSHRC 435, 439 (May 2005). In fact, we recently used it to determine the adequacy of a workplace examination. *Sunbelt Rentals, Inc.*, 38 FMSHRC 1619 (Jul. 2016). In *Sunbelt Rentals*, we held that an examination performed pursuant to 30 C.F.R. § 56.18002(a) (the workplace examination standard for metal and nonmetal mines)[14] must be adequate, and it must identify conditions which may adversely affect safety and health that a reasonably prudent

[14] 30 C.F.R. § 56.18002(a) provides that "[a] competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions."

competent examiner would recognize. *Id.* at 1627.[15] In the case before us, the "nature" of the hazardous condition and the "location" must be recorded in such a way that those who read the examination record will know how and where to address the problem.[16]

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[15] In *Sunbelt*, we emphatically rejected the notion that an "operator must only examine the workplace to a standard of care slightly surpassing not conducting the examination at all." 38 FMSHRC at 1625. Similarly, we reject the operator's argument here that its examination notation need only slightly surpass not writing down anything at all.

Our dissenting colleague's effort to distinguish *Sunbelt* is unavailing. Both cases involve broadly worded examination standards which can be applied more meaningfully by the use of the "reasonably prudent miner" test. Chairman Althen's attempt to distinguish *Sunbelt* stems from the fundamentally different way in which he views the case before us. We apply the reasonably prudent miner standard to provide clarification and guidance for the terms "nature and location of the hazardous condition" — language we consider part of a broadly worded standard. He finds section 75.363(b) "plain" and "clear," and consequently is satisfied that along the entire beltline" sufficiently defines the location of the hazardous condition. Slip op. at 20.

Acting Chairman Althen distinguishes *Sunbelt* in other ways, but we fail to find the differences he identifies relevant to the question of whether the reasonably prudent miner test should be applied. First, he asserts that the standard at issue in Sunbelt did not involve the record of an examination. He states that it involved the competence of the examiner. We read the case to involve the quality of the examination. *See Sunbelt Rentals*, 38 FMSHRC at 1627, 1627 n.18. Despite our colleague's concerns, for the purpose of deciding whether the reasonably prudent miner test is applicable to an examination standard, it doesn't matter whether the issue is the quality of the examination, the competence of the examination, or the specificity of the examination report. *See id.* (relying on *FMC Wyoming Corp.*, 11 FMSHRC 1622 (Sept. 1989), as a basis for the use of the reasonably prudent miner test, even though the issue in *FMC Wyoming* was the competence of the examiner rather than the quality of the examination). Rather, all of these concepts are found in examination standards that are, in our view, "drafted in general terms in order to be broadly adaptable to the varying circumstances of a mine." *Id.*, (quoting *FMC Wyoming Corp.*, 11 FMSHRC at 1629). It is therefore appropriate to apply the reasonably prudent miner test to all of them.

The similarity between the standard at issue in *Sunbelt* and the standard in this case also overrides the other distinction Acting Chairman Althen identifies (that the *Sunbelt* standard governed metal and nonmetal mines while the standard here involves an underground mine, which is the subject of more numerous regulations).

[16] The dissent contends that construing the standard as we have "will cause confusion, ambiguity, and errors, perhaps even dangerous ones, in the prioritization and recording of hazards.'" Slip op. at 23. However, the standard requires that examiners note the "location" of hazards. Furthermore, we believe the "dangerous errors" our colleague fears are less likely to be made when an examiner notes the location of hazards than when — as here — the examiner ignores mention of six hazardous areas over a 3,500 foot belt line, resulting in the clean-up crew not prioritizing the areas of greatest hazards.

As the Judge noted, the inspector testified that the "slope [belt] - needs cleaned – work in progress" notation was deficient because the slope belt needed cleaning every shift. 38 FMSHRC at 2247, citing Tr. 117. Indeed, when the inspector reviewed the examination books for the month preceding his inspection, he found that the same notation of "slope [belts] needs cleaned, cleaning in progress" (and nothing more) appeared for 81 of the 90 preceding examinations. Tr. 121, 124; R. Ex. 2. Moreover, the insufficiency of this recording is evidenced by the fact that none of the miners who were actively working to address the accumulations at the time of the inspection were addressing locations where the beltline was contacting coal.[17] 38 FMSHRC at 2247.

MSHA has recognized that "[a] record of all hazards found, as well as the required corrective action, serves as a history of the types of conditions that can be expected in the mine. When the records are properly completed and reviewed, mine management can use them to determine if the same hazardous conditions are recurring and if the corrective action being taken is effective." *Safety Standards for Underground Coal Mine Ventilation*, 61 Fed. Reg. 9764, 9803 (Mar. 11, 1996). Thus, the purpose of the standard is frustrated when, as here, the operator fails to include any identifying details in a recording, because the record created cannot help identify and correct reoccurring or chronic problems.[18] Moreover, as the Judge pointed out, and

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[17] We understand that "needs cleaned" is a reference to the presence of coal accumulations. However, like the inspector, we conclude that merely reporting the presence of coal accumulations was insufficiently descriptive to comply with the safety standard's reporting requirements in this instance. *See* Tr. 140-41. This is especially true in light of the context here: The belt being referenced was nearly two-thirds of a mile long. Slip op. at 2. The inspector noted six discreet locations where the accumulations had grown so deep that they were in contact with the belt and its components along 105 feet of beltline. *Id.* at 2, 5. Further, Mach had been aware for years — since 2011 — that the belt was prone to "washbacks" that created a chronic accumulations problem. *Id.* at 7.

We agree that in some contexts, "needs cleaned" might be an adequate description. But the area in question here is so large, and the nature of the accumulations so dangerous in certain discreet locations, that the rote invocation "needs cleaned" is practically meaningless. The ineffectiveness of this communication is evinced by the fact that the operator did nothing to indicate that it was prioritizing the clean-up of accumulations that posed the greatest threat, i.e., there was no plan in place to comprehensively address a problem that was only abated by more than a score of miners working over three days.

[18] We note the marked difference between the location written in this examination notation ("slope [belt]") and the locations described in the July 9 and July 10 examinations ("rollers from 3 to 8" and "7A flowthrough"). R. Ex. 2.

other Commission Judges have also recognized,[19] one of the purposes of the standard is to enable miners to know of dangerous conditions before they go underground.

We recognize that in other circumstances the specificity with which a reasonably prudent miner would record the nature of a hazardous condition and its location pursuant to this standard may vary based on context. Here, however, the recording is so vague that it omits information needed to properly identify the nature and location of the hazardous conditions. Regarding Mach's "fair notice" argument, any reasonably prudent miner would understand that the notation in question does not adequately identify the "nature and location of the hazardous conditions." *See Ideal Cement Co.*, 12 FMSRHC 2409, 2416 (Nov. 1990) (In determining whether a safety standard provides adequate notice, the Commission generally applies an objective standard, asking "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard."). Accordingly, we affirm the Judge's finding of a violation.

2. Significant and Substantial

The Judge concluded that the violation was appropriately designated as S&S. Specifically, he found that the recording violation contributed to the hazard of a fire occurring because miners would be unaware of the nature and location of the hazardous conditions, and if an ignition resulted there would be a reasonable likelihood that miners would suffer serious injuries such as smoke inhalation and burns. 38 FMSHRC at 2249-50. We conclude that this finding is supported by substantial evidence.

The first step of the *Mathies* test is met, as we affirm the Judge's finding of a violation. As to the second step, the Judge found that the failure to properly record the slope belt accumulations contributed to the discrete safety hazard that management and miners would be unaware of the nature and location of the ignition hazards, and they would not be able to immediately address the accumulations most likely to result in ignition. *Id.* at 2249; Tr. 129-30. It is undisputed that at the time of the inspection, miners were shoveling where ignition hazards were not present, constituting substantial evidence supporting the Judge's finding. The third and fourth steps of the *Mathies* test are met for the same reasons described *supra* with regard to the accumulations violation.

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[19] *See, e.g., Rosebud Mining Co.*, 34 FMSHRC 2734, 2755-56 (Oct. 2012) (ALJ Andrews) ("The Secretary argues that the [recording] violation is S&S because . . . miners were exposed to potential hazards that would have been discovered by examinations; that oncoming shifts rely on examination books to prepare for hazards . . . . The designation of S&S was found correct . . . . The miners were not alerted in advance, and were unnecessarily exposed to danger."); *Big Ridge, Inc.*, 33 FMSHRC 689, 713 (Mar. 2011) (ALJ Miller) ("[M]iners rely on the preshift examiner to look for hazardous conditions prior to their entry into the mine. Relying upon an inadequate examination may engender a false sense of security and cause the miners to pay less attention to their surroundings as they travel the roadway."); *Consolidation Coal Co.*, 21 FMSHRC 1404, 1408 (Dec. 1999) (ALJ Melick) ("By not reporting the hazardous accumulations of coal in the preshift book, the miners on the day shift were not placed on notice of these hazardous conditions . . . .).

On review, Mach argues that the Judge's underlying factual findings regarding the conditions on the beltline lack the support of substantial evidence. We disagree. The Judge credited the testimony of Inspector Reynolds to support his findings. 38 FMSHRC at 2246. After hearing from all the witnesses and studying the record evidence, he found that the conditions that the inspector observed were present at the time of Adams' morning examination. As stated, *supra*, the Commission recognizes that a Judge's credibility determination is entitled to great weight and may not be overturned lightly. We see no compelling reason to disturb the credibility determinations of the Judge on this point.

Mach presents other allegations of error by the Judge, similar to those we rejected in our analysis of the S&S nature of the accumulations violation, none of which is compelling. For instance, Mach maintains that the Judge erred by failing to account for the dampness of the coal accumulations, the relatively low recovery rate, and its active abatement efforts. For the reasons previously articulated, we believe that these arguments lack merit.

3. High Negligence

The Judge concluded that Mach exhibited a high degree of negligence. He reiterated that the extensive accumulations were present for multiple shifts and found that Adams' decision to perform an examination while driving likely precluded Adams from observing coal that had accumulated on the walkway. The Judge further found that Adams' practice of supplementing his written record of examination in personal meetings with mine managers did not alter his duty to comply with the plain requirements of the safety standard.[20] 38 FMSHRC at 2250.

Mach asserts that the Judge erred in his negligence analysis. First, Mach maintains that it was error for the Judge to consider Adams' use of a vehicle during the examination as exacerbating its negligence. We disagree. The Judge simply inferred that performing an examination from the travelway, while driving, made it more difficult to observe coal that accumulated along the walkway. The inference is based in fact. Inspector Reynolds walked the belt and noted that the majority of the accumulations he observed were on the far side of the belt. In contrast, Adams testified that he did not observe any coal contacting the belt or rollers when he drove up the travelway earlier that morning. It was reasonable for the Judge to infer that the difference in their observations was, at least in part, the result of differences in examination methods. Nothing in the Judge's decision suggests that the use of a vehicle during a belt examination is impermissible to the extent that an examiner is able to observe and record hazardous conditions that are present. In this case, though, the operator should have at least

[20] As part of its negligence argument, Mach attempts to demonstrate that the Judge failed to consider mitigating circumstances justifying a lower degree of negligence in accordance with the Secretary's Part 100 definitions. *See, e.g.*, 30 C.F.R. § 100.3(d) ("High negligence — The operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances."). However, the Commission is not bound by the Secretary's Part 100 definitions of degrees of negligence. *Brody Mining, LLC*, 37 FMSHRC 1687, 1701-03 (Aug. 2015); *Mach Mining, LLC* v. *Sec'y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir. 2016) (The Commission evaluates the degree of negligence using "a traditional negligence analysis."). Accordingly, the Judge may assess negligence as "high" despite a demonstration of some mitigating circumstances. *Id.*

ensured that a closer examination was made in areas more prone to accumulations, especially in light of what the operator acknowledged as an ongoing problem with "washback." *See* Tr. 227, 290, 300, 304, 391.

In addition, Mach asserts that the Judge erred by comingling the requirement to perform an on-shift examination (30 C.F.R. § 75.362(a)(1)) with the more precise recording requirements of section 75.363(b). He did not. The more specific requirements of an examination are not designed to be read in isolation from the more general requirements of an examination; instead they should be read as "interconnected provisions." *See Jim Walter Res., Inc.*, 28 FMSHRC 579, 602 n.28 (Aug. 2006) (citation omitted). We recognize that in this case, the failure to properly record a hazardous condition may have arisen from the inadequacy of the required on-shift examination. Nevertheless, the issuing inspector acted within his discretion when he chose to charge Mach with a violation of the more specific safety standard, section 75.363(b), as opposed to a more general requirement.

Mach further contends that the Judge erred by comparing the more substantive notations for the July 9 and July 10 examinations to the July 14 record because no evidence was elicited as to the conditions that were actually present on those days.[21] We agree that the relevance of the previous examination records, taken alone, is somewhat limited. The mere record of a previous examination does not provide the necessary context by which to judge whether the operator acted with a reasonable degree of prudence in making that recording. Yet, the prior recordings do in fact list locations of hazardous conditions, indicating that Mach understood that it was required to provide some additional detail as to the location of accumulations when making a record. Moreover, the more specific recordings of conditions on the slope belt just a few days earlier should have prompted Adams to more closely inspect those areas for recurring or ongoing problems during his examination.

In summation, we conclude that the complete failure to document extensive accumulations that were in contact with the belt and its moving parts, combined with the failure to document that the belt was misaligned, supports a high negligence determination.

[21] As previously mentioned, a July 9 day shift entry reads: "Need to clean under rollers from 3 to 8" and a July 10 examination record for a belt reads: "Need to clean 7A flowthrough."

III.

Conclusion

We hereby affirm the decision of the Judge in all respects. The violation of section 75.400 cited in Citation No. 8450924 is affirmed as S&S and the result of high negligence. The violation of section 75.363(b) cited in Citation No. 8450926 is upheld and affirmed as S&S and the result of high negligence.

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Acting Chairman Althen, concurring in part and dissenting in part,

I concur with my colleagues in affirming the violation identified in Citation No. 8450924 as exhibiting high negligence and as being significant and substantial. With respect to Citation No. 8450926, I would find that the pre-shift examination report complied with the requirements of section 75.363(b). Therefore, I would vacate that citation.

Citation No. 8450924

The operator conceded that a violative accumulation of mined material existed along the entire slope belt operating in the main entryway to the mine — that is, an entry 26 feet wide and 10 feet high with a paved roadway for vehicular traffic. Testimony established that due to the problems created by the flow of water, cleaning mined material that washed along the beltline was an ongoing, everyday activity with contract labor employed to perform that task.[1]

From an S&S perspective, the case rests upon the reasonably likely effect of the violation under normal mining conditions.[2] Normal mining conditions at that time were belt transportation of mined material of 55% rock and 45% coal, a continuing flow of substantial water on the belt, cleaning actions at the top and at one other point along the belt, and rubbing of the mined material on at least 14 rollers and 105 feet of belt until the already initiated abatement reached those areas.[3]

Operator witnesses testified that with a continual flow of water the accumulation was too damp/wet to ignite — one witness testified colorfully that "[w]ith all due respect, sir, if you could have seen how wet this material was, you couldn't light it with a blow torch, let alone let it rub with the belt rub and have a hazard." Tr. 317. The inspector testified that the material was a

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[1] I concur in the finding of high negligence. Although the operator was addressing the problem of substantial accumulations along the slope belt, the accumulations were a known and ongoing problem. The operator did not devote sufficient efforts to prevent significant accumulations along the entire 3,500-foot belt on the morning of the citation.

[2] Although the Commission's standard of S&S determinations is not an issue in this case, in footnote 5 Commissioners Jordan and Cohen express continuing dissent from the Commission's decision in *Newtown Energy, Inc.*, 38 FMSHRC 2033 (Aug. 2016). In *Newtown Energy*, the Commission announced an authoritative and binding rule for making S&S determinations: (1) has there been a violation of a mandatory safety standard; (2) based upon the particular facts surrounding the violation, is there a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed; (3) based upon the particular facts surrounding the violation, is the occurrence of that hazard reasonably likely to result in an injury; and (4) is any resultant injury reasonably likely to be reasonably serious. *Id.* at 2038-39. This standard, which resolved confusion that had arisen regarding the relationship between steps two and three of the venerable *Mathies* standard, now governs all S&S determinations.

[3] Although MSHA cited the conditions as S&S, it did not require a shutdown of the belt during abatement.

soupy mess saying, "This case is water and rock and coal all souped together, you know, [] they're traveling together." Tr. 169. However, the inspector identified short but distinct areas where the mined material was touching the belt and/or rollers. He also testified that frictional heat of a belt or roller on the accumulation could cause the material to dry and ignite. Although he did not test the temperature of the rollers, he said some rollers were warm or hot. He agreed the materials were at least damp and 55% rock. Nonetheless, he believed that sufficient drying could occur before abatement to create an ignition hazard.

The Judge accepted the inspector's testimony. Thus, he found an ignition reasonably likely because frictional rubbing could dry the accumulated material. The substantial evidence test is not what the trial judge could have found or what an appellate judge would have found, but whether there is sufficient relevant evidence that a reasonable mind would accept as adequate to support the Judge's conclusion. Here, the Judge credited the inspector's evaluation of the effect of continual rubbing of the material. This meets the substantial evidence standard. I, therefore, must concur in affirming the Judge's significant and substantial determination.[4]

[4] The majority finds that "58 violations in a 15-month period is enough to put a reasonable mine operator on notice that greater efforts to comply with the standard were required." Slip op. at 8. According to MSHA records introduced as Sec'y Ex. 2, 58 citations for violation of section 75.400 at the subject mine became final in the months between December 12, 2012 and July 28, 2014. According to other MSHA records, in the calendar year in which this accumulation violation occurred (2014), the Mach No. 1 mine produced 6,482,276 tons of underground coal that was about 1.8% of the total underground coal production in 2014 of 354,709,128 tons. *Compare* data from MSHA, *Mine Data Retrieval System*, https://arlweb.msha.gov/drs/drshome.htm (Jan. 17, 2018) *with* MSHA, *Coal Production*, https://www.msha.gov/sites/default/files/Data_Reports/DEC_15_2016_Historical_MIWQ_Employment_and_Production.pdf (page three) (Jan. 17, 2018).

In 2014, MSHA issued 4,938 citations for violations of section 75.400. MSHA, *Most Frequently Cited Standards by Mine Type*, https://arlweb.msha.gov/stats/top20viols/top20home.asp (Jan. 9, 2018). Fifty-eight violations is 1.2% of 4,938. Although the periods do not match exactly, it is clear that this mine was doing better than average. I note this fact to express my doubts regarding the usefulness of raw numbers standing alone in MSHA adjudications. Perhaps it is understandable for general circulation newspapers that may be unfamiliar with the intensity of inspections and vast number of citations issued annually to castigate operators based upon raw numbers of violations. It is another thing for knowledgeable persons to use raw numbers to draw important and perhaps outcome-determinative conclusions. I disagree with use of an unexamined raw number of violations without consideration of the mine's size, its history of violations relative to industrywide performance, and many other circumstances surrounding the previous violations that may be gleaned from the regulatory record.

Citation No. 8450926

MSHA Inspector Reynolds cited the operator for a violation of 30 C.F.R. 75.363(b) for an alleged failure to make a record of a hazardous condition. The standard is brief, plain, and unambiguous. In relevant part, section 75.363(b) requires, "A record shall be made of any hazardous condition and any violation of the nine mandatory health or safety standards found by the mine examiner." I agree with my colleagues that the standard requires that the record identify the nature of a hazard found by the examiner and its location. Simply stated, when an examiner sees a hazard, he must report what the hazard is and where it is located so that management and miners are alerted and may address and abate it. That is exactly what the examiner did here. Therefore, I respectfully dissent.

I need not extensively discuss the plain meaning rule. In recent years, circuit courts have had several occasions to explain the plain meaning standard to the Commission. *CalPortland Co. v. FMSHRC*, 839 F.3d 1153, 1162 (D.C. Cir. 2016) ("[A]n agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms." (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2445 (2014)); *Performance Coal Co.*, 642 F.3d 234, 239 (D.C. Cir. 2011) ("[T]he language Congress selected [is] plain, clear, and simple and we refuse to muddy it by finding ambiguity where none exists."); *Vulcan Constr. Materials, L.P. v. FMSHRC*, 700 F.3d 297, 309 (7th Cir. 2012) ("[T]he unambiguous language of the statute requires that temporary reinstatement end when the Secretary's involvement ends.").

The present controversy, therefore, is actually quite limited. Did the examiner violate section 75.363(b) by reporting a hazardous accumulation of mined material located along the entire beltline without finding and noting sub-locations of particular accumulations along that beltline? Stated differently, did the examiner fail to report the nature and location of an accumulations hazard that extended the length of the beltline by not including a subset report specifying specific locations within that one hazard/violation that, after hearing, caused the one violation to be S&S?[5]

Although idiomatically terse, Adams' record clearly communicated a systemic problem that everyone in the mine already knew — that mined material was washing from the belt and accumulating along the beltline. This was a hazard that had to be abated along the length of the belt. The report fulfilled the standard by telling miners and mine management the nature and location of the hazard requiring abatement.

As the examiner and a mine supervisor testified, although the washback and spillage of material along the beltline was a particular problem on the day of the violation due to the resumption of longwall mining after a weekend shutdown, such accumulations had been a constant and well-known problem. Tr. 228, 252, 284. Moreover, the report is for the "slope" — that is, observations affecting the slope without any limitations, the entire slope. Thus, the report of a need to clean material is an indication of accumulations along the entire slope. Further, the "needs cleaned" together with "work in progress" (a reference to miners already shoveling the

[5] The Judge did not base his decision on a purported failure to report a purported 1/8 inch cut in a support beam.

accumulations) demonstrates that the examiner's record identified that accumulations of mined material along the belt needed to be and were being cleaned. R. Ex. 1.

Indeed, my colleagues admit that the record did report the nature of an accumulation of mined material (the hazard) and its location — along the slope belt. Slip op. at 12 n.17. In sum, all Commissioners agree that the examiner communicated to management and miners at this mine the presence of a hazard of accumulated mined material located along the entire beltline. Thus, they virtually concede the record complied with the plain and literal language of the standard.

The only case cited by the majority is *Sunbelt Rentals, Inc.*, 38 FMSHRC 1619 (Jul. 2016). That case is wholly inapposite. In fact, that case strengthens the plain meaning of the standard involved in this case. The *Sunbelt* standard did not involve the record of an examination but rather the competence of the examiner. 30 C.F.R. § 56.18002 is in the standards governing metal and nonmetal mines and is the only general provision on examinations of workplaces in those regulations, which are far briefer and less inclusive than the regulations governing underground coal mines. Part 56 is 56 pages long in the paperback printed copy of the Code of Federal Regulations as compared to the 183 pages in Part 75 governing underground coal mines.

Section 56.18002(a) requires that "[a] competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions." In *Sunbelt*, the administrative law judge held that the requirement for a "competent" examiner did not imply that the examination even had to be "adequate." Thus, the ALJ interpreted the examination standard in the regulations to permit inadequate examinations. The Commission rejected that notion and held that an examination by a competent examiner had to identify "conditions which may adversely affect safety and health." *Id.* at 1627.

Absent the Commission reading, which itself is rather vague and only implies an obligation to note a location, there would have been no general standard requiring any level of adequacy. In *Sunbelt*, the Commission interpreted an otherwise ambiguous and effectively meaningless standard in a manner that gave it form and content, albeit less form and content than section 75.363. Here, my colleagues go in an opposite direction: they take a plain, clear, and meaningful standard and misinterpret it creating ambiguity and uncertainty. The *Sunbelt* decision is far different from imposing a policy directive to dissect a clear and compliant hazard report in order to find that it fails to note or delineate one hazard or different hazards within a group of hazards.[6]

[6] In an attempt to bolster their one citation to *Sunbelt*, my colleagues assert that the operator, and presumably by reference this dissent, argues that the examination record need only surpass not writing down anything. Slip op. at 11 n.15. Obviously, that is incorrect. To comply with section 75.363(b) an examiner must do exactly what the standard requires — namely, write down any hazardous condition he finds. That is what the examiner did here. Starting with their incorrect premise, the majority then posits a false symmetry between the standard at issue in *Sunbelt* (30 C.F.R. § 56.18002(a)) and the standard at issue here, 30 C.F.R. § 75.363(b). In *Sunbelt*, the administrative law judge found that an examination by a "competent" examiner did

Here, a long-existing regulation fully and plainly expresses the requirement of the standard. The record in this case fully informed management of the hazard and its location. It was then management's job to provide for abatement in a suitable manner. With a continuing water flow, management needed to clean the entire belt and believed they could do so safely with the belt operational. MSHA subsequently allowed the belt to run throughout the abatement period.

Based upon the sui generis facts of this case, my colleagues find a violation in a failure to report specific locations within one reported accumulation hazard. The outcome of this one case is not so much a problem as the confusion and dissonance created for other cases by the imposition of a new rule without a basis for judging its fulfillment. Thus, the majority would create a new rule, albeit sharply limited by the exceptional facts of this case, in which reporting the nature and location of a hazard is not compliant with section 75.363(b).[7] In their view, the clearly understandable record of an accumulation hazard and its location is not sufficient unless the examiner reports any particular places (or presumably particular hazards) where an inspector asserts the examiner should have observed greater or lesser danger, to some unknown and unarticulated extent, within the reported hazard(s).

The problem for the majority's analysis is that the examiner did precisely what the standard requires. We may frame the dispute between my colleagues and myself by reviewing the citation issued by the inspector for the violation of section 75.400. The citation stated as follows:

> Loose coal was allowed to accumulate in excessive amounts along the slope belt, from approximately 100 feet below the slope collar to the bottom. These accumulations were in continuous windows along both sides of the belt (the majority of instances were along the back side of the belt), which ranged from 4" to 30" deep & from 16" to 72" wide, and occasionally up to the full width of the

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not require that the examination even be "adequate." 38 FMSHRC at 1619. Effectively, that meant the requirement for a "competent" examiner had no meaning. The Commission's decision gave meaning to an otherwise empty standard, but that decision does not inform this decision. Section 75.363(b) is plain, requiring that "[a] record shall be made of any hazardous condition . . . found by the mine examiner." There is no similarity between the two standards regarding ambiguity or correcting the nugatory interpretation of the competent examiner standard in *Sunbelt*. The majority does not stop with that incorrect assertion but goes on to state that section 75.363(b) must be broadly adaptable to varying circumstances in the mine. Slip op. at 11 n.15. They find no settled meaning to this decades-old standard and, to them, its meaning may vary from circumstance to circumstance. This further illustrates the confusion and mischief that would result from the attachment of any importance to the majority's erroneous and sui generis interpretation in this case.

[7] Due to the unique facts of this case, the majority's opinion appears to be one of those occasional decisions that, at first glance appears possibly significant, but that is so wholly an outlier as to fade quickly from memory. It is a letter written on the wet sand of an ocean shoreline. Seen for a moment, then swept away by tide and time.

belt. Additionally, the accumulations were in contact with the moving belt and bottom rollers at the following approximate locations: 570' station; 1100' station; 1900' station; 2100' station; 2200' station; 2300' station.

Sec'y Ex. 5.

In the context of this mine and the known ongoing flooding problem due to the longwall, the examiner's report notified the operator and miners of the conditions cited in the first two sentences of the citation. As understood by everyone at the mine and the majority, he reported the nature and location of the hazard cited by the inspector — an accumulation of mined material along the entire beltline.

The majority's complaint is the failure of the examiner to add language similar to the language the inspector added in the fourth sentence of the citation — that is, the examiner did not expressly identify discrete areas in which he should have seen mined material touching the belt or rollers.

The plain words of the standard, our case law, or the sound adjudication of the standard do not create a duty for an examiner to break out certain areas of one hazard by the degree of danger or to prioritize among a number of reported hazards by the degree of danger. Examiners regularly note multiple separate hazards on one examination report. Some may be S&S and others of far lesser danger.

Nothing in the standard requires the examiner to identify a hazard that he might think is S&S, to opine on a particular hazard within a group, or to opine on where abatement must start. An examiner's identification of a hazard is notice to miners but, importantly, it also is notice to mine management of a hazard that management must address and abate. It is not the examiner's duty to prioritize abatement for management. In fact, it is easy to see that in some circumstances, an effort by an examiner to set abatement priorities actually might redound to the detriment of an overall abatement effort because the examiner may not know the actual danger or imminence of harm created among different hazards. The majority takes a unique case and suggests an unworkable and potentially dangerous standard.

This is a textbook example of the maxim "hard cases make bad law." The majority looks at an unusual, to say the least, circumstance of a 3,500-foot long accumulation. All agree that in this specific case, had the examiner actually seen the beltline or rollers on the mined material, it would have been beneficial for him to have reported such places in addition to the hazard of the accumulations. Indeed, the examiner testified that if he had seen mined material touching a belt he would have reported it. Tr. 230. That is not the question. The question for us is a legal one: What does the standard require? Based on a desire to advance safety, my colleagues interpret the standard in a novel and unwarranted manner to impose a new obligation created by them and not found in the language of the standard or in past enforcement activities. One exceptional fact pattern should not lead to a skewed interpretation of a general standard and certainly must not do so when the interpretation is inconsistent with the plain terms of the standard.[8]

[8] The majority's desire to enhance safety is understandable but inconsistent with the duty to apply the words of a standard as they are written rather than as we might wish they were

My colleagues essentially admit that a requirement for identifying specific sub-locations or specific hazards within a group of reported hazards would create ambiguities in the application and in enforcement — that is, whether a particular location within a hazard or a particular hazard within a group of hazards is sufficiently serious to require a subset record. Slip op. at 13. This is one case. Perhaps the majority can gaze into a crystal ball and foresee the full effect of its novel misinterpretation of this plain standard in this narrow and atypical case. I cannot, other than to know that, if applied, it will cause confusion, ambiguity, and errors, perhaps even dangerous ones, in the prioritization and recording of hazards.

If MSHA, as the agency charged with establishing safety policies, desires to mandate subset reports despite the ambiguities such a rule would produce, MSHA may propose a mandatory standard. Such a proposal would then be subject to public comment and refinement regarding the workability and effect of such a standard. A blundering blunderbuss approach of Commission rulemaking is not the proper or prudent means for rulemaking.

Here, the examiner did what the standard requires. Based upon the plain language of section 75.363(b), the examination report identified the nature of a hazard and its location.

I find further difficulty with the majority's rationale in this case. My colleagues find that the mine examiner's description of the accumulations as needing to be cleaned to be insufficient under section 75.363(b), because it did not explicitly identify locations where coal was touching the belt or rollers. Slip op. at 10. They then go on to cite the regulatory preamble related to section 75.363(b) for MSHA's recognition that "[a] record of all hazards *found* . . . serves as a history of the types of conditions that can be expected in a mine," and conclude that "the purpose of the standard is frustrated when, as here, the operator fails to include any identifying details in a recording." *Id.* at 12 (emphasis added) (alteration in original).

The Judge's decision plainly explains why the report did not mention the conditions the majority finds so important: the mine examiner, Adams, did not observe the conditions. 38

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written for purposes of a particular case. Perhaps judicial restraint is even more difficult in safety cases than in cases in which courts have been constrained to permit grossly repugnant activities such as the protests at funerals for slain service members or KKK marches through American cities. Nonetheless, we should remain mindful of and faithful to the words of the inestimable Justice Cardozo:

> The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life." Wide enough in all conscience is the field of discretion that remains.

Benjamin N. Cardozo, *The Nature of the Judicial Process* 141 (1921).

FMSHRC at 2246. As the preamble clearly states — not to mention the text of the standard itself — a prerequisite to reporting a mine hazard with *any* degree of specificity is to first observe the condition. Not surprisingly, the majority entirely avoids explaining how Adams was to have reported on conditions he did not observe. MSHA did not charge the operator with an inadequate inspection under 30 C.F.R. § 75.362. Instead, MSHA cited the operator for a violation it could not have committed because no one disputes that the mine examiner did not "find" the particular locations that are the gravamen of the majority decision. The majority flees to the refuge of "reasonably prudent miner," but even the most prudent miner cannot report a hazard he did not see. Here, MSHA charged a violation of a standard that, by its very terms, does not apply to the examiner's conduct. For that separate reason, the citation is invalid.[9]

Attempting to define the parameters of the reporting requirement in a case where the examiner did not observe the specific points the majority laments makes no sense on its face, and thus greatly undercuts any precedent the majority may believe it is setting. For that reason and the plain language of the standard, I cannot join in the majority opinion and dissent from the finding of a violation.

I find it necessary to go even further. The majority does not attempt to identify any discernable standard or set forth meaningful guidance for when a mine examiner should report more than the nature and location of a hazard. Instead, the majority waves its collective hand and says only that any required specificity "may vary based on context." Slip op. at 13. The majority's inability to articulate the meaning of their decision serves to emphasize the importance of proposing a clear standard, accepting public comments, and finalizing an understandable standard.

Their comment that the meaning of the decision is unclear demonstrates the lack of fair notice to this operator of a purported obligation to report particular sub-locations within a hazard. The issue of fair notice is determined under an objective standard of whether a reasonably

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[9] The Judge concluded that during his examination Adams *should have seen* at least the contact between the misaligned belt and the steel I-beam. 38 FMSHRC at 2246. If the Secretary established that, it may have constituted a violation of separate standards, sections 75.362(a) and (b) (requiring that an examiner "check for hazardous conditions," including "along each belt conveyor haulageway where a belt conveyor is operated" and for "accumulations of combustible materials"). The inspector, however, did not cite the operator for an inadequate examination and the Secretary did not present any issue under sections 75.362(a) and (b). Finally, section 75.363(a) is not just a specific restatement of section 75.362(a) as my colleagues suggest. Slip op. at 15. It is a different section with a distinct and different duty. Surely, failure to report a found hazard is different from not finding the hazard in the first place. The inspector cited the wrong standard because he faults the examiner for not reporting "found" conditions that the examiner actually did not find. The Judge and majority assume that, despite the ongoing dynamics of a continuously flooding running belt, the conditions must have existed in the same locations and to the same extent as when the examiner passed through the area hours ahead of the inspector. However, what the inspector saw sheds no light on what the examiner actually found. Because the Judge did not discredit the examiner's testimony that he did not find any instances of a rubbing belt or rollers, there is no basis to find a violation of section 75.363(b).

prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard. *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990); *Hecla Ltd.*, 38 FMSHRC 2117, 2121-26 (Aug. 2016).

In *Hecla*, the Commission considered the imposition of a requirement for some sort of geomechanical testing. The theory was novel: MSHA had never required such testing under the cited standard. Although the Commission majority accepted the interpretation, it found the operator lacked fair notice, stating:

> Because the standard had consistently been applied in a more limited fashion, we hold that a reasonably prudent person familiar with the mining industry would not have known that the examination and testing requirement in section 57.3401 might demand a geomechanical or engineering analysis.

Hecla, 38 FMSHRC at 2125.[10]

The fair notice question here is whether a reasonably prudent person familiar with the mining industry would have recognized a requirement that a report identifying an accumulation hazard along the entire length of a beltline had a regulatory obligation to go further and specify particular sub-locations within the hazard that an MSHA inspector later identifies as more serious.

Nothing in the language of the standard, MSHA advisories, or our case law suggests a requirement that a record that identifies the nature and location of a hazard must go further and comment upon particular sub-locations within the hazard. The language of the standard would not give any clue as to how much more serious a sub-location would have to be to require specific reporting. There is no reason why a reasonable person who reported the nature and location of a hazard could know he/she was required to do more. Consequently, I also disagree with and dissent from my colleagues' finding regarding the fair notice issue. I would find that the operator, in this case, did not have fair notice of any requirement to note sub-locations within a hazard.

The majority itself does not discuss how much "more hazardous" a sub-location must be to require separate reporting. Neither I nor anyone else knows whether the majority decision for the reporting of sub-locations is dependent upon the sub-locations being S&S as compared to the remainder of the identified hazard.[11]

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[10] *Hecla* is another case where sui generis facts resulted in a strained, policy-driven interpretation. At least there, however, the majority recognized that the operator did not have fair notice that the Commission could arrive at the strained interpretation it adopted.

[11] I assume that if the Judge in this case had found the separate locations did not make the section 75.400 violation S&S, he would not, or at least should not, have found a violation for not separately reporting such places. However, I readily admit this is an assumption, and the majority, having decided to create a new, ambiguous, factually limited policy out of whole cloth, may disagree.

Whether a condition is S&S is more complex than whether it is a hazard. The S&S determination requires an evaluation of the four factors of *Mathies/Newtown*. The majority, for example, does not consider the effect of a good faith objectively reasonable belief that a particular sub-location was not S&S (or "more dangerous") upon an alleged section 75.363(b) violation for not identifying a sub-location within a properly recorded hazard. (Of course, as noted above, obligations under section 75.363(b) come into play only if an examiner sees a hazard.)

In the event of another set of highly atypical facts, I do not see how other operators will have notice of the scope of any obligation to go beyond the long-accepted scope of section 75.363(b) and the examiner's view of the hazard as he/she finds it. The majority decision does not recognize or discuss that an operator's mine examiner may well have an objectively reasonable good faith belief that the particular location does not create a significantly greater hazard than another location. Does such an objectively reasonable belief constitute a defense to a violation alleging a failure to identify some subset hazard within the legally reported hazard?

In this case, for example, significant testimony supported the proposition that the violation was not reasonably likely to cause a significant danger due to the composition of the material, continuing flood of water, ongoing abatement, etc. Although the examiner rightly said he would have reported any areas of rubbing as such rubbing is undesirable from a safety and a maintenance standpoint, neither he nor other miners thought the rubbing created a reasonable likelihood of ignition. There certainly was sufficient evidence to support a finding that the operator had an objectively reasonable belief that the accumulation was not reasonably likely to ignite before the ongoing abatement reached the area. The majority's overzealous willingness to interpret a plain and effective substantive rule in an overbroad manner, without a full discussion of the dimensions or understanding of their decision, is deeply troubling.

Conclusion

In my view, the Commission makes a policy-based decision to find an obligation not present in the plain words of the standard and of which the operator did not have fair notice. Further, it fails to define in a comprehensible manner the contours of this purported obligation enforced through governmental fines. I respectfully dissent.

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