FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. PENN 2013-385
v.	:	
CONSOL PENNSYLVANIA COAL COMPANY	:	

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

DECISION

BY THE COMMISSION:

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). It involves a citation and order issued to Consol Pennsylvania Coal Company ("Consol") by the Department of Labor's Mine Safety and Health Administration ("MSHA"). The citation alleges a "significant and substantial" ("S&S")[1] violation of the safety standard in 30 C.F.R. § 75.370(a)(1)[2] because the operator failed to comply with its approved mine ventilation plan's directive to maintain the bleeders safe for travel.[3] The order alleges an S&S violation of the safety standard in 30 C.F.R. § 75.364(h)[4] for

[1] 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."

[2] 30 C.F.R. § 75.370(a)(1) provides that "[t]he operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine."

[3] Page 4, Line AA, of the operator's approved mine ventilation plan states that "[t]he means for maintaining the bleeder safe for travel will include compressed air lines routed underground, used in conjunction with air pumps to remove water as necessary to permit safe travel through the perimeter of the bleeder system." Gov't Ex. 3 at 000009.

[4] 30 C.F.R. § 75.364(h) provides that "[a]t the completion of any shift during which a portion of a weekly examination is conducted, a record of the results of each weekly examination, including a record of hazardous conditions . . . found during each examination and their locations, the corrective action taken . . . shall be made."

the failure to note hazardous accumulations of water in the record book. Both violations were alleged to be highly likely to result in fatal injury, the result of the operator's high negligence, and an unwarrantable failure[5] to comply with the cited standard.

After a hearing, the Judge affirmed both violations and upheld the S&S, gravity, high negligence, and unwarrantable failure designations. 37 FMSHRC 1616 (July 2015) (ALJ). The Commission granted the operator's petition for discretionary review challenging these findings.

The Commission:

1. Unanimously affirms the determination that the citation involved an S&S violation.

2. Remands by a majority vote the determinations of gravity, negligence, and unwarrantable failure for the citation, the determinations of gravity and unwarrantable failure for the order, and the penalty assessments for both violations.[6] While Commissioner Cohen joins the Acting Chairman and Commissioner Young in remanding these issues, he writes separately on negligence for the citation and unwarrantable failure for both the citation and the order.

3. Is evenly divided on the S&S and negligence determinations for the order. The Acting Chairman and Commissioner Young would reverse the S&S determination and remand the negligence determination for the order, while Commissioner Cohen joins Commissioner Jordan in affirming both the S&S and negligence determinations. Therefore, because there is no majority on these issues, the Judge's determinations shall stand as if affirmed. *Pennsylvania Elec. Co.*, 12 FMSHRC 1562, 1563 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992).

The following opinion, by all four Commissioners, sets forth the factual and procedural background and a single portion of the disposition where all four Commissioners unanimously affirm that the citation involved an S&S violation.

Following this opinion, the Acting Chairman and Commissioner Young set forth their separate opinion on the remaining issues, i.e., gravity, negligence and unwarrantable failure for the citation, and S&S, gravity, negligence and unwarrantable failure for the order.

Following their opinion, Commissioner Jordan sets forth her separate opinion on the issues of gravity, negligence, and unwarrantable failure for the citation, and S&S, gravity, negligence and unwarrantable failure for the order.

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[5] The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

[6] The Judge who issued the decision has retired.

Following her opinion, Commissioner Cohen sets forth his separate opinion indicating where he joins the Acting Chairman and Commissioner Young, where he joins Commissioner Jordan, and where he writes separately from each Commissioner.

I.

Factual and Procedural Background

A. General Background

Consol operates the Enlow Fork Mine, a large underground coal mine in western Pennsylvania. The mine is divided into numerous districts of longwall panels identified by letter and subdivided by the numbered panels within that district. Each longwall panel runs east to west for approximately two miles while the longwall face is approximately 1000 feet across.

The E-district bleeder system ventilates the mined-out E-15 to E-22 longwall panels.[7] In accordance with 30 C.F.R. § 75.364(a), the system must be examined weekly. During a bleeder exam, an examiner is required to check the ventilation at designated evaluation points throughout the bleeder. At the time of the violations herein, examiners walked the bleeders alone.[8] 37 FMSHRC at 1619.

The ventilation plan required that the examiner be able to pass safely throughout the bleeder without being exposed to excessive accumulations of water. Water is cleared from the bleeders by pumps. The operator's ventilation plan permitted a system of 18-23 air pumps to reroute water accumulations in the bleeders. These air pumps dumped water into a sump that was 10 to 11 feet deep. Two discharge lines transferred water from the sump to an underground retaining pool.[9] *Id.* at 1619-20. The operator also had a backup surface sump pump, which was not included in the ventilation plan and which was used only during emergencies such as when air pumps malfunctioned. Originally, the operator was required to activate the sump pump manually, but a bubbler system later was installed to activate the pump automatically when water reached a set level. The surface sump pump transferred water to three outdoor tanks with a total combined capacity of 63,000-64,000 gallons. When the tanks were full, trucks would unload them. *Id.* at 1621.

On November 20, 2012, MSHA Inspector Walter Young issued a citation to Consol after he observed accumulations of water in the E bleeder district more than 36 inches deep in some

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[7] "Bleeder entries" are defined as "panel entries driven on a perimeter of a block of coal being mined and maintained as exhaust airways to remove methane promptly from the working faces to prevent buildup of high concentrations either at the face or in the main intake airways." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 55 (2d ed. 1997).

[8] By the time of the hearing, a company-wide policy required bleeder examiners to travel in pairs.

[9] Historically, most water accumulations in the bleeder system have been clear, though some could be cloudy, orange, and murky from magnetite and sulfur. Tr. 488-89.

areas. Gov't Ex. 7. On December 10, 2012, Inspector Young again cited the operator for accumulations of water in the E bleeder district; the depth of the water exceeded 24 inches in certain areas. Gov't Ex. 8. The inspector designated both violations as reasonably likely to result in lost workdays and/or restricted duty. In the latter citation, the inspector informed the operator that similar violations in the future might lead to greater enforcement action by MSHA. Gov't Ex. 8.

After the December 10 citation, Consol conducted additional exams in the bleeder. It also installed a monitoring system for the surface sump pump. The computer monitors showed air pressure in the bubbler rather than inches of water in the bleeders, and displayed visual alarms when the sump pump was activated or when the surface tanks were full. 37 FMSHRC at 1624. However, the monitoring system failed to work consistently, due in part to equipment failures. For example, a power outage in the mine on February 1, 2013 might have caused the air pumps to malfunction. The surface pump malfunctioned before February 5, 2013, the date of the citation at issue, due to a hole in its bubbler tubing.

B. Events of February 5-6, 2013

Sometime before 4:00 a.m. on February 5, 2013, Dan Stalnaker, a certified examiner, entered the E-15 side of the bleeder district.[10] Stalnaker encountered an accumulation of water near the E-15 sump; the water contained debris, gridlocks, and pieces of wood but was otherwise relatively clear. Stalnaker donned chest waders that had been left in the mine, and attempted to continue his examination. In total, he was able to take ventilation readings at three evaluation points. He tried to bypass the water by traveling through a man door that was three feet high. However, water poured into his waders when he bent over trying to pass through the doorway, and his methane detector became wet. Stalnaker left the bleeder district between 4:00 and 4:30 a.m. and informed shift foreman Robert Price and mine foreman Mike Giavonelli that he could not complete his bleeder exam because of the wet gas detector. 37 FMSHRC at 1630.

After Stalnaker reported the problem with the bleeder, Price and Giavonelli took separate actions. Giavonelli sent a miner to check whether the surface sump pump was functioning properly. The miner discovered that the surface pump was not running, and at approximately 5:05 a.m. he bypassed the bubbler, solving the problem. Meanwhile, Price instructed another examiner, Kevin Saunders, to complete the bleeder exam by starting from the opposite direction of the bleeders as Stalnaker. *Id.* at 1630-31.

Saunders entered the E-22 side of the bleeder district and traveled through water up to three feet deep between E-21 and E-19. At 10:00 a.m., Saunders encountered waist-deep water near the E-15 sump area that Stalnaker had intended to examine, and retreated before he could complete the exam. *Id.* at 1631.

Stalnaker and Saunders combined to inspect all but two of the ventilation evaluation points in the E bleeder district — the E tailgate overcast and the E tailgate #2 entry (which were near the E-15 sump). Gov't Ex. 3 at 000045; 37 FMSHRC at 1637. The entries in the record

[10] Stalnaker was conducting the exam in place of Jamie Greene, the regular examiner for the E bleeder district. 37 FMSHRC at 1629-30.

book for the overcast and #2 entry in the E tailgate were left blank. Despite this deficiency, Foreman Giavonelli countersigned the record book. While Giavonelli was aware of the hazard from a conversation with Stalnaker, it is undisputed that neither Giavonelli nor Stalnaker nor Saunders noted the existence of hazardous water accumulations in the record book. 37 FMSHRC at 1658-59.[11]

At around 10:00 a.m. on February 5, MSHA received a section 103(g)[12] complaint regarding water accumulation in the E bleeder district. Gov't Ex. 3 at 000011. MSHA Inspector William Gross, who was performing a regular quarterly inspection of the mine, was informed of the complaint and began an inspection of the bleeders around E-15 through E-22 in the E bleeder district sometime after 11:30 a.m. Gross and Consol employee John Brottish entered the bleeder from the E-15 side. Gross found water ranging from 12 to 42 inches in depth, observing that it was murky and obscured the walkway in some areas. He also noted that the area near the E-15 sump was completely flooded.[13] Gross finished his inspection between 8:30 and 9:00 p.m. that day. 37 FMSHRC at 1626-27. During Inspector Gross' examination he walked with Brottish virtually the entire length of the bleeder before eventually withdrawing as a result of deep water at the E-15 sump area that Stalnaker had sought to inspect. During this inspection, Inspector Gross and Brottish passed through and beyond the area of 36 inch water through which Saunders had walked previously in the E-19 to E-21 area.

Inspector Young arrived at about 9 p.m. to relieve Gross and complete the inspection. Young had previously cited similar violations in this area of the mine in November and December of 2012. He testified that his policy was to cite the bleeder for hazardous accumulations of water only when one of the following conditions was met: (1) water was taller than his 18-inch boots, (2) water extended over a large area, (3) water was discolored, or (4) water contained tripping hazards. *Id.* at 1624.

At around 11:00 p.m., Inspector Young spoke to Stalnaker and Saunders about their examinations. Young entered the bleeder at about 2:00 a.m. on February 6. Young observed the E-15 area but did not continue to the opposite side of the bleeder district; therefore, Young did

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[11] The ventilation plan required a weekly examination of the bleeder. Therefore, the operator had until midnight on February 5 to complete the examination.

[12] Section 103(g) of the Mine Act provides that "[w]henever . . . a miner . . . has reasonable grounds to believe that a violation of . . . a mandatory health or safety standard exists . . . such miner . . . shall have a right to obtain an immediate inspection by giving notice to the Secretary . . . of such violation." 30 U.S.C § 813(g). The section 103(g) complaint stated as follows: "I overheard firebosses saying that the E-15 bleeders [were] flooded today. Can this cause ventilation problems and blow up the mine? Please look into this[.] [T]hanks." Gov't Ex. 3 at 000011.

[13] As the Judge noted, Gross testified that if he had been alone, he would not have entered the water because no one could have helped him if he fell. Later, after returning to the MSHA office, Gross was verbally reprimanded by the assistant district manager for entering water that deep.

not observe the conditions in E-19 through E-22. Tr. 118. At E-15, Young checked the man door Stalnaker had attempted to use on February 5 and found that the water was two feet deep, even though the pump had been running for 20 hours by that time. After inspecting the E-15 area, Inspector Young issued Citation No. 7024068 and Order No. 7024069 to the operator.[14] 37 FMSHRC at 1628-39. Young believed that the root cause of the water accumulations in the E bleeder district was Consol's failure to check the bleeder entries and equipment after the 12-hour power outage earlier in the week. *Id.* at 1632. He was not aware, however, that Consol examiner Greene had examined the bleeder the day before (February 4), and that the water had accumulated after that examination. *Id.* at 1651.

The citation alleged a violation of 30 C.F.R. § 75.370(a)(1) for failure to comply with the mine's approved mine ventilation plan. The citation alleged that the bleeders were not maintained for safe travel because there were accumulations of water from 12 to 42 inches in depth, for a total distance of 2350 feet.[15] Moreover, the citation noted that the mine floor in this area could be irregular and contained rib sloughage and other tripping hazards. Gov't Ex. 1; 37 FMSHRC at 1628-34. The order alleged a violation of 30 C.F.R. § 75.364(h) in that the operator's agents had failed to note the hazardous water accumulations in the record book.

Inspector Young designated both the citation and order as being S&S, highly likely to cause two fatal injuries, and a result of the operator's high negligence and unwarrantable failure to comply with the cited standards. Tr. 126. MSHA proposed a penalty of $14,373 for the citation and $14,743 for the order. 37 FMSHRC at 1661-62.

C. The Judge's Decision

The Judge found that both the citation and order were S&S, highly likely to result in two fatal injuries, and a result of the operator's high negligence and unwarrantable failure. Consol does not contest either finding of violation; it does contest the negligence, gravity, S&S, unwarrantable, and penalty determinations.

The Judge found that the citation was properly designated as S&S and likely to result in fatal injuries because a miner traveling alone might trip or stumble and drown in the deep water. The Judge found that the citation was a result of high negligence because the operator knowingly exposed examiners to the cited hazard. With regard to unwarrantable failure the Judge determined that the cited hazard was extensive, obvious and posed a high degree of danger; that the operator knew of the violation prior to Saunders' exam; that the operator was on notice that greater efforts were needed for compliance; and that the violation was a result of high negligence. *Id.* at 1642-1654.

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[14] Sometime after Young arrived at the mine, Andy Yablonsky, an employee of the operator, finished the ventilation exam including inspecting the two bleeder evaluation points that neither Stalnaker nor Saunders were able to inspect. Therefore, Inspector Young did not cite the operator for failing to complete a ventilation exam. 37 FMSHRC at 1638.

[15] The distance was later amended from 2350 feet to 2250 feet. Gov't Ex. 1 at 4.

Regarding the order, the Judge determined it was properly designated as S&S and highly likely to result in fatal injury because the failure to record the hazard made it likely that more miners would be exposed to the conditions described in the citation. The Judge affirmed high negligence for the order because three examiners and foremen, who were aware of the hazard, failed to note it in the record book. She affirmed the unwarrantable failure findings because the citation was the result of an unwarrantable failure, and the relevant facts for the order were identical. *Id.* at 1654-61.

II.

Disposition

A. Citation No. 7024068

Significant and Substantial

Substantial evidence supports the Judge's finding that the violation was significant and substantial. 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.*, 6 FMSHRC 1 (Jan. 1984), 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.

Id. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 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).

Consol does not contest the finding that the accumulations of water violated the ventilation plan's requirement that the bleeders be maintained safe for travel, thus satisfying the first element of the *Mathies* test.

The second element of the test, whether the violation contributed to a discrete safety hazard, is also supported by substantial evidence. The bleeder district contained deep water with various tripping hazards, including uneven floor and debris. Tr. 723-24. Stalnaker and Saunders were exposed to these water accumulations. 37 FMSHRC at 1630. In walking through the water, they both became extremely wet, and Stalnaker had his methane detector get wet and fail when he attempted to climb through a mandoor. *Id.* Some of the water accumulations were so murky that a miner would not be able to see his feet or tripping hazards as he walked through the

water. Tr. 121, 172, 312, 348, 354-56, 392-95, 411-12. Hence, it was reasonably likely that a miner could trip and fall while walking through the water. Tr. 121-22, 143, 230.

Consol argues that the "hazard" identified in the second element of the *Mathies* test must be a hazard contemplated by the standard, and that 30 C.F.R. § 75.370(a)(1) is directed at ventilation issues, not tripping hazards.[16] However, the determination of adequate ventilation in the bleeder requires examinations on a weekly basis. Examinations presuppose that the examiners will be able to safely travel to the places within the mine where the examinations must be conducted. Thus, Paragraph AA of the Enlow Fork Mine's approved ventilation plan requires that the walkways in the bleeder entries be maintained in a manner safe for travel. Tr. 56; Gov't Ex. 1. The requirement of a safe travelway is inextricably intertwined with the ventilation plan requirements of section 75.370.

As to the third element of the *Mathies* test, substantial evidence supports the finding of a reasonable likelihood that the hazard contributed to would result in injury. The Judge credited competent testimony that a miner who tripped and fell was, at a minimum, reasonably likely to suffer reasonably serious injuries such as broken bones. Tr. 121-22.

A reasonable likelihood of broken bones satisfies the fourth element of *Mathies.* The Commission has long recognized that broken bones and other injuries likely to result from a trip-and-fall accident are sufficiently serious in nature to support an S&S designation. *See, e.g., Maple Creek Mining, Inc.*, 27 FMSHRC 555, 562-63 (Aug. 2005) (affirming a Judge's conclusion that serious injuries such as leg or back injuries would arise from the failure to maintain an escapeway in a safe condition); *Buffalo Crushed Stone Inc.*, 19 FMSHRC 231, 238 n.9 (Feb. 1997) (concluding that slipping on a walkway would result in reasonably serious injuries such as a finger or a wrist fracture); *S. Ohio Coal Co.*, 13 FMSHRC 912, 918 (June 1991) (affirming a Judge's conclusion that a trip-and-fall accident would result in reasonably serious injuries such as "sprains, strains, or fractures"). A trip-and-fall accident resulting in broken bones was especially serious here, where the bleeder examiner walked long distances by himself over rough terrain, with no communications link to the surface or to any other miner. Tr. 36-39, 705-06; *see* 37 FMSHRC at 1622.

Consol notes an absence of previous injuries, the fact that only careful examiners entered the area, and its rapid action to abate the condition. These facts, however, do not refute the Judge's S&S finding. The Commission has noted that "[t]he fact that injury has been avoided in the past or in connection with a particular violation may be 'fortunate, but not determinative'" of the question of whether a violation was S&S. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 867 (June 1996) (quoting *Ozark-Mahoning Co.*, 8 FMSHRC 190, 192 (Feb. 1986)). Further, the exercise of caution is not an element in determining the likelihood of injury once the reasonable likelihood of the occurrence of the hazard is established, because "[w]hile miners should, of course, work cautiously, that admonition does not lessen the responsibility of operators, under

[16] Consol relies on an ALJ decision in *Oak Grove Resources*, 34 FMSHRC 594 (Mar. 2012) (ALJ), but acknowledges that other Commission Judges have held to the contrary. *See Consolidation Coal Co.*, 15 FMSHRC 1408, 1413-15 (July 1993) (ALJ); *Oak Grove Res.*, 35 FMSHRC 3039, 3052 (Sept. 2013) (ALJ).

the Mine Act, to prevent unsafe working conditions." *Eagle Nest, Inc.*, 14 FMSHRC 1119, 1123 (July 1992).[17] Finally, when determining whether a violation is S&S, abatement after the violation is cited should not be considered. *Crimson Stone v. FMSHRC*, 198 F.App'x. 846, 851 (11th Cir. 2006).

Substantial evidence and sound legal authority support the Judge's conclusions. Therefore, we affirm the finding that the violation was S&S.

William I. Althen, Acting Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

[17] We have consistently emphasized that, in evaluating the risk of injury, the vagaries of human conduct cannot be ignored. *See Great W. Elec. Co.*, 5 FMSHRC 840, 842 (May 1983); *Lone Star Indus.*, 3 FMSHRC 2526, 2531 (Nov. 1981); *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984).

Opinion of Acting Chairman Althen and Commissioner Young:

A. Citation No. 7024068

Gravity

We remand the gravity determination for a re-assessment of gravity. In doing so, we find that substantial evidence does not support a finding of a high likelihood of a fatality. We do not otherwise express an opinion on the assessment of gravity.

The Judge determined that the violation was highly likely to result in two fatal injuries, agreeing with Inspector Young's designation as to both likelihood and degree of injury. 37 FMSHRC 1616, 1662 (July 2015) (ALJ). In determining the gravity of a violation, Judges are not bound to apply the tables in 30 C.F.R. Part 100, which the Secretary of Labor uses to propose penalties based on a system of points for a multitude of factors. Rather, Judges must assess penalties considering the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i). Instead of narrowly parsing gravity determinations, we consider gravity holistically, considering "factors such as the likelihood of injury, the severity of an injury if it occurs, and the number of miners potentially affected." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2049 (Aug. 2016).

The finding of a high likelihood of two fatalities rests upon the testimony of Inspector Young, who testified that a miner walking alone in water with tripping hazards and a depth of 36 inches or more in this bleeder was highly likely to fall, hit his head or otherwise become incapacitated, and drown. Because two miners entered the water separately and from different ends of the bleeder, the inspector asserted two miners would be potentially affected.

The Department of Labor's Mine Safety and Health Administration ("MSHA") allows individual miners to examine bleeders. Every day individual miners examine bleeders by themselves. Additionally, bleeders are generally wet. 37 FMSHRC at 1620. In fact, the operator's ventilation plan recognizes that water will accumulate in the bleeder, and only requires its removal to the extent that water would prevent safe travel or affect ventilation. Gov't Ex. 3 at 000009. Only examiners who are experienced at going through bleeders perform the weekly examinations. Except for repair work, no other miner may enter or has reason to enter a bleeder.

At the same time, there is always the possibility that a miner walking in any part of a mine will trip and fall. Without doubt, therefore, it is possible that a miner walking in a bleeder with water in it could trip and fall. A fall in water by oneself without an ability to communicate with others increases the danger from a fall.

On November 20, 2012 and December 10, 2012, Inspector Young cited the operator for accumulations of water in this E-tailgate bleeder system. The citations noted that in certain areas the depth of the water was as much as 36 inches in one citation and 24 inches in the other. The water contained various tripping hazards. Gov't Ex. 7. The inspector designated the violations as significant and substantial ("S&S"). In those instances, however, Inspector Young marked the gravity as reasonably likely to result in lost workdays and/or restricted duty. *Id.* Thus, these

citations were for the same bleeder and for similar (with the exception of the depth of the water on December 10, 2012) conditions as the conditions on February 5.

The inspector issued the November 20 citation as low negligence, the December 12 citation as moderate negligence, and the citation in contest here as high negligence. Clearly, the inspector responded to the repetition of the condition. The inspector did not distinguish the danger in November and December from February 5.

Further, Inspector Young testified that MSHA permits miners examining bleeders to walk in up to at least 18 inches of water. Tr. 46. As a matter of MSHA policy, therefore, an individual miner examining a bleeder is considered safe when walking through 18 inches of water. Of course, a miner knocked unconscious from a fall in the permissible 18 inches of water also would be likely to drown. In light of the enforcement policy on 18 inches of water, it was incumbent upon MSHA to explain why a miner is safe from drowning in 18 inches of water but highly likely to drown in deeper water.

During his testimony, Inspector Young explained the possibility of a miner tripping in a bleeder. He testified about objects in the water of the travelways such as pump lines and crib blocks, and spoke of a trip and fall resulting in an examiner hitting his head. Tr. 121-23. Further, Dan Stalnaker was wearing waders, which would have increased the difficulty of returning to a standing position if a fall into water fills the waders.

Inspector Young testified that he had sought support for his gravity determination in MSHA's records. His research revealed only one drowning incident in a bleeder. MSHA, Report of Investigation, Underground Coal Mine, Other (Drowning) Accident (2000). In that instance, the cause of death was "drowning due to occlusive coronary artery disease." The miner either fell into a sump due to his condition or accidentally fell and was unable to get out due to the heart condition. That sole incident, while tragic, does not support the notion that it is "highly likely" a miner — let alone two miners — who are presumed safe in 18 inches of water, will drown in the circumstances of this case.

Other than Inspector Young's testimony, the Secretary did not present any evidence that a miner is highly likely to drown in a bleeder. The inspector's prior actions in not citing any likelihood of a fatality from water in this bleeder appear inconsistent with his assertion of a high likelihood of two fatalities from the February 5 violation. On the other hand, he did testify about tripping hazards, the absence of communications, and the danger of being alone.

Accordingly, we have determined that substantial evidence does not support the Judge's determination of a "high likelihood" of fatal injuries to either or both examiners under the facts presented in this case. Otherwise, as manifest from the foregoing discussion, the record is mixed. The Judge's findings do not satisfy her obligation to provide, in the gravity portion of the decision, a reasoned basis from the totality of the record for the conclusion of a degree of injury which could range from broken bones to a reasonable likelihood of a fatality. We therefore remand for a determination of the gravity of the citation.

Negligence

As in the determination of gravity, the Commission and its Judges are not bound or even significantly guided by the Secretary's definitions of "negligence" in the penalty regulations set forth in 30 C.F.R. Part 100. We thus reject the operator's contention that a Commission Judge may not find high negligence where the operator provides any mitigating circumstances for that violation. *See Mach Mining, LLC*, 809 F.3d 1259 (D.C. Cir. 2016); *Brody Mining, LLC*, 37 FMSHRC 1687, 1701-03 (Aug. 2015) ("Commission Judges are not bound by the definitions in Part 100 when considering an operator's negligence . . . [and] may find 'high negligence' in spite of mitigating circumstances . . . ."). Of course, we also reject any notion that the Judge must find high negligence if he does not find a "mitigating" circumstance. Indeed, the Commission has moved completely away from usage of the Part 100 definitions of negligence or any use of the nebulous notion of "mitigation." We employ "a traditional negligence analysis." *Mach Mining*, 809 F.3d at 1264; *American Coal Co.*, 39 FMSHRC 8, 14 (Jan. 2017). In assessing negligence, the Judge must consider "what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation." *Brody Mining*, 37 FMSHRC at 1702.

Applying a traditional and holistic "reasonable person" negligence analysis to the case before us, Consol Pennsylvania Coal Company ("Consol") had "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." *Leeco, Inc.*, 38 FMSHRC 1634, 1637 (July 2016)[1] (citing *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983)). Because negligence relates to an operator's duty of care to avoid a violation, the "negligence inquiry [is] circumscribed by [the] scope of duties imposed by [the] regulation violated." *Brody Mining*, 37 FMSHRC at 1702 (citing *Spartan Mining Co.*, 30 FMSHRC 699, 708 (Aug. 2008)). When determining the level of negligence for a violation of a ventilation plan provision, as is the case here, a "Judge must consider the actions that a reasonably prudent operator would or would not have taken, under the circumstances presented that are relevant to an operator's obligation to comply with the ventilation plan provisions in question." *Id.* at 1703.

The Secretary proves negligence if he proves by a preponderance of the evidence that the operator failed to act under the circumstances as a reasonably prudent operator familiar with the mining industry, the relevant facts, and the protective purpose of the regulation.[2] In this case, that means the Secretary must prove that the actions taken by the operator after the prior

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[1] *Leeco* involved a fatality. The Commission found the operator was not negligent because it had met the standard of care — that is, had acted as a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation.

[2] The Commission requires the Secretary carry the burden of proving its allegations against an operator holding, "[t]he burden of establishing an operator's negligence under section 110(i), 30 U.S.C. § 820(i), rests on the Secretary." *U.S. Steel Mining Co.*, 8 FMSHRC 1284, 1290 (Sept. 1986); *see also Jim Walter Res., Inc.*, 30 FMSHRC 872, 878 (Aug. 2008) (ALJ) ("The Secretary's burden is to prove the violations and related allegations, e.g., gravity and negligence, by a preponderance of the evidence.").

citations — installation of an automatic secondary pumping system with a bubbler, increased examinations, installation of a monitoring system, etc., *see infra*, slip op. at 18 (discussing efforts) — were insufficient to constitute the actions of a prudent operator. Of course, in a negligence context, the Judge also must look at the reasonably foreseeable consequences of the operator's actions because the foreseeable consequences affect the duty of care.

If negligence exists, the Judge must deal with the degree of negligence. Here, again, the Commission is not bound by the MSHA definitions and, certainly, not by definitions in Section 100.3. For example, the Commission finds high negligence when there is an "aggravated lack of care that is more than ordinary negligence." 37 FMSHRC at 1703 (*quoting Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)). To prove high negligence, the Secretary must prove that the operator's actions after the prior citations demonstrate a level of negligence appreciably greater than ordinary negligence — that is, aggravated misconduct. *See Leeco*, 38 FMSHRC at 1637-38; *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1976-77 (Aug. 2014); *A.H. Smith Stone*, 5 FMSHRC at 15-16.[3] In reviewing the Judge's determination, therefore, we must determine whether substantial evidence[4] supports a finding that the accumulation of water in the bleeder on February 5 resulted from an aggravated lack of care, taking into account all of the facts and circumstances.

The Judge's finding of high negligence rests at least in part on her finding that the violation was highly likely to result in fatal injuries. As explained above, substantial evidence does not support a high likelihood of fatalities. Furthermore, the Judge erred by not properly considering evidence of the operator's efforts to address the known propensity for water buildups prior to February 5 — the date of this violation. Despite these errors, we do not find it appropriate for us, at the Commission level, to designate the degree of negligence. We therefore vacate and remand the negligence issue for reconsideration by the Judge in accordance with this opinion.

First, regarding the role of the Judge's gravity determination in the negligence determination, we have long held that operators must address highly dangerous situations "with a degree of care commensurate with that danger." *A.H. Smith Stone*, 3 FMSHRC at 15. Certainly, therefore, an operator must exercise a very high degree of care to avoid a violation that is highly likely to result in one or more fatalities. However, as we have explained, substantial evidence

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[3] The use of "mitigation" essentially drops from the analysis under the reasonably prudent person standard. Of course, actions that might constitute "mitigation" will play into the reasonable person analysis, but negligence is not a question of whether the operator mitigated negligence. The standard is what a reasonably prudent person would have done. If the operator was negligent, then a question may arise whether the evidence demonstrates an aggravated lack of care. Of course, the Secretary bears the burden of proof throughout the hearing. Even under the Secretary's definitions, the operator does not bear a burden of proving mitigation.

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

does not support the Judge's conclusion of a high likelihood of two fatalities. Inspector Young's prior citations put Consol on notice of a reasonable likelihood of broken bones, and we accept the conclusion that there was a reasonable likelihood of a reasonably serious injury arising from the hazard contributed to by the violation. However, "reasonable likelihood" is a term of art that does not amount to a finding that the injury is "likely" in the standard sense, let alone "highly likely."

"Highly likely" demands evidence of probability exceeding even that used to demonstrate that a condition constituted an imminent danger, or arose from a flagrant violation of a mandatory standard. *See* 30 U.S.C. § 802(j) (imminent danger exists where death or serious physical harm "could reasonably be expected" before abatement); 30 U.S.C. § 820(b)(1) (flagrant violation requires violation to cause or reasonably be expected to cause death or serious bodily injury).

Moreover, a reasonable likelihood of broken bones is significantly different from the foreseeability of a likelihood of death. Thus, it was error for the Judge to premise a finding of high negligence on her erroneous conclusion that it was highly likely that the violation would result in two fatalities. At the same time, the violation was serious, and the negligence attributed to the operator must take into account any reasonable foreseeability that miners would be exposed to the hazard created by the water before the condition could be corrected. If an operator willfully exposes its miners to a known hazard, a finding of high negligence is likely appropriate, regardless of the prior efforts to prevent the hazard.

In this case, Stalnaker and Saunders unnecessarily exposed themselves to danger by entering the water on February 5, 2013. 37 FMSHRC at 1630-31. Of course, reasonably foreseeable consequences of one's actions, including reasonably foreseeable injuries, play a role in a negligence analysis. Therefore, if Consol should have reasonably foreseen the entry of examiners into the water and the nature of any reasonably foreseeable injuries of such action, it would be appropriate to take into account Stalnaker's and Saunders' entry into the water in considering negligence of the operator in the buildup of the water. At the same time, for the reasons set forth in the gravity discussion above, there was no reason for the operator to foresee a "high likelihood" of fatalities — a type of injury that the very same inspector in recent citations had not associated with high water in the bleeder.[5]

It is undisputed that Price, who received Stalnaker's report in the early morning of February 5, was aware of the hazardous water in E-15 prior to Saunders' exam. However, Stalnaker had only inspected the E-15 area. There is no basis for holding that Price knew there were violative water accumulations in the opposite side of the E bleeder district, in E-22, the place where Price instructed Saunders to begin his exam. The evidence therefore suggests that Price did not instruct Saunders to travel through excessive water, but to complete the ventilation exam using an alternate route which, to Price's knowledge, did not contain excessive water, and the Judge's finding that a miner was exposed to a known hazard is not supported by substantial evidence.

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[5] We need not decide at this point what, if any, role Inspector Gross' voluntary walk through the water may or should play in the reasonable foreseeability analysis.

Additionally, while the Judge did mention actions taken by Consol to address the issue of water buildups after the prior citations and before February 5, she erred in rejecting outright any importance of such actions in terms of reasonably prudent actions by a reasonably prudent operator in response to the prior violations.[6] The Judge should have analyzed the effect of the operator's pre-violation preventive efforts, the equipment failures that plagued the pumping system, and abatement efforts following the discovery of the hazard.

Here, the Judge found significant actions by the operator after the prior citations and before February 5. It is clear that the bubbler and the bubbler monitor at the surface pump were actually operational before February 5 and that subsequent damage to tubes prevented them from working effectively. Greene testified that "[t]he buffer [bubbler] system was an upgrade" installed prior to February 5th (Greene was responding to a question about upgrades installed before the remote monitoring system in the foreman's office, which was installed shortly after February 5). Tr. 521-22. William Batton, who worked for MVI, the contractor who serviced the surface pump, agreed that on February 5, a gauge on the bubbler system would tell the depth of water. Tr. 542. He also testified that, when called to the scene on the 5th, he found that the bubbler tubes had been damaged from going down the borehole. He returned and installed new tubes on the 7th. Tr. 534-35.

Further, the operator did not rely solely upon mechanical improvements. It also ordered increased inspections of the bleeder for which only one inspection per week was required by the standard. These extra inspections must be considered in the calculation of negligence. Indeed, the Judge found that the regular bleeder inspector looked at the bleeder after the power outage and did not find a presence of water. Based upon that finding, it appears that if the bubbler tube had not developed holes, it presumably would have alerted the operator that the water level in the sump was getting too high because (1) the readings on the monitor would have been accurate and (2) the sump pump would have automatically activated.[7]

We agree with our colleague, Commissioner Cohen, that Stalnaker and Saunders entering the water is essentially irrelevant to the determination of whether Consol's effort to prevent the accumulation of water was reasonable. Slip op. at 39. Stalnaker's decision to enter the water is only relevant to the evaluation of the foreseeability of an injury if evidence in the record demonstrates it was foreseeable that a miner would enter more than 18 inches of water in an

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[6] The Judge utilized the Part 100 standard of negligence and, therefore, considered the operator's actions in terms of "mitigation." Of course, as we have said, the reasonably prudent person test is holistic. Under that standard, rather than thinking in terms of "mitigation," adjudicators should think in terms of steps a reasonably prudent person would take under the same or similar circumstances.

[7] Preventive efforts included additional exams of the E bleeder district and a remote monitoring system. Equipment failures included a power outage on February 1 that could have shut down various air pumps and a surface pump hole in the bubbler line that caused the surface pump to malfunction on February 5. Abatement efforts included Ciapetta fixing the surface sump pump at 5:00 a.m. and trucks hauling away water from the mine starting at 7:00 a.m.

effort to perform the required bleeder inspection. The Judge must evaluate the prudence of the operator's efforts to prevent an additional water accumulation in light of such foreseeability, if any. We do not prejudge the Judge's decision on remand.

The fact that water built up tells us that the operator's efforts failed to prevent another violation after the December citation; it does not tell us whether the efforts by the operator were commensurate with what a reasonable person would have done in light of reasonably foreseeable consequences or how far off the mark they were. The negligence question is whether the actions of installing the bubbler, the bubbler monitoring systems, and increasing inspections suffice as measures a prudent operator would have taken under the circumstances, i.e., with two prior citations for water accumulations that might have resulted in lost workdays. Assuming Consol was negligent, the next question would be whether the bubbler and monitoring systems and increased inspections were so inadequate as to demonstrate an aggravated lack of care warranting a finding of high negligence.

Unwarrantable Failure

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d). We have held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2002-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

Whether the conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case, including (1) the extent of the violative condition, (2) the length of time that it has existed, (3) whether the violation posed a high risk of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator has been placed on notice that greater efforts are necessary for compliance. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2330 (Aug. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1350-57 (Dec. 2009). These factors must be viewed in the context of the factual circumstances of each case. *Consolidation Coal Co.*, 22 FMSRHC 340, 353 (Mar. 2000). A Judge may determine, in his or her discretion, that some factors are not relevant or may determine that some factors are less important than other factors under the circumstances. *Brody Mining*, 37 FMSHRC at 1692.

Although a separate analysis, the determination of unwarrantable failure essentially embodies a combined analysis of gravity and negligence considerations. For example, when evaluating whether the violation posed a high risk of danger, the Judge must consider whether the Secretary demonstrated it was reasonably foreseeable that miners would enter deeper water. Further, the Judge did not sufficiently consider the broken discharge lines, the malfunctioning bubbler, or the mine's efforts to prevent the flooding through additional inspections, and she discounted the operator's prior efforts to deal with water and the various apparently

unanticipated mechanical failures. *See* 37 FMSHRC at 1650. The Judge lost sight of the ultimate aim of the unwarrantable failure designation. As the Commission has said:

> We conclude that the judge erred in finding unwarrantable failure based on the operator's "failure to leave any stone unturned" and take "every conceivable step" in attempting to eliminate the violations. The judge, after referring to the proper standard for unwarrantable failure set forth in Commission precedent, failed to apply it. In effect, he imposed a standard for unwarrantable failure close to one of strict liability.

Peabody Coal Co., 18 FMSHRC 494, 498 (Apr. 1996) (citation omitted).

The Commission has stated that "a judge's factual findings are often colored by the legal standard applied." *Dolan v. F & E Erection Co.*, 22 FMSHRC 171, 180 n.10 (Feb. 2000). This is borne out by consideration of the seven factors underlying the Judge's unwarrantable failure analysis in this case.

a. Degree of danger

The Judge found that the degree of danger was a high likelihood of two fatalities. 37 FMSHRC at 1651-52. For the reasons set forth above in the gravity discussion, substantial evidence does not support a high likelihood of two fatalities. Consequently, the Judge's unwarrantable failure analysis significantly overstates the degree of danger. This error, standing alone, dictates remand.[8]

b. Length of Time

Under the Commission's unwarrantable failure legal standard, "a Judge may determine, in his or her discretion, 'that some factors are not relevant, or may determine that some factors are much less important than other factors under the circumstances,'" as long as the Judge considers all of the factors. *Brody Mining*, 37 FMSHRC at 1692 (quoting *IO Coal Co.*, 31 FMSHRC at 1351). The Judge found that "the accumulation likely occurred sometime after Greene's last examination, which was less than 48 hours from the time the citation was written." 37 FMSHRC at 1651.

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[8] We are greatly concerned by the incaution exercised by the Secretary and the Judge in designating these violations as "highly likely" to result in a fatal injury. Overcharging and hyperbole in this context breed disrespect for the law and skew the perspective one must employ in discerning merely serious violations from those where the specter of death was truly clear and present. Violations that should have been reasonably foreseen as creating a grave and imminent risk of death or serious bodily injury must be dealt with severely to deter similar transgressions. In such cases, the operator is under a duty to take timely and aggressive actions to prevent miners from being exposed to a deadly hazard caused or contributed to by the violation. It is apparent that the misperception of the danger here infected the Judge's evaluation of the operator's culpability.

Based upon the Judge's findings, the violation arose after Greene's last examination, and the operator learned of the violation when Stalnaker found water deeper than 18 inches. On remand, the Judge must consider the length of time the violation existed as part of her unwarrantable failure analysis.

c. Extent

The Judge found that the water stretched for 400 feet at the 47 crosscut (at a depth of 12 to 42 inches) and from 1,800 feet (at a depth of 12 to 36 inches) between E-19 and E-21. 37 FMSHRC at 1651. However, the Judge also noted that the water in some locations was only a few inches deep. *Id.* The Judge erred by taking into account the entire length of the bleeder because in doing so, she considered non-violative areas.[9]

d. Notice that Greater Efforts Were Necessary

The Commission has recognized that past violations and discussions with MSHA about a problem are relevant to whether an operator was on notice that greater efforts were necessary to comply with a standard. *IO Coal*, 31 FMSHRC at 1353. Without question, the operator was on notice due to its prior citations for the same condition and Inspector Young's explicit notice. 37 FMSHRC 1652-53. The operator presented evidence of increased efforts, but the Judge stated that "[w]hile it is true that at some point, efforts made after notice should 'restart the clock' on notice, the inadequate efforts made by Respondent were not sufficient to do so in this case." *Id.* at 1653. The Judge referred to her prior discussion of the monitoring system, in which she held that "[a]ctions are not mitigation when they are inadequate to the task of preventing, correcting, or limiting exposure." *Id.* at 1650.

The Judge cited two decisions by other Judges for that proposition, each of which was decided under different circumstances. Further, the Judge failed to consider the reasonableness of the preventive measures in light of the fact that the bubbler line encountered a leak preventing it from being effective.

Here, the mine installed an automatic secondary pumping system and a bubbler. It began daily monitoring of the water level through the bubbler's readout, but the bubbler gave false

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[9] The Judge's factual finding underlying her conclusion was wrong, as Commissioner Cohen acknowledges. Slip op. at 41 n.7. But her analysis also misapprehends the relevance of the extent of the water to a finding on the question of unwarrantable failure, i.e., whether the extent of the water gave Consol more reason to have discovered it or reflects on the reasonableness of its actions in attempting to prevent the accumulation. The Judge found that the accumulation occurred less than 48 hours before citation was issued. 37 FMSHRC at 1651. More importantly, the evidence is positive that Consol had met or exceeded inspection requirements during the week preceding the accumulation. Therefore, we think that a reasonable Judge could find that the extensiveness of the water accumulation is of little, if any assistance in determining whether Consol's violation — namely, the buildup of water in the bleeder — was the result of an unwarrantable failure to comply with the requirement to keep the bleeders safe for travel.

readings because a hole in the bubbler's hose prevented accurate measurement of the water level. The recurrence of a violation in which the operator, despite notice, did nothing is not the same as the recurrence of a violation after significant remedial efforts by the operator. The sufficiency of the remedial efforts bears upon evaluation of the notice factor in the unwarrantable failure determination and must be considered.

Efforts by Consol before February 5 to prevent water accumulations are relevant to whether it had notice of a need for even greater efforts to prevent violations from occurring. In other words, what notice did Consol have of a need to do more than the actions mentioned above? After being cited in December, Consol took those efforts. This raises the issue of how Consol was on notice that greater efforts than even those were required. The Judge dismissed that question out of hand because those efforts failed. It is incorrect, however, to assume, as the Judge did, that the efforts the operator took are irrelevant to the question of whether the operator was on notice that greater efforts were necessary.

e. Pre-citation efforts to abate

Where an operator has notice of an accumulation problem, the level of priority that the operator places on the abatement of the problem is relevant. *Enlow Fork*, 19 FMSHRC at 17. The focus on the operator's abatement efforts is on efforts made prior to the issuance of a citation or order. *Id.* Thus, an operator's efforts in cleaning up accumulations before and during an inspection may support a finding that a violation of a standard requiring that an escapeway be "maintained to insure passage at all times of any person" was not caused by unwarrantable failure. *Utah Power & Light Co.*, 11 FMSHRC 1926, 1934 (Oct. 1989).

The Judge found that the operator acted to abate the violation immediately after discovery of the condition and well before any inspector arrived on the scene. 37 FMSHRC at 1653. Stalnaker informed Price about the water between 4:00 and 4:30 a.m. Price then called the surface to have someone ensure that the surface pump was running. 37 FMSHRC at 1630. At approximately 5:00 a.m., Russ Ciapetta began working to bypass the malfunctioning bubbler system, after which the pump resumed operation. *Id.* The operator started removing water from the tanks at 7:00 a.m. 37 FMSHRC at 1630 n.24; Tr. 624.

The operator called Mon Valley Integration at 10:00 a.m. to discover why the bubbler malfunctioned. 37 FMSHRC at 1632; Tr. 527. However, the Judge essentially gave the abatement efforts little to no weight, stating that there is "no reason to believe that abatement after miners are exposed to a hazard alone makes an unwarrantable failure determination inappropriate." *Id.* at 1654. However, the issue is not whether such efforts, standing alone, preclude an unwarrantable failure finding. The issue is the extent to which the Judge should consider such efforts when balancing unwarrantable failure factors. With the understanding that the violation was not highly likely to cause a fatality, the Judge should consider the immediate efforts to abate the violation before the arrival of any inspector and without any knowledge that MSHA would or had received a section 103(g) complaint.

f. Obviousness

The Judge found that the accumulations of water were "massive and [that] the examiner had to travel through them to complete the examination." *Id.* at 1652. Had the newly installed bubbler monitoring system not failed due to a hole in the line, management would have been alerted earlier to the problem and, indeed, ancillary pumping would have started earlier. However, due to that unknown equipment defect, the accumulation only became obvious when the Stalnaker inspection began and there was no reason to know of the accumulation before that point. Here, the operator could not know of a water buildup until Stalnaker arrived on the scene. Then, it acted immediately to abate the violation.

Given that one part of the unwarrantable failure analysis is to determine whether a mine operator engaged in aggravated conduct constituting more than ordinary negligence, if a violation is obvious only after it is discovered, and there is no reason it should have been discovered earlier, then the condition's obviousness once discovered provides little or no assistance in making a determination of aggravated conduct.[10]

g. Knowledge

The Judge also misapplied the aspect of knowledge. The Judge found that the operator's knowledge of the violation was an aggravating factor because despite that knowledge, "miners were willfully exposed to the condition." *Id.* at 1654. Thus, the Judge stated, "the preponderance of the evidence shows that Stalnaker knew about the condition when he encountered it in the bleeder." *Id.* Similar to the Judge's finding of obviousness, when the operator could not have known or have been reasonably required to have known of the violation until it is discovered, the knowledge factor may not be indicative of aggravated conduct.

Therefore, we would remand her finding of unwarrantable failure.

B. Order No. 7024069

Significant and Substantial

Order No. 7024069 was issued because Consol did not record the accumulations of water in the examination book before Giavonelli countersigned it. 37 FMSHRC at 1656. The Judge found, and our colleagues affirm, that the failure to record the accumulations contributed significantly and substantially to a hazard of tripping and falling in the water of the E bleeder district. They reach this conclusion for two reasons. First, they assert that failing to record the

[10] We disagree with the Judge, and Commissioner Cohen, *see* slip op. at 41 n.10, that the entrance of Stalnaker and Saunders into deep water bears upon the "obvious" element of whether the violation (the accumulation of water) was an unwarrantable failure. MSHA did not cite Consol for the entry into the water, but for the accumulation that existed. If critiquing Consol's actions after the violation (water buildup) occurred bears upon other elements of unwarrantable failure, it has no relevance as to whether the violation was "obvious" before it was discovered and abatement was started.

hazard "made it more likely that miners . . . would enter the bleeder with the mistaken belief that it was free of hazards, contributing to the reasonable likelihood of the danger of falling." Slip op. at 30. Second, they also assert that the failure to record the hazard meant that Consol and MSHA would not have a record of its occurrence, which increased the likelihood of future exposure of miners to hazardous water. *Id.* Consistent with the Commission's decision in *Newtown*, we disagree with their assessment.

In *Newtown*, the Commission directed use of "a 'reasonable likelihood' analysis for determining whether a violation significantly and substantially 'contributes' to a hazard." 38 FMSHRC at 2038. When framing the question, we made it clear that not only must the hazard be reasonably likely, but the violation must *sufficiently* contribute to the causation of the hazard, saying: "[T]he question under step two is whether, under these particular circumstances, the violation (the failure to remove the key from the lock) was reasonably likely *to result* in the restoration of power to the shuttle car cables while the inspection group was working on it." *Id.* (emphasis added). In the context of this case, therefore, the question under step two is whether, under these particular circumstances, the violation (the failure to record the hazard) was reasonably likely to result in miners entering deep water to the point of encountering trip-and-fall hazards. In other words, did the violation sufficiently, i.e., meaningfully or "significantly and substantially," contribute to the occurrence of the hazard.

Illustrating this inquiry, in *Secretary of Labor v. Federal Mine Safety and Health Review Commission*, 111 F.3d 913 (D.C. Cir. 1997), the D.C. Circuit affirmed a finding that a violation did not sufficiently contribute to the hazard of a fire, and, therefore, the violation was not significant and substantial. In that case, a pile of trash was located partially in active and partially in inactive portions of the mine. *Id.* at 916. Only a small part of the pile was located in the active portion of the mine, and thus only a small amount of trash was violative. *Id.*

Although the Secretary introduced evidence that the larger nonviolative portion of the trash pile, the mine's history of methane ignitions and fires, and the trash's combustibility all contributed to the hazard of a fire occurring, the court did not consider those when reviewing the violation's contribution to the hazard. *Id.* at 918. First, the court stated that "[t]he statute requires a decision maker, having found a violation, to make two additional findings: whether there is a 'hazard' to which the violation might contribute; and, if so, whether the violation 'significantly and substantially' contributes to that 'hazard.'" *Id.* at 917. "When evaluating the first question," the court continued, "the Commission does consider surrounding conditions." *Id.* However, "when the Commission analyzes whether a particular violation 'significantly and substantially' contributes to the 'hazard,' it considers, as it did here, only the particular violation's contribution." *Id.* at 917-18. Quoting the Commission, the court then specified that "[i]t is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial." *Id.* at 918 (quoting *Texasgulf, Inc.*, 10 FMHSRC 498, 500 (Apr. 1988)). Accordingly, the court concluded, "[a]lthough the Secretary's evidence may suggest that the [nonviolative] trash enhanced the danger of fire, a reasonable factfinder could have concluded that the record contained insufficient evidence that this danger was *markedly increased* by the few additional [violative] items." *Id.* (emphasis added).

Applying the reasoning of the D.C. Circuit, the foreman's failure to record the deep water before signing the examination book did not sufficiently contribute to a hazard of miners tripping and falling in deep water to make the failure an S&S violation. First, abatement was occurring

before Giavonelli signed the book, and no miners other than a bleeder examiner were even permitted to enter the area. This active abatement started well before MSHA was even notified and included calling a contractor, Burns Trucking, that began emptying water from the above-ground tank at 7:00 a.m. 37 FMSHRC at 1630 n.24; Tr. 624. The failure to record the accumulations on February 5 did not contribute in any way to any danger of Stalnaker or Saunders tripping and falling in the water. They entered the water as part of the examination process before Giavonelli signed the report. As the Judge found, the water was obvious, and Stalnaker and Saunders had already encountered and reported the water when Brottish entered the water with MSHA Inspector Gross. The failure to record had no effect on Brottish's or Gross's actions, either.

This is not a situation in which multiple miners could be exposed to a surprising hazard. It is apparent, therefore, that the blank examination page did not contribute to, much less significantly and substantially contribute to, a hazard of a bleeder examiner walking into the water accumulation that resulted in the citation under section 75.370(a)(1). There is no logic to a finding that the failure to record the presence of the water made it reasonably likely that a miner would enter the water. Obviously, a miner could not accidentally enter deep water based upon the absence of a report of deep water.[11]

Second, the failure to record does not sufficiently contribute to a "hazard" that, without a written record, MSHA and Consol would not be aware of water accumulations in the bleeder, thus making it reasonably likely that future examiners would encounter and walk into deep water. Again, it is unclear how failure to record this accumulation would meaningfully contribute to or markedly increase the likelihood of miners entering deep water when they would know they were entering deep water with or without the report. Going further, the absence of a notation of water from the examination record certainly did not mean that Consol was unaware of the accumulation. Indeed, Consol had been aware of the condition for hours before the signing of the record book. From an operational standpoint, Consol had more compelling records of the occurrence beyond the examination book, including increased expenditures for water removal by Burns Trucking.[12] Regarding MSHA's awareness of the hazard, not only did

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[11] Our colleagues assert that the absence of the notation that day made it reasonably likely that Greene, a regular and experienced bleeder examiner, "would enter the bleeder with the mistaken belief that it was free of hazards" at some point in the future. Slip op. at 30. Of course, only bleeder inspectors may walk in the bleeder, and part of their purpose in doing so is to identify hazards that they encounter. The violation in this very case arises from the failure to record hazards found by an examiner. It defies logic and common sense to suggest that Greene, the regular and experienced bleeder examiner, would walk into and through deep water without knowing he was in the water or without knowing it might present a hazard.

[12] Notation of the accumulation would not have provided information beyond that clear to the examiners who encountered the water. Water in the bleeders was not an uncommon occurrence and was not even considered to be a violation up to 18 inches in depth. The examiners could not have provided more detailed information, so that its absence would be material to the reasonable likelihood of injury, without entering the water — an aggravation of the violation, in the eyes of the Judge. Furthermore, one cannot simultaneously maintain that the accumulation was obviously violative to the examiners *and* that it required a record notation to

the Secretary not present evidence that MSHA was reasonably likely to review the book, but it is also entirely speculative to conclude that MSHA not seeing a report of deep water would make the future entry of miners into deep water reasonably likely.[13]

Finally, it is illogical to suggest that examiners would be surprised to encounter the water. Water is common in bleeders, and it is not an insidiously hidden hazard — an examiner would see it before entering it. The problem was the decision to enter the water, not the fact that there was water there, and especially not the fact that the water was not recorded after it had already been encountered.[14]

We do not condone the failure to record a hazard even though the hazard was undergoing abatement. Stalnaker, Saunders, or Giavonelli should have recorded the water, and MSHA appropriately issued an order for Consol's failure to record. Under the circumstances of this case, the absence of the water notation did not meaningfully increase the likelihood of any injury from the current violation or from any future hazard sufficiently to make this violation S&S. The connection between this violation and the occurrence of the identified hazard is too attenuated to survive step two, and for that reason, we conclude that this violation is not significant and substantial.[15]

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avert serious injury or death of examiners who should have known better than to enter the water when they encountered it.

[13] Consol already had increased inspections of the bleeder and of the surface pump. Further, although the Judge did not opine definitively on whether additional long term mechanical abatement measures had been installed on February 5, the evidence demonstrated that solutions were in process, including installation of an electronic remote monitoring system on the Surface Pump and storage tanks, Tr. 737 (Yoho); Tr. 572, 577 (Demidovich); Consol Ex. P; Consol Ex. O, and installation of an alarm system on the surface storage tanks, Tr. 737, 738 (Yoho); Tr. 208 (Young).

[14] The operator's attempts to abate the accumulation were well underway before the record book was signed. While attempting abatement of the problem at its source, the operator continued to attempt to fulfill its responsibilities under the ventilation plan by sending Saunders into the bleeder to take measurements of methane. The nature of the violation here — the failure to record known accumulations whose abatement was already underway — is distinct from the examiners' and MSHA inspectors' decisions to enter the water.

[15] Our colleagues forecast dire, wide-ranging results if our opinion is followed to its logical conclusion. We stress that this is one case drawn from a specific set of facts and circumstances. We arrive at our conclusion by applying established legal principles to the facts of this case, and the applicability of this case to one we may consider in the future depends entirely on the existence of facts that similarly fail to establish a reasonable likelihood of harm arising from the future violation's contribution to a specified hazard.

Gravity

The Judge determined that the violation underlying the order was highly likely to result in fatal injury. 37 FMSHRC at 1662. The order involved the same underlying hazard in the same area as the citation — a trip and fall hazard because of water accumulations in the E bleeder district. We thus vacate the gravity determination and remand for the same reasons, and with the same direction, as the citation.

Negligence

The Judge found that Giavonelli signed the exam book knowing that deep water was present yet not listed in the book. While the operator argued below that it did not have to complete the examination at the time the citation was issued, and therefore it did not have to complete the record, *id.* at 1660, it also conceded the fact of violation. *Id.* at 1656. The operator's arguments below — that Giavonelli was merely signing to say that he saw the sheet and that the time to complete the examination had not yet run — do not offset a negligence finding in this case.

We most certainly do not condone or excuse signing an inspection book at a time when a known hazard has not been listed on the assumption that the condition will be corrected before the time to complete the inspection has elapsed. Here, however, certain factors not considered by the Judge could lead to a finding of ordinary negligence. The Judge should review such factors so that the determination is a full and fair decision based upon all relevant considerations.

First, the Respondent was actively working on the issues omitted from the book, and, given that the area was not an area where miners worked or traveled, it was highly unlikely that any miner not working on and knowledgeable of the issue would enter the bleeder area before the sufficient diminishment of the water. In reality, therefore, the examination book under these especially unique factors played no role in alerting fellow miners of a hazard.

Second, the book did not indicate that Respondent had completed the inspection at the two inspection points that the book omitted. In other words, the book did not represent that a complete inspection had been made at all safety checkpoints. Any knowledgeable person looking at the book would have seen that readings had not been taken at all required checkpoints.

Without prejudging the result in any way, but only to permit a full discussion of all issues bearing upon the degree of negligence, we would remand the determination for review by a Judge in the first instance.

Unwarrantable Failure

As to this issue, the Judge simply stated that the facts and arguments regarding each were "identical" and incorporated her findings for the citation by reference in order to reach the same conclusion. *Id.* at 1661. We find that this cursory analysis was legally deficient and requires remand.

The relevant facts for each violation are not identical. The operator's duties to prevent the water accumulation and to record the same require different conduct by the operator, and the relevance of facts can only be determined in light of that required conduct. For example, regarding the citation, the operator was cited for the same violation on November 20, 2012, and December 10, 2012. The latter citation also informed the operator that similar violations in the future might lead to greater enforcement efforts by MSHA. Gov't Ex. 8. In contrast, there is no evidence that the operator had ever been previously cited for a recordkeeping violation.[16]

We cannot discern how the Judge balanced the factors. We therefore vacate and remand this issue for reconsideration.

William I. Althen, Acting Chairman

Michael G. Young, Commissioner

[16] We note that some of the other *IO Coal* factors may also be analyzed differently for the order than for the citation. On remand, the Judge is free to reach any reasonable conclusion supported by the facts for each factor. These findings are exclusively within the province of the Judge below. Although Commissioner Cohen remands on unwarrantable failure to obtain an analysis by an Administrative Law Judge, he essentially opines on each unwarrantable failure element. The Judge upon remand need not accord any weight whatsoever to Commissioner Cohen's premature statement of his personal view of factual issues.

Opinion by Commissioner Jordan:

This case involves a mine operator who permitted water to accumulate to dangerous levels in its mine, despite multiple warnings from the Department of Labor's Mine Safety and Health Administration ("MSHA"). It involves an agent of the operator, a certified mine examiner, who upon observing the large accumulations of water, nevertheless attempted to wade through it. I join my colleagues in affirming the Judge's determination that the violation was appropriately designated significant and substantial ("S&S"). However, for the reasons set forth below, I would affirm the Judge's finding that the violation constituted an unwarrantable failure, and would uphold the penalty assessed by the Judge as one that appropriately applied the statutory criteria of negligence and gravity.

I also would affirm the Judge's decision regarding the related violation alleging that the operator failed to properly record the existence of the water hazard in the weekly examination book, and would affirm the penalty.

A. Citation No. 7024068

As is the case in many underground mines, Consol Pennsylvania Coal Company ("Consol") had to regularly pump out its bleeders so as to avoid dangerous accumulations of water. Indeed, the approved ventilation plan specified certain means "to remove water as necessary to permit safe travel through the perimeter bleeder system."[1]

Despite this requirement, it is uncontested that on February 5, 2013 the MSHA inspector was confronted with bleeder sections that contained large accumulations of water. In one section water stretched 600-700 feet and ranged in depth from 12-42 inches. In another area it stretched 1,800 feet and ranged in depth from 12-36 inches. 37 FMSHRC 1616, 1640 (July 2015) (ALJ). Three days of pumping in a difficult-to-reach area were required in order to fix the problems and get the water out. *Id.*; Tr. 153-54, 233. The water was murky, cold, contained debris and tripping hazards, and constituted a hazard to miners traveling in the area, leading the Judge to conclude that "[r]espondent's system was wholly inadequate to the challenge of keeping water out of the bleeder." 37 FMSHRC at 1650. In fact, Consol did not contest the Secretary of Labor's determination that it had violated its ventilation plan.

This was not the first enforcement action MSHA had taken against this operator for such a violation. Approximately two months prior to the inspection at issue, MSHA cited Consol

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[1] Specifically, the mine's ventilation plan stated in relevant part:

> The means for maintaining the bleeder safe for travel will include compressed air lines routed underground, used in conjunction with air pumps to remove water as necessary to permit safe travel through the perimeter bleeder system. . . . Ditches, bridges and natural drainage are used to maintain the bleeder entries free from standing water that affects ventilation and prevent safe travel.

Gov't Ex. 3 at 1.

after the inspector observed more than 36 inches of dark, murky water (which covered numerous tripping hazards lying beneath). Gov't Ex. 7. Less than three weeks after that, MSHA issued a second citation because Consol had allowed an accumulation of more than 18 inches of dark, murky water to occur at the sump, as well as permitting more than 24 inches of water to accumulate in another area of the mine. Gov't Ex. 8. Consol maintains that after receiving those citations it took additional steps to control the water and that the accumulations present on February 5 were due to unforeseen circumstances of which the operator could not reasonably be expected to have been aware.

Regardless of whether the presence of the water accumulations on February 5 reflected a failure on the part of Consol to exercise reasonable care, we must consider the Judge's finding that Mine Examiner Dan Stalnaker's decision to proceed through the dangerous water accumulation constituted negligent behavior on his part. Moreover, because Stalnaker was a supervisory employee, the Judge imputed Stalnaker's negligence to the operator for purposes of determining whether the violation resulted from Consol's unwarrantable failure, and for the purpose of determining a penalty that took into account the operator's negligence, as required by section 110(i) of the Mine Act, 30 U.S.C. § 820(i).

Longstanding Commission precedent recognizes that the negligence of an operator's agent is imputed to the operator for purposes of determining an appropriate penalty and for reviewing the Secretary's unwarrantable failure determinations. *See Whayne Supply Co.*, 19 FMSHRC 447, 451 (Mar. 1997); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-97 (Feb. 1991) ("*R&P*"); *S. Ohio Coal Co.*, 4 FMSHRC 1459, 1463-64 (Aug. 1982). We have held that "in carrying out . . . required examination duties for an operator, an examiner . . . may appropriately be viewed as being 'charged with responsibility for the operation of . . . part of a mine,' and therefore, the examiner constitutes the operator's agent for that purpose." *R&P*, 13 FMSHRC at 194.

Here, instead of retreating and reporting that water had accumulated, Stalnaker proceeded into it to conduct his examination. In doing so, he was well aware that the accumulation posed a danger. Indeed, as the Judge noted, Stalnaker himself testified that he would not have let miners work in the amount of water he encountered at the bleeders. 37 FMSHRC at 1629; Tr. 310-11. Before entering the water to conduct his exam, an inspection I note that was done alone and in an isolated area of the mine, Stalnaker made a dangerous situation even more risky by donning illegal chest waders. The chest waders available to Stalnaker lacked flotation devices. Because such waders can fill with water and drag miners under the surface, they increase the risk of drowning and are not permitted. 37 FMSHRC at 1646; Tr. 455, 500, 704. In fact, in this case water did enter Stalnaker's waders and broke his gas detector, causing him to terminate his examination.[2]

In assessing the level of danger and negligence involved, the Judge noted that the water accumulation posed a risk to miners, outside the risk of drowning. She found that Inspector

[2] Stalnaker found the illegal waders located in the East tailgate area where he began his examination. Members of management claimed they had no knowledge how the illegal waders got there. 37 FMSHRC at 1629.

Young credibly testified that the murky water was full of chemicals and bacteria and posed a risk of cellulitis and MRSA (staph bacteria) as a result of these substances. 37 FMSHRC at 1646; Tr. 68-69. Indeed, the water that Stalnaker entered had to be trucked away and processed before it could be released into the environment. 37 FMSHRC at 1646; Tr. 761. A fall that resulted in a cut to the skin could therefore pose more than the usual danger given the contaminated nature of the water. There is testimony that the area in question contained plenty of pipes, supports, and other debris that either could be the cause of or could be struck in a fall. 37 FMSHRC at 1646; Tr. 123. Furthermore, the cold temperature of the water increased the chances that a miner who suffered injury could go into shock. 37 FMSHRC at 1646.

The Judge upheld the designation of the violation as unwarrantable. The Commission has equated unwarrantable with "aggravated conduct" and has affirmed unwarrantable findings where, as here, a supervisory person intentionally engages in behavior violative of a mandatory standard.

The ventilation plan required the bleeder be maintained for safe travel. A bleeder, or section thereof, that cannot be safely traveled should not be traversed by any miner, but particularly should not be traveled by a supervisory employee, well aware of the dangerous nature of the condition.[3] There was no mitigating circumstance present: for example, Stalnaker was not exposing himself to danger to rescue a fellow miner. He was simply trying to carry out the weekly exam in a timely fashion. Stalnaker should have retreated, reported the condition, and waited until sufficient water was pumped out so that the exam could be conducted safely. His decision to continue this dangerous journey constitutes substantial evidence supporting a finding of aggravated conduct. Thus, I would affirm the Judge's finding that the violation was the result of the operator's unwarrantable failure.

Regarding the Judge's gravity finding, I conclude that substantial evidence supports a finding of serious or high gravity, based on the testimony the Judge utilized in supporting her S&S determination, both in regard to tripping hazards, 37 FMSHRC at 1643, and potential injuries, *id.* at 1646. This included the inspector's statements that the bleeder entry contained deep water with various tripping hazards, including uneven floor and debris, that miners who tripped could suffer broken bones or head injuries, that the cited area had pipes, supports and other debris that could be struck in a fall, that cold water increased the chances that a miner could go into shock, and that there was a risk of drowning. *Id.* at 1643-46.

The operator also challenges the Judge's penalty assessment, but the same facts that allowed the Judge to reasonably conclude the conduct at issue supported the Secretary's decision

[3] The fact that an MSHA inspector subsequently entered the area traversed by Stalnaker does not undermine the Judge's unwarrantable designation. Significantly, the inspector was subsequently chastised by his supervisors for exposing himself to a dangerous condition. Tr. 349-50. Moreover, I note that the fact the inspector was not traversing the bleeder alone in itself lessened the dangerous aspect of the activity.

to designate the violation as resulting from an unwarrantable failure to comply, also support the Judge's determination that the penalty should reflect a high degree of negligence.[4]

B. Order No. 7024069

The underlying facts regarding this order are not in dispute. Stalnaker informed the mine foreman, Mike Giavonelli, that he was not able to complete the examination of the bleeder due to the high water. Giavonelli spoke with the shift foreman, who told Giavonelli that Foreman and Mine Examiner Kevin Saunders had been sent into the bleeder to complete the weekly examination. Tr. 703. Saunders thereafter informed Giavonelli that he also was unable to complete the examination because of the water. Although the hazards were not noted and the examination was incomplete, Giavonelli countersigned the examination book.

Substantial evidence[5] supports the Judge's determination that the recordkeeping violation was S&S, pursuant to the standards set forth by the Commission in *Mathies Coal Co.*, 6 FMSHRC 1, 3 (Jan. 1984) (footnote omitted):

> 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.

An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)).

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[4] The operator relies on *Nacco Mining Co.*, 3 FMSHRC 848, 850 (Apr. 1981), arguing that the negligence of agents is not imputable to an operator if they expose only themselves to hazards. This argument is unavailing, as in *Capitol Cement Corp.*, 21 FMSHRC 883, 893-94, (Aug. 1999), we held that the *Nacco* defense is not available when a violation is the result of unwarrantable failure. Moreover, Consol failed to raise this argument before the Judge. *See* section 113(d)(2)(A)(iii) of the Act, 30 U.S.C. § 823(d)(2)(A)(iii) ("Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass.").

[5] 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) ("*R&P*") (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

The order alleges that Consol failed to record obvious and extensive hazardous conditions found during the weekly examination. As the Judge found, four of Consol's foremen — Stalnaker, Saunders, Price and Giavonelli — knew about the water in the bleeder, that it was a hazard, and that it should have been recorded in the book. However, the hazardous water was not noted in the book when Giavonelli signed it. 37 FMSHRC at 1656. The operator does not dispute that the violation occurred, and thus the first *Mathies* element was met.

As to the second *Mathies* step, substantial evidence supports the Judge's finding that the violation was reasonably likely to contribute to the danger of tripping and falling. The record includes evidence of deep water accumulations obscuring an uneven floor and debris. The erroneous recording gave the false impression that the bleeder was entirely free of hazardous conditions contributing to the likelihood that miners may enter the bleeders unaware or unprepared to encounter the tripping hazards. As the Judge correctly noted, the fact that some miners and managers knew about the conditions was immaterial, because without the examination record, other miners had to rely entirely on word-of-mouth. For instance, as the Judge observed, Jamie Greene, the regular examiner, would have had to rely on an informal conversation with Stalnaker to learn about the extremely hazardous condition. *Id.* at 1657. Hence, the absence of a written record of the hazards made it more likely that miners — such as Greene — would enter the bleeder with the mistaken belief that it was free of hazards, contributing to the reasonable likelihood of the danger of falling.

Moreover, as the Judge pointed out, because the water accumulations were not recorded in the examination book, Consol would have had no record of them. Inspector Young testified about the importance of a written record:

> Mike [Giavonelli] is pretty much the guy, whoever is acting as the mine foreman is who controls who works back in the bleeders, he is the one that gives permission, he is the one that tells the shift foreman, let whomever go back and do this. If is not recorded in the books and something happens to Mike . . . and he doesn't come to work . . . who is to say that that isn't going to get forgot about.
>
> . . . .
>
> [W]hen [the mine foreman] signs that weekly book, he is to look at that weekly book, he is to do a basic check from one week to the next. . . . He is the person . . . responsible as far as the underground workings of that mine, and that is the only way he knows if it is proper, without doing it himself, is by looking at those record books.

Tr. 140, 142.

Since the operator would not have had a written record that its efforts to keep water out of the bleeder were inadequate, the likelihood of it quickly and effectively resolving the problem was reduced and the likelihood of additional flooding — and additional exposure of miners to the hazardous water — would have been increased. 37 FMSHRC at 1658.

Importantly, the failure to record the hazards means that MSHA inspectors would not realize that the condition existed, and that hazards might continue to occur in the bleeder without

MSHA's knowledge. In fact, without the section 103(g) (30 U.S.C. § 813(g)) complaint, MSHA never would have known about the water in the bleeder.

Substantial evidence also supports the Judge's determination that the Secretary satisfied the third *Mathies* factor — the danger of tripping and falling was reasonably likely to result in injury. If miners tripped and fell in the bleeder the record supports a reasonable likelihood that an injury would occur such as bruising or fractures, or a cut and resulting infection. Tr. 68-69, 121-22, 143. The Judge's finding that such an injury would be "of a reasonably serious nature" is also supported by substantial evidence. The occurrence of such an injury, potentially miles away from the surface, suffered alone without means of contacting assistance, only exacerbates its seriousness.

The operator again claims that the violation was not reasonably likely to cause reasonably serious injury because only trained, cautious examiners ventured into the E bleeder district, and there is no evidence of any past injuries in this area. As noted *supra* (slip op. at 8-9), the absence of prior injury in the relevant area and the exercise of caution by examiners are irrelevant to the S&S analysis for this recordkeeping violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 867 (June 1996); *Eagle Nest, Inc.*, 14 FMSHRC 1119, 1123 (July 1992). Moreover, Stalnaker and Saunders deliberately went into the water, and thus were exposed to the hazards.

An additional hazard contributed to by this violation (the failure to record the water in the exam book) is that some mine managers would be unaware of conditions that could adversely affect the mine's ventilation system, and thus would not correct them.[6] As the Secretary stated in his post-hearing brief: "Failing to properly record an examination puts miners traveling to an area at risk because they could be unaware of hazards, *and with respect to a bleeder system, puts an entire mine at risk.*" S. Post-Hr'g Br. at 28 (emphasis added). As the Secretary cogently argued on appeal, "Inspector Young believed that the recording violation was S&S not only because it exposed miners to further hazardous water accumulations, but also because it was inconsistent with assuring remedial action in order to prevent accumulating water from resulting in potentially catastrophic ventilation starvation, which was the primary concern of the MSHA inspectors' Section 103(g) investigation in the first place." S. Br. at 30. Inspector Young articulated this concern at trial:

> If this violation wasn't corrected, if the pumping wasn't done, not saying that they didn't because they started the pump, but say, the pumping wasn't adequate, it could affect the ventilation over a period of another week as much water as was back here.
>
> It did not affect the ventilation when we were there on the investigation, but if left unattended, it most certainly could have.

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[6] In *Oak Grove Resources, LLC v. Secretary of Labor*, 520 F.App'x. 1, 2013 WL 1729514 (D.C. Cir. 2013) (unpublished), the Court held that a Judge's determination that a violation of 30 C.F.R. § 75.364(b)(2) for failure to conduct a weekly examination was S&S was supported by substantial evidence. In that case, the examiner was precluded from finishing his inspection because of high water levels. The Court reasoned that the record indicated that a compromised ventilation fan, if undetected by inspection, might allow methane and other potentially lethal gasses to build up in the mine.

Tr. 143. Inspector Gross also testified that he "was concerned about the gas." Tr. 399.

In reversing the Judge, the Chairman and Commissioner Young rely on the fact that the operator was making efforts to remedy the water problem before Giavonelli signed the book. That such activity had commenced is hardly persuasive evidence, especially considering that the water problem was not entirely abated until three days later. 37 FMSHRC at 1657. Similarly, their reliance on the fact that some examiners had personal knowledge of the water problem, slip op. at 22, ignores the requirement that the S&S analysis be applied considering "continued normal mining conditions," and thus must take into account the hazards to other examiners who might not know about the water. Also, although my colleagues are confident that miners would realize they were entering deep water even though the examination report was deficient, they would not necessarily be aware of some of the tripping hazards, including the uneven floor and debris. Slip op. at 7-8; Tr. 724.

Taken to its logical conclusion, my colleagues' position seems to indicate that a failure to record violation involving an obvious hazard that can be avoided by a miner cannot be S&S.[7] Thus, if a mine examiner failed to report a guard missing from a conveyor belt, and it would be obvious to a miner that the belt was not guarded, (and he or she could stay away from the unguarded part of the equipment) the violation would not be S&S because the miner would realize that the belt lacked a guard "with or without the report." Slip op. at 22. I am reluctant to endorse such a concept, as it removes an important enforcement tool needed to ensure compliance with examination requirements.

In sum, under the deferential substantial evidence standard of review, I conclude that the evidence above is such that a reasonable person might accept it as adequate to support the Judge's conclusion that the examination violation was S&S.

The next issue is whether substantial evidence supports the Judge's finding that this conduct constitutes unwarrantable behavior. I would find that it does.

Despite the fact that neither of the two examiners had noted the hazard of dark, murky water and tripping hazards in the bleeder, that Saunders had not signed the book, and that the examination was not complete, Giavonelli countersigned the examination book. 37 FMSHRC at 1637; Tr. 659, 666, 671-72, 682, 717. He knew the examination had not been completed but claimed he signed the book only to signify that he had read it and knew there was a problem. Tr. 671-72, 681-82.

Only later that day, after he discovered that MSHA knew about the water in the bleeder and was likely to issue citations, did he add a note in the examination book to explain what had occurred. Tr. 677-79, 717.

As for Stalnaker and Saunders, they told the inspector that they forgot to fill out the examination book. 37 FMSHRC at 1637; Tr. 100. Saunders also acknowledged that he was complacent because the area often had water accumulations and he was not surprised to find

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[7] My colleagues' position would also lead to the conclusion that even if the water had been so deep that it reached the roof, the failure to record this hazard would not be considered significant and substantial.

water there. 37 FMSHRC at 1638; Tr. 311. Saunders stated that he did not believe the water was a hazard despite the fact that it was cold, murky, contained tripping hazards and was so deep that he did not complete his exam. 37 FMSHRC at 1659.

The importance of the examination requirement cannot be overstated. Here, the operator had a duty to ensure that the water hazards were recorded so that miners and MSHA inspectors would be alerted to the dangers of tripping and falling in the water before being exposed. Recording the hazard would also have provided notice that additional efforts were needed to keep the bleeder clear. *Id.* This information was vital to miner safety.

The inspector's testimony on this subject was stark and direct:

> [T]his is a vast volume of water back here. I mean, it needs to be documented, people need to know. It is required by law. What they are doing to correct it is required by law and the actions that they are taking [are] required by law to correct the condition. It is just not something that you keep two sets of records or you take a mental note on. It is a requirement.

Tr. 140-41.

As the Judge correctly noted, "This was not a mere paperwork error, rather this went to the heart of miner safety in the bleeder. . . . In fact, by creating a false impression about the area, the countersigned record book exacerbated the problem." 37 FMSHRC at 1659-60. The violation involved the failure to record the presence of extensive deep water in an area of the mine where miners had to travel alone, possibly without timely aid if they were injured.[8]

In fact, had the 103(g) complaint not been made and the examination book subsequently updated and corrected to reflect the water hazard, MSHA might never have had access to important historical information that a problem had existed — a problem for which the operator had previously been cited on more than one occasion. MSHA recognized the importance of such documentation when, during the promulgation of the standard, it rejected suggestions that the rule should only require the examiner to record uncorrected hazardous conditions. 61 Fed. Reg. 9764, 9805 (Mar. 11, 1996). In the preamble to the final rule, MSHA emphasized that the examination record serves the important function of noting the history of the types of conditions that can be expected in the mine. MSHA explained that when the records are correctly completed and reviewed, mine managers can use them to ascertain whether the same hazardous conditions are occurring and if effective corrective actions are in place. MSHA also stated that a record that includes all hazardous conditions found and the actions taken to correct them, permits mine management, MSHA inspectors and miners' representatives to more efficiently focus their attention during examinations and inspections. *Id.*

Central to my conclusion that this violation is unwarrantable is the fact that it involves conduct by the highest underground mine official, Mine Foreman Mike Giavonelli, as well as by other mine foremen. Consol unabashedly conceded that "[t]he mine foreman [Giavonelli]

[8] The failure to note and correct the water accumulations violations could also affect the mine ventilation system. Tr. 143.

countersigned the partially complete book while it still had blank entries." PDR at 2. He countersigned the book knowing of the hazardous conditions created by the water and knowing that those conditions were not listed in the book. Moreover, when Stalnaker, the mine examiner, was asked whether he considered putting the location of the water accumulations in the book, he testified that "the date board where proof that I had visited that area was in the water. . . . So I guess looking back on it, yes, I should have put it in the book." Tr. 307.

As mentioned above, pursuant to longstanding Commission precedent, the fact that the conduct at issue involved actions of mine management is a significant aggravating factor supporting a finding that a violation is unwarrantable. *See Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001) (recognizing that because supervisors are held to a high standard of care, the involvement of a supervisor in a violation is an important factor supporting an unwarrantable failure); *Midwest Material Co.*, 19 FMSHRC 30, 35 (Jan. 1997) (reversing a Judge's finding that a violation was not due to the operator's unwarrantable failure in part due to the Judge's failure to recognize that the violation took place in the presence of a foreman, who, under Commission precedent, is held to a high standard of care); *Lion Mining Co.*, 19 FMSHRC 1774, 1778 (Nov. 1997) (holding that the foreman's observation of the violative condition was a factor tending to establish an unwarrantable failure); *S&H Mining, Inc.*, 17 FMSHRC 1918, 1923 (Nov. 1995) (stating that in unwarrantable failure analysis, heightened standard of care is required of section foreman and mine superintendent). As supervisors, the Consol foremen were "entrusted with augmented safety responsibility and [were] obligated to act as a role model." *Capitol Cement Corp.*, 21 FMSHRC 883, 893 (Aug. 1999).

I thus conclude that under the substantial evidence standard, where the inquiry is whether there is "such relevant evidence as a reasonable mind might accept as adequate to support [the Judge's] conclusion," there is more than enough in this record to sustain the Judge's finding that Consol's violation exhibited "aggravated conduct." *See* note 5, *supra.*

Regarding the penalty, the Judge assessed the $14,743 penalty proposed by the Secretary. Consol challenges this penalty determination.

I would affirm the penalty. Under the Commission's deferential standard of review, only penalty assessments "lacking record support, infected by plain error, or otherwise constituting an abuse of discretion" are subject to reversal. *Lopke Quarries*, 23 FMSHRC at 713; *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984).

The Judge's penalty determination easily meets this standard. She properly considered all of the relevant statutory factors under section 110(i) of the Mine Act. 37 FMSHRC at 1661-62. She noted that Consol's actions constituted an unwarrantable failure to comply. *Id.* at 1662 (a finding which, as discussed earlier, I would find is supported by substantial evidence). She clearly gave great weight to her finding of high negligence. This was based on the fact that Giavonelli signed the exam book knowing that water was present and not listed as a hazard. *Id.* at 1658-61.[9] The Judge also emphasized her gravity finding. *Id.* at 1662.[10] Finally, she noted

[9] I would affirm the Judge's finding of high negligence based on the same analysis I use to affirm the finding that the violation was the result of the operator's unwarrantable failure.

that Consol had a history of water accumulations in the particular bleeder at issue, and had been cited several times for that condition. *Id.*

Our case law is clear that Judges have discretion to assign different weight to the various statutory factors, according to the circumstances of the case. *See Lopke Quarries*, 23 FMSHRC at 713. Here, the Judge gave significant weight to negligent gravity, as our precedent permitted her to do.

In sum, I find that in upholding the penalty proposed by the Secretary for the order, the Judge did not abuse her discretion. For the reasons set forth above, I would affirm the decision of the Judge.

Mary Lu Jordan, Commissioner

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[10] The Judge affirmed the inspector's high gravity designation, concluding that it was supported by a preponderance of the evidence. 37 FMSHRC at 1656 (listing the danger as "highly likely" to result in "fatal" injuries). She found that because the conditions listed in the ventilation plan citation (the uneven mine floor and the deep water) were not listed in the examination book, miners would not be aware of them. *Id.* at 1657. Thus, the failure to record the deep water in the book exacerbated its danger because examiners sent to the area would lack knowledge of the nature and extent of the hazard. *Id.* at 1657-58. As the inspector testified, "[i]f somebody was to go back there unknowingly, the water wasn't pumped . . . [s]omebody can fall and somebody can hit their head." Tr. 143.

The Judge also held that if miners entered the area, injuries such as a fracture, bacterial infection, or death by drowning were highly likely to occur. 37 FMSHRC at 1657; Tr. 68-69, 121-22, 143. Because I find that the Judge's analysis is supported by substantial evidence in the record, I would affirm her gravity decision.

Opinion by Commissioner Cohen:

My assessment of the conditions at the Enlow Fork Mine which gave rise to Citation No. 7024068 and Order No. 7024069 is quite similar to that of Commissioner Jordan.

Despite two recent citations by the Department of Labor's Mine Safety and Health Administration ("MSHA") and a specific warning contained in the second of those citations, Consol Pennsylvania Coal Company ("Consol") failed to prevent the waters in the E-15 to E-22 bleeder system from accumulating to dangerous levels. The cold, murky water ranged up to 42 inches in depth in one extensive area and up to 36 inches in depth in another extensive area, for a total of 2350 feet. The mine floor below the water was irregular and contained numerous tripping hazards which could not be seen. The water was so extensive that it took three days after the issuance of the citation and order to be pumped out. The water in the bleeder system clearly constituted a violation of the provision in Consol's ventilation plan which required that the bleeder system be maintained "safe for travel". This was the basis for the issuance of Citation No. 7024068.

Despite the hazards, the water was entered by two Consol examiners — Dan Stalnaker and Kevin Saunders, both of whom were foremen — on February 5, 2013 in an unsuccessful attempt to complete the weekly examination of the bleeder system required by 30 C.F.R. § 75.364. Stalnaker even put on chest waders, which were improper to use because they lacked flotation devices.[1] Stalnaker did not retreat from the high waters until his multi-gas detector was damaged when water poured into his waders while he attempted to go through a 3-foot high mandoor between entries. Consol's practice at that time (it has since been changed) was to have its examiners examine the bleeders alone. Moreover, there was no communications system in the Enlow Fork bleeders. From the point of entering the bleeder system to exiting the system, miners had no way to call for assistance.

Upon the completion of their respective attempts, both Stalnaker and Saunders made entries in the record book for the evaluation points they were able to access, as required by 30 C.F.R. § 75.364(h). Despite the conditions they had encountered, neither of them recorded any "hazardous conditions", as required by the regulation. Two other Consol supervisors — Shift Foreman Robert Price and Mine Foreman Michael Giavonelli — knew about the water and made no effort to make sure that this hazardous condition was recorded. Indeed, Giavonelli signed the record book as Mine Foreman without indicating any hazardous condition. The failure of the four foremen to make a record of the hazardous water was the basis for the issuance of Order No. 7024069.

However, I cannot agree with Commissioner Jordan that all of the Judge's conclusions should be affirmed. As described below, the Judge's analysis was insufficient on the issues of

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[1] It is against both MSHA policy and Consol policy to use chest waders which lack a flotation device. Tr. 419-20, 455, 499-500, 704. Mine Foreman Michael Giavonelli testified that he does not allow miners to wear waders because it is against Pennsylvania state law. Tr. 704. Shift Foreman Robert Price testified that if they get filled with water, it is "tough to get up". Tr. 455. Bleeder examiner Jamie Greene was more explicit — "You could go over water so far, water goes down in, you drown". Tr. 500.

gravity, negligence and unwarrantable failure with regard to Citation No. 7024068, and was insufficient on the issues of gravity and unwarrantable failure with regard to Order No. 7024069. Thus, I would remand on those five issues, and affirm the Judge's decision on the issue of significant and substantial ("S&S") with regard to the citation and on the issues of S&S and negligence with regard to the order.

A. Citation No. 7024068

S&S

With regard to S&S, I join the unanimous Commission opinion.

Gravity

With regard to gravity, I join the opinion of Acting Chairman Althen and Commissioner Young. It appears to me that the Judge became entangled in the distinctions between "highly likely" and "reasonably likely" contained in Table XI referenced in 30 C.F.R. § 100.3(e). In analyzing the gravity of the citation, the Judge found that it was "highly likely" that an injury such as broken bones would result from a slip and fall in the bleeders, then said (three times) that it was "reasonably likely" that a fatal injury (i.e., drowning) would occur, and then inexplicably concluded that the conditions described in the Citation were "Highly Likely to result in Fatal injuries to two miners." 37 FMSHRC 1616, 1643, 1646-47 (July 2015) (ALJ). In making determinations of gravity, Commission Judges should consider the evidence holistically, and not feel bound by the distinctions made by the tables in Part 100. *American Coal Co.*, 39 FMSHRC 8, 20 (Jan. 2017). I join Acting Chairman Althen and Commissioner Young in concluding that: (1) the evidence does not support a high likelihood of injuries, and that (2) on remand the Judge should determine the reasonable likelihood of injuries ranging from broken bones to a fatality.[2]

Negligence

The Judge concluded that Consol demonstrated a high degree of negligence when it failed to comply with its ventilation plan because it: (1) "knew or should have known" of the accumulated water in the bleeders and (2) failed to demonstrate any mitigating circumstances. 37 FMSHRC at 1648. I agree with Acting Chairman Althen and Commissioner Young that the Judge's decision should be remanded, but I do not agree with their rationale.

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[2] With regard to gravity, Commissioner Jordan states that "substantial evidence supports a finding of serious or high gravity". Slip op. at 28. I agree with her. I think it is proper for Commission Judges to make findings as to gravity using terms such as "serious" or "high" while discussing "factors such as the likelihood of injury, the severity of an injury if it occurs, and the number of miners potentially affected." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2049 (Aug. 2016). If the Judge here had made a finding of "serious" or "high" gravity for the citation, I would have joined Commissioner Jordan in affirming the citation. But the Judge stated her conclusion as a "high likelihood" of injuries, a conclusion which, as stated in the opinion of Acting Chairman Althen and Commissioner Young, is not supported by substantial evidence.

In large part, the Judge's analysis of negligence was well reasoned and supported by substantial evidence. For example, she recognized the significance of the fact that the bleeder system was prone to flooding, and that MSHA had previously warned Consol in December 2012 that more effort was needed to control the water level in the bleeder. *Id.* at 1649-50. She correctly determined that since Stalnaker and Saunders were members of management, their knowledge of the high water levels was imputable to Consol. *Id.* at 1648. She correctly found that Stalnaker and Saunders "willfully traveled through the hazards." *Id.* at 1650.[3] Moreover, substantial evidence supports her determination that Consol's system for keeping water out of the bleeder was "wholly inadequate". *Id.* However, in my view, the Judge committed three fundamental errors of analysis which make it impossible to affirm her ultimate conclusion on the issue of negligence.

First, the Judge applied the definitions of levels of negligence found in Table X referenced in 30 C.F.R. § 100.3(d), under which high negligence may be found only if there is a total absence of mitigating conditions. 37 FMSHRC at 1618. Thus, she organized her analysis around the alleged mitigating circumstances asserted by Consol, and concluded that "[a]s none of the actions presented by Respondent constituted mitigating circumstances, the 'High Negligence' designation is appropriate." *Id.* at 1648-50. However, as Acting Chairman Althen and Commissioner Young point out, slip op. at 12-13, the Commission has rejected, in general, reliance on the Part 100 definitions in determining degrees of negligence, and, specifically, the legal principle that the finding of any mitigating circumstance precludes a conclusion of high negligence. Instead, Commission Judges evaluate negligence using a traditional and holistic "reasonable person" analysis of the evidence. Thus, a violation may be found to be "high negligence" even if mitigating circumstances exist. *Brody Mining, LLC*, 37 FMSHRC 1687, 1701-04 (Aug. 2015) ("[A] Commission Judge may find 'high negligence' in spite of mitigating circumstances."). In this case, the Judge's use of the Part 100 definitions, by itself, would not necessarily require remand. However, her reliance on the parameters of the Secretary's Part 100 regulations resulted in a distortion of her analysis which gave rise to two reversible errors.[4]

Second, the Judge did not properly evaluate the fact that, as part of its efforts following MSHA's admonition in the citation for excessive water in the bleeder issued on December 10, 2012, Consol conducted additional monitoring in the area, including examining the bleeder

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[3] Acting Chairman Althen and Commissioner Young make reference to "Inspector Gross' voluntary walk through the water", slip op. at 14 n.5. However, Gross was accompanied by Consol representative John Brottish, and testified that if he had been alone, he would not have entered the water because no one could have helped him if he fell. Tr. 348-49, 398-99.

[4] My impression is that the Judge had a gut sense that the ventilation plan violation was characterized by high negligence — which may be entirely reasonable — and then, because the Part 100 definition of "high negligence" requires the absence of any mitigating circumstance, she fit the evidence into a conclusion that there were no mitigating circumstances. Thus, the use of the Part 100 definitions of the degrees of negligence caused an analytic strait jacket in considering whether allegedly mitigating circumstances are actually mitigating.

system more frequently than once a week.[5] The Judge rejected these efforts as mitigating negligence for two reasons. First, the Judge said that the efforts were "in vain" because, subsequently, Stalnaker and Saunders willfully traveled through the hazards. Second, she found that the efforts were "grossly inadequate" because the actions did not give Consol any indication that water was collecting in the area at dangerous levels. 37 FMSHRC at 1650.

Neither of the Judge's reasons constitutes a basis for rejecting the efforts as mitigation. The fact that Stalnaker and Saunders willfully entered the hazardous water is essentially irrelevant to the fact that Consol was making some effort to monitor the water. The Judge's finding that the efforts were "grossly inadequate" overlooks the fact, as the Judge found in her unwarrantable failure analysis, that in the last examination which Jamie Greene conducted less than 48 hours from the time the citation was written, the water level was not excessive. *Id.* at 1651. Hence, I conclude that the Judge erred in rejecting Consol's efforts to monitor water levels in the bleeder system as a mitigating circumstance. These efforts may not be sufficient to offset the facts described by Commissioner Jordan as constituting high negligence, slip op. at 26-28, but they do represent an effort by Consol to monitor the water levels, and should be considered as a mitigating factor on remand.

Third, the Judge erred in her evaluation of Shift Foreman Price's actions on February 5, 2013. After Stalnaker returned from his unsuccessful attempt to complete the examination of all of the evaluation points, Price directed Saunders to attempt to complete the examination, starting from the E-22 side of the bleeder system. 37 FMSHRC at 1631. The Judge characterized Price's action as "willful exposure [of Saunders] to the hazard" of the dangerous excessive water. *Id.* at 1649.

The record does not indicate that Price knew that Saunders would encounter *hazardous* accumulations of water when attempting to finish the examination from the opposite end of the system. Price's knowledge of the water conditions in the bleeder came from Stalnaker, who previously had only attempted to examine from paths available on the E-15 side. Although Price assumed that Saunders would also encounter some water when walking from the opposite side, this belief does not represent a willful disregard of a hazard as it is permissible, at least according to Inspector Young, for examiners to walk in up to 18 inches of water. Tr. 46, 450, 458. Moreover, the record does not indicate that Price directed Saunders to walk through hazardous water to complete the examination, as is suggested by the Judge's finding of "willful exposure".

I conclude that Price acted reasonably when he assigned Saunders to begin an examination from the opposite end of the bleeders. Price acted in a manner that was consistent with Consol's obligation to conduct a weekly examination and to check for dangerous methane accumulations that may have built up in the bleeders. *See* 30 C.F.R. § 75.364(a). Price understood that Saunders was familiar with the area, and thus capable of navigating alternative

[5] Jamie Greene, the regular examiner of the bleeder system, testified that he walked the area several times in the days before Stalnaker performed the examination and tended to pumps that were down so that Stalnaker (who substituted for Greene on the day at issue) would not have to walk through hazardous levels of water. Greene testified that he did not see excessive water. Tr. 495-96, 519-20. The Judge credited Greene's testimony. 37 FMSHRC at 1651.

routes in the E bleeder system to potentially access the evaluation points. *See* Tr. 458. Accordingly, I conclude that Price should not have been identified as being responsible for the "willful exposure" of Saunders to the hazards of the excessive water.

The Judge's characterization of Price's actions was not inconsequential in the Judge's overall evaluation of Consol's negligence. The Judge rejected the operator's installation of a bubbler system to monitor water levels in the bleeder system as a mitigating circumstance because of "the willfully negligent actions of Stalnaker, Price and Saunders." 37 FMSHRC at 1649-50. On remand, Price's actions should not be considered as "willfully negligent".

I cannot agree with Commissioner Jordan's analysis of negligence because it focuses entirely on the previous citations for excessive water and the actions of Stalnaker and Saunders in entering the water, without considering Consol's efforts between December 10, 2012 and February 5, 2013. At the same time, I cannot join the analysis of negligence by Acting Chairman Althen and Commissioner Young because it places too much emphasis on the Judge's error in finding that an injury was "highly likely" with respect to gravity. Moreover, their opinion does not fully consider the actions of Stalnaker and Saunders in entering the water, and — with respect to Stalnaker — the fact that he improperly donned chest waders in entering the water.[6]

A principal difference between my view and that of Acting Chairman Althen and Commissioner Young is in how we regard the actions of Stalnaker and Saunders. I see the actions of Stalnaker and Saunders in entering the hazardous water in the bleeders as relevant to the violation. In contrast, my colleagues focus exclusively on the accumulation of the water, and regard the actions of Stalnaker and Saunders as relevant only insofar as their entering the water was foreseeable to other members of Consol's management. *See* slip op. at 14.[7]

Consol's ventilation plan requires that the bleeders be "safe for travel". Gov't Ex. 3. If the bleeders are unsafe (because of, for instance, an accumulation of water), and they are traveled while unsafe, then the fact that the unsafe travel occurred exacerbates the negligence of the operator. The foreseeability of the travel would be an issue if those who did the traveling were only rank-and-file miners. But here, Stalnaker and Saunders were — as the Judge found —

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[6] This is particularly relevant to their consideration of unwarrantable failure, as discussed below.

[7] Acting Chairman Althen and Commissioner Young correctly observe that MSHA did not specifically cite Consol for the actions of Stalnaker and Saunders in entering the hazardous water. *See* slip op. at 20 n.10. However, the Judge included their actions in her evaluation of both negligence and unwarrantable failure. 37 FMSHRC at 1648-50, 1654. It is the Judge's decision, and not the MSHA citation, which the Commission reviews on appeal. Moreover, Consol has not argued on appeal that the Judge erred in considering the actions of Stalnaker and Saunders as relevant to the operator's negligence and alleged unwarrantable failure. Rather Consol's argument is that Stalnaker and Saunders did not act in a negligent manner because they believed that they were not exposing themselves to a hazard. PDR at 21. According to Consol, Stalnaker and Saunders acted upon a reasonable good faith belief, and even if the belief was not reasonable, the operator should not be held responsible because the agents' conduct was somehow "idiosyncratic". *Id.*

members of the management of the Enlow Fork Mine. 37 FMSHRC at 1648. As such, their negligence is directly imputed to Consol. *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-96 (Feb. 1991) (holding that negligence of mine examiner is imputed to operator for purposes of determination of unwarrantable failure). Hence, the foreseeability of the actual unsafe travel is not an issue here.

In summary, I would remand the case on the issue of negligence in order for the Judge to consider the issue holistically, without regard to the Part 100 definitions of the degrees of negligence. The Judge should consider both (1) the actions of Consol in dealing with the problem of flooding in the bleeders in light of the two previous citations and the explicit warning by MSHA, and (2) the actions of Consol agents Stalnaker and Saunders in willfully entering the hazardous water. The Judge may, but need not, reach the conclusion that the violation of the ventilation plan was characterized by high negligence.

Unwarrantable Failure

The Judge's decision contains a lengthy discussion of unwarrantable failure, and looks at all of the factors which the Commission has identified as relevant in *IO Coal Co.*, 31 FMSHRC 1346, 1350-57 (Dec. 2009). *See* 37 FMSHRC at 1651-54. Her analysis is, for the most part, well-reasoned and supported by substantial evidence. Contrary to the opinion of Acting Chairman Althen and Commissioner Young, I find no reversible error in the Judge's discussion of the extent of the violative condition,[8] the length of time the violation existed,[9] whether the violation was obvious,[10] Consol's knowledge of the existence of the violation,[11] and whether Consol had been put on notice of the need for greater efforts for compliance.

However, I believe that errors made by the Judge in her analysis of the factors of danger and Consol's efforts to achieve compliance require remand for reconsideration.

With respect to the factor of danger, the Judge's consideration was necessarily informed by her previous determination that the violation produced a high likelihood of fatal injuries. As

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[8] Even if the water itself did not extend for as much as half a mile, it was unquestionably an extensive flooding in two separate areas of the bleeder system. Such error as the Judge made in saying "the water stretched for nearly half a mile", 37 FMSHRC at 1651, is trivial and harmless. The accumulation of water took three days to be abated. Tr. 153-54, 233; 37 FMSHRC at 1636.

[9] Crediting the testimony of Greene, the Judge reasonably concluded that the violation occurred less than 48 hours from the time the citation was written. 37 FMSHRC at 1651.

[10] My colleagues fault the Judge for finding the violation to be obvious since it was not known until Stalnaker entered it. They ignore the fact that after it became known, both Stalnaker and Saunders entered the deep water. Since Stalnaker and Saunders were agents of Consol, their actions in entering the hazardous water is a proper context for considering the obviousness of the violation, which is what the Judge did.

[11] *See* note 8, *supra*.

discussed *supra*, the determination of high likelihood is not supported by substantial evidence. This undercuts the Judge's findings as to danger with respect to unwarrantable failure. On remand, the Judge should revisit her findings as to danger in light of her reconsidered findings with respect to gravity.

With respect to Consol's efforts to abate the violative condition, the Judge focused on the fact that miners were exposed to the hazards of the excessive waters before abatement efforts became effective. 37 FMSHRC at 1654. She should have also considered Consol's efforts to control and monitor water in the bleeder system before Stalnaker entered the water, and the extent to which those efforts were sufficient to the task. Additionally, the fact that efforts were made after miners were exposed to the hazard does not render them meaningless for purposes of unwarrantable failure analysis.

Just as the Judge may well find high negligence on remand, she may also find that the violation was characterized by unwarrantable failure. But she must first reconsider her findings as to the factors of danger and efforts at abatement, and then weigh all of the unwarrantable failure factors together.

B. Order No. 7024069

With respect to the separate recording violation, the Judge concluded that Consol demonstrated high negligence, citing management's knowledge of the hazards, the multiple failures to record the hazards, and the mine's general history of failing to address water accumulations. The Judge found that Giavonelli's decision to sign a record with two obvious deficiencies — (1) a failure to list known hazards and (2) a failure to record air measurements for two of the evaluation points — was aggravating conduct. The Judge reasoned that a miner looking at the record would erroneously assume that the bleeder was safe for travel. In addition, the Judge found that any efforts the operator took to correct the underlying conditions were irrelevant to the negligence associated with the failure to record those conditions. 37 FMSHRC at 1658-61.

S&S

With regard to S&S, I would affirm the Judge's Decision, and join the opinion of Commissioner Jordan.

Gravity

With regard to gravity, I join the opinion of Acting Chairman Althen and Commissioner Young. The Judge's finding of a high likelihood of fatalities is not supported by substantial evidence. On remand the Judge should determine the severity of injury (ranging from broken bones to fatality) which was reasonably likely to have occurred as a result of the hazard contributed to by the violation.

Negligence

I would affirm the Judge's conclusion that Consol's failure to identify hazards in the weekly examination record book should be characterized as high negligence. In this regard, I fully join the opinion of Commissioner Jordan, slip op. at 32-34, 34 n.9, insofar as it applies to the negligence issue.

In contrast, my colleagues Acting Chairman Althen and Commissioner Young would vacate and remand the Judge's negligence analysis, unpersuaded that a knowing violation by mine management constitutes aggravated conduct. They would direct the Judge to reconsider two specific arguments.

First, they assert that the Judge should consider Consol's efforts to abate the water accumulations as relevant, despite the Judge's initial conclusion that those efforts were irrelevant to the recording violation. 37 FMSHRC at 1660 ("This is completely irrelevant to the issue. The dangers associated with an inadequate examination are not completely eliminated by correcting the underlying condition.") I disagree with my colleagues. Even if Consol had completely removed the water after the examinations by Stalnaker and Saunders, its duty to record the hazards observed during the examination would not be altered. Accordingly, I conclude that the Judge was correct in her determination that abatement efforts were not relevant.

Second, my colleagues suggest that Mine Foreman Giavonelli's signing of an incomplete exam report may not demonstrate aggravated conduct. They believe that any person viewing the examination record would have understood that it was incomplete. My colleagues miss the point. Giavonelli signed the examination report with blank spaces by the evaluation points, without any indication on its face that the spaces were blank or the examination incomplete at the time he signed it. This practice invites an examiner to complete the examination without having to approach the mine foreman again. As a result, the circumstances allow the examination report to be subsequently modified without indication on the face of the document. More importantly, in this case, Giavonelli knew that he was signing an examination report that was not completed because the examiners were prevented from accessing evaluation points because of hazardous conditions *that weren't listed on the examination report.* Only the section 103(g) complaint and the arrival of MSHA inspectors caused the discovery that the examination record was incomplete. The Judge was correct in concluding that Giavonelli's signature on an incomplete examination record, together with the failure to record the hazardous conditions, indicates an aggravated lack of care.

Unwarrantable Failure

The Judge's analysis of unwarrantable failure comprises one paragraph in which she states: "The facts and arguments of the parties regarding the unwarrantable failure designation in Order No. 7204069 are identical to those in Citation No. 7204068. Therefore the findings regarding Citation No. 7204068 are incorporated here by reference." 37 FMSHRC at 1661 (citation omitted). However, as noted by Acting Chairman Althen and Commissioner Young, with whose opinion I agree on this issue, the facts and issues regarding unwarrantable failure in

the order, while overlapping in many respects with the citation, are not congruent with the citation.

The analysis of the factor of whether Consol had been put on notice of the need for greater efforts for compliance is certainly different for the order. Unlike the citation, where MSHA had issued two recent citations for excessive water in the bleeder system and had specifically warned Consol to improve its compliance with the "safe for travel" provision of the ventilation plan, no such citations or warnings had been issued that Consol needed to improve its recording of weekly examinations.

The issues of knowledge and obviousness are also different for the order. With the citation, knowledge and obviousness relate to flooding in the bleeder system. With the order, knowledge and obviousness relate to what Consol officials put in the record book. Clearly, they had knowledge, and the violation was (or should have been) obvious.

As to abatement, the citation involves the question of how the Consol officials addressed a known problem of flooding in the bleeder system, both before and after the immediate problem was discovered on February 5, 2013. As described *supra,* this is a complex issue. However, with the order, the issue of abatement is quite clear. Consol not only failed to abate the violation, but compounded it when Mine Foreman Giavonelli signed the book, attesting that it was correct and accurate.

The issues of the extent and duration of the violation were relevant in the context of the citation, but probably are not relevant in the context of the order.

Therefore, the issue of whether the failure to record hazardous conditions in the weekly examination record book was an unwarrantable failure must be remanded to the Judge for reconsideration.[12]

Robert F. Cohen, Jr., Commissioner

[12] My colleagues Acting Chairman Althen and Commissioner Young take me to task for "essentially opin[ing] on each unwarrantable failure element", and instruct the Judge on remand that she "need not accord any weight whatsoever to Commissioner Cohen's premature statement of his personal view of factual issues." *See* slip op. at 25 n.16. What I have said here about the knowledge and obviousness of the recording violation should be manifest even to my colleagues in that Stalnaker and Saunders had each personally viewed, and entered, the accumulations of water before they recorded in the record book that there were no hazardous conditions in the bleeder system. What I have said here about the issue of abatement flows directly from what I said *supra* with regard to Mine Foreman Giavonelli's signature on an incomplete examination record constituting aggravated lack of care. The Judge on remand is, of course, not bound to accept my view of Giavonelli's negligence (in that the finding of high negligence regarding Order No. 7024069 is being affirmed in result without a Commission majority), but probably can figure that out without my colleagues' help.

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