FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

APR 10 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. PENN 2014-108 PENN 2014-109
LEHIGH ANTHRACITE COAL, LLC	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. PENN 2016-135
SHANE T. WETZEL, EMPLOYED BY LEHIGH ANTHRACITE COAL, LLC	:	

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

DECISION

BY: Jordan, Young, and Cohen, Commissioners

These proceedings, which arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"), involve enforcement actions taken by the Department of Labor's Mine Safety and Health Administration ("MSHA") against Lehigh Anthracite Coal, LLC ("Lehigh"), and Shane Wetzel, a foreman employed by Lehigh. The alleged violations arose from an incident in which a miner worked under a dangerous highwall and bank. MSHA issued a citation to Lehigh alleging a violation of 30 C.F.R. § 77.1006(a)[1] that was significant and substantial ("S&S") and the result of Lehigh's unwarrantable failure to comply with the standard.[2] MSHA proposed a civil penalty of $23,229 for the alleged violation.

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[1] 30 C.F.R. § 77.1006(a) provides that "[m]en, other than those necessary to correct unsafe conditions, shall not work near or under dangerous highwalls or banks."

[2] The "significant and substantial" and "unwarrantable failure" terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguished as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard," and establishes more severe sanctions for any

In addition, MSHA proposed a penalty of $2,900 against Wetzel individually under section 110(c) of the Mine Act[3] for knowingly authorizing the violation.

A Commission Administrative Law Judge concluded that the operator had violated section 77.1006(a), that the violation was S&S and caused by unwarrantable failure, and that Wetzel was liable under section 110(c) for knowingly authorizing the violation. 38 FMSHRC 2782, 2794-2805 (Nov. 2016) (ALJ). However, the Judge found that Lehigh's and Wetzel's negligence was "high" rather than "reckless," as alleged by MSHA, and assessed penalties of $6,996 and $1,000 against them, respectively. *Id.* at 2800-02.

The Secretary of Labor petitioned the Commission for review of the Judge's negligence findings and assessment of penalties. We granted review and heard oral argument. For the reasons that follow, we vacate and remand for further proceedings.

I.

Factual and Procedural Background

A. Facts

Lehigh operates the Tamaqua Mine, an open pit anthracite coal mine in Tamaqua, Pennsylvania. In order to extract coal, Lehigh uses explosives to blast open the pit, removes the rock covering the coal to expose the coal seam, and then digs the coal from the pit with an excavator.[4] The rock is deposited in spoil piles located at the north and south sides of the top of the pit. A highwall is created as the pit increases in depth.

When the highwall becomes too unstable to keep an excavator in the pit, coal is removed from the pit using a dragline, a large, track-mounted vehicle which is operated from the surface beside the pit. *Id.* at 2784-85. The dragline has a boom crane that extends over the pit and a bucket attached to the boom. The bucket is lowered into the pit and then digs and scoops coal as it is scraped across the floor. After it has been loaded, the bucket is lifted and the extracted coal is dumped in a collection pile at the side of the pit. The bucket is nine feet long, six feet wide, and four feet deep, and can hold seven cubic yards of material. *Id.* at 2785.

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violation caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

[3] Section 110(c) provides that "any . . . agent of [a] corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to . . . civil penalties." 30 U.S.C. § 820(c).

[4] An "excavator" is a large track-mounted piece of equipment that swivels 360 degrees, has a long boom, and is similar to a backhoe although much larger. Tr. 58.

At the time in question, the highwall, which was located on the north side of the pit, was nearly vertical, and the south wall had a slope of about 50 degrees. The mine resembled the shape of a modified "V," in that the distance between the walls at the top was approximately 50-60 feet, while the distance between the walls at the floor of the pit was approximately 10-30 feet. *Id.* at 2784.

On the night of June 19, 2013, Larry McNeal, the dragline operator, stepped out of his cab to replace a light on the dragline while the bucket was resting on the floor of the pit. While he was out of the cab, McNeal felt two vibrations, which turned out to be coal falling off of the face of the south wall. The fall of coal buried the bucket. McNeal used the dragline controls in an effort to raise the bucket, but the bucket would not budge. *Id.* at 2785; Tr. 60; Ex. S-3 at 3; Ex. S-10; Ex. S-20 at 1.

McNeal called the second shift foreman, Shane Wetzel. Wetzel testified that, as the foreman, he was responsible for safety on his shift and making sure that miners in his charge complied with MSHA's regulations. If miners did not comply with those regulations, then Wetzel had the authority to redirect them and have them perform their work safely. Tr. 455-56.

Wetzel and McNeal tried repositioning the dragline. However, they were unable to pull the bucket free. Tr. 36; Ex. S-3 at 3.

Foreman Wetzel called truck driver Erik Osenbach and excavator-operator Richard Rudinsky to the pit. They considered abandoning the bucket, which would have sacrificed production for the shift, but discarded that option. They also considered building a road to access the pit, but rejected that option as infeasible or requiring too much time and loss of production. 38 FMSHRC at 2785; Tr. 38, 86-87, 328, 354, 356, 433-34.

Instead, they decided that one of them would descend into the pit to attach a chain to the "crow's foot"[5] on the bucket so that an excavator, attached to the other end of the chain, could pull the bucket out. Foreman Wetzel proposed going into the pit himself, but Osenbach volunteered to go because Wetzel had "a wife and kids." 38 FMSHRC at 2786. Rudinsky drove the excavator to the pit, and Osenbach entered the pit and attached the chain.[6] When the excavator attempted to pull the bucket out of the muck using the chain, the chain broke. *Id.* at 2785-86.

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[5] A "crow's foot" is the point at which the two control chains for the dragline attach to the bucket. 38 FMSHRC at 2785.

[6] As part of the retrieval plan, the area was illuminated by the dragline and viewed to see if any material was moving, Osenbach attempted to keep his distance from the highwall and to minimize his time in the pit, and the dragline operator was provided with a horn to alert Osenbach if conditions became more hazardous. Tr. 89, 119, 330, 338, 340, 360, 362, 398-99, 440; Ex. S-20 at 3.

The crew then decided to try pulling the bucket out with a cable. Rudinsky used the excavator to dig a bench that was five feet down from the top of the west bank. The excavator was moved onto this bench to bring it closer to the buried bucket. Tr. 361.

Osenbach entered the pit a second time and hooked a cable to the bucket's control chains. The second attempt to use the excavator to pull out the bucket also failed. Osenbach was not wearing a safety belt or line during either of his two entries into the pit. Each of Osenbach's trips into the pit lasted approximately two minutes. 38 FMSHRC at 2785-86, 2796, 2802.

At 2:43 a.m., Wetzel sent an email to first-shift Foreman Louis Mitchalk informing him of the stuck bucket. Ex. S-13. When Mitchalk arrived at the pit a few hours later, he saw evidence that a miner had entered the pit and notified Lehigh's safety director, John Hadesty. Tr. 234-35.

Mitchalk and his crew then retrieved the stuck bucket by cutting the buried bucket free, attaching another bucket to the dragline, and using the new bucket to dig out the buried bucket. No miners entered the pit during the retrieval. Mitchalk testified that this method had been employed five times before by the operator. 38 FMSHRC at 2787; Tr. 70-73, 246, 256.

During the week of June 19, the operator conducted an investigation of the incident, interviewed witnesses, and gave written warnings to Wetzel, McNeal, Osenbach, and Rudinsky. Lehigh decided to forego its ordinary first step of providing verbal warnings because the miners' conduct was so dangerous. In addition, the operator formalized the procedure it had used to recover the buried bucket, sought and eventually received approval from MSHA for the procedure as part of its ground control plan, and provided training on the new procedure. 38 FMSHRC at 2787, 2802; Tr. 124-26, 245-46, 415-16; Ex. S-5 at 3, Ex. S-14, Ex. S-19 at 3.

On June 24, MSHA received an anonymous complaint about the incident. MSHA Supervisor Tom Yencho called the mine and issued a verbal imminent danger order over the phone. That same day MSHA Inspector David Labenski traveled to the mine, interviewed employees, and determined that no imminent danger was present since the situation had occurred five days earlier.

MSHA investigated the matter, using in part the materials gathered by the operator.[7] On July 3, 2013, MSHA issued Citation No. 8000958, alleging an S&S violation and an unwarrantable failure to comply with section 77.1006(a) for allowing an employee to work near or under a dangerous highwall or bank. It also issued Citation No. 8000959, alleging an S&S and moderately negligent violation of 30 C.F.R. § 77.1710(g) for failure to wear safety belts and lines where there is a danger of falling. In addition, the Secretary later sought a section 110(c) civil penalty against Wetzel for his involvement in the violation of section 77.1006(a).

[7] The inspector's notes stated that throughout the investigation, Lehigh had been "very cooperative and share[d] info. freely when requested. Action was taken to correct the problem before anyone from MSHA knew about it and policies have been written to prevent further troubles. Company tries very hard to make jobs safe." Ex. S-3, notes for 7-8-13 at p. 7.

Lehigh and Wetzel challenged the citations, the special findings in the citations, and the penalty amounts. The matter proceeded to hearing.

B. The Judge's Decision

The Judge affirmed the violation of section 77.1006(a), concluding that Lehigh violated the standard by permitting Osenbach to work near or under a dangerous highwall and bank.[8] 38 FMSHRC at 2793-95. The Judge found that the highwall on the north side of the pit was "cracked and contained unconsolidated material that could fall at any time on a miner below." *Id.* at 2794. He further concluded that the spoil banks on the south side had been undercut and posed a falling hazard. The Judge found that the coal seam on the south side was "cracked and fractured," and that there was between a few hundred pounds and 10 tons of coal still hanging at the time Osenbach entered the pit. *Id.* at 2794, 2797. He stated that the two collapses from this coal seam a few hours earlier "not only indicated a high risk of further collapse, but also removed much of the lateral support for the remaining coal and spoil pile that had yet to fall" and therefore increased the risk of another fall. *Id.* at 2794. The Judge credited testimony that the limited space in the pit ensured that Osenbach would inevitably be near, if not under, those dangerous conditions. He concluded that Osenbach traveled to the bottom of the pit, and that the crow's foot that he reached was within 10 feet of both the northern highwall and southern bank hazards. *Id.* at 2794-96.

The Judge also determined that Lehigh's violation of section 77.1006(a) was S&S and had been caused by an unwarrantable failure. In concluding that the violation was S&S, the Judge found that it was "more than reasonably likely that material could have fallen from the highwall, spoil bank, or coal seam while Osenbach was down in the pit," that it was "highly likely that an injury would have occurred," and that any injury "could have reasonably been expected to be fatal." *Id.* at 2795, 2797. The Judge based his unwarrantable failure determination in part on findings that the cited conduct posed a high degree of danger which was known and obvious to Lehigh. *Id.* at 2797-99.

Furthermore, the Judge held that Wetzel had authorized the violation of section 77.1006(a) within the meaning of section 110(c) of the Mine Act. *Id.* at 2800-01. He reasoned that Wetzel had admitted that it was his decision to send Osenbach into the pit, that the hazards in the pit were obvious, and that Wetzel had acknowledged that there was a level of risk in sending Osenbach into the pit by stating that there was a "moderate" level of risk and a "somewhat likely possibility . . . of some of the rocks coming down into the pit if someone was in there." *Id.*

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[8] The Judge also affirmed the violation alleged in Citation No. 8000959, concluding that the operator violated section 77.1710(g) because Osenbach failed to wear a safety belt or line where there was a danger of falling. 38 FMSHRC at 2802-03. The Judge further determined that this violation was S&S and had been caused by moderate negligence. *Id.* at 2803-04. The Judge's findings regarding this citation are not at issue on appeal. PDR at 13 n.3.

Finally, the Judge concluded that Lehigh's and Wetzel's violative conduct resulted from "high negligence" rather than "reckless disregard," as alleged by MSHA, because Wetzel had been willing to go into the pit himself, Wetzel had a genuine misunderstanding regarding the hazards presented by the conditions, and some efforts had been undertaken to minimize Osenbach's exposure to hazards while in the pit. *Id.* at 2800, 2801. The Judge assessed penalties of $6,996 and $1,000 against Lehigh and Wetzel, respectively, rather than the penalties of $23,229 and $2,900 proposed by the Secretary.

The Secretary filed a petition for discretionary review challenging the Judge's negligence determinations and assessment of penalties, which we granted.

II.

Disposition

The Secretary argues that the Judge's conclusion that MSHA failed to establish reckless disregard is legally invalid and that the evidence of record and the Judge's own factual findings support such a determination. Lehigh and Wetzel did not file a cross-petition challenging any of the Judge's legal determinations and request that the Judge's decision be affirmed.

We accept as undisturbed the Judge's factual findings and credibility determinations and review his negligence holdings based on those findings.[9] According to the Judge's findings, foreman Wetzel authorized Osenbach to enter the pit in circumstances that posed a high risk of fatal injuries to Osenbach -- not once but twice -- to attempt to avoid delays in production. 38 FMSHRC at 2785, 2795, 2797. Such findings support only one conclusion -- that Wetzel recklessly disregarded Osenbach's safety, both as to Lehigh's violation of section 77.1006(a) and Wetzel's knowing authorization of that violation as Lehigh's agent.

Section 110(i) of the Mine Act authorizes the Commission to assess civil penalties for violations under the Act and its implementing regulations, and includes negligence as one of the six factors the Commission is required to consider in so assessing a penalty.[10] The Commission has recognized that in assessing a civil penalty, there is no requirement that equal weight be

[9] The respondents' statement of facts in their brief includes many facts that conflict with the Judge's factual findings. Contrary to their statement of facts, however, Lehigh and Wetzel ultimately acknowledged in their brief that the Judge's "findings were not legally erroneous, contrary to law or unsupported by substantial evidence," and that the Judge's credibility determinations were entitled to deference. Resp. Br. at 15, 19.

[10] The six statutory factors the Commission must take into account in assessing a penalty are: (1) the operator's history of previous violations; (2) the appropriateness of such penalty to the size of the business of the operator charged; (3) whether the operator was negligent; (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation; and (6) the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

assigned to each of the section 110(i) factors. *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1979-80 (Aug. 2014) ("*JWR*"). "Rather, 'Judges have discretion to assign different weight to the various factors, according to the circumstances of the case.'" *Id.* at 1979 (citations omitted).

MSHA's regulations at 30 C.F.R. Part 100 address how MSHA calculates most proposed penalties in light of the section 110(i) factors applied by the Commission in the assessment of penalties. With respect to negligence, "MSHA has adopted a formulaic approach, categorizing negligence into five different levels from 'no' negligence to 'reckless disregard,' based on the existence of a mitigating circumstance, or multiple such circumstances, for the violation." *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015) (citations omitted).

MSHA defines "reckless disregard" to mean that the "operator displayed conduct which exhibits the absence of the slightest degree of care." 30 C.F.R. § 100.3(d).

Commission Judges are not bound in any way by the definitions in Part 100 when considering an operator's negligence. *Brody*, 37 FMSHRC at 1702. Rather, a Judge "may consider the totality of the circumstances holistically." *Id.* Nor was the Judge required to use MSHA's penalty point system in his penalty assessment. *JWR*, 36 FMSHRC at 1980 (citations omitted) ("In determining the amount of a penalty, neither the Judge nor the Commission is restricted by the penalty proposed by the Secretary."). The Judge's decision properly acknowledged this principle and correctly articulated the appropriate framework for determining negligence under the Act. 38 FMSHRC at 2790-91.

In analyzing Wetzel's negligence, however, the Judge noted the Secretary's definition of "reckless disregard," 38 FMSHRC at 2800 n.7, and determined that Lehigh's and Wetzel's level of negligence was high rather than reckless for three reasons. First, he concluded that Wetzel's willingness to enter the pit himself showed a failure to properly evaluate the obvious safety risks around him rather than a reckless indifference to the safety of Lehigh employees. Second, he reasoned that Wetzel had a genuine misunderstanding of the hazards present, although Wetzel's belief was not reasonable. Third, the Judge explained that the efforts taken to ensure that Osenbach stayed away from the longwall and did not linger in the pit demonstrated some degree of care to comply with the standard, although those efforts were "wholly inadequate." 38 FMSHRC at 2800.

The Judge's rationales for his negligence determinations are legally invalid.

In analyzing an operator's degree of negligence, the Commission has recognized that "[e]ach mandatory standard . . . carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an operator met its duty of care, we 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*, 37 FMSHRC at 1702 (citations omitted); *U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984).

First, we note that this case spotlights the difficulties that arise from applying, too literally, MSHA's definitions of negligence in the assessment of penalties by the Commission and its Judges. While such definitions may appropriately guide inspectors, their rigidity adapts poorly to the holistic consideration of negligence by Commission Judges after a hearing. *See Hidden Splendor Res., Inc.* 36 FMSHRC 3099, 3105-08 (Dec. 2014) (Comm'r Cohen, concurring).

In particular, MSHA's definition of "reckless disregard," which focuses on whether an operator has exhibited the "slightest degree of care," is either inappropriately subjective or, if read literally, almost indistinguishable from intentional misconduct by an operator's agent. The definition is therefore not well suited to the objective "reasonably prudent person" standard used by Commission Judges.

We thus suggest Commission Judges should be guided by broader and more general common-law standards more congruent with the Act's intent and purpose, i.e., to prioritize the health and safety of miners. "Reckless disregard" should therefore include, for example, situations where an operator knows or has reason to know of facts which create a high degree of risk of physical harm, and deliberately proceeds to act, or fails to act, in conscious disregard of, or indifference to, that risk. *Cf.* Restatement (Second) of Torts § 500 cmt (Am. Law Inst. June 2017).[11] Thus, the operator's conduct would be measured objectively against the conduct under the same circumstances of a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation at issue. *See* pp. 10-11, *infra.*

The Mine Act recognizes that the "first priority . . . in the . . . mining industry must be the health and safety of its most precious resource – the miner." 30 U.S.C. § 801(a). The Mine Act places primary responsibility for maintaining safe and healthful working conditions in mines on operators, with the assistance of their miners. 30 U.S.C. § 801(e). We have long recognized that mine management should be held to a high standard of care. *See Midwest Material Co.*, 19 FMSHRC 30, 35 (Jan. 1997) ("a foreman . . . is held to [a] high standard of care"). *See also Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1982-83 (Aug. 2014) (Comm'rs Young and Cohen, dissenting) (stating that, while not binding on the Commission, section 100.3(d) puts operators on notice of the Secretary's expectation of the "high standard of care" operators owe to their miners.).

Managers not only act as directly responsible stewards for the health and safety of their miners, they also ensure that miners will conduct themselves as the Act envisions, in a manner that protects their own health and safety and that of their co-workers. "Managers and supervisors in high positions must set an example for all supervisory and non-supervisory miners working under their direction. Such responsibility not only affirms management's commitment to safety but also, because of the authority of the manager, discourages other personnel from exercising

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[11] We are not attempting to comprehensively define "reckless disregard," but only setting forth, using language from the Restatement of Torts (a commonly-cited authority on questions of negligence), a description of a type of reckless disregard which describes foreman Wetzel's actions in this case.

less than reasonable care." *Wilmot Mining Co.*, 9 FMSHRC 684, 688 (Apr. 1987). Wetzel, as a foreman, must be held to this higher standard of care.[12]

This, then, is the appropriate scope of the duty that adheres to an operator's agent under the Act: It is not a duty to exercise reasonable care in the abstract, but rather the obligation to exercise a thoughtful prudence that takes into account the nature of mining, the mine environment, and the purposes of the mandatory safety standards implicated by the circumstances encountered therein.

Wetzel's conduct as a supervisory agent of Lehigh fell far short of his duty under the Act. Contrary to the Judge's first rationale, Wetzel's willingness to enter the pit himself does not amount to a factor which reduces the degree of negligence. As a foreman, Wetzel is held to a very high degree of care, and his actions set an example for other employees. Entering the pit himself and working below a dangerous highwall and bank in conditions that the Judge found to be highly likely to result in fatal injuries would have posed the same unjustifiable risks to Wetzel as to other miners.

Furthermore, Wetzel's entry into the pit would have still unjustifiably set an example of improperly prioritizing the retrieval of the bucket and resumption of production over miners' safety. In any event, Wetzel ultimately authorized a miner on his crew to go into the pit instead of himself – not once, but twice. Doing so showed no meaningful consideration of the exposure to danger inherent in the task.

Nor does the Judge's second reason – Wetzel's misunderstanding of the hazards presented by authorizing Osenbach to enter the pit twice – reduce the level of negligence attributed to the violative conduct. The Judge determined that Wetzel's belief that the south slope did not present a hazard and that Osenbach would be far enough away from the northern highwall hazards was not reasonable, even if it were genuine. 38 FMSHRC at 2800. As we have noted, the operator's agents are held to a very high standard of care. This duty requires a very high standard of care in evaluating hazards, and yet the Judge found that Wetzel's assessment of the danger was unreasonable.

The Commission has held that "if an operator has acted on an objectively reasonable and good faith belief that the cited conduct was in compliance with applicable law, such conduct will not be considered to be the result of an unwarrantable failure when it is later determined that the operator's belief was in error." *Oak Grove Res., LLC*, 38 FMSHRC 1273, 1279 (June 2016) (citations omitted). Although this principle arose in the context of unwarrantable failure determinations, the Commission has engaged in similar considerations when reviewing a Judge's

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[12] Our colleague contends that "Wetzel was not mine management." Slip op. at 21. But Wetzel, who acknowledged that he was responsible for miners' safety on his shift, Tr. 455-56, was the only supervisor on duty at the time of this incident. It therefore does not matter that Wetzel was in charge only of a small group of workers: He was the agent responsible on behalf of the operator for the health and safety of each of those miners, a fact that has not been disputed before us.

negligence determinations. *See, e.g., DQ Fire & Explosion Consultants, Inc.*, 36 FMSHRC 3090, 3097 (Dec. 2014); *Mach Mining, LLC*, 36 FMSHRC 1525, 1527 (June 2014).

In this case, the Judge correctly determined that the exception for "good faith" errors did not excuse the unwarrantable nature of Lehigh's violation of section 77.1006(a). He determined that Wetzel's belief that the violative conduct was safe was not reasonable given the obvious nature of the danger presented. 38 FMSHRC at 2799. Wetzel's unreasonable belief is similarly unavailing in mitigating the negligence determination for penalty purposes. Not only was the belief unreasonable, it disregarded what the Judge himself characterized as an "obvious" danger "highly likely to result in a fatal injury to a miner." *Id.* at 2797-99.

The subjective "genuineness" of Wetzel's belief does not override the requirement that a good faith belief must be objectively reasonable. As noted, the Commission applies an objective, rather than a subjective, standard of care and considers what actions would have been taken by a reasonably prudent person under the same circumstances. Thus, even accepting the Judge's factual finding that Wetzel did not appreciate the obviously high degree of risk present, a reasonably prudent person in his position would have done so. *See, e.g., id.* at 2798 (finding that miner's statement that Wetzel should not enter the pit because he had a wife and children, even if "made half in jest as the Respondent argues, . . . [is] in part a recognition of the high level of danger associated with the retrieval effort and that Wetzel should have understood this.").

We further conclude that the Judge erred with respect to his third rationale for his negligence determination. In order to reduce the level of negligence, the operator's actions would have to correct the hazardous condition. For instance, the D.C. Circuit has stated that a Judge reasonably concluded that an operator's actions that "neither *prevented* nor *corrected* the hazardous condition" did not amount to a factor mitigating high negligence. *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1265 (D.C. Cir. 2016) (emphasis in original). Similarly, the Commission has concluded that the fact that a hazardous area was examined before it was entered did not reduce negligence because the exam "did not eliminate the risk . . . but rather served to measure the risk presented." *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1244 (Aug. 1992).

The actions that were taken to reduce the hazards for Osenbach as he twice entered the pit were effectively meaningless in terms of realistically reducing those hazards. Nor did the actions demonstrate a real attempt to comply with the standard's directive. As part of the retrieval plan, the area was illuminated by the dragline and viewed to see if material was moving, Osenbach attempted to keep his distance from the highwall and to minimize his time in the pit, and the dragline operator was provided with a horn to alert Osenbach if conditions became more hazardous. *See* n.6, *supra*. However, the Judge credited testimony that the lighting was inadequate for illuminating large portions of the pit (38 FMSHRC at 2796-97), and that, given the pit's configuration and where he traveled, Osenbach would inevitably be exposed to the highwall, the spoil bank and the coal seam hazards (*id.* at 2794-95), which is expressly

prohibited by the safety standard. Indeed, the Judge himself determined that such measures were "wholly inadequate." *Id.* at 2800.[13]

Evidence that such wholly inadequate efforts were undertaken in "good faith" does not change the conclusion that such factors do not reduce the level of negligence. 38 FMSHRC at 2800. As discussed above, the subjective good faith of such actions does not reduce negligence where such actions are based on an objectively unreasonable belief. *Cf. IO Coal Co.*, 31 FMSHRC 1346, 1358 (Dec. 2009) (stating that the Judge's finding that a foreman "'was not indifferent to his responsibilities' . . . and 'tried, but failed to meet the standard of care required of him,' . . . does not dispose of the issue of reasonableness").

In sum, the Judge's determination that Lehigh's and Wetzel's negligence was "'high' rather than 'reckless'" was based on legal error. 38 FMSHRC at 2800, 2802. Under the facts of this case as found by the Judge, while the level of negligence did not involve a conscious intention to cause harm to a miner, it did involve a conscious choice to take actions with knowledge of facts that would disclose to a reasonable foreman an unjustifiably high risk of potentially fatal injury to a miner.

Commission Judges have consistently found operators' negligence to be "reckless disregard" where the violation was found to be motivated by a desire to avoid the loss of production. *See RAG Cumberland Resources, LP,* 23 FMSHRC 1241, 1261 (Nov. 2001) (ALJ); *Lhoist N. America of VA, Inc.,* 36 FMSHRC 2413, 2427 (Sep. 2014) (ALJ); *Regent Allied Carbon Energy, Inc.,* 37 FMSHRC 830, 857 (Apr. 2015) (ALJ); *Saiia Construction, LLC*, 38 FMSHRC 2291, 2306 (Aug. 2016) (ALJ) ("The [operator's] message was loud and clear: production over human life").

In this case, Wetzel's conduct, individually and as imputed to Lehigh, amounted to reckless disregard based on the Judge's own findings and conclusions. Wetzel ignored the obvious and high risk of fatal injuries to Osenbach in authorizing him to twice enter the pit, at night under poor illumination, where Osenbach was required to pass through and work in a narrow valley, menaced by unstable ground conditions following a collapse that removed lateral support from the remaining material on the highwall and buried the bucket under so much material that a dragline could not move it. 38 FMSHRC at 2794-96.

As the Judge also concluded, Wetzel sent Osenbach into the pit under these conditions when he knew that safe alternatives were available. He took this action so as to avoid sacrificing

[13] Our colleague alleges that we do not discuss the totality of the evidence because we "summarily declare the totality of actions 'meaningless.'" Slip op. at 20. Our opinion notes with particularity the Judge's own findings of fact and conclusions of law about the dangers present and the failure of Wetzel to apprehend those dangers or to take effective precautions to avoid exposing Osenbach to them. When we conclude, based on the Judge's own evidentiary findings and legal conclusions, that Wetzel's actions were "effectively meaningless in terms of realistically reducing those hazards," we are simply adopting and restating the Judge's finding that Wetzel's actions were "wholly inadequate."

production of coal. 38 FMSHRC at 2785, 2799. Such actions demonstrate a degree of negligence best characterized as reckless disregard. *See Spartan Mining Co., Inc.,* 30 FMSHRC 699, 719-23 (Aug. 2008) (where mine fan stopped and foreman directed miners to attempt to repair damaged cable rather than withdraw from working section, Judge properly characterized foreman's action as reckless disregard); *Signal Peak Energy*, 37 FMSHRC 470, 482 (Mar. 2015) (where operator failed to immediately contact MSHA following an accident with a reasonable potential to cause death because of a desire to resume production, the Judge correctly found the violation to be reckless disregard).

We note that the Judge characterized this as a case in which "a supervisor directed a miner into a situation that posed an immediate and appreciable risk to the safety of that miner." 38 FMSHRC at 2799. The Judge found that Wetzel did this knowingly. *Id.* at 2801. This is so contrary to the standard's command that miners not work under or near dangerous highwalls that the operator cannot be said to have exercised any meaningful care for the safety of the miner endangered here.

We conclude that the record on review supports only the conclusion that the respondents recklessly disregarded the safety of a miner, and thus demonstrated the highest possible level of negligence for purposes of penalty assessment under section 110(i). To hold otherwise would be to find that an operator does not act with reckless disregard when its agents see hazardous conditions but fail to use the judgment responsible supervisors must exercise to avoid placing miners in peril, or when those agents recognize the likelihood of dire consequences but disregard that likelihood and allow or direct miners to expose themselves to mortal danger without justification. *See* 38 FMSHRC at 2797, 2799 (finding "obvious" dangers here were "highly likely to result in fatal injury to a miner").

Given this determination, it is therefore unnecessary to remand the determination of respondents' level of negligence to the Judge. *See, e.g., Walker Stone Co. v. Sec'y of Labor*, 156 F.3d 1076, 1085 n.6 (10th Cir. 1998); *Sedgman*, 28 FMSHRC 322, 331 (June 2006) (stating that remand unnecessary where Judge failed to examine whether certain actions violated a safety standard because record supplied "more than sufficient evidence" to uphold the citation).

We vacate the penalties assessed against the respondents and remand them for reassessment. On remand, the Judge may weigh the section 110(i) factors as he deems appropriate under the circumstances of this case.[14]

[14] We note that upon discovering the incident prior to MSHA being notified, Lehigh itself investigated what had occurred, disciplined Wetzel and the other miners involved, and changed its policies so as to formalize the procedure it had used to safely retrieve the buried bucket. Such proactive actions may be considered under section 110(i) as "demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation." *See Hidden Splendor,* 36 FMSHRC at 3109 (Comm'r Cohen, concurring). We do not consider the statutory phrase "after notification of a violation" as being limited to notification by MSHA or its inspectors. An operator which is ultimately charged with a violation may

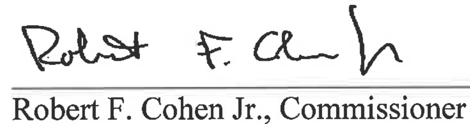
III.

Conclusion

For the reasons discussed above, we hold that the Judge's negligence determinations were based on legal error. We further vacate the penalties assessed against Lehigh and Wetzel with respect to the violation of section 77.1006(a) and remand for reassessment consistent with this decision.

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner



Robert F. Cohen Jr., Commissioner

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receive "notification of a violation" where, as here, another foreman discovers the unsafe action and notifies the company's safety director.

Acting Chairman Althen, dissenting:

I would not find the Judge made legal errors as asserted by the Secretary and found by my colleagues. Even had he made the asserted errors, substantial evidence supports the Judge's decision, and the Judge's penalty assessment does not constitute an abuse of discretion. I respectfully dissent.

I. Substantial Evidence Supports the Judge's Negligence Finding.

The Mine Safety and Health Administration ("MSHA") alleged reckless disregard based upon its definition in 30 C.F.R. § 100.3(d) Table X. There, MSHA defines "reckless disregard" as "the operator displayed conduct which exhibits the absence of the slightest degree of care." *Id.* This is a classic and completely acceptable definition of reckless disregard. After reviewing the evidence, the Judge found the Secretary had not proved an absence of the slightest degree of care. He found high negligence.

The Commission reviews a Judge's negligence determination under the substantial evidence standard. *Leeco, Inc.*, 38 FMSHRC 1634, 1636-37 (July 2016); *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1976 (Aug. 2014). The majority does not address directly whether substantial evidence supports the Judge's decision. Instead, it focuses upon alleged legal errors. Our duty in this case, therefore, is two-fold. First, we must consider the legal errors asserted by the Secretary. Second, if errors occurred, we must decide whether such errors are sufficient to affect the outcome of the case. *Cf. Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996) (reviewing first for legal error, then for substantial evidence). "Substantial evidence is relevant evidence that a reasonable mind would accept as adequate to support the [Judge's] conclusion." *Craig v. Apfel*, 212 F.3d 433, 435 (8th Cir. 2000).[1]

Further, "[i]n determining whether existing evidence is substantial, we consider 'evidence that detracts from the [Judge's] decision as well as evidence that supports it.'" *Prosch v. Apfel*, 201 F.3d 1010, 1012 (8th Cir. 2000) (quoting *Warburton v. Apfel*, 188 F.3d 1047, 1050 (8th Cir. 1999)). However, "[w]e may not reverse the [Judge's] decision merely because substantial evidence" exists in the record that would have supported a contrary outcome. *Id.*

A Judge is not required to discuss all the evidence submitted, and a failure to cite specific evidence does not indicate that the Judge did not consider that evidence. *Craig*, 212 F.3d at 436. Importantly, therefore, we must consider all the evidence in evaluating a decision for substantial evidence purposes.

The operator, through its supervisor Wetzel, erred in sending a miner into the pit in an effort to free the bucket. The seriousness of the error springs not only from the level of danger to the miner but also, and perhaps more so, because it was not necessary to retrieve the bucket immediately through exposure of a miner to a potentially fatal situation. After the event was over and management learned of it, mine management responded quickly and aggressively to

[1] The Secretary suggests that the Commission just go ahead and assess the penalty proposed by MSHA. I concur with the majority's rejection of that approach.

deter Wetzel or any other line foreman from making a similar mistake in the future. Although Wetzel grievously failed in his duties, mine management was exemplary in fulfilling its duties to miner safety.

The issue before the Judge was not whether Wetzel was negligent but instead the level of negligence exhibited by Wetzel. The Judge applied MSHA's definition of reckless disregard as accepted and argued by both parties. He decided that the action was highly negligent rather than reckless disregard. The Judge based the decision upon a finding that Wetzel exercised a degree of care. As said, the outcome of our review depends upon the existence of any legal errors and whether substantial evidence in the record as a whole supports a finding that the Judge's decision was reasonable.

As explained below, I do not agree with the majority's findings of legal errors. Going further, the Judge pointed to a number of actions, and the record discloses other actions, demonstrating that Wetzel, and hence the operator, showed a degree of care. Of course, the issue before us is not whether we would have made the same finding. Ultimately, the only issue is whether, after reviewing the totality of the evidence, we should find the Judge's decision was unreasonable.

The facts show that Wetzel did not send a worker into the area unilaterally, immediately, or without discussion and consideration. He met with the entire crew. As a group, the crew discussed means of freeing the bucket, including attaching a chain to the bucket. They identified a procedure through which a miner would enter the pit very briefly to attach a chain to the crow's foot.

Wetzel examined the southern slope, judged that it was strong enough to support itself, and did not see any indication of future movement. Further, Wetzel considered the danger from the Northern highwall and decided Osenbach's route would keep him far enough from it to be safe.

Wetzel did not order Osenbach to go into the pit. In fact, Wetzel said he would hook the chain, but Osenbach then volunteered to do it.[2] Under the Judge's analysis, Wetzel showed regard for safety before he accepted Osenbach volunteering to go into the pit. Stated differently, Wetzel did not disregard safety consciously or unconsciously, nor did he act without any concern for safety. After a group discussion, he made a conscious decision that a miner could hook the chain to the bucket safely. The facts on the record that demonstrate that it was reasonable for the Judge to find a degree of care and a regard for safety include the discussion with the crew, review of conditions, a brief period of exposure, defining a route, lighting the area, and voluntary participation by a physically fit miner.

[2] Not being the trier of fact and having only a transcript before us, we may not assign a reason for or significance to Osenbach's remark that he would go into the pit because Wetzel had children. *See Martin Cty. Coal Corp.*, 28 FMSHRC 247, 257 (May 2006) (stating that "fact-finding is not the province of the Commission").

None of this undercuts the Judge's decision of high negligence, and this opinion is not in any sense a defense of Wetzel's conduct. Based on the evidence, the Judge reasonably found that Wetzel made a decision to send/allow Osenbach to enter the pit, albeit an ill-conceived decision, in consultation with the crew, with a degree of care, and with regard for the safety of the miner.

Reviewing the entire record, the facts are sufficient to affirm the decision under the substantial evidence standard of review. For this reason, I dissent from the majority's decision to vacate the Judge's negligence determination and to hold, as a matter of law, that Wetzel and Lehigh's actions constituted reckless disregard.

II. The Judge Appropriately Used the Secretary's Definition of Reckless Disregard and Considered Facts Relating to the Level of the Operator's Negligence.

Had the majority found that, based upon the exclusion of certain evidence or conclusions, the evidence only supported a conclusion that the operator displayed the absence of a slight degree of care, I would have disagreed with but understood their decision. That is not their approach. Instead, the majority not only accepts the Secretary's conversion of a substantial evidence case into a "legal" case through asserted legal arguments but also surpasses even the Secretary by going further than the Secretary and suggesting, but not mandating, a different definition of reckless disregard for this case at the appellate level. Using that definition and disallowing certain findings by the Judge rather than reviewing the totality of the evidence, the majority reverses.

I have great respect for my colleagues and recognize that they will disagree, probably strongly, with me; nevertheless, I am constrained to address their opinion. Their decision strikes me as a desired result driving the law rather than the law driving a principled result.

When the Secretary alleges that an operator's actions exhibited reckless disregard for safety, he takes on a self-prescribed task of proving by a preponderance of the evidence "the absence of the slightest degree of care." 30 C.F.R. § 100.3(d). That is a standard and much-utilized definition of reckless disregard. In turn, that is the standard under which the parties tried the case and the standard to which the Judge held the Secretary. Neither party challenged the definition of reckless disregard before the Judge or us, nor did either party brief the effect of a different definition upon the outcome. The only arguments before us are the Secretary's arguments that the Judge could not legally consider certain facts or reach certain conclusions.

The majority accepts the Judge's findings of fact and credibility determinations. Slip op. at 6. They review the case under those fact and credibility findings. However, the majority ultimately fails to apply the substantial evidence standard. The term "substantial evidence" only appears one time in their opinion in an irrelevant footnote. Slip op. at 6 n.9. On top of that, the majority goes beyond the petition of the Secretary and refuses, in this instance, to allow the Judge to apply the longstanding definition of reckless disregard, although neither party objected

or provided any briefing of their alternative definition or its applicability to the facts of this case.[3]

A. The Majority Ignores Decades of Negligence Caselaw to Arrive at Its Suggested Definition of Reckless Disregard.

After public notice and comment, MSHA promulgated the definition of reckless disregard thirty-five years ago in 1982. Criteria and Procedures for Proposed Assessment of Civil Penalties, 47 Fed. Reg. 22,286 (May 21, 1982). There, MSHA said, "[t]he 'reckless disregard' category, for which the maximum number of points would be assigned, is characterized by conduct which exhibits the absence of even the slightest degree of care." *Id.* at 22,289-90. Since that promulgation, the Commission and Judges have used that definition in literally dozens and dozens of cases.

For purposes of this case, however, the majority chooses to use an alternate definition of reckless disregard not used by the Judge or briefed by the parties. They explain their adoption of a "conscious disregard" definition by referencing the test for ordinary negligence — that is, "actions [that] 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." Slip op. at 7. The majority then essentially applies a "reasonable person test" to "conscious disregard" in a manner that reduces the burden of proving reckless disregard.

The majority apparently posits a false dichotomy between the definition of reckless disregard used by the Judge and their definition. In a field as vast as the law of negligence, it is natural that one may find different definitions for reckless disregard with slightly different wording or that conflict in minor ways. For example, some courts equate reckless disregard with gross negligence, using the "slight degree of care" touchstone. *See, e.g., Ave. CLO Fund, Ltd. v. Bank of Am., N.A.*, 723 F.3d 1287, 1300 (11th Cir. 2013) ("New York law defines gross negligence as 'conduct that evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing,' or 'the failure to exercise even slight care.'" (citations omitted)); *Penunuri v. Sundance Partners, Ltd.*, 2017 UT 54, ¶ 35, — P.3d — ("In Utah, gross negligence is 'the failure to observe even slight care; it is carelessness or recklessness to a degree that shows utter indifference to the consequences that may result.'" (quoting *Blaisdell v. Dentrix Dental Sys., Inc.*, 284 P.3d 616, 621 (Utah 2012)) (citation omitted)).

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[3] I can only conclude that the majority implicitly agrees that under the definition that MSHA, the Commission, and the Commission's Judges have routinely applied — the section 100.3 definition of reckless disregard — substantial evidence supports the Judge's decision. Otherwise, there would be no reason to substitute summarily an alternate definition of reckless disregard that the majority then, incorrectly but more easily, finds to have been met. Despite Commission caselaw that Judges may use the Part 100 definitions and years of consistent use of the section 100.3 definition of reckless disregard, the majority reaches an outcome by "suggesting" a different definition of reckless disregard for purposes of this case. They do not explain any reason for departing from the standard definition in this one case. This case-by-case, "do whatever we feel is right" approach is contrary to principled adjudication.

Other courts find reckless disregard is a step beyond gross negligence. *See, e.g.*, *Saba v. Compagnie Nationale Air France*, 78 F.3d 664, 668 (D.C. Cir. 1996) ("There is a continuum that runs from simple negligence through gross negligence to intentional misconduct. Recklessness, or reckless disregard, lies between gross negligence and intentional harm."); *Doe v. Boy Scouts of Am. Corp.*, 147 A.3d 104, 120 (Conn. 2016) ("More recently, we have described recklessness as a state of consciousness with reference to the consequences of one's acts. . . . It is more than negligence, more than gross negligence." (quoting *Doe v. Hartford Roman Catholic Diocesan Corp.*, 119 A.3d 462, 483 (Conn. 2015)) (alteration in original)).

Some authorities virtually equate reckless disregard with intentional misconduct, finding reckless disregard is close to an intentional wrongdoing. *See, e.g.*, *Mandolidis v. Elkins Industries, Inc.*, 246 S.E.2d 907, 913 (W. Va. 1978) ("[West Virginia law] recognizes a distinction between negligence, including gross negligence, and wilful, wanton, and reckless misconduct. The latter type of conduct requires a subjective realization of the risk of bodily injury created by the activity and as such does not constitute any form of negligence.").

Nowhere in this array of cases is there a suggestion that failing to act as a reasonably prudent person under similar circumstances — the definition of ordinary negligence — demonstrates reckless disregard. Indeed, jurisdictions using a "conscious disregard" standard often use absence of a slight degree of care as the touchstone of conscious disregard. *See, e.g.*, *Ave. CLO Fund*, 723 F.3d at 1300 ("New York law defines gross negligence as 'conduct that evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing,' or 'the failure to exercise even slight care.'" (citations omitted)); *District of Columbia v. Walker*, 689 A.2d 40, 44 (D.C. 1997) (defining gross negligence generally as "[t]he failure to exercise even slight care," and gross negligence under a qualified immunity statute as requiring "such an extreme deviation from the ordinary standard of care as to support a finding of wanton, willful and reckless disregard or conscious indifference for the rights and safety of others." (citation omitted) (alteration in original)); *Cf. Smith v. Brown & Williamson Tobacco Corp.*, 410 S.W.3d 623, 630-31 (Mo. 2013) (en banc) (stating that a showing of reckless disregard requires evidence that the defendant "knew of the defect and danger of the product and, by selling the product, showed *complete* indifference to or conscious disregard for the safety of others." (emphasis added) (citations omitted)).

The case law is legend. In California, "gross negligence" is defined as either the "want of even scant care or an extreme departure from the ordinary standard of conduct." *Van Meter v. Bent Constr. Co.*, 297 P.2d 644, 648 (Cal. 1956); *Franz v. Bd. of Med. Quality Assurance*, 642 P.2d 792, 798 (Cal. 1982) (en banc). Kentucky requires more than a showing of failure to exercise slight care to find gross negligence: As to gross negligence, this claim requires "something more than the failure to exercise slight care. We have stated that there must be an element either of malice or willfulness or such an utter and wanton disregard of the rights of others as from which it may be assumed the act was malicious or willful." *City of Middlesboro v. Brown*, 63 S.W.3d 179, 181 (Ky. 2001). Gross negligence requires "'first a finding of failure to exercise reasonable care, and then an additional finding that this negligence was accompanied by wanton or reckless disregard for the lives, safety or property of others.'" *Robbins v. New*

Cingular Wireless PCS, LLC, No. CV 5:15-71, 2016 WL 1089252, at *4 (E.D. Ky. Mar. 18, 2016) (quoting *Brown*, 63 S.W.3d at 181), *aff'd*, 854 F.3d 315 (6th Cir. 2017). Or, as the Supreme Court of Louisiana has defined the terms, "'Reckless disregard' is, in effect, 'gross negligence.' Gross negligence has been defined by this court as 'the want of even slight care and diligence. It is the want of that diligence which even careless men are accustomed to exercise.'" *Lenard v. Dilley*, 805 So.2d 175, 180 (La. 2002) (citation omitted).

Authorities that equate "reckless disregard" with a failure to use the slightest degree of care are on the mark. The United States Supreme Court, quoting the Supreme Court of Vermont, has applied the following definition of gross negligence in a diversity jurisdiction case:

> Gross negligence is the equivalent to the failure to exercise even a slight degree of care. . . . But it falls short of being such reckless disregard of probable consequences as is equivalent to a willful and intentional wrong.

Conway v. O'Brien, 312 U.S. 492, 495 (1941) (quoting *Shaw v. Moore*, 162 A. 373, 374 (Vt. 1932) (adopting Massachusetts' gross negligence definition)). *See also, e.g.*, *Saba*, 78 F.3d at 668; *Boy Scouts of Am. Corp.*, 147 A.3d at 120; *Mandolidis*, 246 S.E.2d at 913; *IPSCO Tubulars, Inc. v. Ajax TOCCO Magnathermic Corp.*, 779 F.3d 744, 752 (8th Cir. 2015) ("Gross negligence is 'the failure to use even slight care.'" (quoting *Spence v. Vaught*, 367 S.W.2d 238, 240 (Ark. 1963))) (applying Arkansas law); *Ave. CLO Fund*, 723 F.3d at 1300; *Sundance Partners, Ltd.*, 2017 UT 54, ¶ 35; *Ambrose v. New Orleans Police Dept. Ambulance Serv.*, 639 So. 2d 216, 219 (La. 1994) ("Gross negligence has been defined as the 'want of even slight care and diligence" and the "want of that diligence which even careless men are accustomed to exercise.'" (quoting *State v. Vinzant*, 7 So. 2d 917, 922 (La. 1942))); *Colby v. Boyden*, 400 S.E.2d 184, 189 (Va. 1991) ("[G]ross negligence is the 'absence of slight diligence, or the want of even scant care' . . . ." (quoting *Frazier v. City of Norfolk*, 362 S.E. 2d 688, 691 (Va. 1987))). In Texas, gross negligence requires proof of an objective element and a subjective element: "For the subjective element, [a defendant] must have 'actual, subjective awareness of the risk involved and choose to proceed in conscious indifference to the rights, safety, or welfare of others.'" *Miller v. Mullen*, 531 S.W.3d 771, 779-80 (Tex. Ct. App. 2016) (quoting *Burleson v. Lawson*, 487 S.W.3d 312, 322 (Tex. Ct. App. 2016)). Under that standard, a "plaintiff must show that the defendant knew about the peril, but his acts or omissions demonstrated that he didn't care." *Miller*, 531 S.W.3d at 780 (quoting *Turner v. Franklin*, 325 S.W.3d 771, 782 (Tex. Ct. App. 2010)).

From the foregoing, it appears that the majority has consciously disregarded the definitions of reckless disregard showing that a person who exercises care and considers the safety of the workers in making a decision involving safety is both exercising care and not "consciously disregarding" safety. Under the "absence of slight care" or the "consciously disregard" definitions, the ultimate issue is whether Wetzel showed regard or a slight degree of care for safety. If he exercised care, then he did not "disregard" safety. Such conclusion is

consonant with the plain meaning of "disregard."[4] Moreover, any disregard for or ignoring of safety must be "conscious" — that is, knowing. Therefore, the actor must knowingly/subjectively ignore or pay no attention to safety concerns.

These myriad decisions demonstrate that jurisdictions define gross negligence as the absence of even a slight degree of care and many jurisdictions consider reckless disregard to require a higher showing of culpability than gross negligence. Unlike MSHA's definition of other degrees of negligence, there is overwhelming support in the law for MSHA's definition of reckless disregard. I find no reason not to use the Part 100.3 standard of reckless disregard as the Commission standard. Moreover, nothing changes regarding the ultimate outcome of this case if we use the majority's definition, especially when it appears the only reason to do so is to reverse the Judge's finding.

B. The Majority's Legal Analysis Misrepresents and Disregards Commission Precedent to Reach the Majority's Desired Result.

Rather than finding substantial evidence does not support the Judge's decision, the majority find the Judge's "negligence determinations are legally invalid." Slip op. at 7. They do not discuss meaningfully the totality of the evidence but summarily declare the totality of actions "meaningless." *Id.* at 10.[5]

The majority first notes the duty of mine management. Unaccountably, in doing so, they fail to note that the Judge specifically recognized and took into account the duty of foremen regarding safety. 38 FMSHRC 2782, 2799 (Nov. 2016) (ALJ). Therefore, the majority is reciting an element that the Judge took fully into account. The fact that he considered the point cuts in favor of affirmance. Further, although Wetzel certainly was a manager, he was a "manager" in the sense of being the head of a tiny three or four person crew on a night shift. The majority quotes *Wilmot Mining Co.*, 9 FMSHRC 684, 688 (Apr. 1987), in which the Commission drew an important distinction between mine management and less senior supervisors. Slip op. at 8-9. The Commission stated, "Managers and supervisors in high positions must set an example for all supervisory and non-supervisory miners working under their direction." *Wilmont*, 9 FMSHRC at 688.

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[4] Disregard is "[t]o ignore or treat as unimportant; to pass by as undeserving of notice." *Disregard*, Black's Law Dictionary 573 (10th ed. 2014); *see also* Random House Dictionary of the English Language 569 (2d ed. 1987) ("to pay no attention to; leave out of consideration; ignore").

[5] My colleagues and I are professional attorneys. To the best of my knowledge, none of us has any educational, professional, or meaningful experiential background in actual mining processes, let alone the dynamic conditions of an anthracite mine. Yet, the majority feels qualified to opine authoritatively that meeting and discussing the situation with the entire crew, surveying the surface areas for stability, using lights, planning a route of entry and exit, minimizing the duration of any exposure, etc., are "meaningless." Slip op. at 10.

Clearly, Wetzel was not mine management; he was in the category of lower level supervisors for whom the Commission in *Wilmot Mining Company* said mine management must set an example. Actual mine management set an example for him, other supervisors, hourly workers, and other operators' management by responding quickly and aggressively to the event. This is not to imply that foremen do not have a duty to exercise a high degree of care. It is merely to point out that emphasizing the duty of mine management is not meaningful in this case where the Judge factored Wetzel's status into his decision and mine management actually was proactive.

In turning to the more substantive part of the majority's decision, their explanation presents different twists on the same argument. The majority finds that Wetzel's willingness to enter the pit did not mitigate the hazard. Slip op. at 9. They say that Wetzel's "misunderstanding" of the hazard and "subjective" belief that it was safe to use the procedure to connect the chain to the bucket did not "mitigate" the hazard. *Id.* at 9-10. Although somewhat ambiguous, they also appear to state that actions taken to deal with a hazard do not "mitigate" negligence if those measures are not successful. *Id.* at 10-11.

An error common to these assertions is that they take the Judge to task for alleged "mitigation" findings he did not make. The Judge did not find that Wetzel's willingness to enter the pit, his belief, or his actions "mitigated" negligence. Nowhere in the decision did the Judge find mitigation. Instead, he cited facts to support his conclusion that Wetzel did not manifest an absence of a degree of care or, in the words the majority would prefer, a conscious disregard for the safety of the crew. Essentially, the Judge found that Wetzel's judgment was badly flawed and his conduct was highly negligent, but that Wetzel did show a degree of concern or care for the miners or, stated differently again, that he actually showed a conscious degree of care or regard for safety. The absence of a "mitigating" factor does not prove the Judge erred or that Wetzel or the operator exhibited reckless disregard.[6]

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[6] I do not agree with the majority's applying a new definition on appeal, and I do not think the new definition differs significantly, if at all, from section 100.3. As demonstrated, the long-used definition is a standard and acceptable one. However, MSHA's definitions of ordinary and higher negligence do differ markedly from the Commission's definition. MSHA defines all negligence as "high" negligence unless there is a mitigating factor. The Commission allows a finding of high negligence if, and only if, the Judge finds "an aggravated lack of care that is more than ordinary negligence." *American Coal Co.*, 38 FMSHRC 2062, 2084 (Aug. 2016) (quoting *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)). These are obviously inconsistent approaches. We may aptly summarize the proper consideration of negligence as follows:

1. Taking into account the totality of the evidence, has the Secretary proved by a preponderance of the evidence that the operator did not take the actions that a reasonably prudent operator would have taken under the same or similar circumstances? If so, then the operator was negligent. If the operator acted prudently, then the operator was not negligent.

Another puzzler is the majority's reason for pointing out that an objectively reasonable belief in one's actions fully defeats an unwarrantable failure charge.[7] The majority writes that the Judge could not consider Wetzel's "subjective" mental state because, in a different area of the law, unwarrantable failure cases, an objectively reasonable belief frees an operator from

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2. The Judge must then place the negligence on a continuum from no negligence to the extreme forms of negligence. This continuum does not compel categorization or, more pertinently, great leaps or reductions in penalties based upon categorization. On a continuum, negligence may fall just above or below a "category." For Mine Act purposes, slight deviations from a particular category need not result in substantial penalty differences.

3. To the extent it is useful to classify a degree of negligence in a particular case,

   (a) The normal finding for the failure to take actions that a reasonably prudent operator would have taken is ordinary negligence;

   (b) If the Secretary proves by a preponderance of the evidence that the operator exercised aggravated lack of care amounting to less care than even an ordinarily careless person exercises then the negligence is higher than ordinary and is "high" or "gross."

   (c) If the Secretary proves by a preponderance of the evidence that the operator showed a complete lack of concern or care for safety — that is, did not show the slightest degree of care — then the operator acted with reckless disregard.

4. For penalties assessed by MSHA under the regular point system, the *Sellersburg* rule applies. *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1986). Therefore, if the penalty assessed by the Judge diverges substantially from the penalty proposed by the Secretary under the regular point system, the Judge must explain the reasons for diverging substantially from the Secretary's proposed penalty. The Judge must consider all penalty criteria.

5. If MSHA bases the penalty upon a special assessment, then the Secretary must bear the considerable burden of providing special reasons for a substantially enhanced penalty. Because a special assessment is arbitrary in the first instance, the Judge must evaluate the violation holistically and set a penalty that is fair and consistent with penalties that have been or should be assessed for similar violations by similarly situated operators throughout the same sector of the mining industries.

[7] The majority cites *DQ Fire & Explosion Consultants, Inc.*, 36 FMSHRC 3090, 3097 (Dec. 2014). Slip op. at 10. That case involved a finding of high negligence rather than reckless disregard. They also cite *Mach Mining, LLC*, 36 FMSHRC 1525, 1527 (June 2014). Slip op. at 10. That case involved the mine president/superintendent, and the Commission accepted a finding that the ignorance of the mine president was "slight mitigation," but was insufficient to defeat a high negligence finding.

liability for an unwarrantable failure.[8] By focusing on whether Wetzel had an objective or subjective belief that descent into the pit was safe, the majority misinterprets the relevance of Wetzel's mental state to a finding of reckless disregard, especially since the majority prefers to make Wetzel's conscious refusal to care about safety a necessary element of the accusation.

As we have seen, when courts consider the higher levels of culpability such as gross negligence and reckless disregard, the mental state of the actor becomes an increasingly important consideration. The mental state of the actor is critical in the sense of whether the actor showed a degree of care for the safety of others: Did the actor consider safety and, if so, did he simply disregard the danger, showing that he disregarded the results of his actions upon worker safety? On the other hand, did he take steps demonstrating that he had a regard for safety?

Thus, as I have repeatedly and even tediously said, the issue regarding reckless disregard is whether the actor showed any degree of care or regard for safety. *See, e.g.*, *Lascola v. Barden Miss. Gaming LLC*, 349 F. App'x 878, 886 (5th Cir. 2009) ("Reckless disregard is generally 'accompanied by *a conscious indifference to consequences, amounting almost to a willingness that harm should follow*.'" (emphasis added) (quoting *Maye v. Pearl River Cty.*, 758 So. 2d 391, 394 (Miss. 1999))); *City of San Antonio v. Hartman*, 201 S.W.3d 667, 672 n.19 (Tex. 2006) ("Because 'conscious indifference' and 'reckless disregard' are not defined in the statute, we give each its ordinary meaning. We have often interpreted these terms to require proof that a party *knew the relevant facts but did not care about the result*." (emphasis added) (citation omitted)).

The majority does not cite persuasive precedent. In *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1265 (D.C. Cir. 2016), cited by the majority, slip op. at 10, the circuit court found the Administrative Law Judge reasonably concluded that the pre-violation conduct actually showed persistent negligence by the operator because the operator took no further steps to prevent the accumulation. Thus, the circuit court did not hold that whenever a violation occurs the operator must have been negligent. Indeed, the operator's actions were relevant and enhanced the finding of negligence.[9]

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[8] When an operator acts with an objectively reasonable belief that its actions were safe and in compliance with the law and regulations, it has not engaged in aggravated conduct constituting an unwarrantable failure.

[9] The majority's phrasing puts the words of the Administrative Law Judge into the mouth of the circuit court and misses the key point that the prior actions served to prove negligence. The relevant passage is as follows:

> Further, the ALJ could reasonably conclude that Mach's decision to turn off the main belt no more served to show that it was not highly negligent. Shutting off the main belt "neither *prevented* nor *corrected* the hazardous condition." *Mach Mining,* 36 FMSHRC at 2543. Instead, the ALJ concluded, the fact that Mach needed to

Similarly, the majority's citation to *BethEnergy Mines, Inc.*, 14 FMSHRC 1232 (Aug. 1992), does not support its position. The majority states that "the Commission has concluded that the fact that a hazardous area was examined before it was entered did not reduce negligence because the exam 'did not eliminate the risk . . . but rather served to measure the risk presented.'" Slip op. at 10 (quoting *BethEnergy*, 14 FMSHRC at 1244). In this curt summation, however, the majority omits key facts and context from the case.

The violation was for entering a dangered off area for reasons other than elimination of the hazard. 14 FMSHRC at 1236. In that context, the Commission stated:

> The fact that [an acting construction foreman] examined the area before the cars were brought through it does not reduce BethEnergy's conduct to "moderate negligence," as argued by the operator (BE Br. at 34-35). The examination did not eliminate the risk posed by the unsaddled beams but rather served to measure the risk presented. Such deliberate conduct is appropriately characterized as a knowing neglect of the actions required by section 75.303(a).

Id. at 1244. Section 75.303(a), at that time, stated that "[n]o person other than an authorized representative of the Secretary or a State mine inspector or persons authorized by the operator to enter such place for the purpose of eliminating the hazardous condition therein, shall enter [a hazardous place while a danger sign] is . . . posted." *Id.* at 1232 n.1 (quoting 30 C.F.R. § 75.303(a)) (emphasis omitted). The violation, therefore, was for entering a hazardous place while a danger sign is posted. Examining the area, therefore, was not relevant to the standard and did not eliminate the risk of entering the area.

The Commission did not hold, as the majority misinterprets, that examining the area did not "reduce negligence." Indeed, the majority's misinterpretation is complicated by the fact that negligence was not even before the Commission: the Commission's statement in *BethEnergy* was made in the context of the unwarrantable failure analysis in which the Commission affirmed the Judge's unwarrantable failure finding. In *BethEnergy*, the Commission concluded that examination of a hazardous area does not negate an unwarrantable failure designation when the violation was for entering the area for a purpose other than to correct the hazardous condition,

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> stop production to correct the dangerous condition it had allowed to persist indicated how negligent Mach had been. Upon turning off the belt, Mach took no further step to clean up the accumulations.

Mach, 809 F.3d at 1265 (emphasis in original).

and the operator's agent knowingly had a danger sign removed and replaced before and after moving cars through the area. This is far different from the majority's characterization.[10]

If the test of negligence were whether the operator prevented the occurrence of a violation, every violation would automatically entail negligence. That is not our law. The test for even low or ordinary negligence is not whether a violation occurred but, again, whether the operator acted as a reasonably prudent mining operator would under similar circumstances. It is plainly incorrect to insinuate that the occurrence of a violation, standing alone, demonstrates negligence, let alone reckless disregard.

This is particularly important because the Mine Act is a strict liability statute. The operator is liable for a penalty for every violation attributable to it regardless of negligence. However, the Commission finds no negligence if the operator acted as a reasonably prudent person even though a citable violation or even fatal accident occurs. For example, in *Leeco, Inc.*, 38 FMSHRC 1634 (July 2016), the Commission considered a case in which a miner whom the operator had warned not to enter a red zone subsequently suffered a fatal injury in a red zone. The operator had taken a number of steps in addition to warning the miner not to enter a red zone. After the fatality, MSHA charged the operator with moderate negligence. The Commission first restated the Commission's test for ordinary negligence. *Id.* at 1637. It then reversed the finding of moderate negligence, holding,

> Without evidence that a reasonably prudent operator would have done more under the circumstances, it was error for the Judge to conclude that Leeco's response to Smith's previous incident was insufficient.

Id. at 1639. Thus, the fact that the actions taken by the operator did not "prevent" a fatal injury to a miner from an unsafe act in which he had earlier engaged did not preclude a finding of no negligence when the operator acted in a reasonably prudent manner. The operator took the actions of a reasonably prudent operator and, accordingly, was not negligent.

Similarly, in *Jim Walter Resources*, 36 FMSHRC 1972, the Commission upheld a finding of no negligence in a case involving whether an operator had acted prudently in hiring and monitoring a contractor. A fall seriously injured a contractor's employee. Although the operator's hiring, training, and monitoring practices did not prevent the accident, the Judge found no negligence by the operator. The Commission sustained the Judge's decision finding that the operator acted in a reasonably prudent manner. *Id.* at 1976. *See also Nally & Hamilton Enters.*, 38 FMSHRC 1644, 1652 (July 2016) ("We affirm the finding of no negligence. The Judge found that the operator established and conducted a sufficient training and enforcement program

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[10] Ironically, in *BethEnergy*, which the majority contends stands for the proposition that examining an area did not reduce negligence, the Secretary did not allege that the operator's actions constituted "reckless disregard," and the inspector "did not believe that such conduct rose to the level of 'reckless disregard' because [the acting construction foreman] had made an examination of the area before he authorized a miner to enter it." 14 FMSHRC at 1236.

to avoid liability under *Southwestern I.*"). The occurrence of a violation or an accident, standing alone, most certainly does not prove any degree of negligence. Surely, the majority does not mean that anything and everything an operator understands, believes, and does are irrelevant to whether an operator has acted negligently, let alone with a reckless disregard of safety.

The majority further errs in that it does not examine the totality of the evidence to discern whether the Judge's decision is reasonable. Even were the majority's propositions regarding the understanding, beliefs, and actions of the operator correct, the majority does not adequately explore whether the operator's action showed a slight regard for safety. As a result, as the majority reaches the denouement of its decision, the majority simply reweighs or does not discuss the evidence regarding whether the Secretary proved the operator failed to show any slight degree of care or consciously disregarded safety through the foreman's discussions with the crew and other actions. Slip op. at 10-11.

Having intruded upon the Judge's duty and reweighed the evidence, the majority asserts that Wetzel's conduct "demonstrated the highest possible level of negligence." *Id.* at 12. Under the facts of this case, that finding is either absurdly incorrect or buys into the Secretary's proposition that the Judge should simply decide upon a category of negligence and, then, his/her work is complete, so that a finding of reckless disregard is always tantamount to the worst imaginable negligence. I do not think the majority actually can mean what it said.[11]

III. Penalty Considerations on Remand

The majority decision remands the case for the assessment of a penalty. In doing so, the majority rejects the Secretary's suggestion that once the Commission places negligence in one of the MSHA-described categories, the Judge should accept the MSHA-proposed penalties. The majority eschews taking any position on the penalty, thereby suggesting they would not object to the same penalty as previously assessed. Consequently, I offer a few comments regarding penalties.

Neither the term "high negligence" nor the term "reckless disregard" appears in the Mine Act. Indeed, the term "negligent" appears only twice. Both uses are in section 105 and relate to the criteria by which the Secretary proposes and the Commission assesses penalties.[12] 30 U.S.C. § 815.

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[11] Indeed, had Wetzel not discussed the plan with the crew, had he not taken efforts to ensure Osenbach's safety, and had he not had a good faith belief that that the descent into the pit was safe, 38 FMSHRC at 2800, surely Wetzel's actions would have been worse than they were in this case. Yet the majority fails to grapple with the Judge's finding that Wetzel genuinely thought that descent into the pit was safe, opting instead to consider such information legally irrelevant in assigning culpability.

[12] Interestingly, even section 110(i) the Mine Act does not refer to degrees of negligence but only asks "whether the operator was negligent." 30 U.S.C. § 820(i).

The term "gross negligence" appears once. That is in section 116 of the Act, which provides for certain limitations on liability. The section provides the limitations "shall not apply where the action that is alleged to result in the property damages or injury (or death) was the result of gross negligence, reckless conduct, or illegal conduct . . . ." 30 U.S.C. § 826(a). The same section 116 also contains the only Mine Act usage of the term "reckless conduct." Placement of that term in the same section with, and after, gross negligence must indicate that Congress considered reckless conduct a step beyond gross negligence bordering upon illegal conduct. The only other usage of the term "reckless" in the Mine Act is in the flagrant violation provision in section 110. 30 U.S.C. § 820(b)(2).

The absence of the terms "reckless disregard" or "high negligence" and the sparing use of reckless or even negligent highlight that the terms upon which this case appears to turn are completely drawn from MSHA's penalty regulation at 30 C.F.R. § 100.3 rather than the Mine Act. There, they appear only for the purpose of assigning penalty points that result in substantial point changes under regular penalty regulations depending upon placement of negligence in a predefined category. The regulation assigns 35 points for high negligence, while reckless disregard adds an additional 15 penalty points to a total of 50 negligence points to the penalty calculation. 30 C.F.R. § 100.3(d). In every case, 15 additional penalty points substantially increases the penalty. When the other points reach a significant level in the range of 110 points, the additional 15 points begins to increase the MSHA assessment by tens of thousands of dollars. *See* 30 C.F.R. § 100.3(g).

The use of general categories of negligence obviously is helpful, but it does not permit us to ascertain where the Judge placed the negligence along the broad spectrum. Certainly, the Judge found Wetzel's conduct severely lacking in ordinary care. Therefore, regarding a continuum, his view appears to place the negligence only a short step below reckless because Wetzel exercised some care. Accordingly, the majority's change in terminology may perhaps be only a small nudge on the continuum in this case.

The majority has not reversed any of the Judge's factual findings. Thus, the Judge may continue to take into account the entirety of Wetzel's actions, including his meeting with the crew before acting, in assessing a penalty against him and the operator. Indeed, the majority permits or even urges the Judge to take into account the exceptional response by management into account is assessing the penalty. This is especially true, given that the Commission previously has found, albeit incorrectly in my view, that "deterrence" is a relevant factor that Judges may consider separately from the statutorily-prescribed criteria in assessing penalties. *See Black Beauty Coal Co.*, 34 FMSHRC 1856, 1864-69 (Aug. 2012).[13]

If that is true, then the principle must work to permit a lowered assessment. Prior to involvement by MSHA, the operator acted aggressively to deter similar errors in the future.

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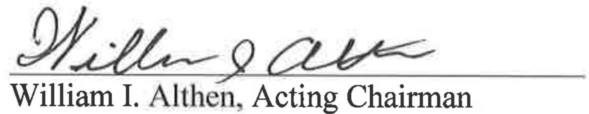
[13] I look forward to the day when the Commission explicitly overrules its unfounded departure from the terms of the Mine Act in the *Black Beauty Coal Company* case. However, if a consideration outside the statutory criteria may influence the penalty, such factor may also assert a downward influence.

Because the operator took quick and decisive actions before any MSHA involvement, the Judge might well apply *Black Beauty* to find that the operator need not incur a severe fine to achieve future compliance as it already positively demonstrated safety consciousness. As the majority emphasizes, if the Judge wishes to consider the operator's exemplary unilateral corrective action, he may do so. In that case, the Judge could reduce the penalty upon remand.

Conclusion

For the reasons set forth above, I respectfully dissent.



William I. Althen, Acting Chairman

Distribution:

R. Henry Moore, Esq.
Jackson Kelly PLLC
Three Gateway Center, Suite 1500
401 Liberty, Avenue
Pittsburgh, PA 15222

Edward Waldman, Esq.
Office of the Solicitor
US Department of Labor
201 12th St. South, Suite 401
Arlington, VA 22202-5450

Ali Beydoun, Esq.
Office of the Solicitor
US Department of Labor
201 12th St. South-Suite 401
Arlington, VA 22202-5450

Melanie Garris
Office of Civil Penalty Compliance, MSHA
U.S. Department of Labor
201 12th Street South, Suite 401
Arlington, VA 22202-5450

Administrative Law L. Zane Gill
Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
1331 Pennsylvania Avenue, N. W., Suite 520N
Washington, D.C. 20001