

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20006

March 27, 2000

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. WEVA 93-77-R
	:	through WEVA 93-80-R
CONSOLIDATION COAL COMPANY	:	WEVA 93-146-B
	:	WEVA 93-146-C

BEFORE: Marks, Riley, and Verheggen, Commissioners¹

DECISION

BY: Marks, Riley, and Verheggen, Commissioners

This consolidated contest and civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (the “Act” or “Mine Act”), raises the issue of whether Consolidation Coal Company (“Consol”) violated four mandatory safety standards as alleged in one citation and three orders issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) in connection with a methane explosion which occurred on March 19, 1992, at Consol’s Blacksville No. 1 Mine in northern West Virginia, resulting in the deaths of four miners and injuries to two others. Commission Administrative Law Judge Gary Melick vacated the citation and upheld the orders. 20 FMSHRC 1336 (Dec. 1998) (ALJ). We granted cross petitions for discretionary review filed by the Secretary of Labor and Consol. The Secretary petitioned for review of the judge’s decision vacating the citation and vacating MSHA’s allegations of unwarrantable failure on two of the orders. Consol petitioned for review of the judge’s decision upholding the orders and his finding of unwarrantable failure with respect to one of the orders. For the reasons that follow, we affirm in part, reverse in part, vacate in part, and remand.

¹ Chairman Jordan and Commissioner Beatty recused themselves in this matter and took no part in its consideration. Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

I.

Factual and Procedural Background

Consol's Blacksville No. 1 Mine liberated over 1 million cubic feet of methane during a 24-hour period and, therefore, was liberating "excessive quantities of methane," as specified in section 103(i) of the Mine Act, 30 U.S.C. § 813(i), which provides for spot inspections by MSHA in that circumstance. 20 FMSHRC at 1337. Donzel Ammons was a Consol vice-president who was in charge of several mines, including Blacksville No. 1. *Id.* Among those working under Ammons were Daniel Quesenberry, Ammons' assistant; Robert Levo, superintendent of Blacksville No. 1; and Jack Lowe, foreman of Blacksville No. 1. *Id.*

Consol ceased production at the mine in June 1991 and by 1992 began closing down the mine. *Id.* The primary activities during January to March 1992 were mine maintenance, withdrawal of supplies and equipment, and removal of above-ground stockpiles of coal. *Id.* By letter dated February 3, 1992, Consol's regional manager for safety, Charles Bane, notified MSHA that Consol was in the process of withdrawing production equipment from the mine. *Id.*; Resp't Ex. 3. The letter further stated that Consol would shut down all fans and simultaneously cap all shafts when the underground areas had been vacated. 20 FMSHRC at 1337; Resp't Ex. 3.

Later in February, Consol decided to install an 800-foot dewatering pipe in the production shaft to prevent water from accumulating in the mine and seeping into adjacent Consol mines. 20 FMSHRC at 1337.² Consol's regional engineering office, headed by Van Pitman, was responsible for installing the dewatering pipe. *Id.* Pitman directed Ed Moore, supervisor of environmental quality control, to arrange for the installation. *Id.* Moore, in turn, retained an independent contractor, M. A. Heston, Inc., to do the work. *Id.* Heston had worked for Consol on many other jobs. *Id.* at 1339.

In order to install the dewatering pipe, it was necessary to build a work platform over the production shaft. *Id.* at 1338. Ammons assigned that project to his assistant, Quesenberry, who contracted with Forest Construction to construct a platform, sufficiently open to facilitate the work, but which later could be sealed to form a permanent cap over the shaft. *Id.*³

² The production shaft was one of the mine's six shafts and had been used to transport coal out of the mine with a skip hoist. 20 FMSHRC at 1337; Resp't Ex. 14. According to the approved ventilation plan, the shaft had been intaking 187,000 cubic feet of air per minute ("cfm"). 20 FMSHRC at 1337.

³ We will hereinafter refer to this platform as a "cap" because this is the term used by the parties and judge throughout these proceedings. We note, however, that the platform was not a cap because it was not used to seal the production shaft. *Cf.* 30 C.F.R. § 75.1711-1 ("Caps consisting of a 6-inch thick concrete cap or other equivalent means may be used for sealing."). Instead, Consol intended initially to use the so-called "cap" as a work platform to install the

Officials from Consol, Forest Construction, and M. A. Heston conferred on methods to construct a cap over the shaft that would allow work to be performed on the dewatering pipe and also would support the weight of the pipe. 20 FMSHRC at 1339. Initially, Consol's regional engineering office had recommended the use of only a partial or "half" cap, so as to allow ventilation to enter the shaft, with a fireproof partition as a means to prevent sparks from entering the shaft. *Id.*; Tr. 117, 154, 501, 951-53.

Ammons told Quesenberry that he wanted threaded pipe to be used for the dewatering project, so that pipe segments would not have to be welded together over the production shaft. 20 FMSHRC at 1340. Ammons was concerned with igniting grease in the production shaft, although he was also aware of the potential for methane occurring in the shaft. *Id.* In a meeting with Consol's regional engineering department, Quesenberry relayed the request for threaded pipe and left the meeting with the understanding that it would be used. *Id.* Subsequently, when the pipe was delivered to the mine, Quesenberry learned for the first time that engineering department personnel had decided to use non-threaded pipe that would have to be welded. *Id.* Ammons then telephoned Pittman, who explained that threaded pipe would not hold the weight of the casing. *Id.* Without consulting with the engineering office, Ammons decided to construct a "full" cap over the shaft, to ensure that sparks from welding would not enter the shaft. *Id.* at 1339; Tr. 694-95, 809-11.

The plan for construction of the cap over the shaft was based on a standard design used previously by Consol (though not as a platform for installing dewatering pipe). *See* 20 FMSHRC at 1339, 1340; Tr. 1698; Gov't Ex. 24. The base of the cap was to be constructed of 1/4-inch steel plate welded to 6-inch I-beams across the shaft opening. 20 FMSHRC at 1339. A 6-inch concrete deck would then be poured over the top of the steel plate. *Id.* at 1339, 1340. The plan included a 22-inch square opening in the center of the cap to allow entry of the 16-inch dewatering pipe, with additional I-beam support to bear the weight of the pipe. *Id.* at 1339. At least until the shaft was permanently capped, air would still be able to enter the shaft around the dewatering pipe. *Id.* For ventilation, Ammons added two smaller steel pipes to the plan, each 6 inches in diameter, penetrating through the cap, welded to the steel plate below and extending 3 feet above the concrete deck where they would be capped by a valve connected to additional lengths of PVC pipe. *Id.* The 6-inch pipes were incorporated into the plan, at least in part, to provide the ventilation necessary to dilute methane in the shaft. *Id.* at 1342.

Ammons' decision to add the additional pipes for ventilation of the shaft was based on his background and experience. *Id.* at 1339. It was standard procedure to cap a production shaft in this manner when sealing a mine, and Ammons determined that the pipes would provide adequate

dewatering pipe into the production shaft through the large opening provided for that purpose. The platform would have become a cap only after completion of the dewatering pipe installation when Consol intended to seal the shaft. Tr. 605-06, 1602, 1610, 1703.

ventilation.⁴ *Id.* He did not consult with any of Consol's engineers or conduct any simulations or tests to determine if the pipes would provide adequate ventilation while the work of installing the dewatering pipe was completed. *Id.* He was unfamiliar with the methane liberation rate at the mine, the volume of air movement the two 6-inch pipes were capable of providing, or the velocity of the airflow. *Id.* He assumed that the air intake through one of the ventilation pipes would have been sufficient to ventilate the production shaft. *Id.* However, he had never been involved in a project similar to this where welded pipe segments (for the dewatering pipe) were installed through a modified cap. *Id.*

Since Consol's regional safety office generally communicated with MSHA on ventilation plans, John Yerkovich, Consol's regional safety inspector (and Charles Bane's assistant), verbally informed Terry Palmer, an MSHA safety inspector specializing in ventilation, of Consol's plans to undertake what they characterized as capping the production shaft before capping the other shafts and vacating the mine. *Id.* at 1337, 1338.⁵ Following that conversation, by letter dated March 3, 1992, Yerkovich wrote to MSHA concerning the project. *Id.*; *see* Gov't Ex. 27. The letter did not indicate, however, that a dewatering pipe would be installed through the cap and into the shaft. 20 FMSHRC at 1338; Gov't Ex. 27. Palmer drafted a response to the letter, dated March 16, for the signature of MSHA district manager Ronald Keaton. 20 FMSHRC at 1338; *see* Gov't Ex. 29. Palmer recommended to Keaton that MSHA seek additional information from Consol because it was unclear why Consol was deviating from its original plan of capping all the shafts in the mine at one time. 20 FMSHRC at 1338. Palmer believed that since the production shaft was intaking 187,800 cfm of air, capping the shaft required agency approval under MSHA regulations because it involved a change in the ventilation plan. *Id.*; Gov't Ex. 26. The plan stated that "all changes or revisions to the ventilation plan" must be approved before being implemented. Gov't Ex. 26. Palmer's letter was not mailed to Consol until after the March 19 explosion. 20 FMSHRC at 1338.

Construction of the production shaft cap took place during the week of March 9, 1992, with the concrete deck being poured on Friday, March 13. *Id.* at 1340; Tr. 254-60.⁶ Once the

⁴ *See also* 30 C.F.R. § 75.1711-1 ("Caps shall be equipped with a vent pipe at least 2 inches in diameter extending for a distance of at least 15 feet above the surface of the shaft.").

⁵ At trial, Yerkovich testified that Raymond Strahin, another MSHA ventilation specialist who worked with Palmer, told him that written notification of this change would be sufficient (Tr. 1254-57), which Strahin denied. 20 FMSHRC at 1338; Tr. 1866. Palmer testified that he told Yerkovich that capping the production shaft would result in a change in the ventilation plan that would have to be approved by MSHA's district manager. 20 FMSHRC at 1338; Tr. 1106.

⁶ MSHA inspector Dale Dinning, along with inspector trainee William Sperry, were at the mine on March 13 on a section 103(i) spot inspection, and observed the pouring of concrete over the steel plate. Tr. 1339-40, 1342-49, 1509-10, 1513. The two inspectors were at the mine next on March 19, the day of the explosion, for a regular inspection. Tr. 1341-42, 1351-52.

concrete was in place, airflow decreased from around 187,000 cfm to around 7,350 cfm. 20 FMSHRC at 1341. On March 13, Consol stopped its morning shift of underground personnel from entering the mine while portions of the cap were put in place. *Id.* at 1340. After Consol personnel evaluated the effects of the ventilation change, they determined that the mine was safe to enter, and the miners continued the removal of underground equipment. *Id.* at 1340-41. In evaluating the effect of the cap, Consol utilized the same procedures as a preshift examination that took approximately 30 minutes to complete. *Id.* at 1341. Consol also checked charts for the fans on the surface. *Id.* The charts reflected readings of water gauges near the fans that measured pressure differences. Tr. 635-37, 932-33. However, the charts on the fans would not show the impact of capping on airflow within the shaft itself. 20 FMSHRC at 1341. Around 11:00 a.m. on March 13, mine foreman Jack Lowe traveled underground to the bottom of the production shaft to release smoke from a smoke tube and ascertained that there was a drift of airflow down the shaft. *Id.* He did not, however, measure the velocity of the airflow. *Id.* Nor was the impact of the cap on airflow in the production shaft evaluated. *Id.*

On Monday, March 16, Heston employees arrived at the Blacksville Mine to organize materials and begin preparations for fabricating the dewatering pipe. *Id.* Consol environmental engineer Rodney Baird and Consol environmental technician Russell DeBlossio were assigned to oversee installation of the dewatering pipe, although each assisted in the manual labor of installing the pipe. *Id.* Baird was certified to make methane examinations and had a working methane detector in his vehicle at the mine. *Id.* Neither Baird nor DeBlossio had any experience in underground ventilation. *Id.*

On Wednesday, March 18, Heston employees began installing the 16-inch dewatering pipe into the production shaft. Tr. 262-63. The dewatering pipe was constructed by welding each 20-foot long section to the one below it. Tr. 175. The first section of pipe was plugged to prevent welding sparks from entering the shaft through the pipe. 20 FMSHRC at 1342. As each new length of pipe was lifted in place, the 22-inch opening in the cap through which the lengthening column of pipe extended down into the shaft was sealed with Thermoglass cloth and two steel plates cut to fit around the pipe. *Id.* The pipe sections were then welded together several feet above the 22-inch opening by miners standing on the cap. *Id.*; Gov't Ex. 15. With the plugged 16-inch pipe in place and steel plates and Thermoglass cloth surrounding the pipe, airflow into the production shaft was again reduced, from 7,350 to 790 cfm. 20 FMSHRC at 1341, 1342.

Consol environmental engineer Baird and Heston employees found that the 6-inch ventilation pipe closest to the 22-inch opening interfered with installation of the dewatering pipe. *Id.* at 1342. Blacksville Superintendent Robert Levo received a request from the production shaft site for a saw to cut off the PVC pipe extension of one of the 6-inch ventilation pipes. *Id.* A ball of burlap or Thermoglass cloth was put inside the shortened pipe, and a second piece of the material was wired over the top. *Id.* The elimination of one of the two 6-inch pipes as a source of ventilation further reduced airflow to 400 cfm. *Id.* at 1341, 1342. Levo visited the job site after the pipe was plugged. *Id.* at 1342. He could not recall whether he told Baird the importance of leaving the pipe open, but assumed Baird knew enough to reopen the pipe. *Id.* Ed

Moore, in charge of environmental quality control in Consol's regional engineering office and Baird's boss, was also aware that one of the ventilation pipes had been cut and covered or plugged. *Id.* at 1337, 1342.

Throughout the first day of installation, one welder was used, and approximately 12 sections of dewatering pipe were installed. *Id.* at 1342-43. Installation resumed at 7:30 a.m. the following day, Thursday, March 19, with Baird and DeBlossio again assisting. *Id.* On this occasion, Heston utilized two welders instead of one, reducing by half the time it took to weld sections of pipe together. *Id.* at 1343. At approximately 10:18 a.m., a methane explosion occurred in the production shaft that completely destroyed the cap. *Id.* Consol engineer Baird and three Heston employees were killed in the explosion; two other Heston employees were injured. *Id.* In addition, underground stoppings, cribs, and overcasts within 100 feet of the production shaft were damaged. *Id.*

Following an investigation,⁷ MSHA issued the following citation and three orders:

Citation No. 3109521 charged Consol with a violation of 30 C.F.R. § 75.301 (1991) for failing to maintain the volume and velocity of air sufficient to render harmless explosive gasses in the production shaft. 20 FMSHRC at 1343. MSHA determined that the violation was significant and substantial ("S&S")⁸ and was the result of the operator's unwarrantable failure (*see infra* n.11). *Id.*

Order No. 3109522 charged Consol with a violation of 30 C.F.R. § 77.1112(b) (1991) by failing to make required methane examinations at the capped production shaft where welding was being performed. 20 FMSHRC at 1345. MSHA designated the violation as S&S and alleged that it was the result of the operator's unwarrantable failure. *Id.* at 1347.

Order No. 3109523 charged Consol with a violation of 30 C.F.R. § 75.316 (1991) by making a major change in the approved ventilation plan without MSHA approval when it capped the production shaft. 20 FMSHRC at 1348. MSHA determined that the violation was S&S and the result of the operator's unwarrantable failure. *Id.* at 1351.

Order No. 3109524 charged Consol with a violation of 30 C.F.R. § 75.322 (1991) by making changes in its ventilation which affected the split of air ventilating the production shaft where miners were allowed to work before effects of the changes were evaluated. 20 FMSHRC

⁷ For a description of the post-accident investigation, see *Consolidation Coal Co.*, 20 FMSHRC 315, 316-17 (Apr. 1998).

⁸ 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."

at 1351. MSHA designated the violation as S&S and alleged that it was the result of the operator's unwarrantable failure. *Id.* at 1353.

As a result of the violations, MSHA proposed civil penalties of \$200,000. *Id.* at 1337.

Following an 8-day hearing, the judge issued his decision in which he dismissed the citation and found violations with regard to the three orders. *Id.* at 1344, 1346-47, 1349-50, 1353. With regard to special findings, the judge found that the violations charged in all three orders to be S&S. *Id.* at 1347, 1350-51, 1353. He also found that the violation charged in Order No. 3109523 was the result of Consol's unwarrantable failure, but concluded that the violations alleged in the other two orders were not unwarrantable. *Id.* at 1348, 1351, 1353-54. The judge reduced MSHA's proposed penalties to \$70,000. *Id.* at 1354.

The Secretary and Consol filed cross appeals with the Commission, both of which were granted.

II.

Disposition

A. Citation No. 3109521

The citation alleges that, in violation of 30 C.F.R. § 75.301 (1991),⁹ Consol allowed methane to accumulate in the production shaft, an active working of the mine, and that the methane was ignited on March 19 when Heston employees were welding during the installation of the 16-inch pipe. 20 FMSHRC at 1343-44; Gov't Ex. 1. The term "active workings" was defined at 30 C.F.R. § 75.2(g)(4) (1991) as "any place in a coal mine where miners are normally

⁹ The cited regulation, 30 C.F.R. § 75.301 (1991), provided in relevant part:

All active workings shall be ventilated by a current of air containing not less than 19.5 volume per centum of oxygen, not more than 0.5 volume per centum of carbon dioxide, and no harmful quantities of other noxious or poisonous gases; and the volume and velocity of the current of air shall be sufficient to dilute, render harmless, and to carry away, flammable, explosive, noxious, and harmful gases, and dust, and smoke and explosive fumes. . . .

The language of the regulation tracked section 303(b) of the Mine Act, 30 U.S.C. § 863(b). The regulation was revised and recodified in 1996 at 30 C.F.R. § 75.321(a).

required to work or travel.”¹⁰ The citation was designated S&S and the result of the operator’s unwarrantable failure.¹¹

The judge found no evidence that any person worked or traveled in the production shaft after it was capped on March 13, 1992. 20 FMSHRC at 1344. The judge analyzed the language of the regulation and found that it was clear. *Id.* The judge reasoned that “active workings” included “any place *in* a coal mine” but not the areas above and below the cap. *See id.* (emphasis added). Moreover, the judge also found that, even if the language of the regulation was not plain, the Secretary’s interpretation was unreasonable. *Id.*

The Secretary argues that her interpretation of the standard is entitled to deference. S. Br. at 16-17. More particularly, the Secretary asserts that the definition of “active workings” is “any place,” and the dictionary definition of “place” includes physical surroundings or environment, which is broad enough to encompass the area above the cap. *Id.* at 18-20. The Secretary argues that it would defeat the purpose of the regulation to require that a miner has to be “in” the production shaft before the regulation would apply, particularly given the facts of this proceeding where miners were on top of the cap inserting pipe into the shaft. *Id.* at 21-25. Finally, the Secretary argues that the occurrence of preshift examinations at the bottom of the shaft was sufficient to support a determination that the shaft was an active working. *Id.* at 25-26.

In response, Consol asserts the language of the standard and the definition of “active workings” are clear and the Secretary is not entitled to deference in interpreting them. C. Revised Resp. Br. at 2-4, 9. Rather, Consol argues that “active workings” should be given its ordinary meaning and considered in light of other terms in the Mine Act and its legislative history. *Id.* at 5-7. Further, Consol contends that Congress, when it enacted the Federal Coal Mine Health and Safety Act of 1969 (“Coal Act”), distinguished abandoned areas from active workings, with ventilation requirements only applying to the latter. *Id.* at 7-8. Consol finally argues that the Secretary misconstrued Commission case law regarding active workings. *Id.* at 10-12.

The first inquiry in statutory construction is “whether Congress has directly spoken to the precise question in issue.” *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *Chevron*, 467 U.S. at 842-43; *accord Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990). In

¹⁰ The regulatory definition of “active workings” is taken from the Mine Act, 30 U.S.C. § 878(g)(4). The present definition in the regulations is identical in language to that in effect at the time of the alleged violation. *See* 30 C.F.R. § 75.2 (1999).

¹¹ Although the judge did not acknowledge in his decision that the citation charged Consol with unwarrantable failure in committing the violation (20 FMSHRC at 1343), the citation clearly alleged it, and the Secretary raised the judge’s failure to so find in her petition for review. S. PDR at 22.

ascertaining the plain meaning of the statute, courts utilize traditional tools of construction, including an examination of the particular statutory language at issue, and the language and design of the statute as a whole, to determine whether Congress had an intention on the specific question at issue. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *Local Union 1261, UMWA v. FMSHRC*, 917 F.2d at 44; *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989).

We agree with the judge that the language of § 75.301 and the definition of “active workings” are clear. However, we disagree with his application of the statutory and regulatory provisions to the facts of this case. We conclude that substantial evidence¹² does not support his finding that no persons worked or traveled in the production shaft.

The judge found “[t]here is no evidence in this case that any person worked or traveled or normally worked or traveled in the production shaft after the shaft was capped on Friday, March 13, 1992.” 20 FMSHRC at 1344. This finding is erroneous. To the contrary, the record clearly indicates that the shaft continued to be an active working after being capped, because miners continued to work or travel there during installation of the dewatering pipe. Specifically, miners continued to conduct methane and air flow tests at the bottom of the shaft on a daily basis, including on the morning of the explosion. Tr. 1450-53, 1478-81, 1494-95. Those tests are sufficient in and of themselves to establish that the entire shaft remained an active working up to the time of the explosion.

Furthermore, as we explained above (*see supra* note 3), the so called “cap” Consol constructed over the production shaft was designed to be used initially as a work platform, not to seal the shaft as a cap would normally be used. *See* 30 C.F.R. § 75.1711-1. As even the judge recognized, construction of the modified cap actually facilitated work in the shaft, i.e., installation of the dewatering pipe through the 22-inch opening in the cap. 20 FMSHRC at 1349.¹³

Consol argues that finding the production shaft an active working is contrary to Commission case law. Consol states that in *Southern Ohio Coal Co.*, 12 FMSHRC 1498 (Aug.

¹² When reviewing an administrative law judge’s factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). “Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support [the judge’s] conclusion.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that “fairly detracts” from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

¹³ We fail to understand why the Secretary adopted, without question, Consol’s characterization of the work site from which the dewatering pipe was being installed as a “cap.”

1990) (“*SOCCO*”), *aff’d mem.*, 940 F.2d 653 (4th Cir. 1991), the finding that a portion of a tailgate entry was an “active working[] was not premised upon the conduct of regular examinations,” but rather was “based upon the fact that . . . an escapeway was involved.” C. Revised Resp. Br. at 11. This is an incorrect reading of *SOCCO*. The Commission’s decision was actually based upon the fact that the tailgate entry “had to be maintained and *inspected*” — necessitating travel through the entry — because it was an escapeway. 12 FMSHRC at 1502 (emphasis added); *see also id.* at 1501 (numerous references to the need for the tailgate entry to be “maintained and examined” at least “[o]nce a week”). *SOCCO* thus, in fact, actually supports our holding that the production shaft was an active working. Here, miners were traveling to the bottom of the shaft to take methane checks *on a daily basis*.¹⁴ *See also Old Ben Coal Co.*, 3 FMSHRC 608, 609 (Mar. 1981) (without deciding whether the “function” alone of an area of a mine qualifies it as an active working, an area where no miners worked was found to be an active working where it was inspected once a week, rock dusted, and designated as an escapeway).

Although four other cases Consol cites were decided by our judges, and thus have no precedential value (29 C.F.R. § 2700.72), we note that in all four cases, our judges found that bleeder entries were not active workings under regulations then in force providing, *inter alia*, that bleeder systems “shall not include active workings.” 30 C.F.R. § 75.316-2(e)(2) (1991); *see Old Ben Coal Co.*, 13 FMSHRC 1930, 1948 (Dec. 1991) (ALJ); *Rushton Mining Co.*, 11 FMSHRC 1506, 1507 (Aug. 1989) (ALJ); *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 1318, 1322 (July 1989) (ALJ); *United States Steel Corp.*, 6 FMSHRC 291, 307 (Feb. 1984) (ALJ). Section 75.316-2(e)(2) was eventually replaced by more specific regulations covering bleeder entries when MSHA revised its ventilation regulations in 1996. *See* 61 Fed. Reg. 9764 (1996); *see, e.g.*, 30 C.F.R. §§ 75.321(a)(2) (air quality requirements for bleeder entries); 75.364(a)(2) (weekly examination requirements for bleeder entries). The four cases Consol cites are thus irrelevant to the instant proceedings.¹⁵

In light of the conclusion that the production shaft was an active working, largely undisputed evidence establishes that ventilation in the production shaft was insufficient to dilute

¹⁴ Consol also attempts to distinguish a case in which former Chief Administrative Law Judge Paul Merlin held that a tailgate entry where miners were working to abate a “long-standing water problem” was an active working. *Consolidation Coal Co.*, 14 FMSHRC 590, 595-96 (Apr. 1992) (ALJ). Consol states that in that case, “miners normally and routinely worked in the tailgate entry at issue.” C. Revised Resp. Br. at 11. Here, miners normally and routinely traveled to the production shaft to check for methane.

¹⁵ Consol also cites *National Mining Association v. MSHA*, 116 F.3d 520 (D.C. Cir. 1997), with no explanation as to its relevance aside from a reference appearing in that case to two of the ALJ cases we have already discussed. In that decision, which was not a Mine Act proceeding under Commission jurisdiction, the National Mining Association petitioned directly to the court for review of several of MSHA’s ventilation regulations that were finalized in 1996 — including 30 C.F.R. § 75.321(a)(2), which the court upheld. *Id.* at 525-28.

and render harmless methane in the shaft. In this regard, both the Secretary's expert, John Urosek, and Consol's expert, Donald Mitchell, concluded that airflow in the production shaft had been reduced to no more than 400 cfm, and also agreed that the airflow was insufficient to render harmless methane being liberated into the shaft. 20 FMSHRC at 1343. Thus, the record evidence leads to only one conclusion — that Consol violated section 75.301. *See Walker Stone Co. v. Secretary of Labor*, 156 F.3d 1076, 1085 n.6 (10th Cir. 1998) (remand unnecessary where record as whole admits only one conclusion on issue).

We reverse the judge's determination that section 75.301 was not violated and remand the citation to the judge for consideration of the S&S and unwarrantable failure determinations¹⁶ and imposition of the appropriate penalty.

B. Order No. 3109522

The order alleges that Consol failed to conduct methane tests at the production shaft where Heston was performing welding operations in violation of 30 C.F.R. § 77.1112(b).¹⁷ 20 FMSHRC at 1345; Gov't Ex. 2 at 1. The order further alleges that the cap on the production shaft severely restricted ventilation into the shaft and that the mine had a known history of methane liberation. 20 FMSHRC at 1345; Gov't Ex. 2 at 2. In addition, MSHA determined that the violation was S&S and resulted from the operator's unwarrantable failure. 20 FMSHRC at 1345; Gov't Ex. 2 at 1. The judge concluded that the standard required methane examinations be made in areas within a range of likely ignition from welding, including the area beneath the cap. 20 FMSHRC at 1346. The judge further concluded that the violation was S&S but not a result of the operator's unwarrantable failure. *Id.* at 1347-48.

¹⁶ Because the judge dismissed the underlying violation, he did not reach the S&S or unwarrantable failure designation of the citation.

¹⁷ The cited regulation, 30 C.F.R. § 77.1112(b), provides:

Before welding, cutting, or soldering is performed in areas likely to contain methane, an examination for methane shall be made by a qualified person with a device approved by the Secretary for detecting methane. Examinations for methane shall be made immediately before and periodically during welding, cutting, or soldering and such work shall not be permitted to commence or continue in air which contains 1.0 volume per centum or more of methane.

Unlike the preceding standard involving "active workings," which is defined in the Mine Act and regulations, "areas" is not defined.

Consol argues the judge ignored the “regulation’s clear terms.” C. Br. at 17. Consol contends that the area likely to contain methane must be the same area where welding was performed. *Id.* at 17-18. Further, Consol argues that the regulation must give fair warning of what conduct is prohibited before sanctions can be imposed. *Id.* at 18-19. Consol asserts that the Secretary bore the burden of proving that she had an approved device for taking methane examinations and that the judge erred when he placed the burden on Consol to prove the non-existence of such a device. *Id.* at 19-21. Consol concludes by arguing that the S&S determination and the \$10,000 penalty should be vacated. *Id.* at 19. Finally, Consol asserts that substantial evidence supports the judge’s determination that the violation was not the result of Consol’s unwarrantable failure. C. Revised Resp. Br. at 14-28.

The Secretary responds that her interpretation of the standard is reasonable, furthers the purposes of the Mine Act, and is owed deference. S. Resp. Br. at 5-8. In essence, the Secretary argues that the standard should be interpreted to guard against the risk that was present in the instant proceeding. *Id.* at 8. The Secretary asserts that Consol’s efforts to ventilate the shaft and to prevent sparks and molten metal from entering the shaft indicate that Consol was concerned with the buildup of methane in the shaft and the hazard of ignition. *Id.* at 9-10. The Secretary contends that the regulation provided fair notice of the conduct required; indeed, the Secretary argues that Consol had actual notice of the requirements of the regulation. *Id.* at 11-14. The Secretary urges rejection of Consol’s impossibility or infeasibility of performance with the regulation argument, on the ground that the regulation does not permit such a defense. *Id.* at 15-18. Finally, the Secretary argues that substantial evidence does not support the judge’s conclusion that the violation was not the result of Consol’s unwarrantable failure. S. Br. at 26-41.

1. Violation

The “language of a regulation . . . is the starting point for its interpretation.” *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See id.*; *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993).

Here, as a threshold matter, we find clear and unambiguous the requirement of section 77.1112(b) that “[b]efore welding . . . is performed in areas likely to contain methane, an examination for methane shall be made.” 30 C.F.R. § 77.1112(b). To prove a violation of this regulation, the Secretary must show (1) that a particular area was “likely to contain methane,” (2) that welding was performed in that area, and (3) that no examination of the area was made. Clearly, the area directly beneath the cap was an area “likely to contain methane.” *Id.* The mine liberated a high level of methane. 20 FMSHRC at 1337. Construction of the cap over the production shaft significantly reduced air flow into the shaft. *Id.* at 1341. Moreover, when one of the 6-inch ventilation pipes was plugged, reducing air flow to a mere 400 cfm, there was, as the

judge found based on expert testimony, “a potential for explosive concentrations of methane to accumulate beneath the cap.” *Id.* at 1346 (citations omitted). The fact that an explosion occurred is proof enough that ventilation of the area beneath the cap was inadequate to dilute, render harmless, and carry away methane being liberated in the shaft. *See id.* (“[t]he methane explosion itself is *prima facie* proof” that methane was likely to accumulate beneath the cap).¹⁸

The question remains, though, whether the area beneath the cap can be said to have been within the relevant area in which welding was performed. The judge concluded that “the area beneath the cap . . . was within the area or zone affected by [the] welding.” *Id.* We find that substantial evidence supports this conclusion. First, we note that the operator took precautions to guard against welding sparks and molten metal from going into the production shaft (*id.* at 1342), evincing Consol’s concern that the welding posed some risk of causing an ignition in the shaft. *See Mid-Continent Resources, Inc.*, 6 FMSHRC 1132, 1138 (May 1984) (“the substantial evidence standard may be met by reasonable inferences drawn from indirect evidence”). But more importantly, we note that the I-beam supporting the dewatering pipe extended across the production shaft (Gov’t Ex. 15, Drawing 12), and also connected the area above the cap to the atmosphere of the production shaft (Gov’t Ex. 15, Drawing 1). Experts for Consol agreed with the Secretary’s position that the most likely cause of the methane explosion was the improper grounding of the second welding machine to the I-beam (20 FMSHRC at 1346), which probably caused arcing to occur between the pipe being welded and the I-beam. Tr. 455-57; 2156-58; 2182-83, 2355-56). Given this direct electrical link between the work area above the production shaft and the atmosphere of the shaft below the cap,¹⁹ we find that Consol was clearly and unambiguously required under section 77.1112(b) to perform methane examinations in the area immediately below the cap.

Consol’s argument that, to prove a violation of section 77.1112(b), the Secretary “must establish that ‘a device approved by the Secretary for detecting methane’ was in existence . . . and that the operator failed to utilize that device” (C. Br. at 19) puts the cart before the horse. Given the very high likelihood of methane being present under the cap, a fact Consol fully appreciated, it was up to the company to design the cap in such a way as to allow the required methane examinations to be performed. Indeed, the judge found that Consol could have incorporated sampling pipes into the cap (20 FMSHRC at 1347), and substantial evidence supports the judge. In any event, the appropriate response to the lack of a device that could accurately measure methane levels beneath the cap would have been to suspend welding over the

¹⁸ Ammons, Bane, Moore, Pittman, and DeBlossio all testified regarding the potential for methane in the shaft absent adequate ventilation. Tr. 435, 494, 686-87, 821, 956-57, 1723-24. Moreover, Consol’s expert Mitchell stated that, even with both air pipes open, there would have been some areas beneath the cap with explosive concentrations of methane, and that it was reasonable to expect methane accumulations. Tr. 2277, 2328.

¹⁹ Consol’s argument that the cap separated the production shaft from the welding (C. Br. at 17-18) is simply without merit.

production shaft rather than blindly proceed and risk the disastrous consequences that, in fact, occurred.

In light of the above, we affirm the judge's determination of violation and S&S designation.²⁰

2. Unwarrantable Failure

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

Whether conduct is “aggravated” in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the extent of the violative condition, the length of time that it has existed, whether the violation is obvious or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, and the operator's knowledge of the existence of the violation. *See Cyprus Emerald Resources Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984). These factors need to be viewed in the context of the factual circumstances of a particular case, and some factors may be irrelevant to a particular factual scenario. But all of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether the level of the actor's negligence should be mitigated.

²⁰ Consol did not separately challenge the judge's S&S determination, but requested the Commission reverse the judge's determination if it agreed to reverse the underlying violation. *See* C. Br. at 21. Also, in light of our agreement with Consol that this violation can be decided on the basis of the clear language of the regulation, there is no notice issue present. Further, even if the language of the regulation were ambiguous, Consol cannot raise a notice issue because the company failed to raise it before the judge. 30 U.S.C. § 823(d)(2)(A)(iii); *see* C. Post-Hearing Br. at 54-61; C. Resp. to S. Post-Hearing Br. at 11-14.

The judge concluded that, while Consol was negligent in failing to measure for methane below the cap, that negligence did not rise to the level of unwarrantable failure. 20 FMSHRC at 1348. The judge relied on four considerations: Consol could have reasonably perceived that methane would not accumulate above the cap so that not testing would not be violative; Consol could have perceived that the welding was to be performed in a discrete area above the cap that separated the welding from the methane; methane examinations were in fact performed at the bottom of the shaft; and the most likely ignition source, an electrical arc from an improperly grounded welding machine, was not an obvious source of ignition. *Id.*

The judge, however, failed to fully consider all the facts and circumstances relevant to an unwarrantable failure determination. As the judge noted, the Blacksville No. 1 Mine was a “gassy” mine — one that emitted large quantities of methane. *Id.* Consol witnesses testified extensively regarding the gassy nature of the mine and how methane, which is lighter than air, could migrate into the shaft and accumulate under the cap. Tr. at 555, 562, 580-81, 616, 624, 686, 691, 958, 1202, 1243-46, 1288, 1693. The judge also found that “Consol officials admitted that they knew methane could be liberated into the production shaft.” 20 FMSHRC at 1348. Further, Consol officials were well aware of the hazards associated with methane accumulations and welding. Tr. 481-85, 1309, 1436. Consol assistant vice-president Quesenberry even testified that he understood the need to test for methane underneath the cap. Tr. 624-25. Nevertheless, Consol decided to install dewatering pipe that required welding just above the shaft. By proceeding to cover the shaft, causing inadequate ventilation, and to weld in the presence of accumulating methane of which they were or should have been aware, Consol ignored obvious danger that was apparent to a number of its managers.

However, corporate balkanization at Consol apparently led to a situation where officials in one division did not know what those in another division were doing. Thus, Blacksville Mine vice-president Ammons was not consulted on the decision by Consol’s regional engineering department to switch from threaded pipe to welded pipe. 20 FMSHRC at 1340. Ammons, without consulting anyone in Consol’s environmental quality control department or its regional safety office, determined to utilize two six-inch ventilation pipes to ventilate the production shaft, even though he did not know the methane liberation rate or how much air would come in through the ventilation pipes. *Id.* at 1339. When Consol regional safety inspector Yerkovich notified MSHA of the proposal to cap the production shaft, he did not notify MSHA of when the proposed capping was to occur or that welded dewatering pipe would be installed in the shaft. *Id.* at 1338. Nor did Yerkovich alert anyone in the Consol hierarchy that MSHA had not responded to his notification of the early capping. Accordingly, Consol proceeded to construct the cap without hearing back from MSHA. *Id.* Finally, Consol regional engineering employees DeBlossio and Baird, who were assigned to the project, had no experience in underground mine ventilation. *Id.* at 1341. Indeed, DeBlossio was not even aware that the Blacksville Mine liberated large quantities of methane. *Id.*

The confusion resulting from this inadequate communication and coordination was itself a contributing cause of the explosion. There was a serious lapse of judgment among Consol

personnel in not ordering or ensuring that methane checks were made underneath the production shaft cap. *See Rock of Ages Corp.*, 20 FMSHRC 106, 115 (Feb. 1998) (a foreman’s failure to search for undetonated explosives when such explosives had been uncovered in the past evinced a reckless disregard for the hazards associated with misfires), *aff’d in pertinent part*, 170 F.3d 148 (2nd Cir. 1999).

The factors on which the judge relied in finding no unwarrantable failure are at odds with findings that he made in regard to the underlying violation or are contrary to the Commission’s unwarrantable failure test. The first factor that the judge considered — the failure to measure methane accumulations above the cap — is not relevant because the underlying violation concerns the failure to measure methane *below* the cap. Similarly, the fact that welding was occurring above the cap is not dispositive, since the heart of the alleged violation deals with the effects the welding had on the atmosphere in the production shaft via the electrical connection between the welding area and that atmosphere. Further, Consol’s assertedly reasonable and good faith belief that testing for methane at the bottom of the shaft was adequate to comply with the standard was undercut by its own witness, Quesenberry, who acknowledged the need to test for methane under the cap, as well as at the bottom of the shaft. Tr. 624-25. Finally, arcing associated with electrically energized equipment is, as the Secretary points out (S. Br. 31-32), a well-recognized ignition source for methane in mines. *See, e.g., Eastover Mining Co.*, 4 FMSHRC 123, 123 (Feb. 1982) (recognizing that electrical arcing presents a potential ignition source).

In light of the foregoing discussion, we vacate the judge’s unwarrantable failure determination and remand the matter to him for reconsideration in light of the facts and circumstances outlined above.

C. Order No. 3109523

This order charged Consol with an S&S and unwarrantable violation of 30 C.F.R. § 75.316 (1991)²¹ on the ground that, because major ventilation changes resulted from capping the production shaft, Consol was obligated to revise its mine ventilation plan to reflect those changes and obtain the prior approval of the MSHA District Manager. 20 FMSHRC at 1348; Gov’t Ex. 3 at 1. The judge rejected Consol’s contention that such approval was not required in this instance. 20 FMSHRC at 1349. While the judge recognized that, prior to March 1992, section 75.316 approval for capping a mine shaft was not required in MSHA District 3 when the capping occurred during mine sealing, he found this case clearly distinguishable because the Blacksville No. 1 production shaft was not sealed, but rather remained partially open to allow for the ongoing work of fabricating the dewatering pipe and for continued intake ventilation. *Id.*

²¹ At that time, section 75.316 tracked section 303(o) of the Act, 30 U.S.C. § 863(o), and provided in relevant part: “[a] ventilation system and methane and dust control plan and revisions thereof suitable to the conditions of the mining system of the coal mine and approved by the Secretary shall be adopted by the operator” Similar requirements can now be found in 30 C.F.R. § 75.370 (1999).

The judge also found that an agent of Consol, Yerkovich, was specifically informed by ventilation specialist Palmer that revision of the ventilation plan to reflect capping the production shaft would require MSHA approval, thereby placing Consol on notice of its obligations in this instance. *Id.* at 1349-50. The judge refused to credit Yerkovich's denials that he was told prior approval for capping the production shaft was required. *Id.* at 1350. The judge found the violation to be S&S and of high gravity. He also found that Yerkovich was directly and specifically told of the necessity of obtaining MSHA approval for the capping job, and that Consol deliberately disregarded that directive. Finally, the judge determined that Consol's violation of section 75.316 resulted from its unwarrantable failure. *Id.* at 1350-51.

1. Violation

Consol argues the judge erred in discrediting Yerkovich's trial testimony that MSHA ventilation specialist Strahin told him approval was not necessary. C. Br. at 22-23. According to Consol, that testimony, contrary to the judge's finding, is not inconsistent with Yerkovich's earlier deposition testimony, given his explanation that he did not have the opportunity at the deposition to testify regarding his conversation with Strahin. *Id.* at 23. Consol also contends that substantial evidence does not support the judge's conclusion regarding differences in previous Consol capping projects, because Consol witnesses testified that, prior to the mine explosion, approval was not required for capping projects in which neither the mine nor the shaft at issue was sealed completely. *Id.* at 23-24.

The Secretary maintains the judge correctly analyzed testimony in finding that Yerkovich was informed by Palmer that approval of the capping project was necessary. S. Resp. Br. at 23-24. The Secretary also argues that to the extent there may have been prior occasions in which Consol, without receiving MSHA approval, partially sealed shafts in District 3 while miners remained underground, there is no evidence that MSHA's ventilation specialists in that district were aware of such projects, much less acquiesced to them. *Id.* at 24 n.16.

There is no dispute that the changes in ventilation resulting from the dewatering project were such that, according to the terms of section 75.316, Consol was obligated to revise its ventilation plan to show those changes and get MSHA's approval before undertaking the project.²² As the judge noted, "when the extant ventilation plan was approved, the accompanying letter sent to Consol stated that '[y]ou are reminded that all changes or [revisions] to the ventilation plan must be submitted and approved before they are implemented.'" 20 FMSHRC at

²² We note that both of Consol's arguments in support of its contention that the judge's finding of violation should be reversed — that Yerkovich was told by Strahin that approval was not necessary in this instance and that approval had not previously been required in District 3 for Consol capping projects — are essentially estoppel arguments. In general, the Commission does not recognize estoppel as a valid defense to a citation or order. *See King Knob Coal Co.*, 3 FMSHRC 1417, 1421-22 (June 1981). While Consol cites no reason why we should depart from that practice here, we nevertheless address its arguments.

1349 (quoting Gov't Ex. 26 at 1). In addition, consistent with that directive, the March 3, 1992, letter from Consol informing the MSHA District Manager of the capping project described it as a "proposed air change" at Blacksville No. 1. Gov't Ex. 27.

Moreover, the judge, in concluding that Consol was specifically made aware of the need for MSHA approval in this instance, credited the testimony of Palmer and Strahin over Yerkevich's conflicting testimony. See 20 FMSHRC at 1349-50. A judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). The Commission has recognized that, because the judge has an opportunity to hear the testimony and view the witnesses, he is ordinarily in the best position to make a credibility determination. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff'd sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998). Nonetheless, the Commission will not affirm such determinations if there is no evidence or dubious evidence to support them. *Consolidation Coal Co.*, 11 FMSHRC 966, 974 (June 1989).

In this instance there is sufficient evidence to support the judge's credibility determinations. Both Palmer and Strahin were clear in their testimony that, with respect to the production shaft project, neither had acquiesced to anything less than the prior approval required by section 75.316. Tr. 1106 (Palmer), 1865-66 (Strahin). In addition, while being deposed, Yerkevich agreed with the statement that Palmer and Strahin "indicated to you in no uncertain terms that they thought that you needed prior approval." Gov't Ex. 51 at 83 (deposition excerpts) (emphasis added). In these circumstances, the judge, who had the opportunity to view all three witnesses while each gave his trial testimony, clearly was justified in refusing to credit Yerkevich's claim at trial that Strahin had told him that prior approval was not necessary. Tr. 1256-57, 1294-95.²³ Substantial evidence therefore supports the judge's conclusion that Consol was informed by a representative of MSHA that approval was necessary before the project could proceed.

As for Consol's claim that the judge erred in distinguishing previous Consol capping projects in MSHA District 3, we do not agree. The testimony cited by Consol (C. Br. at 24; C. Reply Br. at 10-11) fails to establish that MSHA knew of a previous instance in which Consol had

²³ Consol gives no citation to the record in support of its claim that Yerkevich explained at trial that he did not have an opportunity at his deposition to elaborate regarding the conversation he had with Strahin. See C. Br. at 23. Yerkevich did testify at trial that, in general, given the way some of the deposition questions were phrased, his answers were not entirely complete. However, he did not indicate that this testimony specifically applied to the subject of what he was told regarding the need for approval under section 75.316, even when he was given an opportunity to do so. Tr. 1304-06.

capped a shaft and conducted welding over a hole in the cap while there were men underground in that portion of the mine.

The judge's determination that Consol violated section 75.316 is affirmed.

2. Unwarrantable Failure

Consol contends that, in finding the violation unwarrantable, the judge failed to consider or discuss extensive evidence establishing that, based on Consol's prior dealings with MSHA and the presence of two MSHA inspectors at the mine while the production shaft was being capped and the dewatering pipe installed, Consol's personnel had a reasonable, good faith belief that approval from MSHA for ventilation changes resulting from the capping project were not required in this instance. C. Br. at 24-30. The Secretary answers that because the violation occurred despite Palmer's warning to Yerkovich regarding the need for prior approval, Consol's decision to move ahead without that approval constitutes aggravated conduct. S. Resp. Br. at 25-27. The Secretary also maintains that the mere contemporaneous presence at the mine of two inspectors is insufficient to excuse Consol's failure to comply with section 75.316, given that neither inspector was a ventilation specialist responsible for approving changes to ventilation plans. *Id.* at 28-29.

It was not error for the judge to refuse to accord Consol shelter from the unwarrantable failure charge on the basis of evidence of its good faith and reasonableness.²⁴ Consol bases the reasonableness of its belief that approval was not required here on prior MSHA treatment of Consol District 3 capping projects, as well as circumstances surrounding this project and Consol's notification to MSHA. Regardless of whether the evidence Consol cites establishes the reasonableness of its belief in the inapplicability of section 75.316 to a project *such as this*, the fact remains that Yerkovich was told by an MSHA representative that prior approval was necessary *in this instance*. Moreover, Yerkovich did not remain silent about this conversation but reported it to his superiors at Consol. *See* 20 FMSHRC at 1350-51.

In light of this evidence, we agree with the judge that Consol's failure to obtain MSHA approval, despite being put on notice that approval was required in this instance, demonstrates that Consol's conduct was aggravated and therefore unwarrantable. *See Rochester & Pittsburgh*, 13 FMSHRC at 194 (intentional misconduct, whether by commission or omission, is aggravated conduct). Consequently, we affirm the judge's unwarrantability determination.

D. Order No. 3109524

²⁴ In general, the Commission will not find a violation unwarrantable where it is shown to have resulted from the operator's mistaken but good faith, reasonable belief that it was in compliance with applicable law. *See Florence Mining Co.*, 11 FMSHRC 747, 753-54 (May 1989).

This order charged that Consol, during the capping of the production shaft and installation of the dewatering pipe, violated 30 C.F.R. § 75.322 (1991),²⁵ and that the violation was S&S and due to the Consol's unwarrantable failure. 20 FMSHRC at 1351; Gov't Ex. 4. The Secretary alleged two separate grounds of violation. Specifically, she alleged that, on March 13, while Consol had properly withdrawn its personnel from the mine to evaluate changes in ventilation caused by construction of the cap, the operator violated the regulation by permitting miners to return underground without evaluating ventilation changes within the production shaft. 20 FMSHRC at 1351; Gov't Ex. 4 at 1.

The order alleged that a second material change to the split of air ventilating the production shaft occurred the following week, when the plugged dewatering pipe was inserted into the 22-inch hole in the cap and the remaining portion of that hole was covered. 20 FMSHRC at 1351; Gov't Ex. 4 at 2. According to the order, when the subsequent closing of one of the two intake ventilation pipes in the cap is also taken into account, ventilation in the shaft was reduced from approximately 7,500 cfm to around 400 cfm. 20 FMSHRC at 1351; Gov't Ex. 4 at 2. Miners remained working both underground and above during the change in ventilation, and the split of air ventilating the production shaft was not evaluated following the change. 20 FMSHRC at 1351; Gov't Ex. 4 at 2.

The judge rejected Consol's argument that section 75.322 did not apply. Relying on the testimony of Ammons, the judge found the production shaft intake could be properly characterized as a "split of air." 20 FMSHRC at 1352 n.2. Focusing solely on the reduction in airflow in the covered production shaft from 7,500 cfm to 400 cfm caused by insertion of the dewatering pipe and closing one of the ventilation pipes, the judge found that reduction materially affected the split of air ventilating the production shaft. *Id.* at 1352-53. Because it was undisputed that the reduction of airflow within the production shaft affected the safety of persons in the mine (*id.* at 1352), the judge concluded that Consol was required to follow the procedures set forth in section 75.322, and violated the standard when it failed to do so. *Id.* at 1353.

²⁵ At the time of the explosion, section 75.322 tracked section 303(u) of the Mine Act, 30 U.S.C. § 863(u), and provided that:

Changes in ventilation which materially affect the main air current or any split thereof and which may affect the safety of persons in the coal mine shall be made only when then the mine is idle. Only those persons engaged in making such changes shall be permitted in the mine during the change. Power shall be removed from the areas affected by the change before work starts to make the change and shall not be restored until the effect of the change has been ascertained and the affected areas determined to be safe by a certified person.

The regulation was revised and recodified in 1996 at 30 C.F.R. § 75.324.

While the judge found the section 75.322 violation to be S&S and of high gravity, he concluded it was not shown to be the result of Consol's unwarrantable failure. 20 FMSHRC at 1353-54. The judge based his unwarrantability determination solely on his finding that, without the testimony of the four dead miners, the Secretary could not show whether Consol officials failed to notify those working on the project of the importance of keeping the two ventilation pipes open for intake air, or whether the dead miners were otherwise aware of that importance of doing so. *Id.* at 1354.

1. Whether the Production Shaft Intake Is a Split of Air Under Section 75.322

We note at the outset that the judge did not address the change in ventilation of the production shaft on March 13 caused by closing of the shaft. This does not affect our consideration, however, as Consol's appeal of the finding of violation is based on an issue which applies to all changes in ventilation the Secretary alleges in the order occurred without compliance with section 75.322.

Specifically, Consol urges reversal of the finding of a violation on the ground that the judge's conclusion that the intake air in the production shaft was a "split of air" under section 75.322 is factually and legally erroneous, and unsupported by substantial evidence. C. Br. at 31-33. According to Consol, the judge ignored evidence establishing that the production shaft intake air did not contribute to the main air current ventilating the underground workings of the mine. *Id.* at 31-32; C. Reply Br. at 13-14. In response, the Secretary maintains that there is overwhelming support in the record, in the form of admissions by Consol officials, for the judge's conclusion that the production shaft intake constituted a "split of air" under section 75.322. S. Resp. Br. at 30-33.

Section 75.322 applies to changes materially effecting *any* split of a mine's main air current. While the term "split" is undefined in the regulations, the standard's use of the term is consistent with the industry usage. The *Dictionary of Mining, Mineral, and Related Terms* defines "air split" as "[t]he division of the main current of air into two or more parts." American Geological Institute, *Dictionary of Mining, Minerals and Related Terms* 12 (2d ed. 1997).

We note that Consol's claim that the production shaft was not a "split of air" is contrary to the testimony of some of its highest officials. According to Ammons, air from the production shaft was going to the mine's active workings, and both Ammons and Quesenberry conceded that the production shaft intake qualified as a split of the main air current. Tr. 648, 669, 749.

Moreover, Consol's claim that section 75.322 was inapplicable to the capping project is contradicted by its own actions. The record reflects that Consol treated the March 13 covering of the shaft as a change in ventilation subject to section 75.322, and attempted to comply with at least some of the regulation's requirements. 20 FMSHRC at 1340-41; Tr. 736-37, 1634. Indeed,

Yerkovich cited Consol's compliance with the regulation that day as a reason why MSHA prior approval of the capping was not required under section 75.316. Tr. 1298-1300.

In addition, the production shaft was one of only five primary entry points for intake air in the mine. Gov't Ex. 13 (Blacksville No. 1 Mine Post-Accident Mine Ventilation System Investigation) at 5-6; Gov't Ex. 26 (data included in last ventilation plan). Five surface-mounted exhaust fans drew air into the production shaft and four additional shafts elsewhere in the mine that were all intake entries or had intake compartments. Gov't Ex. 13 at 5-6. Before the production shaft was covered, air flowed through the shaft at nearly 200,000 cfm. *Id.* at 27, 28; Gov't Ex. 26. This was a greater rate than two of the other intake shafts and constituted approximately 17% of the total amount of air entering the mine. Gov't Ex. 13 at 28. At that time, no more than 34% of the intake air flowed through any one shaft. *Id.* Furthermore, the production shaft and the nearby service shaft, also known as the portal shaft, were situated and designed so that any reduction in air flow in the production shaft was compensated by an increase in air flow through the service shaft. Tr. 648-49, 735-36, 1654, 1689; Gov't Ex. 13 at 18-23.

Consol's recitation of evidence that ventilation changes that occurred once the production shaft was covered did not materially affect ventilation in the mine misses the point. C. Br. at 32-33. By its terms, section 75.322 was not triggered by only those ventilation changes that would "materially affect" mine-wide ventilation or the ventilation of active workings, but rather was triggered by any ventilation change that would "materially affect" any split of a mine's main air current.²⁶ Moreover, by twice providing that the actions it required operators to take were limited in geographic scope to those "areas" affected by the change in ventilation, the regulation clearly connotes that the ventilation changes to which it refers include those changes that have less than mine-wide effects. Consequently, we reject Consol's invitation to overturn the judge's finding that the air ventilating the production shaft was an air split to which section 75.322 applied.²⁷

²⁶ To the extent that Consol's appeal can be read as an attack on the judge's determination that the ventilation changes that occurred while the dewatering pipe was being installed "materially affect[ed]" the production shaft air split, we reject any such argument, as that determination is supported by substantial evidence. The judge correctly calculated and took into account that a reduction in air from 7,350 cfm to 400 cfm is a decrease of over 94%. 20 FMSHRC at 1353. Moreover, as the judge acknowledged (*id.*), Consol's expert Mitchell conceded that such a reduction would result in a material affect on ventilation. Tr. 2306-09.

²⁷ We note that Consol had the opportunity to present expert testimony that section 75.322 was not at all applicable in this instance, but did not do so. Its expert, Mitchell, who was the assistant chairman of the Mine Enforcement and Safety Administration committee that wrote the Part 75 regulations following the passage of the 1969 Coal Act, testified at length regarding whether the post-capping changes to the ventilation in the production shaft "materially affect[ed]" the shaft's ventilation as section 75.322 uses that term. However, he never disputed that the regulation applied to the shaft intake as a main air current or air split. Tr. 2247-60.

In light of the record evidence and the plain meaning of the term “split of air,” substantial evidence supports the judge’s conclusions that the production shaft intake was a split of air to which the requirements of section 75.322 applied, and that the changes in ventilation that occurred during installation of the dewatering pipe materially affected that split of air. We therefore affirm the judge’s finding that Consol violated section 75.322.

2. Unwarrantable Failure

The Secretary urges reversal of the judge’s negative unwarrantability finding on the ground that the judge failed to consider an extensive body of evidence which demonstrates that Consol’s failure to ascertain the effect on ventilation of the production shaft of the activities that surrounded capping the shaft constituted an unwarrantable failure to comply with the standard. S. Br. at 42-49. The Secretary also contends that the judge erred in failing to take into account the reason why the four dead miners were unavailable to testify, and that he should have shifted to Consol the burden of showing what the miners knew regarding the need to keep the ventilation pipes in the cap open. *Id.* at 49-55.

Consol maintains that, assuming *arguendo* that it violated section 75.322, the judge’s negative unwarrantability determination is supported by substantial evidence. C. Revised Resp. Br. at 29. Consol further contends that any violation of section 75.322 cannot be deemed unwarrantable because it reasonably relied on guidance provided by MSHA that any ventilation change under 9,000 cfm is not subject to the requirements of the regulation. *Id.* at 29-31.

While we are refusing Consol’s request to overturn the judge’s finding of a section 75.322 violation, that does not end the question of the extent of the violation. This is a relevant issue because of the judge’s conclusion that the violation *he found* was not unwarrantable. However, as mentioned, the judge did not completely address the question of the extent of the violation posed by the order. The judge failed to address whether section 75.322 was violated in connection with the March 13 completion of construction of the cap over the production shaft. Below, the parties disputed whether Consol’s actions that day in evaluating the change of air flow within the production shaft — an area “affected” by the change in ventilation and therefore subject to evaluation — were sufficient to comply with section 75.322’s requirement that the safety of the effects of the change be ascertained. *See* S. Post-Hearing Br. at 62-63; C. Post-Hearing Br. at 52-53. The judge never resolved this dispute, and thus never addressed whether Consol violated section 75.322 on March 13 and, if so, whether the violation that day was unwarrantable.²⁸

²⁸ The judge’s failure to resolve the issue may be the result of believing that the Secretary was alleging that the March 13 and 17 air changes had to be considered cumulatively. *See* 20 FMSHRC at 1353. However, it is undisputed that the capping of the shaft by itself resulted in a material effect on the air in the production shaft, and the citation plainly alleges that on March 13 “Consol did not evaluate the change to the air split ventilating the Production shaft itself before allowing miners to return to work.” Gov’t Ex. 4 at 1.

In light of his failure to completely address the extent to which Consol violated section 75.322, the judge's negative unwarrantability finding is fundamentally inadequate. Consequently, we vacate that finding and remand for a more complete consideration of the evidence and issues raised by the allegation of unwarrantability in connection with the order alleging a section 75.322 violation. *See Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222-23 (June 1994) (remand for judge to adequately address evidentiary record). On remand, the judge should resolve whether section 75.322 was first violated on March 13.

As for the issue the judge found dispositive on the question of unwarrantability — the closing of one of the ventilation pipes — on remand it would only be necessary for the judge to reach the issue of whether the ventilation pipe closing resulted in an unwarrantable violation of section 75.322 if the record evidence does not establish that an unwarrantable violation of the regulation occurred before that point.²⁹ Moreover, unlike the judge, we do not consider the testimony of the dead miners a necessary prerequisite to finding Consol's actions unwarrantable, for, as the judge found, there is evidence in the record that superintendent Levo not only facilitated the cutting of one of the ventilation pipes, but also at one point witnessed that it had been closed. 20 FMSHRC at 1342.

In determining unwarrantability on remand, the judge should address all of the factors the Commission considers relevant to the question of unwarrantability, as discussed at page 14, *supra*. There may be a number of such factors present here with respect to the section 75.322 violation, including the extensiveness of the violative condition (once the judge has completely addressed the allegations in the order) and the degree of danger posed by the violation.³⁰ We also

²⁹ We note that much of the reduction in ventilation that occurred during installation of the dewatering pipe was due not to the closing of a ventilation pipe, but to the insertion of the dewatering pipe into the cap. The Secretary's expert Urosek estimated that, at certain times during the installation process, there would have been less than 800 cfm of air ventilating the shaft even if both ventilation pipes were open, because the dewatering pipe, the plates that fit around it, and the Thermoglass cloth would almost entirely seal off the 22-inch diameter hole providing most of the ventilation to the shaft. Tr. 2071-72; Gov't Ex. 13 at 21-23. Consol did not dispute this figure, which represents a decrease of over 89% from the amount of air that was entering the shaft immediately before installation of the dewatering pipe began. Unlike with the closing of the ventilation pipe, there is no dispute that Consol should have been aware of the reduction in airflow resulting from installation of the dewatering pipe, as it knew the dewatering pipe was being installed through the cap and that the Thermoglass cloth was being used to prevent sparks from falling into the shaft. Tr. 699-700 (testimony of Ammons).

³⁰ While no miners were near the bottom of the production shaft when the explosion occurred, the equipment that remained at or near that area was severely damaged. Tr. 2056-57, 2115-16. It was stipulated that "[o]vercast, cribs, stoppings, and the rotary dump in the underground areas [of the mine] within 100 feet of the shaft were . . . damaged by the force of the explosion." Jt. Ex. 1 at 3 (Jt. Stip. 14); *see also* Gov't Exs. 20-21 (post-explosion underground

again note the relevancy of Consol supervisory personnel participating in various aspects of the project but not communicating with each other.

As part of his unwarrantable failure analysis, the judge should also consider whether a defense was established by Consol. Consol claims that it did not comply with section 75.322 because it was relying on the 9,000 cfm figure then contained in MSHA's *Program Policy Manual* ("PPM") as the minimum air reduction necessary to trigger application of section 75.322. See 20 FMSHRC at 1353; Resp't Ex. 52. The judge considered Consol's claim in concluding that there was a violation (20 FMSHRC at 1353),³¹ but made no finding regarding the good faith and reasonableness of the claim in light of the facts. Such a finding is necessary in the context of an unwarrantable failure charge. See *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1628 (Aug. 1994) ("reasonableness" of belief determined by surrounding circumstances).

E. Penalties

The Secretary seeks review of the two \$10,000 penalties the judge assessed in connection with each of the two orders he found not to be unwarrantable, a reduction from the \$50,000 the Secretary sought for each violation. S. Br. at 55-61. Because we have vacated and remanded those negative unwarrantability determinations, the penalties assessed for the two orders are also vacated and remanded. On remand, once the judge has decided whether the violations were unwarrantable, we direct him to reassess the penalties consistent with findings made on each of the six statutory penalty criteria set forth in section 110(i) of the Mine Act. We also direct the judge to consider our previous holdings that a judge's assessment of a penalty may not "substantially diverge" from the penalty proposed by the Secretary without sufficient explanation. See *Unique Electric*, 20 FMSHRC 1119, 1123 n.4 (Oct. 1998); *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983); see also *Dolese Bros. Co.*, 16 FMSHRC 689, 695 (Apr. 1994). The judge's initial decision lacked any such explanation.

III.

Conclusion

maps). Consol also acknowledged that it knew that a fire in the production shaft caused by the welding above it would put the miners who were underground at risk. Tr. 1648 (testimony of Charles Bane).

³¹ Below, Consol claimed that the *PPM* was dispositive on the issue of whether, under section 75.322, a ventilation change of less than 9,000 could be considered to "materially affect" a main air current or air split. C. Post-Hearing Br. at 48-51. The *PPM*, however, while it can provide guidance on an issue, has been found by the Commission to lack legal effect and thus cannot be used against the Secretary as grounds to estop a finding of violation. See *King Knob*, 3 FMSHRC at 1419-22.

For the foregoing reasons, we: (1) reverse the judge's determination that section 75.301 was not violated, and remand for a determination of whether that violation was S&S and due to Consol's unwarrantable failure, and a penalty assessment; (2) affirm the judge's determination that Consol violated section 77.1112(b), and vacate and remand his determination that the violation was not unwarrantable and his penalty assessment for further consideration consistent with this opinion; (3) affirm the judge's determination that Consol violated section 75.316 and that the violation was unwarrantable; and (4) affirm the judge's determination that Consol violated section 75.322, and vacate and remand his determination that the violation was not unwarrantable and his penalty assessment for further consideration consistent with this opinion.

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