

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

April 30, 2001

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. WEVA 98-37
	:	
	:	
CONSOLIDATION COAL COMPANY	:	

BEFORE: Jordan, Chairman; Riley and Verheggen, Commissioners<sup>1</sup>

DECISION

BY: Riley and Verheggen, Commissioners

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977 (“Mine Act” or “Act”), 30 U.S.C. § 801 et seq. (1994). At issue is Commission Administrative Law Judge Jerold Feldman’s decision dismissing a citation issued on August 5, 1997 by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) against Consolidation Coal Company (“Consol”) in connection with visible dust generated during roof bolting at Consol’s Blacksville No. 2 Mine, allegedly in violation of 30 C.F.R. § 72.630(d).<sup>2</sup> 22 FMSHRC 121 (Jan. 2000) (ALJ). The Commission granted the Secretary’s petition for

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<sup>1</sup> Commissioner Beatty recused himself in this matter and took no part in its consideration.

<sup>2</sup> Section 72.630(d) states:

*Ventilation control.* To adequately control dust from drilling rock, the air current shall be so directed that the dust is readily dispersed and carried away from the drill operator or any other miners in the area.

30 C.F.R. § 72.630(d).

discretionary review challenging the judge's decision. For the reasons that follow, we affirm the judge's decision.

## I.

### Factual and Procedural Background

Consol operates the Blacksville No. 2 mine, an underground coal mine in Monongalia County, West Virginia. 22 FMSHRC at 123; S. Ex. 11. At the time MSHA issued the citation at issue in these proceedings, Consol used scroll auger drills on its roof bolting machines at the mine. 22 FMSHRC at 123. A scroll auger drill has a spiral design that, as the drill penetrates the roof, allows particles of rock that are displaced by the drill to run out of the hole along the drill's spirals, rather than plugging up the hole. *Id.*; Tr. 90. The roof bolting machine, or "roof bolter," was located towards the front of the continuous mining machine. *See* S. Exs. 2, 3. Individual miners stationed on either side of the continuous mining machine operated the roof bolter. Tr. 105, 110.

The ventilation control systems used with the scroll auger roof bolters were designed to divert the dust generated by roof drilling into the end of a slider tube that was the last extension segment of the ventilation tubing. 22 FMSHRC at 125. As the face in the section was advanced, the slider tube was periodically extended so that it remained 10 feet from the face. *Id.* The ventilation was directed to divert the drill dust away from the faces of the miners operating the roof bolters. *Id.*

Before the citation at issue in this proceeding was issued, MSHA subjected Consol's drill dust control measures for scroll auger roof bolters to some scrutiny. *See id.* at 121. On December 5, 1996, after receiving a complaint pursuant to section 103(g) of the Mine Act, 30 U.S.C. § 813(g),<sup>3</sup> MSHA issued a citation charging Consol with a violation of section 72.630(d) based on an inspector's observations of visible drill dust around the position of the return side roof bolter in the 9-S section of the Blacksville No. 2 Mine. 22 FMSHRC at 124. Consol abated this citation by wrapping a ventilation tube joint to keep air from escaping. *Id.* Sometime later, in early 1997, Consol replaced the 45 horsepower fans in its ventilation control system with 75

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<sup>3</sup> Section 103(g) provides, in pertinent part:

Whenever a representative of the miners or a miner . . . has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger . . . .

30 U.S.C. § 813(g)(1).

horsepower fans, which at that time was the largest fan used for dust ventilation control purposes. *Id.*

On April 8, 1997, Consol's corporate dust control coordinator Craig Yanak and other Consol officials met with MSHA officials, including MSHA Inspector William Ponceroff, to discuss dust control. *Id.* During this meeting, the MSHA officials expressed concern over Consol's use of scroll augers. *Id.* Yanak testified that he heard Ponceroff state "that his next venture was going to be to rid Blacksville Two of the . . . scroll augers by whatever means it was necessary for him to do so." Tr. 1042.<sup>4</sup> Later that month, on April 30, MSHA issued a citation on the 9-S section of Blacksville No. 2 for a violation of the respirable dust standard, 30 C.F.R. § 70.100(a). 22 FMSHRC at 124. Sampling had revealed a respirable dust concentration of 2.98 milligrams per cubic meter of air ("mg/m<sup>3</sup>"). *Id.* MSHA abated the citation on June 17, 1997 after abatement respirable dust samples revealed dust levels below the 2.0 mg/m<sup>3</sup> standard. *Id.*

On June 4, 1997, Ponceroff issued a citation on the 9-S section of Blacksville No. 2 alleging a violation of section 72.630(d) based on his observations of drill dust around the return side roof bolter, occupation code 048. *Id.* at 125; S. Ex. 6. Consol abated the citation by installing belting around the frame of the miner and at the drill head in order to divert dust away from the drill operator. 22 FMSHRC at 125. The judge noted, however, that "Ponceroff's observations of excessive dust due to inadequate ventilation control *were not confirmed* by MSHA's respirable dust sample results taken on the 048 occupation during the period June 4 through June 6, 1997, to abate [the citation] issued on April 30, 1997." *Id.* (emphasis in original). The average of these abatement samples was 1.4 mg/m<sup>3</sup>. *Id.*

On June 5, 1997, Consol dust control coordinator Yanak went to the 9-S section to take spot respirable dust concentration readings with a real time aerosol monitor (RAM). *Id.* Because RAM readings can not distinguish between dust particles and other particles, RAM readings tend to be higher than dust samples taken with cassettes. *Id.* The RAM readings indicated respirable dust readings of between 0.1 and 0.2 mg/m<sup>3</sup>, well below permissible limits. *Id.*

On August 5, 1997, "[i]n response to continuing complaints from union representatives about the miners' exposure to drill dust," Ponceroff returned to the 9-S section during the midnight shift. *Id.* Ponceroff observed what he considered to be excessive dust around the return side roof bolter, and concluded that "the dust was in the roof bolters' breathing zones." *Id.* At this time, the continuous miner had advanced deep into the mining cycle, with the ventilation exhaust tubing extending approximately 188 feet from where the exhaust fan was located. *Id.* at 126. Both miners operating the roof bolters testified that they believed they were exposed to excessive dust. *Id.* Randy Murray, a union safety committeeman who accompanied Ponceroff

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<sup>4</sup> Roy Pride, the Blacksville No. 2 Mine general superintendent, testified "Ponceroff had made . . . statements that he was going to get the drill steels out of Blacksville Number 2 mine and that he was going to keep seeing visible dust until he got the spiral drill steels out of [the mine]." Tr. 861, 973-74.

(*id.* at 125), testified that, although the section ventilation was adequate, he believed that it “was not carrying the dust away adequately from the miners.” *Id.* at 126. Murray testified that Consol could not control the dust “by ventilation . . . we would still be getting dust no matter what they did [with ventilation].” Tr. 209-10.

As a result of his August 5 inspection, Ponceroff issued Citation No. 4540528, which he designated significant and substantial,<sup>5</sup> alleging a violation of section 72.630(d) for ineffective dust control measures. 22 FMSHRC at 127. The citation stated in part: “Dust resulting from drilling rock was observed in the 9-S section exposing the return and intake roof bolters to inhalation hazards from dust.” S. Ex. 5.

Following the issuance of the citation, Consol added a section of tubing to extend the main ventilation tubing further in by the roof bolters. 22 FMSHRC at 127. Consol also repaired the belt that had been placed around the frame of the continuous miner to keep dust from traveling from the intake side underneath the miner to the return side. *Id.* In addition, Consol installed external water sprays to keep the dust down. *Id.* During the day shift on August 5, Ponceroff returned to the 9-S section and determined that these remedial measures had not succeeded in correcting the dust problems he observed the night before. *Id.* at 128. He extended the abatement period for the citation until August 12, 1997, to allow MSHA technical support personnel to visit the mine and evaluate the problem. *Id.*

An MSHA technical support team visited the 9-S section on August 12 and 19. *Id.* Following the August 12 visit, Consol replaced the continuous miner with a continuous satellite miner. *Id.* Compared to the continuous miner Consol previously used, the controls for the roof bolter on the satellite miner are located farther back from the drill hole, and the design of the satellite miner’s frame resulted in less dust being drawn under and dispersed upward. *Id.* By the time the technical support team visited the mine again on August 19, the satellite miner was operating only 50 feet from the exhaust fan. *Id.* Although the team found no problems with dust control on the section, it recommended that Consol replace its 18-inch oval ventilation tubing with more efficient round ventilation tubing with internal seals. *Id.* At this time, Ponceroff terminated Citation No. 4540528. 22 FMSHRC at 128. Sometime later, MSHA and Consol informally agreed that over the next 18 months, the company would retrofit its continuous miners with hollow steel drills and dust collection systems when the miners were brought to the surface for maintenance and repair. *Id.*

Consol contested the penalty MSHA proposed for Citation No. 4540528 and a hearing was held. *Id.* at 121-22. First, the judge found that while section 72.630 allows three methods of

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<sup>5</sup> 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.”

controlling drill dust,<sup>6</sup> whichever method is used must be effective — even if not the most efficient. *Id.* at 122. He went on to find that “the goal of dust control is divert lighter respirable dust particles away from miners even though visible dust may continue to exist.” *Id.* at 129. Noting that “[r]espirable dust is comprised of extremely small particles that are not visible in the atmosphere” (*id.*), the judge concluded:

[O]bservation of a dust cloud by an MSHA inspector, particularly at the site of a dust producing rock drilling activity, is not, *alone*, evidence of ineffective dust control measures. Rather, ineffective dust control measures must be evidenced by an operator’s identifiable failure to follow the MSHA approved ventilation and dust control plan, or, an identifiable defect in the dust control equipment.

*Id.* at 122-23 (emphasis in original); *see also id.* at 130 (“The notion that visible dust observed in a cap light during the drilling process in an underground mine, alone, should provide a generic basis for allegations of violative conduct must be rejected.”).

The judge then stated, however, that “[s]ubjective visible observations that serve as the sole basis for alleging a [section] 72.360 violation are not always reliable,” and proceeded to evaluate the reliability of Ponceroff’s testimony. *Id.* at 130. The judge first noted Ponceroff’s observations of visible dust that led him to issue a citation on April 30, 1997 similar to the one at issue here, observations which MSHA samples of the mine atmosphere did not confirm. *Id.* The judge then stated that “the significance of visible observations of drill dust is particularly suspect in this case, where pressure was brought to bear on MSHA inspectors to force [Consol] officials into replacing the ventilation controls with dust collection systems.” *Id.* In light of these considerations, the judge discredited Ponceroff’s observations and concluded that they, alone, did not establish a violation. *Id.* The judge also discredited the observations of the miners who testified regarding visible dust, noting that their “descriptions must be viewed in the context of the [their] general dissatisfaction with ventilation as a means of controlling drill dust, and their desire for state-of-the-art dust collection.” *Id.*

The judge then found that MSHA did not identify any “missing, defective or otherwise ineffective means of dust control” employed by Consol, this based on his finding that none of the modifications implemented by Consol to abate the violation lessened the level of dust exposure. *Id.* at 130-31. He also noted that the Secretary’s vacating the S&S designation on the citation was inconsistent with her assertion that the miners were not adequately protected from drill dust exposure. *Id.* at 132. The judge concluded that “the Secretary has failed to demonstrate, by a preponderance of the evidence, that [Consol’s] ventilation control configuration was defective, or

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<sup>6</sup> 30 C.F.R. § 72.630(a) provides: “Dust resulting from drilling in rock shall be controlled by use of permissible dust collectors, or by water, or water with a wetting agent, or by ventilation, or by any other method approved by the Secretary that is as effective in controlling dust.”

that it otherwise failed to adequately control dust from rock drilling on August 5, 1997,” and he accordingly dismissed Citation No. 4540528. *Id.*

## II.

### Disposition

The Secretary argues “the judge erred by failing to accept her interpretation of section 72.630(d) as requiring that ventilation systems used to control drill dust be effective and readily disperse and carry away the dust from the drill operator and other miners in the area even when the operator is following its ventilation and [dust] control plan and the ventilation controls are not effective.” PDR at 12. The Secretary goes on to assert that, based on the testimony of her witnesses, Consol’s dust control system violated section 72.630(d) because it was visually ineffective. *Id.* at 13-16. She also disputes the judge’s reliance in discrediting Ponceroff on the April citation for a violation of section 72.630(d) where contemporaneous samples revealed acceptable levels of respirable dust in the area. *Id.* at 17. Section 72.630(d), the Secretary asserts, requires that all drill dust be controlled, not just respirable dust. *Id.* Pointing to the preamble to the final rule, she also argues that section 72.630(d) was promulgated because enforcement based solely on a permissible exposure limit (i.e., 2.0 mg/m<sup>3</sup> of respirable dust) would not adequately protect miners from drill dust, where extremely high exposure can occur in a very short time. *Id.* at 17-18 (citing 59 Fed. Reg. at 8318). The Secretary challenges the judge’s reliance on the S&S designation on the citation being vacated as a grounds for dismissing the citation. *Id.* at 18-19. Finally, the Secretary argues that the judge’s finding that Consol’s ventilation controls were not defective is not supported by substantial evidence. *Id.* at 19-20.

Consol argues that the Commission should not consider the Secretary’s deference argument because she did not raise it before the judge. Consol Br. at 11. Moreover, Consol argues, section 72.630(d) “is, by the Secretary’s own admission, clear and unambiguous,” and that, therefore, it is not open to interpretation by the Secretary. *Id.* Consol further argues to prove a violation of section 72.630(d), the Secretary must demonstrate that the drill dust controls in the approved dust control plan are not functioning properly. *Id.* at 12-13. Consol goes on to assert that substantial evidence supports the judge’s finding that its ventilation controls were not defective. *Id.* at 13-15. Finally, Consol argues that the judge properly rejected evidence of a violation based solely on “subjective visual observations,” and the judge’s rejection on credibility grounds of the testimony of Inspector Ponceroff and the miners should not be disturbed. *Id.* at 15-16.

The regulation at issue in this case is clear and unambiguous. It requires that when ventilation is used to control dust generated by drilling rock, “the air current shall be so directed that the dust is readily dispersed and carried away from the drill operator or any other miners in the area.” 30 C.F.R. § 72.630(d). In fact, both the Secretary and the judge agree that section 72.630(d) requires operators to control drill dust, and that any such control must be effective.

22 FMSHRC at 122; PDR at 12.

What is also clear from the preamble to the final rulemaking promulgating section 72.630(d) is that the standard is intended to prevent exposure to respirable dust. 59 Fed. Reg. at 8322 (“All drillers and other miners must be protected from the inhalation hazard of respirable drill dust.”). As explained in the preamble, however, the standard does not condition compliance upon meeting a permissible exposure limit measured exclusively through sampling. *Id.* at 8318, 8323. Instead, MSHA announced that it will look at a number of factors to test an operator’s compliance with the standard, including:

- determining whether “a dust control is missing, defective, or obviously visually ineffective,” *id.* at 8325;
- “reviewing manufacturer’s specifications or other pertinent data relative to the design and operation of the dust control” in situations “where it is not obvious that a control is effective,” *id.*;
- measuring “air quantity or other measures set forth in a mine’s ventilation and methane and dust control plan,” *id.*; and
- “if practical, collecting samples to evaluate [the] effectiveness” of dust controls, *id.* at 8324.

We thus disagree with the judge’s statement that “observation of a dust cloud by an MSHA inspector, particularly at the site of a dust producing rock drilling activity, is not, *alone*, evidence of ineffective dust control measures.” 22 FMSHRC at 122 (emphasis in original). We can envision circumstances in which compliance can be determined solely on the basis of an inspector’s observations of a dust cloud, and the preamble clearly contemplates such cases when it refers to dust controls that are “obviously visually ineffective.” 59 Fed. Reg. at 8325. The judge, however, did not base his decision on his erroneous reading of section 72.360. Instead, he evaluated the testimony of Ponceroff and the miners and rendered a finding on its reliability. Since he took this extra step, we find his initial error harmless.

This testimony served as the basis on which the Secretary alleged that Consol violated section 72.630(d). The Secretary frames her initial argument as turning on regulatory interpretation, but she in fact bases her assertion that Consol violated section 72.630(d) on the testimony of Ponceroff and the miners operating the roof bolters that “the drill dust was not being readily dispersed.” PDR at 13-14. Indeed, this case does not turn on regulatory interpretation at all, but instead on the factual underpinnings of the Secretary’s case.

The judge concluded that neither the testimony of Ponceroff nor the miners was credible.<sup>7</sup> The Commission must exercise a great degree of deference when considering a judge's credibility determinations. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998). The Commission has noted that “the general rule [is] that, absent exceptional circumstances, appellate courts do not overturn findings based on credibility resolutions.” *Id.* at 1881 n.80. The sorts of exceptional circumstances that would warrant overturning a judge's credibility findings are where such findings are self-contradictory, based on irrational criteria, or contradict the evidence. *Id.* As the Eleventh Circuit has explained, “[s]ince the ALJ has an opportunity to hear the testimony and view the witnesses he is ordinarily in the best position to make a credibility determination.” *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984). In light of this, the *Ona* court concluded that “as a general rule courts are bound by the credibility choices of the ALJ, even if they ‘might have made different findings had the matter been before [them] . . . de novo.’” *Id.* at 719 (quoting *Gulf States Mfrs., Inc. v. NLRB*, 579 F.2d 1298, 1329 (5th Cir. 1978)); *cf. Brock v. Roadway Express, Inc.*, 481 U.S. 252, 266 (1987) (“Final assessments of the credibility of supporting witnesses are appropriately reserved for the administrative law judge, before whom an opportunity for complete cross-examination of opposing witnesses is provided.”). *See also Metric Constructors, Inc.*, 6 FMSHRC 226, 232 (February 1984) (when judge's finding rests on credibility determination, Commission will not substitute its judgment for that of judge absent clear indication of error), *aff'd*, 766 F.2d 469 (11th Cir. 1985).

Here, no grounds exist upon which we would overturn the judge's findings on the credibility of Ponceroff and the miners. To the contrary, his findings are supported by substantial evidence.<sup>8</sup> Particularly relevant is the judge's view of this case “in the context of the roof bolter's

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<sup>7</sup> The dissent argues that the “judge never explicitly stated whether . . . he found [Ponceroff] credible,” and is “particularly reluctant” to conclude that the judge discredited the testimony of the miner witnesses “due to the dissatisfaction they had expressed with the existing dust control procedures at the mine.” Slip op. at 11, 12. The dissent would remand this case to allow the judge to “make explicit credibility determinations.” Slip op. at 13. We do not agree. Here, the judge made findings adequate to support his decision, and sufficiently explained his reasoning. Although he never explicitly states that he discredited the testimony of Ponceroff and the miners, he came as close as a judge can get to discrediting testimony without explicitly saying so, and we certainly find he implicitly discredited the testimony. Insofar as the judge's credibility findings here are implicit, we have found implied credibility determinations where judges have said far less. *See Fort Scott Fertilizer—Cullor, Inc.*, 19 FMSHRC 1511, 1516 (Sept. 1997) (recognizing implicit credibility finding of judge); *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 261, 265, 267 (Feb. 1997) (same).

<sup>8</sup> 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

general dissatisfaction with ventilation as a means of controlling dust” (22 FMSHRC at 130), as well as MSHA’s apparent efforts to advance this agenda of the miners, as when Ponceroff announced “that his next venture was going to be to rid Blacksville Two of the . . . scroll augers by whatever means it was necessary for him to do so.” Tr. 1042. We find any such statement as this directed at Consol officials inappropriate insofar as the ventilation system used by Consol to control drill dust complied with section 72.630(d), as confirmed by the MSHA technical support team that visited the 9-S section on August 12 and 19, 1997 and found no problems with the system. 22 FMSHRC at 128.

We find unpersuasive the Secretary’s argument that the judge, in discrediting Ponceroff, should not have relied on respirable dust samples that were at odds with the inspector’s issuance of a citation in April 1997 for a violation of section 72.630(d) based on his visual observations of dust. PDR at 17; S. Br. at 19-21. The Secretary argues that “to establish a violation of Section 72.630(d), [she] need not show that the [permissible exposure limit] was exceeded.” S. Br. at 19. She also points to language in the preamble which states that “the final rule is a work practice standard that *does not require sampling*.” *Id.* at 20 (quoting 59 Fed. Reg. at 8322 (Secretary’s emphasis)). Clearly, the preamble explicitly and for good reason does not condition compliance with section 72.360(d) upon sampling. But this is not to say that the preamble precludes the use of sampling to evaluate the effectiveness of drill dust controls. To the contrary, it explicitly contemplates the use of such sampling. 59 Fed. Reg. at 8325 (“In those cases where it is not obvious that a control is effective, MSHA inspectors will continue to have the option . . . of sampling to determine its effectiveness.”). Under MSHA’s own rule, sampling is thus relevant in evaluating the effectiveness of a drill dust control.

Here, though, the point is even narrower. Here, the respirable dust sampling used to discredit Ponceroff was not used to establish a violation of section 72.360(d). Instead, the samples were taken to determine whether Consol had successfully abated a violation of section 70.100(a) — samples taken in the same area and at the same general time that Ponceroff claimed to have observed a violation of section 72.360(d). We find the samples relevant to the reliability of Ponceroff’s ability to visually evaluate Consol’s drill dust controls, and that the judge properly considered them.<sup>9</sup>

The judge also reached the issue of whether MSHA “identified a missing, defective or otherwise ineffective means of dust control.” 22 FMSHRC at 130. He concluded that MSHA

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mind might accept as adequate to support [the judge’s] conclusion.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Under the substantial evidence test, the Commission may not “substitute a competing view of the facts for the view [an] ALJ reasonably reached.” *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983).

<sup>9</sup> We also note that Ponceroff’s observations were also undercut by the RAM readings taken by Yanak. 22 FMSHRC at 125.

made no such showing. *Id.* at 131. Given that the Secretary's assignment of error on this point rests upon further testimony of Ponceroff and miners with respect to dust conditions in the 9-S section (S. Br. at 20), and that we have already affirmed the judge's discrediting of this testimony, the Secretary's argument is unavailing.

### III.

#### Conclusion

For the foregoing reasons, we affirm the judge's decision dismissing Citation No. 4540528.

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James C. Riley, Commissioner

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Theodore F. Verheggen, Commissioner

Chairman Jordan, dissenting:

I agree with my colleagues that the judge erred in holding that compliance with 30 § 72.630(d) can never be determined solely on the basis of an inspector's observations of dust. Slip op. at 7. However, I disagree with their conclusion that because the judge evaluated the credibility of the inspector's testimony as to the extent of dust observed, his application of the wrong legal standard amounts to harmless error. *Id.* I believe remand is necessary to permit the judge to discuss the evidence in the record corroborating or refuting the inspector's statements, and to clarify the judge's views regarding the inspector's credibility.

On August 5, 1997, Inspector Ponceroff conducted an inspection of the Blacksville Mine during the midnight shift. 22 FMSHRC 121, 125 (Jan. 2000) (ALJ). The inspector observed drill dust "engulfing" two roof bolter operators, and issued a citation for a violation of 30 C.F.R. § 72.630(d), which requires that dust from drilling rock be readily dispersed and carried away from the drill operator and other miners. 22 FMSHRC at 125-127.

The testimony of the inspector was the centerpiece of the Secretary's case alleging the presence of visible dust near the miners. Unfortunately, and likely due to the judge's erroneous determination that an inspector's observations of dust "alone" does not provide a basis for establishing the violation, *Id.* at 130, the judge's analysis of the inspector's testimony is somewhat opaque. The judge never explicitly stated whether or not he found him credible. *Id.* Referring to evidence that MSHA and the miners wanted the operator to implement a different dust collection system, the judge noted only that the inspector's "observations and conclusions must be viewed in context." *Id.* I am reluctant to equate this comment with a credibility determination, particularly when the judge does not mention or offers only a passing reference to the evidence tending to corroborate the inspector's testimony.

For example, the inspector's observations regarding the extent of dust present are supported by contemporaneous notes, Gov. Ex. 1 at 8, which even Consol characterizes as "meticulous." Consol Post-Hearing Br. at 6. In addition, the inspector's testimony that the drill dust surrounded the roof bolters was confirmed by seven miner witnesses.<sup>10</sup> After acknowledging

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<sup>10</sup> The two miners who were roof bolting when the inspector issued the citation under review described their working conditions as follows:

"I always got dust from my bolter and the opposite bolter. It would come under the machine and come up in my face . . . [Y]ou were exposed to the dust all the time . . . It was on my teeth when I come [sic] out of the mine. . . . I ate a lot of dust." Tr. 401, 409-411.

"[The dust] came down and just swirled all around . . . [a]ll around you personally, yourself, the person that was drilling in that area." Tr. 457.

The miner who accompanied the inspector offered the following description:

their “vivid descriptions of dust exposure,” 22 FMSHRC at 130, the judge noted the miners’ “dissatisfaction with ventilation as a means of controlling dust.” *Id.* I believe my colleagues read too much into this statement when they conclude that the judge discredited every miner who testified. Slip op. at 8. Moreover, I think we should be particularly cautious in ascribing credibility determinations to the judge in this case because his erroneous legal standard rendered the inspector’s testimony about visible dust irrelevant to the judge’s determination of whether a violation of section 72.630(d) occurred.

Affirming the present decision requires us to adopt a credibility determination from judicial comments that would suggest the judge viewed the roof bolters as a collective body whose veracity regarding visible dust was inherently suspect, due to the dissatisfaction they had expressed with the existing dust control procedures at the mine. 22 FMSHRC at 130. I am particularly reluctant to follow this course of action given the fact the record contains comments by the judge which would indicate a different view of the miners’ testimony. At one point the judge stated, “I think I’ve said numerous times, I thought that the testimony of the miners is very compelling [as] to the dust exposure that they had.” Tr. 829. At the end of the trial, the judge announced, “the testimony by the roof bolters was compelling.” Tr. 1315 .

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“[The] auger-type drill . . . allowed dust to come straight down and suspend in and around the bolters . . . [a]round their body. On their face, their arms, their legs.” Tr. 205, 208.

When the inspector returned to the area during the next day shift, he concluded that conditions had not improved. 22 FMSHRC at 128. The roof bolters on duty during that shift provided the following description of their environment:

“[Dust] was mostly just right around my head and down around my body. . . . The dust was coming from the hole that I drilled and dropped straight down and then I blew them up you know, coming up around my body . . . . [M]y dust and Kenny’s dust on the other side would come my way because I had ventilation up there and that could suck his dust across to me.” Tr. 531.

“Everybody inhaled the drill dust when they drilled augers. There’s no way to get out of it . . . . [W]e always ate dust while we was in the mine, sir, bolting.” Tr. 470, 475.

Consequently, I believe this case should be remanded so the judge can properly analyze the comprehensive testimony, conduct a separate, careful analysis of the testimony of each individual witness, and make explicit credibility determinations.<sup>11</sup>

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Mary Lu Jordan, Chairman

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<sup>11</sup> In *Morgan v. Arch of Ill.*, 21 FMSHRC 1381 (Dec. 1999), the Commission refused to affirm a credibility determination that ignored extensive record evidence tending to call the judge's finding into question. 21 FMSHRC 1381, 1391. We stated that "[a]lthough we will overturn a judge's credibility determination only in rare circumstances, we will not rubberstamp them." *Id.* at 1391-92. We noted that before a judge credits any testimony, he must reconcile all record evidence that is inconsistent with that conclusion. *Id.* at 1391. The same holds true when a judge refuses to credit a witness' testimony.

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