FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

MAY 31 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. CENT 2015-385
v.	:	
BUSSEN QUARRIES, INC.	:	

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

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). The Department of Labor's Mine Safety and Health Administration ("MSHA") issued a citation to Bussen Quarries, Inc., for allegedly violating the requirement of 30 C.F.R. § 56.15005 that "[s]afety belts and lines shall be worn when persons work where there is danger of falling." A Commission Judge affirmed the citation in all respects. 37 FMSHRC 2786 (Dec. 2015) (ALJ). Bussen is appealing the Judge's violation, significant and substantial ("S&S"),[1] and high negligence determinations.[2]

The Commissioners are evenly divided on whether to affirm the Judge's decision in its entirety, or to reverse the finding of violation. The effect of the split decision is to allow the Judge's decision to stand as if affirmed. *Pa. Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd*, 969 F.2d 1501 (3d Cir. 1992).

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[1] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

[2] In its petition for discretionary review, which it adopted as its opening brief, Bussen requested that the Commission hear oral argument on its appeal. Commission Procedural Rule 77 specifies that any oral argument request is to be made by separate motion. 29 C.F.R. § 2700.77. The Commission nevertheless considered Bussen's request. It decided, however, that oral argument would not be ordered.

I.

Factual and Procedural Background

The alleged violation took place on December 2, 2014, at Bussen's limestone mine in Missouri. Miners would routinely drill bore holes into what was known as the "State Ledge" highwall there, pump water out of the holes as necessary, and then use explosives in the holes to blast through the limestone and rock.

Bussen's practice was to drill blasting holes no closer than eight to nine feet from the highwall's edge. MSHA has developed a power point program for section 56.15005 defining a Fall Hazard Zone requiring a tie off as working within six feet of the crest. The operator's stated policy was that miners were to tie off when within seven feet.[3] There is no dispute regarding the danger of the 70-foot dropoff from the edge of the highwall in question.

On December 2, a blasting crew of four individuals was atop the highwall. Prior to loading explosive shots into previously drilled holes, the crew expected to have to pump water out of least some of the holes. Accordingly, one of the members of the crew had driven a truck carrying a pump, mounted on a wheeled cart, to the site. David Becker, the lead blaster on the crew, unloaded the pump cart. Before much longer, however, another truck, carrying bags of blasting powder, arrived. Consequently, Becker moved the pump cart out of the way, repositioning it so that the other crew members could quickly unload the bags of powder.

Shortly thereafter, MSHA Inspector Gary Swan reached the top of the highwall. Swan observed that the pump cart was approximately four and one-half feet from the edge of the highwall, with the cart's curved handles pointed towards the edge. Swan approached Becker, who was checking for the presence of water in the holes, and told him that he wanted to discuss the placement of the pump. Upon hearing this, Becker reached for the pump, pulling it closer to the line of drill holes and spinning it so that the handles no longer faced the highwall. Tr. 19-22, 79; Gov't Ex. 1, at 3 (photo of pump after it was so moved, with annotation indicating its prior placement).

When Swan asked about fall protection, Becker told him that he had not worn it when moving the pump. Becker did say that fall protection was available in the truck that had brought the pump. Tr. 23. Swan determined that the location of the pump "could put a person using the cart approximately 2 to 3 feet from the edge of the highwall with their [sic] back to the edge. This practice exposes miners to a fall hazard." Gov't Ex. 1, at 1. Because fall protection had not been used, Swan issued Citation No. 8860004 for an alleged violation of section 56.15005. *Id.* The citation stated the condition was S&S and the result of high negligence on the part of the operator. *Id.* The Secretary proposed a civil penalty in the amount of $6,300.

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[3] To tie off atop a highwall, Bussen miners would use a line attached to a "T" bar or spike dropped into a drill hole.

In her decision, the Judge refused to credit Becker's hearing testimony on a number of points. She instead agreed with the Secretary that the initial repositioning of the cart, with its handles pointing towards the highwall edge, indicated that at some point Becker likely was between the cart handles and the edge of the highwall, less than four and one-half feet away from it, without having been tied off.[4] The Judge further found that Becker or other members of the crew "could" have used the pump where it was located near the edge of the highwall, and may have chosen to do so without wearing fall protection. Accordingly, she found that a violation of section 56.15005 had been established, given the danger of falling posed to miners by being so close to the edge of the highwall. 37 FMSHRC at 2788-89.

The Judge also affirmed the S&S allegation. She found that the violation of section 56.15005 contributed to a hazard, in that it presented the danger of a miner tripping and falling from the unmarked edge of the highwall while either using the pump or moving it to or from another location, all without the benefit of fall protection. The Judge concluded that there was a discrete hazard created by the violation and that the hazard was reasonably likely to result in an injury. She also concluded that the injury suffered in a 70-foot drop from the highwall would almost certainly be fatal. *Id.* at 2790-91.

The Judge additionally upheld the high negligence allegation, finding that the operator had been put on notice by MSHA of what is expected of it with regard to section 56.15005 and concluding that a violation of the standard was thus indicative of a significant lack of care. She further found that Becker had stated to Inspector Swan that he was in charge of the operation that morning and through his actions indicated that he was aware that the pump was too close to the highwall edge. The Judge also found it significant that despite the operator's policy on fall protection in the danger zone being even more stringent than MSHA's policy, and that a few months prior to the citation it had conducted a safety meeting with miners at which fall protection had been discussed, the pump had nevertheless been placed by Becker so obviously close to the edge. *Id.* at 2791-92.

On review, Bussen contends that the Judge's conclusions on the fact of violation, its S&S nature, and the operator's high negligence are not supported by substantial evidence.

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[4] Specifically, the Judge refused to credit Becker's testimony (1) that at no point was he within seven feet of the edge on the morning of the citation; (2) that he was the only one who would have used the pump that day; (3) that he would not have used it in the position four and one-half feet from the edge; and (4) that he would not have crossed the operator's seven-foot boundary beyond which fall protection was required, in order to retrieve the pump even if Inspector Swain had not been present. 37 FMSHRC at 2788-89.

II.

Separate Opinions

Commissioners Jordan and Cohen, writing in favor of affirming the Judge's decision as supported by substantial evidence with respect to each of the three issues:

A. Violation

We conclude that substantial evidence[1] supports a finding of violation in this instance. We would affirm the Judge's conclusion that David Becker's positioning of the pump cart during the unloading of the powder truck placed him less than four and one-half feet from the highwall's edge without fall protection.

The Judge's conclusion that the standard was violated is based primarily upon her finding that "it seems most likely that Becker pushed the pump by its handles rather than carrying it or pushing or pulling it from the side opposite the handles," and thus the handles pointing towards the highwall edge indicate that he was between the pump cart and the highwall edge. 37 FMSHRC at 2789. The Commission has held that a violation may be proven through inferences drawn from indirect evidence so long as the inference is reasonable. *See, e.g., Jim Walter Res., Inc.*, 28 FMSHRC 983, 989 (Dec. 2006) (stating that inferences drawn from indirect evidence are reasonable when there is "a logical and rationale connection between the evidentiary facts and the ultimate fact inferred") (citation omitted). Here the Judge's inference is a commonsense view of how the cart in question had been placed in the position where Inspector Swan observed it, and is thus is a reasonable inference. Consequently, it was well within the Judge's purview as the trier of fact to conclude that, at some point, Becker had to have been within three to four feet of the edge of the highwall with his back to it.[2] *See* 37 FMSHRC at 2791; *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983) (Commission may not substitute its conclusion regarding the facts from the record for that reasonably reached by the Judge).

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[1] When reviewing a Judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the Judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

[2] Our colleagues argue that the Judge's reference to the six-foot "fall hazard zone" provided in an MSHA PowerPoint presentation was error because the Judge considered this informal guidance as part of the mandatory legal standard. Slip op at 12. We disagree. Although the Judge referred to the informal guidance, her essential finding was that a miner's approach to within three or four feet of a 70-foot cliff created a "danger of falling," in violation of the standard. *See* 37 FMSHRC at 2788-91.

The Judge's decision is also supported by her comparative credibility findings. At the hearing, there was a significant difference in the testimony of Becker and Inspector Swan as to Becker's actions. Becker explained that, in order to initially move the pump cart away from the back of the powder truck, he grasped the pump cart's handles to spin the cart so that it was pointing in the opposite direction. He maintained that this action resulted in the handles pointing toward the highwall edge while he remained more than seven feet away from the edge. Tr. 74-76.

Becker further testified how he had retrieved the pump cart, with its handles pointing towards the highwall edge, without having to walk behind the handles, and thus be near the highwall edge with his back to it. He explained that he was able to grasp the pump and spin it back without moving closer to the edge. Tr. 76. Further, he stated that he did so in order to expressly demonstrate to the recently arrived Swan how the pump cart could be moved by a miner while standing more than seven feet away from the edge. Tr. 79-81.

Swan, however, told a different story. He testified that as soon as he started questioning Becker on why the pump was so close to the highwall edge, Becker quickly grabbed it and moved it to be near the drill holes, and thus more than seven feet away from the edge. Tr. 20-21. In Swan's view, if he had not been there, a miner would have retrieved the pump cart by placing himself between the handles and the highwall edge and thus be within the area in which fall protection was required to be used. Tr. 32-33.

Consequently, Swan also did not believe Becker's explanation of how he had originally positioned the pump cart. Instead, Swan was persuaded by the proximity of the cart and its handles pointing towards the highwall edge to conclude that a miner must have been less than six feet from the highwall edge to position the cart where he saw it, and thus working where there is a danger of falling in violation of section 56.15005, since fall protection had admittedly not been worn. Tr. 20, 22-24, 26, 27.

The operator points to Becker's testimony in urging that the Commission find that substantial evidence does not support the Judge's decision on the violation. However, the Judge refused to credit Becker's account with regard to how the pump cart came to be positioned four and one-half feet from the highwall's edge, and how it would have been retrieved had Swan's arrival not prompted Becker's quick method of retrieving it. She instead credited Inspector Swan with respect to a miner having to be close to the highwall edge to move the cart. 37 FMSHRC at 2788-89.

While Bussen argues that the Judge erred in these credibility findings, we see no compelling reason to disturb the Judge's credibility determinations. The Commission has recognized that a Judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). Here, the Judge was required to choose between the competing explanations of Becker and Swan, after having had the

opportunity to hear the testimony of both and observe their demeanor as witnesses.[3] *See, e.g., Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106-07 (D.C. Cir. 1998).

The Judge was also dissuaded from crediting Becker's account by what he did upon Swan's arrival. Rather than concluding that Becker had by his actions established that he could reposition the cart and remain more than seven feet away from the edge, the Judge inferred that those actions indicated that "Becker was aware that the pump was too close to the edge and quickly moved it before the inspector could do anything further." 37 FMSHRC at 2791. This is a reasonable inference for the Judge to have drawn under the circumstances.

In summary, we conclude that substantial evidence supports the Judge's determination that Bussen violated section 56.15005.[4]

B. <u>S&S</u>

A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

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

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[3] The Judge also noted Swan's extensive mining experience. Swan not only had been an inspector for seven years but, prior to that, had worked 30 years in the mining industry, primarily with surface mines, including in supervisory positions. 37 FMSHRC at 2787.

[4] Although the citation alleges that the pump was being used from its positon near the highwall edge (Gov't Ex. 1, at 1), the Secretary failed to establish that was the case. Indeed, the evidence is largely to the contrary. In particular, the record seems clear that the pump had just been delivered to the highwall and had not even been fully assembled yet. Tr. 25, 42-43. Consequently, we view the Judge's findings on the potential use of the pump to be no more than speculation. We note that the Secretary in his brief made no attempt to defend those findings, going as far as to characterize the issue as "irrelevant" on review. S. Br. at 10. Consequently, our conclusion that the citation should be affirmed is based solely on the placement of the pump cart in the position where Inspector Swan found it. Thus, our colleagues' emphasis on what miners other than Becker might or might not have done, slip. op at 12-14, is not essential to our analysis of the violation given the Judge's finding that Becker's actions violated the standard.

> and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

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

Given our conclusion that the Judge's finding of violation is supported by substantial evidence with respect to Becker's repositioning of the pump, and how he or any other miner would have retrieved it in the absence of inspector Swan, we limit our analysis under *Mathies* to those facts. Because that is sufficient to constitute a violation of section 56.15005, the first *Mathies* step is satisfied.

Since the issuance of the Judge's decision and the submissions of the parties' briefs, the Commission has further explained how the second and third steps of *Mathies* should be applied. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037-40 (Aug. 2016); *ICG Illinois, LLC*, 38 FMSHRC 2473, 2475-76 (Oct. 2016). In our view, the Judge's analysis of the violation under *Mathies* steps two and three is consistent with our decisions in those recent cases.

Turning to the second step of the *Mathies* test, the inquiry here was whether the lack of fall protection was reasonably likely to lead to the danger of falling (the hazard expressed in section 56.15005).[5] Clearly the 70-foot dropoff from the highwall here is a danger to which the tie-off requirement of section 56.15005 is directed.

MSHA has taken the position that, in highwall work areas, a danger arises when a miner takes a position six feet or less from the edge of the dropoff or unstable ground or footing. Gov't Ex. 5, at 7 (copy of MSHA's Safe Practices Near a Highwall Crest Powerpoint Presentation). MSHA has identified a number of reasons for how a miner could end up going over an edge when working within six feet of it, including slipping or tripping due to weather conditions, boreholes, or cracks in or clutter about the ground. In addition, in order to better help miners keep their bearings when close to the edge, MSHA suggests that there be visual warnings of the edge, or physical barriers to it. *Id.* at 6-14. Given that the violation here involved a miner getting to within steps of the edge of the highwall with his back to it, MSHA's concerns are appropriately considered in this instance.

Our S&S inquiry considers the violative conditions as they existed prior to and at the time of the violation as well as how they would have existed had normal operations continued. *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1267 (D.C. Cir. 2016) (citations omitted).

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[5] In *ICG Illinois*, we stated separately that we "would hold that a violation sufficiently 'contributes' if it is at least somewhat likely to result in, or could result in, a safety hazard." 38 FMSHRC at 2476 n.5. We do not find the qualitative difference between "reasonably likely" and "somewhat likely" to matter in this case, where a miner lacking fall protection was so close to a deadly dropoff.

In normal mining operations, there is always the potential for slipping and falling, and it was exacerbated in this instance by, as the Judge found, the presence of rock dust on the ground. 37 FMSHRC at 2791; Gov't Ex. 1, at 3-4 (photos of highwall edge area). In addition, she was correct to cite the lack of ground markings or other warnings of or barriers to the edge, which had been somewhat obscured by the rock dust.[6] 37 FMSHRC at 2788, 2791; Gov't Ex. 1, at 3-4. Finally, the inspector testified as to the presence of the shavings piles that had resulted from the prior drilling of the bore holes, and over which a miner could stumble while working close to the edge. Tr. 25.

Hence, there existed a reasonable likelihood that Becker, or any other miner repositioning and then retrieving the pump cart within two to three feet of the edge of the highwall with his back to it, could slip, trip, stumble or inadvertently step over the unmarked edge — precisely what fall protection is designed to protect against. Regarding the third step of the *Mathies* test, it is reasonably likely that the hazard (a 70-foot fall) would result in injury. In addition, there is no dispute regarding the severity of the injuries that would result from a 70-foot plunge, so the fourth step was satisfied as well. Consequently, we would affirm in result the Judge's S&S determination.

C. Negligence

Bussen contends that the Judge erred in finding high negligence when the operator's fall protection policy was even more stringent than that of MSHA, and it had trained its miners to follow that policy. Citing *Excel Mining LLC*, 497 F.App'x 78, 79 (D.C. Cir. 2013), Bussen attempts to rely upon 30 C.F.R. Part 100, MSHA's regulations governing its proposal of civil penalties. Bussen maintains that, under 30 C.F.R. § 100.3(d), the existence of a single mitigating circumstance prevents a finding of high negligence in connection with a violation, even where the operator knew of the violation.

However, the D.C. Circuit has since held that the Commission, in assessing final civil penalties under the Act,[7] is not bound by Part 100, including the regulations defining "negligence" and setting forth MSHA's various degrees and descriptions of negligence. *Mach*

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[6] The operator argues that the lack of warning markers or barriers should not be taken into account, because the inspector did not cite it for a violation of 30 C.F.R. § 56.20011. That standard provides in pertinent part that "[a]reas where health or safety hazards exist that are not immediately obvious to employees shall be barricaded, or warning signs shall be posted at all approaches." A highwall edge, however, would seem to be immediately obvious from the vantage point of an individual "approaching" it. The measures noted to be lacking in this instance would instead serve as an additional reminder to miners busy at work in the area of the proximity of the dangerous edge just a few feet away.

[7] Negligence is one of the six statutory penalty criteria the Commission is to consider in assessing civil penalties pursuant to section 110(i) of the Act, 30 U.S.C. § 820(i).

Mining, 809 F.3d at 1263-64.[8] Instead of applying section 100.3(d), the Commission uses "a traditional negligence analysis." *Id.* at 1264; *The American Coal Co.*, 39 FMSHRC 8, 14 (Jan. 2017). In determining the degree of negligence, the Judge should consider "what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation." *JWR Res., Inc.*, 36 FMSHRC 1972, 1975 (Aug. 2014). In addition, because Commission Judges are not bound by Part 100 when considering an operator's negligence, they are not limited to a specific evaluation of potential mitigating circumstances. *Brody Mining, LLC*, 37 FMSHRC 1687, 1702-03 (Aug. 2015).

Although the Judge, in concluding that high negligence had been established here, referred to the Part 100 negligence definitions, her analysis of the record evidence regarding the operator's negligence conforms with a "traditional negligence analysis," because she "consider[ed] the totality of the circumstances holistically." *Brody*, 37 FMSHRC at 1702. Based on Becker's quick move to pull the pump away from the edge after Inspector Swan voiced concern about the situation, the Judge found that Becker was aware that the pump cart was positioned improperly in the danger zone. She further found that the edge of the highwall was an obvious danger to any persons in the area, and Becker therefore should have been alerted to the nearby danger. 37 FMSHRC at 2791-92. The Commission has held that high negligence can be found even when the violation is the result of a momentary error, when the error is by a supervisor or other agent of the operator and the violation is obvious. *See American Coal*, 39 FMSHRC at 14, 20, 22-23; *see also Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998) (willful violation constitutes high negligence).

Bussen contends that, because Becker was a miner paid an hourly rate, any negligence on his part should not be attributed to Bussen. The Secretary responds that Becker's status in the crew meant that he was acting as Bussen's agent in this instance, and thus his negligence was attributable to it. *See generally Martin Marietta Aggregates*, 22 FMSHRC 633, 637 (May 2000) (citing cases).

The Judge concluded that Becker was "in charge" of the crew working atop the highwall that morning, and she considered that fact in her high negligence determination. 37 FMSHRC at 2787, 2791-92. While there is not a great deal of record evidence on this issue, it is undisputed that Swan asked Becker who was "in charge" and elicited a positive response from Becker. Becker informed Swan that he was the miner who was oldest and with the most experience in the crew (Tr. 19, 26), and he testified that his official title was "lead blaster." Tr. 69. In contrast, the operator made no attempt to establish that another individual was supervising the crew that morning, and in its post-hearing brief did not even address the high negligence allegation, and

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[8] Commissioner Cohen has explained why it is inappropriate for the Commission to apply the definitions contained in Table X of 30 C.F.R. § 100.3(d) in defining degrees of negligence. In particular, a finding of "high negligence" should not be precluded on the basis of a single mitigating circumstance. *Hidden Splendor Res., Inc.*, 36 FMSHRC 3099, 3105-09 (Dec. 2014) (Comm'r Cohen, concurring).

thus Becker's status in the crew. We agree with the Secretary that, for purposes of the rather unique circumstances of this case, Becker qualified as an agent of the operator for purposes of attributing his negligence to the operator in this instance.

In any event, we do not read the Judge's reliance on Becker's role relative to the remainder of the crew to be the entire basis for establishing that he was an agent of the operator in this instance. She also cited Becker's status as the lead blaster as illustrative in finding that, despite the operator's safety and discipline policies, it apparently had not succeeded in impressing upon its miners the importance of using fall protection when near a highwall's edge. *See* 37 FMSHRC at 2792.

Bussen contends that the Judge should have given its safety and discipline policies dispositive weight and reduced the level of negligence. However, it was not error for the Judge to decline to do so. Not only did Becker not adhere to the fall protection policy in this instance, but the evidence is that he was not disciplined by Bussen for failing to do so. Tr. 50, 83.

The operator also objects to the weight the Judge gave to the lack of warning markers or barriers at the highwall's edge in affirming the negligence as high in this instance. It contends that, in so doing, the Judge adopted requirements not imposed by section 56.15005. We disagree with this reading of the Judge's analysis. Her consideration of this evidence was more of a finding that such markers or barriers would have mitigated the operator's negligence in this instance, as those are measures MSHA recommends but does not require for highwall operations. Gov't Ex. 5, at 8. Their absence explains in part why the Judge was not persuaded to reduce the level of Bussen's negligence.

Accordingly, we conclude that the Judge's high negligence finding is supported by substantial evidence in this instance, and thus would affirm it.

D. Conclusion

For the foregoing reasons, we would affirm the Judge's decision that Bussen violated section 56.15005, that the violation was S&S, and that it resulted from high negligence.

Mary Lu Jordan, Commissioner

Robert F. Cohen, Jr., Commissioner

Acting Chairman Althen and Commissioner Young, writing in favor of vacating the citation:

The Judge inferred a miner, Becker, placed himself in danger of falling. To do so, she disregarded Becker's sworn testimony explaining how he placed a moveable pump four and a half feet from the crest of the highwall, failed to contend with his physical demonstration to the inspector how this had been done, and then inferred — contrary to these facts of record — that the miner must have stood with his back to the highwall based merely on the direction of the pump's handles. Our task is to determine if that inference was reasonable in light of the totality of the evidence presented at the hearing and the analysis presented in the Judge's decision.

As set forth below, the Judge's inference that Becker placed himself in danger of falling, standing alone, is not supported by substantial evidence and therefore, is not reasonable. The miner's sworn testimony, his demonstration of his action, the evidence at the scene, and plain common sense contradict the Judge's inference. Moreover, the Judge further erred by basing the inference on the operator's failure, in the Judge's view, to comply with a host of non-mandatory safety suggestions made in informal MSHA presentations.

Discussion

A. The Judge failed to analyze the violation against the requirements of the standard.

We begin with the regulation the Secretary alleges Bussen violated. 30 C.F.R. § 56.15005 states: "Safety belts and lines shall be worn when persons work where there is danger of falling." In order to prove a violation of this standard, the Secretary must prove three elements: a person was (1) working (2) where there was a danger of falling (3) without wearing safety equipment. While the Judge below focused most of her opinion on possible actions and hazards that she speculated might arise in the future and on conditions that she believed to have been inadequate in light of informal guidance promulgated by the Secretary, the law imposes on the Secretary the burden of establishing each element of this violation, including the fact that a miner actually worked where there was a danger of falling. *See Cathedral Bluffs Shale Oil Co.*, 6 FMSHRC 1871, 1874-75 (Aug. 1984);[1] *cf. W.G. Yates & Sons Constr. Co., Inc. v. OSHRC*, 459 F.3d 604, 607 (5th Cir. 2006) (stating that all circuits considering the question agree that the

[1] The Court of Appeals for the D.C. Circuit reversed and remanded the Commission's decision vacating the citation in *Cathedral Bluffs*. *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533 (D. C. Cir. 1986). However, the Court's decision was grounded on a holding that the enforcement guidelines at issue did not establish binding norms for determining when independent contractors could be cited. *Id.* at 537-39. Indeed, the Court found it "noteworthy that the Secretary took pain to exclude the enforcement guidelines from the final rule, and directed that they not be published with the rule in the Code of Federal Regulations." *Id.* at 539. In contrast, the elements at issue here appear in the text of a duly-promulgated, mandatory safety standard. The Commission's holding that the Secretary is required to prove all of the elements supporting a citation, and the logic supporting our holding that the Secretary failed to do so in *Cathedral Bluffs*, were undisturbed by the Court of Appeals.

Secretary has the burden of establishing each element of a violation under the Occupational Safety and Health Act).

When we examine the decision in its entirety, we see the Judge failed to measure the operator's conduct against the standard or to hold the Secretary accountable to his burden of proving a violation of its provisions. Instead, the Judge repeatedly relies on speculation and evaluates the operator's mine site actions against suggestions made in an MSHA informal PowerPoint to infer dangers of falling. 37 FMSHRC at 2788; *see also* Gov't Ex. 5, at 7.

The Judge accepted into evidence an MSHA PowerPoint presentation, "Fall Prevention on Highwalls." The presentation endorses the concept of a "Fall Hazard Zone" — that is, a space six feet or less from a stable crest or unstable ground. *See* Gov't Ex. 5, at 7. The operator in this case similarly recognizes the concept and had voluntarily established a seven-foot hazard zone from the edge of the highwall. 37 FMSHRC at 2788.

The concept of a six-foot "fall hazard zone" is certainly a beneficial suggestion. However, applying the six-foot "fall hazard zone" as if it were a mandatory standard upon which one may ground a strict liability violation is inconsistent with the actual regulation language promulgated by the Secretary and thus is impermissible. A violation of section 56.15005 is shown when the Secretary establishes each of the elements of the violation, i.e., whether the Secretary proved that in the specific circumstances of the citation it was more likely than not that a miner was working where there was a danger of falling and was not wearing a lifeline. The Secretary did not introduce any evidence for the proposition that every incursion within six feet of a crest creates a danger of falling.[2]

Nonetheless, the Judge repeatedly refers to the PowerPoint suggestions and opines that the failure to follow the suggestions put miners in danger of falling. The Judge draws a number of unreasonable and unsupported inferences.

The Judge below simplified the Secretary's burden of proof by dispensing with it: "I agree with the Secretary that the position of the pump together with the absence of any warnings near the edge created a danger of falling." 37 FMSHRC at 2788. Even were this statement true, it is wholly irrelevant to whether any miner actually was working where there was a danger of falling, an essential element of an alleged violation. The absence of warnings is not a violation and is not relevant if there were no miners working in an area where they would be in danger. There is no testimony from any witness that any miner worked near the edge of the highwall.

Essentially, the Judge finds that, because current mine practices did not follow all MSHA informal guidance, it was likely a miner might in the future be placed in a danger of falling area. In doing so, the Judge applies the principle of "continued normal mining operations" that makes

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[2] As noted, the Secretary expressly stated the PowerPoint was not an official interpretation of the standard. Consequently, deference is not required or appropriate under either *Auer v. Robbins*, 519 U.S. 452 (1997), or *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

an existing violation S&S if based upon events likely to occur if the violation continued during such operations. However, there is no basis to cite inchoate circumstances not constituting a violation. If no miner is in danger of falling, MSHA cannot cite a violation of section 56.15005 based upon a belief that in the future a miner might come into a danger of falling without a lifeline. There simply is no basis in the Mine Act to cite an operator and assess a penalty for violations that have not yet occurred but that the inspector, Secretary, or Judge speculates may happen in the future. The Judge errs fundamentally in finding a violation based upon speculation that the operator "created a danger of falling."[3]

The Judge also found that the routine and necessary placement of blasting boreholes created a danger of falling, stating that "[t]he bore holes had been drilled between eight and nine feet from the highwall edge, which itself would make it easy for a miner to come within six feet of the edge, given there was no demarcation line for reference." 37 FMSHRC at 2788. There are two problems with this finding. First, the boreholes themselves at eight feet provided a line of demarcation. Miners would know that staying beyond them would keep them more than seven feet from the edge of the highwall.

The second problem is that the Judge relied on best-practices guidance to impose additional responsibilities on the operator, without citing any special hazards here. In fact, the photographs of the highwall show a fairly clean and level area near the edge. The Judge nonetheless faults Bussen for not providing signage or markings not required, even in the absence of a showing that such signage was necessary.

The Judge did discuss the miners working in the area. However, she never showed that any of them had at any point worked where they were in danger of falling. Her foundation is pure speculation. She noted that while Becker stated that he was the only one who worked with the pump, three other miners in the area "had every opportunity to use or move the pump." *Id.* at 2788-89. The Judge "agree[d] with the inspector's reasonable inferences that these other miners *could have* used or moved the pump from its location near the edge." *Id.* at 2789 (emphasis added). This is complete speculation.

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[3] The Judge also relied upon page eight of the PowerPoint, which suggests using visual warnings and ground markings (signs, tape, cones, boulders, paint, or chalk) and physical barriers (berms, boulders, fencing, etc.) "to warn miners when they are approaching an edge." *Id.* at 2788 (citing Gov't Ex. 5, at 8). The Judge applied the Fall Hazard Zone and suggestions about visual warnings as if they were mandatory standards and faulted Bussen for failing to implement the visual warning suggestions, even though the PowerPoint expressly states that it does not identify MSHA standards. It states, "[T]his program ***does not establish official MSHA policy*** on all possible methods of compliance at every mining operation. Instead, this program provides suggestions and recommendations to the mining industry for educational purposes." Sec'y's Ex. 5, at 34 (emphasis added). Obviously, the Secretary — who cannot be held to the burden of establishing elements set forth in non-binding guidance, *see Brock v. Cathedral Bluffs*, 796 F.2d at 537-39 — likewise cannot establish by mere guidance a binding norm for determining violations. It was clear error for the Judge to implicitly hold otherwise here.

Further, the Judge again misread the standard to impose liability for the mere positioning of a piece of equipment. Her musings on the potential for such work might be relevant to an S&S analysis if miners had been shown to have worked in the area. But the evidence is devoid of any such evidence. Becker testified that he was the only miner to use the pump and no witness testified otherwise. The Judge simply speculated that other miners might go into the non-mandatory Fall Hazard Zone. Her inference that Becker had done so is groundless and her speculation that some other miner might do so in an imagined, hypothetical future is irrelevant to a violation of the standard.

The Judge further speculated that no one would have put on fall protection "to perform the simple task of moving the pump."[4] *Id.* at 2789. Not only is the Judge's opinion speculative, but it also ignores the evidence, supported by the inspector's testimony, that the pump could have been moved without coming within six feet of the crest of the highwall. Becker testified that he had done so. In fact, he demonstrated the action by easily and quickly moving the pump, while standing next to the inspector, Tr. 40-41, without exposing himself to a danger of falling. The evidence thus directly refutes the Judge's supposition that a miner had to encounter a danger of falling to return the pump.

Accordingly, the Judge erred by effectively imposing requirements not specified in the regulation. In turn, using this view, she simply inferred, contrary to Becker's testimony, that Becker put himself in danger of falling.

B. <u>The Judge's inference that Becker placed himself in danger of falling without wearing a lifeline is not supported by substantial evidence and is unreasonable.</u>

Of course, credibility determinations are entitled to respect, and we generally defer to credibility determinations of ALJs. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992). However, credibility determinations are not beyond review. The Eighth Circuit has long held that a contention grounded on speculation and unsupported by substantial evidence must fail as a matter of law. *Armour & Co. v. Harcrow*, 217 F. 224, 228 (8th Cir. 1914); *NLRB v. Monroe Auto Equip. Co.*, 368 F.2d 975, 980 (8th Cir. 1966); *J.E.K. Indus., Inc. v. Shoemaker*, 763 F.2d 348, 353 (8th Cir. 1985).

Thus, while our colleagues correctly note that we do not lightly overturn an ALJ's credibility determinations, slip op. at 5, neither may such determinations be *made* lightly. An ALJ's credibility determination must be supported by substantial evidence. *See Buckler v. Bowen*, 860 F.2d 308, 311 (8th Cir. 1988) (citing *Hardin v. Heckler*, 795 F.2d 674, 676 (8th Cir. 1986)) ("[An] ALJ may disbelieve a claimant's allegations of pain, but credibility determinations must be supported by substantial evidence.").

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[4] The Judge found that safety lines were on site at but chose to infer that the miners would have chosen to put themselves in danger of falling without putting on the lifelines. 37 FMSHRC at 2789. As with other findings, no evidence supports this speculation.

The Secretary's contention cannot rest on a mere scintilla — here, the position of the cart without any evidence other than Becker's testimony as to how it got in that position — as a basis for speculation. The Secretary's argument in this case would fail even on a motion for a directed verdict. At that stage, "[t]here must be a conflict in the substantial evidence and not merely speculation or conjecture. Plaintiff is not entitled to unreasonable inferences, 'or inferences at war with undisputed facts.'" *J.E.K. Indus.*, 763 F.2d at 353 (citations omitted) (quoting *Schneider v. Chrysler Motors*, 401 F.2d 549, 555 (8th Cir. 1968)).

Thus, "if a credibility determination is unreasonable, contradicts other findings of fact, or is 'based on an inadequate reason, or no reason at all,' [the court] will not uphold it." *NLRB v. McCullough Envtl. Servs., Inc.*, 5 F.3d 923, 928 (5th Cir. 1993) (quoting *NLRB v. Moore Bus. Forms, Inc.*, 574 F.2d 835, 843 (5th Cir. 1978)). The record must support a credibility determination. This means that "[w]hen the decision of an ALJ rests on a negative credibility evaluation, the ALJ must make findings on the record and must support those findings by pointing to substantial evidence on the record." *Ceguerra v. Sec'y of Health & Human Servs.*, 933 F.2d 735, 738 (9th Cir. 1991). This requirement follows from the "bedrock principle of administrative law" that "[a] reviewing court can evaluate an agency's decision only on the grounds articulated by the agency." *Id.*

Becker testified under oath that, to move a pump out of the way of a truck delivering explosives, he swung the pump from a location approximately seven feet from the edge of the highwall to a location approximately within four and a half feet of the edge of the highwall. Tr. 72. The pump handles faced toward the highwall. No witness contradicted Becker, and miners verified that a truck delivering explosives had arrived on the bench. Tr. 87, 94.

The Judge never accounts for and in fact disregards this evidentiary record. She appears to have based her wholly subjective view on a belief that Becker was not telling the truth. She never explains her rationale, beyond a specious assertion that it "seems most likely" that the cart in question was placed there in a manner at variance with Becker's sworn testimony and that it is "difficult to imagine" how it could have been placed as he testified. 37 FMSHRC at 2789.

There is no need for imagination. Becker provided a demonstration *proving* that the cart could be moved without coming anywhere near the crest of the highwall or in danger of falling. The most the Judge could have inferred was that Becker might have been slightly closer than six feet from the edge of the highwall briefly when he moved the cart out of the way. But, here, we have sworn, uncontradicted testimony that not even this happened.

Furthermore, Becker's sworn testimony is corroborated by other evidence in the record. When Swan, who had not seen Becker relocate the pump, approached, Becker took hold of the pump and swung it back to a location more than six feet from the edge of the highwall. Tr. 20, 41-42. In fact, the inspector's notes corroborate that Becker was able to retrieve the pump by swinging it around without approaching the highwall, Tr. 20, and that Becker told Swan that he had placed the pump in the same manner. Gov't Ex. 1, at 2 ("The miner that put the cart in place stated that he has fall gear in the truck but didn't feel he needed it. Stated that he swung the cart in place."); *see also* Tr. 35-36 (inspector confirming that his notes were accurate).

Becker's easy retrieval of the pump from a safe location demonstrates that he could move the pump just as he testified. There is no evidence contradicting that ability. There is no evidence to support a notion that by moving the pump toward the crest in the same manner that he retrieved it, the handles could not end up facing the highwall.

Further, the Judge does not deal with the common sense question of why a miner using the handles to move the pump out of the way would back the pump toward the highwall rather than push it toward the highwall. The pictures of the pump show the wheels are located at the back of the pump so that a person could move it forward or backward. Gov't Ex. 1, at 3-4. The Judge does not explain her finding that the miner backed toward the highwall and approached within two or three feet of the edge with his back to the highwall when if a miner were using the handles to roll the pump, it would make more sense to roll it toward the highwall. Indeed, with respect to anyone working around the pump, thereby coming closer to the highwall, the Inspector testified, "I'm not saying anybody would do that." Tr. 32. Similarly, under the Judge's theory, in retrieving the pump, the miner would have had to walk around the pump in order to push it away from the highwall. None of this makes more sense — that is, it can be more likely inferred that the miner moved the pump to its position and retrieved the pump from its position in exactly the manner he physically demonstrated and swore to in his testimony.

Not only did the Judge not consider this obvious impediment to her assumption that Becker pulled the pump toward the highwall, but she also did not consider her own finding that there were no recent footprints near the edge of the highwall. She noted that, "Swan noticed that there were ***older*** footprints near the edge of the highwall, but they were covered in rock dust and he could not tell how recently they had been made." 37 FMSHRC at 2787 (emphasis added).[5] This raises a question: if Becker did walk too close to the edge in order to place the cart there with the handles facing toward the edge of the highwall shortly before the inspector arrived, how did he get there without creating fresh footprints in the dust that the Judge found to be on the bench? The weather was dry and the bench was flat. Tr. 53; Gov't Ex. 1, at 3-4. Although there was still evidence in the dust of someone walking at that location several days before (likely before firing the prior shot, Tr. 77-78), the Judge cites no evidence in the record of any foot traffic near the highwall after those prior footprints were made.

In sum, no witness, including the inspector, observed any miner in, or close to, a position where such miner was in danger of falling from the highwall. Indeed, Becker and Swan agree on one fact: neither of them saw any miner working where he would have been in danger of falling, as the standard requires.

This consistency in the record should have proven fatal to the Secretary's case. Yet despite the absence of any evidence of an incursion near the highwall and Becker's demonstrated

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[5] Although the Judge discussed testimony throughout her decision, she cited the transcript precisely one time. 37 FMSHRC at 2791. It would be eminently helpful if the Judge would provide transcript citations when discussing testimony in future cases.

retrieval of the pump from a safe distance, the Judge wholly discredited Becker's testimony. 37 FMSHRC at 2788. The Judge did not comment upon Becker's demeanor, cited no impeachment, and relied on no evidence that contradicts his testimony. It is entirely improper, as a matter of law, for a Judge to disregard Becker's sworn and demonstrated testimony, implying that said testimony is untruthful, without citing anything more than a single, inconclusive fact and drawing an inference contradicted by every other fact in the record.[6]

Finally, the Judge's finding of high negligence encapsulates the defective findings and reasoning throughout her decisions. The Judge concludes, "The miners testified that they stayed seven feet back from the edge, but I am skeptical given the location of the holes, the location of the pump, and the fact that there were no warnings to remind workers to stay back." *Id.* at 2792. The boreholes were eight feet from the crest in a position *where they had to be for mining.* Thus, the Judge cites three factors that are not individually or collectively violative or negligent: (1) placement of the boreholes in places necessary for mining as evidence of high negligence regarding a fall standard, (2) placement of the pump although the placement was not a violation and the pump was easily retrieved without creating any danger of falling, and (3) failure to utilize the presence of non-mandatory signs even though boreholes were present.

The Judge's inference of a violation is thus unreasonable and refuted by the record. It rests entirely upon the Judge's articulated discontent with lawful mining practices and her disregard of the Secretary's burden of proof and the absence of any evidence that might support that burden.

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[6] Our colleagues suggest that the Judge made "comparative credibility findings" when she discredited Becker's testimony about what he did when he placed the pump on the highwall and instead adopted the inspector's testimony speculating what happened. Slip op. at 5. However, the Judge's resolution in the disputed testimony is likewise infected by error. As fully explained in the preceding discussion, the evidence corroborates Becker's explanation of the event and does not support the inspector's mere speculations of what he believed likely happened. Hence, the Judge's credibility findings are not supported by the evidence and must be overturned. *See Morgan v. Arch of Illinois*, 21 FMSHRC 1381, 1389-93 (Dec. 1999) (noting an exceptional circumstance warranting overturning a Judge's credibility finding is when such finding is contradicted by the record evidence); *Consolidation Coal Co.*, 11 FMSHRC 966 (June 1989) (stating that a Judge's credibility findings and resolutions will not be affirmed if there is no evidence or dubious evidence to support them).

Conclusion

While a judge's credibility determination is usually entitled to great weight, we cannot defer to a judge's unreasonable and unreasoned decision to disbelieve a witness without justification in the evidence. In turn, we cannot accept an inference based upon the unreasoned discrediting of a witness, without discussion of contradictory evidence, and without any basis in the evidence.

Because the Judge's inference that a miner worked in an area where he was in danger of falling without using fall protection is not supported by substantial evidence, we would reverse the Judge and vacate the citation.

William I. Althen, Acting Chairman

Michael G. Young, Commissioner

Distribution

Ryan D. Seelke
Steelman, Gaunt & Horsefield
901 Pine Street, Suite 110
Rolla, MO 65401
Rseelke@steelmanandgaunt.com

Elizabeth A. Johnston
Office of the Solicitor
US Department of Labor
201 12th St. South-Suite 401
Arlington, VA 22202-5450
Johnston.elizabeth@dol.gov

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

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

Administrative Law Judge Margaret Miller
Federal Mine Safety Health Review Commission
721 19th Street, Suite 443
Denver, CO 80202-2500