

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET N.W., 6TH FLOOR
WASHINGTON, D.C. 20006

December 6, 1995

IN RE: CONTESTS OF RESPIRABLE DUST SAMPLE ALTERATION CITATIONS	:	Master Docket No. 91-1
KEYSTONE COAL MINING CORPORATION	:	Docket Nos. PENN 91-451-R through PENN 91-503-R
v.	:	Docket Nos. PENN 91-1176-R through PENN 91-1197-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. PENN 91-1264 through PENN 91-1266
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	and
v.	:	Docket No. PENN 92-182 Docket No. PENN 92-183
KEYSTONE COAL MINING CORPORATION	:	
JIM WALTER RESOURCES, INC., et al., Intervenors	:	
UNITED MINE WORKERS OF AMERICA (UMWA), Representative of Miners	:	

BEFORE: Marks, Doyle, and Holen, Commissioners

BY: Marc Lincoln Marks, Commissioner

I vigorously dissent.¹

¹ I wish to acknowledge with deep appreciation the extraordinary professionalism that was shown during the preparation of this dissent by my personal Counsel, Christopher Yost. In addition, I mention as well, the long hours of tedious work that were performed by the Commission's General Counsel, Joseph Ferrara and his staff, particularly, Elizabeth Ebner and Beverly Bryce who from the inception of this very long effort on the part of the Commission, in a

I. Introduction

The history of these so called dust cases may seem at first to begin when the then Secretary of Labor, the Honorable Lynn Martin, ordered citations issued against approximately one-third of the entire coal industry (847 operators) for violating 30 C.F.R §§ 70.209(b), 71.209(b); or 90.209(b) (collectively "section 209(b)") by illegally altering the dust cassettes that they submitted to the Pittsburgh Health Technology Center in Pittsburgh, Pennsylvania. Section 209(b) was promulgated to verify and ensure that the respirable dust levels in the mines subject to the standard were maintained at no greater than an average concentration of 2.0 milligrams of respirable dust per cubic meter of air or, under extraordinary conditions, maintained at or below 1.0 milligram of respirable dust per cubic meter of air. However, I suggest that these cases did not begin when the Honorable Lynn Martin ordered the instant citations issued, but rather, these cases have their beginning prior to that date, when the United States Government brought the Peabody Coal Company to the bar of justice for, among other things, illegally altering dust cassettes. Interestingly enough, the altering, which the Peabody Coal Company admitted to, consisted of, *inter alia*, forcing air into the dust cassette and causing the filter to display an abnormal white center or an AWC. It was this very AWC appearance that caused the dedicated employees of the United States Government, sometime later, to become suspicious of the thousands of AWCs that the cited operators were submitting to the Pittsburgh Health Technology Center.

There is, however, a dramatic difference between what happened in the Peabody Coal Company case and what happened in the dust cases before us now. In 1987, the management of the Peabody Coal Company had the decency and courage to admit their wrongdoing: they plead guilty and took their medicine (and a pretty strong medicine it was) -- a fine of one half a million dollars! Unfortunately, that was not the case with the defendants in these dust cases. Rather, defendants in these cases got together, hired counsel, and came up with a defense. Although defendants and their counsel's imaginative defense and arguments convinced the Administrative Law Judge, as reading his decisions confirm, those decision lack legal significance. Not only was the ALJ obviously susceptible to the defendants' arguments, but the ALJ enhanced them and committed fundamental error in doing so! As a result, the Administrative Law Judge's decisions must be reversed.

Although the body of this opinion will set out the ALJ's errors in detail, I believe it is incumbent upon me to briefly highlight his errors at this point. The history of these dust cases establishes that August 13, 1992 was a disastrous date for the United States Government's case. On that date the Administrative Law Judge issued an order interpreting section 209(b), the section

most professional manner, put before all the Commissioners involved in this case the necessary tools to render both its majority and dissenting opinion. I wish to acknowledge also the hard work and professionalism of the majority's Counsel, James Callear, who though on the opposite side of the issue from that which I took, at all times was willing to discuss the issues which were so pertinent to the decision in this case.

that all 847 operators in these dust cases were charged with violating, resulting in the issuance of approximately 5,000 citations against those operators.

Section 209(b) states:

The operators shall not open or tamper with the seal of any filter cassette or alter the weight of any filter cassette before or after it is used to fulfill the requirements of this part.

The judge interpreted section 209(b) to require the United States Government to prove that the cited cassettes were intentionally altered. Taking on himself the mantle of "Noah Webster," the Administrative Law Judge had this to say about the meaning of section 209(b):

If the weight of a filter cassette is "altered," the alteration can only be caused in one of two ways: either some person or persons actively caused it, or it resulted accidentally. The words of the standard in Section 209(b) according to their plain meaning refer to an action, proscribe conduct, include the concept of intention, and exclude an accidental occurrence.

14 FMSHRC 1510, 1513 (August 1992) (emphasis added).

Obviously, if "altered" can have two meanings its meaning is not "plain[!]" *Id.*

In spite of the law requiring an ALJ to give weight to the Secretary's reasonable interpretation of section 209(b), the judge did just the opposite and made the defendants' day! The Secretary of Labor, the Honorable Lynn Martin, interpreted section 209(b) to require the United States Government to prove that the weight of the cited cassettes was changed or altered while in the operator's control and that the issue of whether the section was violated in no way hinged on operator intent. The Administrative Law Judge rejected the Secretary's reasonable interpretation of section 209(b). The Administrative Law Judge forced the United States Government to prove that the alteration in the weight of a cited filter was caused by intentional and deliberate operator misconduct. *In Re: Contest of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 1510, 1517 (August 1992). Once the Trial Judge made the aforementioned ruling, (playing "Noah Webster" with the word "alter") he affirmed that ruling on September 8, 1992, after the United States Government requested he reconsider his August 13, 1992 ruling. *In Re: Contest of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 1675, 1677 (September 1992). To add insult to injury, the Administrative Law Judge later placed a burden of proof on the Government that required it to exclude all possible, potential, and reasonable nonintentional causes of AWCs.

I now stop the reel and frame the still picture of what the United States Government faced as these cases proceeded to trial.

First the trial judge insisted that two trials take place. The first trial he called the common-issues trial. The second trial he called the mine-specific trial. In the first trial, the Government knew that the judge would force them to prove that the AWCs on the cited filters were caused by the operators' intentional and deliberate misconduct and that the judge would (as he did) carry over to the second trial his rulings in the first trial on the evidence and the law.

However, what the Government could not have anticipated was that the judge was going to force the Government -- if you can believe this -- to exclude all potential, possible, and reasonable nonintentional causes of AWCs appearances. Even in criminal cases, where the burden of proof is beyond a reasonable doubt, the case law is well settled that the prosecution does not have to exclude every other reasonable hypothesis to convict the charged party of violating the cited law. Likewise, in a civil case, the party carrying the burden of proof does not have to exclude every other potential, possible, and reasonable cause of the acts charged. However, as the first case went to trial, and as the second case proceeded, that is exactly what this trial judge forced the Government to do. As I will expand on in depth in section V.A. *supra*, the judge again and again and again and again stated that there were too many other possible explanations for the appearance of the AWCs and, consequently, the Government failed to prove that the ONLY reason for the appearance of the AWC was the intentional and deliberate operator misconduct.

Not only did the trial judge place a burden of proof on the Government that was impossible to shoulder, but, as both of his opinions indicate, he rejected the testimony of each and every expert witness that the Government put forth and turned a blind eye towards the mountain of extraordinary statistical evidence presented by the Government.

Under these circumstances, could there be any doubt that the judge would hold, as he did, in favor of the defendants in both of these cases.

II. The Judge Erred in Failing to Give Weight to the Secretary's Interpretation of Section 209(b)

A. Legislative Background of Section 209(b)

The defendants in these cases were cited for violating section 209(b), which provides:

The operator shall not open or tamper with the seal of any filter cassette or *alter* the weight of any filter cassette before or after it is used to fulfill the requirements of this part.

Section 209(b) (emphasis added). Section 209(b) is an important part of a regulatory scheme designed to protect miners from silicosis. Silicosis has been recognized for a long time as a disease associated with coal miners. The inhalation of silica-bearing dust has been causally linked to the disease. *See Coal Mine Health and Safety: Hearings Before the Subcommittee on Labor of*

the Committee on Labor and Public Welfare, United States Senate, 91st Cong., 1st Sess., 764 (1969); Coal Mine Health and Safety: Hearings Before the Committee on Education and Labor, House of Representative, 91st Cong., 1st Sess., 119, 309, 310, 337 (1969). Recognizing this hazard, section 102(a)(1) of the Senate bill which became the 1969 Coal Act, and which was carried over into the Mine Act of 1977, required that the respirable dust standard be reduced when coal dust contains more than 5 percent quartz and that the applicable dust standard "be determined in accordance with a formula prescribed by the Surgeon General."² The Senate Committee report stated, "Since high quartz content in coal dust . . . presents a greater health hazard, the Surgeon General is directed to prescribe the formula to be used in arriving at a dust standard for dust containing more than 5 percent quartz which offers comparable protection to the statutory standards for dust containing 5 percent or less quartz." S. Rep. No. 410, 91st Cong., 1st Sess. 46 (1969) reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st. Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 172 (1975). It was in complying with this requirement of section 205 of the 1969 Coal Act, that the Secretary of Health, Education, and Welfare prescribed, and the Secretary of the Interior adopted, the formula set forth in 30 C.F.R. § 70.101. The formula was developed by the National Institute for Occupational Safety and Health and was based upon Public Health Service studies evaluating the effects of free silica on respiratory health. See 36 Fed. Reg. 4981 (March 16, 1971); *U.S. Steel Mining Co. Inc.*, 5 FMSHRC 46, 50-51 (January 1983)(ALJ).

Silicosis is a pulmonary disease caused by silica-bearing (quartz) dust retained by the lungs following respiration.³ The retained dust causes a scarring process, known as fibrosis. If the fibrosis occurs in the most distal portions of the lungs, the alveoli, nodes of scar tissue develop which compromise the air exchange capacity of the lungs. Damage caused by the scarring is irreversible and there is no known treatment for the disease! Silicosis can develop into a life-threatening respiratory condition known as progressive massive fibrosis. (Such a condition can develop also as the result of coal workers' pneumoconiosis.) Progressive massive fibrosis can develop long after an individual's exposure to quartz-bearing dust has ceased. The more silica dust an individual is exposed to, the greater the probability of developing silicosis. Based upon the data presently available, however, it is impossible to quantify the physiological effect of infrequent, low-level exposures to silica-bearing dust. However, it is known that there is, in any event, a cumulative dose-response effect from repeated exposures. An increased frequency of

² A companion bill introduced in the House of Representatives contained the same provision but required the Secretary of Health, Education, and Welfare to prescribe the formula. The House provision was adopted at Conference and carried over, without substantive change, to the 1977 Mine Act as section 205. Section 205 of the 1977 Mine Act was subsequently amended to transfer this function to the Secretary of Health and Human Services.

³ Quartz is a form of silica described as "A crystallized silicon dioxide." Bureau of Mines, U.S. Department of the Interior, Dictionary of Mining, Mineral, and Related Terms 884 (1968).

exposure and/or an increased concentration of dust increases the risk of developing silicosis. *U.S. Mining Co., Inc.*, 8 FMSHRC 1274 (September 1986).

When Congress delegated to the Secretary of Health, Education, and Welfare the authority to prescribe the applicable limit of respirable dust when the quartz content exceeds 5 percent, it intended that exposure level to be the maximum level allowed to achieve its stated goal of preventing disabling respiratory disease. Section 201(b), 30 U.S.C. § 841(b). Further, as stated by the Commission in *Consolidation Coal Co.*, 8 FMSHRC 890 (June 1986), "Congress clearly intended the full use of the panoply of the Act's enforcement mechanisms to effectuate this Congressional goal . . ." *Consolidation Coal Co.*, 8 FMSHRC at 897. Section 209(b) plays a critical role in effectuating this Congressional goal by seeking to ensure that dust samples accurately reflect the respirable dust levels in the mines in order to protect miners from silicosis to the maximum extent possible under the law.

B. The Secretary's interpretation of section 209(b)

Against this background of Congress' clear intent to prevent respirable diseases induced by silica-bearing dust, it is critical that section 209(b) be interpreted to protect miners from silicosis to the maximum extent possible under the law. According to the Secretary's interpretation of this provision, an operator violates section 209(b) when the weight of a cited filter is altered while the filter is in the operator's control. *See* Secretary of Labor's Motion for Reconsideration and for Clarification ("Motion for Reconsideration") at 2-3; *see also* Secretary of Labor's Statement in Opposition to Contestants' Motion for Consolidation and Trial at 2-4; Secretary of Labor's Statement of the Issues and Trial Proposal at 2-5; *see generally In Re: Contest of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 1510, 1513 (August 1992); *In Re: Contest of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 1675 (September 1992). The Senate's committee report on the Mine Act of 1977 states that because the Secretary "is charged with responsibility for implementing this Act, it is the intention of the Committee, consistent with generally accepted precedent, that the *Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts.*" S. Rep.No. 181, 95th Cong., 1st Sess. 49 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 637 (1978) (emphasis added). It is, of course, well-settled that an agency's interpretation of its own regulation is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). Indeed, where the Secretary presents a plausible reading of his own regulation, an appellate body must give weight to the Secretary's interpretation. The Secretary is emphatically due this respect when he interprets his own regulations. *United States v. Larionoff*, 431 U.S. 864, 872-73 (1977) (if an agency's interpretation is not plainly inconsistent with the wording of the regulation, it is due weight even though the regulation may contain "a number of ambiguities"); *Udall v. Tallman*, 380 U.S. 1, 4 (1965) ("The Secretary's interpretation may not be the only one permitted by the language of the orders, but it is quite clearly a reasonable interpretation; courts **must** therefore respect it."); *Federal Labor Relations Authority v. United States Department of Treasury*, 884

F.2d 1446, 1454 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1055 (1990); *Hispanic Information & Telecommunications Network, Inc. v. FCC*, 865 F.2d 1289, 1296 (D.C. Cir. 1989) ("An agency's interpretation of its own regulations will be accepted unless it is plainly wrong."). When faced with a problem of regulatory construction, the Commission gives great weight to the Secretary's reasonable interpretation.

Prior to the judge's decision interpreting section 209(b), the Secretary asserted that section 209(b) is clear on its face. Motion for Reconsideration at 3. Alternatively, the Secretary asserted that in the event the language of section 209(b) is ambiguous his interpretation is reasonable and, thus, entitled to deference. *Id.* at 3-5. According to the Secretary, the terms "open", "tamper", and "alter" should be read in the "context in which they appear, rather than interchangeably." *Id.* at 2. According to the Secretary, the term "alter" means change. Consequently, a violation of section 209(b) "occurs whenever there is a change, or alteration, of the weight of the dust filter. The fact of the violation in no way hinges on operator intent." *Id.* at 2-3 (emphasis added). The Secretary contended that questions of intentional or deliberate conduct are relevant only in the penalty assessment phase and are not relevant to the question of whether the standard has been violated. Secretary of Labor's Statement in Opposition to Contestants' Motion for Consolidation and Trial at 4.

The terms "alter" and "tamper" can not be read as synonyms. Elementary principles of regulatory construction dictate that one part of a regulation should not be construed as to make another part superfluous or redundant and, thus, "emasculate" that part. *See United States v. Menasche*, 348 U.S. 528, 538-39 (1955); *Nat'l Wildlife Federation v. Sec. of Interior*, 839 F.2d 694, 752 (D.C. Cir. 1988); *Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1108 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 952 (1980). The Secretary interprets "tamper" to connote intentional or deliberate conduct and "alter" to connote mere change, unoccasioned by intentional or deliberate conduct. Motion for Reconsideration at 2-3.

To sustain the Secretary's interpretation of section 209(b), and of the terms "alter" and "tamper," the Commission need not find that the Secretary's construction is the only reasonable one, or even that it is the interpretation it would have reached. *Unemployment Comp. Comm'n v. Aragon*, 329 U.S. 143, 153 (1946). *See also, e.g., Gray v. Powell*, 314 U.S. 402, 412 (1941); *Universal Battery Co. v. United States*, 281 U.S. 580, 583 (1929). Rather, to have his interpretation sustained, the Secretary need only present a plausible, reasonable interpretation that is not plainly inconsistent with the wording of section 209(b). The Secretary's interpretation is reasonable and consistent with the language of section 209(b). Consequently, because this Commission accords weight to such interpretations of the Mine Act and the regulations promulgated under it, the Secretary's interpretation of section 209(b) must be sustained!

C. Judge Broderick's orders and decisions regarding the interpretation of section 209(b)

Judge Broderick⁴ rejected the Secretary's reasonable interpretation of section 209(b) twice. *In Re: Contest of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 1510 (August 1992); *In Re: Contest of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 1675 (September 1992). The judge, interpreting "alter" and "tamper" as synonymous terms, emasculated the term "alter" and, thus, violated a basic tenet of statutory construction. In doing this, judge Broderick erred. This error infected every aspect of the trial and the decisions that followed.

In framing the issue for the common issues trials, Judge Broderick rejected the Secretary's interpretation and stated the following:

The basic common issue for the trial of which these cases are consolidated and which will be resolved in the trial is: Whether an abnormal white center (AWC) on a cited filter cassette establishes that the operator *intentionally* altered the weight of the filter?

14 FMSHRC 1510, 1517 (August 1992). In ruling on the Secretary's motion for clarification, Judge Broderick again rejected the Secretary's interpretation and stated the following:

The issue is whether an AWC on a cited filter cassette establishes that the operator *intentionally* altered the weight of the filter.

14 FMSHRC 1675, 1677 (September 1992) (emphasis added).

At the outset of his decision on common issues, Judge Broderick set forth the following issues:

1. What is an AWC?
2. Does an AWC on a cited filter establish that the mine operator *intentionally* altered the weight of the filter?

The Secretary has the burden of proof on these issues. The burden requires that the Secretary show by a preponderance of evidence that (1) the term "AWC" has a coherent meaning and was consistently applied; (2) the cited AWCs can *only* have resulted from *intentional acts*; (3) the AWCs resulted in weight losses in the cited filters.

15 FMSHRC 1456, 1463-64 (July 1993) (footnote omitted) (emphasis added). In determining

⁴ Judge Broderick retired upon the issuance of his decisions in the dust cases.

whether the Secretary's witness, Mr. Thaxton's classification of citeable filters -- those exhibiting Abnormal White Centers ("AWCs") -- was coherent and consistent, Judge Broderick noted the following:

The basic issue to be determined in the common issues trial is whether an AWC on a cited filter establishes per se that the mine operator *intentionally* altered the weight of the filter.

Id. at 1464 (emphasis added). In setting forth his conclusions of law, Judge Broderick concluded that the Secretary failed to prove that an "AWC on a cited filter establishes that the mine operator *intentionally* altered the weight of the filter." *Id.* at 1521 (emphasis added). Judge Broderick also concluded that the Secretary failed to prove that "*deliberate* conduct on the part of the cited mine operators is the *only* reasonable explanation for the cited AWCs." *Id.* (emphasis added).

Judge Broderick concluded that:

the record shows too many other potential causes for the dust dislodgement patterns on the cited AWCs for me to accept the Secretary's *circumstantial* evidence as sufficient to carry his burden of proof that the mine operators *intentionally* altered the weight on the cited filters.

Id. at 1522 (emphasis added).

In forecasting the issue for the mine-specific trial, Judge Broderick stated the issue would be as follows:

[W]hether the weight of the filters cited as AWCs from the Urling No. 1 Mine was *intentionally* altered by the mine operator, *considering the findings made as a result of the common issues trial*, and the evidence which may be introduced concerning the dust sampling and handling practices at the mine.

Id. (emphasis added). In the mine-specific decision, Judge Broderick further stated that, "[o]n the basis of all the evidence introduced in the common issues trial[,] the Secretary had failed to prove in the common-issues trial that an AWC on a cited filter "establishes" that the cited operator "*intentionally* altered the weight of the filter[.]" *Keystone Coal Mining Corporation*, 16 FMSHRC 857, 861 (April 1994) (emphasis added). Judge Broderick further stated that the Secretary had failed to prove in the common-issues trial that "*deliberate* conduct on the part of the cited mine operators is the *only* reasonable explanation for the cited AWCs." *Id.* In discussing his ultimate findings and conclusions of law, Judge Broderick held that the same evidentiary burden that was applicable in the common issues trial was applicable in the Keystone mine-specific case: the Secretary must prove "that the 75 cited Urling filters resulted from *intentional* tampering." *Id.* at 895 (emphasis added).

Quite clearly, the judge rejected the Secretary's reasonable interpretation of section 209(b) and substituted his own interpretation, which he subsequently applied through the two trials and in his decisions.

D. Fundamental Error

In the interest of justice and upon consideration of public policy, I conclude that the judge committed fundamental error in rejecting the Secretary's reasonable interpretation of section 209(b). The judge erred in his most important determination in this case: ruling on the Secretary's interpretation of section 209(b). The majority's failure to consider the judge's rejection of the Secretary's reasonable interpretation of section 209(b) as fundamental error has resulted in an *unjust* resolution of these proceedings.

As noted above in section II.A., in enacting the Coal Act of 1969 and the Mine Act of 1977, Congress clearly intended to prevent respirable diseases induced by silica-bearing dust. Consequently, it was critical that the Secretary's reasonable interpretation of section 209(b) be sustained in order to protect miners from silicosis to the maximum extent possible under the law. Although the Secretary did not appeal the judge's rejection of his reasonable interpretation of section 209(b) to the Commission, in the interest of justice and based on considerations of public policy, the judge's interpretation of section 209(b) *must be reviewed and ultimately set aside* and the Secretary's interpretation sustained in order to effectuate the purposes of the Coal Act of 1969, as amended by the Mine Act of 1977.

There is "no rigid and undeviating judicially declared practice under which courts of review invariably and under all circumstances decline to consider all questions which have not previously been specifically urged." *Nuelsen v. Sorensen*, 293 F.2d 454, 462 (9th Cir. 1961) ("*Nuelsen*"), *see also McDougall v. Dunn*, 468 F.2d 468, 476 (4th Cir. 1972) ("*McDougall*"). And for good reason! Indeed, both the Federal Rules of Appellate Procedure and the Commission's own procedural rules require the "just" determination of all cases. 28 U.S.C.A. § 2106 and 29 C.F.R. 2700.1(c) (emphasis added). Specifically, the *Nuelsen* court stated that there could not be an inflexible practice whereby appellate bodies decline to consider any and all questions which had not been specifically raised to the appellate body without doing violence to the statutes which gave them appellate power to modify, reverse or remand decisions "as may be just under the circumstances." *Nuelsen*, 293 F.2d at 462, *quoting* 28 U.S.C.A. § 2106. In *McDougall* the court stated the following:

Appellate Courts are not . . . powerless to correct errors in the trial, even if not raised by appeal, "where injustice might otherwise result * * *. Rules of practice are devised to promote justice, not to defeat them. . . . Orderly rules of procedure do not require sacrifice of the rules of fundamental justice." *Washington Gas Light Co. v. Virginia Electric & Pow. Co.* (4th Cir. 1971) 438 F.2d 248, 250-251, *quoting from Hormel v. Helvering* (1941) 312 U.S. 552 *See also Dudley v. Inland Mutual Insurance Co.* (4th Cir. 1962) 299 F.2d 637, 641-642. Indeed,

“Exceptional case or particular circumstances may prompt a reviewing court, where injustice might otherwise result or where public policy requires, to consider questions neither pressed nor passed upon below.” *Nuelsen* . . . at 462; *Washington Gas Light Co. v. Virginia Electric & Pow. Co.*, *supra*.

McDougall v. Dunn, 468 F.2d at 476. The Federal Rules of Appellate Procedure have been incorporated by the Commission’s regulations for the purpose of guiding the Commission on matters of procedure. 30 C.F.R. 2700.1(b). Moreover, just as the Federal Rules of Appellate Procedure give Federal appellate courts the power to take such actions “as may be *just* under the circumstances[.]” 28 U.S.C.A. § 2106, the Commission’s own regulations instruct the Commission to construe its rules to “secure the *just* . . . determination of all proceedings[.]” 30 C.F.R. 2700.1(c) (emphasis added).

Reading 30 C.F.R. 2700.1(b) & (c) and 28 U.S.C.A. § 2106 together, I conclude that the Commission is empowered, indeed *obligated*, to review the judge’s rejection of the Secretary’s reasonable interpretation of section 209(b). In agreement with the rationale of the Ninth Circuit Court of Appeals in *Nuelsen* and the Fourth Circuit Court of Appeals in *McDougall*, I conclude that in light of 30 C.F.R. 2700.1(c) our procedural rules can not be read to prevent review of this issue without doing violence to the mandate of our rules to “secure the *just* . . . determination of all proceedings[.]” 30 C.F.R. 2700.1(c). Failure to address this issue has resulted in an unjust decision being rendered by the majority. This is contrary to the dictates of 30 C.F.R. 2700.1(b) & (c) and 28 U.S.C.A. § 2106. The judge’s rejection of the Secretary’s reasonable interpretation of section 209(b) presents exceptional circumstances and, as such, the Commission is required to consider this issue. Indeed, if there was ever a case that fit the bill of an “[e]xceptional case . . . where injustice might otherwise result” the “dust cases” are such cases. *Nuelsen*, 293 F.2d at 462.

Moreover, “public policy requires” that this issue be reviewed. *See Nuelsen*, 293 F.2d at 462. Public policy demands that the Coal Act of 1969, as amended by the Mine Act of 1977, be read so as to protect miners to the maximum extent permitted by law. As set forth above at II.B., the Secretary’s interpretation serves to best protect miners from silicosis, the disabling condition discussed *supra* at II.A. The judge’s interpretation, discussed *supra* at II.C., diminishes the ability of the Government to protect miners from silicosis. Consequently, because the judge’s interpretation of section 209(b) does not serve to best protect miners from silicosis and the Secretary’s interpretation *does* serve to best protect miners from silicosis, public policy requires that the judge’s interpretation to be set aside and the Secretary’s interpretation be given weight.

Thus, both public policy and the interest of justice require that the Commission not only review this issue, they also require that the judge’s rejection of the Secretary’s reasonable interpretation of section 209(b) be overturned and the Secretary’s reasonable interpretation of section 209(b) be given full force and affect. Again, rules of practice are devised to promote justice, not to defeat them. . . . Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.” *Washington Gas Light Co. v. Virginia Electric & Pow. Co.* (4th Cir. 1971).

E. The Secretary prevails in these cases under his interpretation of section 209(b)

According to the Secretary's reasonable interpretation of section 209(b), an operator violates section 209(b) when the weight of a submitted filter is reduced or changed while the filter is in the operator's control. See *In re Respirable Dust Sample Alteration Citations*, 14 FMSHRC 1510, 1511. As stated by the trial judge:

each of the citations contested herein charges the mine operator with violating the provisions of Section 209(b) of Part 70, Part 71, or Part 90. All the citations allege a violation of the cited standard in virtually identical language:

The weight of the respirable dust cassette no. _____ collected on [date] from a sampling entity at this mine has been **altered** while the cassette was being submitted to fulfill sampling requirements of Title 30 C.F.R. Parts 70, 71 or 90.

Id. at 1512 (emphasis added).

Consequently, to prevail in these cases under the Secretary's interpretation of section 209(b), it was incumbent upon the Secretary to establish that there was a change in, or alteration of, the weight of the cited dust filter while the filter was in an operator's control.

That the occurrence of an AWC is accompanied by a change in the weight on a given filter is axiomatic. The judge found that AWC dust dislodgment patterns result in a weight change. *Id.* at 1517.

The only question that remains is who had control of the filter when it developed the AWC appearance and its accompanying change in weight.

The Secretary's witnesses, Dr. Marple and Dr. Rubow, concluded that "[t]he operation of the desiccator at [Pittsburgh Health Technology Center] is not a source of dust dislodgment patterns [and] [t]he shipment of compliance samples by airplane is not a probable cause of dust dislodgment patterns on filters." 15 FMSHRC at 1481. In Dr. Miller's opinion, another witness for the Secretary, the results of his tests excluded mailing as a cause of the cited AWCs and also ruled out handling in the Pittsburgh Health Technology Center ("PHTC") as the cause of AWCs. *Id.* at 1485.

The trial judge stated the following in his findings of fact:

D. The dust dislodgment patterns on the cited filters classified under tamper codes 1, 2, 3, and 7 **cannot have resulted from:**

1. a rapid decrease in air pressure such as might occur when the cassettes

were transferred by airplane, or **the handling of the cassettes by the Post Office**. The results of Dr. Marple's rapid decrease in air pressure experiment and the experience of Dr. Grayson who received a number of dust laden filters by air and postal delivery establish that air transport and Post Office handling do not cause AWC patterns on filters.

2. **desiccation of the filter capsules in the PHTC weighing laboratory**. Dr. Lee's desiccator tests which produced what he termed AWCs are of limited evidentiary value because of the differences in the desiccator used by MSHA and that used by Lee. Moreover, most of the photographs of the filters which underwent the test do not show dust dislodgment patterns similar to cited AWCs. Dr. Marple's experiment using the MSHA desiccator establishes that proper operation of the desiccator (and there is no evidence that it was not used properly by MSHA) does not cause dust particle dislodgment.

3. **handling of the cassettes and capsules in the PHTC**. Dr. Lee was of the opinion based on his observation of the handling practices in the PHTC and on the results of his stack and chuck tests and rapid disassembly tests that 5 to 15 percent of the cited AWCs resulted from PHTC handling and 30 to 50 percent were contributed to by PHTC handling. He did not provide the rationale for these percentage estimates. The photographs of the filters after the stack and chuck and rapid disassembly tests for the most part do not resemble the cited filters. Based upon my consideration of G-170 showing the operation of the PHTC and of the various tests and experiments which produced AWC-like dust dislodgment patterns, **I conclude that the PHTC handling, including the stack and chuck procedures and the rapid disassembly procedures, did not cause the cited AWCs.**

Id. at 1514-1515 (emphasis added). Thus, it is a fortiori that the cited filters were in the control of the respondents when the filters developed the AWC appearance and their accompanying change in weight.

In fact, the main thrust of the defendants' arguments in these cases has been that AWCs are caused by nonintentional conduct, such as rough handling by employees. *See, e.g. id.* at 1489-93, 1495-96 (discussion of Dr. Lee's opinions on nonintentional causes of AWCs and factors that made certain filters more susceptible to the nonintentional formation of AWCs); 1497-99 (discussion of Dr. Grayson's opinions on nonintentional causes of AWCs and factors that made certain filters more susceptible to the nonintentional formation of AWCs); 1499-1507 (discussion of Dr. McFarland's opinions on nonintentional causes of AWCs and factors that made certain filters more susceptible to the nonintentional formation of AWCs); 16 FMSHRC at 861-868 (discussion of the testimony regarding the rough handling of sampling equipment by

Environmental Safety Department (“ESD”)⁵ personnel and Urling miners); Brief of Keystone Coal Mining Corporation at 22-32 (arguments concerning nonintentional causes of AWCs at Urling). Thus, out of their own mouths, the defendants have proven the Secretary’s case!

Moreover, even the judge concluded that, in addition to intentional causes, AWCS can have resulted from:

1. impacts to the cassette from dropping or striking it;
2. impacts to the hose from stepping on it, dropping an object on it, striking it against a wall while the hose was wrapped around the sampling assembly, closing a door or drawer on it, or sitting on it;
3. snapping together the two halves of the filter cassette.

15 FMSHRC at 1513. In this connection, the judge further found that “[a]lthough the expert witnesses for the Secretary and the mine operators differ as to the likelihood that a dust dislodgment pattern similar to the cited AWCs would result from incidents described in numbers 1 and 2 above, the experiments all show that at least sometimes they do occur.” *Id.* Further, in the mine specific case, the judge found that:

the dust dislodgment patterns on the cited filters could have resulted **wholly** or partly from the handling of the sampling assemblies by the miners being sampled. Specifically, they could have resulted from pumps falling to the mine floor from the remote box or from miners' belts, from pumps being detached from the hoses and falling to the floor, from hoses being snagged on objects in the mine, from hoses being pinched on the mantrip, from hoses being impacted by other pumps on the lampman's counter or the mechanic's box, or from hoses being wrapped around pumps.

16 FMSHRC at 868 (emphasis added). And again, the judge found that:

the dust dislodgment patterns on the cited Urling filters could have resulted **wholly** or partly from the handling of the sampling assemblies by the ESD personnel described in this section. Specifically, they could have resulted from the carrying of multiple pumps by their hoses, dropping carrying boxes with pumps to the floor of a vehicle or onto a table, stepping on hoses, placing pumps on hoses, catching hoses in car doors or the office door, dropping pumps and sampling assemblies on the ground or on the floor, dropping dust laden cassettes on the floor, or otherwise

⁵ The Environmental Safety Department (“ESD”) is where Rochester and Pittsburgh conducts its respirable dust sampling program for the Urling Mine, as well as all other Rochester and Pittsburgh mines.

impacting the hose as previously described.

Id. at 864 (emphasis added).

Based on the record evidence, the defendants' own experts, witnesses, and briefs, as well as the judge's findings, the record supports only one conclusion: that the cited filters developed their AWC appearances and accompanying weight change while in the defendant-operators possession. Or, in other words, the defendant-operators' altered the cited filters in violation of section 209(b). I would therefore reverse the judge's decisions.

V. Other Errors Made By The Judge

Although I conclude that the above fundamental error committed by the judge is more than sufficient to reverse his decisions, I nevertheless wish to comment on a number of other reversible errors made by the judge which would provide separate, independent grounds for overturning his decisions.

A. Burden of Proof

The judge erred in his application of the burden of proof in the common-issues case. That error infected both his common-issues decision and his decision in the mine-specific case.

In the common-issues case not only did the judge erroneously reject the Secretary's interpretation of section 209(b), he also applied a burden of proof standard that was impossible for the Secretary to meet under the judge's interpretation requiring the Secretary to prove AWCs were the result of intentional conduct. While using the term "preponderance of the evidence," the judge's formulation of that standard bears little, if any, resemblance to that standard as it is understood at common law. At common law, preponderance of the evidence "means that amount of credible evidence which is most persuasive on a particular point." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983). The preponderance of the evidence standard has also been defined at common law as "[t]he greater weight of evidence, evidence which is more convincing than the evidence which is proffered in opposition to it." *St. Paul Fire & Marine Insurance Company v. U.S.*, 6 F.3d 763, 769 (Fed. Cir. 1993), *reh. denied*. In general, preponderance of the evidence is such evidence as, when weighed against that opposed to it, has the more convincing force that something is more likely so than not so. *Merzon v. County of Suffolk*, 767 F. Supp. 432, 444 - 445 (E.D. N.Y. 1991); *see* Standard Civil Jury Instruction for the District of Columbia § 2-8 (revised ed. 1985); *see also*, *Bazemore v. Friday* 478 U.S. 385, 400 (1986); *Smith v. U.S.*, 726 F.2d 428, 430 (8th Cir. 1984); *Nissho-Iwai Co., Ltd. v. M/T Stolt Lion*, 719 F.2d 34, 38 (2nd Cir. 1983); and *Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1204 n. 3 (D. D.C. 1990).

The preponderance standard is satisfied when the party bearing the burden has shown that "the existence of a fact is more probable than its non-existence. . . ." *Concrete Pipe and Products*

of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. ___ at ___, 113 S. Ct. 2264, 2279 (1993) (citations omitted). Thus, if the evidence presented by the Government establishes that intentional tampering is more likely than not the cause of the AWC appearances, the Secretary has sustained his burden of proof. See *Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1204 n.3 (D. D.C. 1990).

The judge in his decision on common issues applied the following standard of proof:

The Secretary has the burden of proof on these issues. The burden requires that the Secretary show by a preponderance of evidence that . . . the cited AWCs can *only* have resulted from intentional acts[.]

15 FMSHRC at 1463-64 (emphasis added). This is a burden of proof that the Secretary could not have satisfied. By using the term "only" the judge, in essence, required the Secretary to eliminate all other possible causes of, and reasonable explanations for, AWCs in order to prevail. This point is highlighted by the judge's own conclusions of law. Specifically, Judge Broderick concluded that:

The Secretary has failed to carry his burden of proving by a preponderance of the evidence that deliberate conduct on the part of the cited mine operators is the *only* reasonable explanation for the cited AWCs.

Id. at 1521 (emphasis added). Over and over again the judge required the Secretary to prove that the cited AWCs can *only* have resulted from intentional acts and deliberate conduct. Specifically, the judge required the Secretary to prove AWCs could *only* have resulted from intentional acts as follows:

The Secretary has the burden of proof on these issues.

The burden requires that the Secretary show by a preponderance of evidence that (1) the term "AWC" has a coherent meaning and was consistently applied; (2) the cited AWCs can *only* have resulted from intentional acts; (3) the AWCs resulted in weight losses in the cited filters.

15 FMSHRC at 1463-64.

No matter how many times he intoned the phrase "preponderance of the evidence," the simple fact remains that the judge required the Government to prove that the *only* cause of the AWCs was intentional conduct, to the exclusion of all other causes!

Under the correct burden of proof the Secretary need not eliminate all other possible, potential, or even reasonable causes of AWC in order to satisfy the preponderance of the evidence standard. As long as the weight of credible evidence shows that other possible or reasonable

explanations are less likely to be the cause of the AWCs than intentional tampering, the Secretary must prevail. Even in criminal proceedings the Government is not required to exclude every other reasonable hypothesis so long as the evidence as a whole supports the allegation of misconduct "beyond a reasonable doubt." See *U.S. v. Rivera Rodriguez*, 808 F. 2d 886, 890 (1st Cir. 1986). In essence, the judge held the Secretary to an even higher burden of proof than the criminal standard, "beyond a reasonable doubt," by requiring him to eliminate all other possible, potential, and even reasonable causes of AWC in order to prevail. This fact is revealed through the judge's analysis leading up to his conclusion that the Secretary failed to prove that deliberate tampering was "the *only* reasonable explanation for the cited AWCs." 15 FMSHRC at 1521 (emphasis added). Specifically, Judge Broderick concluded that:

the record shows *too many other potential causes* for the dust dislodgement patterns on the cited AWCs for me to accept the *Secretary's circumstantial evidence* as sufficient to carry his burden of proof that the mine operators intentionally altered the weight on the cited filters.

Id. at 1522 (emphasis added).⁶ Over and over again the judge stated that AWCs could possibly have resulted from unintentional conduct. Specifically, the judge stated:

... Findings of Fact II.C.1, 2, and 3 indicate that the appearances of the filters cited under tamper codes 1, 2, 3, and 7 **can have** resulted from many different incidents or accidents unrelated to intentional tampering.

15 FMSHRC at 1521 (emphasis added). Again the judge stated:

C. The dust dislodgment patterns on the cited filters classified under tamper codes 1, 2, 3, and 7 *can have* resulted from:

1. impacts to the cassette from dropping or striking it;
2. impacts to the hose from stepping on it, dropping an object on it, striking it against a wall while the hose was wrapped around the sampling assembly,

⁶ The judge appears to minimize the potency of circumstantial evidence in this passage. The Commission has often relied on such evidence, particularly where intentional conduct is an essential element of the case. *Northwestern Resources Co.*, 8 FMSHRC 883, 886 (June 1986); *Lizza Industries, Inc.*, 6 FMSHRC 8, 15 (January 1986); *Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981) *rev'd on other grounds*, 709 F.2d 86 (D.C. cir. 1983). Moreover, direct evidence of intentional or deliberate conduct is rarely encountered. *Phelps Dodge Corp.*, 3 FMSHRC at 2510. It is entirely appropriate for a judge to draw reasonable inferences of intentional or deliberate conduct from circumstantial evidence. *Id.* Adding to the judge's inappropriate belittling of circumstantial evidence, in this case there were two eyewitnesses to intentional tampering in the mine-specific trial. 16 FMSHRC at 891 and 892.

closing a door or drawer on it, or sitting on it;

3. snapping together the two halves of the filter cassette.

15 FMSHRC at 1513 (emphasis added). Again, the judge stated:

Dust dislodgment patterns on the cited filters classified under tamper code 5 *can have* resulted from someone inserting a cotton swab into the cassette inlet and rubbing or twisting it on the filter.

1. Dust dislodgment patterns on the cited filters classified under tamper code 5 *can have* resulted from someone inserting a cotton swab into the cassette inlet and rubbing or twisting it on the filter.
2. Dust dislodgment patterns on the cited filters classified under tamper code 5 *can have* resulted from dropping the filter cassettes.

D. The dust dislodgment patterns on the cited filters classified under tamper code 9 *can have* resulted from someone intentionally inserting something in the cassette inlet.

15 FMSHRC at 1518 (emphasis added). Yet again, the judge stated:

Findings of Fact II.C.1, 2, and 3 indicate that the appearances of the filters cited under tamper codes 1, 2, 3, and 7 *can have* resulted from many different incidents or accidents unrelated to intentional tampering.

15 FMSHRC at 1521 (emphasis added). And again, the judge stated:

In summary, the record shows *too many other potential causes* for the dust dislodgment patterns on the cited AWCs for me to accept the Secretary's circumstantial evidence as sufficient to carry his burden of proof that the mine operators intentionally altered the weight on the cited filters.

15 FMSHRC at 1522 (emphasis added). Also, the judge stated that all of the following *could have* contributed to AWCs:

- F. Sampling assembly variables

* * *

3. A filter cassette with a smaller filter-to-foil distances is more prone to

an AWC dust dislodgment pattern than one with a larger filter-to-foil distance.

4. A floppy filter is more prone to an AWC dust dislodgment pattern than a more taut filter.

* * *

6. The firmness or softness of the sampling assembly hose may be related to the formation of an AWC.

15 FMSHRC at 1515 and 1516. Yet again, the judge stated:

... filters with a shorter filter-to-foil distance or which are floppy are more susceptible to reverse air AWC formation.

15 FMSHRC at 1520.

By requiring the Secretary to prove that the cited AWCs can *only* have resulted from intentional acts and deliberate conduct to the exclusion of any other potential cause, the judge committed reversible error.

Contrary to the assertions of my colleagues, the judge's decision does not support the conclusion that his use of the term "*only*" was merely made in reference to the issue presented. As set forth above, in delineating the burden of proof, the judge clearly required that the Secretary prove that the cited AWCs can *only* have resulted from intentional acts. He then found that the Secretary failed to carry that burden because there were too many other "could haves" and "can haves." ONLY means ONLY! It does not mean more likely than not, there is a quantitative difference!

The judge's failure to apply the correct standard of proof infected his entire evaluation of the evidence, not only in the common-issues proceedings, but also in the mine-specific proceedings. In the mine-specific proceedings, the judge utilized the same incorrect standard of proof that he used in the common-issues proceeding. In discussing his ultimate findings and conclusions of law, Judge Broderick made the following comments regarding the standard of proof:

The *same evidentiary burden* is applicable in the Keystone mine-specific case as was applicable in the common issues trial[.]

16 FMSHRC at 895 (emphasis added). Judge Broderick explicitly "incorporated" into "any decision following the mine-specific trial" the findings and conclusions in his common-issues decision. 15 FMSHRC at 1522; *see also* 16 FMSHRC at 861. Moreover, the judge stated that "[t]he same evidentiary burden [was] applicable in the Keystone mine specific case as was

applicable in the common issues trial" 16 FMSHRC at 895.

The judge repeatedly held in his mine-specific decision that non-intentional conduct *could have* caused the AWCs. Specifically, the judge stated the following:

My decision on the common issues trial made certain findings of fact. I found that reverse air AWCs *could have* resulted from intentional acts, such as blowing or otherwise directing a pulse of air into the cassette outlet or introducing a vacuum source into the cassette inlet. I found that such AWCs *could also have* resulted from impacts to the cassette or the sampling hose, which might have occurred accidentally during normal handling of the sampling equipment at the mines, or from snapping together the two halves of the cassette. I further found that the reverse air AWC dislodgment patterns could not have resulted from mailing the cassettes from the mines to the PHTC, or the desiccation of the filter capsules or other handling of the cassettes and capsules at the PHTC. I found that the filter-to-foil distance in the cassettes and the floppiness of the filters were factors in the susceptibility of filters to AWC dislodgments; and that the firmness or softness of the sampling assembly hose, and variables in the dust on the filter *may have* affected the susceptibility to AWCs. . . . With respect to filters cited under tamper codes other than those considered the result of reverse air, I found that those classified under tamper codes 5 and 9 *could have* resulted from intentional tampering, but those classified under codes 8 and 10 were not consistently classified or were not shown to have been likely caused by intentional acts.

16 FMSHRC at 861 (emphasis added). And again:

I find as facts that the dust dislodgment patterns on the cited Urling filters *could have* resulted wholly or partly from the handling of the sampling assemblies by the ESD personnel described in this section. Specifically, they *could have* resulted from the carrying of multiple pumps by their hoses, dropping carrying boxes with pumps to the floor of a vehicle or onto a table, stepping on hoses, placing pumps on hoses, catching hoses in car doors or the office door, dropping pumps and sampling assemblies on the ground or on the floor, dropping dust laden cassettes on the floor, or otherwise impacting the hose as previously described.

16 FMSHRC at 864 (emphasis added). And again:

I find as facts that the dust dislodgment patterns on the cited filters *could have* resulted wholly or partly from the handling of the sampling

assemblies by the miners being sampled. Specifically, they *could have* resulted from pumps falling to the mine floor from the remote box or from miners' belts, from pumps being detached from the hoses and falling to the floor, from hoses being snagged on objects in the mine, from hoses being pinched on the mantrip, from hoses being impacted by other pumps on the lampman's counter or the mechanic's box, or from hoses being wrapped around pumps.

16 FMSHRC at 868 (emphasis added). And again:

During the period from August 1, 1989 to May 31, 1990, two kinds of continuous miners were used at Urling: the Lee-Norse miners operated from controls on the machine, and the Joy miners operated from a remote control box (some Joy miners could be operated from a remote control box (some Joy miners could be operated from the remote control box or from controls on the miner). The Lee-Norse miner vibrated when cutting coal, so that the sampling head attached to the canopy swayed back and forth and contacted the canopy post. I find that this *could have* caused or contributed to abnormal dust patterns on Urling filters.

16 FMSHRC at 882 (emphasis added). And again:

I find as facts that there were changes in the handling practices of end personnel beginning in the spring of 1990. Specifically, Eget, who handled the sampling equipment in a rougher manner than the others, did not pick up pumps and samples from April 9 to May 10, 1990. Snyder and the other dust technicians were more careful in their handling and carrying of pumps and hoses, and, in particular, were careful to avoid hose impacts because of the MSHA dust sample investigation. These changes *could have* been factors in the decrease in the number of cited AWCs in the Spring of 1990.

16 FMSHRC at 884 (emphasis added). And again:

I conclude that the reverse air dust dislodgment patterns on the cited Urling filters *could have* resulted from accidental impacts to the sampling equipment, particularly the hoses, in the Urling mine during sampling or after the samples were taken. I conclude that the dust dislodgment patterns did not result from intentional tampering On the basis of my findings on page 8, *supra*, I conclude that the reverse air dust dislodgment patterns on the cited Urling filters *could have* resulted from accidental impacts to the sampling equipment, particularly the hoses, while the samples were being handled by R & P's ESD lab personnel. Also, on the

basis of my common issues decision, I conclude that reverse air dust dislodgment patterns on the cited Urling filters *could have* resulted from intentional tampering including blowing by mouth or otherwise directing air into the cassette outlet or introducing a vacuum source into the cassette inlet.

16 FMSHRC at 898 (emphasis added).

As noted above, the Government need not eliminate all other possible or potential causes of AWCs. The judge, under his erroneous interpretation of section 209(b), was not called upon to discover how many possible explanations there could be for AWCs but, rather, to determine if intentional tampering was more likely than not the cause of the AWCs. The Secretary must prevail under the judge's erroneous interpretation of section 209(b), regardless of the number of could haves and can haves, so long as the Secretary establishes that intentional tampering is more likely than not the cause of AWCs.

In his own words, the judge carried over his contaminated formulation of the burden of proof from the common issues trial into the mine specific trial. This is evidenced by his continued mantra "*could have*"/ "*can have*" in connection with possible, non-intentional causes of AWCs. 15 FMSHRC at 1513, 1514, 1515, 1516, 1518, and 1521; 16 FMSHRC at 861, 864, 868, 882, 884, and 898. Consequently, neither decision can be allowed to stand inasmuch as each one contains the exact same fatal flaw: the judge's pronouncement and application of an erroneous burden of proof. Both decisions, on this ground alone, must be set aside because this error made it impossible for the Secretary to prove his case under the judge's erroneous interpretation of section 209(b).

Although such a legal error would normally result in a remand order, the facts of this case, as discussed below, support only one conclusion: that the Secretary established that AWCs were more likely than not the result of intentional conduct. I would therefore reverse the judge's decisions.

B. Under the Correct Standard of Proof, the Secretary Presented Sufficient Evidence to Satisfy the Preponderance of the Evidence Standard and the Judge's Conclusions to the Contrary are not Supported by Substantial Evidence.

In spite of the fact that the trial-judge erroneously forced the Government to prove its case by showing that AWCs were the result of intentional misconduct, in fact the Government did prove by a preponderance of the evidence that AWCs were caused by intentional misconduct. The judge's conclusion, to the contrary, is not supported by substantial evidence. Based on the substantial evidence test, I would reverse the judge's decision in both the common-issues case and in the mine-specific case.

The Commission is bound by the terms of the Mine Act to apply the substantial evidence

test when reviewing an administrative law judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I); *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994). That standard of review requires that a fact finder weigh all probative record evidence and that a reviewing body examine the fact finder's rationale in arriving at his decision. *Wyoming Fuel*, 16 FMSHRC at 1627; *see also*, *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994), *citing Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-89 (1951). A judge must analyze and weigh the relevant testimony, make appropriate findings, and explain the reasons for his decision. *Wyoming Fuel*, 16 FMSHRC at 1627; *Mid-Continent*, 16 FMSHRC at 1222, *citing The Anaconda Co.*, 3 FMSHRC 299, 299-300 (February 1981). An appellate body reviewing a judge's factual findings will not affirm his findings if they are unreasonable, incredible or if there is dubious evidence to support them. *See e.g.*, *Krispy Kreme Doughnut Corp. v. NLRB*, 732 F.2d 1288, 1293 (6th Cir. 1984); *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1263 (7th Cir. 1980).

As outlined below, *under the correct burden of proof* -- which the judge did not apply⁷ -- the Government presented sufficient evidence during the course of the common-issues trial and the mine-specific trial to establish its case, even under the judge's erroneous interpretation of section 209(b).

1. Expert Witnesses

(i). The judge erred in failing to credit Mr. Thaxton.

I find that the Government, through Mr. Thaxton, presented compelling testimony that AWCs were not the result of normal handling conditions but, rather, were more likely than not the result of deliberate and intentional misconduct. The judge erred in failing to credit Mr. Thaxton's testimony on several fronts.

Interestingly enough, the ALJ accepted Mr. Thaxton as an expert in the common-issues trial and the mine-specific trial in the fields of respirable dust sampling and in determining normal and abnormal patterns on filters. 16 FMSHRC at 872; 15 FMSHRC at 1473. The judge accepted Mr. Thaxton's opinion that the AWCs at Urling "*did not result from normal sampling[.]*" 16 FMSHRC at 897 (emphasis added). These two findings have led to a conclusion that Mr. Thaxton's ultimate opinion on the causes of AWCs was persuasive. However, the judge inexplicably made a finding contrary to Mr. Thaxton's opinion. Specifically, the judge held that deliberate and intentional conduct was not the most likely cause of AWCs. 16 FMSHRC at 897; 15 FMSHRC at 1521. This finding was inconsistent with his above cited conclusions and can not be sustained under the substantial evidence test. Further, the judge concluded that Mr. Thaxton's reasons for not citing filters designated as "no calls" were tenuous and not appropriate exercises of MSHA's discretion. The judge's conclusions in this connection constitute an intrusion on

⁷ *See supra* pages 15-22 and accompanying notes (discussion of the judge's erroneous formulation and application of the burden of proof).

MSHA's prosecutorial discretion. Contrary to the judge's conclusion, Mr. Thaxton's decision not to cite the 400 no-call filters -- which only amounted to less than ten percent of the 5,000 cited AWCs and less than five percent of the 75 cited AWCs at Urling -- did not affect the coherence or consistency of MSHA's citation criteria. In fact, it is impossible to reconcile this adverse finding by the judge with his determination that Mr. Thaxton's classification system was coherent and consistent. See 15 FMSHRC at 1469 and 16 FMSHRC at 897. The judge's finding that Mr. Thaxton's reasons for not citing filters designated as "no calls" was tenuous and not an appropriate exercise of the MSHA's discretion is inconsistent with his twice stated finding that Mr. Thaxton's classifications of AWCs *were coherent and consistent*. His findings, therefore, are not supported by substantial evidence and can not be sustained.

(ii). The judge erred in crediting Dr. Lee's opinions over Mr. Thaxton's opinions

There is not substantial evidence to support the judge's acceptance of Dr. Lee's opinions over Mr. Thaxton's opinions. Many of Dr. Lee's opinions were speculative and not supported by experimental evidence. Specifically, Dr. Lee's opinion concerning the degree of force necessary to produce dust dislodgement on the cited filters being less than that caused by deliberate blowing in a reverse direction is without any experimental or scientific support. Consequently, the judge erred in crediting and relying on Dr. Lee's opinion in this connection.

Moreover, Dr. Lee's system of classification is as unreliable as his ability to apply that system during the course of the trial. Specifically, Dr. Lee was only minimally successful in correctly classifying cited filters under his systems of classification during the trial. The evidence reveals in this connection that under his Richard J. Lee Group type-system ("RLJG"), Dr. Lee could replicate his classifications less than 50% of the time. In connection with his Feature Code Classifications, he was able to replicate his classifications only 10 out of 35 times. 15 FMSHRC at 1489. In connection with his mixed mode classifications system, Dr. Lee was unable to identify: which mode occurred first; the characteristics of a reverse air pulse on his group D; or the characteristics of an impact on most of his group A. Moreover, Dr. Lee could not always identify both of the events in his mixed mode classifications or say for sure that there was a mixed mode appearance on many of the filters. In addition, Dr. Lee could not identify whether a pattern was caused by a mixed mode event or by a single event, nor could he rule out that the pattern was caused by reverse air flow.

Dr. Lee's opinions were riddled with inadequacies and inconsistencies. It is incomprehensible that the ALJ could rely on such facially flawed testimony or that the majority could sustain the judge. The judge erred in relying on Dr. Lee's opinion and, consequently, his findings in this connection cannot be sustained on the basis of substantial evidence.

(iii). The judge erred in relying on certain expert testimony that was withheld from the Secretary during discovery

Neither the opinion of Dr. Corn regarding accidental causes of AWCs nor the opinion of

Dr. Lee regarding the affect of sprays and scrubber systems on the formation of AWCs were stated during the discovery phase of this litigation. Although expressly asked by the Secretary during the discovery phase of this litigation, Dr. Corn and Dr. Lee responses concerning these matters were either not forthcoming or very cursory. At trial, on direct examination by their counsel, Dr. Corn and Dr. Lee gave in depth testimony concerning these matters. In spite of the Secretary's objection that he was surprised by their testimony and, consequently, prejudiced because he could not adequately cross examine or offer rebuttal evidence, the judge allowed into the record Dr. Corn's testimony regarding accidental causes of AWCs and Dr. Lee's testimony regarding the affect of sprays and scrubber systems on the formation of AWCs.

The discretion of an ALJ to permit the introduction of evidence which is not shared during discovery and to exclude the introduction of evidence which is not shared during discovery is not without limits. Defendant's failure to meet the requirements of Rule 26 should have resulted in the exclusion of the proffered evidence when the Government objected. *See Wright & Miller Federal Practice and Procedure Civil 2d* § 2050 (1994); *see also, Freund v. Fleetwood Enterprises, Inc.*, 956 F.2d 354, 356-59 (1st Cir. 1992); *Jenkins v. Whittaker Corp.*, 785 F.2d 720, 728 (9th Cir. 1986); *Weiss v. Chrysler Motors Corp.*, 515 F.2d 449, 454-57 (2d Cir. 1975); *Allread v. City of Grenada*, 988 F.2d 1425, 1435-36 (5th Cir. 1993). Under the circumstances, as set forth above, it is clear that neither the opinion of Dr. Corn regarding accidental causes of AWCs nor the opinion of Dr. Lee regarding the affect of sprays and scrubber systems on the formation of AWCs was properly disclosed during discovery, in spite of the Secretary's best efforts to ascertain these opinions during the that phase of this litigation. It is equally clear that the Secretary was prejudiced by the surprised he encountered and the accompanying impact that surprise had on his ability to effectively cross examine Dr. Corn and Dr. Lee and to present rebuttal evidence. Permitting Dr. Corn and Dr. Lee's testimony to go into the record when it should have been excluded under Rule 26 was improper. Had Dr. Corn's testimony been excluded, the respondent's suggestion that unintentional conduct affects the occurrence of AWCs would have been, at the very least, significantly weakened. Had Dr. Lee's testimony been excluded, the respondent would not have presented any evidence on the affect of sprays and scrubber systems on the formation of AWCs. To the extent that the judge relied on this testimony in reaching his final conclusion, that conclusion is not properly supported by substantial evidence.

(iv). The judge erred in relying on Dr. Corn's conclusions on accidental causes of AWCs because they lacked scientific foundation

The assertion of Dr. Morton Corn, the respondent's witness, that events associated with collection, handling, and analysis provided a more plausible explanation for AWCs than tampering was not only improperly admitted, it was not made on the basis of scientific experimentation. Further, in connection with Dr. Corn's digital image analysis study, the judge found it was "*complex, confusing, and contradictory*[".] 15 FMSHRC at 1512 (emphasis added). Consequently, to the extent the judge relied Dr. Corn's opinion in this connection to support Dr. Lee's opinions, he erred. For the judge to have relied on Dr. Corn's opinion in this connection to support Dr. Lee's opinions was inconsistent with his rejection of Dr. Corn's digital image analysis

study, upon which Dr. Corn relied in supporting Dr. Lee. Thus, the judge's determination in this connection was not supported by substantial evidence.

(v). The judge erred in accepting the opinion of Dr. Lee over the opinion of Dr. Marple on the effect of sprays and scrubber systems on the formation of AWCs

Initially, the judge erred in accepting Dr. Lee's opinion without adequately articulating his reasons for doing so. A reviewing court "is not compelled to respect" credibility choices "based on an inadequate reason or no reason at all." *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984), quoting *NLRB v. Moore Business Forms, Inc.*, 574 F.2d 835, 843 (5th Cir. 1978). The judge's crediting of Dr. Lee over Dr. Marple was in error. The judge failed to adequately articulate his reasons for crediting Dr. Lee over Dr. Marple and, therefore, his crediting of Dr. Lee can not be sustained. Particularly in light of the serious inconsistencies between Dr. Lee's testimony on the affect of sprays and scrubber systems on the formation of AWCs and the actual affect, as outlined below. *Ona Corp. v. NLRB*, 729 F.2d at 719.

Dr. Lee's testimony regarding the affect of sprays and scrubber systems on the formation of AWCs is unreliable because of his lack of expertise, his failure to make factual observations, and the lack of scientific support for his opinions. Further, the scrubber systems can not explain the sudden decline in AWC appearances on or about March 26 at the Urling mine. On March 19, 1990, MSHA instituted an AWC void code. The void code was issued in response to MSHA's discovery that operators were submitting filters exhibiting white circular areas in the center of the filters -- abnormally white centers -- a phenomenon that was both abnormal and suspicious. The void code was a three-letter code (AWC) which indicated to an operator submitting a respirable dust sample that MSHA would not accept its submitted respirable dust sample to determine whether the operator met the respirable dust standard. In other words, MSHA informed operators that submitted samples were voided because of AWC appearances. Thereafter, MSHA began rejecting submitted respirable dust samples that displayed an abnormally white center. Over all, MSHA issued approximately 5,000 citations to 847 mines and assessed more than \$6.5 million in penalties. Once word of the void code spread throughout the industry, filters with AWCs all but vanished. For example, in the eight months preceding the void code notification date, 58% (36 out of 68) of the samples from three continuous mining units which were not equipped with scrubbers had AWCs while during the eight month period following March 26 of the 65 samples submitted from the same three machines -- which were still not equipped with scrubbers systems -- *none exhibited AWC appearances*. K Stip. No. 94; K Exs. G-544; R-2006A. In light of this uncontradicted evidence it is astonishing that the judge still found that sprays and scrubber systems had an affect on the formation of AWCs. Moreover, this evidence provides compelling proof that it was the institution of the void code and not the sprays and scrubber systems that affected the dramatic reduction in the formation of AWCs. The judge's determination in this regard is unsupported by substantial evidence.

Moreover, the judge's conclusion that Dr. Marple's testimony was inconsistent demonstrates that he did not fully understand Dr. Marple's testimony. In this connection, Dr.

Marple testified that moisture within and on the face of the coal seam could affect the adhesion of the dust particles to the filter. However, Dr. Marple testified that once coal dust was airborne and carried to the filter the dust was not moist and, thus, water scrubbers had no effect on the adhesion of the dust particles to the filter. The judge failed to recognize this important aspect of the testimony and, consequently, his conclusion that Dr. Marple's testimony was inconsistent is simply erroneous and can not be sustained under the substantial evidence test. Dr. Marple's opinions should have been credited over Dr. Lee's opinions, and not doing so was error.

2. The judge erred in failing to consider the optional quartz sampling program

Initially, I reject the judge's conclusion that because the "persons at the [Pittsburgh Health Technology Center] who examined the quartz samples for AWC appearances were not called to testify" it was "impossible" for him to "draw any conclusions from the fact that no appearances on quartz samples were noted or cited by MSHA." 16 FMSHRC at 888. The witness called by the Secretary to present testimony on the results of the optional quartz sampling program at the Pittsburgh Health Technology Center, was Paul Parobeck. Since 1984, Mr. Parobeck had supervised the two individuals at the Pittsburgh Health Technology Center who examined the quartz samples for AWC appearances. Mr. Parobeck observed and reviewed the work of these two individuals, as well as all of the relevant Rochester and Pittsburgh's records.⁸ Therefore, Mr. Parobeck was competent to offer testimony in connection with the results of the optional quartz sampling program at the Pittsburgh Health Technology Center. The judge's determination to the contrary is erroneous.

The judge erred in failing and refusing to consider the results of the optional quartz sampling program at the Urling mine. It is logical to assume that if AWCs were produced on respirable dust samples by inadvertent or unintentional conduct at a given rate, AWCs would also be produced on quartz samples by those same events at a comparable rate. This is so because the quartz samples were collected in the exact same manner and under the exact same circumstances as the respirable dust samples. The critical difference between respirable dust samples and quartz samples is that it was in Rochester and Pittsburgh's interest to achieve low dust levels in the respirable dust sampling program while it was in R&P's interest to achieve high dust levels in the quartz sampling program. Contrary to what one would expect to see if the AWCs were being caused by inadvertent or unintentional conduct, the evidence submitted by the Government established that none of the 75 quartz samples taken by R&P exhibited an abnormal appearance while 40% of the respirable dust samples exhibited an abnormal appearance. This is astonishing evidence and strongly suggests that the respirable dust samples were altered. That the levels of abnormal appearances in the quartz samples were not exhibited at a rate comparable to the levels of abnormal appearances in the respirable dust samples powerfully suggests that the AWCs on the respirable dust samples were not produced by inadvertent or unintentional conduct.

⁸ R&P is the sole owner of Keystone, the operator of the Urling mine. 16 FMSHRC at 858.

The judge reasoned that because the actual quartz samples no longer exist (as a result of the testing process which destroys them) he could not rely on them. While it is true that the actual filters no longer existed because the process of testing the quartz samples destroys them, this fact is insufficient to exclude perhaps the single most powerful piece of evidence of deliberate and intentional conduct in the mine-specific trial. This evidence, enriched by the other evidence and expert testimony, was sufficient to satisfy the Secretary's burden of proof and to establish that the cited AWCs were more likely than not the result of Urling's deliberate and intentional conduct. Urling did not set forth any believable or credible explanation to rebut, counter or explain away this extraordinary evidence.

3. Statistical Evidence

(i). The significance of the void code

On March 19, 1990, MSHA instituted an AWC void code. The void code was issued in response to MSHA's discovery that operators were submitting filters exhibiting white circular areas in the center of the filters -- abnormally white centers -- a phenomenon that was both abnormal and suspicious. The void code was a three-letter code (AWC) which indicated to an operator submitting a respirable dust sample that MSHA would not accept its submitted respirable dust sample to determine whether the operator met the respirable dust standard. In other words, MSHA informed operators that submitted samples were voided because of AWC appearances. Thereafter, MSHA began rejecting submitted respirable dust samples that displayed an abnormally white center. Over all, MSHA issued approximately 5,000 citations to 847 mines and assessed more than \$6.5 million in penalties.

(ii). The judge's determination that the statistical evidence does not establish that AWCs resulted from intentional tampering which ceased after the institution of the void code is not supported by substantial evidence

The mountain of statistical evidence in this case, when combined with the other evidence and the testimony of expert witnesses, points to one inevitable and unavoidable conclusion, and the Secretary's brief put it best when it stated: "*Something dramatic happened on or about March 26, 1990*" and it "defies human credulity and common sense to conclude, as the judge did, that [the statistical evidence does] not constitute compelling support for the Secretary's explanation of why AWCs routinely occurred and then abruptly ceased to occur." *Id.* at 39.

In brief, the statistical evidence establishes that after the institution of the void code the number of voided filters plummeted. Specifically, the evidence demonstrates that after the institution of the void code the number of voided filters sent on to Mr. Thaxton from the Government's Pittsburgh Health Technology Center dropped from an average of 6.5% to an average of less than 1%. Further, the evidence shows that the drop in the rate of samples exhibiting AWCs submitted by all of Rochester and Pittsburgh's mines was even more dramatic: cassettes submitted before March 26, 1990, and manufactured during a nine day period,

manifested AWCs at a rate of 29% while cassettes manufactured during that same period but submitted after March 26, 1990, manifested AWCs at a rate of 1%. The most dramatic drop in the rate of samples exhibiting AWCs, however, was at the Urling mine: cassettes submitted before March 26, 1990, and manufactured during a nine day period, manifested AWCs at a rate of 25% while cassettes manufactured during that same period but submitted after March 26, 1990, manifested AWCs at a rate of 0%. Moreover, R&P's logbooks established that: (1) when Urling used cassettes from the 300,000 series before March 26, 1990, approximately 40% (66 of 165) had AWCs; and (2) when Urling used cassettes from the 300,000 series after March 26, 1990, less than 2% (1 of 59) had AWCs. This brief sampling of the evidence demonstrates quite clearly that it was the void code, and not a miraculous convergence of unrelated natural and unnatural phenomenon that caused the precipitous drop in the rate of AWCs. It stretches the bounds of the human imagination to suggest, as the respondents and intervenors have, that changes in the mine environments; changes in the filter manufacturing process, and changes in the handing of filter cassettes all occurred on or about the third week of March 1990 and this strange and miraculous convergence of events is what caused the AWC rate to plummet. To ask us to believe that is to ask us to believe that elephants fly. The judge erred in discounting the significance of the statistical evidence and, consequently, his decisions are not supported by substantial evidence.

(iii). Contrary to the judge's determination, bimonthly sampling does not merely reflect how operators carry out dust sampling

The evidence established that the samples from the Urling mine were submitted at varying time intervals and were not submitted on a strict and regular bimonthly interval. Consequently, contrary to the judge's determination, bimonthly sampling does not merely reflect how operators carry out dust sampling. Further, the manipulation of the evidence into bimonthly groupings by the respondents, especially the March 1 to April 30, 1990 grouping, masks the significance of the March 26 date by smoothing out the variations in the AWCs rates during that critical time period. Thus the judge's erroneous determination that the samples at Urling were submitted on a strict and regular bimonthly interval is unsupported by substantial evidence. Further, viewing the statistics in a bimonthly format caused the judge to erroneously discount the statistical evidence. As set forth above, the sudden drop in the occurrences of AWCs at the Urling mine was simply astonishing. Obviously what happened here was that the defendant, having been caught, saw to it that the illegal acts were stopped. The judge's discounting of this evidence is similarly mind boggling. Moreover, the judge's determination is simply not supported by substantial evidence.

Contrary to the judge's determination, the evidence shows that March 26, 1990, is the date that Rochester and Pittsburgh's Environmental Safety Department personnel became aware of the void code. Specifically, Mr. Donald Eget, supervisor of the Environmental Safety Department ("ESD"), testified that he knew little concerning the details of MSHA's investigation in February and March of 1990. All of Mr. Eget's information was second hand and he did not recall receiving any details in connection with MSHA and the United States Attorney's investigation of tampering at Rochester and Pittsburgh ("R&P"). Mr. Eget was unfamiliar with the concept of AWCs prior to the void code notification. Upon receipt of the void code Mr. Eget called MSHA

for an explanation of the code. Mr. Eget's assistant, Mr. Houck, had less information than Mr. Eget. Most importantly, after Mr. Eget called MSHA for an explanation of the code, the flow of AWCs from ESD came to an abrupt halt.

4. The judge erred in his conclusions regarding filter-to-foil distances

The judge's conclusion that the filters produced before February 13, 1990, were more likely to have a short filter-to-foil distances of 2mm, or less than those produced after February 13, 1990, was based on a woefully inadequate sample size. The evidence establishes that fewer than 100 measurements (out of 200,000 filters) for the before period were taken and more than 1,700 measurements (out of 200,000 filters) for the after group were taken. Further, within each group there were widely varying measurements, with a substantial percentage of short filter-to-foil distances measured in the "before" group. Moreover, the comparisons between the two groups were compromised by data from the more than 4,000 measurements of filter-to-foil distance of filters that were manufactured between October 25, 1990, and February 15, 1992, a period well after the institution of AWC void code. Even so, those 4,000 measurements indicated that 50% of the filters being manufactured during that period had short filter-to-foil distances yet there were almost no AWCs from those groups of filters, not what should be expected if filter-to-foil distances affected the formation of AWCs.

Moreover, Dr. Marple testified that some taunt filters might not move even if they had a short filter-to-foil distance. Further, Dr. Marple found that filter-to-foil distance and floppiness were not likely to affect the formation of AWCs because of the overriding affect of the threshold velocity of the dust on each filter. The only basis provided by respondents' experts for the assertion that filter-to-foil distance affected the probability of AWCs occurring was "common sense." CI 4756, 5004, 5273, 6222, 6831, 7697, and 7897. To the contrary, if anything, common sense leads to an opposite conclusion. Specifically, as noted above, out of the 4,000 measurements of filter-to-foil distance of filters that were manufactured between October 25, 1990, and February 15, 1992, 50% had short foil-to-filter distances. However, overall only 2% of cited AWCs came from this group of filters. If filter-to-foil distance affects the occurrence rate of AWCs common sense would dictate that AWCs would occur at a higher rate than that which occurred. The only fact that would explain why the actual occurrence rate was not at the expected rate is the *institution of the void code*. Consequently, the judge erred in relying on the "common sense" theory posited by respondents' experts. Using "common sense" is a laudatory thing to do; however, in these cases, along with common sense, legal principles must prevail. The defendants, rather than using common sense used common illegality to infect we know not how many miners with silicosis.

Moreover, and perhaps most importantly, Rochester and Pittsburgh's ("R&P") logbooks established that: (1) when Urling used cassettes from the 300,000 series before March 26, 1990, approximately 40% (66 of 165) had AWCs; and (2) when Urling used cassettes from the 300,000 series after March 26, 1990, less than 2% (1 of 59) had AWCs. The AWC rate for the cassettes the judge held were more susceptible to AWC because of manufacturing anomalies was actually

lower than it was for cassettes manufacture on other dates -- again, the exact opposite of that expected if manufacturing anomalies accounted for AWC susceptibility. The overwhelming evidence demonstrates that cassettes submitted before March 26, 1990, and manufactured during a nine day period manifested AWCs at a rate of 25% at Urling and 29% at other R&P mines while cassettes manufactured during that same period but submitted after March 26, 1990, manifested AWCs at a rate of **1% at Rochester and Pittsburgh mines and 0% at the Urling mine!** Again, the only fact that would explain this phenomenon is the *institution of the void code and that the offending companies were caught*. Therefore, the judge's determination that filter-to-foil distances were likely factors in the occurrences of AWCs is not supported by substantial evidence and cannot be sustained.

5. The judge's determination that handling variables affected the AWCs occurrence rate is not supported by substantial evidence

The evidence on "handling variables" does not support the judge's conclusions that the rough handling of the equipment contributed to the occurrence of AWCs. The evidence reflects that only three individuals at R&P's Environmental Safety Department ("ESD") handled Urling dust filters -- Messrs. Eget, Houck, and Snyder. Both Mr. Eget and Mr. Houck admitted that they did not change their handling practices immediately after the void code was instituted. Although Mr. Snyder testified that he made a few changes in the manner in which he handled the sampling units, he could not identify the point in time at which he made the changes. However, he stated that *he did not make any changes in the manner in which he transported the sampling devices until after January 1992, 21 months after the institution of the void code!* Mr. Snyder testified further that he first received instructions on specific modifications he should make in his handling practices after January 1992. Consequently, no reasonable inference can be drawn from this evidence to support a finding that "handling variables" contributed to the precipitous fall in AWCs after the institution of the void code. In fact, the evidence demonstrates that handling practices did not change until almost two years after the institution of the void code.

The judge also relies on the fact that Mr. Eget, admittedly the roughest handler of the sampling devices, was absent between April 9, 1990 and May 10, 1990. However, Mr. Eget handled the devices as *roughly after May 10, 1990 as he had before April 9, 1990*. K 2179, 2362, and 2993. Consequently, the virtual cessation of AWCs after March 26, 1990, can not be explained by the absence of Mr. Eget because he continued to handle them in this same manner until his retirement in January 1992 -- *21 months after the dramatic decline in the AWCs rate*. The findings by the judge in this connection are not supported by substantial evidence and, thus, can not stand.

6. The judge's credibility findings in connection with the ESD personnel can not be sustained.

Where a judge's credibility determinations are based in essence not upon the demeanor of the witnesses, but rather upon an analysis of their testimony and other record evidence, as here,

such determinations are not entitled to special deference. *Consolidation Coal Co. v. NLRB*, 669 F.2d 482, 488 (7th Cir. 1982). Further, material evidence cannot, as the judge did here, be disregarded or eliminated by the causal expedient of crediting or discrediting witnesses. *Medline Industries v. NLRB*, 593 F.2d 788, 795 (7th Cir. 1979). Moreover, the judge's credibility determinations are based on an illogical assumption -- that people do not violate the law because they are aware of criminal and civil penalties. As extraordinary as it may seem, this is what the ALJ said in his opinion speaking of the credibility of Eget and Houck:

Both Eget and Houck knew that tampering was illegal. Eget at least was aware that such acts could result (and had resulted) in criminal sanctions Relying on the absence of any adequate motive for tampering, and the strong disincentive provided by their knowledge of possible sanctions for tampering, I accept as truthful the statements of each of them that he did not tamper with compliance respirable dust samples submitted to MSHA. . . . *I consider these credibility determinations to be of overriding importance in this decision.*

16 FMSHRC at 902-903 (emphasis added).

Jails are full of people who are "aware that [their] acts could result (and had resulted) in criminal sanctions." *Id.* at 902. The judge's credibility determinations are not entitled to weight because he based them on unfounded considerations. *Ona Corp.*, 729 F.2d at 719; *Omni International Hotels v. NLRB*, 606 F.2d 570 573; *Breeden*, 493 F.2d at 1010; *Victor Products Corp v. NLRB.*, 208 F.2d 834 839 (D.C. Cir. 1953). As a result, the judge's credibility determinations are not legally sustainable. In my 40 years as a member of the bar I have never come across as ludicrous a statement as this trial judge made when he said:

Both Eget and Houck knew that tampering was illegal. Eget at least was aware that such acts could result (and had resulted) in criminal sanctions Relying on the absence of any adequate motive for tampering, and the strong disincentive provided by their knowledge of possible sanctions for tampering, I accept as truthful the statements of each of them that he did not tamper with compliance respirable dust samples submitted to MSHA. . . . *I consider these credibility determinations to be of overriding importance in this decision.*

Id. (emphasis added).

7. The judge erred in refusing to admit criminal evidence in the common-issues trial

In the Secretary's Statement and Introduction to Offers of Proof Regarding Potential Testimony of Pysher, *et al.*, he offered evidence of criminal tampering by other operators to demonstrate that tampering was a quick and easy way to remove dust; that tampering had

occurred; and that tampering was not an isolated event. Specifically, the Secretary stated:

Attached are Offers of Proof with regard to five witnesses who have observed or participated in tampering with respirable dust samples. These Offers set forth the testimony these witnesses would present if they were allowed to testify at trial.

With respect to the five proposed witnesses, they would be expected to testify that deliberate tampering and falsification of samples were, in fact, activities engaged in by mine operators who submitted AWCs. These witnesses could establish that deliberate behavior was used to mislead MSHA or misrepresent the actual level of dust concentration at mines and they could describe such deliberate acts either in which they participated or which they personally observed. These witnesses could testify as to why samples were deliberately altered or fraudulently manufactured and they could testify how easily such acts were carried out. These witnesses can rebut the operators' experts' testimony of possible or speculatively potential causes of AWCs by showing what actually did occur at many mines. This testimony is not intended to impute criminal conduct to all operators; rather, it is to establish that such behavior was not isolated, inconsequential or remote. This testimony and related documentary evidence would prove that deliberate tampering is a reasonably likely cause of AWCs and that such likelihood must be weighed against the explanations offered by the operators in this proceeding. These people participated in or observed deliberate attempts to create altered or fraudulent samples at mines which submitted more than 400 of the cited AWCs. Furthermore, the testimony and exhibits related to these witnesses will corroborate the opinions of Robert Thaxton and Dr. Virgil Marple that deliberate behavior created altered samples.

Statement and Introduction to Offers of Proof Regarding Potential Testimony of Pysher, *et al.* The excluded criminal evidence was clearly relevant in the dust cases. Its probative value was directly related to the issue of how AWCs could occur and, in fact, that they had occurred in the past. In light of the limited purpose for which the evidence was introduced the evidence posed little, if any, potential for any prejudicial impact. This is particularly so given that these proceedings were held before a trial judge.

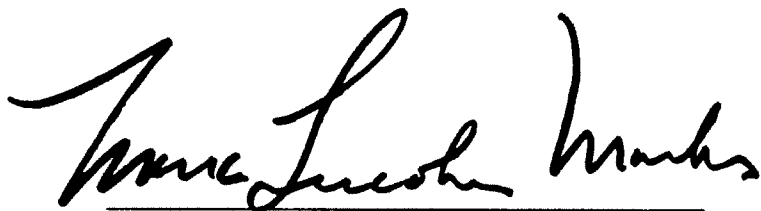
Because the probative value of the proffered evidence outweighed any potential prejudicial impact it should have been admitted. Respondent complained that the evidence was character evidence -- i.e. offered to show that mine operators were predisposed to intentionally tamper because they had done so in the past. I reject this assertion even though it is a well known fact that such was done in the past (and unfortunately continues from time to time even today). As set forth above, the evidence was patently not offered for this purpose. Further, while the proffered

criminal evidence was also relevant to issues of motive and opportunity to tamper, evidence submitted for these two purpose come under the exceptions to the exclusion of character evidence contained in Rule 404(b). Thus, submitted for this limited purpose, the evidence was clearly relevant to the ultimate question of whether AWCs were more likely than not the result of intentional conduct.

Finally, inasmuch as the Secretary specifically stated that the evidence was not submitted for the purpose of proving that because one operator tampered the respondents tampered and it was heard by an experience trial judge, its probative value outweighed any potential prejudicial effect. Inasmuch as it was offered into evidence for this limited purpose, it was improperly excluded and the judge erred in not considering this evidence. As such, the judge's decisions are not supported by substantial evidence because he failed to admit and weigh this probative evidence. *Wyoming Fuel*, 16 FMSHRC at 1627; *see also, Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994), *citing Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-89 (1951). As set forth above, a judge must analyze and weigh the relevant testimony, make appropriate findings, and explain the reasons for his decision. *Wyoming Fuel*, 16 FMSHRC at 1627; *Mid-Continent*, 16 FMSHRC at 1222, *citing The Anaconda Co.*, 3 FMSHRC 299, 299-300 (February 1981). The judge failed to do this and, as a result, his findings cannot be affirmed.

VI. Conclusion

Unfortunately, we can not tell and will never know how many men and women were infected with black lung disease as a result of the illegal actions of the company defendants in these cases. Considering the length of time their illegal actions went on, the number could well be in the many thousands. Hopefully, the Government of the United States will in the end prevail, in spite of the insensitive majority decision in this case and for whatever little satisfaction that gives those thousands of people who have been harmed by the defendants' illegal acts, the right thing will have been done by them.



Marc Lincoln Marks, Commissioner

Distribution

Jerald S. Feingold, Esq.
Stephen D. Turow, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

R. Henry Moore, Esq.
Buchanan Ingersoll
USX Tower, 57th Floor
600 Grant Street
Pittsburgh, PA 15219

Barry A. Woodbrey, Jr., Esq.
United Mine Workers of America
900 15th Street, N.W.
Washington, D.C. 20005

Laura E. Beverage, Esq.
Jackson & Kelly
1660 Lincoln St.
Denver, CO 80264

Timothy M. Biddle, Esq.
Crowell & Moring
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004

Michael T. Heenan, Esq.
Smith, Heenan & Althen
1110 Vermont Avenue, N.W.
Washington, D.C. 20005

John Palmer, Esq.
Robinson & McElwee
P.O. Box 1791
Charleston, WV 25326

H. Thomas Wells, Esq.
Maynard, Cooper, Frierson & Gale
1901 6th Avenue, N.W.
Suite 2400 AmSouth/Harbert Plaza
Birmingham, AL 35203