FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 21, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. SE 2005-51
JIM WALTER RESOURCES, INC.	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

DECISION

BY THE COMMISSION:

This penalty proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act" or "Act"), arises from a citation alleging a violation of 30 C.F.R. § 75.1725(c).[1] The Department of Labor's Mine Safety and Heath Administration ("MSHA") issued the citation to Jim Walter Resources, Inc. ("JWR") following an investigation into a fatality. Administrative Law Judge Avram Weisberger affirmed the citation, determined that it was significant and substantial ("S&S"), and imposed a penalty of $32,500 for the violation. 28 FMSHRC 134 (Mar. 2006) (ALJ). JWR filed a petition for discretionary review, which the Commission granted. For the reasons stated herein, we affirm the judge's decision.

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[1] Section 75.1725(c) states:

> Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments.

30 C.F.R. § 75.1725(c).

I.
Factual and Procedural Background

JWR operates the No. 7 Mine, an underground coal mine in Brookwood, Alabama. 28 FMSHRC at 134. Electrically-powered conveyor belts transport coal through the mine to the surface, where rock is separated from coal, which is further processed. *Id.* The belts stand about 45 to 60 inches above the mine floor. Tr. 128, 188. Initially, at the face, coal is dumped onto the North Main belt, which goes to the North Main chute, or header, at the outby end of the belt. 28 FMSHRC at 134. The chute is 40 inches wide and 20 inches long. Tr. 186-87. From the chute, the coal falls onto the West A belt.[2] 28 FMSHRC at 134. While on that belt, the coal goes through another chute at the end of the West A belt and is dumped onto the Mother belt, which transports the coal to the surface of the mine. *Id.*; Tr. 286-87. On the surface, the coal goes into a bunker where skips pick up the coal and carry it into the preparation plant where the rock is separated from the coal. Then the rock is placed on a refuse belt which carries the rock outside the plant onto a refuse pile. Tr. 286-87. A radial stacker is used to distribute the refuse evenly on the pile. Tr. 287.

At the intersection of the North Main belt and West A belt, there is a series of buttons, or switches, each of which controls power to one of the belts.[3] 28 FMSHRC at 134. In addition, a television camera is stationed on the east side of that intersection to transmit pictures of the area, including the North Main discharge chute, to the control office on the surface. *Id.* at 135. Catwalks parallel either side of the North Main belt, and there is a "crossover" on the West A belt in front of the discharge chute. *See* JWR Ex. 1-A (attached).

On April 22, 2004, evening-shift laborer Gary Keeton was assigned to the area around the West A belt and the North Main belt. 28 FMSHRC at 135. His duties included keeping the surfaces around the belts clean of coal spillage and clearing any obstructions from the chutes. *Id.* It was not unusual for material to clog the chutes, and the North Main chute generally became clogged more frequently than the West A chute, which fed the Mother belt. *Id.* One way to remove rock that was blocking a chute was to use a steel bar to pry the rock loose. *Id.* at 137. At around 10:35 p.m., miner Carlos Maynor saw Keeton washing the discharge chute at the West A belt roller. *Id.* at 135.

At 10:57 p.m., power to the West A and North Main belts was cut off. *Id.* From 10:57:22 to 11:26 p.m., electric power to the North Main belt was turned off by one of the

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[2] In the proceedings below, the West A belt was sometimes referred to as the West Main belt.

[3] Attached to the decision is a schematic drawing of the layout of the conveyor belts, chutes, and the buttons or switches. Switches with an R designation control the West A belt, and switches with a B designation control the North Main belt. 28 FMSHRC at 134 n.1. The drawing was used as an exhibit at trial and was designated as JWR Ex. 1-A.

switches at the intersection.[4] *Id.* The log also showed that, for 32 seconds, from 10:57:38 p.m. to 10:58:10 p.m., power to the West A belt was turned off. *Id.* The computer log recorded these times based on a signal from one of the remote switches that controlled power to the belts, but the log did not identify which of the switches was used to deactivate the belts. *Id.* *See* JWR Ex. 1-A. Also at approximately 10:57 p.m., an individual in the mine control office on the surface observed a transmission from the North Main intersection on the television screen that showed the boots of an unidentified figure on the east catwalk in front of the chute on the North Main belt. 28 FMSHRC at 135 (citing Tr. 212).

Ned Martin worked as a laborer performing the same duties as Keeton on the owl shift, which followed Keeton's shift. *Id.* Generally, when Martin arrived at the beginning of his shift, he would meet with Keeton near the west catwalk at the North Main chute, because a bench was located there where they kept their lunch boxes. Tr. 156-57. When Martin arrived at the chute on the night of April 22, he observed that the West A belt was running but that the North Main belt was not. 28 FMSHRC at 135. Martin looked for Keeton but did not see him. Tr. 157-58. He looked up the chute on the North Main belt and saw a rock, about three to four inches in diameter that was rounded and shiny. 28 FMSHRC at 135, 138. Someone from the control office called him and asked him why the North Main belt was not running, and Martin turned the power back on. Tr. 157-58. He did not try to dislodge the rock from the chute, but sometime later he observed that the rock was no longer in the chute. 28 FMSHRC at 135.

Keeton remained unaccounted for, and a comprehensive search was initiated. Gov't Ex. 4 at 3-4. At around 4:00 a.m., his body was found on the surface of the mine. 28 FMSHRC at 136. His body was located in a bunker where rock that had been separated from coal in the coal preparation plant was dumped after leaving the plant. *Id.* & n.2. Also on the surface, a drill steel bar, similar to one used by Keeton to unclog the chutes, was found inside the preparation plant in the duct work above the rotary breaker. *Id.* at 136. During MSHA's investigation into the accident, a ladder was found on the east catwalk about two feet away from the chute leaning against the frame of the conveyor belt. *Id.*; Tr. 193-95.

Following its investigation, MSHA issued a citation alleging a violation of 30 C.F.R. § 75.1725(c). Gov't Ex. 7. The citation stated in pertinent part:

> [M]aintenance was being conducted on April 22, 2004 between 10:57 PM and 11:15 PM at the North Main Belt Header and West "A" belt conveyor without removing power and blocking the West "A" belt from motion. As a result, a miner contacted the moving belt conveyor while attempting to perform assigned belt maintenance, that included removing blockages, and was fatally injured as he contacted the moving belt or as he was subsequently

[4] The power was not turned back on until 11:26 p.m. when Keeton's replacement, Ned Martin, came to the area at the start of his shift. Tr. 157-58.

transported on the belt 9000 feet through belt transfers and a rock breaker to the surface mine refuse pile.

Id. at 1. The violation was designated S&S. *Id.*

JWR filed a notice of contest regarding MSHA's proposed penalty assessment, and the case was assigned to a judge. Prior to the hearing, the parties entered into joint stipulations of fact that formed part of the record in the proceeding.

On March 9, 2006, the judge issued a decision in which he affirmed the violation alleged in the citation. The judge found that, based on the existence of the "*combination of all the facts* relied on by the Secretary," it was reasonable to infer that Keeton turned off power to the belts about 10:57 p.m. and then started to use a steel bar to remove a rock or rocks that were stuck in the North Main chute. 28 FMSHRC at 138 (emphasis in original). The judge further found that power at the West A belt was off only briefly, indicating that power was on and the belt was not blocked against hazards when Keeton was trying to clear the chute. *Id.* at 139. In so concluding, the judge stated that JWR "has not set forth any plausible theory based upon any facts in the record to support a reasonable inference that Keeton was not involved in clearing the chute." *Id.* at 138-39. The judge also rejected JWR's argument that, even if Keeton had been trying to remove a rock from the chute, the work did not constitute "maintenance" within the meaning of the regulation. *Id.* at 139-40. Relying on the criteria in *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), the judge also determined that the violation was S&S. *Id.* at 140-41. In assessing a penalty for the violation, the judge examined the penalty criteria and concluded that a penalty of $32,500 was appropriate. *Id.* at 141-42.

II.
Disposition

JWR argues that the judge's findings that supported his inference that Keeton was performing maintenance work without removing power from the West A belt and blocking it against motion are not supported by substantial evidence. PDR at 3; JWR Br. at 6-8, 18-19. JWR attacks the inferences drawn by the judge from the facts because they are not "reasonable." *Id.* at 9-14. JWR argues that the judge erred by placing the burden of proof on it to show what happened to Keeton. *Id.* at 14-17. JWR challenges the judge's conclusion that unclogging or clearing a chute is "maintenance" as contemplated by section 75.1725(c). *Id.* at 17. JWR argues that the present case is distinguishable from the decision in *Walker Stone Co.*, 19 FMSHRC 48 (Jan. 1997), upon which the judge relied. *Id.* at 17-18. JWR also asserts that the Secretary is seeking to enforce a new definition of "maintenance" to include unclogging a chute, without giving fair notice of the interpretation. *Id.* at 19-22.

JWR further argues that the judge's S&S determination is incorrect because there was no violation and that there was a lack of evidence to support the second, third, and fourth elements of the *Mathies* test. *Id.* at 22-23. With regard to the penalty, JWR notes that this was its first

violation of the regulation during the two-year period prior to the citation and maintains that the judge erred when he concluded that JWR's negligence level was "moderate." *Id.* at 23-25.

In response, the Secretary argues that the judge's finding that JWR violated section 75.1725(c) is supported by substantial evidence. S. Br. at 9-10. The Secretary further argues that the judge's inference that Keeton was trying to unclog the North Main chute when he came into contact with the West A belt was reasonable. *Id.* at 11-19. The Secretary disagrees that the judge required JWR to prove facts that would support an alternate theory to the inference that Keeton was involved in clearing the chute. *Id.* at 19-22. The Secretary asserts that, based on its plain meaning, section 75.1725(c) applies to dislodging rocks from the chute and rejects JWR's argument that it did not have notice of the regulation's terms. *Id.* at 23-30. The Secretary states that substantial evidence supports the judge's S&S determination. *Id.* at 30-32. Finally, the Secretary argues that the judge properly assessed the penalty, noting that the record supported the judge's finding of moderate negligence. *Id.* at 32-34.

The facts in this proceeding are generally not in dispute; however, the inferences drawn from those facts are. Further, JWR challenges the judge's reading of section 75.1725(c), which it is charged with violating. We address first the meaning of the regulation.

A. Meaning of section 75.1725(c)

Section 75.1725(c) provides that "repairs or maintenance shall not be performed on machinery" until the power is off and the machinery is blocked against motion. Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). It is only when the meaning is ambiguous that deference to the Secretary's interpretation is accorded. *See Udall v. Tallman*, 380 U.S. 1, 16-17 (1965) (finding that reviewing body must "look to the administrative construction of the regulation if the meaning of the words used is in doubt") (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945)).

As always, the "language of a regulation . . . is the starting point for its interpretation." *Dyer v. United States*, 832 F.2d at 1066 (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). In the absence of a statutory definition or a technical usage of a term, the Commission applies its ordinary meaning. *See, e.g., Thompson Bros. Coal Co.*, 6 FMSHRC 2091, 2096 (Sept. 1984). "Repair" means "to restore by replacing a part or putting together what is torn or broken: fix, mend . . . to restore to a sound or healthy state: renew, revivify . . . ." *Webster's Third New Int'l Dictionary, Unabridged* 1923 (1986). "Maintenance" has been defined as "the labor of keeping something (as buildings or equipment) in a state of repair or efficiency: care, upkeep . . ." and "[p]roper care, repair, and keeping in good order." *Walker Stone Co.*, 19 FMSHRC 48, 51 (Jan. 1997), quoting *Webster's* at 1362, *aff'd*, 156 F.3d

1076 (10th Cir. 1998); *see* Am. Geological Inst., *Dictionary of Mining, Mineral, and Related Terms* 328 (2d ed. 1997). *See also Sedgman*, 28 FMSHRC 322, 329 (June 2006) (in reading 30 C.F.R. § 77.200, which requires that all mine structures "shall be maintained in good repair to prevent accidents," the Commission applied the ordinary meaning to "maintain," in the absence of a technical usage).

The judge properly relied on the Commission's decision in *Walker Stone* in concluding that Keeton's work involving clearing obstructions from the chute was repair work or maintenance within the meaning of section 75.1725(c). In *Walker Stone*, the Commission concluded that the "repair or maintenance" language in a similarly worded regulation[5] "clearly and unambiguously reaches the facts presented in this case, i.e., the breakup and removal of rocks clogging the crusher." 19 FMSHRC at 51. There, the equipment at issue was a rock crusher at a quarry that was fed by a chute or hopper. When a rock became lodged inside the crusher, it prevented the crusher from operating until the rock was removed. *Id.* at 49. While there are factual distinctions between the crusher in *Walker Stone* and the coal chute at JWR's mine, the Commission's rationale in applying the regulation in *Walker Stone* is highly relevant to the instant case.

As the Commission explained in *Walker Stone*, "[I]t is undisputed that the obstructing rock caused the crusher's drive motor to stall, rendering the crusher defective or inoperable until the rock was removed. . . . In our view, the removal of rock to restore the crusher to working condition is clearly covered by the broad phrase 'repairs or maintenance of machinery or equipment.'" *Id.* at 51. The Commission's rationale as to why freeing a rock from the crusher was "repair or maintenance" within the scope of the regulation is persuasive. *See also Sec'y of Labor v. Ohio Valley Coal Co.*, 359 F.3d 531, 535-36 (D.C. Cir. 2004) (where the court held that section 75.1725(c) broadly applied to a miner's assessment of a mechanical problem with a running conveyor belt because the assessment was part of the task of keeping equipment in a state of repair).

In sum, we rely on the plain meaning of the "repair or maintenance" language in section 75.1725(c). Moreover, the Commission's *application* of the repair or maintenance language in an analogous regulation to a similar piece of equipment in *Walker Stone* is controlling here. Therefore, we reject JWR's argument that section 75.1725(c) does not apply to clearing the chute on the North Main belt.[6]

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[5] The regulation at issue in *Walker Stone*, 30 C.F.R. § 56.14105, applies to surface mining equipment at metal and nonmetal mines and states, "[r]epairs or maintenance of machinery or equipment shall be performed only after the power is off, and the machinery or equipment blocked against hazardous motion."

[6] Because we conclude that the meaning of the standard is clear from the regulation's plain language, it follows that the standard provided the operator with adequate notice of its requirements. *See Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997) (holding that

B. Whether a violation of section 75.1725(c) occurred

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

The Commission has held that "the substantial evidence standard may be met by reasonable inferences drawn from indirect evidence." *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984). The Commission has emphasized that inferences drawn by the judge are "permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred." *Id.* Finally, the Commission has noted, "'The possibility of drawing either of the two inconsistent inferences from the evidence [does] not prevent [an agency] from drawing one of them . . . .'" *Id.* (quoting *NLRB v. Nevada Consolidated Copper Corp.*, 316 U.S. 105, 106 (1942)).

The Secretary's theory of violation in the case is built on the following allegations: between 10:57 p.m. and 11:15 p.m., Keeton was performing maintenance work at the North Main and West A belts that included removing blockages from the North Main chute. The Secretary further maintains that Keeton attempted to unclog the chute without removing power and blocking the West A belt from motion. As a result, the Secretary concludes that Keeton was fatally injured as he contacted the moving belt or as he was subsequently transported out of the mine on the moving belt. 28 FMSHRC at 136; Gov't Ex. 7.

In evaluating the Secretary's case, the judge considered a number of facts that were based on record testimony and evidence, as well as the stipulations entered into by the parties. The judge enumerated nine facts that he considered as support for the Secretary's position that section 75.1725(c) was violated. 28 FMSHRC at 136-37. Thus, the judge initially found that, on April 22, 2004,[7] Keeton was the only evening shift miner assigned to the North Main and West A belts

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adequate notice is provided by unambiguous regulation). Therefore, we reject JWR's argument, Br. at 19-22, that it did not have fair notice of the regulation's application to clearing obstructions from the chute.

[7] JWR correctly notes that several of the judge's references in his findings to "April 23" should be to "April 22." JWR Br. at 8. *See* 28 FMSHRC at 136-37. In addition, the reference in the judge's decision, 28 FMSHRC at 138, as to when the drill steel bar was found on the surface

and that among his duties was clearing any obstructions from the chute that dumped coal from the North Main belt to the West A belt.[8] *Id.* Further, there was testimony from another laborer, Ned Martin, that the chutes on the belts can become clogged and that the North Main chute became clogged more frequently than the West A chute. *Id.* at 137. The judge also found that, when Martin arrived for work on April 22, he saw that the North Main belt was not running and that he observed a large round rock in the top of the chute and that the rock appeared shiny, as if it had been smoothed off. *Id.* Martin also testified that one way to remove a rock obstructing a chute is to use a steel bar to pry it loose. *Id.* The judge also found that, on April 23, at about the same time at which Keeton's body was found, a steel bar similar to the one Keeton used to pry rocks loose from the chute was found on the surface in the preparation plant. *Id.* & n.4.

The judge noted further that Martin testified that, although miners are not allowed to climb onto a belt to clear a chute, he has done so by using a bar to dislodge a rock from the chute while standing on the West A belt below. 28 FMSHRC at 137. The judge held that, during MSHA's investigation, it was determined that a television camera was transmitting pictures from the area where Keeton was working to the control office, and that at 10:57 p.m. the screen showed an unidentified figure on the catwalk in the front of the North Main chute. *Id.* Further, the judge found that at 10:57:38 p.m., power was turned off to the North Main belt and stayed off for about one half hour, and for approximately thirty seconds power was turned off to the West A belt. *Id.* Finally, the judge noted that, at 4:23 a.m. on April 23, Keeton's body was found on the surface in a pile of rocks that had been conveyed out of the mine. *Id.*

Substantial, largely uncontradicted, record evidence fully supports these findings. JWR challenges several of the facts that the judge relied on. JWR Br. at 6-8. However, we conclude that those challenges lack merit, because the facts that the judge relied on in drawing in his inferences all have record support.[9]

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should be "April 23," rather than "April 24." Tr. 213.

[8] JWR asserts that the judge's finding that it was one of Keeton's duties to clear obstructions from the North Main chute is not supported by the record because Ned Martin's testimony, upon which this finding was based, did not refer to the belt in its configuration at the time of the accident. JWR Br. at 8 (citing Tr. 144-45). However, Martin identified the configuration of the belts and chutes from a picture that was taken just after the accident as being an accurate depiction of the area about which he was testifying. Tr. 143. Thus, there is nothing in Martin's testimony that would indicate that it referred to a changed or more recent belt configuration. In any event, as the Secretary notes, Br. at 11 n.1, the parties stipulated that one of Keeton's assigned tasks "included clearing any obstruction from the North Main belt head roller chute at the West A belt." Jt. Stip. 13.

[9] JWR claims that one of the "facts" relied upon by the judge in drawing his inference — that "the West A belt was not blocked against motion" — is unsupported by the record. JWR Br. at 6. This argument misses the mark. This aspect of the judge's decision is an inference drawn

Based on these facts, the judge concluded that it was "reasonable to infer" that Keeton turned off the power to the belts at about 10:57 p.m. and then started to use a steel bar to remove a rock that was stuck in the North Main chute. 28 FMSHRC at 138-39. The judge further concluded that, although Keeton had removed power from the North Main belt with the remote control button, power was only removed from the West A belt for a brief period, and the belt remained in motion and had not been blocked during the relevant period. *Id.* at 139.

While it is possible that other inferences could have been drawn from the facts surrounding Keeton and his fatal accident on April 22, it is for the trier of fact to decide among reasonable inferences. Moreover, it is not necessary that the inference drawn by the judge be more likely correct than other permissible inferences. *See generally* 9A Wright & Miller, *Federal Practice and Procedure* § 2528 (2d ed. 1995). "In cases where more than one reasonable inference could have been drawn from the record, it is for the trier of fact to decide between those inferences." *Sec'y of Labor on behalf of Jackson v. Mountain Top Trucking Co.*, 23 FMSHRC 1230, 1236 (Nov. 2001). *See Enlow Fork Mining Co.*, 19 FMSHRC 5, 13 n.10 (Jan. 1997) ("[T]he possibility that two inconsistent conclusions may be drawn from the evidence does not mean that the [fact finder's] findings are unsupported by substantial evidence considering the record as a whole.") (quoting *NLRB v. Vincent Brass & Aluminum Co.*, 731 F. 2d 564, 567 (8th Cir. 1984)). We conclude that the judge's inferences are reasonable and rationally connected to the facts on which the judge based them.[10] Therefore, we do not disturb them.[11]

Before the judge, JWR argued that there was no evidence that Keeton was trying to remove a rock from the chute; that there was no spillage around the North Main belt that would have indicated the chute was clogged; that the rock that Ned Martin saw in the chute moved out of the chute when power was restored to the North Main belt, indicating that the rock had not been obstructing the chute; and that there was no evidence establishing that the steel bar found on

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from facts, was identified as such by the judge (28 FMSHRC at 136), and was not included in the factual statements supporting his inferences. *See id.* at 136-37. Thus, as an inference, it should be reviewed under a reasonableness standard. *Mid-Continent Res.*, 6 FMSHRC at 1138.

[10] JWR repeatedly argues that there is an absence of direct evidence supporting the judge's inferences, including that Keeton was performing maintenance when he came into contact with the belt. JWR Reply Br. at 4. However, as the Commission has recognized, inferences are used when it is difficult or impossible to obtain direct evidence on the fact to be inferred. *See Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1284 (Dec. 1998).

[11] Even if certain details of Keeton's activities at the end of his shift are unknown, the facts as found by the judge can cumulatively be found to indicate that Keeton was actively involved with maintaining the belts and chute and trying to correct an apparent problem when he came into contact with a moving belt at a time when the power should have been off and the belt blocked against motion. This would suffice to establish a violation under the D.C. Circuit's decision in *Ohio Valley*, 359 F.3d at 535-36.

the surface had been used by Keeton. 28 FMSHRC at 137-38. While the judge acknowledged that these facts tended to weaken the nexus between certain individual facts and inferences that the Secretary wanted drawn, nevertheless, the judge considered it critical to consider "the existence of the *combination of all the facts*." *Id.* at 138 (emphasis in original). In rejecting JWR's assertion that these facts undercut the inferences that he drew from other facts, the judge concluded that the facts relied on by JWR "are insufficient to rebut the inferences drawn from the Secretary's case-in-chief." *Id.* We see no basis for disturbing the judge's conclusion.[12]

Before the Commission, JWR argues that the judge improperly placed the burden of proof on it to show a "plausible theory based upon any facts in the record to support a reasonable inference that Keeton was not involved in clearing the chute." JWR Br. at 14-15, quoting 28 FMSHRC at 138-39. JWR asserts that the judge did not require the Secretary to prove her case by a preponderance of the evidence but rather required JWR to prove that Keeton was not performing maintenance work when he contacted the belt. *Id.* at 15. However, in agreement with the Secretary, we conclude that the judge's decision clearly indicates that the Secretary was required to carry her burden of proof and prevail in the case by a preponderance of evidence.

In that part of the decision immediately preceding the judge's statement that JWR had not shown "any plausible theory" as to what Keeton was doing, the judge clearly evaluated the facts elicited by the Secretary and the inferences that she requested him to make. 28 FMSHRC at 136-37. The judge then weighed the facts and arguments supporting JWR's position, referring to this as JWR's "rebuttal of the Secretary's case." *Id.* at 138. Later in the decision, the judge again noted that the facts shown by JWR "are insufficient to rebut the inferences drawn from the Secretary's case-in-chief." *Id.*; *see also id.* at 139 ("I find that the arguments and evidence relied on by [JWR] to be too speculative to support any reasonable inference that Keeton fell on the belt but not while engaged in clearing the chute."). Finally, the judge concluded by stating that "the Secretary has established by a preponderance of evidence" that Keeton was engaged in attempting to move a rock that was lodged in the North Main chute. *Id.*

The foregoing analysis makes clear that the judge required the Secretary to carry her burden of proof in sustaining a violation of the regulation. Therefore, JWR's argument that it had to independently prove an alternate plausible theory as to what Keeton was doing, rather than to rebut the Secretary's case, lacks merit when the decision is read in its entirety. *See Twentymile Coal Co.*, 26 FMSHRC 666, 681 (Aug. 2004) (judge's several uses of word "could" in his S&S determination were not grounds for reversal when it was clear that judge adhered to criteria in

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[12] In any event, it is not essential that all of the judge's findings of fact be affirmed, as long as the facts that are upheld on review are supported by the record and are sufficient to sustain the ultimate conclusion. *See Sec'y of Labor on behalf of Kaczmarczk v. Reading Anthracite Co.*, 21 FMSHRC 572, 581 n.11 (June 1999) (affirming the judge's conclusion, based on the record evidence as a whole, that the operator established its affirmative defense in a discrimination case, even if the judge had erred concerning certain evidentiary findings related to that defense).

Mathies Coal Co.), *rev'd on other grounds*, 411 F.3d 356 (D.C. Cir. 2005). *See also In Re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838-42 (Nov. 1995) (judge's reference in his decision to the Secretary having failed to show that the "only reasonable explanation" for the allegedly violative conduct did not indicate that he misapplied the preponderance of evidence standard but rather that he required an examination of other possible causes of the violation), *aff'd sub nom. Sec'y of Labor v. Keystone Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998).

Further, JWR argues that inadequate consideration was given to a toxicology report, JWR Ex. 4, which indicated that Keeton's blood contained the drug orphenadrine, which has possible side effects of drowsiness, dizziness, and fainting. JWR Br. at 4 n.3, 13. However, the judge found a lack of record support regarding the "medical effects of the medication . . . , its quantity, or the length of time that it had been in his blood stream." 28 FMSHRC at 139. In this regard, the only evidence in the record regarding the side effects of the drug was a document printed off an internet web site. There was no testimony on the drug's effect on Keeton. JWR Ex. 5; Tr. 303-06. Thus, substantial evidence supports the judge, and we agree that there is a lack of record evidence upon which to base any further findings regarding the drug and its effect on Keeton.

Finally, JWR contends that the judge ignored evidence that Keeton was a safe worker. JWR Br. at 10. With regard to Keeton's record as a safe worker, the Commission has previously held that such general evidence that a miner is "careful" is insufficient to contradict or impeach more specific evidence of a violation. *See Steele Branch Mining*, 15 FMSHRC 597, 600 n.5 (Apr. 1993). Therefore, we reject JWR's argument.

In short, we conclude that substantial evidence supports the judge's factual findings. We further conclude that the inferences that he drew from the facts were reasonable and logically connected to the facts from which they were drawn.

C. The S&S determination

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

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

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

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

JWR's argument that the judge should not have found that the violation of section 75.1725(c) was S&S essentially reargues that there was no underlying violation. JWR further argues that there was no substantial evidence to support the second, third, and fourth *Mathies* factors. PDR at 20-21; JWR Br. 22-23. For the reasons stated in support of the violation, substantial record evidence fully supports that there was a violation that created a discrete safety hazard. Further, as the judge found, because the hazard resulted in a fatality, it is evident that the third and fourth *Mathies* factors have been met. 28 FMSHRC at 141. We, therefore, affirm the judge's S&S determination.

D. The penalty calculation

The Commission's judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). Such discretion is not unbounded, however, and must reflect proper consideration of the penalty criteria set forth in section 110(i) and the deterrent purpose of the Act.[13] *Id.* (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984)). The judge must make "[f]indings of fact on each of the statutory criteria [that] not only provide the operator with the required notice as to the basis upon which it is being assessed a particular penalty, but also provide the Commission and the courts . . . with the necessary foundation upon which to base a determination as to whether the penalties assessed by the judge are appropriate, excessive, or insufficient." *Sellersburg*, 5 FMSHRC at 292-93. Assessments "lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal." *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984). In reviewing a judge's penalty

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[13] Section 110(i) sets forth six criteria to be considered in the assessment of penalties under the Act:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

assessment, we must determine whether the judge's findings with regard to the penalty criteria are in accord with these principles and supported by substantial evidence. Here, JWR takes issue with the judge's consideration of two of the criteria: violation history and level of negligence.

In his decision, the judge considered JWR's history of violations to be a neutral factor in assessing the penalty. 28 FMSHRC at 142. JWR argues that the judge erred in failing to consider that the violation of section 75.1725(c) was its first violation of that regulation during the two prior years. However, in arguing that the judge should have treated its violation history more favorably, JWR errs. The Commission has previously held that the reference in section 110(i) to an "operator's history of previous violations" refers to the operator's general history of previous violations, not just to violations of a kind similar to the one giving rise to the penalty assessment. *See Jim Walter Res., Inc.*, 18 FMSHRC 552, 556-57 (Apr. 1996).

Further, in assessing the penalty, the judge considered JWR's level of negligence to be "moderate." JWR takes issue with that determination because, JWR asserts, the judge failed to adequately consider JWR's training of its miners in general and Keeton's training in particular. JWR Br. at 23-24; JWR Reply Br. at 16-17. In support, JWR argues that miner Ned Martin testified regarding the training he received on belt safety and that the safety director of the mine adopted MSHA's "best practices" for belt safety and integrated them into its training. *Id.* However, the judge's decision indicates that he fully considered these facts. In this regard, the judge noted that, although JWR generally trained its workers not to straddle a moving belt while trying to remove a rock from the chute, there was no evidence that Keeton received this training. 28 FMSHRC at 141. Substantial evidence supports the judge's finding that there was a lack of record evidence as to what training Keeton received.[14] Finally, it is apparent from the judge's decision that he fully considered the training that miners received[15] and Keeton's record as an experienced and safe worker. 28 FMSHRC at 141. We see no basis for setting aside the judge's determination of moderate negligence as an abuse of discretion. *See U.S. Steel Corp.*, 6 FMSHRC at 1432. We, therefore, affirm the judge's penalty of $32,500.

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[14] JWR's assertion, JWR Br. at 24, that the judge precluded it from placing into evidence testimony regarding Keeton's training is not supported by the transcript pages that it cites.

[15] In support of the judge's determination of moderate negligence, the Secretary argues that JWR's training of miners with regard to procedures in performing maintenance or repairs on the belt system was not consistent with the requirements of section 75.1725(c), because the remote control switches did not remove power from the belts; nor did activation of the switches meet the blocking requirement. S. Br. at 33-34. In light of the fact that the judge did not address this point in analyzing the negligence factor in section 110(i), it is not necessary for the Commission to reach it in reviewing the judge's penalty assessment.

III.
Conclusion

On the basis of the foregoing, we affirm the judge's decision in all respects.

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Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

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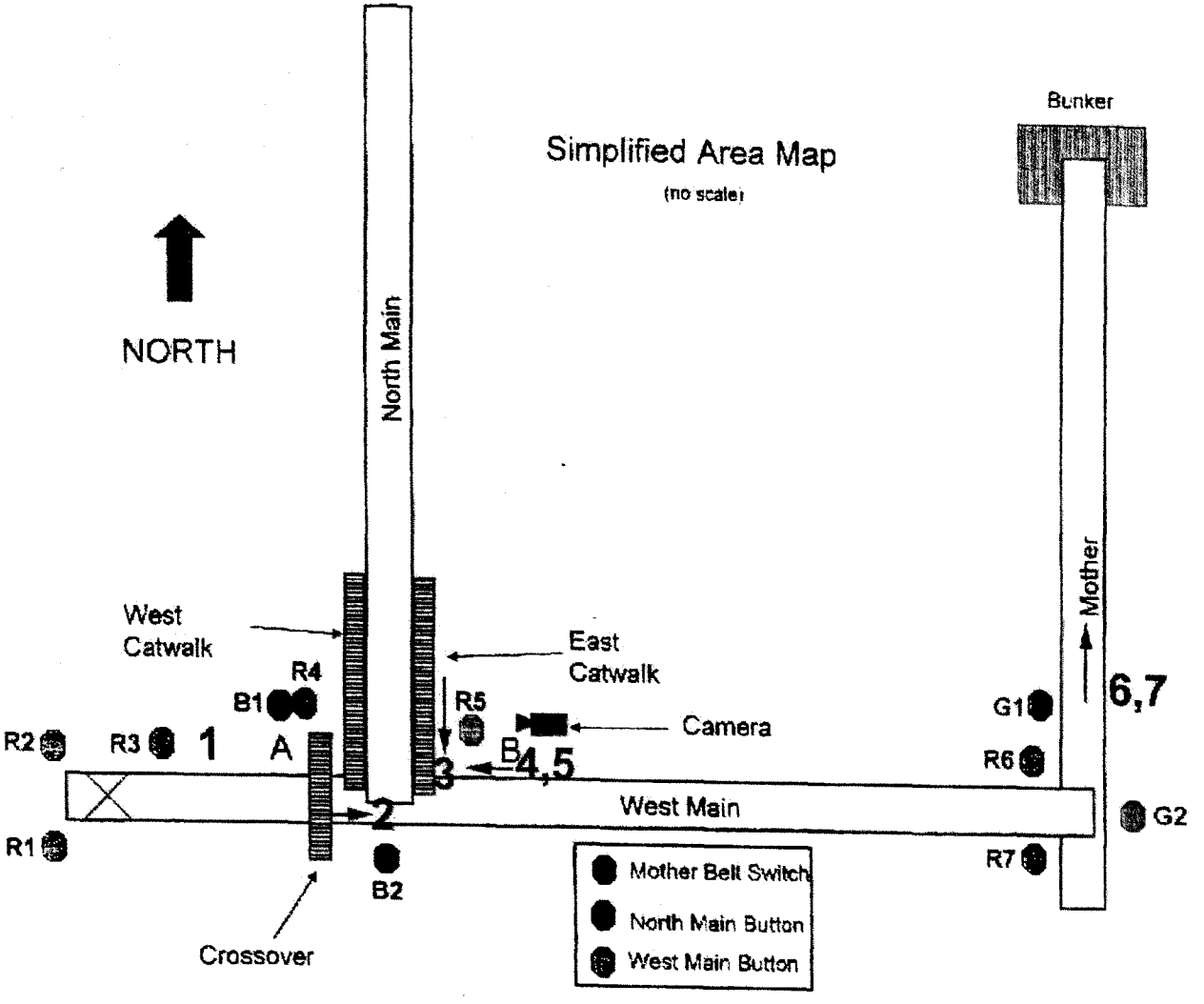
Simplified Area Map
(no scale)
NORTH
North Main
Bunker
Mother
6,7
West
Catwalk
East
Catwalk
Camera
B1
R4
R5
R2
R3
1
A
B
4,5
3
2
West Main
G1
R6
G2
R7
R1
B2
Crossover
Mother Belt Switch
North Main Button
West Main Button