

No. 13-1659

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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BLACK BEAUTY COAL COMPANY,

Petitioner,

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

and

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH ADMINISTRATION (“MSHA”),

Respondents.

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ON PETITION FOR REVIEW OF A DECISION  
OF THE FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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BRIEF FOR RESPONDENT THE SECRETARY OF LABOR, MSHA

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## STATEMENT REGARDING ORAL ARGUMENT

The Secretary opposes Black Beauty's request for oral argument. The facts and legal arguments are adequately presented in the briefs and the record, and the decisional process would not be significantly aided by oral argument because:

- the law applicable to this case has been established by precedents of the Federal Mine Safety and Health Review Commission;
- the parties do not dispute the applicable Commission precedents;
- no questions of statutory or regulatory interpretation are presented;
- no significant policy questions are presented; and,
- the relevant underlying facts are largely undisputed, with the exception of one of the ALJ's credibility determinations;

Resolution of this appeal requires a straightforward application of settled law to largely undisputed facts. The Secretary therefore urges the Court to decide this case on the briefs and the record.

## JURISDICTIONAL STATEMENT

The jurisdictional statement of the petitioner, Black Beauty Coal Company, is correct but incomplete. This case arises under the Federal Mine Safety and Health Act of 1977 (the “Mine Act” or the “Act”), as amended. 30 U.S.C. § 801 *et seq.* The Act grants jurisdiction to the Federal Mine Safety and Health Review Commission -- an agency independent of the Department of Labor -- to adjudicate contested citations, orders, and penalties issued under the Act. 30 U.S.C. §§ 815(d), 823. Black Beauty invoked the Commission’s jurisdiction by contesting the May 14, 2008, proposed penalty for the violation alleged in the citation at issue on June 9, 2008<sup>1</sup> -- within the Act’s thirty-day limit. 30 U.S.C. § 815(a); *see also* 29 C.F.R. § 2700.26.<sup>2</sup>

Following a decision by a Commission administrative law judge (“ALJ”) affirming the citation and the penalty on March 25, 2010, Joint Appendix (“JA”) 36-50, Black Beauty filed a petition for discretionary review with the Commission on Monday, April 26, 2010 -- within the Act’s thirty-day limit. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a); *see also* 29 C.F.R. § 2700.8(c) (where the last day to file is a weekend or federal holiday, filing is permitted on the next business day);

Administrative Record (“AR”) at 402-32. The Commission directed review, JA 51,

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<sup>1</sup> Neither the proposed penalty nor the contest is contained in the Administrative Record filed by the Commission, but the Secretary will provide copies of those documents if requested.

<sup>2</sup> Regardless of whether it contests a citation, an operator that contests a proposed penalty may challenge the violation alleged in the citation as well as the amount of the penalty. *See Mach Mining, LLC v. Sec’y of Labor*, 728 F.3d 643, 645 fn.3 (7th Cir. 2013).

and subsequently issued a decision on August 2, 2012, vacating the ALJ's decision and remanding the case for further consideration. JA 52-78. Following the ALJ's February 1, 2013, decision on remand again affirming the citation and penalty, JA 79-91, Black Beauty filed a timely petition for discretionary review with the Commission on March 1, 2013, AR at 704-20, which the Commission denied. JA 92. The ALJ's decision on remand therefore became the final order of the Commission on March 13, 2013, forty days after the issuance of the ALJ's decision. *See* 30 U.S.C. § 823(d)(1).

This Court has subject-matter jurisdiction under Section 106(a)(1) of the Act, which confers jurisdiction to review final Commission orders on the United States Court of Appeals for the Circuit in which the violation is alleged to have occurred or the United States Court of Appeals for the District of Columbia Circuit. 30 U.S.C. § 816(a)(1). Black Beauty timely filed its petition for review of the Commission's March 13, 2013, order with this Court on March 27, 2013. The coal mine at which the violation was alleged to have occurred is in Indiana, JA 16, which is within this Court's geographic jurisdiction. The Court therefore has jurisdiction.

#### STATEMENT OF THE ISSUES

Section 77.1605(k) of 30 C.F.R. states that “[b]erms or guards shall be provided on the outer bank of elevated roadways.”

1. Is a dragline bench a “roadway” within the meaning of Section 77.1605(k) during a dragline move where it is a “common practice” for service trucks to travel

on the bench to bring maintenance and/or repair personnel and equipment to draglines that break down during moves?

2. Did the ALJ permissibly credit the MSHA inspector's testimony that there was no berm on the dragline bench for a distance of two-tenths of a mile?

3. Has Black Beauty failed to raise any legally relevant argument concerning the ALJ's finding that the violation was "significant and substantial"?

4. Does substantial evidence support the ALJ's finding that the violation resulted from Black Beauty's "unwarrantable failure"?

## STATEMENT OF THE CASE

### A. Nature of the Case

The Mine Act, which was enacted to improve and promote safety and health in the Nation's mines, 30 U.S.C. § 801, authorizes the Secretary to promulgate health and safety standards for mines, conduct regular inspections, issue citations and orders for violations of the Act or the standards, and propose penalties for those violations. 30 U.S.C. §§ 811(a), 813(a), 814(a), 815(a), 820(a); *see generally Big Ridge, Inc. v. FMSHRC*, 715 F.3d 631, 635-36 (7th Cir. 2013). The Secretary administers and enforces the Mine Act through the Mine Safety and Health Administration ("MSHA"). 29 U.S.C. § 557a. Citations and orders contested by mine operators are adjudicated by the Commission. 30 U.S.C. §§ 815(d), 823. Commission ALJs conduct trial-type hearings in conformance with the Administrative Procedure Act, subject to discretionary appellate review by the Commission and judicial review by an appropriate United States Court of Appeals. 30 U.S.C. §§ 815(d) (incorporating 5 U.S.C. § 554), 816(a)(1).

This case arose at Black Beauty’s Somerville Central Mine, a surface coal mine, and involves a dragline. A dragline is, as the Commission noted, “excavating equipment that casts a rope-hung bucket a considerable distance; collects the dug material by pulling the bucket towards itself on the ground with a second rope; elevates the bucket; and dumps the material on a spoil bank, in a hopper, or on a pile.” JA 53 n.3 (citing *Dictionary of Mining, Mineral and Related Terms*)<sup>3</sup>; see generally *Amax Coal Co. v. United Mine Workers of America*, 92 F.3d 571, 572 (7th Cir. 1996) (“[a] dragline is a large stripping machine that removes surface materials, such as rock and dirt, which cover the coal, in order to access and remove the coal from the mine pit”). A dragline typically operates on a surface called a “bench,” which is, as the Commission noted, a “ledge that, in open-pit mine[s] and quarries, forms a single level of operation above which mineral or waste materials are excavated from a contiguous bank or bench face . . . .” JA 53 n.2 (citing the *Dictionary of Mining, Mineral and Related Terms*).

The citation at issue alleges a violation of 30 C.F.R. § 77.1605(k) consisting of the absence of a berm on the dragline bench for two-tenths of a mile. JA 27. The citation also alleges that the violation was both “significant and substantial” and an “unwarrantable failure to comply” within the meaning of Section 104(d) of the Act

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<sup>3</sup> The *Dictionary*, which the Commission has characterized as a “recognized authority” on the usage of mining terms, *Sec’y of Labor v. Wolf Run Mining Co.*, 32 FMSHRC 1669, 1685 (2010), and which numerous courts, including this one, have cited, e.g., *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1149 n.4 (7th Cir. 1984), is available on line at <http://www.maden.hacettepe.edu.tr/dmmrt/>.

(30 U.S.C. § 814(d)). *Id.*<sup>4</sup> A violation that is “significant and substantial” and an “unwarrantable failure” both subjects the operator to a higher monetary penalty (*see generally* 30 U.S.C. § 820(i); 30 C.F.R. § 100.3) and serves as a predicate, in the event of certain subsequent “unwarrantable failure” violations, for withdrawal orders.<sup>5</sup>

## B. Course of the Proceedings

The ALJ affirmed the citation and the “significant and substantial” and “unwarrantable failure” designations, and assessed a penalty of \$4,329. JA 37-42, 49. The ALJ also affirmed two Section 104(d) orders alleging other berm violations of Section 77.1605, JA 42-49, neither of which is at issue before the Court. The Commission, however, vacated the ALJ’s decision and remanded for further consideration. JA 52-78. On remand, the ALJ again found that Black Beauty violated Section 77.1605(k) and that the violation was “significant and substantial”

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<sup>4</sup> Section 104(d) states:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of a nature as could *significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard*, and if he finds such violation to be caused by an *unwarrantable failure of such operator to comply with such mandatory health or safety standards*, he shall include such finding in any citation given to the operator under this chapter....

30 U.S.C. § 814(d)(1) (emphases added).

<sup>5</sup> A withdrawal order requires an operator to immediately withdraw all persons from the affected area of the mine, except those necessary to abate the violation (*see* 30 U.S.C. § 814(c)), until the violation is abated.

and an “unwarrantable failure,” and reinstated the penalty. JA 80-85. The Commission denied discretionary review, JA 92, and Black Beauty petitioned this Court for review.

### C. Disposition Below

#### 1. The ALJ’s Initial Decision

The ALJ found that the fact that a rubber-tired service truck traveled on the bench was enough -- by itself -- to render the dragline bench a “roadway.” JA 39. Additionally, the ALJ found that the berm was “inadequate” for approximately two-tenths of a mile based on the testimony of MSHA Inspector Vernon Stumbo. *Id.* The ALJ also found the violation to be “significant and substantial” and an “unwarrantable failure.” JA 40-42.

#### 2. The Commission’s Decision

The Commission held that the ALJ erred in holding that the bench was a “roadway” simply because a rubber-tired vehicle traveled on it. JA 54. Under its precedent, the Commission explained, an elevated area, such as a bench, is a “roadway” “where a vehicle commonly travels its surface during the normal mining routine.” *Id.* Applying that test, a four-to-one majority of the Commission held that the ALJ’s error was harmless because “the record evidence demonstrate[d] that vehicles commonly traveled over the surface of the bench during the normal mining routine, including during a routine dragline move.” JA 55. The majority identified three facts supporting that conclusion: (1) haulage trucks regularly traveled the bench before a dragline move and would do so afterwards; (2) during a dragline move, which occurred every seven to ten days, a rubber-tired backhoe routinely

accompanied the dragline to carry the dragline's electrical cable; and (3) it was "common practice" for a service truck to assist a dragline that broke down during a move. *Id.*<sup>6</sup>

A three-member majority held, however, that the ALJ erred in crediting Inspector Stumbo's testimony so as to find that the berm was "inadequate" because Stumbo testified that the berm was non-existent. JA 56-57.<sup>7</sup> Further, the majority noted that the ALJ neglected to determine the credibility of the testimony of Terry Traylor, Black Beauty's Operations Manager, who testified that after the berm was lowered for the dragline move, the "remnant berm" was high enough to protect the service truck that traveled to the disabled dragline. JA 57. Consequently, the Commission vacated the ALJ's finding that the violation was established, and also vacated the accompanying "significant and substantial" and "unwarrantable failure" designations, and remanded for further consideration. The Commission instructed that any "significant and substantial" and "unwarrantable failure" analysis on remand "should conform to the guidance we have provided with respect to the other violations herein." *Id.*

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<sup>6</sup> The lone dissenting Commissioner opined that the Secretary did not establish that "it was *routine* for the dragline to be serviced by the welding truck during a move," and that even if it was routine, the bench was not a "roadway" because any bench would then be a "roadway" during a dragline move whether the dragline required the assistance of service trucks or not. JA 75 (emphasis in original).

<sup>7</sup> One of the four Commissioners who agreed that the bench was a "roadway" would have affirmed the ALJ's finding that the violation was established based on the ALJ's crediting of Inspector Stumbo's testimony. JA 70.

Regarding one of the other violations, the Commission affirmed the ALJ's "significant and substantial" finding. JA 60-63.<sup>8</sup> In so doing, the Commission affirmed the ALJ's findings that:

- the discrete safety hazard to which the violation contributed was "the danger of a vehicle veering off the elevated roadway and rolling, or falling, down the spoil incline," JA 60;
- if a vehicle veered off the elevated roadway and rolled or fell down the incline, it was reasonably likely that an injury would have resulted, JA 61-62; and,
- any such injury would have been reasonably serious, JA 62.

Regarding the unwarrantable failure issue, the Commission affirmed the ALJ's finding regarding another violation that two previous berm violations for which Black Beauty had been cited five days earlier put Black Beauty on notice that greater efforts to comply with berm requirements were necessary. JA 64.<sup>9</sup> The Commission rejected the notion that Inspector Stumbo's unfamiliarity with the details of the prior violations was relevant to whether Black Beauty was on such notice. *Id.*

### 3. The ALJ's Decision on Remand

Stating that she had re-examined the trial transcript, the ALJ found on remand that Inspector Stumbo "testified convincingly" that he did not observe "*any* berms at all" on the section of the bench in question. JA 81 (emphasis in original). The ALJ

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<sup>8</sup> Two Commissioners dissented for factual reasons related to the other citation. JA 76-77.

<sup>9</sup> The Commission, however, vacated and remanded the "unwarrantable failure" finding for factual reasons related to the other citation. JA 63-64.

found Stumbo's testimony convincing because he detailed: (1) the procedure he used to measure distances on the bench; and (2) a conversation with Terry Traylor during the inspection in which he informed Traylor that there "was zero berms" on the bench. JA 81-82. The ALJ therefore found that there was no berm on the bench for two-tenths of a mile and concluded that Black Beauty violated Section 77.1605(k). JA 82.

Turning to the "significant and substantial" issue, the ALJ found that it was reasonably likely that a truck would go over the edge of the roadway and fall approximately 50 feet, and that the resulting injuries were reasonably likely to be "serious and potentially fatal." JA 83-84.

Finally, regarding the "unwarrantable failure" issue, the ALJ found that:

- the violation was not likely to have existed for a large amount of time given the temporary nature of the bench;
- the violation was "probably not extensive" physically, but because there were no barricades, the violation was extensive "in that anyone could access and travel the road";
- the two September 6 citations put Black Beauty on notice that greater efforts were necessary to comply with berm requirements on the dragline bench;
- Black Beauty made no effort to abate the violation prior to Inspector Stumbo's inspection;
- the absence of a berm for two-tenths of a mile should have been obvious to Black Beauty;

- several Black Beauty managers were present on the bench, and Black Beauty therefore knew of the violation but took no action to install berms or block entry to the bench; and
- the violation was highly dangerous for the reasons discussed in the “significant and substantial” analysis.

JA 84-85. The ALJ accorded the most weight to Black Beauty’s repeated failure to maintain adequate berms, the obviousness of the violation, and the ease with which the violation could have been corrected, in concluding that the violation resulted from Black Beauty’s “unwarrantable failure.” JA 85.

## STATEMENT OF THE FACTS

### 1. Black Beauty’s Procedure for a Dragline Move

Black Beauty uses a ten-million pound dragline at its Somerville Central Mine to remove the rock between three seams of coal. JA 17-18, 34. Ordinarily, the dragline bench is used by large haulage trucks to transport coal. JA 19, 21, 24. Black Beauty does not dispute that Section 77.1605(k)’s berm requirement applies to the bench during such times. Accepting MSHA’s policy that a berm must be at least as tall as the mid-axle height of the largest vehicle using the roadway, Black Beauty maintained a berm approximately five to six feet tall during such times. JA 18-19, 21.

The dragline must cease excavating in order to be moved to another position on the bench every seven to ten days. JA 21. In order to provide sufficient maneuvering room for the dragline during a move, Black Beauty lowers the berm from five or six feet to three feet. JA 18-19. The dragline moves itself, approximately 450 to 500 feet

per hour, JA 18, by use of “shoes,” or “pontoons,” on each side of the machine that take eight-foot “steps.” JA 17-18. The “shoes” create holes in the bench varying in depth from three inches to three feet. JA 18, 25. Additionally, during a dragline move, the dragline’s tub<sup>10</sup> drags on the ground when the “shoes” lift the dragline, creating a series of six-inch tall ridges. *Id.* Consequently, a dragline move leaves in its wake an approximately 100-foot-wide swath of ground that is very rough. JA 19-20, 22, 25. The bench varies between 150 and 160 feet wide, JA 22-23, 25, although at some points it widens to between 180 and 200 feet, JA 9, and a moving dragline is located approximately 25 feet from bench’s outer edge. JA 22.<sup>11</sup>

Although the dragline propels itself, it needs the assistance of a bulldozer and a backhoe. The bulldozer precedes the dragline across the bench in order to both make a smooth path for the dragline and lower the berms. JA 18-19. The backhoe, which is a rubber-tired vehicle, carries the dragline’s electrical cable during the move in order to prevent the dragline from running over the cable and damaging or destroying it. JA 21, 24. Additionally, when the dragline breaks down during a move and requires repair, it is a “common practice” for Black Beauty to use the down time to perform maintenance on the dragline. JA 25.

After the dragline completes its move, Black Beauty restores the bench to a condition in which haulage trucks can again use it as a roadway. JA 19, 21, 23, 24.

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<sup>10</sup> The tub, which had a diameter of 80 feet, is “the part of the machine that sits on the ground holding the remainder of the machine up.” JA 18.

<sup>11</sup> The other side of the bench did not have an edge that presented a fall risk, but rather, a spoil bank. JA 19, 23-25.

That is, the bulldozer repairs the damage caused by the dragline's "shoes" and the tub, and rebuilds the berm to its full height. *Id.*

## 2. Events Preceding the September 11 Inspection

Five days prior to the inspection that resulted in the citation before the Court, MSHA Inspector Jim Coomes issued two citations to Black Beauty alleging violations of Section 77.1605's berm requirements at the Somerville Central Mine. Administrative Record ("AR") at 288-91. The first citation alleged a violation of Section 77.1605(k) consisting of an inadequate berm for four-tenths of a mile on a bench on which haulage trucks had resumed travel after a dragline move was completed and before the berm was rebuilt. AR 288-90; JA 21. The second citation alleged a violation of Section 77.1605(l) consisting of an inadequate berm at a dumping location on the dragline bench. AR 291.<sup>12</sup> Black Beauty did not contest either citation.

## 3. The September 11 Inspection

Because of his experience and expertise concerning surface mines, and because of the Somerville Central Mine's recent problems with berm issues, Inspector Stumbo was assigned to participate in the inspection of that mine on September 11. JA 8. Stumbo's supervisor told him that Black Beauty had received two berm citations a

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<sup>12</sup> Section 77.1605(l) states:

Berms, bumper blocks, safety hooks, or similar means shall be provided to prevent overtravel and overturning at dumping locations.

30 C.F.R. § 77.1605(l).

few days earlier and was on “high alert” that it needed to make a greater effort to comply with berm requirements. JA 8.

During the inspection, Stumbo observed that there was no berm on the dragline bench for two-tenths of a mile -- approximately 1,200 feet. JA 9, 27, 29. At the time of the inspection, the dragline was down for repair of an electrical problem that had disabled it during an intended 3,000-foot move. JA 12, 17, 20, 25. Stumbo observed a service truck with welding equipment located alongside the dragline on the side closest to the bench’s edge. JA 9, 17-18, 27, 33, 35. Stumbo followed the service truck’s tracks and measured its closest approach to the edge with a steel tape line as eighteen feet. JA 9. Stumbo also observed four Black Beauty managers present on the bench, including Operations Manager Terry Traylor and Dragline Manager C.B. Howell. JA 9, 11. Howell testified that it was “common practice” to perform maintenance on a dragline that was down for repairs. JA 25. Howell and Traylor testified that the service truck was necessary to perform welding maintenance on the dragline’s bucket. JA 19-20, 25.

Beyond the bench’s edge was a steep incline with a 50-foot drop to the bottom of the pit. JA 9, 24.

#### 4. The Factual Dispute

The only significant factual dispute in this case is whether there was a berm on the dragline bench at the time of the inspection. As mentioned above, Stumbo testified that there was no berm for two-tenths of a mile. Operations Manager Traylor, however, testified that there was a remnant berm sufficient to comply with Section 77.1605(k). According to Traylor, the height of the remnant berm equaled

the tire of Stumbo's vehicle, which Traylor testified was parked closest to the edge. JA 20. That height was "somewhat above 16, 17 inches," according to Traylor. *Id.* Traylor further testified that a berm of that height would equal the mid-axle height of the service truck, JA 22, which was undisputedly approximately 21 inches according to Stumbo's measurement with the steel tape line. JA 9.

#### SUMMARY OF THE ARGUMENT

The Commission has long held -- and neither party disputes -- that an elevated area is a "roadway" within the meaning of Section 77.1605(k) where a vehicle commonly travels its surface during the normal mining routine. Applying that test, the dragline bench here was a "roadway" -- even during the dragline move -- because it was Black Beauty's "common practice" for service trucks to travel on the bench in order to do repairs or maintenance on draglines that broke down during moves.

The ALJ's finding that Inspector Stumbo "testified convincingly" that there was no berm on the bench for two-tenths of a mile is a credibility determination within the ALJ's purview as the fact-finder. There are no circumstances that would justify the extraordinary step of overruling the ALJ's credibility determination. Indeed, Black Beauty itself undermines Terry Traylor's testimony that there was a sufficient remnant berm by suggesting, in connection with the "unwarrantable failure" issue, that Traylor was too far from the bench's edge (150-160 feet) for the absence of the berm to be obvious to him.

Black Beauty's only argument concerning the "significant and substantial" issue is that the ALJ erred in finding that a vehicle was reasonably likely to go over the

unbermed edge. That issue, however, is irrelevant under Commission precedent -- precedent that Black Beauty does not dispute -- holding that the proper inquiry is whether the hazard to which the violation contributed is reasonably likely to result in an injury-causing event. In this case, therefore, the proper inquiry was whether a vehicle traveling over the edge was reasonably likely to result in injury. The ALJ's affirmative finding on that issue is not challenged by Black Beauty.

Finally, the ALJ's "unwarrantable failure" finding is supported by substantial evidence. Black Beauty challenges the ALJ's reliance on two previous citations for berm violations issued to Black Beauty just five days earlier. Contrary to Black Beauty's contentions, the circumstances of those citations are in the record and show that they put Black Beauty on notice that greater efforts to comply with berm requirements were necessary. Black Beauty also challenges the ALJ's finding that the violation was not obvious. The record, however, establishes that there was no berm for a distance of 1,200 feet on a 3,000-foot-long bench on which four Black Beauty managers were present.

Accordingly, the Court should affirm the decision below.

## ARGUMENT

### I

Black Beauty Violated 30 C.F.R. § 77.1605(k) By Failing to Provide a Berm On Its Dragline Bench When A Service Vehicle Traveled On It To Perform Maintenance On a Dragline That Had Broken Down During a Move

#### A. The Standard of Review and Applicable Law

This Court reviews questions of law *de novo*. *Mach Mining*, 728 F.3d at 659.<sup>13</sup> The Court reviews an ALJ's factual findings under the "substantial evidence" standard. *Id.* Substantial evidence is "that which a reasonable mind might accept as adequate to support a particular conclusion." *E.g., Zeigler Coal Co. v. Office of Workers' Comp. Programs*, 490 F.3d 609, 614 (7th Cir. 2007). The Court may not set aside an ALJ's inference simply because it finds the opposite conclusion more reasonable or questions the factual basis for the inference. *Id.* Making credibility determinations and resolving inconsistencies in the evidence is within the sole province of the ALJ. *Id.* The ALJ's credibility determinations are subject to abuse-of-discretion review by the Court. *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995). The Court defers to the ALJ's credibility determinations absent "extraordinary circumstances," *Chao v. Gunito Corp.*, 442 F.3d 550, 557 (7th Cir. 2006), such as "a clear showing of bias by the ALJ, utter disregard for uncontroverted, sworn testimony, or acceptance of testimony which on its face is incredible." *Michael v. FDIC*, 687 F.3d 337, 348 (7th Cir. 2012).

Although neither the Act nor the standards define the term "roadway," the Commission has long held -- and neither party disputes -- that an elevated area, such as a bench, is a "roadway" where a vehicle commonly travels its surface during the normal mining routine. *E.g., Sec'y of Labor v. Capitol Aggregates, Inc.*, 4 FMSHRC 846, 847 (1982). In *Capitol Aggregates*, the Commission held that a 30-

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<sup>13</sup> The Secretary does not seek deference to his interpretation of Section 77.1605(k) because the only question in this case is the application of the Commission's interpretation (with which the Secretary agrees) to the facts of this case.

foot long ramp used by a front-end loader for dumping petroleum coke into a solid fuel hopper was a “roadway.” *Id.* The Commission reasoned that “common usage” of the term “ramp” could include a “roadway,” and that “common sense” dictated that the ramp was a roadway “in light of the nature of the use of the ramp . . . and the purpose of the cited standard.” *Id.*

**B. The Dragline Bench Was a “Roadway” During the Dragline Move Because Black Beauty’s “Common Practice” Was For Service Trucks to Travel On It to Perform Maintenance or Repairs on Draglines That Broke Down During Moves**

The purpose of Section 77.1605(k) is to prevent vehicular overtravel on “elevated roadways” by “reasonable guidance and control of vehicular motion.” *Sec’y of Labor v. United States Steel Corp.*, 5 FMSHRC 3, 5 (1983).<sup>14</sup> The only remaining question in this case, therefore, is “the nature of the use” of the bench. *See Capitol Aggregates*, 4 FMSHRC at 847. It is undisputed that:

- dragline moves across the bench occurred every seven to ten days;
- when a dragline broke down, Black Beauty’s “common practice” was to use the down time to perform routine maintenance on the dragline; and,
- the personnel and equipment necessary to perform repairs or maintenance on a disabled dragline were transported to the dragline by rubber-tired service trucks.

Although there is no evidence in the record regarding the frequency of dragline breakdowns, either generally or during dragline moves, such breakdowns occurred frequently enough for Dragline Manager Howell to characterize the performance of

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<sup>14</sup> The Commission reached that conclusion based on 30 C.F.R. § 77.2’s definition of a “berm” as “a pile or mound of material capable of restraining a vehicle,” and on the recognition that “absolute prevention of overtravel by all vehicles under all circumstances” was “probably . . . an unattainable regulatory goal” in light of the heavy weights and large sizes of many mine vehicles. *Id.* at 5 n.6.

routine maintenance on draglines that were down for repairs as a “common practice.” Moreover, repair and maintenance work is part of the normal mining routine. *See Jeroski v. FMSHRC*, 697 F.3d 651, 652 (7th Cir. 2012) (observing that 30 C.F.R. § 46.2(h) defines “mining operations” to include “maintenance and repair of mining equipment”); *see also* 30 C.F.R. § 77.404(a) (“[m]obile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately”).

Ignoring the Commission’s “nature of the use” test, Black Beauty contends -- without citing any authority -- that “[t]he critical consideration is the nature of the bench at the time of the move.” BB Br. at 17. “In essence,” Black Beauty argues, a dragline move makes the bench so rough that it “destroys the existing roadway.” *Id.* Black Beauty acknowledges, however, that service trucks nevertheless travel on the bench during dragline moves in order to assist the dragline when it becomes disabled during a move. BB Br. at 9-10 (service truck assisting dragline disabled during a move “must proceed very slowly,” and “the remnant berm that exists during a dragline move provides adequate protection for a service or pick-up truck”). In effect, Black Beauty’s position is that because it has rendered the condition of the bench so poor, it should not be required to provide a berm to protect the service trucks that must travel on it. The poor condition of the bench does not make it something other than a roadway; it makes the bench a roadway that is especially

unsafe. Common sense dictates that the poor condition of the bench makes a berm all the more important.

Citing *Cleveland Cliffs Iron Co., Inc.*, 3 FMSHRC 291, 293 (1981), Black Beauty contends that Section 77.1605(k) falls within the subpart of the standards entitled “Loading and Haulage,” and that the service truck assisting the disabled dragline was not loading or hauling. BB Br. at 14-15. Initially, the heading under which a statutory or regulatory provision is placed cannot override the provision’s plain meaning. *Pennsylvania Dep’t of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998) (“[t]he title of a statute . . . cannot limit the plain meaning of the text”); see also *Brotherhood of Railroad Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 538-29 (1947) (“headings and titles can do no more than indicate the provisions in a most general manner,” and “matters in the text which deviate from those falling within the general pattern are frequently unreflected in the headings and titles”).

In any event, the Commission held in *Cleveland Cliffs* that “the term ‘hauling’ should be broadly construed” to include hauling “men and replacement parts.” 3 FMSHRC at 293. The present case is indistinguishable: the service truck hauled the personnel and equipment necessary to perform maintenance on the dragline.

Additionally, the Commission held in *Cleveland Cliffs* that the area at issue was a “roadway” because it was used for hauling on a “regular . . . basis,” even though that usage was “limited.” *Id.* Again, the present case is indistinguishable: although service trucks may travel on dragline benches during dragline moves on a “limited

basis,” that usage is “regular” -- indeed a “common practice” -- when a dragline becomes disabled during a move.

Further ignoring the Commission’s “nature of the use” test, Black Beauty contends that other factors must be considered: the size of the bench, the proximity of vehicles to the edge, the frequency with which vehicles were present, the length of time that the bench would exist, and the purpose of any vehicle present. BB Br. at 15. Those factors may be relevant to whether any violation was “significant and substantial” (*i.e.*, the level of danger) or an “unwarrantable failure” (*i.e.*, the level of culpability), but they are not relevant to whether the bench was a “roadway.” *See generally Sec’y of Labor v. Cent. Sand & Gravel Co.*, 23 FMSHRC 250, 260 (2001) (“whether a violation is [significant and substantial] is an entirely separate issue from whether the regulation violated actually applies”).

Neither of the two ALJ decisions Black Beauty cites in support of its multi-factor test is persuasive.<sup>15</sup> In *Sec’y of Labor v. Peabody Coal Co.*, 6 FMSHRC 2530 (ALJ Morris 1984), the ALJ found the proximity of vehicles to the edge of a bench to be a relevant factor because the Secretary “bears the obligation to prove that the activity he seeks to control is fairly within the terms of the regulation.” *Id.* at 2543-44. The “terms of the regulation,” however, do not state that an “elevated roadway” must have a berm if vehicles operate within a certain distance of the outer edge. Rather,

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<sup>15</sup> A Commission ALJ’s decision has no precedential value, 29 C.F.R. § 2700.69(d), but the Court may consider whether the ALJ’s reasoning is persuasive. *See Big Ridge*, 715 F.3d at 640 (considering the “merits of [the ALJ’s] reasoning” but finding it “not persuasive”).

the standard states -- without qualification -- that an “elevated roadway” must have a “berm.” Similarly, in *Sec’y of Labor v. Peabody Coal Co.*, 12 FMSHRC 109, 115-16 (ALJ Lasher 1990), the ALJ neither explained why factors such as size, proximity, and frequency were relevant nor cited authority for that proposition.

Black Beauty next contends that the bench was used only by vehicles assisting the dragline. BB Br. at 17. The Commission, however, has rejected the argument that the type or purpose of the vehicle traveling a surface has any bearing on whether that surface is a “roadway.” In *Sec’y of Labor v. El Paso Rock Quarries*, 3 FMSHRC 35, 36 (1981), the Commission rejected the argument that a surface traveled by haulage trucks was not a “roadway” because the trucks were merely hauling explosives to an area to be drilled and blasted. Similarly, in *Cleveland Cliffs Iron Co.*, 3 FMSHRC at 292-93, the Commission rejected the argument that a surface was not a “roadway” because the trucks that traveled on it were pick-up and flatbed trucks rather than haulage trucks.

In this instance, Black Beauty inexplicably failed to comply with its own policy of lowering the berm to three feet during a dragline move -- a policy that, if followed, would have made it unnecessary for MSHA to issue the citation now before the Court. Similarly, no citation would have been necessary if Black Beauty had not chosen to perform routine welding maintenance on the dragline’s bucket while the dragline was down for electrical repairs -- maintenance that Black Beauty does not even claim was necessary to resume the dragline move.

Accordingly, the bench was a “roadway” subject to Section 77.1605(k)’s berm requirement as a matter of law.

C. The ALJ Acted Within Her Discretion in Crediting Inspector Stumbo’s Testimony That There Was No Berm On the Bench For Two-Tenths Of a Mile

On remand, the ALJ stated that, “[u]pon re-examination of the trial transcripts, I find that Inspector Stumbo testified convincingly that he did not observe *any* berms at all on the section of the bench in question.” JA 81. The ALJ did not abuse her discretion in so finding, and there are no circumstances that would support overturning the ALJ’s credibility determination.

Black Beauty contends that the ALJ erred insofar as she found Stumbo’s testimony convincing based on the fact that he “detailed the procedure he used to verify measurements on the bench.” BB Br. at 20-21.<sup>16</sup> According to Black Beauty, Stumbo did not testify to any “procedures with respect to determining the purported lack of any berms.” BB Br. at 20. Black Beauty misunderstands the ALJ’s reasoning. The ALJ did not mistakenly believe that Stumbo determined there was no berm after measuring it to be zero inches tall; rather, the ALJ’s reference to Stumbo’s measurement procedure indicated that Stumbo’s attention to detail, as

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<sup>16</sup> Black Beauty does not challenge the second basis the ALJ provided for finding Stumbo’s testimony convincing: the fact that he testified in detail concerning a conversation in which he informed Traylor that “there was zero berms” on the bench. JA 82.

evidenced by the procedure he used to obtain various measurements discussed in his testimony, enhanced his overall credibility.<sup>17</sup>

Black Beauty further contends that Stumbo exaggerated because even he testified that there was a berm on the bench. BB Br. at 21. Stumbo testified that there was no berm for two-tenths of a mile, or roughly 1,200 feet. Operations Manager Traylor testified that the dragline's move was intended to about 3,000 feet. JA 17. That leaves at least 1,800 feet along which there could have been some remnant berm. Consequently, Stumbo's "no berm" testimony is consistent with the existence of a remnant berm on a portion of the bench.

Black Beauty states in a footnote that the ALJ failed to explain why she found Traylor's testimony not credible. BB Br. at 21 n.4. Black Beauty itself, however, undermines Traylor's testimony that there was a remnant berm. Although Black Beauty asserts that Traylor had "a clear sight line" to the bench's edge, BB Br. at 20, it later suggests that Taylor was too far from the edge -- "approximately 150-60 feet" -- for the absence of a berm to be obvious to him or within his knowledge. BB Br. at 28. That latter point is consistent with Traylor's indefinite and fluctuating testimony, in which he first testified that the remnant berm was "somewhat above 16, 17 inches," JA 20, and moments later testified that the remnant berm was at least as tall as the mid-axle height of the service truck, JA 22, which was twenty-one inches.

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<sup>17</sup> Stumbo testified that he measured the width of the bench, the closest distance of the service truck from the edge, and the mid-axle height of the service truck using a steel tape line. JA 9.

Moreover, the ALJ's path here was unmistakable. The Court will affirm an agency decision of less than ideal clarity where the Court can discern the agency's path. *E.g., MBC Commodity Advisers, Inc. v. Commodity Futures Trading Comm'n*, 250 F.3d 1052, 1065 (7th Cir. 2001). The ALJ did not overlook the testimony on which Black Beauty relies; rather, she explicitly recognized it in her initial decision, JA 38 (describing Traylor's testimony), and implicitly recognized it in her decision on remand. JA 81 (the ALJ "re-examin[ed] the trial transcripts"). Thus, although the ALJ did not explain why she found Stumbo's testimony more convincing than Traylor's, she did explain why she found Stumbo's testimony convincing, and she did consider Traylor's testimony. Nothing more is required of an ALJ. A remand would be futile; the result would be foreordained. *See Zeigler Coal Co. v. Kelley*, 112 F.3d 839, 843 (7th Cir. 1997).

Accordingly, the ALJ properly credited Stumbo's testimony that there was no berm on the bench for two-tenths of a mile. The Court therefore should affirm the ALJ's finding that Black Beauty violated Section 77.1605(k).

## II.

### Black Beauty Fails to Raise Any Argument Legally Relevant to the "Significant and Substantial" Issue

#### A. The Standard of Review and Applicable Law

This Court reviews questions of law *de novo*. *Mach Mining*, 728 F.3d at 659. The Court reviews an ALJ's factual findings under the "substantial evidence" standard. *Id.*

This Court has applied the Commission's precedent establishing what the Secretary must prove in order to sustain a "significant and substantial" designation. *Buck Creek*, 52 F.3d at 133. The Commission has held that for a violation to be "significant and substantial," there must be:

(1) a 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 will be of a reasonably serious nature.

*Buck Creek*, 52 F.3d at 135, citing *Sec'y of Labor v. Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (1984); *see also Cumberland Coal Res. v. FMSHRC*, 717 F.3d 1020, 1025-28 (D.C. Cir. 2013) (in the case of a lifeline violation, the issue under the third prong of *Mathies* is whether delayed escape in an emergency is reasonably likely to result in injury).

**B. The Proper Inquiry Under the Third Prong of *Mathies* In This Case Is Whether an Injury Was "Reasonably Likely" If a Truck Went Over the Bench's Edge and Fell to the Surface Below**

As Black Beauty correctly states, the third prong of *Mathies* "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." BB Br. at 22. Black Beauty, however, asserts that substantial evidence does not support the ALJ's finding that an overtravel incident was "reasonably likely." BB Br. at 24. Overtravel is the hazard, not the injury.

The Commission held below that whether an overtravel incident was “reasonably likely” was not the relevant inquiry under the third *Mathies* prong. JA 61. Rather, the relevant inquiry was “whether the hazard in question -- a vehicle veering off the road because of a lack of berms -- would be reasonably likely to cause injury.” *Id.* Black Beauty does not challenge that holding on appeal. Nor does Black Beauty challenge the Commission’s holding, under the second prong of *Mathies*, that the ALJ accurately identified the hazard to which the violation contributed as “the danger of a vehicle veering off the elevated roadway and rolling, or falling” over the edge. JA 60. Nor does Black Beauty challenge the ALJ’s finding on remand that if a truck veered over the edge and fell the estimated 50 feet to the surface below, “it is reasonably likely that the driver and any passengers would sustain broken bones and injuries of a serious and potentially fatal nature.” JA 84.<sup>18</sup>

Accordingly, the Court should affirm the ALJ’s conclusion that Black Beauty’s Section 77.1605(k) violation was “significant and substantial.”

### III.

#### Substantial Evidence Supports the ALJ’s Finding that Black Beauty’s Violation of Section 77.1605(k) Resulted From Its “Unwarrantable Failure” to Comply With That Standard

##### A. The Standard of Review and Applicable Law

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<sup>18</sup> The ALJ rendered that finding under the fourth prong of *Mathies* in her decision on remand, JA 84, and under the third prong in her initial decision. JA 41. Any error is harmless, however, because Black Beauty does not challenge the ALJ’s factual finding and it is amply supported, as the ALJ found on remand, by Inspector Stumbo’s testimony that, in determining that the injuries sustained would be serious, he accounted for the weight and material of the trucks traveling the road and the distance of the potential fall. JA 84.

The ALJ's factual findings are subject to substantial evidence review. *Mach Mining*, 728 F.3d at 659.

An “unwarrantable failure” involves “aggravated conduct constituting more than ordinary negligence,” such as “indifference, willful intent or serious lack of reasonable care,” *Buck Creek*, 52 F.3d at 136, citing *Emery Mining Corp. v. Sec’y of Labor*, 9 FMSHRC 1997, 2001-03 (1987), or “intentional or knowing failure to comply or reckless disregard for the health and safety of miners.” *Buck Creek*, 52 F.3d at 136, citing *Sec’y of Labor v. Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (1991); *Sec’y of Labor v. Virginia Crews Coal Co.*, 15 FMSHRC 2103, 2107 (1993). The Commission has identified several factors that an ALJ must consider in analyzing an “unwarrantable failure” designation: the duration and extent of the violation, whether the operator was placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition (prior to issuance of the citation or order), whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation. *E.g.*, *Black Beauty Coal Co. v. FMSHRC*, 703 F.3d 553, 560 (D.C. Cir. 2012) (citing *Sec’y of Labor v. IO Coal Co., Inc.*, 31 FMSHRC 1346, 1351 (2009)). Any mitigating circumstances must also be considered. *E.g.*, *IO Coal*, 31 FMSHRC at 1350-51.

**B. Black Beauty Had Prior Notice That Greater Efforts To Comply With Berm Requirements Were Necessary**

Black Beauty contends that “[t]here was no evidence as to the substance or content” of the two previous berm citations relied on by the ALJ in finding that

Black Beauty was on notice that greater efforts were necessary for compliance. BB Br. at 27. On the contrary, the two citations -- neither of which Black Beauty contested -- were admitted into evidence. AR 288-91. The first citation, as Traylor himself testified, concerned a violation of Section 77.1605(k) consisting of an inadequate berm for four-tenths of a mile on a bench on which haulage trucks had resumed travel after a dragline move but before the berm was rebuilt. AR 288-90; JA 21. That citation put Black Beauty on notice that greater efforts to comply with Section 77.1605(k) were necessary specifically in connection with dragline moves. The second citation, as Traylor testified, concerned a violation of Section 77.1605(l) (text at fn. 12, *supra*) consisting of an inadequate berm at a dumping location on the dragline bench. AR 291; JA 21. That citation reinforced the message that greater efforts to comply with berm requirements in general were necessary. Contrary to Black Beauty's assertion, the fact that Inspector Stumbo did not have detailed knowledge of the substance of the prior citations is irrelevant. *See* BB Br. at 27. The issue is whether Black Beauty had notice; the prior citations themselves provided that notice. *See IO Coal Co.*, 31 FMSHRC at 1354 (precise similarity between the prior violation and the present violation is not required).

#### C. The Absence of a Berm For 1,200 Feet Was Obvious

Black Beauty contends that the ALJ erred in finding the violation to be obvious. BB Br. at 28. According to Black Beauty, the violation was not obvious because: (1) the bench was very wide; (2) three of the four management trucks on the bench arrived via a different route than the inspector and were located on the other (*i.e.*, spoil) side of the dragline; and (3) the fourth manager -- Traylor -- was 150-160 feet

away from the edge. *Id.* Assuming that the width of the bench is relevant to the obviousness of the violation, the absence of the berm extended for a distance of approximately 1,200 feet -- the length of four football fields -- and was at least six times the width of the bench (*i.e.*, 180 to 200 feet at its widest point). Further, as the ALJ observed, the fact that there was a violation should have been obvious because the height of the missing berm should have been at least mid-axle height, *i.e.*, twenty-one inches. JA 85.<sup>19</sup>

#### D. No Mitigating Circumstances Weigh Against the ALJ's "Unwarrantable Failure" Finding

Finally, Black Beauty contends that the ALJ neglected to consider that it lowered the berm for safety reasons. BB Br. at 28. The implication is that mitigating circumstances weighed against the ALJ's "unwarrantable failure" finding. Initially, Black Beauty did not merely *lower* the berm, it *eliminated* the berm. Further, Black Beauty fails to identify any safety reasons, and the record does not disclose any. Rather, the record shows that Black Beauty lowered the berm for operational reasons, *i.e.*, to provide room to maneuver the dragline during a move. JA 19. Even if Black Beauty had safety reasons for eliminating the berm, that is not a defense to an "unwarrantable failure" designation. Rather, the Commission has held that an operator can avoid an "unwarrantable failure" by establishing that it had a reasonable, good-faith belief that its conduct was the safest method of compliance

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<sup>19</sup> Black Beauty asserts that the ALJ erred in finding that it knew the violation existed. BB Br. at 28. That one-sentence assertion, however, is unaccompanied by explanation, argument, or citation to the record or authority. Four Black Beauty managers were undisputedly present on the bench at the time of the inspection. They either knew or should have known that there was 1,200-foot gap in the berm.

with the applicable standard. *E.g., Sec’y of Labor v. Consolidation Coal Co.*, 23 FMSHRC 588, 596 (2001). Black Beauty cannot claim that it was attempting to achieve compliance with Section 77.1605(k) with a 1,200-foot gap in the berm.

Accordingly, the Court should affirm the ALJ’s conclusion that Black Beauty’s violation of Section 77.1605(k) resulted from its “unwarrantable failure” to comply with that standard.

### CONCLUSION

For the foregoing reasons, the Court should hold that the dragline bench was a “roadway” within the meaning of Section 77.1605(k) and affirm the ALJ’s findings that Black Beauty violated Section 77.1605(k), that the violation was “significant and substantial,” and that the violation resulted from Black Beauty’s “unwarrantable failure.” Accordingly, the Court should deny the petition for review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2013, I electronically filed the foregoing response brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF System.

I certify that all participants in the case are represented by attorneys who are registered CM/ECF users with this Court and that service on such participants will be accomplished by CM/ECF system service on the following:

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