

ORAL ARGUMENT NOT YET
SCHEDULED

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 11-1306

BLACK BEAUTY COAL COMPANY,

Petitioner,

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

and

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

Respondents.

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

BRIEF FOR THE SECRETARY OF LABOR

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CERTIFICATE AS TO PARTIES, RULINGS,
AND RELATED CASES

(A) Parties and Amici. All parties, intervenors, and amici appearing before the Federal Mine Safety and Health Review Commission and its administrative law judge and in this Court are listed in the brief for Black Beauty Coal Company.

(B) Rulings Under Review. References to the rulings at issue appear in the brief for Black Beauty Coal Company.

(C) Related Cases. This case has not previously been before this Court or any other Court. Counsel are unaware of any related cases currently pending before this Court or any other Court.

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GLOSSARY OF ABBREVIATIONS AND ACRONYMS

Black Beauty Commission	Black Beauty Coal Company Federal Mine Safety and Health Review Commission
JA	Joint Appendix
Judge	Administrative Law Judge
Mine Act or Act	Federal Mine Safety and Health Act of 1977
MSHA	Mine Safety and Health Administration
Pet. Br.	Brief for Black Beauty
Secretary	Secretary of Labor
Secy's Exhs.	Secretary's Exhibits or Government's Exhibits

STATEMENT OF JURISDICTION

The Secretary of Labor ("the Secretary") is satisfied with the jurisdictional and standing statements set forth in Black Beauty Coal Company's ("Black Beauty's") brief.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the administrative law judge's finding that the cited condition constituted a violation of 30 C.F.R. § 75.400.
2. Whether substantial evidence supports the administrative law judge's finding that the violation constituted an "unwarrantable failure to comply" and reflected "high negligence."

PERTINENT STATUTES AND REGULATIONS

The pertinent statutes and regulations are set forth in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory Framework

The Federal Mine Safety and Health Act of 1977 ("the Mine Act" or "the Act") was enacted to improve and promote safety and health in the Nation's mines. 30 U.S.C. § 801. In enacting the Mine Act, Congress stated that "there is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's . . . mines

. . . in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines." 30 U.S.C. § 801(c). Titles II and III of the Act establish interim mandatory health and safety standards. In addition, Section 101(a) of the Act authorizes the Secretary to promulgate improved mandatory health and safety standards for the protection of life and the prevention of injuries in coal and other mines. 30 U.S.C. § 811(a).

Under Section 103(a) of the Mine Act, inspectors from the Mine Safety and Health Administration ("MSHA"), acting on behalf of the Secretary, regularly inspect mines to assure compliance with the Act and with standards. 30 U.S.C. § 813(a). If an MSHA inspector discovers a violation of the Act or a standard during an inspection or an investigation, he must issue a citation or an order pursuant to Section 104(a) or Section 104(b) of the Act to the operator of the mine. 30 U.S.C. §§ 814(a) and 814(b).

Section 104(d) of the Mine Act provides for increasingly severe sanctions if, among other things, the Secretary finds that a violation was "caused by an unwarrantable failure of [the] operator to comply" with a standard. 30 U.S.C. § 814(d). Those sanctions may include the issuance of a withdrawal order.

Id.

Section 110(a) of the Mine Act provides for the assessment of a civil penalty against the operator of a mine in which a violation of a standard occurs. 30 U.S.C. § 820(a). Section 110(i) of the Act requires that, in determining what penalty is to be assessed under Section 110(a), consideration be given to, among other things, "whether the operator was negligent." 30 U.S.C. § 820(i).

An operator may contest a citation, order, or proposed civil penalty before the Commission. 30 U.S.C. §§ 815 and 823. The Commission is an independent adjudicatory agency established under the Mine Act to provide trial-type administrative hearings before an administrative law judge and appellate review in cases arising under the Mine Act. 30 U.S.C. § 823. See Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 204 (1994); Secretary of Labor on behalf of Wamsley v. Mutual Mining, Inc., 80 F.3d 110, 113-14 (4th Cir. 1996). If the Commission declines to review an administrative law judge's decision, the judge's decision becomes a final and appealable Commission decision. Id.

B. Facts and Procedural History

This case arises from an inspection of the Air Quality No. 1 underground bituminous coal mine on February 26, 2009, conducted by MSHA Inspector Danny Franklin. Inspector Franklin was accompanied by Section Foreman Randy Hammond. JA 38A-39A; Tr. 77-79. The inspection began at the mine's "Three Main

North/One West B" area. JA 39A; Tr. 79. Franklin and Hammond progressed in by at the One West B belt tail and, after traveling approximately 60 feet, Franklin smelled the distinct odor that is produced when coal burns -- an awareness he gained from working in the coal industry since 1973. JA 38A, 39A; Tr. 76, 79-81. To Inspector Franklin, this odor meant that even though the CO alarm was not triggered, there was a problem somewhere in the vicinity. JA 39A, 48A; Tr. 81, 117. Franklin observed three miners working approximately 50 feet away, and inquired whether they were engaged in any activity that would create the smell. JA 39A; Tr. 81. When the miners responded in the negative, Franklin inquired whether the miners had recognized the smell as an indication of burning coal. JA 39A; Tr. 81.

One of the miners, belt mechanic Wayne Vogel, responded that he recognized the burning smell, and had investigated it approximately 30 minutes before the arrival of the inspection team, but could find neither the cause nor the source of the smell. As a result, Vogel stated, he did not report the matter to management because he did not feel that there was anything to report. JA 40A; Tr. 82.

The team left the area and Franklin "followed his nose" directly to the source of the smell -- the I West tail roller -- where he observed an accumulation of coal around the tail roller, trapped in place by guards and becoming increasingly

compacted. JA 40A; Tr. 83, 85; GX 65. Franklin observed that the guards were preventing the coal from escaping and that the material was packed to a point where the moving roller was turning in the compacted coal. JA 40A; Tr. 85. Franklin measured the accumulation and found it to be two feet in depth, 19 inches in width, and five feet in length. The roller was turning in a slightly smaller area of the accumulation. JA 40A-41A; Tr. 85-86. Inspector Franklin believed that the spinning roller was itself an ignition source in that it was creating friction in a combustible fuel source. JA 41A; Tr. 87. This source, Franklin believed, was the cause of the burning smell. JA 41A; Tr. 86-88.

Inspector Franklin next motioned for Foreman Hammond to look at the belt. JA 43A; Tr. 96-97. Hammond acknowledged that the accumulation existed and testified that he smelled something akin to burning rubber in the vicinity. JA 59A, 61A; Tr. 159, 168. Hammond believed that the smell came from a piece of skirt rubber, bolted to the side of the tail piece to prevent coal spillage, that had torn and was rubbing up against the belt. JA 59A; Tr. 160. When Franklin inquired what was going to be done with the problem evident at the tail, Hammond walked away to make a call to enlist help to fix the problem. JA 43A; Tr. 96.

Inspector Franklin believed that Foreman Hammond should have immediately shut the belt down, rather than leave the area

to enlist help. JA 43A; Tr. 97. Although there was no visible smoke in the area, Franklin believed the situation to be an immediate hazard because the combustible material was already hot and emitting a burning smell. JA 43A; Tr. 94. He believed that there was a reasonable likelihood that a fire was imminent, and that as many as six miners would be in immediate danger. JA 42A-43A; Tr. 93-96.

Because the miners had been smelling the odor of burning coal for approximately 30 minutes before the team's arrival, Inspector Franklin suspected that their senses had more likely than not been deadened to a point where a fire would be well on its way before the miners would even notice it. JA 43A, 44A; Tr. 95, 98. No one had taken the appropriate steps to verify the source of what could have become a very dangerous problem, in order to remedy it. JA 44A-45A; Tr. 101-102. The mine had been cited for violative accumulations in the past,¹ and Franklin believed that the miners had developed a culture of simply ignoring certain safety hazards. JA 44A-45A; Tr. 101-102. As a

¹ In the approximately one-year period preceding the inspection, the mine had been cited for violative accumulations 102 times. In the two-year period preceding the inspection, the mine had been cited for violative accumulations 234 times. 33 FMSHRC 1482, 1483 (2011); JA 8A; Sec'y Exhs 60, 63, 64, 69, 71. In addition, MSHA had discussed accumulations with mine management "for quite some time," and had warned that the mine was receiving "way too many" citations for violative accumulations on the belts. 33 FMSHRC at 1483, 1488; JA 9A, 14A; Tr. 104.

result, Inspector Franklin issued an order alleging a violation of 30 C.F.R. § 75.400,² and determined that the violation was significant and substantial ("S&S"),³ reflected high negligence, and constituted an "unwarrantable failure to comply" with Section 75.400. JA 44A-45A; Tr. 101-103.

C. The Judge's Decision

The administrative law judge found that the cited accumulation existed and constituted a violation of Section 75.400. 33 FMSHRC at 1486; JA 12A. The judge also found that the violation was S&S (33 FMSHRC at 1486-87; JA 13A), constituted an unwarrantable failure to comply, and reflected high negligence. 33 FMSHRC at 1488; JA 14A.

In finding that Black Beauty violated the standard, the judge rejected Black Beauty's argument that the accumulation

² 30 C.F.R. § 75.400 states:

Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not permitted to accumulate in active workings or on diesel-powered and electric equipment therein.

³ A "significant and substantial" violation is described in Section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). Under Commission case law, a violation is properly designated "S&S" "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Div., Nat'l Gypsum Co., 3 FMSHRC 822, 825 (1981).

amounted to nothing more than "permissible spillage." Instead, the judge found that "since it is undisputed that there were accumulations packed in the guard on the conveyor and the rollers were turning in that accumulation," a violation of the standard occurred. 33 FMSHRC at 1486; JA 12A.

In finding that the violation posed a significant risk to miners and constituted an unwarrantable failure, the judge found that, although the torn skirt could have caused the accumulation to occur quickly, Black Beauty failed to explain "why the odor of burning coal had been evident for more than 30 minutes prior to the arrival of Hammond and Franklin." 33 FMSHRC at 1487; JA 13A. The judge found in addition that even though the accumulation on the ground may have been recent, "it is clear that the coal turning in the belt was not . . . [and] should have been seen and noted by Villain."⁴ 33 FMSHRC at 1487; JA 13A. The judge found further that because neither of Black Beauty's witnesses -- neither Hammond nor Villain -- "explained the coal turning in the rollers emitting the burning odor," Inspector Franklin's scenario of events "was the most likely and [was] grounded in fact." 33 FMSHRC at 1488; JA 14A. The judge

⁴ James Villain was a belt shoveler at the time the order was issued. He testified that he had only recently cleaned the tail of the B belt and was on his way to the head area when the belt was shut down. He immediately returned to the tail to learn the cause of the stoppage. 33 FMSHRC at 1485-86; JA 12A; TR. 173-75.

determined, therefore, that although no one was certain "how long the condition existed, it [was] fair to say that it existed far longer than it should have." 33 FMSHRC at 1488; JA 14A; Tr. 90.

The judge also observed that the mine had received a number of citations for accumulations as well as a number of warnings for excessive accumulations at the belt line, had "not taken effective measures to correct the continued accumulations violations," and may have made "no effort to correct these persistent conditions." 33 FMSHRC at 1488; JA 14A; Tr. 102. The judge concluded that "the negligence was high, that the operator demonstrated indifference or lack of reasonable care, that the violation was the result of the operator's unwarrantable failure to comply with the mandatory standard," and that the \$ 70,000 penalty proposed by the Secretary was appropriate. 33 FMSHRC at 1488; JA 14A.⁵

SUMMARY OF ARGUMENT

It is settled law that a judge's credibility determinations are entitled to great weight and may not be overturned lightly. E.g., Farmer v. Island Creek Coal Co., 14 FMSHRC 1537, 1541 (1992). It is also settled law that the Commission's findings of fact are conclusive as long as they are supported by

⁵ Black Beauty filed a petition for discretionary review with the Commission; the Commission denied review.

substantial evidence on the record as a whole. E.g., RAG Cumberland Resources v. FMSHRC, 272 F.3d 590, 598 (D.C. Cir. 2001). Finally, it is settled law that an unwarrantable failure determination is made by looking at all the facts and circumstances of each case to ascertain whether any aggravating factors exist. E.g., Consolidation Coal Co., 23 FMSHRC 588, 593 (2001). In this case, substantial evidence supports the judge's finding that the cited condition, which had been emitting a burning odor for 30 minutes, constituted a violative accumulation and not merely spillage. Substantial evidence also supports the judge's finding that the accumulation, which was preceded by an extensive history of violative accumulations and provoked no effective response by any Black Beauty miner, constituted an unwarrantable failure and reflected high negligence.

ARGUMENT

I.

SUBSTANTIAL EVIDENCE SUPPORTS THE JUDGE'S FINDING THAT THE CITED CONDITION CONSTITUTED A VIOLATION OF 30 C.F.R. § 75.400

A. The Substantial Evidence Test

In reviewing the 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 (1989) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). Under the substantial evidence test, a judge's credibility determinations are entitled to great weight and may not be overturned lightly. Farmer v. Island Creek Coal Co., 14 FMSHRC at 1541. The substantial evidence test may be met by reasonable inferences drawn from indirect evidence, as long as there is "a logical and rational connection between the evidentiary facts and the ultimate fact inferred." Jim Walter Resources, Inc., 28 FMSHRC 983, 989 (2006); Mid-Continent Resources, Inc., 6 FMSHRC 1132, 1138 (1984).

The Court reviews the Commission's factual findings under the substantial evidence test. If they are supported by substantial evidence, the Commission's findings are conclusive upon the Court. RAG Cumberland, 272 F.3d at 599 (citing 30 U.S.C. § 816(a)(1)). See also United Food & Commercial Workers Union v. NLRB, 506 F.3d 1078, 1084 (2007)(citing National Steel & Shipbuilding v. NLRB, 156 F.3d 1268, 1271 (D.C. Cir. 1998), Capital Cleaning Contractors, Inc. v. NLRB, 147 F.3d, 999, 1004 (D.C. Cir. 1998) (Board's findings of fact are conclusive and Court reviews inferences drawn therefrom with considerable deference in light of Board's expertise).

B. Substantial Evidence Supports the Judge's Finding
That the Condition Constituted a Violative Accumulation

Order No. 8414994 alleged that Inspector Franklin observed an accumulation of loose coal measuring two feet in depth, 19 inches in width, and five feet in length at the site. JA 40A-41A; Tr. 85-86. There is no dispute that the condition described by the inspector existed: Section Foreman Hammond acknowledged its existence. JA 59A, 61A; Tr. 159, 168. Hammond also acknowledged, as Franklin testified, that there was a distinct odor of material burning. JA 59A, 61A; Tr. 159, 168. (Franklin believed the material to be coal, while Hammond believed it to be rubber). Also not in dispute is that although there was no smoke and the carbon dioxide monitors had not sounded, miners in the vicinity had been smelling the burning odor for up to 30 minutes before the arrival of the inspection team. JA 43A-44A; Tr. 95, 98. Although the smell was in the air and was noticeable, no one took appropriate steps to determine the source of the odor. JA 44A-45A; Tr. 101-102. Franklin measured the coal and determined that the material was packed to a point where the moving roller was turning in the compacted coal, and Hammond acknowledged the condition. JA 60A; Tr. 163.

Black Beauty contends that the cited condition constituted "permissible spillage" rather than a "violative accumulation."

Pet. Br. at 12-14.⁶ Citing Old Ben Coal Co., 1 FMSHRC 1955, 1958 (1979) and Utah Power & Light Co. v. Secretary of Labor, 951 F.2d 292, 295 n.11 (10th Cir. 1991), Black Beauty contends that it should have been allowed a reasonable amount of time to clean up spillage instead of being accused of permitting the material to accumulate. Pet. Br. at 12. In Old Ben and Utah Power & Light, the Commission and the Court both recognized the inevitability of coal spillage during the course of mining operations -- and both agreed that spillage can easily become an accumulation depending upon its size and amount and whether it is cleaned up "with reasonable promptness" and "all convenient speed." The Court and the Commission also noted that "those masses of combustible materials which could cause or propagate a fire or explosion are what Congress intended to proscribe." Utah Power & Light Co., 951 F.2d at 292.⁷

⁶ The judge declined to address the issues of spillage on the ground because it was undisputed that "there were accumulations packed in the guard on the conveyor and the rollers were turning in that accumulation." 33 FMSHRC at 1486; JA 12A; (emphasis added). This finding was sufficient to establish a violation of the standard.

⁷ The Commission referenced the intent of Congress because the language of 30 C.F.R. § 75.400 is copied verbatim from the interim mandatory safety standards for underground coal mines contained in the Federal Mine Safety and Health Act of 1977. 30 U.S.C. § 864(a).

In Utah Power & Light Co., the Commission stated that Congress "intended to prevent, not merely minimize accumulations." Id. In upholding the Commission's decision,

Black Beauty claims that Inspector Franklin "admitted that the skirt rubber was the cause of the spillage" in the tail roller guard. Pet. Br. at 14. That claim mischaracterizes what Franklin said. The quoted testimony shows that Franklin said that he "didn't see the cause," and merely said that the torn skirt explanation was reported to him by Hammond and seemed reasonable to him. In any event, even if Franklin conceded that the torn skirt caused the condition, that proves nothing, because nothing in Franklin's testimony, and nothing in the other witnesses' testimony, establishes when the skirt was torn. In short, nothing in the record precludes the inference -- drawn by an experienced mine inspector and adopted by the trier of fact (33 FMSHRC at 1487-88; JA 13A-14A) -- that the accumulation in the tail roller guard had existed for at least 30 minutes because the miners had smelled a burning odor for at least 30 minutes.⁸ And nothing precludes the inspector's

the Tenth Circuit Court agreed that although some spillage may be inevitable during coal mining, a "spillage" becomes a violative "accumulation" if it is not cleaned up "with reasonable promptness" and "all convenient speed." Utah Power & Light, 951 F.2d at 295 n.11.

⁸ Black Beauty asserts that the judge found two discrete conditions -- (1) the condition that was caused by the torn curtain, and (2) the pre-existing condition in the guard on the roller belt -- and declined to address whether the first condition was a spillage rather than an accumulation. Pet. Br. at 14-16. That assertion misstates what the judge did. The judge found two discrete conditions -- (1) the material on the ground, and (2) the material in the guard -- declined to address

experience-based judgment -- which the inspector confirmed when he "followed his nose" and discovered the roller turning in a packed accumulation of coal in the guard -- that the burning odor the miners had smelled was the odor of burning coal.

II.

SUBSTANTIAL EVIDENCE SUPPORTS THE JUDGE'S FINDING THAT THE VIOLATION CONSTITUTED AN "UNWARRANTABLE FAILURE" AND REFLECTED "HIGH NEGLIGENCE"

The term "unwarrantable failure" has been determined by the Commission to mean "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Emery Mining Corp., 9 FMSHRC 1997, 2004 (1987). Accord Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (1987). See also Secretary of Labor v. FMSHRC, 111 F.3d 913, 919-920 (D.C. Cir. 1997). The Commission has stated that "unwarrantable failure" is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." Emery, 9 FMSHRC at 2003-04. Accord Rochester & Pittsburgh Coal Co., 13 FMSHRC 189, 193-94 (1991); Windsor Coal Co., 21 FMSHRC 997, 1000 (1999). The Commission has held that a number of factors are relevant in determining whether a violation is an unwarrantable failure, including the extensiveness of the violative condition, whether the violative condition was obvious,

whether the material on the ground was spillage, and specifically found that the material in the guard was an accumulation. 33 FMSHRC at 1486; JA 12A.

the length of time the violative condition existed, the operator's efforts to eliminate the violative condition, whether the operator had been placed on notice that greater efforts at compliance were necessary, whether the violative condition posed a high degree of danger, and whether the operator had a history of previous similar violations. Consolidation Coal Co., 23 FMSHRC at 593; Windsor Coal, 21 FMSHRC at 1000; LaFarge Construction Materials and Theodore Dress, 20 FMSHRC 1140, 1145 (1998). The Commission has also held that the unwarrantable failure determination is made "by looking at all the facts and circumstances of each case to see if any aggravating factors exist," and to see if any mitigating factors exist. Consolidation Coal, 23 FMSHRC at 593 (emphases added). Accord IO Coal Co., 31 FMSHRC 1346, 1350-51 (2009).

Although "unwarrantable failure" and "negligence" are not identical concepts, the Commission has recognized that they are similar concepts and are to be analyzed by looking at similar factors. Rochester & Pittsburgh, 13 FMSHRC at 193-94; Thunder Basin Coal Co., 19 FMSHRC 1495, 1503 (1997). Section 100.3(d) of the Secretary's current penalty regulations, which govern the Secretary's penalty proposals but not the Commission's penalty assessments, defines "negligence" as "conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risk of harm." 30 C.F.R. § 100.3(d). Section 100.3(d) defines

"high negligence" as occurring when "[t]he operator knew or should have known of the violative condition or practice, but [when] there are no mitigating circumstances." Id. Mitigating circumstances "may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices." Id.

In this case, substantial evidence supports the judge's finding that the accumulation violation constituted an "unwarrantable failure" and reflected "high negligence." As set forth above, the smell of burning coal was obvious -- and had existed for 30 minutes -- yet Inspector Franklin observed no effort to discover or address the hazardous condition. JA 45A; Tr. 104. The only action by any Black Beauty miner in response to the 30-minute burning smell was belt mechanic Vogel's attempt to investigate the source of the smell. When Vogel could not ascertain the source of the smell, Vogel chose not to report the situation to management because he did not believe there was anything to report. JA 40A; Tr. 82. Instead, Vogel and the other miners simply allowed the burning smell to continue for 30 minutes -- until Inspector Franklin "followed his nose," discovered the accumulation that was the source of the smell, and took immediate action.

Properly, both the inspector and the judge viewed the miners' inaction in the context of Black Beauty's history of

accumulations violations. 33 FMSHRC 1488; JA 14A; JA 44A; Tr. 98-99A. In the approximately one-year period preceding the inspection, the mine had been cited for violative accumulations 102 times. In the two-year period preceding the inspection, the mine had been cited for violative accumulations 234 times. 33 FMSHRC 1483; JA 9A; JA 2A; Secy's Exhs. 60, 63, 64, 69, 71. On the very day of the inspection, the mine had been cited three times for violative accumulations. 33 FMSHRC at 1488; JA 14A; JA 41A; Tr. 89. In addition, management had been warned by MSHA that the mine was receiving "way too many" citations for violative accumulations on the belts. 33 FMSHRC at 1483, 1488; JA 9A, 14A; JA 45A; Tr. 104. The mine's history of accumulations violations strongly supports an unwarrantable failure finding in its own right. See Consolidation Coal, 23 FMSHRC at 595 (unwarrantable failure finding supported by history of 88 accumulations violations in the preceding two years and four accumulations violations in the preceding two days); New Warwick Mining Co., 18 FMSHRC 1568, 1574 (1996) (unwarrantable failure finding supported by history of 16 accumulations violations in the preceding four months and two accumulations violations in the preceding two days); Peabody Coal Co., 14 FMSHRC 1258, 1263 (1992) (unwarrantable failure finding supported by history of 17 accumulations violations in the preceding six-and-a-half months). When combined with the

miners' inaction in this instance, that history also supports the judge's inference "that the mine ha[d] failed to train its miners to call or seek help when they cannot discover the source of a burning smell." 33 FMSHRC 1488; JA 14A.

Black Beauty contends that the judge's unwarrantable failure and high negligence findings are erroneous because they were based on the conduct of an hourly employee -- Vogel -- and the conduct of an hourly employee cannot be imputed to the operator for unwarrantable failure and negligence purposes. Pet. Br. at 22-24.⁹ Black Beauty misapprehends the judge's analysis. The judge did not focus on the miners' conduct. Rather, she focused, as she was required to do, on the operator's conduct -- and inferred that the operator failed to train its miners to call in or seek help when they smelled something burning. Given the mine's compelling history of accumulations violations, and the miners' complete failure to take effective action, that inference is permissible.¹⁰ And given the catastrophic potential consequences of a fire in an

⁹ In addition, Black Beauty again claims that the judge erroneously found two discrete conditions. Again, Black Beauty's claim is incorrect. See p. 15 n.9, above.

¹⁰ As the judge observed, Black Beauty could have introduced evidence to show that it trained its miners how to respond to accumulation-related problems. It did not do so. 33 FMSHRC 1488; JA 14A.

underground coal mine,¹¹ that inference supports a finding of unwarrantable failure and high negligence.

CONCLUSION

For the reasons set forth above, the Court should affirm the judge's decision.

Respectfully submitted,

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¹¹ The judge specifically found that the violation was "significant and substantial" because it was reasonably likely to result in fatal injuries to miners. 33 FMSHRC at 1487; JA 13A. Black Beauty does not challenge that finding.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B, (C), D.C. Cir. Rules 28(c) and 32 (a)(1), I certify that this Brief for the Secretary of Labor contains 4,535 words as determined by Word, the processing system used to prepare this brief.

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CERTIFICATE OF SERVICE

I certify that this Brief for the Secretary of Labor was served by sending a copy by electronic transmission and two copies by overnight delivery this 14th day of May, 2012, on:

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