FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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SEP 24 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING DOCKET NO. WEST 81-93
v.	Assessment Control No. 05-00296-03054 V
C F & I STEEL CORPORATION, Respondent.	MINE: Allen

Appearances:

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Before: Judge John A. Carlson

DECISION

This case, heard under provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act"), arose from an inspection of respondent's underground coal mine. On September 11, 1980 one of the Secretary of Labor's inspectors issued a withdrawal order under section 104(d)(2) of the Act alleging that CF&I had failed unwarrantably to support the roof in the No. 4 entry 7 panel east section in the mine. Specifically, he cited a violation of that part of 30 C.F.R. § 75.200 which provides:

> The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs.

The order also alleges that the violation was "significant and substantial." On September 15, 1980, the inspector modified his order to amplify his description of the roof's condition and to note that an unplanned roof fall had occurred on that day in the No. 4 entry. The order was terminated on September 18, 1980.

In this present proceeding the Secretary seeks a civil penalty of $5,000. CF&I duly contested the proposed assessment, and a full hearing on the merits was held. No jurisdictional issues were raised. Both parties filed post-hearing briefs.

REVIEW OF THE EVIDENCE AND DISCUSSION

I

Undisputed portions of the record show that at the time of issuance of the 104(d)(2) withdrawal order, prior citations had created a proper predicate under the Act, On April 2, 1980, respondent was issued a 104(d)(l) citation alleging a violation of the same standard cited here. On April 3, 1980, respondent was issued a 104(d)(1) withdrawal order based upon coal dust accumulations. There were no intervening "clean" inspections before September 11, the date of the present order. The prior citations were not contested and the proposed penalties were paid.

Inspector Donald Jordan, who issued the order upon which the present proposed penalty is based, insisted that miners be withdrawn from the No. 4 belt entry because of inadequate roof support. Specifically, the inspector testified that he observed cracks and fissures in the roof and evidence of rolling ribs. He also testified that roof beams were sagging and twisted and that he observed cracked and broken timbers, (Tr. 21-24). These conditions, he contended, showed that the roof was inadequately supported and was "extremely hazardous." The condition of the roof, in his opinion, could lead to an unintended roof fall, entrapping as many as twelve miners and causing possible fatalities (Tr. 32).

The inspector believed that his September 12 determinations were substantiated by a roof fall which occurred between the time of that inspection and his followup visit on September 15. This fall occurred primarily in an intersecting cross-cut, but extended into the No. 4 entry, with debris reaching to the belt in the center of the entry, a distance of 12 to 15 feet.

Witnesses for CF&I did not seriously dispute the inspector's observations of the physical condition of the No. 4 entry (Tr.107), but disagreed with most of his conclusions.

Witnesses for both parties agreed that the approved roof control plan, which called for epoxy-resin roof bolts on four foot centers, was not

adequate in entry No. 4. Respondent's witnesses insisted, however, that at and before the time of inspection, its miners were carrying out an ambitious program of additional shoring, which was sufficient to support the roof.

Jack W. Snow, the mine superintendent, testified that he recognized that "we had undue pressures, both roof and floor" (Tr. 74). In a general way, he also agreed with the inspector that the 7 Panel East Section (entries 4, 5, and 6) had experienced a number of unplanned roof falls prior to the inspection (Tr. 36, 114). He insisted, however, that the addition of supplemental wooden props, spot beams, and matting had kept the roof safe. At one point he put it this way: "At the time I felt that the area was sufficiently supported and probably to the best of our ability for the conditions that we had" (Tr. 77). Snow also showed that 280 props had been set in the No. 4 entry between July 17 and September 11, 1980. Addition of too much support, he testified, could be counter-productive because the floor tended to heave upwards. This phenomenon causes upright supports, (timbers in this instance) to push upwards against the roof or cross beams, resulting in distortion or breakage and an actual weakening of the roof.

Ike Gonzales, an inspector from CF&I's safety department and Edward Griego, assistant foreman for 7 Panel East, gave testimony which tended to support that of Snow.

Witnesses for the parties also differed over another matter: how much of the part of the No. 4 entry that the inspector regarded as dangerous was actually used by miners. By the end of the hearing it was clear that the inspector's concern did not extend to the entire length of the entry. He acknowledged that the "worst part" was from a heavily timbered section near the beginning of the entry at the belt head to a point 200 feet outby the face (Tr. 57). According to Jordan this "worst" area had some spot beams and timbers, as well as the bolts called for in the basic plan, but it was clearly unsafe (Tr. 21, 57-58, 65). The first 100 feet outby the face he felt to be in better condition because it had had less time to deteriorate. Respondent's witnesses did not deny that the installation of supplemental supports had proceeded generally outby to inby, but they nevertheless maintained that all areas were adequately supported.

Inspector Jordan was particularly concerned that during his September 11 inspection he saw miners inby the "worst part" of the roof. He maintained that they could not have passed through the No. 5 entry because it was blocked by a previous fall. (Entries 5 and 6 parallel No. 4.) He also maintained that the No. 4 entry provided the only means of entry and exit because No. 6 entry was also blocked, and that No. 4 was the only designated escapeway. Respondent's witness countered these assertions through testimony that CF&I had properly designated entry No. 6 as an

escapeway despite the presence of a roof fall. Specifically, Gonzales testified that by September the fall area in the no. 6 entry had been made easily passable by timbering and installation of steps over the debris (Tr. 123, 126-127).

Additionally, foreman Griego testified that his four crewman who were inby the cave-in in the no. 5 entry had not travelled there through the full length of no. 4. They had walked there, he asserted, through the no. 5 entry, detouring the length of only two crosscuts (about 130 feet) through no. 4 entry.

Respondent's witnesses did not suggest, however, that miners, except for those installing supports, were forbidden to travel or work in no. 4 beltway entry while it was in the condition observed by the inspector. It was acknowledged, for example, that work would be done on the belt itself whenever necessary (Tr.118-119). Also, Mr. Griego indicated that before his crew began work on September 11, the graveyard shift had intended to work on a 200 foot extension of the belt, but instead had spent most of their time knocking out a stop in a crosscut to improve air flows to the face (Tr.138-139).

II

Roof control citations alleging non-compliance with approved plans can usually be proved or disproved by evidence of the simplest sort -- measurement of roof widths and support spacings. Where, as here, however, the parties agree that the general plan is insufficient, and 29 C.F.R. § 75.200, demanding "adequate" control comes into play, determinations become more difficult. Wholly objective criteria are necessarily supplanted in some measure by judgmental determinations.

Respondent's officials believed that the additional supports in the no. 4 beltway entry were sufficient; Inspector Jordan believed that they were not. Having considered all the evidence, I must agree with the inspector. I do so for several reasons. The inspector had a lengthy familiarity with the Allen Mine and the particular formation through which the no. 4 entry and the entire 7 panel East section had been cut. His judgment that major segments of the entry in question remained dangerous despite continuing installation of spot supports is lent credence by the undisputed history of roof falls in that section, and the post-inspection cave-in which partly involved entry 4. In addition, the inspector 's certainty that spot installation of additional props and beams was not keeping up with the rate of roof deterioration was unshakeable throughout the trial. Rebpondent's witnesses, on the other hand, occasionally tended to hedge on their certainty of adequate support. Mr. Greigo, for example, in explaining why he did not express disagreement when the inspector told him the roof was bad, replied:

> Well, it didn't look that bad to me, but I always obey what they say,

> the federal [sic] usually is supposed to know a little bit more what they do. So we take their word quite a bit. (Tr. 139).

He and Superintendent Snow both acknowledged that the September 15 fall which extended in the no. 4 entry would not have occurred with adequate support (Tr. 119, 143).

Accordingly, I find that substantial portions of the roof in the no. 4 entry were inadequately supported in violation of the cited standard. In making this finding I am not unmindful of respondent's contention that the inspector's sole concern with the roof in entry 4 was based upon a mistaken belief that the entire length of that entry was a designated escapeway (respondents brief at 7). I agree that this was a major concern of the inspector, and that the inspector's belief in that regard was not borne out by the record. Respondent's evidence that two adequate escapeways existed, and that these routes included only a short section of the no. 4 entry, is persuasive. This finding, however, goes only to the gravity of the violation. The record clearly discloses that the cited entry was open to use by miners, and that work on the belt could have proceeded at any time.

I have also considered the contention that placement of additional timbers on a heaving floor may further weaken a roof. The argument lacks substantial merit in that witnesses for both parties noted that props may be "pencilled" or sharpened to minimize this effect. Beyond that, I must endorse the inspector's view that if addition of timbers proved infeasible, respondent was obliged to turn to more elaborate and expensive means of protection, such as steel arches.

III

We now consider the question of penalty. Section 110(i) of the Act requires the Commission, in penalty assessments, to consider the size, negligence, prior history and good faith of the operator, and its ability to continue in business.

The parties stipulated to respondent's large size, (507 employees and 500,000 tons of annual coal production); and that the imposition of the proposed penalty would not impair the mine's ability to remain in business (Tr. 4).

From the evidence I must conclude that the operator was guilty of some degree of fault. Its officials were aware of the conditions upon which the inspector based his conclusion that the roof was dangerous. Since his conclusion was found valid, it follows that respondent should have known of the hazard and violation. It was therefore negligent. On balance, I find the degree of negligence to be moderate.

No specific evidence of respondent's prior history of violation was adduced beyond the two prior orders or citations upon which the present withdrawal order was based. Given the mine's considerable size, its prior history cannot be said to warrant heavy penalty consideration.

The same may be said of respondent's abatement efforts. Although the inspector made clear that little was done on the weekend following his Friday inspection, there is no convincing evidence as to whether anyone was present in the no. 4 entry over the weekend. Abatement followed with good speed after that.

The ultimate evidence shows that the gravity of the violation was less severe than the inspector believed. This is so because, during the times material to his order, the number of miners exposed to the inadequately supported roof *was* substantially fewer than he envisioned. Also, he was heavily influenced by a belief, which I have determined to be ill-founded, that the no. 4 entry was a necessary escape route from 7 panel east sect ion.

Finally, credit must be given to the respondent for its continuing efforts to shore up the cited roof before the inspection. Although its diligence was not sufficient to meet the threat posed by the deteriorating roof, respondent's efforts showed it was scarcely indifferent to the hazard.

On balance, I find the penalty proposed by the Secretary to be excessive. I conclude that a civil penalty of $1,800 is appropriate.

IV

In his opening remarks, the Secretary announced his intent to prove that the violation here was "significant and substantial" and was the result of an "unwarrantable failure" to comply with the standard (Tr.4-5). Respondent, in its post-hearing brief, argued that the facts failed to show unwarrantability. Such special findings are significant because they may lead to a sequence or "chain" of withdrawal orders under section 104 of the Act.

Although both parties approached the hearing with the belief that the validity of special findings was in issue, I am obliged to consider whether I have the power to make such a determination under the statutes. The present case, it must be remembered, did not arise from a contest by respondent of the validity of the 104(d)(2) withdrawal order itself. Respondent had a right to file a timely challenge to the order, but it did not exercise that right. 1/

1/ Section 105(d) of the Act allows 30 days to contest a withdrawal order issued under section 104.

The issue, then, is this: May an operator who fails to contest a 104(d)(2) withdrawal order nevertheless challenge the validity of accompanying special findings in a subsequent penalty proceeding arising from the same violation?

The statutory scheme under which withdrawal order sequences develop is fairly complex. Section 104(d)(l) is the mainspring. It requires the inspector to record on any citation his finding that a violation is "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." It likewise requires him to record any finding that such violation was "caused by an unwarrantable failure" of the operator to comply with a mandatory standard. Should the same inspection, or another inspection within the next 90 days, disclose another unwarrantable failure to comply with a mandatory standard, the inspector must then issue a withdrawal order, requiring closure of the affected mine area. The order remains in effect until the violation is corrected.

Section 104(d)(2) comes into play only when a withdrawal order has issued under Section 104(d)(l). Where a "similar" violation is cited before an interviewing "clean" inspect ion, the inspecting official must issue another withdrawal order. 2/

Section 104(e)(l) and (2) provide that where an operator has a pattern of "significant and substantial" violations of mandatory standards "he shall be given written notice that such pattern exists." Then, should an inspector find another significant and substantial violation within 90 days from the issuance of the notice, he must issue a withdrawal order for the affected mine area. 3/ Under section 104(e)(3), a clean inspection of the mine terminates any pattern of violation which has resulted in the issuance of a 90 day notice.

2/ Under the 1969 Coal Act, which used the same language, a "similar" violation was held to mean one arising from an unwarrantable failure to comply. The concept does not require that it bear substantive similarity to the former violation, nor does it require any showing that the violation was "significant and substantial." Ziegler Coal Company, 6 IBMA 182 (1976); Old Ben Coal Company, 1 FMSHRC 1954 (1979).

3/ Section 104(e)(4) requires that the Secretary of Labor promulgate regulations establishing criteria for determining when a pattern of violations exists. To date, he has not done so.

Where the Secretary charges an operator with an ordinary violation under section 104(a) of the 1977 Act, and accompanies that charge with special findings, the Commission's position is now clear: The validity of the special findings is fully in issue in a subsequent penalty proceeding. Cement Division, National Gypsum Company, 3 FMSHRC 822 (1981). This should not be surprising, since it has long been accepted doctrine that the existence of the underlying violation may be tested in an operator's challenge to a later-filed penalty proceeding. 4/

Where special findings are attached to a withdrawal order under 104(d)(1) or 104(d)(2), however, the results are not so clear. One line of cases arising under the 1969 Coal Act holds that the validity of a withdrawal order is never in issue in a penalty proceeding based upon the occurrence which gave rise to the order. The present Commission in Wolf Creek Collieries Co., March 26, 1979, Docket No. PIKE 78-70-P, in following the holdings of its predecessor, the Interior Board of Mine Operations Appeals, put it this way:

> The Board consistently held that the validity of a withdrawal order is not an issue in a penalty proceeding under section 109 and that it is error to vacate an order in such a penalty proceeding. 5/

To my knowledge neither the old Board nor the present Commission has dealt squarely with the question of how this principle affects possible rights to question special findings in a penalty proceeding.

Relying on these cases, however, at least one judge has held that under the Coal Act where an operator failed to ask for review of withdrawal order, any special findings made in connection with that order become final with the order. Consequently, their validity could not be considered in a penalty proceeding. Clinchfield Coal Company, 2 FMSHRC 290, 292 (1980), Judge Moore.

Although the 1977 Act is indisputably a cognate of the 1969 Act, the enforcement provisions of the two differ in several significant particulars. Most prominent among these is section 104(e) of the new Act which provides for withdrawal orders arising from a "pattern" of significant and substantial violations. This provision had no counterpart under the 1969 statutes. Thus, assuming that challenges to special findings could not be made under the Coal Act in a penalty proceeding subsequent to an unreviewed withdrawal order, it does not necessarily follow that the same would hold true under the present Act.

4/ The Commission has also made it clear that under the 1977 Act an operator may, if he wishes, file an immediate contest of a simple 104(a) citation without waiting for issuance of the Secretary's penalty proposal. This is so whether or not the citation is accompanied by special findings. Energy Fuels Corporation, 1 FMSHRC 299 (1979); Helvetia Coal Company, 1 FMSHRC 321 (1979).

5/ Prominent Coal Board cases which defined this doctrine include Ziegler Coal Company, 2 IBMA 216, 223-224 (1973), Plateau Mining Company, 2 IBMA 303 (1973), and North American Coal Corporation, 3 IBMA 93 (1974).

For the reasons which follow, I am convinced that under the 1977 Act the validity of special findings may be litigated in a penalty proceeding. First, one must note that the Commission in Wolf Creek Collieries, supra, went out of its way to declare that the case presented no issues under the 1977 Act. (See note 1 in that decision.)

My conclusion is chiefly based upon those Commission cases which hold that whenever an inspector finds a violation of a mandatory standard, the allegation of that violation stands on its own feet, even if it results in the issuance of a withdrawal order. Hence, if the the withdrawal order is somehow defective, the judge is without authority to vacate the "underlying" violation and the charges survive as a simple 104(a) matter. In Island Creek Coal Company 2 FMSHRC 279 (1980) the principle was set forth as follows:

> The Act mandates assessment of a penalty for any violation of a mandatory safety standard, such as 30 CFR § 75.400, whether that violation is alleged in a citation issued under section 104(a), or in a withdrawal order issued under section 104(d) or other sections of the Act. Whether a withdrawal order was properly issued or not (rather than a citation alone) does not affect the fact that a violation of a mandatory safety standard was alleged in that order. That allegation, unless itself properly vacated, survives a vacation of the order it is contained in, and, if proven, the assessment of a penalty under section 110 is required. Thus, whether the October 6, 1978 withdrawal order was properly issued under section 104(d)(l) is not relevant to the assessment of a penalty under section 110 for an alleged violation of a safety standard cited in that order. Therefore, the judge erred in granting the motion to dismiss.

Van Mulvehill Coal Co., Inc. 2 E'MSHRC 283, also decided under the present Act, reaches an identical result. A much similar sort of reasoning was applied by the present Commission and by the Coal Board to the 1969 Act. See, respectively, Old Ben Coal Company, 2 FMSHRC 1187 (1980), and Eastern Associated Coal Corp., 1 IBMA 233 (1972).

Island Creek and similar cases can only be read to say that every withdrawal order based upon violation of a mandatory standard contains a 104(a) citation within it, whether that citation is spelled out or not. As to "spelling out," the practice of the Secretary's inspectors has shown little consistency. Often they will issue a "combined citation and withdrawal order," as described by the Commission in Van Mulvehill, supra. At other times, as in the case at bar (and apparently in Island Creek, supra), only the withdrawal order is issued, along with a notation of the mandatory standard allegedly violated. The printed forms. used for all these actions are the same, and only the whim of the inspector appears to dictate whether he also checks the box marked "citation" when he checks the one marked "order." Similarly, no set consideration of either law or

policy appears to dictate whether the space on the standard form designated "type of action" is completed only to show, for example "104(d)(2)," as in the present case, or to show "104(d)(2) and 104(a)," as in others which I have seen.

In any event, the thrust of the Commission's holdings appears to be that any withdrawal order founded upon violation of a mandatory standard holds within it a simple 104(a) citation, whether expressed or not.

If that be so, it follows that an operator who forgoes a challenge to the withdrawal order itself, should not be foreclosed from challenging the "underlying" 104(a) citation in the subsequent penalty proceeding. Put another way, if the simple citation survives the Secretary's vacation of the withdrawal order, rationality and consistency dictate that it likewise survive as an issue in the subsequent penalty proceeding, Otherwise, the survival principle espoused by the Commission would be a one way street -- open for Secretary to travel should his withdrawal order be found somehow deficient, but closed to the operator who wishes to dispute the question of violation in his penalty proceeding. I cannot believe that the Commission or Congress intended such an anomalous result. Credence is lent this belief by the Commission's holding in Pontiki Coal Co., 1 FMSHRC 1476 (1979). This case, arising under the Coal Act, involved the propriety of the judge's vacation of a withdrawal order in the later penalty proceeding arising from the unreviewed order. As in the cases cited earlier in this decision, the Commission held that the vacation of the order was improper in the penalty proceeding. It further held, however, that the existence of violation was in issue, and affirmed the violation,

Once we accept the notion that an operator may attempt to disprove violation in a penalty contest arising from an unreviewed withdrawal order, it follows that he should likewise be able to dispute the validity of special findings. I take this view because special findings are clearly incidents of the violation., not the withdrawal order. Section 104(d)(1) of the Act dictates that the inspector shall record such findings where the violation is "significant and substantial" and where it results from an "unwarrantable failure" to comply with a standard. Sections 104(d)(2) and 104(e) also treat these findings as qualities or circumstances of the violation. As for Commission holdings, the decision in National Gypsum, supra, is consistent with the idea that special findings are an adjunct to violation.

I therefore conclude that the parties properly considered the validity of the special findings an issue in this civil penalty case. In so concluding, I do not mean to suggest that the validity of the withdrawal order itself could have been tried in a penalty proceeding. That issue was not presented here, and for purposes of this decision it is assumed that the Commission will adhere to those Coal Board precedents which hold that an order is final unless separately challenged by timely contest or application for review. I simply hold that the scope of those precedents is narrow, giving finality only to the order itself and not the underlying allegation of violation, nor the special findings which are auxiliary to that allegation.

The concept of finality is justifiable and likely necessary because of the summary character of a closure order. If the order could be vacated in a later penalty proceeding, such action could raise troublesome uncertainties about consequences of a closure -- uncertainties which ought to be resolved quickly through a prompt attack on the order itself, by way of a petition for review in an imminent danger case, or by a contest of the order in one arising under 104(d) or 104(e). Such a vacation, for example, could cloud the standing of miners who seek compensation under section 111 of the Act for lost pay because of a withdrawal.

One might argue, of course, that the special finding which is overturned in a penalty case may have served as the very foundation of the withdrawal order. Consequently, to allow litigation of the special finding in a penalty proceeding, while treating the order which rests upon it as final and binding, is contradictory. Such results occur frequently under regulatory statutes, however, and need not be a matter of concern. The same argument could be raised about the examination of the underlying violation in a penalty case following an unreviewed withdrawal order such as was involved in Pontiki, supra. Had the Commission not affirmed the judge's finding of violation in that case, presumably the withdrawal order would have remained valid even though the violative conduct upon which it was based was found not to exist.

The Occupational Safety and Health Review Commission, which adjudicates disputes arising under the Occupational Safety and Health Act of 1970 (29 U.S.C. § 651 et seq.), faced similar arguments in cases involving "failure to abate" citations under that Act. In the typical OSHA abatement case a prior citation for violation of a safety standard has become final by operation of law when an inspector, on subsequent inspection, concludes that the violative condition was not corrected. He then issues another citation charging a failure to abate, a separate offense under the statutes. The Commission, in such cases, holds that the employer, despite the finality of the prior order, may show that no violation existed in the first instance. In York Metal Finishing Company, OSAHR Docket No. 245, [1 BNA OSHC 1655 (1974)], for example, the Commission rejected arguments of res judicata and collateral estopple based upon the finality of the prior citation, although it did concede that the first citation was indeed final and could not be vacated. Those doctrines were inapplicable, it held, because there had never been an adjudication on the merits. The same may be said under the present mine act.

In the instant case one could also argue that special findings should not be at issue in penalty proceedings because the Secretary should be able to regard those findings as fully established links in the chain possibly leading to additional withdrawal orders. It is likely true, to cite one example, that a finding of "significant and substantial" violation made in connection with a withdrawal order could trigger a 90 day notice under section 104(e) of the Act well before the penalty case arising from the original order reached the hearing stage. This sort of infirmity, however, did not concern the Commission in National Gypsum, supra. Under that case the special findings accompanying the citation plainly resided in some degree of doubt until their validity was decided in the penalty proceeding. In the several months which may pass between the issuance of the citation and the hearing on penalty, such findings might well be used to trigger a 104(d) or 104(e) withdrawal.

One more matter requires attention before I rule on the special findings in this case. Under the 1969 Act, a withdrawal order under 104(c)(2) [104(d)(2) under the present Act] need not be predicated upon a "significant and substantial" finding. The violation giving rise to the closure need only be shown to have been the product of an "unwarrantable failure" to comply. Ziegler Coal Co., 6 IBMA 182(1976). This principle was expressly upheld by the present Commission in a case arising under the 1969 law. Old Ben Coal Co., supra

In this case, however, the question is not whether a finding of "significant and substantial" was essential to the issuance of the withdrawal order (it clearly was not> ; but whether it was proper to list it as a possible predicate to future orders. May the Secretary's inspector, in other words, properly record a violation as "significant and substantial" despite the fact that he intends to issue a 104(d)(2) order which only requires a finding of "unwarrantable failure"? I hold that he may. Section 104(d)(l) commands inspectors in "any" inspection of a mine to make special findings a part of the citation whenever the elements necessary for such findings are present. If I am correct that every order involving violation of a mandatory standard embodies an underlying citation, it follows that a "significant and substantial" allegation was proper, even though not necessary for the issuance of the 104(d)(2) withdrawal order. This view is in harmony with the entire scheme of sanctions under the Act. Nothing in the Act or legislative history suggests that if a violation qualifies as both "significant and substantial" and "unwarrantable" the Secretary must, depending upon what link in the chain is involved, ignore one or the other. If anything, the legislative history, to the extent it speaks to the matter, implies quite the opposite: that a sequence of "unwarrantable failure" violations and one of "significant and substantial" violations are intended to run parallel to one another. S. Rep. 95-181, 1st Sess., 33 (1977); reprinted-in Legislative History of the Federal Mine Safety and Health Act of 1977 at 622 (1978) (Legis.Hist.) The Senate Committee put it this way:

> It is the Committee's intention that the Secretary or his authorized representative may have both enforcement tools available, and that they can be used simultaneously if the situation warrants. For example, where an operator has been given a Section 105(c) [104(d) in the final enactment] citation and a 105(d) [now 104(e)] notice, and thereafter an inspection discloses a violation of a "significant and substantial" nature and which is also "unwarranted," the operator will be issued both an order under Section 105(c) and an order under 105(d). The requirements to break a sequence in Sections 105(c) and 105(d) differ, and are intended to be satisfied individually.

The evidence in the case before me shows that the violation was the product of an "unwarrantable failure" to comply with the cited standard. "Unwarranted failure" occurs where the violative condition is one of which the operator had knowledge or should have had knowledge, or which the operator failed to correct through indifference or lack of reasonable care. Ziegler Coal Company, 7 IBMA 280 (1977). Here it is apparent that the operator knew of the conditions of the roof, but believed its abatement efforts sufficient. I have found them insufficient, however, and the failure to comply was therefore "unwarrantable." The previous determination of negligence made with regard to penalty was based upon the same findings as those which constitute an "unwarrantable failure."

I further conclude that the violation was "significant and substantial." In such a violation "'. . . there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.' National Gypsum, supra. The unstable and inadequately supported roof described earlier in this decision made a collapse or fall reasonably likely. Had that occurred, serious injury for any miners under the fall was almost inevitable.

CONCLUSIONS OF LAW

Based upon the entire record in this case, and consistent with the findings embodied in the narrative portions of this decision, the following conclusions of law are made:

(1) The Commission has jurisdiction to hear and decide this matter.

(2) Respondent, C F & I Steel Corporation, violated 30 C.F.R. § 75.200 as alleged in the withdrawal order.

(3) The violation was "significant and substantial," and was the result of an "unwarrantable failure" to comply with the cited standard.

(4) The appropriate civil penalty for the violation is $1,800.

ORDER

Accordingly, the allegation of violation is ORDERED affirmed; the special findings that such violation was "significant and substantial," and the product of an "unwarranted failure" to comply are ORDERED affirmed; and respondent is ORDERED to pay a civil penalty of $1,800 within 30 days of the date of this decision.

John A. Carlson
Administrative Law Judge

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