FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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February 23, 2015

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. KENT 2008-737 A.C. No. 15-18267-144079
v.	
MANALAPAN MINING CO., INC., Respondent	Mine: RB No. 10 Mine

DECISION ON REMAND

Before: Judge Feldman

I. Procedural History[1]

This proceeding initially concerned four alleged violations of 30 C.F.R. § 75.400, which prohibits the accumulation of combustible coal dust materials, three of which have been resolved. The remaining alleged violation, which was previously remanded by the Commission for further consideration in *Manalapan I*, 35 FMSHRC 289 (Feb. 2013), has once again been remanded for resolution of whether the cited violation of section 75.400 in Order No. 7511478 (Belt No. 2) was attributable to an unwarrantable failure. *Manalapan II*, 36 FMSHRC 849 (Apr. 2014).

[1] There have been several decisions issued in this matter:

- My initial decision, 32 FMSHRC 690 (June 2010) (ALJ), will be referred to as the "*initial decision.*"
- The Commission's initial remand, 35 FMSHRC 289 (Feb. 2013), will be referred to as "*Manalapan I.*"
- My first decision on remand, 35 FMSHRC 1377 (May 2013) (ALJ), will be referred to as the "*previous remand decision.*"
- The Commission's second remand, 36 FMSHRC 849 (Apr. 2014), will be referred to as "*Manalapan II.*"

The Commission succinctly summarized the material facts in this case in its current remand in *Manalapan II*:

> Manalapan operated an underground coal mine in Pathfork, Kentucky. Coal was extracted from the working face by a continuous miner and transported out of the mine by a series of conveyor belts that were approximately 2,300 feet in total length. The extracted material was transferred in turn from the No. 4 belt at the face to the No. 3 and No. 2 belts and ultimately to the No. 1 belt nearest the surface. The conditions in the mine were constantly wet because of percolation of water through old works and the mine floor and ribs, and by the use of water for dust control at the face. Despite the presence of water pumps, water was never completely removed, and the mine floor remained muddy at all times.

36 FMSHRC at 850-51.

As noted in my initial decision in this matter:

> The [Secretary] initially sought to impose a total civil penalty of $833,600.00 for four alleged "flagrant" violations of the mandatory safety standard contained in section 75.400, 30 C.F.R. § 75.400, of the Secretary's regulations. . . .
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> On November 3, 2009, the Secretary filed . . . an amendment to the May 15, 2008, civil penalty petition removing the "flagrant or reckless disregard" charge for the 104(d) citation and three 104(d) orders that are the subject of this proceeding. In addition, the Secretary reduced the total proposed penalty from $833,600.00 to $240,000.00 to conform with the maximum civil penalty of $60,000.00 [in effect at that time] for each of the four alleged combustible accumulation violations that the Secretary asserts is attributable to Manalapan's unwarrantable failure.

Initial Decision, 32 FMSHRC 690, 690-91 (June 2010) (ALJ).

My initial decision affirmed 104(d)(1) Citation No. 7511467 (Belt No. 4) as a significant and substantial (S&S) violation attributable to an unwarrantable failure, and imposed a civil penalty of $20,000.00. *Id.* at 697-99. With respect to 104(d)(1) Order No. 7511472 (Belt No. 3), my initial decision also affirmed the cited violation and its S&S nature, but modified the order to a section 104(a) citation, thus reflecting that the cited condition was not attributable to an unwarrantable failure. A $12,000.00 civil penalty was imposed for 104(a) Citation No. 7511472 (Belt No. 3). *Id.* at 700-02. With regard to 104(d)(1) Order No. 7511478 (Belt No. 2), the subject of this Remand Decision, my initial decision affirmed the violation, deleted the S&S designation, and modified the order to a 104(a) citation, thus deleting the unwarrantable failure designation. A $4,000.00 civil penalty was imposed for 104(a) Citation No. 7511478 (Belt No. 2). *Id.* at 702-04. Finally, my initial decision vacated 104(d)(1) Order No. 7511479 (Belt No. 1) as the facts surrounding the cited condition did not support the alleged section 75.400 violation. *Id.* at 704-05.

The Secretary appealed the removal of the unwarrantable failure designations with respect to the cited conditions in 104(a) Citation Nos. 7511478 (Belt No. 2) and 7511472 (Belt No. 3).[2] In response to the Secretary's appeal, in *Manalapan I*, the Commission remanded this matter for reconsideration of these unwarrantable failure deletions. 35 FMSHRC at 298. My previous remand decision reinstated Order No. 7511472 (Belt No. 3), reflecting that the cited condition was attributable to an unwarrantable failure, and raised the civil penalty from $12,000.00 to $16,000.00. *Previous Remand Decision*, 35 FMSHRC 1377, 1381 (May 2013) (ALJ). Upon revisiting the circumstances surrounding the unwarrantable designation in Order No. 7511478 (Belt No. 2), I concluded, in essence, that the issuing inspector's testimony characterizing the cited condition as a "borderline" violation failed, as a matter of law, to satisfy the Secretary's preponderance of evidence burden of demonstrating that a violation occurred. *Id.* at 1383-85. Thus, my previous remand decision vacated Order No. 7511478 (Belt No. 2).

This brings us to the Commission's current remand, in *Manalapan II*, in which the Commission vacated and reversed my previous remand decision that vacated Order No. 7511478 (Belt No. 2) because the Secretary had not proven that the cited violation had in fact occurred. In so doing, the Commission credited the Secretary's assertion that my initial unappealed finding that the accumulations along the Belt No. 2 constituted a violation of section 75.400 became the law of the case and could not be revisited on remand.[3] 36 FMSHRC at 852. Thus, the Commission has concluded that I am precluded from vacating Order No. 7511478 (Belt No. 2) based on the law of the case doctrine. *Id.*

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[2] A flagrant violation reflects that a violative condition is extremely dangerous in that it has been, or can reasonably expected to be, the proximate cause of death or serious bodily injury. 30 U.S.C. § 820(b)(2). Despite initially designating the cited accumulations at Belt Nos. 1 and 2 as flagrant, the Secretary did not contest my initial decision that the alleged accumulation violation at Belt No. 1 did not occur, and that the cited accumulation at Belt No. 2 was not reasonably likely to contribute to a serious injury.

[3] At trial, the Secretary's sole witness, the issuing inspector, agreed that the accumulations at Belt No. 1 were "too wet to propagate an explosion." 35 FMSHRC at 1382 (citing trial transcript, at 150-52 (incorporating Resp. Ex. 13 deposition testimony, at 110-12)). Although the inspector testified that the accumulations at Belt No. 3 constituted a violation, he opined that the accumulation at "[Belt] Number 2 was on the borderline." *Id.* It is regrettable that the Secretary's appeal is based on the law of the case doctrine, rather than on his assertion that the alleged accumulation violation at Belt No. 2 in fact occurred. Consequently, the Secretary seeks to impose a civil penalty regardless of whether the cited accumulations constituted a violation of section 75.400. Our Government should be held to a higher standard.

As stated by the Commission, the law of the case "doctrine provides that when a decision is made at one stage of litigation and not challenged on appeal, it continues to govern." *Id.* (citations omitted). However, the Commission further noted that this doctrine allows for a "modicum of residual flexibility in exceptional circumstances." *Id.* at 853 (citations and quotations omitted). These exceptions include "a showing that the prior decision was clearly erroneous and would work a manifest injustice." *Id.* (citations and quotations omitted).

II. Discussion

In addressing the Commission's remand in *Manalapan II*, it is particularly essential that this matter be viewed in context.[4] The Secretary has retreated from his original desire to impose a total civil penalty of $833,600.00 for the four subject cited conditions. In this regard, the Secretary has failed to contest not only the fact that the accumulation conditions cited in Order No. 7511479 (Belt No.1) were neither S&S nor unwarrantable, but also the fact that the evidence does not support that the violation in fact occurred. On this point, the issuing inspector testified that the cited coal dust accumulations at Belt No. 1 were not combustible as they were so liquefied that they were "incapable of being handled because the material ran through the fingers." 32 FMSHRC at 704. With respect to Order No. 7511478 (Belt No. 2), as previously noted, the Secretary has not appealed the initial decision deleting the S&S designation, thus reflecting that the cited condition was not reasonably likely to contribute to injuries of a reasonably serious nature. It is obvious that, despite his best intentions, even the Secretary's proposed reduced total $240,000.00 civil penalty grossly overstates the monetary sanction that should be imposed in this matter.

It is in this context that I turn to consideration of Order No. 7511478 (Belt No. 2), the only order subject to this Remand Decision. It is true that my previous remand decision did not explicitly characterize my affirmance of Order No. 7511478 in my initial decision as "a mistake" despite the Secretary's "borderline situation" characterization. 32 FMSHRC at 702 (citing Tr. 150-52). I readily admit that I did not consider the law of the case doctrine in vacating Order No. 7511478. Nevertheless, my decision to vacate Order No. 7511478 in my previous remand decision was based on my belief that the characterization of the alleged violation as "borderline," consistent with the undisputed extremely wet conditions along Belt No. 2, failed to satisfy the Secretary's preponderance of the evidence burden.[5] *Rag Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (quoting *Concrete Pipe and Prod. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622 (1993)) (holding that satisfying the preponderance of the evidence standard requires the proponent to demonstrate "that the existence of a fact is more probable than its nonexistence"). As such, I continue to believe that my affirmance of the

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[4] I believe it is appropriate to clarify the record with respect to my decision vacating Order No. 7511478 (Belt No. 2), which has been reversed by the Commission, in the event this matter is appealed.

[5] As noted in my previous remand decision, synonyms for the term "borderline" include "dubious," "questionable," "ambiguous," "doubtful," and "inconclusive." 35 FMSHRC at 1383 (citing *Webster's Third New Int'l Dictionary* 255 (1993); *Roget's II: The New Thesaurus*, 52, 17 (3rd ed. 1996)).

violation in my initial decision was, implicitly, and as a matter of law, an unjust mistake that should not be perpetuated to the benefit of the Secretary through application of the law of the case doctrine.[6] In the final analysis, a "borderline" violation is a non-event unworthy of recognition.

However, the Commission does not share my view that a "borderline" characterization is inadequate, as a matter of law, to establish a violation. Rather, in *Manalapan II*, the Commission concluded, in essence, that the inspector's testimony that the Belt No. 2 violation was a "borderline situation" is "susceptible to different interpretations." 36 FMHSRC at 853; *see* Tr. 150-52. Thus, the Commission concluded that affirming the violation in Order No. 7511478 in my initial decision was not so "clearly erroneous" as to justify an exception to the law of the case doctrine. *Id.* Consequently, the Commission has reinstated the violation in Order No. 7511478 and directed me to consider whether the violation was properly attributable to an unwarrantable failure. *Id.* at 855.

Accordingly, I will now turn to an evaluation of whether the cited accumulation conditions in Order No. 7511478 were attributable to an unwarrantable failure. The criteria for an unwarrantable failure finding are addressed in my initial decision:

> The elements of unwarrantable conduct are well settled. The Commission has determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining*, 9 FMSHRC at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-194 (Feb. 1991); *see also Buck Creek Coal*, 52 F.3d 133, 135-36 (7th Cir. 1995) (approving the Commission's unwarrantable failure test).
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> The Commission examines various factors in determining whether a violation is unwarrantable, including the magnitude of a violative condition, the length of time that it has existed, whether the violation is obvious, whether the violation poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's compliance efforts

[6] I am cognizant of the Commission's decision in *Douglas R. Rushford Trucking*, 23 FMSHRC 790 (Aug. 2001). In *Rushford*, the judge affirmed an unwarrantable violation that contributed to a fatality. However, the judge reduced the proposed $25,000.00 civil penalty to $3,000.00. The case was remanded for an explanation of the penalty reduction in light of the judge's unwarrantable failure findings. On remand, the judge reevaluated the evidence with respect to his initial finding of gross negligence and imposed a $4,000.00 civil penalty. On appeal, the Commission concluded that "the law of the case with respect to negligence is controlled by the judge's finding from his original decision that the violation was a result of 'high and gross negligence.'" 32 FMSHRC at 791. However, in the present case, I have not reevaluated the factual evidence. Rather, I simply concluded that, assuming everything the Secretary alleges is true, his characterization of the violation as "borderline" fails, as a matter of law, to establish that the violation in fact occurred.

> made prior to the issuance of the citation or order. *Enlow Fork Mining Co.*, 19 FMSHRC at 11-12, 17; *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984). Repeated similar violations may be relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Peabody*, 14 FMSHRC at 1263-64.

32 FMSHRC at 694-95.

Significantly, it is not necessary to find that all factors are relevant or deserving of equal weight in order to determine that a violation is unwarrantable. *IO Coal*, 31 FMSHRC 1346, 1351 (Dec. 2009); *Eastern Associated Coal Corp.*, 32 FMSHRC 1189 (Oct. 2010). Although the cited accumulations were extensive, obvious, and apparently existed for a significant period of time, there are significant mitigating circumstances that markedly reduced the degree of hazard posed by the violation. Namely, as noted in *Manalapan II*, the mine floor remained muddy at all times because of water percolation through old works, the mine floor, and ribs. 36 FMSHRC at 850-51. It is undisputed that the conveyer belt conditions became progressively wetter as water used for dust suppression at the face accumulated as the coal was transported on the conveyer system from Belt No. 4 nearest the face to Belt No. 1 nearest the surface. *Id.*; 32 FMSHRC at 691. To wax poetically, suffice it to say, there was "water, water, every where."[7]

Thus, indicia of an unwarrantable failure, such as extensiveness, obviousness, and duration, which are normally significant factors in an unwarrantable failure finding, are entitled to less weight given the circumstances in this case. With respect to the degree of danger posed by the cited violation, it is significant that my initial decision to delete the S&S designation has not been appealed by the Secretary. Consequently, as previously noted, the Secretary has, in effect, conceded that the cited accumulations are not reasonably likely to contribute to a fire or explosion. Thus, Manalapan's failure to timely remove the accumulations, given the violation's lack of serious gravity, may not be viewed as a significant aggravating factor. Hence, the circumstances surrounding the violation are indicative of no more than moderate negligence and do not support the Secretary's assertion that the violation was attributable to inexcusable conduct. The remaining unwarrantable failure indicia are not aggravating factors. Accordingly, the 104(d)(1) Order No. 7511478 (Belt No. 2), designated as non-S&S in nature, **shall be modified to a 104(a) citation to reflect that the cited violation was attributable to moderate negligence, rather than an unwarrantable failure.**

The Secretary initially proposed a penalty of $60,000.00 for Order No. 7511478. The civil penalty analysis in my initial decision is incorporated by reference. *See* 32 FMSHRC at 695, 704. Given the modification of the 104(d)(1) order to reflect that the conditions along Belt No. 2 were neither S&S in nature nor attributable to Manalapan's unwarrantable failure, **a civil penalty of $4,000.00 shall be assessed for 104(a) Citation No. 7511478.**

[7] Samuel Taylor Coleridge, *The Rime of the Ancient Mariner*, in Lyrical Ballads (1st ed. 1798).

ORDER

The fact of the violation and its non-S&S nature having been reinstated by the Commission in *Manalapan II*, **IT IS ORDERED** that Order No. 7511478 be modified to a section 104(a) citation to reflect that the cited violative accumulations were not attributable to Manalapan's unwarrantable failure. **IT IS FURTHER ORDERED** that Manalapan Mining Company, Inc., pay, within 40 days of the date of this Remand Decision, **a total civil penalty of $4,000.00** in satisfaction of 104(a) Citation No. 7511478 (Belt No. 2).[8] [9]

IT IS FURTHER ORDERED that upon timely receipt of the total $40,000.00 payment, the civil penalty proceeding in KENT 2008-737 **IS DISMISSED**.

Jerold Feldman
Administrative Law Judge

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[8] Payment should be addressed to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include the Docket No. and A.C. No. noted in the above caption on the check.

[9] Thus, **Manalapan's total liability in Docket No. KENT 2008-737 is $40,000.00**: $20,000.00 for 104(d)(1) Citation No. 7511467 (Belt No. 4), $16,000.00 for 104(d)(1) Order No. 7511472 (Belt No. 3), and $4,000.00 for 104(a) Citation No. 7511478 (Belt No. 2).