FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. NEWTOWN ENERGY, INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEVA 2011-283 A.C. No. 46-09231-235522-01 Mine: Coalburg No. 2

DECISION ON REMAND

Appearances: Benjamin D. Chaykin, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;

Christopher D. Pence, Esq., Hardy Pence PLLC, Charleston, West Virginia, for Respondent.

Before: Judge L. Zane Gill

This case is before me on remand from the Commission. 38 FMSHRC 2033 (Aug. 2016). On August 7, 2013, I issued a decision after hearing for the single section 104(d)(1) citation contained in this docket. 35 FMSHRC 2494 (Aug. 2013) (ALJ). On appeal, the Commission reversed several aspects of my decision and remanded others. 38 FMSHRC at 2050.

On remand, I must revisit Citation No. 8110086, which was issued to Newtown Energy, Inc. ("Newtown") for failing to lock out and tag out the power cable connector for the Number 34 shuttle car in Newtown's Coalburg No. 2 mine. The citation alleged the violation was significant and substantial ("S&S")[1] and an unwarrantable failure[2] to comply with the mandatory

[1] The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a [. . .] mine safety or health hazard."

[2] The unwarrantable failure terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by an "unwarrantable failure of [an] operator to comply with [. . .] mandatory health or safety standards."

safety standard in 30 C.F.R. § 75.511, requiring that disconnecting devices be properly locked out and tagged out before engaging in electrical work. The Secretary of Labor proposed a penalty of $7,578.00.

I. PROCEDURAL BACKGROUND AND ISSUES ON REMAND

In my August 7, 2013, decision, I found a violation of 30 C.F.R. § 75.511 but concluded that the violation was not S&S or an unwarrantable failure on the part of the mine operator. 35 FMSHRC at 2506, 2508. These determinations were based on my findings that the violation was unlikely to result in an injury and reflected a low degree of negligence, due to mitigating circumstances. *Id.* at 2501–03, 2506.

On appeal, the Commission upheld the violation but found that it was S&S and that Newtown had demonstrated high negligence. 38 FMSHRC at 2049–50. The Commission concluded there was insufficient evidence supporting several of my findings reducing the likelihood of the violation and mitigating Newtown's negligence. *Id.* at 2042–44, 2047–48. The Commission further held that I erred by failing to discuss the established unwarrantable failure factors and directed me to consider the supervisor's involvement as an additional aggravating factor in my unwarrantable failure determination. *Id.* at 2046.

Consequently, the issues before me on remand are (1) whether the violation was an unwarrantable failure, and (2) what is the appropriate penalty assessment.

II. FURTHER FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

MSHA Inspector Russell Richardson issued Citation No. 8110086 on May 25, 2010, during an inspection of Newtown's Coalburg No. 2 mine. (Tr.26:10–12) Richardson wrote the citation for Newtown's failure to properly lock out and tag out the "cathead"[3] power cable connector for the number 34 shuttle car. (Tr.36:8–10, 53:18–54:3)

A. Further Findings of Fact

Mine Superintendent Robert Herndon accompanied Richardson on his inspection of the mine. (Tr.30:2–3) As mine superintendent, Herndon directed the workforce, ensured compliance with federal laws and regulations, and was responsible for the health and safety of the miners. (Tr.93:18–23, 119:1–6) He was second in command at the mine and had the power to discipline and fire employees. (Tr.31:15–19, 118:8–14) Herndon was also a certified electrician at the time of the inspection. (Tr.119:7–9) He completed specialized training that included proper procedures for locking out and tagging out electrical equipment. (Tr.119:10–24)

Inspector Richardson directed Herndon to lock out and tag out the cathead for the number 34 shuttle car before they inspected its power cable. (Tr.36:14–18) Herndon procured a lock,

[3] A cathead is the "connecting plug" through which an electrical cable is attached to a receptacle at a power station. (Tr.15:15–24, 17:15–24)

de-energized the cathead, and attached the lock but was unable to remove the key from the lock without breaking it. (Tr.103:1–6, 104:11–22) He did not inform Richardson that he had left the key in the lock upon returning from the power center. (*See* Tr.46:10–20, 137:23–138:13) Herndon subsequently repaired damage to the cable, including an exposed copper conductor, using a knife. 35 FMSHRC at 2497–98. The repair of the cable, while the cathead was not properly locked out, constituted electrical work in violation of section 75.511. *Id.* at 2498–500.

Herndon and one other miner started the repairs after the damage to the cable was discovered at 9:15 a.m. (*See* Tr.56:24–57:7; G. Ex. 2) The lock out tag out violation was discovered at 9:30 a.m. and terminated five minutes later. (Tr.49:1–7; G. Ex. 3) I credit Richardson's undisputed testimony that repairs stopped upon discovery of the lock out violation until it was terminated. (Tr.46:15–20) I also credit Herndon's undisputed testimony that applying a new insulating wrap to the cable took 10 minutes. (Tr.108:5–9) In light of the foregoing, I conclude that the violation existed for approximately 10 to 15 minutes, between 9:15 a.m. and 9:30 a.m., while the repairs were being conducted.

Newtown has suggested that the danger of the violation was mitigated by the short distance between the shuttle car and power center. (Resp't Post-Hr'g Br. at 16) However, the distance is only relevant if miners could see that repairs were ongoing.[4] Richardson testified that the power center was not visible from the shuttle car, as there were blocks of coal in the way. (Tr.37:2–9) Although part of Herndon's testimony implies visibility, he also testified on cross examination that the shuttle car was not visible from the power center. (Tr.127:22–128:8, 134:14–20) I therefore credit Richardson's testimony and conclude that there was no visibility between the shuttle car and power center.

B. Unwarrantable Failure

The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). It is characterized by "indifference," a "serious lack of reasonable care," "reckless disregard," or "intentional misconduct." *Id.* at 2003–04; *see also Buck Creek Coal*, 52 F.3d 133, 136 (7th Cir. 1995) (approving the Commission's unwarrantable failure test). Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of a case to see if aggravating or mitigating factors exist. *IO Coal Co.*, 31 FMSHRC 1346, 1350–51 (Dec. 2009). The Commission has identified several such factors, including: the length of time a violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious, whether the violation posed a high degree of danger, and the operator's knowledge of the existence of the violation. *Id.* Because supervisors are held to a high standard of care, their involvement in a violation is another important factor supporting an unwarrantable failure determination. *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001) (citing *REB Enters.*,

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[4] The Commission found insufficient evidence to support Newtown's assertion that miners approaching the power center could be warned away by Herndon, at the shuttle car, regardless of the distance or visibility. 38 FMSHRC at 2043.

Inc., 20 FMSHRC 203, 225 (Mar. 1998)). Furthermore, "[i]t is well established that a supervisor's violative conduct, which occurs within the scope of his employment, may be imputed to the operator for unwarrantable failure purposes." *Capitol Cement Corp.*, 21 FMSHRC 883, 893 (Aug. 1999) (citation omitted), *aff'd*, 229 F.3d 1141 (4th Cir. 2000) (unpub.). All relevant facts and circumstances of each case must be examined to determine whether an actor's conduct is aggravated or if mitigating circumstances exist. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000).

The Secretary asserts that the violation was an unwarrantable failure. (Sec'y Post-Hr'g Br. at 19) In support, he argues that Herndon was subject to a higher standard of care as a supervisor and his actions were an intentional, knowing breach of the safety standard. (*Id.* at 19–22) The Secretary further asserts that the violation was extensive, long-lasting, obvious, and posed a high degree of danger, and that Newtown was on notice. (*Id.* at 20–22) In response, Newtown argued that Herndon made a good faith attempt to comply with Inspector Richardson's request to lock out and tag out the shuttle car power cable and that he did not believe electrical work was being done. (Resp't Post-Hr'g Br. at 5, 16) Newtown further asserts that the short time period, lack of danger, lack of notice, and extensive safety training are all mitigating factors that support removal of the unwarrantable failure designation. (*Id.*)

On appeal, the Commission concluded that Newtown's conduct constituted high negligence. "The Commission has also previously recognized that a finding of high negligence suggests unwarrantable failure." *Eagle Energy Inc.*, 23 FMSHRC 829, 839 (Aug. 2001). In analyzing an unwarrantable failure, I must consider the Commission's factors for determining aggravated conduct. *IO Coal Co.*, 31 FMSHRC at 1350–51.

1. Involvement of a Supervisor

The direct involvement of a supervisor in the creation of a violation is an aggravating factor. *Lopke Quarries*, 23 FMSHRC at 711. Herndon's position as mine superintendent is not disputed. (Tr.93:12–13) He was responsible for the health and safety of the miners and for ensuring compliance with federal laws and regulations. (Tr.93:18–23, 119:1–6) As a supervisor, Herndon was in a position to set an example for his miners and must be held to a high standard of care. Nevertheless, while escorting Inspector Richardson, Herndon improperly locked out and tagged out the cathead by leaving the key in the lock during electrical repairs. 35 FMSHRC at 2500. Herndon's role as mine superintendent is a critical aggravating factor that I weigh heavily in my unwarrantable failure determination.

2. Operator's Knowledge; Obviousness of the Violation

As a supervisor, Herndon's knowledge of the violation may be imputed to Newtown. *Capitol Cement*, 21 FMSHRC at 893. Herndon suggested he was unaware of the violation because he believed that repairing the power cable's protective outer jacket did not constitute electrical work. (Tr.111:2–21, 115:22–116:5, 120:9–15) He further testified that leaving the key in the lock while conducting the repair was a safe practice, as there were no miners located near the power center. (Tr.123:7–124:3; *See* Tr.113:23–114:18) However, the repairs involved cutting into the insulation of the power cable with a knife, which exposed the cable's copper

conductor. (Tr.59:21–60:14) I have previously determined that such repairs constitute electrical work. 35 FMSHRC at 2497–98. Herndon, who was a certified electrician trained in lock out and tag out procedures, at a minimum should have known that cutting into a power cable constitutes electrical work, given the obvious danger. (Tr.119:15–24) Indeed, Herndon admitted that leaving the key in the lock while conducting electrical work is not a safe practice. (Tr.119:15–24, 120:9–21) Despite conducting repairs knowing that the cathead was not properly locked out, he did not tell the inspector of his inability to properly lock out and tag out the cathead. (*See* Tr.46:10–20, 137:23–138:13) Thus, I believe Herndon took a calculated risk in performing electrical repairs on the cable that he knew were in violation of section 75.511. Herndon's knowledge of the violation, imputed to Newtown, is an aggravating factor that I accord significant weight in my determination.

Additionally, the existence of the violation should have been obvious to Herndon. He was aware from his electrician training that leaving the key in the lock was an improper lock out and only did so after trying to forcibly remove it. (Tr.55:16–56:6, 104:11–22, 119:15–24) I find the violation's obviousness to be an aggravating factor but accord it minimal weight, as its relevance is subsumed by Herndon's knowledge of the violation's existence.

3. Degree of Danger

The facts and circumstances establish that the violation posed a high degree of danger. Herndon repaired a power cable with an exposed copper wire conductor using a knife. (Tr.59:21–60:14, 124:12–23) If the cable were re-energized, touching the exposed conductor with a knife or hand would ground the cable's 277 volts, which could prove fatal. (Tr.41:12–20, 60:15–22) Newtown asserts that the violation was not dangerous, as there was no likelihood that a miner would re-energize the shuttle car's cable. (Resp't Post-Hr'g Br. at 16) The Commission rejected this argument, finding the violation was S&S and reasonably likely to result in a potentially fatal injury to one miner. 38 FMSHRC at 2045, 2049. Newtown also argues that the closeness of the power center to the shuttle car is a mitigating factor. (Resp't Post-Hr'g Br. at 16) I find the distance between them is not mitigating, based on the established lack of visibility between the power center and shuttle car. Furthermore, Newtown's training program and compliance with other safety standards are not mitigating considerations. *See Buck Creek Coal*, 52 F.3d at 136. Based on these findings, and in line with the Commission's determination of high gravity, I find that the violation posed a high degree of danger and therefore accord this factor considerable weight in my determination.

4. Length of Time Violation Existed; Extent of the Violation

As for the length of time, the violation existed for approximately 10 to 15 minutes while the cable was being repaired. (*See* Tr.46:15–20, 48:20–49:7, 56:24–57:7, 108:5–9; G. Ex. 2, 3) This was a relatively short window of time in which the shuttle car cable could be re-energized, and I therefore find it to be a mitigating factor. However, I accord this factor little weight, given the high degree of danger created by the violation and the direct involvement and knowledge of the mine superintendent.

The extent of the violation is that it posed a risk of fatal injury to the two miners repairing the shuttle car power cable.[5] (Tr.58:11–24, 108:3–4) Considering the high degree of danger but limited period of exposure to that danger, I find the extent of the violation to be neither aggravating nor mitigating. I therefore accord it nominal weight in my determination.

5. Notice That Greater Efforts Are Necessary for Compliance; Abatement of the Violation

The two remaining unwarrantable failure factors are less relevant. The Secretary concedes that Newtown was not contemporaneously cited for 30 C.F.R. § 75.511 or otherwise put on notice by MSHA that greater efforts were required for compliance. (Sec'y Post-Hr'g Br. at 21) The Secretary's argument that Herndon had notice due to his training as a certified electrician is misplaced: his training goes to his knowledge of the violation. Newtown did not have notice. I therefore find this factor mitigating but accord it minimal weight, as any tendency to mitigate is far outweighed by the involvement and knowledge of a supervisor, imputed to Newtown.

Finally, the record establishes that no abatement efforts were made prior to the citation's issuance. When Herndon discovered that the power cable would require electrical repairs, he had an opportunity to correct the improper lockout by alerting Richardson that the lock needed to be replaced. He failed to act. I find his failure to act an aggravating factor in light of his knowledge of the violation, but accord it minimal weight in comparison to the other aggravating factors discussed.

In reaching my unwarrantable failure determination, I note that the Commission found insufficient evidence to support the remaining mitigating considerations argued by Newtown, which I see no need to repeat here.[6] 38 FMSHRC at 2041–44, 2046–48. On remand,

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[5] On appeal to the Commission, the Secretary raised the argument that the long-term implications of Herndon's attitude towards this violation should be considered, and suggested that continuing violations were likely. (Sec'y Pet. for Discretionary Review at 9) My review of the record does not convince me that this was an ongoing problem at Newtown, as opposed to a temporary lapse of judgment by Herndon.

[6] Newtown has consistently asserted that Herndon acted in a good-faith attempt to comply with the inspector's request when he de-energized the cathead but left the key in the lock. (Resp't Post-Hr'g Br. at 16.) While the Commission addressed related claims in the context of its S&S and negligence determinations, I feel obligated to directly address Newtown's assertion as an unwarrantable failure defense. The Commission has previously held that an operator's good faith "objectively reasonable" belief that cited conduct complied with the law is a defense to an unwarrantable failure. *IO Coal*, 31 FMSHRC at 1357–58 (citation omitted). Here, however, the Commission determined that Herndon "failed to demonstrate good faith because he did not inform Richardson that he was unable to procure a functional lock." 38 FMSHRC at 2047–48. Furthermore, as noted above, Herndon did not have a reasonable belief that his conduct complied with the standard, as he is a certified electrician and should have known that his repairs constituted "electrical work." Because the violation did not result from

I find that the short time the violation existed and the lack of notice to Newtown were mitigating factors. Nevertheless, those factors are greatly outweighed by the high level of danger, the direct involvement of the mine superintendent, and his knowledge that he was violating the regulation. Upon weighing all the evidence as a whole, I conclude that the violation of section 75.511 was an unwarrantable failure by Newtown to comply with a mandatory health or safety standard.

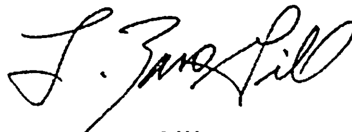
C. Penalty

When assessing a civil penalty, section 110(i) of the Mine Act requires that I consider six criteria: (1) the operator's history of previous violations; (2) the appropriateness of the penalty relative to the size of the operator's business; (3) the operator's negligence; (4) the penalty's effect on the operator's ability to continue in business; (5) the violation's gravity; and, (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

The parties stipulated to the operator's history of previous violations, the size of its business, and its good faith in rapidly abating the violation. (Sec'y Pre-Hr'g Rep., Stip. 9, 10) Newtown further stipulated that any resulting penalty will not affect its ability to remain in business. (Sec'y Pre-Hr'g Rep., Stip. 5) The Commission determined the violation was S&S, and characterized the gravity as high, that is, reasonably likely to result in a potentially fatal injury to one miner. 38 FMSHRC at 2049–50. The Commission also concluded that Newtown demonstrated high negligence based on the involvement of a supervisor who should have known, as a certified electrician, that he was violating federal safety regulations. The Commission's findings are the law of the case, and I have further determined that the violation was an unwarrantable failure to comply with a mandatory health or safety standard. *See E. Ridge Lime Co.*, 21 FMSHRC 416, 421–22 (Apr. 1999). In light of the foregoing, I conclude that a penalty of $7,578.00 is appropriate for Citation No. 8110086.

III. ORDER

WHEREFORE, it is hereby **ORDERED** that Citation No. 8110086 be **AFFIRMED** as written. It is further **ORDERED** that Newtown **PAY** a penalty of $7,578.00 within forty (40) days of the date of this decision on remand.



L. Zane Gill
Administrative Law Judge

Herndon's reasonable good faith belief that his conduct complied with section 75.511, I reject Newtown's "good faith" argument as a defense or mitigation of its conduct.

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