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FMSHRC-WDC
September 30, 1987

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

v. Docket No. WEVA 85-169

QUINLAND COALS, INC.

BEFORE Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1982)(the "Mine Act"), and presents three issues: (1) whether substantial evidence supports Commission Administrative Law Judge William Fauver's findings of violations of 30 C.F.R. $ 75.200 and 30 C.F.R. $ 75.303, and his finding of negligence with respect to the violation of section 75.200; (2) whether an allegation by the Secretary of Labor ("Secretary") that a violation was caused by an operator's unwarrantable failure to comply with a cited standard can be contested in a civil penalty proceeding, where the order itself was not contested pursuant to section 105(d); and (3) whether the judge erred in considering certain exhibits. For the reasons that follow, we affirm the judge's findings of violation and negligence, hold that the judge erred in failing to rule on the merits of the unwarrantable failure allegation, and conclude that the judge's consideration of the exhibits was not improper.

I.

The No. 1 Mine operated by Quinland Coals, Inc. ("Quinland") is an underground coal mine located in southern West Virginia. On October 11, 1984, Ernest Thompson, an inspector of the Department of

Labor's Mine Safety and Health Administration ("MSHA"), conducted an inspection of the mine in order to inspect seals located in the mine's East Mains area. 1/ The alleged violations concern the roof conditions in the

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1/ The seals are concrete block bulkheads notched at least six inches into the ribs and flush with the floor and the roof. They were constructed following a methane explosion. Their purpose is to seal off the area where the explosion occurred from the rest of the mine.

entry in which the No. 7 seal is located.

The entry was accessible from a crosscut. In the entry and near its intersection with that crosscut, the inspector observed a large roof fall and as he walked toward the seal, he observed approximately ten broken posts lying on the ground in the entry. The inspector also observed that one side of the seal was being crushed by the weight of the roof. He noted that the roof was cracked and that the cracks ran from the roof fall to and beyond the seal. The inspector testified that he heard hissing through the cracks and that his methane detector registered an atmosphere of more than 5% methane in the immediate vicinity of the seal.

The inspector found that these conditions constituted a violation of 30 C.F.R. $ 75.200 in that the roof was not adequately supported to protect persons from falls. 2/ The inspector also found that this violation was the result of Quinland's unwarrantable failure to comply with section 75.200 and that the violation significantly and substantially contributed to a mine safety hazard. 30 U.S.C. $ 814(d)(1). Because a citation had been issued to Quinland pursuant to section 104(d)(1) of the Mine Act, within 90 days prior to the October 11, 1984 inspection, the inspector cited the violation of section 75.200 in an order issued pursuant to section 104(d)(1). Id. 3/ Quinland abated the

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Tr. 21. See also Bureau of Mines, U.S. Department of Interior, A Dictionary of Mining, Mineral, and Related Terms 975 (1968).

2/ Section 75.200, which restates section 302(a) of the Mine Act, 30 U.S.C. $ 862(a), provides in part:

> Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. 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. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form....

(Emphasis added.)

3/ Section 104(d)(1) of the Mine Act states:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially

section 75.200 violation by installing approximately 20 posts in the entry in order to support the roof.

Following the underground portion of the inspection, the inspector returned to the surface and went to the mine office where he reviewed that portion of the preshift examination record book relating to the No. 7 seal area. The inspector observed the word "clear" written in the book to describe the condition of the No. 7 seal area as found by the preshift examiner on October 11, 1984. The inspector found that the failure to record the condition of the roof and the presence of the methane indicated that the preshift examination on October 11 was inadequate and that it constituted a violation of 30 C.F.R. $75.303. 4/

> contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this [Act]. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) of this section to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

4/ Section 75.303, which restates section 303(d)(1) of the Mine Act, 30 U.S.C. $863(d)(1), provides in part:

> (a) Within 3 hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative. Each such examiner shall examine every working

section in such workings and shall make tests in
each such working section for accumulations of
methane with means approved by the Secretary for
detecting methane, and shall ... examine seals and
doors to determine whether they are functioning
properly; examine and test the roof, face, and rib
conditions in such working section... and examine for
such other hazards and violations of the mandatory health

The inspector also found that the inadequate examination was the result of Quinland's unwarrantable failure to comply with section 75.303 and significantly and substantially contributed to a mine safety hazard. Accordingly, the inspector issued a second section 104(d)(1) order of withdrawal.

Quinland did not contest the section 104(d)(1) orders within 30 days of their receipt. 30 U.S.C. $815(d). In March 1985, however, when the Secretary proposed civil penalties for the violations, Quinland requested a hearing. 30 U.S.C. $815(a). In answer to the Secretary's civil penalty assessment petition, Quinland denied that it violated the cited mandatory safety standards. In addition, Quinland asserted that "should a violation [of section 75.200] be found to exist ... the unwarrantable feature of the violation is improper."

Following an evidentiary hearing, the administrative law judge concluded that Quinland violated both sections 75.200 and 75.303. 8 FMSHRC 1175 (August 1986)(ALJ). The judge credited the testimony of the inspector and found that the condition of the roof was inadequate to protect persons from roof falls. 8 FMSHRC at 1178. Regarding the preshift examination, the judge found that the hazardous condition of the roof should have been reported by the preshift examiner on October 11, 1984, and that the failure to do so was a violation of section 75.303. 8 FMSHRC 1178 79. The judge held, however, that the failure of the preshift examiner to note the presence of methane did not violate the standard because the Secretary did not prove that methane was present at the time of the preshift examination. 8 FMSHRC at 1179.

The judge found that both violations were of a significant and substantial nature, but made no finding as to whether the violation of section 75.200 was due to Quinland's unwarrantable failure to comply with the standard. The judge assessed civil penalties of $850 for the violation of section 75.200 and $450 for the violation of section 75.303. We granted Quinland's petition for discretionary review.

II.

Section 75.200 requires that roof and ribs "be supported or otherwise controlled adequately." Liability for an alleged violation of this standard is resolved by reference to whether a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized that the roof or ribs

were not adequately supported or otherwise controlled. Specifically, the

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> or safety standards, as an authorized representative of the Secretary may from time to time require.... Upon completing his examination, such miner examiner shall report the results of his examination to a person, designated by the operator to receive such reports... before other persons enter the underground areas of such mine to work in such shift. Each such mine examiner shall also record the results of his examination with ink or indelible pencil in a book approved by the Secretary....

adequacy of particular roof support must be measured against what a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided in order to meet the protection intended by the standard. Canon Coal Co., 9 FMSHRC 667, 668 (April 1987). Cf. Ozark-Mahoney Co., 8 FMSHRC 190, 191-92 (February 1986): Great Western Electric Co., 5 FMSHRC 840, 841-42 (May 1983), U.S. Steel Corp., 5 FMSHRC 3, 5 (January 1983); Alabama By-Products Corp., 4 FMSHRC 2128, 2129 (December 1982). Measured against this test, we conclude that substantial evidence supports the judge's conclusion that the roof support in the area of the No. 7 seal was inadequate. 5/

In holding that Quinland violated section 75.200, the judge credited the testimony of the inspector that the roof support in the No. 7 seal entry was inadequate to protect persons from roof falls. 8 FMSHRC at 1178. The inspector's testimony regarding the conditions of the roof was detailed and essentially uncontradicted. The inspector described the roof fall, the broken posts, the damage to the No. 7 seal caused by the weight of the roof, and the cracks in the roof. The inspector stated that the roof had "dropped down approximately an inch ... [and] ... was leaning on what supports they had in there and the seal." Tr. 26. The inspector believed that the weight on the roof caused the posts to break. Dust on some of the broken posts indicated to the inspector that the posts had been broken for perhaps a month or two and that the deterioration of the roof was progressive.

We have recognized that a "judge's credibility findings ... should not be overturned lightly." Robinette v. United Castle Coal Co., 3 FMSHRC 803, 813 (April 1981). Accord. Bjes v. Consolidation Coal Co., 6 FMSHRC 1411, 1418 (June 1984). Quinland's witnesses did not dispute the condition of the roof as described by the inspector. Indeed, they confirmed generally what the inspector had seen. The mine foreman stated that the area in which the seals were located had "bad top" in places. Tr. 124. Quinland's preshift examiner acknowledged that some broken posts had not been replaced. Tr. 200. Both agreed that some posts had been broken for a month or more.

Thus, in view of the inspector's detailed testimony describing the conditions in the area of the No. 7 seal, the mine foreman's acknowledgement that the roof was bad generally and the pre-shift examiner's acknowledgement that some broken posts had not been replaced, we conclude that substantial evidence supports the judge's finding of a violation of section 75.200. Further, given this evidence establishing that the violation of section 75.200 was

visually obvious and had existed for a protracted time, we find that substantial evidence also supports the judge's conclusion that Quinland was negligent in allowing the violation of section 75.200 to exist.

5/ Quinland's assertion that the Secretary is estopped from alleging a violation of section 75.200 because MSHA inspectors had found previously that the roof in the area of the No. 7 seal was adequately supported is rejected. _King Knob Coal Co., Inc., 3 FMSHRC 1417, 1421.22 (June 1981); See also Burgess Mining and Construction Co., 3 FMSHRC 296, 297 (February 1981).

We also affirm the judge's finding that Quinland violated section 75.303. The preshift examiner was aware of the conditions but did not report them. As held above, a reasonably prudent person would have concluded that the roof was not adequately supported. Section 75.303 requires the preshift examiner to report hazardous conditions and violations of mandatory safety standards such as inadequately supported roof. In failing to report that condition, the preshift examiner violated the standard.

III.

The inspector found that the violation of section 75.200, as cited in the section 104(d)(1) order, was the result of Quinland's unwarrantable failure to comply with the mandatory standard. As noted, Quinland did not contest the validity of the order pursuant to section 105(d) of the Mine Act. 6/ Instead, in contesting the Secretary's penalty proposal pursuant to section 105(a) of the Act, Quinland contended specifically that the unwarrantable failure finding was improper. 7/

6/ Section 105(d) states in part:

> If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 814 of this [Act], or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 814 of this [Act], or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 814 of this [Act], or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 814 of this [Act], the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's

citation, order, or proposed penalty, or directing
other appropriate relief....

30 U.S.C. $ 815(d).

7/ Section 105(a) states in part:

> If, after an inspection or investigation, the Secretary issues a citation or order under section

The judge did not address this argument. On review Quinland argues that the judge erred in failing to rule on the merits of its challenge to the unwarrantable failure finding. The Secretary responds that under these circumstances the issue of whether a violation is caused by an unwarrantable failure may be considered only in a section 105(d) proceeding to review a citation or order, and not in a section 105(a) penalty proceeding. 8/ We hold that the validity of such findings is a proper subject for review in a penalty proceeding.

The contest provisions of section 105 are an interrelated whole. We have consistently construed section 105 to encourage substantive review rather than to foreclose it. See, e.g., Energy Fuels Corp., 1 FMSHRC 299, 309 (May 1979). The statutory scheme for review set forth in section 105 provides for an operator's contest of citations, orders, and proposed assessment of civil penalties. Generally, it affords the operator two avenues of review. Not only may the operator immediately contest a citation or order within 30 days of receipt thereof, 30 U.S.C. $815(d), but he also may initiate a contest following the Secretary's subsequent proposed assessment of a civil penalty within 30 days of the Secretary's notification of the penalty proposal. 30 U.S.C. $

> [104] of this [Act], he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section [110(a)] of this [Act] for the violation cited and that the operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. A copy of such notification shall be sent by mail to the representative of miners in such mine. If, within 30 days from the receipt of the notification issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the citation or the proposed assessment of penalty and no notice is filed by any miner or representative of miners under subsection (d) of this section within such time, the citation and the proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency....

30 U.S.C. $ 815(a).

8/ Several unreviewed decisions of various Commission administrative law judges reflect disagreement on this issue. Two decisions hold that the merits of an unwarrantable failure finding may be reviewed in a civil penalty proceeding. C. F. & I. Steel Corp., 4 FMSHRC 1776, 1786, (September 1982) (ALJ Carlson); Price River Coal Co., 3 FMSHRC 1766, 1771-73 (October 1983) (ALJ Vail). Three decisions reach the opposite conclusion. Turner Brothers. Inc., 6 FMSHRC 2125, 2130 (September 1980) (ALJ Koutras); Clinchfield Coal Co., 2 FMSHRC 290, 292 (February 1980) (ALJ Moore); Windsor Power House Coal Co., 6 FMSHRC 1739, 1740.41 (July 1980) (ALJ Melick).

815(a). 9/

The interrelationship between a contest proceeding and a civil penalty proceeding has, in the past, been a source of confusion and dispute over the issues that may be raised properly in each proceeding and over their preclusive effect once raised. In resolving these arguments we have afforded a wide latitude for review and eschewed preclusion. For example, in Energy Fuels, supra, we rejected the Secretary's argument that review of a violation and special findings contained in an abated citation is available only in a civil penalty proceeding. We found that the language of the Act did not so limit review and that the purposes of the Act and the interests of those subject to it are best served by permitting an immediate contest. 1 FMSHRC at 309. 10/ Here, the Secretary argues that failure to seek an immediate contest of the order containing the alleged violation bars the operator from challenging the validity of special findings in a subsequent civil penalty proceeding. We reject once again a restrictive interpretation of section 105. Because under the Mine Act a special finding is a critical consideration in evaluating the nature of the violation alleged and bears upon the appropriate penalty to be assessed, we conclude that the Act does not preclude the review of special findings in a civil penalty proceeding and that the purpose of the Act and the interests of those subject to it are best served by permitting review.

There is no dispute that the fact of violation may be placed in issue by the operator in a civil penalty proceeding regardless of whether the operator has availed itself of the opportunity to contest the citation or order in which the allegation of violation is contained. The Commission also has held that the procedural propriety of the issuance of a withdrawal order does not affect the allegation of a violation contained in the order. Island Creek Coal Co., 2 FMSHRC 279, 280 (February 1980); Van Mulvehill Coal Co., 2 FMSHRC 283, 284 (February

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9/ The procedures followed by the Secretary in proposing penalties for violations usually result in an operator's receipt of the Secretary's notice of proposed penalty at a time substantially after the expiration of the 30-day period within which the operator may contest a citation or order.

10/ The special findings of "unwarrantable failure" and "significant and substantial" are found in sections 104(d) and 104(e) of the Act. 30 U.S.C. $$814(d), 814(e). Under section 104(d), an inspector's finding that a violation is the result of "unwarrantable failure" to

comply with a mandatory standard and is "significant and substantial" leads to the issuance of a section 104(d) citation, and subsequent findings of unwarrantable failure may lead to a "chain" of withdrawal orders until an inspection of the mine discloses no further violations based on unwarrantable failure. 30 U.S.C. $$814(d)(1) & (2). Under section 104(e) where an operator has been given written notice by the Secretary that a pattern of "significant and substantial" violations exists, further significant and substantial violations may lead to a similar "chain" of withdrawal orders. 30 U.S.C. $814(e).

1980. The allegation of violation survives and if proven must be subject to the assessment of a civil penalty. 30 U.S.C. $820(a); Tazco, Inc., 3 FMSHRC 1895, 1896-98 (August 1981); See also Co-op Mining Co., 2 FMSHRC 3475, 3475-76 (December 1980). Similarly, since the alleged violation survives, findings incidental to the violation survive as well.

It is apparent from the language of section 104(d) that special findings are made incident to the finding of violation. In addition to the finding of violation, the inspector must find that "such violation" is of a significant and substantial nature and that "such violation" is caused by the operator's unwarrantable failure to comply with the cited standard. 30 U.S.C. $814(d)(1) (emphasis added). As the Commission has held, these findings fully describe the nature and the characteristics of the violation. Consolidation Coal Co., 6 FMSHRC 189, 192 (February 1984).

The allegation of a violation contained in a citation or order is an initial step in the enforcement of the Mine Act and of its mandatory health and safety standards. The civil penalty assessed for the violation must reflect the surrounding facts and correlate with the nature of the violation through application of the statutory penalty criteria. 30 U.S.C. $820(i). Accordingly, in assessing a penalty, consideration of all incidents of a violation, including the special findings, is appropriate. The Commission has stated:

> The validity of the allegation of violation and of any special findings made in connection with the alleged violation all bear upon the appropriate penalty to be proposed by the Secretary prior to adjudication and to be assessed by the Commission if a violation is ultimately found....

Old Ben Coal Co., 7 FMSHRC 205, 207.08 (February 1985)(emphasis added).

In previous cases where the Secretary has charged an operator with a violation in a citation issued pursuant to section 104(a) of the Mine Act, 30 U.S.C. $814(a), and has made special findings in the citation, the validity of the special finding at issue has been addressed in the penalty proceedings albeit without specific discussion of the issue addressed here. Cement Division, National Gypsum Company, 3 FMSHRC 822 (April 1981). See also Consolidation Coal Co., supra, 6 FMSHRC at 191-192. The

Commission also has recognized that the statutory penalty criterion of negligence and the special finding of unwarrantable failure, although not identical, are based frequently upon the same or similar factual circumstances. Black Diamond Coal Co, 7 FMSHRC 1117, 1122 (August 1985). 11/ In addition, the Secretary's regulatory procedures governing his proposed assessment of civil penalties reflect

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11/ In like manner, the "gravity" penalty criteria and a special finding of "significant and substantial," although not identical, are based frequently upon the same or similar factual circumstances. 30 U.S.C. $$820(i), 814(d).

the interrelationship between special findings and the appropriate penalty to be assessed. 30 C.F.R. $100.5(b) provides in part that "MSHA may elect to waive the regular assessment formula ($ 100.3) or the single assessment provision ($100.4) if the agency determines that conditions surrounding the violation warrant special assessment." The regulation further provides that "[a]ccordingly, the following categories [of violations] will be reviewed individually to determine whether a special assessment is appropriate:... (b) Unwarrantable failure to comply with mandatory health and safety standards...." 30 C.F.R. $100.5(b). Because of the interdependent nature of special findings and the penalty assessment provisions of the Mine Act, it is appropriate to allow contest of such findings in a civil penalty proceeding and not to preclude this challenge because the operator failed to contest the validity of the order in which the findings are contained within 30 days of its issuance.

Most mine operators who immediately challenge a citation or order containing a special finding are concerned with the withdrawal consequences of an order or its "chain" implications. Conversely, those that elect to forego the immediate contest of an order that includes special findings will not be concerned primarily with such consequences. We expect that by delaying contest of an order and the special findings contained therein until the civil penalty proceeding is instituted, an operator's concern will be the deletion of the special findings and a reduction of the civil penalty. Indeed, this is the relief requested in the present case. We recognize that if a special finding is vacated by a judge, in some instances it may be appropriate for the judge to order modification or vacation of the order in which the special finding is contained. Such a circumstance most likely would arise when such modification or vacation would bear upon pending litigation involving a "chain" of which the order was a part. See generally Consolidation Coal Co., 4 FMSHRC 1791, 1793-95 (October 1982). This case does not require discussion of all conceivable collateral effects that might arise from the vacation or modification of an order containing special findings. Resolution of such questions can await cases in which they are specifically presented. 12/ Whatever the collateral effects may be, they arise from the right to review provided to operators by section 105 of the Act.

We therefore conclude that the judge erred in failing to consider Quinland's challenge to the unwarrantable failure finding associated with the violation of section 75.200.

12/ We note that the Secretary has the power to propose more quickly a penalty for citations and orders and thus lessen the chances for

ripple effects that may result from vacation of the underlying order.

IV.

The final issue raised by the operator is whether the judge erred in considering copies of Quinland's preshift examination reports submitted to the judge by counsel for the Secretary following briefing of the case. The judge requested summaries of the reports in order to evaluate the veracity of Quinland's preshift examiner with respect to the frequency of his reports of hazardous conditions. The information was relevant and material to the issue of credibility. In submitting copies of the reports themselves, the Secretary's counsel failed to follow literally the procedure ordered by the judge. However, acceptance of the copies did not prejudice Quinland because they confirmed the examiner's statement that he frequently noted hazardous conditions during his preshift examinations. Tr. 205-06. Furthermore, the judge did not rely on the reports in concluding that Quinland violated section 75.303. Consequently, even if acceptance of the reports was erroneous, the error was harmless.

V.

For the foregoing reasons, we hold that substantial evidence supports the findings of the judge that Quinland violated section 75.200 and section 75.303 and that the violation of section 75.200 was the result of Quinland's negligence. We further hold that the judge erred in failing to address whether the violation of section 75.200 was the result of Quinland's unwarrantable failure. Finally, we hold that the operator was not prejudiced by the judge's acceptance of copies of preshift examination reports. Accordingly, the contested findings of violation and negligence are affirmed, as is the civil penalty assessment for the violation of section 75.303. The matter is remanded to the judge to determine whether the violation of section 75.200 was the result of Quinland's unwarrantable failure to comply with that mandatory safety standard and for such further proceedings as are then appropriate.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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