CCASE:
EMERY MINING V. MSHA
DDATE:
19871211
TTEXT:

FMSHRC-WDC
December 11, 1987

EMERY MINING CORPORATION

v. Docket No. WEST 86-35-R

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

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

DECISION

BY THE COMMISSION:

This proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1982)("Mine Act"), requires the Commission to determine the meaning of the term "unwarrantable failure" as used in section 104(d) of the Mine Act. 30 U.S.C. $ 814(d). For the reasons that follow, we conclude that unwarrantable failure means aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act.

I.

This proceeding involves a violation by Emery Mining Corporation ("Emery") of 30 C.F.R. $ 75.200, the mandatory underground coal mine roof control standard. Commission Administrative Law Judge John J. Morris found that the violation occurred and was the result of Emery's unwarrantable failure to comply with the cited standard within the meaning of section 104(d)(1) of the Mine Act. 30 U.S.C. $ 814(d)(1). 1/

_____

1/ Section 104(d)(1) of the Act states in part:

> 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

~1998
8 FMSHRC 930 (June 1986)(ALJ). The sole issue on review is whether this finding of unwarrantable failure was proper. For the reasons that follow, we conclude that Emery did not exhibit the kind of aggravated conduct necessary to sustain a finding of unwarrantable failure. Accordingly, we reverse.

Emery's Deer Creek mine is an underground coal mine located in Huntington, Utah. On October 22, 1985, Emery's safety department received reports that along the First South haulage track, between the No. 65 and No. 66 crosscuts, a section of chain link mesh was hanging from the roof. That same day Emery safety engineer, Gary Christensen, was instructed to investigate the problem. Christensen was accompanied underground by Dick Jones, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), and by Max Tucker, a member of the union safety committee.

Along the haulage track, between the No. 65 and No. 66 crosscuts, chain link mesh had been bolted to the roof. Christensen found three or four inches of loose coal resting on the mesh. The coal had broken from the roof, fallen onto the mesh, and caused the mesh to sag. While Christensen clipped the mesh to remove the coal, Jones and Tucker examined the surrounding area and found four roof bolts, each of which was missing its six-inch-square bearing plate. The MSHA inspector believed that the pressure of the roof had "popped" the bearing plates off the bolts. Approximately 10 feet away from these bolts, fallen coal had caused the chain link mesh to sag and press across a trolley guard.

Inspector Jones concluded that the roof conditions between the No. 65 and No. 66 crosscuts indicated that the roof was not adequately

---

> do not cause imminent danger, such 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, 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 ... 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.

30 U.S.C. $814(d)(1).

supported in violation of section 75.200. 2/ Having made further findin000that the violation was of a significant and substantial nature and was the result of the operator's unwarrantable failure to comply with the standard, the MSHA inspector issued to Emery a citation pursuant to section 104(d)(1) of the Mine Act (n. 1, supra).

Emery contested the citation, asserting that it was not in violation of section 75.200 and that, in any event, the violation was not the result of its unwarrantable failure. Following an evidentiary hearing, the judge credited the inspector's testimony that a lack of adequate roof support was shown by virtue of the four roof bolts that had "popped" their plates. 8 FMSHRC at 935. The judge held that the sagging in the chain link mesh itself did not violate the standard, but served to focus attention on the area of the entry where the violation occurred. Id. Noting that the First South haulage track was a regularly traveled entry in the mine, the judge concluded that the roof bolts had "popped" their plates at least a week before October 22, and that Emery's safety personnel, who were required to inspect the haulage track for safety hazards, "should have known of the condition." 8 FMSHRC at 936. The judge therefore concluded that the violation was due to Emery's unwarrantable failure to comply with section 75.200.

On review Emery contends that if the judge's decision stands, any violation in an active area of a mine will be an unwarrantable failure violation because supervisors and preshift examiners travel through and inspect all such areas. Emery argues that the judge's decision construes unwarrantable failure as equivalent to ordinary negligence and that only a more stringent legal standard, one involving aggravated conduct, can be the basis for an unwarrantable failure finding. 3/ We agree.

2/ Section 75.200 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/ The American Mining Congress ("AMC") has filed a brief amicus curiae that essentially presents the same arguments put forth by Emery.

II.

In the Mine Act the term "unwarrantable failure" appears only in section 104(d). Its presence and use is of vital importance in the enforcement of the Act. See Nacco Mining Co., 9 FMSHRC 1541, 1545-46 (September 1987); UMWA v. FMSHRC and Kitt Energy Corp, 768 F.2d 1477, 1479 (D.C. Cir. 1984). See also S. Rep. No. 181, 95th Cong., 1st Sess. 31 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 619 (1978)("Mine Act Legis. Hist."). Section 104(d) is an integral part of the Act's enforcement scheme, a scheme which, as an incentive for operator compliance, provides for "increasingly severe sanctions for increasingly serious violations or operator behavior." Cement Division, National Gypsum Company, 3 FMSHRC 822, 828 (April 1981). Under this enforcement scheme, sections 104(a) and 110(a) provide that the violation of any mandatory safety or health standard requires the issuance of a citation and assessment of a monetary civil penalty. 30 U.S.C. $$ 814(a) & 820(a). Under sections 104(b) and 110(b), if the operator does not correct the violation within the prescribed period, the more severe sanction of a withdrawal order is required and a greater civil penalty is assessed. 30 U.S.C. $$ 814(b) & 820(b).

Under section 104(d) an unwarrantable failure finding serves to trigger the application of yet more rigorous sanctions. As the U.S. Court of Appeals for the District of Columbia Circuit has explained:

> An "unwarrantable failure" citation commences a probationary period: If a second violation resulting from an "unwarrantable failure" is found within 90 days, the Secretary must issue a "withdrawal order" requiring the mine operator to remove all persons from the area ... until the violation has been abated....
>
> Once a withdrawal order has been issued, any subsequent unwarrantable failure results in another such order. This "chain" of withdrawal order liability remains in effect until broken by an intervening "clean" inspection. That is, "an inspection of such mine [which] discloses no similar violations."

UMWA v. FMSHRC and Kitt Energy Corp., 768 F.2d at 1478-79 (emphasis in original). The court described this section 104(d) "chain" of

citations and withdrawal orders, keyed to the operator's unwarrantable failure to comply, as "among the Secretary's most powerful instruments for enforcing mine safety." 768 F.2d. at 1479. The threat of the "chain" is a forceful incentive for the operator to exercise special vigilance in health and safety matters. Nacco Mining Co., supra, 9 FMSHRC at 6.

Although section 104(d) is.a key element of the overall attempt to improve health and safety practices in the mining industry (Mine Act

Legis. Hist. at 618-620), the Act does not define the term "unwarrantable failure." Consequently, in determining its meaning, we must turn to intrinsic and extrinsic aids of statutory construction. We must examine the meaning of the term with reference to both its meaning in ordinary usage and its context in the statute, as well as any legislative history and judicial precedent relating to "unwarrantable failure."

We first determine the ordinary meaning of the phrase "unwarrantable failure." "Unwarrantable" is defined as "not justifiable" or "inexcusable." "Failure" is defined as "neglect of an assigned, expected, or appropriate action." Webster's Third: New International Dictionary (Unabridged) 2514, 814 (1971) ("Webster's"). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by "inadvertence," "thoughtlessness," and "inattention." Black's Law Dictionary 930-31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention. Thus, the ordinary meaning of the phrase "unwarrantable failure" suggests more than ordinary negligence. Indeed, we note the Secretary's position that this view of unwarrantable failure represents the intent of the phrase. The Secretary insists that to equate ordinary negligence with unwarrantable failure is to "grossly mischaracteriz[e]" his position. S. Reply Br. 3, 5.

In statutory interpretation, the ordinary meaning of words must prevail where that meaning does not thwart the purpose of the statute or lead to an absurd result. In re Trans Alaska Pipeline Rate Case, 436 U.S. 631, 643 (1978). Far from leading to an absurd result, construing "unwarrantable failure" to mean aggravated conduct constituting more than ordinary negligence produces a result in harmony with the Mine Act's statutory enforcement scheme of providing increasingly severe sanctions for increasingly serious mine operator behavior. Within the Mine Act are found distinct descriptions of types of operator conduct that evoke particular sanctions. "Negligent" conduct is considered when proposing and assessing civil penalties. 30 U.S.C. $$ 815(b)(1)(B) & 820(i). Conduct that is "knowing" and "willful" may result in civil or criminal sanctions against individual corporate agents. 30 U.S.C. $$ 820(c) & (d). Conduct determined to be characterized by an unwarrantable failure to comply with a mandatory regulation results in a section 104(d) "chain" of citations and orders. The Mine Act's use of different terms within the same statute demonstrates that Congress intended the different terms to censure different types of operator conduct within

a graduated enforcement scheme. Cf. Persinger v. Islamic Republic of Iran, 729 F.2d 835, 843 (D.C. Cir. 1984); National Insulation Transp. Committee v. I.C.C., 683 F.2d 533, 537 (D.C. Cir. 1982).

Construing unwarrantable failure to mean aggravated conduct constituting more than ordinary negligence is consistent with the manner in which the Secretary enforces the Mine Act. In civil penalty cases brought before the Commission, the Secretary often argues that an operator was negligent in allowing a violation to exist, yet the

Secretary does not assert that the operator's conduct was marked by unwarrantable failure. Similarly, in settling civil penalty cases the Secretary often agrees to delete unwarrantable failure findings because, upon further consideration, the operator's negligence was less egregious than had been believed. Equally significant, the Secretary's civil penalty proposal regulations recognize degrees of negligence, 30 C.F.R. $ 100.3(d), but distinguish unwarrantable failure violations as distinct and subject to higher special penalty assessments. 30 C.F.R. $ 100.5(b). Further, the Secretary has represented before the Commission that unwarrantable failure findings constitute approximately three percent of the citations and orders issued by MSHA. 4/ Amicus AMC attached to its brief official MSHA reports, which indicate that in 1986 the Secretary issued 126,026 citations that were the result of operators' "low" or "moderate" negligence, and 3,462 violations that were the result of operators' "high negligence" or "reckless disregard." The latter number roughly corresponds with the 3,572 "unwarrantable failure" citations issued in 1986. AMC Br. 16-17 and attachments D & E. Thus, in enforcement practice as well as in theory, the Secretary views unwarrantable failure as aggravated conduct that is more than ordinary negligence. See S. Reply Br. 3, 5; S. Br. 9.

Construing unwarrantable failure as aggravated conduct constituting more than ordinary negligence also is essentially in harmony with the legislative history bearing on the term. Unwarrantable failure sanctions first appeared in section 203(d) of the Federal Coal Mine Safety Amendments Act of 1965. 30 U.S.C. $ 472 (1966). Section 203(d) was carried over with minor changes as section 104(c) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. $ 814(c) (1976) ("Coal Act"), and section 104(c) was, in turn, carried over without substantive change as section 104(d) of the Mine Act. In summarizing the major provisions of the bill that became the Coal Act, the Conference Committee stated that unwarrantable failure to comply meant "the failure of an operator to abate a violation he knew or should have known existed." Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 1602 (1975) ("Coal Act Legis. Hist."). In addition, the House Managers stated that unwarrantable failure to comply meant "the failure of an operator to abate a violation he knew or should have known existed, or the failure to abate a violation because of a lack of due diligence, or because of indifference or lack of reasonable care on the operator's part." Coal Act Legis. Hist. 1512. Further, in Zeigler Coal Co., 7 IBMA 280, 295-96 (March 1977), the Interior Board of Mine Operations

Appeals interpreted unwarrantable failure to mean the failure to abate conditions or practices the operator "knew or should have known existed or which it failed to abate because of due diligence, or because of indifference or lack of reasonable care." In drafting the 1977 Mine Act, the Senate Committee report cited Zeigler with approval. Mine Act Legis. Hist.

_____

4/ See the Secretary's brief on review in Helen Mining Co., 9 FMSHRC 1095 (June 1987): S. Br. 11. See also statement of Solicitor of Labor, George Salem, Nacco Mining Co., 9 FMSHRC 1541 (September 1987), Oral Arg. Tr. 20.

Thus, the legislative histories of the Coal Act and the Mine Act and the Board's definition in Zeigler make reference to "unwarrantable failure" in terms of "indifference," "knew or should have known," "lack of due diligence," and "lack of reasonable care." Although neither the legislative histories nor the Board further explored the meaning of these terms in any detail, the ordinary meanings of these terms are largely congruent with the aggravated conduct meaning discussed above. Indeed, in discussing aggravated conduct that constitutes unwarrantable failure, the Commission has concurred previously with the Board's Zeigler decision to the extent that an unwarrantable failure may be proved by showing that a violative condition or practice was not corrected prior to the issuance of a citation or order because of "indifference, willful intent or serious lack of reasonable care." United States Steel Corp., 6 FMSHRC 1423, 1437 (June 1984); Westmoreland Mining Co. 7 FMSHRC 1338, 1342 (September 1985).

The descriptions of unwarrantable conduct proffered in the legislative histories and Zeigler in large measure harmonize with and complement the conclusion that unwarrantable failure means more than ordinary negligence. The usual meaning of "indifference" is of "little consequence" or "total or nearly total lack of interest." Webster's 1151. In common legal parlance "indifferent" conduct is conduct more aggravated than ordinary negligence. Prosser and Keaton on the Law of 'Torts 212 (1984). Likewise, under the Mine Act a corporate agent who "knowingly" authorizes a violation of a mandatory health or safety standard under the Act is subject to personal civil and criminal liability. 30 U.S.C. $ 820(c). This heightened liability is clearly a Congressional response to more serious breaches of operator conduct, i.e., aggravated conduct. The term "knowingly" has been interpreted to mean "knew or had reason to know." Secretary v. Kenny Richardson, 3 FMSHRC 8, 16 (January 1981), aff'd, 689 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983); Secretary v. Roy Glenn, 6 FMSHRC 1588, 1585-86 (July 1984). Therefore, the references in the legislative history and in Zeigler to "indifference" and "knew or should have known"

5/ Zeigler was decided on a remand from the U.S. Court of Appeals for the District of Columbia Circuit. UMWA v. Kleppe, 532 F.2d 1403 (D.C. Cir. 1976). The issue before the D.C. Circuit was whether an "unwarrantable failure" closure order (and subsequent closure orders in the chain) had to be based both on "unwarrantable failure"

and "significant and substantial findings." The court held that only a finding that the violation was the result of the operator's unwarrantable failure to comply was required. Before the court, the UMWA had also challenged the Board's definition of '"unwarrantable failure," established in a prior, unappealed case. Eastern Associated Coal Co., 3 IBMA 331 (September 1974). In Eastern, the Board had defined "unwarrantable table failure" as intentional or knowing failure to comply or reckless disregard for the health and safety of miners. Id. at 356. The court in Kleppe explicitly declined to address the definition of "unwarrantable failure," but left the Board the option to revisit the issue. 532 F.2d at 1407 n.7.

describe aggravated forms of operator conduct.

With regard to the phrases "lack of due diligence" and "lack of reasonable care" also appearing in these sources, we recognize that the phrases, if considered in isolation, can be viewed as referring to an ordinary negligence test. However, ascribing such a meaning to "unwarrantable failure" cannot be reconciled with either the purpose of unwarrantable failure sanctions or with the ordinary meaning of the term unwarrantable failure itself. Where the ordinary meaning of the phrase "unwarrantable failure" complements and effectuates the enforcement scheme of the Mine Act that meaning must prevail. As the U.S. Court of Appeals for the District of Columbia Circuit recently stated in a related context, "it is beyond cavil that the first step in any statutory analysis, and our primary interpretive tool, is the language of the statute itself." American Civil Liberties Union v. FCC. 823 F.2d 1554, 1568 (D.C. Cir. 1987). Thus, to the extent that these limited references in the legislative history are at odds with the structure and purpose of the Act, as well as other parts of the legislative history, they are not controlling. Abourezk v. Reagan, 785 F.2d 1043, 1055 n.11 (D.C. Cir. 1986), cert. granted, U.S. , 107 S.Ct. 666 (December 15, 1986). See also United Air Lines, Inc. v. CAB, 569 F.2d 640, 647 (D.C. Cir. 1977). Therefore, we conclude that unwarrantable failure means aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act.

III.

Turning now to the specific violation at issue, we conclude that substantial evidence does not support the judge's finding that the violation resulted from Emery's unwarrantable failure to comply with section 75.200.

The judge premised his finding that the lack of adequate roof support was the result of an unwarrantable failure upon his conclusion that the four roof bolts were without their bearing plates for at least a week before their condition was detected and that Emery's preshift and onshift inspectors should have detected and corrected the condition. 8 FMSHRC at 936. Under the circumstances of this case, the fact that Emery's preshift or onshift examiners did not detect the four roof bolts with "popped" plates is not an adequate basis for a finding of such aggravated conduct constituting unwarrantable failure.

Emery was not indifferent to roof support in the entry

between the No. 65 and No. 66 crosscuts. Indeed, the record shows that Emery knew for some time of the instability of the roof along the track haulage, including the area between the cited crosscuts, and took exceptional measures to provide adequate roof support. Emery placed cribs on one side of the track and timbers on the other as close together as possible. Emery placed steel mats on the roof, running crossways, and pinned the mats with roof bolts. In addition, Emery installed chain link mesh between the mats with another set of roof bolts. Emery exceeded the requirements of its approved roof control plan by placing some roof bolts as close together as one or two feet. The area between the crosscuts was approximately 55 feet long. The area

contained hundreds of roof bolts. Given these efforts to support the roof adequately, we cannot conclude that simply because four of these roof bolts had missing plates Emery exhibited aggravated conduct exceeding ordinary negligence. Cf. Westmoreland Mining Co., 7 FMSHRC at 1342.

Accordingly, we hold that the violation of section 75.200 was not caused by Emery's unwarrantable failure. We reverse the judge's contrary finding and modify the section 104(d)(1) citation to a citation issued pursuant to section 104(a). 30 U.S.C. $ 814(a).

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

~2006
Distribution

Timothy M. Biddle, Esq.
Crowell & Moring
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004

Barry F. Wisor, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Henry Chajet, Esq.
American Mining Congress
1920 N Street, N.W.
Suite 300
Washington, D.C. 20036

Administrative Law Judge John Morris
Federal Mine Safety and Health Review Commission
333 West Colfax Avenue, Suite 400
Denver, Colorado 80204