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YOUGHIOGHENY & OHIO COAL
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FMSHRC-WDC
December 11, 1987

YOUGHIOGHENY & OHIO COAL COMPANY

v.

Docket Nos. LAKE 86-21-R
LAKE 86-30-R

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

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

v.

Docket No. LAKE 86-56

YOUGHIOGHENY & OHIO
COAL COMPANY

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

DECISION

BY THE COMMISSION:

In this proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act"), the issues are whether Commission Administrative Law Judge Gary Melick erred in concluding that two violations of a mandatory safety standard were the result of Youghioghenny and Ohio Coal Company's ("Y&O") "unwarrantable failure" within the meaning of section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1); whether the two violations were of a "significant and substantial" nature; and whether the procedure followed by the judge in assessing civil penalties for the violations was proper. 1/ For the

1/ Section 104(d)(1) 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

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reasons that follow, we affirm the judge's unwarrantable failure findings and one of the two significant and substantial findings, but reverse as to the other significant and substantial finding and remand that matter for reconsideration of the civil penalty.

I.

Y&O's Nelms No. 2 Mine, an underground coal mine, is located in Harrison County, Ohio. On Friday, October 25, 1985, Inspector Franklin Homko of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Y&O a citation for failure to comply with the mine's approved roof control plan in violation of 30 C.F.R. § 75.200. 2/ The citation charged non-compliance with the plan's requirements for temporary roof supports in the face areas of the A entry, D entry, and

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, except those persons referred to in subsection (c) 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.

2/ 30 C.F.R. 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.... The plan shall show the type of supported spacing approved by the Secretary.

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the D to E crosscut in the No. 3 section. This citation was not contested. The following Monday, October 28, 1985, the inspector returned to the mine and found that the conditions leading to the October 25 citation had been corrected and that mining had advanced in the A and D entries and in the D to E crosscut. However, the inspector again found that temporary roof supports in these areas did not comply with the roof control plan and therefore violated section 75.200. The inspector further found that the violation resulted from Y&O's unwarrantable failure to comply with the cited standard and that it constituted a significant and substantial violation. Therefore, the inspector issued a section 104(d)(1) order of withdrawal (Order No. 2823806).

Subsequently, on November 19, 1985, the inspector conducted an inspection of the No. 5 section. The entries in the No. 5 section had been advanced by a continuous mining machine ("continuous miner") and cuts had been made in the sides of the entries at an obtuse angle ("fan cuts"). The inspector observed that a fan cut on the right side of one of the entries had cut into a corresponding fan cut on the left side of the adjacent entry. The roof in the area created by this "hole through" was unsupported. The inspector found that in making the "hole through" into an area where the roof was not supported, Y&O violated its approved roof control plan. Accordingly, the inspector cited Y&O for a violation of section 75.200, made unwarrantable failure and significant and substantial findings, and issued an order of withdrawal pursuant to section 104(d)(1) (Order No. 2823831).

Following an evidentiary hearing, the judge found that the violations occurred, were "unwarrantable" and "significant and substantial" within the meaning of section 104(d)(1) of the Mine Act, and assessed civil penalties of \$800 and \$500 for the violations. 8 FMSHRC 948 (June 1986)(ALJ). In determining that the temporary roof support violation (Order No. 2823806) was the result of Y&O's unwarrantable failure to comply with section 75.200, the judge concluded that "the repetition of the same type of violation within such a short time shows indifference or lack of due diligence or reasonable care." 8 FMSHRC at 954. The judge held that Y&O "should have known" of the violation. *Id.* The judge found that the "hole through" violation (Order No. 2823831) was attributable to unwarrantable failure for the same reason. 8 FMSHRC at 954.

On review Y&O does not challenge the findings of violation, but argues that the judge applied an incorrect legal standard in determining that the violations resulted from unwarrantable failure on its part. Y&O's arguments are virtually identical to those of

the operator in Emery Mining Co., 9 FMSHRC , slip op. at 3, WEST 86-35-R (December 11, 1987), a case that we also decide today. Y&O argues, as did the operator in Emery, that the judge's decision construes unwarrantable failure as equivalent to ordinary negligence. It asserts that this result is erroneous because it conflicts with the carefully balanced enforcement scheme of the Act and distorts the proper focus of section 104(d). We agree.

II.

In *Emery*, we concluded that unwarrantable failure means aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act. *Emery*, slip op. at 1, 8. This conclusion was based on the ordinary meaning of the term "unwarrantable failure," the purpose of unwarrantable failure sanctions within the Mine Act, and the relevant legislative history and judicial precedent. We stated that whereas negligence is conduct that is "inadvertent," "thoughtless," or "inattentive," unwarrantable conduct is conduct that is described as "not justifiable" or "inexcusable". Only by construing unwarrantable failure by a mine operator as aggravated conduct constituting more than ordinary negligence, do unwarrantable failure sanctions assume their intended distinct place in the Act's enforcement scheme. *Emery*, slip op. at 5.

We noted that section 104(d) is an integral part of the Mine Act's enforcement scheme, a scheme that, as an incentive for operator compliance, provides for "increasingly severe sanctions for increasingly serious violations or operator behavior." *Emery*, slip op. at 4 (quoting *Cement Division, National Gypsum Company*, 3 FMSHRC 822, 828 (April 1981)). We further observed that in the Mine Act unwarrantable failure is but one description of the type of operator conduct that evokes particular sanctions. We concluded that 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. *Emery* slip op. at 5 We noted further the insistence of the Secretary that equating ordinary negligence with unwarrantable failure "grossly mischaracterize[s]" his position, and that our construction of unwarrantable failure to mean aggravated conduct constituting more than ordinary negligence is fully consistent with the manner in which the Secretary enforces the Mine Act. *Emery*, slip op. at 5, 6.

Finally, we found that construing unwarrantable failure consonant with its ordinary meaning and based upon the purpose of the Act's unwarrantable sanctions was in substantial harmony with the legislative history and judicial precedent bearing on the provision. *Emery*, slip op. at 7-8. Consequently, we held that unwarrantable failure means aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act.

III.

Applying this conclusion to the case at hand, we hold that

substantial evidence supports the judge's findings that the violations at issue were the result of Y&O's unwarrantable failure to comply with section 75.200.

The judge's finding that the temporary roof support violation (Order No. 2823806) was attributable to unwarrantable failure was premised upon the fact that the inspector had cited a similar violation of section 75.200 in the same area on October 25, only three days before the issuance of Order No. 2823806. In addition, the judge noted that

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preshift examinations of the affected area were conducted but that the violative conditions had not been reported. 8 FMSHRC at 950-51. Y&O argues that the temporary roof supports of the last row in the A entry were only 7, 10, and 2 inches in excess of the maximum distance to the faces. Y&O also argues that it had directed experienced miners to correct the previous violation but that for "unknown reasons they bolted and repositioned temporary supports incorrectly". Y&O Br. 2. 3/

The inspector testified that during 1985 there were 17 roof falls at the mine and that two occurred on the No. 3 section. This history of roof falls placed Y&O on notice that heightened scrutiny to assure compliance with its roof control plan was vital. Given the prior violation of section 75.200 in the same area of the mine only days before the violation at issue occurred and the extent of the violative condition, we find that Y&O's conduct in relation to the violation was more than ordinary negligence and that substantial evidence supports the judge's conclusion that the violation resulted from Y&O's unwarrantable failure.

Regarding the "hole through" violation (Order No. 2823831), the judge based his unwarrantable failure finding upon the fact that the roof control plan, without exception, prohibits cutting through to areas in which the roof is not supported adequately. Yet in this case Y&O's section foreman, who was at the controls of the continuous miner, nonetheless cut through into an area of unsupported roof. 8 FMSHRC at 954. Y&O argues that the "hole through" was not deliberate but accidental. Y&O Br. 7. This assertion is contradicted by the record. A member of Y&O's safety department testified that the "hole through" was done deliberately for ventilation purposes. Tr. 266, 285-87. In any event, even if the "hole through" were accidental, the roof control plan clearly prohibits cutting through into areas of unsupported roof and the section foreman is responsible for compliance with the plan. In discharging this important responsibility the section foreman is held to a "demanding standard of care in safety matters." Wilmot Mining Co., 9 FMSHRC 684, 688 (April 1987) Here, the section foreman's conduct in "holing through" did not meet that standard and demonstrated a serious lack of reasonable care, exceeding ordinary negligence and constituting an unwarrantable failure to comply with section 75.200.

Regarding the significant and substantial nature of the temporary roof support violation (Order No. 2823806), the judge was persuaded by the testimony of the inspector that there existed a reasonable likelihood that the hazard contributed to by the violation

would result in a partial or complete roof fall resulting in serious or fatal injuries. 8 FMSHRC at 950. We have held that a violation is properly designated significant and substantial "if, based on the particular

3/ The misplaced temporary supports in the A entry constituted only a part of the violation. There were other violative conditions. In the D entry there was one missing temporary support, and in the D to E crosscut there was one missing temporary support and one temporary support that was misplaced by 10 inches. On review Y&O does not address these conditions.

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facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." National Gypsum, 3 FMSHRC at 825. In Mathies Coal Co., 6 FMSHRC 1, 3.4 (January 1984), we explained:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary ... must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

The third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984) (emphasis deleted). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *Id.*

Y&O admits that it was not in compliance with its roof control plan. The evidence establishes that the discrete safety hazard contributed to by the violation was the danger of a roof fall. The issue is whether there was a reasonable likelihood that the hazard contributed to would result in an event in which there is an injury. The improperly supported roof was in the face areas of the No. 3 section and additional mining was planned in those areas. Continued normal mining operations would bring miners under the inadequately supported roof. Lawrence Wehr, a member of Y&O's safety staff, conceded that miners in the cited area would be subject to danger. Tr. 135.37, 138-41. Given the history of unstable roof at the Nelms No. 2 mine and the fact that continued normal mining operations would endanger miners, an injury causing roof fall was reasonably likely. Therefore, substantial evidence supports the administrative law judge's finding that this violation was of a significant and substantial nature.

In concluding that the "hole through" violation (Order No. 2823831) was of a significant and substantial nature, the judge relied upon the testimony of the inspector who stated that the

"hole through" exposed a large area of unsupported roof and presented a significant roof fall hazard. 8 FMSHRC at 954. Although the Secretary established that the "hole through" constituted a violation of section 75.200 and that the violation contributed to the danger of a roof fall, we conclude that substantial evidence does not support a finding that there was a reasonable likelihood that a roof fall would result in an injury.

It is undisputed that the section foreman operating the continuous

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mining machine was under supported roof at all times when he made the fan cuts and the "hole through." Tr. 230, 241, 246, 268, 273-74. It also is undisputed that Y&O was not going to mine further the rooms involved; these were the last cuts. Thus, had normal mining operations continued, no miners would have entered the rooms in which the "hole through" occurred. In addition, Y&O posted danger signs at the entrance to the rooms leading to the "hole through." In light of these facts, we hold that substantial evidence does not support the judge's conclusion that the violation significantly and substantially contributed to a mine safety hazard.

Finally, we turn to the penalty aspects of the case. Y&O contends that in proposing civil penalties for the violations, the Secretary did not adhere to his penalty regulations. (30 C.F.R. Part 100) and that a remand to the Secretary is therefore necessary. Similar arguments by Y&O were addressed in detail by the Commission in another decision issued while the present case was pending on review. *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 679-80 (April 1987). As explained in this prior decision, the Commission possesses explicit statutory authority to assess an appropriate penalty based on the record evidence developed before it pertaining to the statutory penalty criteria of section 110(i). 30 U.S.C. § 820(i). The Commission's penalty assessments are subject to judicial review. Because the record developed in an adversarial proceeding concerning the statutory penalty criteria will invariably be more complete and fairly balanced than the information normally available to the Secretary when he unilaterally proposes a civil penalty, no compelling legal or practical purpose would be served by requiring the Secretary to repropose a penalty after a hearing in a civil penalty proceeding has been concluded. Here, a full evidentiary hearing has been held and the judge has assessed civil penalties based on the evidence. Therefore, as in the prior case, the proper course is to review the judge's penalty assessment to determine whether it is supported by the record.

In assessing a civil penalty of \$500 for the "hole through" violation (Order No. 2823831) the judge considered his finding that the violation was significant and substantial but did not expressly refer to the gravity of the violation. 8 FMSHRC at 954. Although the penalty criterion of "gravity" (30 U.S.C. § 820(i)) and the significant and substantial nature of a violation (30 U.S.C. §814(d)) are not identical, they are based frequently upon the same or similar factual considerations. *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1622 n. 11 (September 1987). Since we have determined that the "hole through" violation was not of a significant and substantial nature, we

remand to the judge to examine the gravity of the violation in light of this determination and to assess an appropriate civil penalty.

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V.

Accordingly, we affirm the judge's unwarrantable failure findings for both violations and the judge's significant and substantial finding with respect to the temporary roof support violation (Order No. 2823806). We vacate the judge's significant and substantial finding and civil penalty assessment for the "hole through" violation (Order No. 2823831) and remand that matter for reconsideration of the civil penalty.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

Distribution

Robert C. Kota, Esq.
Youghiogheny & Ohio Coal Company
P.O. Box 1000
St. Clairsville, Ohio 43950

Vicki Shteir-Dunn, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Administrative Law Judge Gary Melick
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041