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MSHA V. FLORENCE MINING
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
May 9, 1989
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
v. Docket Nos. PENN 86-297-R
PENN 87-16
FLORENCE MINING COMPANY

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners
DECISION
BY THE COMMISSION:
At issue in this consolidated contest and civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1982)("Mine Act"), is whether the Florence Mining Company ("Florence") violated 30 C.F.R. $ 75.1704 by removing from service an approved emergency escape facility while miners were underground. 1/ Also at issue is whether the violation was significant and substantial in nature and caused by Florence's unwarrantable failure to comply with the mandatory safety standard. Commission Administrative Law Judge William Fauver answered these questions in the affirmative. 9 FMSHRC 1180 (June 1987)(ALJ). For the reasons that follow, we affirm the judge's finding of a violation but reverse his unwarrantable failure and significant and substantial findings and remand the proceeding.

1/ Section 75.1704 essentially restates 317(f)(1) of the Mine Act, 30 U.S.C. $ 877(f)(1), and provides in part:
... Escape facilities approved by the Secretary or his authorized representative, properly maintained and frequently tested, shall be present at or in each escape shaft or slope to allow all persons, including disabled persons, to escape quickly to the surface in the event of an emergency.
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The material facts are not in controversy. Florence operates the Florence No. 2 Mine, an underground coal mine located at Huff, Pennsylvania. The workings of the mine are reached by means of a "dual compartment" slope, approximately 620 feet in length, which

has a belt entry in the top compartment and a track entry in the lower compartment. Supplies and equipment are lowered into the mine by a materials hoist located in the track entry. A concrete walkway, approximately 5 feet wide, with a handrail and lighting, is located on the left side of the slope beside the materials hoist track. Miners enter and leave the mine by means of the walkway.

Prior to November 1985, Florence removed injured or disabled persons from the mine, either by handcarrying a stretcher up the walkway ("stretchering out") or by transporting them on a weight car attached to the materials hoist ("hoisting out"). In late 1985, Florence's practice of hoisting out injured miners was challenged by representatives of the miners as being unapproved. Thereafter, Florence requested the Secretary of Labor's ("Secretary") Mine Safety and Health Administration ("MSHA") to approve its use of the hoist as an escape facility. On March 4, 1986, MSHA approved the hoist as a means of transporting sick or injured miners to the surface. The resulting "Emergency Escape Hoist Facilities Plan" ("the plan") in part required that when miners were underground a person trained in the operation of the hoist be available within 30 minutes after notification to transport injured or disabled persons to the surface. 2/ MSHA's approval of the hoist as an emergency escape facility did not address Florence's pre-existing policy, acceptable under the standard, of stretchering out injured or disabled miners.

In preparation for lowering a large piece of mining equipment into the mine on the weekend of August 16, 1987, Florence's management decided to replace the cable on the materials hoist. (Although the cable had several broken strands, it did not meet the regulatory criteria for mandatory retirement. 3/) On August 13, 1986, after the morning shift had entered the mine by means of the walkway, the hoist was removed from service for approximately five and one-half hours while the cable was replaced. Although Florence had notified the local union president that the cable would be replaced, the miners working underground on the August 13 morning shift apparently were not informed by Florence that the cable would be replaced during their shift.

On August 14, the Johnstown, Pennsylvania, MSHA Subdistrict Field Office received a telephone call from a representative of the miners

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2/ Section 75.1704 does not specifically require an "Emergency Escape Hoist Facilities Plan," it merely requires Secretarial approval of "escape facilities" installed by the operator. By contrast, other standards, e.g., 30 C.F.R. $$ 75.220 and 75.316, specify that plans are to be adopted by the operator and approved by the Secretary. We nevertheless adopt the characterization of the approval document as a

"plan" to which the parties agreed.
3/ See, 30 C.F.R. $ 75.1434.
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requesting an inspection pursuant to section 103(g)(1) of the
Mine Act. 4/ The request was based on the miners' belief that the
new cable on the hoist had been damaged during its installation.
When MSHA Inspector Ronald Gossard arrived at the mine on
August 14, he was presented with a written request for a section
103(g)(1) inspection of the cable. Pursuant to the request, the
inspector conducted an inspection but determined that the cable was
not in violation of any mandatory safety standards. The inspector was
then given another written request for an additional section 103(g)(1)
inspection concerning the fact that the cable had been replaced while
miners were underground. Upon inquiry to Mine Superintendent Thomas
Moran and others, the inspector ascertained that the hoist had been
out of operation from 9:30 a.m. to 3:00 p.m. the previous day, while
a production crew was underground. The inspector found this to be a
violation of section 75.1704. He also found that the violation was
significant and substantial in nature and the result of Florence's
unwarrantable failure to comply with the standard. Therefore, the
inspector issued to Florence Order No. 2697882 pursuant to section
104(d)(2) of the Mine Act. 5/

4/ Section 103(g)(1) states in part:
Whenever a representative of the miners or
a miner in the case of a coal or other mine where
there is no such representative has reasonable
grounds to believe that a violation of this [Act]
or a mandatory health or safety standard exists
... such miner or representative shall have a right
to obtain an immediate inspection by giving notice
to the Secretary or his authorized representative of
such violation or danger.... Upon receipt of such
notification, a special inspection shall be made as
soon as possible to determine if such a violation or
danger exists in accordance with the provisions of
this [Title]. If the Secretary determines that a
violation or danger does not exist, he shall notify
the miner or representative of the miners in writing
of such determination.
30 U.S.C. $ 813(g)(1).
Section 104(d)(2) states:
If a withdrawal order with respect to any area
in a coal or other mine has been issued pursuant to
paragraph (1), a withdrawal order shall promptly be

issued by an authorized representative of the Secretary
who finds upon any subsequent inspection the existence
in such mine of violation similar to those that resulted
in the issuance of the withdrawal order under paragraph (1)
until such time as an inspection of such mine discloses no
similar
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The order states in relevant part:
The slope hoist facility approved by MSHA to
transport injured miners from the mine was removed
from operation to replace the hoist cable while miners
were underground. The hoist was not available for use
from 9:30 a.m. to 3:00 p.m. on August 13, 1986. The
operator's approved plan requires a person trained to
operate the hoist shall be available when miners are
underground to transport injured persons to the surface.
This requirement implies that the hoist will also be
available for use when miners are underground.
The inspector subsequently modified the order to reflect his finding
that management was aware that under the plan the hoist was required
to be available to transport injured or disabled persons to the
surface and that management nonetheless scheduled the hoist to be
replaced while miners were underground. The modification further
noted that the replacement of the hoist cable caused the approved
escape facility to be inoperative for approximately five and one-half
hours while miners were underground.
Florence contested the validity of the order of withdrawal and
the civil penalty of $400 proposed by the Secretary for the violation
of section 75.1704 on the grounds that, under section 104(d), an
inspector may only cite violations that the inspector observes in
progress. Florence argued that even if there had been a violation,
it had ceased before the inspector's arrival and, consequently, could
not be cited in a withdrawal order issued pursuant to section 104(d).
Florence also contended that, in fact, it had not violated section
75.1704, or, in the alternative, that the violation had not resulted
from its unwarrantable failure to comply, nor was it significant and
substantial in nature.
The administrative law judge rejected Florence's contentions.
The judge found that enforcement actions under section 104(d) "may
be issued for violations that are reasonably recent, consistent with
the prompt disposition intended by section 104(d), even though the
violation ceased before the inspector's arrival on the scene."
9 FMSHRC at 1186. The judge also held that the inspector reasonably
concluded that the provision in the plan requiring that a person
trained to operate the hoist be available when miners are underground

meant that Florence was required to keep the hoist in service while
miners were underground. 9 FMSHRC at 1187. The judge noted that
section 75.1704 contains "no provision or exception allowing the
operator to close or remove approved escape facilities while miners
are underground." He therefore concluded that it was a violation of
section 75.1704 for Florence to shut down the

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violations. Following an inspection of such mine
which discloses no similar violations, the provisions
of paragraph (1) shall again be applicable to that mine.
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hoist while its miners were underground. Id. In addition, the
judge held that the violation was both caused by an unwarrantable
failure to comply and significant and substantial in nature, and
he assessed a civil penalty of $400. 9 FMSHRC at 1187-92.
On review, Florence argues that the judge erred in four
respects: (1) in concluding that a section 104(d)(2) order of
withdrawal could be based upon a violation occurring prior to its
detection by the inspector; (2) in finding a violation of section
75.1704; (3) in determining that the alleged violation was due to
Florence's unwarrantable failure to comply with the standard; and
(4) in finding that the violation was of a significant and substantial
nature. We consider each of these challenges in turn.
I.
Subsequent to the judge's decision, the Commission issued a
series of decisions addressing the first issue raised by Florence.
Nacco Mining Co., 9 FMSHRC 1541 (September 1987), pet. for review
filed, No. 88-1053 (D.C. Cir. January 27, 1988); Emerald Mines Corp.,
9 FMSHRC 1590 (September 1987), aff'd, 863 F.2d 51 (D.C. Cir. 1988);
White County Coal Corp., 9 FMSHRC 1578 (September 1987), pet. for
review filed, No. 88-1174 (D.C. Cir. March 1, 1988); and Greenwich
Collieries, 9 FMSHRC 1601 (September 1987). In these decisions the
Commission concluded that a section 104(d) enforcement action may be
based upon violations detected by an inspector even after the
violations had ceased to exist. In particular, Nacco and Emerald
involved the issuance of section 104(d)(1) citations for violations
detected by inspectors during section 103(g)(1) inspections. The
Commission found "nothing in the language of section 103(g) that
requires the violation to be ongoing when the inspector arrives at
the mine site." 9 FMSHRC at 1548; 9 FMSHRC at 1594. Further, in
White County Coal Corp., the Commission concluded that: "section
104(d) orders may be based upon violations detected by the inspector
during an inspection occurring after the violation has ceased to
exist." The Commission noted that "the focus of section 104(d) is

upon unwarrantable failure by the operator, not upon whether its
detection occurred concurrently with its commission." 9 FMSHRC
at 1581.

In affirming Emerald, supra, the United States Court of
Appeals for the District of Columbia Circuit stated:

The gravity of the mine operator's conduct does not
turn on whether the operator was caught in or after
the act. We are satisfied that the Commission's
interpretation properly preserves "the unwarrantable
failure closure order as an effective and viable
enforcement sanction".... [W]e hold that the Secretary
may make "unwarrantable failure" findings under section
104(d) of the Mine Act for violations that have abated
before the inspector arrives at the site.

Emerald, supra, 863 F.2d at 59 (citations omitted). Therefore, we
hold that the judge correctly rejected Florence's argument that a
withdrawal

order cannot properly be issued pursuant to section 104(d)(2)
for violations detected after they have ceased to exist.

II.

We further conclude that substantial evidence supports the
judge's conclusion that Florence violated section 75.1704. There
is no dispute that, at Florence's request, use of the materials
hoist was approved by the Secretary as an emergency escape facility
to transport injured or disabled miners from the mine. Exhibit GX-D.
This approval required in part that "a person trained in the
operation of the hoist shall be available when miner(s) are
underground to transport injured persons to the surface," and that
the hoist "be operative within 30 minutes after being alerted."
Id. at Attachment 2, 4. We agree with the judge that the inspector's
interpretation of the provisions of the plan to require that the
hoist be kept in service while miners are underground is reasonable.
9 FMSHRC at 1186-87. We therefore agree that Florence was required to
keep the hoist in service while miners were underground. Here it is
uncontroverted that, in order to replace the cable, Florence removed
the facility from service for five and one.half hours on August 13,
1986, while a production shift was underground.

Florence argues that because the plan contained no express
language specifying when the hoist cable could be changed and because
Florence could stretcher out injured or disabled miners, it did not
violate section 75.1704. These arguments miss the mark. Although
Florence correctly notes that it was not foreclosed from stretchering
out injured miners even after obtaining approval to use the hoist,
once it had committed to utilize the hoist as an approved escape

facility, Florence was obligated by the terms of the plan to maintain
its availability within 30 minutes while miners were underground.
We therefore affirm the judge's finding of a violation of section
75.1704.
III.
In decisions issued subsequent to the judge's decision,
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." Emery Mining Corp.,
9 FMSHRC 1997, 2004 (December 1987); Youghiogheny & Ohio Coal
Company, 9 FMSHRC 2007, 2010 (December 1987). In concluding that
Florence unwarrantably failed to comply with section 75.1704,
the judge stated that "the phrase 'unwarrantable failure' means
the failure of an operator to abate a condition or practice
constituting a violation of a mandatory standard it knew or should
have known existed, or the failure to abate such a condition or
practice because of indifference or lack of reasonable care."
9 FMSHRC at 1187-90. The judge determined that under either the
"knew or should have known" or the "indifference or lack of reasonable
care" construction, Florence "demonstrated an unwarrantable failure to
comply with the cited safety standard when it deliberately shut down
the hoist for 5 l/2 hours on a production day." 9 FMSHRC at 1191.
Florence argues that the judge applied an incorrect legal standard in
determining whether the violation was the result of its unwarrantable
failure to comply, and that, in any event, the violation was not the
result of its
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unwarrantable failure.
The Commission has previously reviewed the same construction
of "unwarrantable failure" as was set forth by the judge in the
present case, and has concluded that "[e]ven though the judge did
not literally anticipate and apply the aggravated conduct standard
of unwarrantable failure enunciated in Emery, his treatment of the
question of unwarrantable failure ... is in accord substantively
with that decision." Quinland Coals, Inc., 10 FMSHRC 705, 708 (June
1988); see also The Helen Mining Company, 10 FMSHRC 1672, 1676
(December 1988). Therefore, the relevant inquiry is whether the
evidence supports the judge's finding of unwarrantable failure.
Florence argues that an unwarrantable failure finding is
inappropriate due to the existence of a good faith dispute over
the requirements of the approved emergency escape facilities plan.
In support of this argument, Florence points to the lack of express
language in the plan addressing when the hoist must be operable, the
witnesses' differing interpretations of the plan provision mandating
that a hoist operator be available when miners are underground, the

fact that this was the first occasion since the hoist had become an approved escape facility that the cable was replaced, the lack of prior interpretative disputes with MSHA over the requirements of the plan and the availability of an alternative method of compliance with the standard (stretchering out). Florence also stresses that in issuing the withdrawal order the inspector found only "moderate" negligence in respect to the violation and that this finding conflicts with his further finding of an unwarrantable failure.

In determining whether the judge's unwarrantable failure finding is supported by substantial evidence, we must consider the record as a whole including the evidence that "fairly detracts" from the finding. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951). Measured against this standard, we conclude that the judge's finding of unwarrantable failure cannot be sustained.

As discussed, the inquiry is whether Florence's conduct in removing the hoist from service constituted aggravated conduct exceeding ordinary negligence. The great weight of the evidence establishes that Florence's on-shift repair of the hoist was not attributable to such aggravated conduct. Rather, as set forth below, it is clear that Florence's decision to remove the hoist from service was based on its own good faith belief that it was not prohibited from doing so by the terms of the approved escape plan and by virtue of the continued presence and availability of the slope walkway as a permissible escape route.

First, the inspector and the mine superintendent agreed that the plan did not expressly address when the hoist cable could be replaced or serviced and did not expressly specify whether or when the hoist could be taken out of service when miners were underground. Tr. 21, 133. Also, this was the first occasion that the hoist cable had been replaced since the hoist had been approved as an emergency escape facility. Prior to this approval, no standard or plan proscribed replacement of

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the hoist cable during production shifts, and it is undisputed that the issue of whether, or when, the approved escape facility could be removed from service had not previously arisen as an issue between Florence and MSHA.

Second, it must be stressed that the stretchering out of injured miners along the illuminated, cement slope walkway was an acceptable means of compliance with the standard which does not require the presence of a mechanical escape facility in the type of slope in question. As the MSHA inspector indicated in his testimony, the approval of the hoist as an escape facility did not affect Florence's ability to remove injured miners by transporting them out of the mine on stretchers handcarried up

the walkway. Tr. 86. Rather, this route remained as an "alternative
or additional means of removing injured people." Id. The record
makes it abundantly clear that the continued availability of this
escape facility during the time that the materials hoist was out of
service formed the basis for Florence's belief that removal of the
hoist was not violative of the cited standard.
Third, the MSHA inspector found that the level of Florence's
negligence in connection with the violation was "moderate," a finding
left unchanged during the two subsequent modifications of the order.
In this regard, we note that MSHA Policy Memorandum Nos. 88-2C and
88-lM, issued April 6, 1988, provide that "evidence of moderate
negligence will generally not support unwarrantable failure findings."
As counsel for the Secretary admitted at the oral argument before
the Commission in this case, the Secretary continues to adhere to the
statement of position in the policy memorandum and the inspector's
findings therefore "somewhat ... conflict." Oral Arg. Tr. at 29-31.
Although the validity of the interpretation set forth in the policy
memorandum is not at issue in this case, we agree with Florence that
the inspector's conflicting findings detract from the Secretary's
arguments in support of the unwarrantable failure finding.
In sum, in light of our review of the record as a whole, we
conclude that Florence's action was a result of its mistaken, but
good faith, belief in the correctness of its interpretation of the
plan and of the requirements of section 75.1704. Therefore, we
conclude that Florence:s conduct in connection with the violation
did not constitute aggravated conduct exceeding ordinary negligence
and the judge:s contrary finding of an unwarrantable failure must be
reversed.
IV.
Florence also challenges the judge's finding that the violation
of section 75.1704 was of a significant and substantial nature. After
affirming the violation, the judge determined that the purpose of the
approved emergency escape facility was "to provide safe and relatively
fast transportation of injured persons from the mine." 9 FMSHRC
at 1192. Stating that transportation by hoist was faster and superior
to transportation by stretcher up the slope, the judge determined that
"[b]y shutting down the hoist for 5B hours while the day shift miners
were underground, mine management consciously removed an important
emergency protection of the miners" and that this reduction of
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protection could "significantly and substantially contribute to
the cause and effect of aggravated injury, or even death, e.g.,
in case of severe shock, internal bleeding or burns." Id.
Florence argues that the judge's finding of a significant and
substantial violation is not supported by substantial evidence. It

asserts that there is no medical evidence in the record supporting a
finding that the unavailability of the hoist would result in an
injury of a reasonably serious nature. Instead, it asserts that the
testimony in this regard is comprised of only unfounded speculation.
Florence further argues that the judge erred because he based his
significant and substantial finding on a comparison of two methods
for the evacuation of injured or disabled miners, a comparison in
which stretchering out injured miners came up short, when, in fact,
both methods of evacuation are acceptable to MSHA. We agree.

A violation is properly designated as being of a significant
and substantial nature if, based on the particular facts surrounding
the violation, there exists a reasonable likelihood that the hazard
contributed to will result in an injury or illness of a reasonably
serious nature. Cement Division, National Gypsum Co., 3 FMSHRC 822,
825 (April 1981). In arriving at the definition of significant and
substantial in National Gypsum, the Commission explicitly rejected
the Secretary's position that significant and substantial violations
include all but "purely technical violations" or those "which pose
risks having only a remote or speculative chance of happening." Id.
at 826, n.5. ln Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984),
the Commission explained:

In order to establish that a violation of
a mandatory safety standard is significant and
substantial under National Gypsum, the Secretary
of Labor 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," and that the
likelihood of injury must be evaluated in terms of continued normal
mining operations. Austin Power Co. v. Secretary, 861 F.2d 99, 103-04
(5th Cir. 1988); U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574
(July 1984); see also Halfway, Inc., 8 FMSHRC 8, 12 (January 1986).

Our affirmance of the judge's finding that Florence violated
section 75.1704 establishes the first element of the Mathies test.
The second element requires the Secretary to prove that the violation
of section 75.1704 presented a discrete safety hazard. The judge
based his finding that the violation could "contribute to the cause
and effect of

aggravated injury, or even death" upon the testimony of the inspector. 9 FMSHRC at 1192. The inspector stated that stretchering out injured or disabled miners could result in aggravation of injuries or disabilities due to delay in reaching the surface, jostling of the stretcher, or reduced ability to effectively administer first aid. Tr. 26-28, 30.31, 46.49, 87-88. We conclude that substantial evidence does not support a finding that the time difference between the two methods of evacuation presented a discrete safety hazard. Estimates of the time required to evacuate an average-sized miner up the slope via a stretcher varied from 5-7 minutes to 10-12 minutes. Tr. 73, 101, 173. Estimates of the time required to evacuate a miner up the slope on the weight car ranged from 2 to 3 minutes. Tr. 74-75, 171. Although all witnesses agreed that the actual hoisting out would be faster than stretchering out, Superintendent Moran emphasized that procedures involved in readying the hoist could lessen and even eliminate the time difference between the two evacuation methods. Tr. 74-78, 100, 111, 146, 173.74, 185-87. Even assuming that the hoist operator had been alerted and the hoist was at the bottom of the slope, the stretcher would have to be secured to the weight car, safety drags would have to be set, and the hoist operator would have to be notified to begin raising the hoist. See, e.g., Tr. 50-53, 136-38. In addition, the inspector testified that the plan allowed for a delay of up to 30 minutes for the hoist operator to be located and alerted to lower the hoist. Tr. 74-80. ln view of these facts, the evidence cannot be viewed as supporting the conclusion that stretchering out would result in a meaningful delay in reaching the surface and that utilization of the stretcher method would ipso facto constitute a discrete safety hazard.

As to whether stretchering out miners could result in aggravation of their injuries or disabilities due to jostling of the stretcher or reduced ability to administer first aid, the inspector stated that he believed more severe injuries were likely if an injured miner were stretchered out of the mine. However, the inspector admitted that he was unfamiliar with the injury record at the No. 2 mine and did not know what injuries had occurred there. Tr. 47-48. The Secretary presented no evidence showing that the stretchering out of miners had resulted in exacerbated injuries or disabilities at the No. 2 mine, or, for that matter, at any other mine.

Most importantly, the witnesses agreed that the use of stretchers was an acceptable method of evacuating injured or disabled miners to the surface prior to MSHA's approval of the hoist as an emergency escape facility and that even after the approval MSHA continued to regard the use of stretchers as an acceptable means of transporting miners to the surface. Tr. 85-86. Put simply,

if no hoist were in place at this slope mine, there would not even
have been a violation since the walkway alone would have constituted
full compliance with the standard in issue. Tr. 56, 68.69, 85-86.
It would be anomalous, indeed, to conclude that a method of evacuation
that would be acceptable in and of itself is somehow transformed into
an evacuation method involving significant and substantial hazards
simply because an approved alternative became temporarily unavailable.
For these reasons, we conclude that substantial evidence does
not
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support the judge's finding that the violation of section 75.1704
was significant and substantial in nature.

V.

In sum, we affirm the judge's finding that Florence violated
section 75.1704 by removing an approved emergency escape facility
from operation while miners were underground, but we reverse the
judge's findings that the violation was the result of Florence's
unwarrantable failure and that it was significant and substantial
in nature. Accordingly, we remand the proceeding for reconsideration
of the civil penalty assessed in light of our reversal of the
unwarrantable failure and significant and substantial findings.

Ford B. Ford, Chairman
Richard V. Backley, Commissioner
Joyce A. Doyle, Commissioner
James A. Lastowka, Commissioner
L. Clair Nelson, Commissioner
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Distribution

R. Henry Moore, Esq.
Buchanan Ingersoll
58th Floor
600 Grant Street
Pittsburgh, PA 15219

Jerald S. Feingold, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Administrative Law Judge William Fauver
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041