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MSHA V. EASTERN ASSOCIATED COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
February 7, 1991

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA) Docket No. WEVA 89-198

v.

EASTERN ASSOCIATED COAL
CORPORATION

BEFORE: Backley, Acting Chairman; Doyle, Holen, and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)("Mine Act" or "Act"), presents the question of whether a violation by Eastern Associated Coal Corporation ("Eastern") of 30 C.F.R. 75.400, a mandatory underground coal mine safety standard requiring that combustible materials be cleaned up and not permitted to accumulate in active workings, was of a "significant and substantial" nature ("S&S") and the result of Eastern's "unwarrantable failure" to comply with the standard. 1/ Commission Administrative Law Judge Avram Weisberger concluded that Eastern violated 30 C.F.R. 75.400 but that the violation was not S&S and was not the result of its unwarrantable failure. 12 FMSHRC 239 (February 1990)(AlJ). The Commission granted the Secretary of Labor's petition for discretionary review, which challenges the judge's determinations that the violation was not S&S and was not unwarrantable. For the reasons that follow, we affirm, on substantial evidence grounds, the judge's conclusion that the violation was not S&S, and vacate his conclusion that the violation was not unwarrantable, remanding the issue of unwarrantability for reconsideration.

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1/ 30 C.F.R. 75.400. entitled "Accumulation of combustible materials," states:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

I.

Factual Background and Procedural History

Eastern owns and operates the Federal No. 2 Mine, an underground coal mine located in West Virginia. On February 8, 1989, a Department of Labor Mine Safety and Health Administration ("MSHA") inspector, Thomas Doll, examined the 3 North tipple area during the course of a quarterly inspection of the mine. When Doll entered the tipple area, James Merchant, the tipple operator, informed Doll of an oil leak on the opposite side of the track and stated that he had reported the leak to Eastern's management "more than once." Tr. 137.38.

Upon inspection, Doll found accumulations of hydraulic oil on and around the hydraulic tub structure. The hydraulic tub is designed to hold over 30 gallons of hydraulic oil. It has a 460-volt AC motor, pump, and a series of hoses and fittings that take oil where it is needed for the operation of the tipple. Doll testified that the oil was leaking from numerous hose fittings and that some of the fittings were "dripping really bad, ... coming out really fast... ." Tr. 146, 175. The oil was on and under the motor and motor frame, on the tub's hoses, and under the hydraulic tub. A piece of belting was hooked under one of the fittings to direct one of the leaks to the mine floor. The puddles under the tub were approximately three feet wide, four feet long, and up to four inches deep. According to Doll, the oil was pure hydraulic oil and was not mixed with mud or dirt. The motor on the hydraulic tub was functioning, but the tipple itself was not running. Tr. 144.48.

Doll also found accumulations of hydraulic oil under the car spotter motor, which was located near the hydraulic tub. 2/ Doll did not notice any leaks on the car spotter motor and believed that the accumulations came entirely from the hydraulic tub. Doll estimated that the total accumulation of hydraulic oil was 20 to 25 gallons. Doll also noticed that a trench, measuring 10 inches wide, 6 to 8 inches deep, and 15 feet long, had been hand-dug to collect the oil. Tr. 143.47.

Doll issued a withdrawal order to Eastern, pursuant to section 104(d)(2) of the Mine Act, 30 U.S.C. 814(d)(2), alleging a violation of 30 C.F.R. 75.400 for an excessive accumulation of a combustible material, hydraulic oil. Doll found that the alleged violation was S&S. At the hearing, he testified that the hazard was the accumulation of hydraulic oil, coupled with the presence of electrical wires, motors, and cables as ignition sources. Doll indicated that the oil was flammable and that some ignition sources were nearby, pointing out that the cables for the motor on the hydraulic tub and the motor on the car spotter were within inches of

the oil. He indicated that a short-out, arc, or spark could start a fire and stated that ignition of the oil was "highly likely" if the "situation was not taken care of." Doll further testified that in the event of a fire, serious burn or smoke inhalation injury was quite likely. Tr. 152.54.

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2/ The car spotter motor moves the coal cars on the track as they are loaded so that the cars are loaded evenly.

Doll found Eastern's negligence to be high and that the violation resulted from Eastern's unwarrantable failure to comply with the standard because the condition had been reported to Eastern by Merchant, the tipple operator, on January 31, 1989, a week prior to the date the violation was cited. Doll testified that the quantity of accumulated oil was also a factor. Doll further stated that the track was fire bossed daily and that the condition should have been noticed. Doll indicated that, while he had been informed that Eastern had sent mechanics to work on the leaks during the prior weekend, considering the way the system was leaking, he did not believe that any effective work had been done. Tr. 156.58.

Merchant testified that on and off for the two to three years prior to the citation there had been problems keeping a sufficient reservoir of oil in the tipple. Tr. 197. He indicated that on some days he would be required to add some 20 to 25 gallons of oil per shift. Tr. 198. Merchant stated that he had told his foreman, John Kucish, and Roger Boggess, a maintenance foreman, of the oil leak problems at the tipple. Tr. 117, 200, 03, 260. He testified that about a week before February 8, he had reported the condition to Kucish and that Boggess subsequently told him that the problem was supposed to have been fixed, but that the person assigned did not get to it. Merchant also testified that on February 6 and 7 the tipple was not leaking any less, because he still needed to add 15 to 25 gallons of oil each shift. According to Merchant, he would have had to add oil under normal conditions only once each month. Tr. 203.07.

To abate the violation, Kucish, Boggess, and David Tennant, underground maintenance superintendent, went to the site. The area was cleaned and the car spotter unit was run to determine what, if anything, was leaking. According to Kucish, drips were located at some of the fittings. In his view, those drips were insufficient to accumulate during one shift into the quantity of oil present when the order was issued Tr 242-246.

Before the Judge, Eastern conceded the violation. In addressing the S&S question, Eastern argued that there was no likelihood of any injury as a result of the accumulation. Boggess and Tennant testified that a spark or short from the electrical equipment in the area would be incapable of igniting the oil. Tr. 255, 264. Kucish further testified that the area was adequately rock dusted. Tr. 239. Boggess and Kucish testified that there was a fire suppression system over the car spotter motor. Tr. 240-41, 253-54. Boggess also testified that there were fire fighting materials and equipment in the area, including water hoses, rock dust, and fire

extinguishers. Tr. 240.

In contesting the inspector's unwarrantable failure finding, Eastern argued that it had performed maintenance on the tipple equipment, including dealing with oil leaks, on January 31 and February 4, 1989. Kucish testified that when he observed the area on February 5, 1989, after the second maintenance operation, there were no observable oil leaks. Tr. 231-32. Eastern asserted that it was unaware of the oil situation at the tipple on February 8, 1989, and further suggested that the accumulation could have resulted from either spillage or overfilling of the hydraulic tub that day.

In his decision, the judge found a violation of 30 C.F.R. 75.400, as conceded by Eastern. However, the judge vacated the S&S and unwarrantable failure findings. With respect to the S&S finding, the judge held that "[a]lthough, based on [Inspector] Doll's testimony, it can be concluded that ignition of the oil could have resulted, I find that it has not been established that such an event was reasonably likely to occur." 12 FMSHRC at 240. The judge discounted the fact that various ignition sources, including a motor, wires and cables, were present because "there is nothing in the record to indicate that this equipment was in such a condition as to make sparking or arcing an event reasonably likely to occur." Id. Relying on Eastern's witness"s' testimony, the judge stated:

> [D]ue to Roger Boggess' experience as a maintenance foreman, I place some weight on his opinion that a spark would not ignite the oil, and that a sustained fire would be needed. Further, John Kucish, who was the production foreman in charge of the section on February 8, indicated that the area in question was adequately rock.dusted. Also, he and Boggess indicated that there was a fire suppression system over the top of the power unit of the car spotter, and that there were various items to extinguish fires in the area.

12 FMSHRC at 240. Taking all of the above factors into account, the judge concluded that it had not been established that the violation was S&S.

The judge also determined that the violation was not unwarrantable. He found that the leak had existed on and off for two to three years and had been reported to Eastern several times, including one week prior to the issuance of the instant order. 12 FMSHRC at 242. However, the judge noted:

> I accept the testimony of Respondent's witnesses that

twice within 8 days prior to February 8, maintenance work had been performed on the equipment in question. I accept the testimony of Kucish that when he observed the area on the day after the work had been performed on February 4, there were no "visual leaks". ... Although Merchant indicated that on February 6-7, 1989, the equipment was not leaking less, there is no evidence that the

> condition was reported to management on these days. I thus conclude, taking the above into account, that Respondent herein did not exhibit any aggravated conduct, and hence the violation herein did not result from its unwarrantable failure.

12 FMSHRC at 242.

In assessing the civil penalty for the violation, the judge found that Eastern was highly negligent for not ensuring that its work on February 4 was successful and that there was no longer any accumulation of oil. The judge relied on Merchant's testimony that the leakage problem had existed intermittently for two to three years and had been reported to Kucish numerous times. The judge additionally noted the large quantity of oil observed on February 8. 12 FMSHRC at 242. The judge assessed a civil penalty of $900. Finally, the judge modified the withdrawal order to a citation issued pursuant to section 104(a) of the Mine Act, 30 U.S.C. 814(a)

## II.

## Disposition of Issues

### A. Whether the violation was S&S

A violation is properly designated as being S&S "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 Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory 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

340 U.S. 474, 488 (1951); see also e.g., Florence Mining Co., 11 FMSHRC 747, 753, 755.57 (May 1989). The term "substantial evidence," as this Commission has consistently recognized, means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Harry Ramsey v. Industrial Constructors Corp., 12 FMSHRC 1587, 1592 (August 1990), and cases cited.

As to the first S&S element, the violation of section 75.400 has been established. Concerning the second element, there is no serious question on review that a discrete hazard of a potential fire existed. There was an undisputed accumulation of a combustible substance, hydraulic oil, combined with the presence of possible ignition sources. The crucial question on review is the third S&S element - whether there was a "reasonable likelihood that the hazard contributed to will result in an injury." The third element of the Mathies formula "requires 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)), and the violation itself must be evaluated in terms of continued normal mining operations. (U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984); see also Halfway, Inc., 8 FMSHRC 8, 12 (January 1986)). The relevant time frame for determining whether a reasonable likelihood of injury exists includes both the time that a violative condition existed prior to the citation and the time that it would have existed if normal mining operations had continued. Halfway, Inc., 8 FMSHRC at 12; U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985).

As a threshold contention. the Secretary submits that the judge erroneously equated the reasonable likelihood element with the presence of an "imminent danger." (See 30 U.S.C. 817 (dealing with procedures to counteract imminent dangers); see also 30 U.S.C. 802(j) (definition of "imminent danger").) If this were, in fact, what the judge had done, the Secretary's point would be well taken. Section 104(d)(1) of the Mine Act, in which the S&S terminology is initially set forth, makes clear that the conditions created by an S&S violation need not necessarily be so impending as to constitute an imminent danger. 3/ We find no indication in the

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

> 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 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]....

judge's decision, however, that he actually required the Secretary to demonstrate a reasonable likelihood of injury so pressing as to be "imminent." Further, we are satisfied that the judge applied the correct reasonable likelihood test consistent with Commission precedent. The question is whether his findings in that regard are supported by the evidence.

In Texasgulf, supra, the Commission developed an analytical approach useful for determining the reasonable likelihood of a combustion hazard resulting in an ignition or explosion. The Commission established that there must be a "confluence of factors" to create a likelihood of ignition. 10 FMSHRC at 501. The evidence relied on by the judge in the present proceeding provides adequate support for a finding that there was not a "confluence of factors" pointing to a reasonable likelihood of a fire involving the accumulation of hydraulic oil.

The judge relied on Boggess' testimony that a spark would not ignite the oil, and that a sustained fire would be needed for ignition. 12 FMSHRC at 240; Tr. 253. Tennant, who has State electrical certification, also testified that a spark would not be a sufficient ignition source for hydraulic oil. Tr. 264. Boggess testified that the hydraulic oil would not burn easily. Tr. 252. On review the Secretary has not addressed substantively Boggess' or Tennant s testimony, or otherwise discussed the actual ignitability of hydraulic oil. Although Inspector Doll testified that the oil was not fire-resistant (Tr. 147), he conceded that he did not perform any combustibility tests (Tr. 161). The Secretary had the burden of proof on this point, but only very limited evidence concerning the combustibility of hydraulic oil was presented.

As the judge also found, there was nothing in the record to indicate that the mining equipment nearby was in such a condition as to make sparking or arcing an event reasonably likely to occur. 12 FMSHRC at 1240. Boggess testified that there were no shorts or other problems with the electrical circuits at the time. Tr. 253. Tennant testified that it was unlikely for a fire to start because the power unit's electrical system was protected by electrical devices that would deenergize power if there were any abnormalities in the electrical circuits. Tr. 263. Boggess stated that the electrical equipment was protected by electric circuits. Tr. 253. Inspector Doll conceded that the system overloads, breakers, and similar devices were working. Tr. 164. There is no evidence in the record indicating the likelihood of these safety features breaking down under normal continued mining operations.

The evidence of record suggests that even if there were to be an

ignition, it would be of a limited nature and readily contained. The judge assigned weight to the testimony of Kucish and Boggess that there was a fie suppression system, including a water dilute system, over the top of the hydraulic tank itself, and readily accessible firefighting equipment, including water hoses, rock dust, and fire extinguishers. 12 FMSHRC at 240;

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30 U.S.C. 814(d)(1)(emphasis added).

Tr. 240-41, 253-54, 263, Boggess also testified that the systems were in working order. Tr. 253. MSHA Inspector Doll conceded that these fire suppression systems were working. Tr. 164. Kucish also testified that the area was adequately rock-dusted and that, as a general rule, the area was damp. Tr. 239-40. Merchant conceded that the area was adequately dusted. Tr. 164. Additionally, Merchant acknowledged that he installed a belt to function like a trough to drain the oil away from the electrical motors and added rock dust to much the oil in the ditch. Tr. 197-98, 199, 216. See also Tr. 183-84. A mine is also posted at all times at the loading station just a few feet away. Tr. 240, 263. The testimony also suggests that there has never been a fire on a power unit at the tipple. Tr. 264.

The Commission's task is not a de novo reweighing of somewhat conflicting evidence but a determination of whether there is substantial evidence in the record to support the judge's conclusions. As explained above, we conclude that substantial evidence does support the judge's conclusion that the hazard was not reasonably likely to cause an injury and, consequently, that the violation was not S&S. 4/

B. Whether the violation was unwarrantable failure

The Commission has held that the unwarrantable failure is 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 Co., 9 FMSHRC 2007, 2010 (December 1987). This determination was derived, in part, from the ordinary meaning of the term "unwarrantable failure" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" ("the failure to use such care as a reasonably prudent and careful person would use, characterized by "inadvertence," "thoughtlessness" and "inattention"). Emery, supra, 9 FMSHRC at 2001. This determination was also based on the purpose of unwarrantable failure sanctions in the Mine Act, the Act's legislative history, and judicial precedent. Id.

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4/ The three Commission decisions relied on by the Secretary on review are distinguishable from the present case. U.S. Steel Mining Co., 7 FMSHRC 327 (March 1985), affirming a judge's S&S finding, involved a water pump with power wires that were not protected with a required bushing. The pump vibrated when in operation. The vibration could cause a cut in the wire's insulation and, if the circuit protection failed, a person touching the pump frame could be shocked or electrocuted. The vibrating defect is more akin here to the presence of a more flammable substance or more certain evidence of sparking or arcing. Youghiogheny & Ohio Coal Co., 9 FMSHRC 673 (April 1987) and U.S. Steel Mining Co., 6 FMSHRC 1866 (August 1984), also

affirming judges' S&S findings, involved hazards concerning potential methane ignitions. Methane is ignitable by a spark and is much more flammable and explosive than hydraulic oil. Further, the mines in both those proceedings were gassy mines, as defined in the Mine Act. In all three of these cases, we perceive the kind of showing of a "confluence of factors" that was not made here.

In finding that the violation was not the result of Eastern's unwarrantable failure, the judge accepted testimony of Eastern's witnesses that twice within eight days prior to February 8, maintenance work had been performed on the equipment in question. 12 FMSHRC at 242. Boggess and Tennant testified that a leak had been reported on January 31, 1989, and that corrective maintenance was performed that day. Boggess and Tennant also testified that on February 4, maintenance at the triple and track unit was performed and that adjacent hydraulic jacks were repacked or replaced because of possible leaks. Tennant stated that any leaks the could be found were addressed that day. The judge accepted the testimony of Kucish that, when he inspected the area on February 5, there were no apparent leaks. Id. Kucish additionally testified that "the area had been cleaned up and had been dusted." Tr. 231. The judge also concluded that aggravated conduct was lacking because the leakage on February 6-7 was not reported to Eastern. 12 FMSHRC at 242.

Notwithstanding these findings, the judge also found that Eastern was "highly negligent" with respect to the violation:

> [T]aking into account Merchant's testimony, that I accept, that the leak had existed on and off for 2 to 3 years, and was reported by him to Kucish on numerous times, and taking into account the large quantity of oil that was observed on February 8, I conclude that the Respondent was highly negligent in not having taken steps to ensure that an accumulation would no longer occur. Although maintenance work was performed on February 4, and examined one day later by Kucish, and observed not to have any visible leaks, there is no evidence that Respondent examined the area on February 6-7, to ensure that its work on February 4 was successful, and there was no longer any accumulation of oil. For these reasons, I conclude that Respondent was highly negligent herein.

12 FMSHRC at 242 (emphasis added).

The terms "unwarrantable failure" and "negligence" are distinguished in the Mine Act. A finding by an inspector that a violation has been caused by an operator's unwarrantable failure to comply with a mandatory health or safety standard may trigger the increasingly severe enforcement sanctions of section 104(d). 30 U.S.C. 814(d). Negligence, on the other hand, is one of the criteria that the Secretary and the Commission must consider in proposing and assessing, respectively, a civil penalty for a violation of the Act or of a mandatory health or safety standard.

30 U.S.C. 815(b) (1)(B) & 820(i). Although the same or similar factual circumstances may be included in the Commission's consideration of unwarrantable failure and negligence, the concepts are distinct. See Quinland Coals, Inc., 7 FMSHRC 1117, 1122 (August 1985); Black Diamond Coal Co., 9 FMSHRC 1614, 1622 (September 1987). Nevertheless, as explained in Emery, and Youghiogheny & Ohio aggravated conduct constitutes more than ordinary negligence for

purposes of a special finding of unwarrantable failure. Highly "negligent" conduct involves more than ordinary negligence and would appear, on its face, to suggest an unwarrantable failure. Thus, if an operator has acted in a highly negligent manner with respect to a violation, that suggests an aggravated lack of care that is more than ordinary negligence.

Evidence seemingly unaddressed by the judge in his analysis is relevant in considering the question of unwarrantable failure. The judge appears to have found that a leak was the source of the problem. See 12 FMSHRC at 242. Thus, he apparently rejected the testimony of Eastern's witnesses that the most plausible explanation for what occurred was either a spill or overfill. The judge, however, made no finding concerning how long the leak had continued unabated. If the leak had actually continued unabated from February 6, as Merchant testified, a lack of care on Eastern's part would appear to be present. Tr. 205-06. The area was fire-bossed daily and involved at least 12 to 15 inspections (preshift and onshift) by four or five different people over the period February 6-8. Tr. 209, 233, 235; R. Exh. 6.

A lack of actual knowledge by Eastern's management of the apparently continuing leak does not necessarily bar an unwarrantable failure finding. In Pocahontas Fuel Co., 8 IBMA 136, 148.49 (1977), aff'd sub nom. Pocahontas Fuel Co. v. Andrus, 590 F.2d 95 (4th Cir. 1979), failure of a rank-and-file preshift examiner to detect a violation was found to be imputable to the operator for unwarrantable failure purposes. Even assuming that Eastern's preshift and onshift examiners did not record any continuing problem, that consideration does not necessarily preclude an unwarrantable failure finding. Emery makes clear that unwarrantable failure may stem from what an operator "had reason to know" or "should have known." 9 FMSHRC at 2003.

We further note the judge's finding that "leakage off and on" had been a problem for two to three years. 12 FMSHRC at 242. Arguably, this continuing problem placed on Eastern the need for heightened scrutiny to assure compliance with section 75.400. See Youghiogheny & Ohio, 9 FMSHRC at 2011 (history of roof falls at mine placed operator on notice that heightened scrutiny was vital). (We also note that in the Y&0 case, the Commission recognized that preshift examinations of the affected area had been conducted but that the violative condition had not been reported. 9 FMSHRC at 2010-11.)

We do not reach an ultimate resolution of this issue. The fact that the judge did not reconcile his findings with respect to negligence and unwarrantable failure requires that we vacate his conclusion that no unwarrantable failure existed and remand this proceeding to the judge for

further analysis and consideration.

## III.

## Conclusion

For the foregoing reasons, we affirm the judge's determination that Eastern's violation of section 75.400 was not S&S, vacate his determination that the violation did not result from unwarrantable failure, and remand the question of unwarrantability for reanalysis and further consideration consistent with this opinion. If the judge determines on remand that the violation did result from unwarrantable failure, the citation should be converted to the original section 104(d)(2) withdrawal order.

Richard V. Backley, Acting Chairman

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