CCASE:
MSHA V. PEABODY COAL
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August 6, 1992
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. LAKE 91-11

PEABODY COAL COMPANY

BEFORE: Ford, Chairman; Backley, Doyle, Holen, and Nelson, Commissioners
DECISION
BY THE COMMISSION:
This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. • 801 et seq. (1988) ("Mine Act" or "Act"). The sole issue is whether Commission Administrative Law Judge Gary Melick erred in finding that a violation of 30 C.F.R. • 75.400 by Peabody Coal Company ("Peabody") resulted from its unwarrantable failure to comply with the standard.(Footnote 1) For the reasons set forth below, we affirm the judge's determination of unwarrantable failure.

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1 30 C.F.R. • 75.400, which repeats the statutory language of section 304(a) of the Mine Act, 30 U.S.C. • 864(a), provides:
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.
The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. • 814(d)(1), which, in pertinent part, distinguishes those violations of mandatory health or safety standards "caused by an unwarrantable failure of [an] operator to comply with such mandatory health or safety standards...."

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I.

Factual and Procedural Background

Peabody operates the Peabody No. 10 Mine, an underground coal mine in Christian County, Illinois. On May 18, 1990, Edward Banovic, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted a regular inspection of the mine. He reviewed the preshift examination books and discovered that repeated problems were recorded concerning the transfer point between the conveyor belts in the second north

and seventh west areas of the mine.(Footnote 2) At approximately 9:00 a.m., Inspector Banovic, accompanied by Robert Stevens, a United Mine Workers of America ("UMWA") safety representative, travelled to the transfer point in order to inspect it. When they arrived, power to the belts had been turned off due to unrelated problems in another area of the mine.(Footnote 3) Inspector Banovic discovered coal dust and loose coal in five different locations within approximately 100 feet of the transfer point. Two of the piles were comprised of coal and measured approximately 15 feet in length and 30 inches in height. Inspector Banovic testified that, if the belt had been running, the belt line would have rubbed against the coal. A third pile, approximately 24 inches high and four feet wide, was comprised of charred, discolored, pulverized coal dust packed around the second north drive roller. According to the inspector, the drive roller is approximately 30 inches in diameter, and as it turned, it would compress the coal dust. The inspector also observed two piles of fine coal dust that measured 30 inches in height, four feet in width and four feet in length between the drive roller and the transfer point.

Inspector Banovic testified that "the two long locations of coal were at a transfer point where coal could spill steadily as the shift was being conducted." Tr. 75. He believed that the coal dust packed around the drive roller had been present in that location for at least five days. Tr. 75-76. He explained that coal accumulates slowly in such a location, and that it would take "a reasonable period of time" for it to accumulate to the extent that he observed. Tr. 75. He also stated that its discoloration indicated that it had been present for "a considerable amount of time while the rollers were turning." Tr. 99. In addition, Inspector Banovic testified that the "two large piles" were fresh, and that he believed they had been deposited within 24 hours of his arrival. Tr. 75.

After examining the area, Inspector Banovic then travelled to the surface and further examined the mine examiners' books in order to document

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2 Under 30 C.F.R. • 75.303(a), certified persons designated by the operator of the mine are required to examine active workings of a mine for hazardous conditions and record the results of that examination.

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3 The second north belt dumps onto the seventh sub-main west belt, which dumps onto the main south belts. The belts are synchronized, so that the inoperability of the main-south belt prevented the belts in question from running.

the instances in which such accumulations had previously been reported. He noted that a spillage had been reported in the entry for the 8:00 a.m. shift that morning. He also found examiners' notations indicating that the cited areas had needed to be cleaned at the start of seven of the eight previous shifts.

Based upon his observations, Inspector Banovic issued an order, pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. • 814(d)(1), alleging a significant and substantial ("S&S") violation of section 75.400.(Footnote 4) Inspector Banovic stated that the violation occurred as a result of Peabody's unwarrantable failure because similar problems regarding the cited area had been entered repeatedly in the preshift examination books, Peabody had repeatedly violated the standard, MSHA officials had discussed with Peabody officials those repeated violations of section 75.400, and because management neglected to properly repair the belt drive. Tr. 85. The order was terminated after five miners worked for four hours removing the accumulations. Following an evidentiary hearing, the judge found that Peabody violated section 75.400, and that the violation was S&S, and caused by Peabody's unwarrantable failure to comply. Peabody Coal Co., 13 FMSHRC 835 (May 1991)
(ALJ). In reaching his unwarrantable failure finding, the judge relied upon Inspector Banovic's testimony that the cited area and condition had been reported several times in the preshift examination book and that, although the condition had been so recorded the morning of the inspection, the condition was not being abated at the time the inspector examined it. 13 FMSHRC at 839. In addition, the judge noted MSHA supervisory Inspector Lonnie Conner's testimony that MSHA had met with Peabody in March, June, and November 1989, to
discuss Peabody's repeated violations of section 75.400, but that there had been no decrease in the number of violations since those discussions. 13 FMSHRC at 840.
The judge discredited the testimony of William Raetz, superintendent of the mine, that the single miner who had been assigned to clean the cited area as well as other areas, would have completed that task by the end of the shift. 13 FMSHRC at 840. The judge relied upon the uncontroverted testimony that it took five miners four hours to abate the violative condition. Id.
The judge then noted Mr. Raetz's testimony that, after a meeting with MSHA, Raetz gave supervisory personnel instructions to correct the recurring accumulation problems. 13 FMSHRC at 840. The judge also stated that, although Raetz indicated that Peabody maintains records of disciplinary action taken for failure to comply with regulations, Raetz did not know whether any disciplinary action had been taken due to a failure to correct violations of section 75.400. 13 FMSHRC at 840-41. The judge indicated that, regardless of any disciplinary actions taken to ensure compliance with the standard, Peabody had been cited 17 times between October 30, 1989, and May 10, 1990, for violations of section 75.400. Citing Youghiogheny & Ohio Coal Co., 9 FMSHRC

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4 The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. • 814(d)(1), which, in pertinent part, distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard...."

2007 (December 1987) ("Y&O") and Emery Mining Corp., 9 FMSHRC 1997 (December
1987), the judge concluded that "[t]his evidence is relevant in showing a pattern of lack of due diligence, indifference or lack of reasonable care and supports the finding that the violation herein was the result of gross negligence and aggravated acts and/or omissions constituting `unwarrantable failure.'" 13 FMSHRC at 841. Accordingly, the judge assessed the penalty proposed by the Secretary in the amount of $1,400. Id. The Commission subsequently granted Peabody's petition for discretionary review, in which Peabody contests only the judge's unwarrantable failure finding.

II.

Disposition of issues

We conclude that substantial evidence supports the judge's finding that Peabody's violation of section 75.400 was caused by its unwarrantable failure to comply with the standard. In Emery, the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. This determination was derived, in part, from the plain meaning of "unwarrantable" ("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"). 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.

The Commission has previously recognized as relevant to unwarrantable failure determinations such factors as the extent of a violative condition, or the length of time that it has existed, whether an operator has been placed on notice that greater efforts are necessary for compliance, and the operator's efforts in abating the violative condition. See, e.g., Quinland Coals, 10 FMSHRC 705, 708-09 (June 1988); Y&O, 9 FMSHRC at 2011; Utah Power & Light Co.,
11 FMSHRC 1926, 1933 (October 1989)("UP&L"). We conclude that the judge considered such factors demonstrating aggravated conduct and that substantial evidence supports his decision.

The record reveals that the five accumulations of loose coal and coal dust were extensive. Peabody argues that the cited accumulations must have accumulated after the preshift examination, between 9:00 p.m. and midnight on May 17, 1990. P. Br. at 8-9.(Footnote 5) The judge, however, credited Inspector

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5 Peabody focuses upon the fact that Janette Molancus, a belt shoveler for Peabody, told Inspector Banovic that the area under the belt had been cleaned on May 17, at 4:00 p.m. Peabody notes that, although the cited accumulations had been recorded as part of the preshift examination for the 8:00 a.m. to

4:00 p.m. shift on May 18, (the shift during which the inspection occurred), no accumulations had been recorded as a result of the preshift examination for the preceding shift (midnight to 8:00 a.m. on that day). Tr. 89. Peabody speculates that the accumulations must have occurred sometime after that preshift examination. Because a preshift examination is performed within the three hours prior to the beginning of a shift, and because coal is not produced during night
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Banovic's testimony that the accumulations around the drive roller had existed for up to one week. 13 FMSHRC at 839.
Inspector Banovic testified that, although some of the accumulations might have been freshly deposited, he determined that the coal dust packed around the second north drive roller had existed in the area for a period of time between five days and one week, given its packed, discolored and charred appearance. Tr. 75-76, 99. The inspector suggested that the reason the coal packed around the drive roller had not been reported was because the preshift examiner might not have looked "underneath that belt drive as he walked by the area." Tr. 90. In addition, Inspector Banovic testified that Ms. Molancus told him that the area under the seventh west belt had been cleaned on May 17, not that the head roller or drive roller had been cleaned. Tr. 87.
The evidence that the coal packed around the drive roller was charred and discolored, and that coal accumulates slowly in such a location, was undisputed. Furthermore, the fact that the presence of that coal dust was not recorded does not necessarily establish that the area was clean during the shift immediately prior to the inspection. Such a fact may only indicate that the examiner failed either to see or to record an accumulation, as Inspector Banovic posited, and does not bar an unwarrantable failure finding. See generally Eastern Associated Coal Corp., 13 FMSHRC 178, 187 (February 1991).
In concluding that Peabody's conduct amounted to an unwarrantable failure, the judge considered Inspector Banovic's testimony that accumulation problems in the cited area had been reported several times in the preshift examination books. 13 FMSHRC at 839. Inspector Banovic testified that entries for seven of the eight preshift examinations prior to the inspection noted problems with accumulations or spilling in the cited area. Tr. 80-81. For example, the entry for the midnight shift on May 17 specified that an area of the second north belt "still spills A LOT." P-Exh. 7 (emphasis in original). Such evidence is relevant in demonstrating that Peabody had prior notice that a problem with coal and coal dust accumulations existed in the cited area, and that greater efforts were necessary to assure compliance with section 75.400. Peabody's failure to rectify the acknowledged spilling problem at the cited location was properly considered by the judge when determining whether Peabody's violation was caused by its unwarrantable failure. See, e.g., Y&O, 9 FMSHRC at 2011; Quinland, supra, 10 FMSHRC at 709;
Eastern, supra, 13 FMSHRC at 187; Drummond Co.,Inc., 13 FMSHRC 1362,

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(September 1991).
The judge also properly considered Inspector Banovic's testimony that, at the time of the inspection, no one was engaged in attempting to remove the accumulations. 13 FMSHRC at 839. Peabody argues that this fact does not establish that Peabody engaged in aggravated conduct because a belt shoveler had been assigned to clean the cited area, but was cleaning another area first. P. Br. at 7-9. Peabody also focuses upon Raetz's testimony that, under its policies, a foreman has until the end of a shift to rectify a
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shifts, Peabody concludes that the accumulations occurred sometime between 9:00 p.m. and midnight on May 17. P. Br. at 8-9.
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problem of which he had been made aware earlier in that shift. The judge found that Peabody's conduct was "particularly aggravated" because it assigned only one person to work less than one shift to correct the condition. 13 FMSHRC at 840. The judge noted that undisputed evidence established that it eventually took four hours for five miners to clean up the accumulations. Id. The judge held that "[t]his evidence clearly supports a finding that under all the circumstances the operator knew or should have known of these loose coal and coal dust deposits and failed to abate the violative conditions because of lack of due diligence, indifference or lack of reasonable care." Id.
In contrast, in UP&L, supra, 11 FMSHRC at 1933, the Commission affirmed the judge's finding that the operator's violation of section 75.400 was not caused by its unwarrantable failure to comply with the standard. In that case, the Commission relied, in part, upon the fact that before and during the inspection, miners were present shoveling the coal accumulations and attempting to abate the condition. The record contains no evidence that Peabody gave similar priority to the abatement of the cited accumulations. Although Peabody was aware that the cited area required close scrutiny, given the fact that seven of the eight past preshift examination reports revealed accumulation problems, Peabody assigned only one miner to clean the area and she had also been given other responsibilities. The judge found that such an effort was not sufficient to effectively deal with the cited accumulations. This finding supports the judge's determination that Peabody engaged in aggravated conduct. See Drummond, supra, 13 FMSHRC at 1369.
Peabody argues that the judge improperly relied on its past violations of section 75.400 in determining whether the cited conduct was unwarrantable. P. Br. at 2. Peabody contends that Commission precedent reveals that only past violations involving the same regulation, and occurring in the same area within a "continuing time frame" may properly be considered when determining whether a violation is unwarrantable. P. Br. at 4. The judge considered the fact that Peabody had been cited 17 times over the preceding six and a half months for violations of section 75.400. While the judge considered that

history as relevant and supportive of an unwarrantable failure finding, it is clear that the judge primarily relied upon his findings that the accumulations had been noted in approximately seven of the preceding preshift reports, and that the conditions were obvious and extensive requiring significant abatement efforts. 13 FMSHRC at 841. Moreover, the Commission has not limited, in the manner asserted by Peabody, the circumstances under which past violations may be considered by a judge in determining whether an operator's conduct demonstrated aggravated conduct.

Peabody contends that section 104(d) orders cannot be based on an operator's prior violations because such a "pattern of violations" should give rise only to sanctions under section 104(e) of the Act. P. Br. at 6. We reject Peabody's argument. The record demonstrates that the inspector issued the section 104(d) order because of Peabody's unwarrantable failure to comply with the standard rather than merely because it had violated the same standard on a number of occasions in the past. Moreover, the inspector acted properly, in determining whether Peabody engaged in aggravated conduct, in considering whether Peabody had been put on notice, as a result of previous MSHA

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enforcement actions, that coal accumulations around belts had created a problem that required more attention.

Similarly, we disagree with Peabody's argument that the judge improperly took Peabody's past violations into account twice when assessing a civil penalty: once when considering the history of violations component of section 110(i), and again when considering section 110(i)'s negligence component. P. Br. at 5. Although the judge may have considered the same factual circumstances for two of the criteria under section 110(i), this was not improper or duplicative because the purposes of such consideration are different. As discussed above, a history of similar violations at a mine may put an operator on notice that it has a recurring safety problem in need of correction and thus, this history may be relevant in determining the degree of the operator's negligence. Nonetheless, section 110(i) requires the judge to consider the operator's general history of previous violations as a separate component when assessing a civil penalty. Past violations of all safety and health standards are considered for this component.

In sum, the evidence reveals that the coal accumulations were extensive, and that at least one had existed for a period of time possibly as long as a week. In addition, the record discloses that, although Peabody had heightened awareness that the cited area had accumulation problems and that greater efforts were required to assure compliance with section 75.400, Peabody did not take adequate measures to remedy the spilling problems. Taken as a whole, the record provides substantial evidence supporting the judge's conclusion that Peabody's violation of section 75.400 was caused by its unwarrantable failure.

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III.

Conclusion

For the reasons set forth above, we affirm the judge's finding that Peabody's violation of section 75.400 was caused by its unwarrantable failure to comply with the standard.

Ford B. Ford, Chairman
Richard V. Backley, Commissioner
Joyce A. Doyle, Commissioner
Arlene Holen, Commissioner
L. Clair Nelson, Commissioner