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SOL (MSHA) V. AMERICAN MINE SERVICES
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September 24, 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. WEST 91-563 WEST 91-624
AMERICAN MINE SERVICES, INC.	:	

BEFORE: Holen, Chairman; Backley, Doyle, 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 issue of whether a violation by American Mine Services, Inc. ("AMS") of 30 C.F.R. 75.1400-3(Footnote 1) was caused by AMS's unwarrantable failure to comply with the standard. Administrative Law Judge John J. Morris concluded that the violation was not a result of the operator's unwarrantable failure. 14 FMSHRC 2123 (December 1992)(ALJ). The Commission granted the

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1 Section 75.1400-3, entitled "Daily examination of hoisting equipment," provides:

> Hoists and elevators shall be examined daily and such examinations shall include, but not be limited to, the following:
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> (b) Hoists and elevators. (1) An examination of the rope fastenings for defects;
> (2) An examination of the safety catches;
> (3) An examination of the cages, platforms, elevators, or other devices for loose, missing or defective parts;
> (4) An examination of the head sheaves to check for broken flanges, defective bearings, rope alignment, and proper lubrication; and
> (5) An observation of the lining and all other equipment and appurtenances installed in the shaft.

Secretary's petition for discretionary review, which challenges the judge's finding on unwarrantable failure. For the reasons that follow, we affirm.

I.
Factual and Procedural Background

AMS operates the West Elk Mine, otherwise known as the Mount Gunnison No. 1 Mine, an underground coal mine in Somerset, Colorado. On January 23, 1991, a hoist malfunctioned, trapping three miners in the ventilation shaft for two and a half hours. The malfunction was caused by a collar door jam.

The hoist operator had not examined and checked the hoisting equipment prior to transporting the three miners. Inspector Cosme Gutierrez of the Department of Labor's Mine Safety and Health Administration ("MSHA") investigated the incident. Inspector Gutierrez issued a citation to AMS under section 104(d)(1) of the Mine Act, 30 U.S.C. 814(d)(1), for failure to make a daily inspection of the hoisting equipment as required under section 75.1400-3.

AMS contested the citation, and a hearing was held before Judge Morris. The operator argued that there had been no violation of section 75.1400-3 because AMS inspected the hoist on a daily basis, as required by the standard. The judge concluded that AMS violated section 75.1400-3 by failing to check the hoisting equipment "at the commencement of the shift or at least prior to [the] beginning of any hoist functions." 14 FMSHRC at 2128. The judge also concluded that the violation was significant and substantial ("S&S")(Footnote 2) in nature. 14 FMSHRC 2128-29. He determined, however, that AMS's conduct did not constitute an unwarrantable failure to comply with the safety standard. 14 FMSHRC at 2129. With respect to assessment of a civil penalty, the judge concluded that AMS was moderately negligent. Id.

The Secretary appealed the judge's finding on unwarrantable failure. AMS did not seek review of the judge's determinations as to violation or S&S designation.

II.
Disposition

On review, the Secretary asserts that the judge failed to consider two evidentiary factors presented below, which, he asserts, establish unwarrantable failure. The Secretary had introduced evidence that the mine operator knew of recent malfunctions in the upper limit switch(Footnote 3) of the hoist, which

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2 The S&S terminology is taken from section 104(d)(1) of the Act, which 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...."

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3 A "limit switch" is a "device fitted to an electrically driven hoist or winding engine which becomes effective at the end of a wind to prevent the cage overwinding or underwinding." Bureau of Mines, U.S. Department of Interior,

should have put him on notice of a need for heightened scrutiny of the hoist. In addition, the hoist operator's explanation to the inspector, that he was too busy to perform the test, showed that the operator knew the hoist should have been inspected before the miners were lowered. The Secretary argues that the judge's decision, which overlooks these factors, is not supported by substantial evidence. The Secretary seeks a remand for further consideration of the record.

In finding the Secretary's evidence inadequate to establish unwarrantable failure, the judge discussed and discounted the fact that AMS was cited for a violation of 30 C.F.R. 75.1400-4 a few minutes before issuance of the contested citation. The judge did not discuss the evidence referenced by the Secretary on appeal. Nevertheless, we conclude, based on the record before us, that AMS's actions do not constitute unwarrantable failure.

In Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987), 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'"). Id. at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." Id. at 2003-04; Rochester & Pittsburgh Coal Co., 13 FMSHRC 189, 193-94 (February 1991). The Commission's determination was also based on the purpose of unwarrantable failure sanctions in the Mine Act, the Act's legislative history, and on judicial precedent. Emery, 9 FMSHRC at 2002-03.

The Secretary and AMS stipulated that AMS inspected the hoist three times daily, once each shift. Tr. 164-65. The standard requires that hoists and elevators "shall be examined daily...." 30 C.F.R. 75.1400-3. AMS had inspected the hoist on the night shift of January 21, which was the last working day and shift before the hoist malfunction. Tr. 177-79. The record also contains undisputed evidence that the hoist was generally maintained in good working order and that the hoisting apparatus exceeded MSHA's safety standards. Tr. 170; Tr. II 230.

In Emery, 9 FMSHRC at 2004-05, the Commission determined that the operator's failure to detect four popped roof bolts was not aggravated conduct where Emery had otherwise taken additional measures to provide support and was not indifferent to roof support. See also Rushton Mining Co., 10 FMSHRC 249, 253 (March 1988). Here, AMS had taken extra measures with respect to the hoist apparatus itself and the frequency of inspections and, in general, was not indifferent to hoisting safety measures.

Dictionary of Mining, Minerals and Related Terms 643 (1968). Inspector Gutierrez testified that "limit switches or safety valves would cause that cage to shut off before it hits the top of the chutes." Tr. 57.

The Secretary contends that the required daily inspection must be performed prior to use of the hoist. At the hearing, the MSHA witnesses testified as to that timing requirement but said they knew of no written document specifying such a requirement. Tr. 155-56. The regulation at issue does not expressly set forth when, during a day or during a shift, a hoist inspection is to be made. A potential for confusion arises from the difference between the language of the regulation and MSHA's unwritten enforcement policies. In King Knob Coal Co., Inc., 3 FMSHRC 1417, 1422 (June 1981), the Commission held that confusing or unclear MSHA policies are a factor mitigating operator negligence. We conclude that the absence of specific guidance by MSHA concerning its view of the meaning of "daily" examination under section 75.1400-3 mitigates against a finding of aggravated conduct on the part of AMS.

As to prior malfunction of the limit switch, the operator's master mechanic, Tony Bowac, testified that he had adjusted and checked the limit switch the day before the incident. The log book contained the notation of "check and adjust" on January 22. Tr. II 203-04. The Commission has explained that a defective condition may place an operator on notice of the need for heightened scrutiny to ensure compliance with Mine Act regulations. See Eastern Associated Coal Corp., 13 FMSHRC 178, 187 (February 1991) (continuing leakage problem placed the operator on notice of the need for heightened scrutiny of the leaks); Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2011 (December 1987)(history of roof falls at mine placed operator on notice that heightened scrutiny of roof conditions was vital). There is no evidence, however, to suggest that a limit switch malfunction should have alerted the operator to a possible problem with the collar door. AMS acted appropriately by inspecting and adjusting the limit switch prior to using the hoist.

The Secretary also relies on the inspector's testimony that the hoist operator told him that he had "neglected" to examine the hoist prior to its use due to a "hectic morning." Tr. 61. This statement, even taken at face value, neither constitutes a defense nor, under the circumstances, indicates the aggravated conduct of unwarrantable failure. Emery, 9 FMSHRC at 2003-04. Cf., e.g., Rochester & Pittsburgh, 13 FMSHRC at 193-94 (aggravated conduct shown where operator failed to make the required weekly examination, but certified that he had); Youghiogheny & Ohio, 9 FMSHRC at 2011 (aggravated conduct presented when foreman demonstrated serious lack of reasonable care by violating clear terms of roof control plan).

We conclude that substantial evidence(Footnote 4) supports the judge's determination that the failure to check the hoist before lowering the miners did not amount to aggravated conduct. See 14 FMSHRC at 2129. Although the

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4 The Commission is bound by the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (November 1989), quoting Consolidation Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

judge failed to address some of the Secretary's evidence, the evidence presented on this record, including that on which the Secretary relies, supports no other conclusion than that the conduct of AMS was not unwarrantable failure. In such circumstances, a remand to the judge for reconsideration would serve no purpose. See Donovan v. Stafford Construction Co., 732 F.2d 954, 961 (D.C. Cir. 1984) (remand unnecessary because evidence could justify only one conclusion).

III.

Conclusion

For the foregoing reasons, we affirm in result the judge's determination that the conduct of AMS was not unwarrantable failure.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner