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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

CYPRUS PLATEAU MINING CORPORATION	:	
v.	:	Docket Nos. WEST 92-371-R WEST 92-485(B)
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	

BEFORE: Jordan, Chairman; Backley, Doyle and Holen, Commissioners

DECISION

BY THE COMMISSION:

This consolidated contest and 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"), involves a citation issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Cyprus Plateau Mining Corporation ("Cyprus"), alleging a violation of 30 C.F.R. 75.220 (a)(1). Administrative Law Judge John J. Morris upheld the citation but concluded that the violation was not significant and substantial ("S&S") and was not due to Cyprus's unwarrantable failure. 15 FMSHRC 1738 (August 1993) (ALJ).

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FOOTNOTE 1

30 C.F.R. 75.220(a)(1) provides:

> Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered.

FOOTNOTE 2

In his decision, the judge also ruled on a citation alleging Cyprus failed to remove from production a shuttle car with inoperative brakes. Docket No. WEST 92-370. The Secretary petitioned for discretionary review of portions of the judge's decision relating to that violation. We have issued a separate decision on that petition. Cyprus Plateau Mining Corp., 16 FMSHRC (August 25, 1994). We have denominated the two civil penalty proceedings (Docket No. WEST 92-485) as (A) and (B), respectively.

The Secretary timely filed a petition for discretionary review, which challenges the judge's conclusions as to S&S and unwarrantable failure. For the reasons that follow, we reverse.

I.

Factual and Procedural Background

Cyprus operates the Star Point No. 2 Mine, an underground coal mine, in Carbon County, Utah. On or about September 13, 1991, five or six miners working in either the second right or third right section under the direction of Foreman Robert Powell removed ventilation tubing from a section of the roof in the number 2 entry to avoid damaging the tubing when a continuous miner extended a crosscut into the entry. Although the entry had been permanently supported, the last 15 to 20 feet of the crosscut had not been roof bolted or otherwise supported. 15 FMSHRC at 1741, 1743, 1748. Tr. 31-32, 136-37, 235-36; Exh. M-2.

After the opening of the intersection, the ventilation tubing was rehung under the last row of roof bolts closest to the newly mined area of the crosscut. While miners supported the tubing, other miners secured it to the roof bolts with chain. The installation took several minutes to complete. 15 FMSHRC at 1748-49. Tr. at 107-08, 110-11, 239-40, 241-43, 279, 303.

On March 12, 1992, MSHA Inspectors William Taylor and Dale Smith investigated a section 103(g) complaint about the incident. After interviewing several of the miners involved, MSHA issued a citation alleging Cyprus had violated its roof control plan when, after mining into a permanently supported entry from a crosscut, miners hung ventilation tubing in the intersection. 15 FMSHRC at 1740-41. Exh. M-4. Section Q of Cyprus's roof control plan stated:

> UNSUPPORTED OPENINGS AT INTERSECTIONS
>
> When a mine opening holes into a permanently supported entry, room or crosscut, or when new openings are created by starting a side cut, no work shall be done in or inby such intersection until the new opening is either permanently supported, timbered off with at least one (1) row of temporary support

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FOOTNOTE 3

Section 103(g), 30 U.S.C. 813(g) provides:

> Whenever a ... miner ... has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, such miner ... shall have a right to obtain an immediate inspection by giving notice to the Secretary....

(posts or jacks) or at least one (1) row of permanent supports are installed across the opening in the bolting pattern.

15 FMSHRC at 1741-42. Exh. M-3.

The intersection extended from the rib adjacent to the crosscut to the rib on the opposite side of the entry. Thus, under Cyprus's roof control plan, even though that area had previously been roof bolted, once the crosscut was opened up, further work in or inby the intersection was prohibited until the new opening was supported. 15 FMSHRC at 1741, 1748. Tr. 34-38; Exh. M-2.

In response to MSHA's citation and penalty proposal, Cyprus filed a notice of contest. Following an evidentiary hearing, the administrative law judge held that Cyprus had violated section 75.220(a)(1). The judge found that "work (hanging the tubing) was being done 'inby' the intersection without the new opening being supported in any manner." 15 FMSHRC at 1748. Additionally, the judge found that there was a reasonable likelihood that, while hanging the tubing, miners had stepped under the section of the crosscut that lacked any support. Id. at 1749.

The judge found that the violation was not S&S, concluding that the Secretary had failed to show a reasonable likelihood that the hazard created by the violation would result in an injury. The judge also found that the violation did not arise from the operator's unwarrantable failure, noting that Foreman Powell had "a good faith belief (although mistaken)" that some activity was permitted in the area. 15 FMSHRC at 1750-51. The Commission granted the Secretary's petition for review.

II.

Disposition of Issues

A. Significant and Substantial

The Secretary argues that the judge's determination that the violation was not S&S is not supported by substantial evidence. He further asserts that compelling evidence shows the inherent danger of working under unsupported roof, as well as the bad roof conditions existent in this mine. Sec. Br. at 4-8. In response, Cyprus argues that the judge's determination is correct, asserting that the Secretary relied on overstated evidence that addressed general roof conditions in the mine, rather than conditions specific to the violation. C. Reply Br. at 10-15.

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 relevan 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 Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). We are guided by the settled principle that, in reviewing the whole record, an appellate tribunal must also consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).

A violation is 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, 825-26 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission further 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. [Footnote omitted]

See also Austin Power, Inc. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g, 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria).

Substantial evidence does not support the judge's conclusions. In determining that the violation was not S&S, the judge concluded that the Secretary had not proven the third element of the Mathies test. He found that the Secretary's evidence did not address the specific roof conditions in the entry, that the inspector did not discuss roof conditions with the miners, and that the inspectors were not present at the time of the breakthrough. 15 FMSHRC at 1750. The judge's approach to the evidence presented in support of the S&S determination was unduly restrictive.

The Secretary's primary evidence consisted of the testimony of Inspector Taylor, who had inspected the mine on many occasions over an eight year period and was familiar with it. Tr. 20. He noted the generally poor condition of the mine roof, the history of roof falls, and the particular dangers present in newly mined intersections due to the stresses placed on both ribs and roof. Inspector Taylor noted that the crew was hurriedly attempting to complete a

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FOOTNOTE 4

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

job before the end of the shift, when miners would be most tired, and that it would have been almost impossible to complete the work without moving under the unbolted area. Tr. 37-38, 41-45, 96-98. In addition, miners testified as to the adverse condition of the mine roof; the obstruction created by the ventilation tubing, which blocked their view of the roof and the last row of roof bolts; and the likelihood that miners moved under the unsupported roof of the crosscut while hanging the tubing. Tr. at 114-16, 138, 142-43, 154, 157-59. Commission case law makes clear that an MSHA inspector need not be present at a mine when a violation occurs in order to designate the violation S&S. See Nacco Mining Co., 9 FMSHRC 1541, 1546-47 (September 1987); White County Coal Corp., 9 FMSHRC 1578, 1580-82 (September 1987); Emerald Mines Corp., 9 FMSHRC 1590, 1593-95 (September 1987).

We reject Cyprus's argument that the Secretary's evidence was too generalized and not directed at the specific place in the mine where the violation occurred. In evaluating the presence of a hazard, the Commission has previously considered conditions on a mine-wide basis. See Texasgulf, Inc., 10 FMSHRC 498, 503 and cases cited (April 1988)(methane emissions). See also VP-5 Mining Co., 15 FMSHRC 1531, 1536-37 (August 1993)(friction generated by roof falls as an ignition source). Viewing the record as a whole, we find that it does not support the judge's conclusion that Cyprus's violation was not reasonably likely to result in an injury. Accordingly, we reverse the judge's determination that the violation was not S&S.

B. Unwarrantable Failure

The Secretary asserts that Foreman Powell "knew or should have known" that hanging ventilation tubing under unsupported roof was unsafe and prohibited under the ventilation plan, and that, if Powell mistakenly believed that the plan permitted that activity, his belief must be held in good faith and must be reasonable. Sec. Br. at 9-13. Cyprus argues that a "should have known" standard is contrary to Commission precedent, that a mistaken but good faith belief in an interpretation of a ventilation plan does not support an unwarrantable determination, and that Powell properly weighed the miners' limited exposure in hanging tubing versus what he believed to be the greater hazard miners face when they install temporary supports. As a final point, Cyprus notes, in support of Powell's interpretation of the roof control plan, that the sole plan approval criterion pertaining to unsupported openings at intersections refers to "work or travel" (see 30 C.F.R. 75.222(e)), and Cyprus's roof control plan prohibited only "work." C. Reply Br. at 15-22.

Cyprus is correct that, according to Commission precedent, a "should have known" standard is not determinative of unwarrantable failure. Virginia Crews Coal Co., 15 FMSHRC 2103, 2107 (October 1993). In Emery Mining Corp., 9 FMSHRC 1997, 2001

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

The judge found that Foreman Powell had a good faith, albeit mistaken, belief that the roof control plan permitted some activity, including the installation in question, in or inby the unsupported intersection. 15 FMSHRC at 1750-51. Cyprus argues that the Commission should not review the reasonableness of Powell's interpretation of the roof control plan. See Oral Arg. Tr. at 40, 43. We disagree; the Commission has imposed a requirement as to reasonableness of belief in prior cases. The Commission has recognized that "if an operator reasonably believes in good faith that the cited conduct is the safest method of compliance with applicable regulations, even if it is in error, such conduct is not aggravated conduct constituting more than ordinary negligence." Southern Ohio Coal Co., 13 FMSHRC 912, 919 (June 1991), citing Utah Power and Light Co., 12 FMSHRC 965, 972 (May 1990). See Florence Mining Co., 11 FMSHRC 747, 753-54 (May 1989). Moreover, the Commission has used a similar approach in work refusal cases under section 105 (c), 30 U.S.C. 815(c). A miner's work refusal constitutes protected activity when he has a good faith belief that the work involves a hazard and that belief is also reasonable. See Paula Price v. Monterey Coal Co., 12 FMSHRC 1505, 1514-15 (August 1990).

The judge erred in failing to consider the reasonableness of Powell's belief. Powell testified that, because the plan prohibited "work" but not all activity in or inby unsupported intersections, some activity was permitted, including preshifting, pulling bad ribs, sound testing for bad roof, rock dusting, and establishing ventilation; mining and roof bolting were prohibited. Tr. 245-46.

Powell's interpretation of the plan was at odds with that of Cyprus's manager of safety and health, Richard Tucker, who was responsible for roof control training at the mine. Tucker testified that the plan did not permit miners to go inby an unsupported intersection for any reason. Tr. 318. The record indicates that, on prior occasions, Powell's crew generally

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FOOTNOTE 5

The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. 814(d)(1), which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with ... mandatory health or safety standards ...."

had not hung ventilation tubing in unsupported intersections. See Tr. 138-39. Powell's inconsistent actions in applying the provision further detract from the reasonableness, as well as the good faith, of his interpretation.

We conclude that, Powell's narrow interpretation of work, as not including the hanging of ventilation tubing, is unreasonable. We note that his interpretation of work would include only selected stages of the extraction process. It would exclude essential activities that are regulated under the Act and have long been accepted as mining work.

We reject Cyprus's argument that its weighing of miners' exposure to unsupported roof during the installation of temporary supports compared to their exposure during the task at issue militates against a finding of unwarrantable failure. Installation of temporary roof supports is required by Cyprus's roof control plan and is necessary for safe mining practice.

Powell's disregard of the requirements of the roof control plan in ordering miners to work in the intersection amounted to a serious lack of reasonable care. Accordingly, we reverse the judge's determination that the violation did not result from the operator's unwarrantable failure.

III.

Conclusion

For the foregoing reasons, we reverse the judge's decision on S&S and unwarrantability, and remand for recalculation of the civil penalty.

Mary Lu Jordan, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner