FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710
September 19, 2013

MACH MINING, LLC	:	
	:	
v.	:	
	:	Docket No. LAKE 2009-324-R
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

Before: Jordan, Chairman; Young, Cohen, and Nakamura, Commissioners[1]

DECISION

BY THE COMMISSION:

In this contest proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act" or "Act"), the Secretary of Labor issued a citation to Mach Mining, LLC, alleging a failure to record hazardous conditions during weekly examinations in violation of 30 C.F.R. § 75.364(h). An Administrative Law Judge found that Mach had committed a significant and substantial violation of the regulation, but that it was not due to an unwarrantable failure to comply. 32 FMSHRC 1375, 1385 (Sept. 2010) (ALJ).

The Secretary subsequently filed a petition for discretionary review challenging the Judge's unwarrantable failure finding, which the Commission granted. For the reasons stated herein, we reverse the Judge's decision and conclude that Mach's violation of the requirement to record the hazardous conditions was a result of its unwarrantable failure.

[1] Commissioner William I. Althen assumed office after this case had been considered at a Commission meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218 (June 1994). In the interest of efficient decision making, Commissioner Althen has elected not to participate in this matter.

I.

Facts and Proceedings Below

Mach Mining operates the Mach #1 Mine, an underground coal mine near Johnston City, Illinois. 32 FMSHRC at 1376-77; PDR at 2. On February 12, 2009, MSHA Inspector Bobby Jones conducted a regular quarterly inspection of the Mine. 32 FMSHRC at 1376-77; Stip. 9. During the inspection, Jones examined the primary escapeway at Headgate No. 4 ("HG #4"). 32 FMSHRC at 1378. At the mouth of the HG #4 primary escapeway was an 11-foot tall regulator containing a 4'4" wide x 6' tall opening that controls the velocity of air coursing through the escapeway. Stips. 17-19, 21, 23. The opening must be traversed by miners when using the escapeway. Stip. 23. A lifeline within the escapeway runs from the fan at the surface of the mine to the loading point. 32 FMSHRC at 1384; Stip. 13. While in the escapeway, Jones discovered numerous hazardous conditions dispersed over 100 to 120 feet of the travelway. 32 FMSHRC at 1382; Stip. 11. The conditions included a pallet of crib ties, a take-up track, a pile of gob, concrete blocks on both sides of the regulator, and water on the ground. 32 FMSHRC at 1377; Stips. 11, 29, 31, 32, 40. The pallet of crib ties, take-up track, pile of gob, and the concrete blocks had been present in the escapeway since January 6, 2009, when the regulator was created. Stip. 42. Jones inspected the weekly examination logs and discovered that there was no record of the hazardous conditions. Tr. 13-17.

Mach began its weekly examinations of the primary escapeway at HG #4 five weeks prior to the issuance of the subject citation. Stip. 35. Company Mine Examiner Dave Adams was assigned the task of conducting the weekly examinations for hazardous conditions at HG # 4 from January 8 through February 12, 2009. During this period, Adams failed to note any hazardous conditions in his examination records. Stips. 36, 43, 44. The most recent weekly examination performed by Adams prior to Jones' inspection occurred on or about February 9, 2009, three days before Jones' inspection. Stip. 41.

As a result of Inspector Jones' observations at HG #4, he issued two citations. The first, Citation No. 8414211, alleged a significant and substantial ("S&S")[2] violation of 30 C.F.R. § 75.380(d)(1), which requires that escapeways be "[m]aintained in a safe condition to always assure passage of anyone." The second, Citation No. 8414214, the subject of this case, alleged an S&S violation of 30 C.F.R. § 75.364(h), which requires that hazardous conditions be recorded

[2] 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 any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

during weekly examinations.[3] 32 FMSHRC at 1378. Jones also designated this violation as an unwarrantable failure to comply.[4] *Id*. The "Condition and Practice" section of the citation states:

> When inspected the weekly examination records did not show the hazards noted in Citation No. 8414211. These conditions had existed since the HG#4 unit went into production and the area had been examined for five consecutive weekly examinations. The extensiveness of these hazardous conditions were obvious to the most casual observer. A crew was sent to start clearing the hazards immediately.

G. Ex. 3. Mach had not been previously cited for the existence of materials in the escapeway. 32 FMSHRC at 1382-83.

The Judge held separate hearings and issued separate decisions on the two citations. On February 24, 2010, he issued a decision affirming Citation No. 8414211 and its S&S designation. *Mach Mining, LLC*, 32 FMSHRC 213 (Feb. 2010) (ALJ).[5] Mach did not appeal this decision.

On September 27, 2010, the Judge issued his decision on Citation No. 8414214 and affirmed the section 75.364(h) violation. 32 FMSHRC at 1380. He found that there was a violation "due to the *combination* of the pallet crib ties, take-up track, pile of gob, loosely strewn concrete blocks on either side of the regulator, and the presence of water, which would hinder and delay the emergency evacuation of miners, especially any who were injured." *Id*. (emphasis in original). In addition, the Judge noted that, despite the presence of the items in the escapeway

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[3] 30 C.F.R. § 75.364(h) provides, in pertinent part, that:

> *Recordkeeping*. At the completion of any shift during which a portion of a weekly examination is conducted, a record of the results of each weekly examination, including a record of hazardous conditions found during each examination and their locations, the corrective action taken, and the results and location of air and methane measurements, shall be made.

[4] The unwarrantable failure terminology is also 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." If an MSHA inspector finds that a violation is S&S and due to the operator's unwarrantable failure, the citation is to be issued pursuant to section 104(d)(1), which can lead to more stringent enforcement measures.

[5] The Judge had previously issued another decision in these matters on July 15, 2009, for the purpose of addressing whether the cited area was a "working section." *Mach Mining, LLC*, 31 FMSHRC 947 (July 2009) (ALJ).

for five weeks, Adams had failed to note any of the conditions in his weekly reports. *Id*. The Judge also affirmed MSHA's S&S designation. *Id*. at 1381. He determined that a reasonably serious injury was reasonably likely to occur because the combination of accumulated items in the escapeway created a stumbling and tripping hazard and would impede a prompt evacuation in an emergency, especially in the presence of smoke and low visibility. *Id*.

The Judge determined that Mach's negligence did not rise to the level of unwarrantable failure. *Id*. at 1385. He did, however, identify a number of factors that weighed in favor of an unwarrantable failure finding. He found that the accumulated materials extending 100 to 120 feet in the escapeway were extensive. *Id*. at 1382. He also found that the cited materials were obvious. *Id*. at 1385. He determined that the violation posed a high degree of danger. *Id*. at 1383. Also, he found that the conditions had existed and not been reported for five weeks. *Id*. at 1382.

Nonetheless, the Judge found it persuasive that Mach had not previously been cited for an obstructed escapeway and had not otherwise been notified by MSHA that greater compliance efforts were necessary. *Id*. at 1382-83. He then concluded that because Mach lacked prior notice of the need for greater compliance, its abatement efforts prior to the issuance of the citation should be viewed in the context of its "good faith belief that the accumulated items were not hazardous." *Id*. at 1383-84. Additionally, although the Judge noted that the existence of the cited materials was obvious, he found Adam's testimony – that he in "good faith" believed that the cited materials were not hazardous conditions that he was required to report in a weekly examination – to be credible and "objectively reasonable" under the circumstances. *Id*. at 1384-85. The Judge ultimately concluded that "considering the lack of notice from MSHA, [] the level of [Mach's] negligence is mitigated regarding what it reasonably should have known concerning the existence of a hazard." *Id*. at 1385.

II.

Disposition

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). 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, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). It is conduct that is "not justifiable" or "inexcusable." *Utah Power & Light Co.*, 12 FMSHRC 965, 971 (May 1990), *citing Emery Mining*, 9 FMSHRC at 2001.

Whether conduct is "aggravated" in the context of unwarrantable failure is determined by considering all of the facts and circumstances of each case to see if any aggravating factors exist, including (1) the extent of the violative condition, (2) the length of time that the violative condition existed, (3) whether the violation posed a high degree of danger, (4) whether the

violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator had been placed on notice that greater efforts were necessary for compliance. *See Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1351-57 (Dec. 2009); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999). While some factors may be irrelevant to a particular factual scenario, *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000), all of the relevant facts and circumstances of each case must be examined to determine if an operator's conduct is aggravated, or whether mitigating circumstances exist. *Id.*; *Manalapan Mining*, 35 FMSHRC at 293; *IO Coal*, 31 FMSHRC at 1351.

When passing the Mine Act, Congress stated that "the unwarranted failure order recognizes that the law should not tolerate miners continuing to work in the face of hazards resulting from conditions violative of the Act which the operator knew of or *should have known of* and had not corrected." S. Rep. No. 95-181, at 31 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 619 (1978) (emphasis added). It is well settled that an operator's knowledge may be established, and a finding of unwarrantable failure supported, where an operator reasonably should have known of a violative condition. *IO Coal*, 31 FMSHRC at 1356-57; *Emery Mining*, 9 FMSHRC at 2002-04; *Drummond Co.*, 13 FMSHRC 1362, 1367-68 (Sept. 1991), *quoting Eastern Assoc. Coal Corp*., 13 FMSHRC 178, 187 (Feb. 1991). An operator's good faith belief or disagreement regarding whether a cited condition constituted a hazard is "inextricably intertwined with the issues of the operator's knowledge of the existence of the violation and the obviousness of the violation." *IO Coal*, 31 FMSHRC at 1357.

In the instant case, the Judge determined that Mach, in "good faith," believed that the cited materials in the escapeway "did not constitute a hazardous condition that had to be reported." 32 FMSHRC at 1385. As support, the Judge noted Adams' belief, based on his experience, that no hazard existed because of the presence of a lifeline that was accessible to miners, and a clear walkway or path from the opening in the regulator to the stairs to the first overcast. *Id*. at 1384. He also noted Adams' testimony that "[t]here was nothing present in the area that wasn't present throughout the mine," and found "significant" his testimony that "prior to February 12, no one from MSHA had told him that the accumulated items in the escapeway constituted hazardous conditions." *Id*. at 1384. The Judge further stated that "I observed his demeanor, and find his testimony credible in all these regards." *Id*. at 1384-85.

We find no evidence in the record that compels us to overturn the Judge's credibility determination with regard to Adams' testimony. *See Farmer v. Island Creek Coal Co*., 14 FMSHRC 1537, 1541 (Sept. 1992).[6] However, the analysis does not end here. As the Judge correctly explained (32 FMSHRC at 1385), if he finds that there was a "good faith" belief by the

[6] We note that the Secretary does not challenge the Judge's finding of Mach's good faith belief. PDR at 9.

operator, he must next determine whether that belief was objectively reasonable under the circumstances. *IO Coal*, 31 FMSHRC at 1357; *Kellys Creek Res.*, 19 FMSHRC 457, 463 (Mar. 1997) (*citing Cyprus Plateau Mining Corp*., 16 FMSHRC 1610, 1615-16 (Aug. 1994)).

In light of the extensiveness and obvious nature of the hazardous conditions and the protective purpose of the relevant standard, we conclude that the Judge erred in finding that Mach's "good faith" belief was objectively reasonable. The Judge found that Adams' belief was objectively reasonable because Mach had not been notified by MSHA that the materials in the escapeway posed a problem. 32 FMSHRC at 1385. Consequently, he concluded that the level of Mach's negligence regarding what it reasonably should have known concerning the existence of the hazardous conditions was mitigated. He thus held that the Secretary had "not established that the level of Respondent's negligence relating to the violation at bar reached the level of aggravated conduct." *Id*.

Instead of relying solely on the lack of prior notice, the Judge was required to decide whether a reasonably prudent person familiar with the protective purpose of the standard would have ascertained that extensive debris scattered throughout a primary escapeway constituted a hazardous condition requiring reporting in the weekly examination log. *See American Coal Co*., 29 FMSHRC 941, 953 (Dec. 2007). We hold that a reasonably prudent mine examiner should have recognized the extensive and obvious hazardous conditions which were present here.

Even without being informed by an MSHA inspector, a reasonably prudent mine examiner should know that a combination of a pallet of crib ties, concrete blocks, a gob pile, take-up track, and water over 120 feet of the escapeway floor would significantly impede any miner attempting to quickly escape and thus frustrate the purpose of section 75.364(h). Indeed, Inspector Jones stated in the citation that the "extensiveness of these hazardous conditions [was] obvious to the most casual observer."[7] Gov. Ex. 3. The cluttered escapeway Inspector Jones described and diagramed allows for only one conclusion: that the primary escapeway contained numerous and extensive hazards that Mach was required to record in the weekly examination log, and immediately correct. *See* Gov. Ex. 2.

[7] The danger was also recognized by the Judge, who affirmed the Secretary's S&S designation, concluding that a reasonably serious injury was reasonably likely to occur because the combination of accumulated items in the escapeway created a stumbling and tripping hazard and would impede a prompt evacuation in an emergency, especially in the presence of smoke and low visibility. 32 FMSHRC at 1381.

The purpose of requiring that escapeways always be clear and available is self-evident. Miners must be able to quickly exit the mine in the event of an emergency. *See American Coal*, 29 FMSHRC at 954. In *American Coal*, the Commission explained the importance of keeping escapeways clear of impediments:

> An operator thus violates section 75.380(b)(1)'s requirement to "provide" escapeways from a working section when its miners are substantially hindered or impeded from accessing designated escapeways, as in such an instance the escapeways are not being supplied for the use of the miners. There is no disputing that escapeways are needed for miners to quickly exit an underground mine and that impediments to a designated escapeway may prevent miners from being able to do so. The legislative history of the escapeway standard states that the purpose of requiring escapeways is "to allow persons to escape quickly to the surface in the event of an emergency."

Id. at 948.

Contrary to the Judge's reasoning (32 FMSHRC at 1384-85), Mach's failure to provide a clear and unobstructed escapeway is not excused by the presence of a required lifeline. It was completely unreasonable for Adams to imply that the lifeline would help miners navigate a dangerous, cluttered obstacle course. To the contrary, the lifeline's purpose is to help miners find the mine's exit in conditions of low visibility and panic. *See* Fed. Reg. 71430, 71431 (Dec. 8, 2006); 30 C.F.R. § 75.380(d)(1). It is equally unreasonable to believe that because the primary escapeway was no more cluttered than the rest of the mine, no hazard existed. Section 75.380(d) requires that the primary escapeway be free of obstructions "to *always* assure safe passage." 30 C.F.R. § 75.380(d)(1) (emphasis added)." The operator's arguments do little more than demonstrate Mach's serious lack of reasonable care and its clear lack of appreciation for the dangers posed by obstructed escapeways.

Accordingly, Mach's "good faith" belief that it was not required to note in its weekly examination and promptly correct the hazards presented by the various materials dispersed throughout the primary escapeway was not objectively reasonable under the circumstances. As a result, the lack of prior notice from MSHA did not constitute a mitigating factor with regard to Mach's negligence.

III.

Conclusion

Mach exhibited a serious lack of reasonable care in its failure to record and correct these conditions in the escapeway as required by the Act. The record evidence permits no other conclusion. We therefore reverse the Judge's decision and affirm the Secretary's designation of Mach's violation of 30 C.F.R. § 75.364(h) as an unwarrantable failure to comply with the standard.[8] *See American Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (remand not necessary when record supports no other conclusion).

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

[8] We note that the penalty proceeding, Docket No. LAKE 2009-426, was assigned to a different judge.

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