FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, DC 20004

OCT 07 2014

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. KENT 2009-951
	:	KENT 2009-952
v.	:	KENT 2009-960
	:	
ICG HAZARD, LLC	:	

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

DECISION

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("the Act"). Two orders issued to ICG Hazard, LLC, by the Secretary of Labor remain at issue before the Commission.[1] The specific issues for review are: whether the Administrative Law Judge properly affirmed Order No. 8315597 as a section 104(d)(1) order;[2] and whether the Judge properly assessed a $138,500 civil penalty for Order No. 8316130.

For the reasons that follow, we modify section 104(d)(1) Order No. 8315597 to a section 104(a) citation[3] and remand the citation for reassessment of the penalty. We also vacate the Judge's penalty for Order No. 8316130 and impose a civil penalty of $70,000.

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[1] Of the fifteen citations and orders in the captioned dockets, seven were resolved through partial settlement, and eight were affirmed by the Judge. Unpub. Dec., slip op. at 21-22 (Oct. 2012) (ALJ). ICG sought review of four citations and orders; the Commission granted review of the two orders discussed herein and denied review of Citation No. 8315134 and Order No. 8315174.

[2] In relevant part, section 104(d)(1) establishes additional sanctions for any violation caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards." 30 U.S.C. § 814(d)(1).

[3] Section 104(a) generally authorizes the Secretary to issue citations for violations of "this [Act], or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this [Act]." 30 U.S.C. § 814(a).

I.

Order No. 8315597

A. Factual and Procedural Background

Mine Safety and Health Administration ("MSHA") Inspector James Daniels issued Order No. 8315597 after inspecting the 001 Section Joy Continuous Miner in ICG's Flint Ridge Mine No 2. The order alleges that ICG failed to conduct an adequate on-shift dust control examination, in violation of section 75.362(a)(2),[4] by failing to note that the continuous miner had inadequate water pressure and insufficient sprays. Gov. Exs. 12, 13. The inspector designated the alleged violation as non-significant and substantial ("non-S&S"), but attributable to a high degree of negligence.

Inspector Daniels also determined that the violation was the result of an unwarrantable failure to comply with a mandatory standard pursuant to section 104(d) of the Act. Gov. Ex. 13. Because MSHA had previously issued a section 104(d)(1) citation to ICG at this mine, he determined that the violation gave rise to a section 104(d)(1) order.[5]

The Judge affirmed the order as "non-S&S with a high degree of negligence" based on the obviousness of the missing sprays and inadequate pressure. Slip op. at 16. The Judge made no explicit finding of unwarrantable failure; however, she ultimately affirmed the violation as a section 104(d)(1) order by stating "Modifications - None" in her summary of the penalties, and raised the penalty from $2,000 to $5,000. *Id.* at 22; Pet. for Assessment of Penalty, Ex. A.

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[4] Section 75.362(a)(2) states in relevant part that "[a] person designated by the operator shall conduct an examination and record the results and the corrective actions taken to assure compliance with the respirable dust control parameters specified in the approved mine ventilation plan . . . within 1 hour after the shift change," including an examination of "water pressures . . . [and] water spray numbers." 30 C.F.R. § 75.362(a)(2).

[5] Section 104(d)(1) establishes a "d-chain" framework in which an initial violation that is both S&S and an unwarrantable failure is designated as a section 104(d)(1) citation, and any subsequent unwarrantable failure violation within the next 90 days, even if not S&S, necessarily results in the issuance of a section 104(d)(1) withdrawal order. 30 U.S.C. § 814(d)(1).

Here, the d-chain predicate was Citation No. 8315134, which was issued 57 days prior to Order No. 8315597, and alleged an S&S violation and an unwarrantable failure to comply with the mine's ventilation plan, in violation of section 75.370(a)(1). Gov. Ex. 19; *see* n.8, *infra*. The citation was affirmed by the Judge in the decision at issue, and review was denied. Slip op. at 3-6; *see* n.1, *supra*.

ICG contends, and the Secretary agrees, that the Judge failed to make an unwarrantable failure finding, and therefore Order No. 8315597 cannot stand as a section 104(d) order. The parties request that the order be modified to a section 104(a) citation. ICG Br. at 5; Sec'y Resp. at 2.

B. Disposition

The Commission has ruled that the question of whether a violation resulted from an unwarrantable failure to comply is based on an examination of specific criteria. Here, the Judge failed to address the relevant criteria, and did not make an explicit finding of unwarrantable failure for Order No. 8315997.

The Commission has defined "unwarrantable failure" as "aggravated conduct constituting more than ordinary negligence." *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013) (citing *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987)). The Commission outlined the criteria for determining whether conduct is "aggravated," 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 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).

Id. Although not all factors may be relevant to every case, all relevant factors must be examined. *Id.*; *IO Coal*, 31 FMSHRC at 1351.

In this case, the Judge made no finding with respect to unwarrantable failure. The Judge's decision with respect to Order No. 8315597 does note the obviousness of the violation, basing the high negligence finding on the mine's "fail[ure] to conduct an adequate on-shift in the face of such obvious problems." Slip op. at 16. The Judge also concludes that the underlying conditions existed for more than one shift, though this finding is made as evidence of the violation itself – i.e., that the conditions did not occur after the most recent on-shift examination – rather than as evidence of aggravated conduct. *Id.* However, the decision fails to address the remaining factors, or alternatively, to explain why they are not relevant.[6]

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[6] A number of other unwarrantability factors, as related to the *underlying conditions only*, are discussed in the Judge's analysis of Citation No. 8315596, which found that the inadequate

We emphasize that it is the failure to address all the relevant factors, rather than the mere absence of the phrase "unwarrantable failure," that compels this conclusion. A Judge must analyze and weigh relevant testimony, make appropriate findings, and explain the reasons for her decision. *See Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222 (June 1994) (citing *Anaconda Co.*, 3 FMSHRC 299, 299-300 (Feb. 1981)). Here, the appropriate findings are the relevant unwarrantability factors, irrespective of the inclusion of the words "unwarrantable failure."

Generally, when a Judge has failed to make appropriate findings, remand is appropriate. *See, e.g., Mid-Continent Res.*, 16 FMSHRC at 1222-23. However, the burden of proving unwarrantable conduct rests with the Secretary, *Peabody Coal Co.*, 18 FMSHRC 494, 499 (Apr. 1996), and here, the Secretary has in essence conceded that the record is insufficient to establish unwarrantable failure.[7] Accordingly, remand with regard to that element is unnecessary. Order No. 8315597 is modified to a section 104(a) citation, and remanded for reconsideration of the penalty consistent with the removal of the unwarrantable failure designation.

II.

Order No. 8316130

A. Factual and Procedural Background

MSHA Inspector Robert Ashworth issued Order No. 8316130 after inspecting the continuous miner in the mine's 002 Section. The order alleges that the continuous miner had

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water pressure and missing sprays on the 001 continuous miner constituted a failure to comply with the mine's dust control plan, in violation of 30 C.F.R. § 75.370(a)(1). Slip op. at 15-16; *see* n.8, *infra*. However, as noted by the Judge, the unwarrantability of an inadequate examination must be established independently from that of the underlying violative conditions. *Id.* at 14; *see Consolidation Coal Co.*, 23 FMSHRC 588, 597 (June 2001) (finding that the unwarrantability analyses for related violations of 30 C.F.R. §§ 75.400 and 75.360 may rely on some of the same factual findings, but are not interchangeable).

[7] The Secretary's Response Brief states:

> [A] reading of the Judge's decision confirms that the judge did not make a finding that the violation alleged in Order No. 8315597 was an unwarrantable failure. *See* Dec. at 16. Accordingly, the judge should have modified Order No. 8315597 from a Section 104(d)(1) order to a Section 104(a) citation.

Sec'y Resp. at 2.

inadequate water pressure and a number of missing sprays, in violation of section 75.370(a)(1), which requires compliance with the approved ventilation and dust control plan.[8] Gov. Ex. 16.

The Secretary initially designated the condition as a flagrant violation and proposed a $138,500 civil penalty pursuant to section 110(b)(2) of the Act, 30 U.S.C. § 820(b)(2). Prior to the hearing in this matter, the parties filed joint stipulations in which the Secretary agreed not to pursue the flagrant designation. Jt. Ex. 1, Jt. Stip. 6. However, the relevant stipulation was not addressed at the hearing or in the parties' post-hearing briefs, nor did the Secretary propose a new reduced penalty for Order No. 8316130 consistent with a non-flagrant violation.

The Judge affirmed the order as S&S and attributable to unwarrantable failure, with no modifications, and assessed the $138,500 penalty originally proposed by the Secretary. Slip op. at 17-19, 22. The Judge's decision makes no mention of the flagrant designation.

ICG contends, and the Secretary agrees, that the Judge improperly exceeded the $70,000 maximum assessable civil penalty for non-flagrant violations provided by section 110(a)(1) of the Act, 30 U.S.C. § 820(a)(1), because the Secretary stipulated that he did not intend to pursue the flagrant designation. ICG Br. at 5-6; Sec'y Resp. at 2. Alternatively, ICG argues that the penalty is improper because the Judge failed to make a finding regarding a flagrant violation. ICG Br. at 7.

ICG requests that the $138,500 civil penalty be vacated and remanded for reassessment of a penalty consistent with the non-flagrant maximum provided in section 110(a)(1). The Secretary contends that a remand is unnecessary, because "[i]nasmuch as the judge assessed a penalty of $138,500 . . . the judge a fortiori has already determined that a penalty of $70,000 is appropriate." Sec'y Resp. at 3 n.1.

B. <u>Disposition</u>

Section 110(a)(1) states that the operator of a mine "in which a violation occurs of a mandatory health or safety standard . . . shall be assessed a civil penalty by the Secretary which penalty shall not be more than $50,000 [currently $70,000] for each such violation;" however, pursuant to section 110(b)(2), "[v]iolations under this section that are deemed to be flagrant may be assessed a civil penalty of not more than $220,000." 30 U.S.C. §§ 820(a)(1), (b)(2). The Judge did not make a flagrant finding with regard to Order No. 8316130. Therefore, the $138,500 civil penalty assessed by the Judge was improper.

A violation is deemed to be flagrant if it is "a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard

[8] Section 75.370(a)(1) requires the operator to "follow a ventilation plan approved by the district manager . . . designed to control methane and respirable dust." 30 C.F.R. § 75.370(a)(1).

that . . . reasonably could have been expected to cause[ ] death or serious bodily injury." 30 U.S.C. § 820(b)(2). ICG correctly states that the Judge failed to make findings with respect to any of the elements unique to a flagrant violation.

The Secretary's stipulation does not foreclose the possibility of a flagrant designation.[9] Nevertheless, in this case, the Secretary's stipulation does resolve the issue as a practical matter, because the Secretary did not present any evidence at hearing related to the unique elements of a flagrant violation, i.e., that the violation was a reckless or repeated failure to make reasonable efforts to eliminate a known violation. Therefore, the record compels the conclusion that the Secretary did not establish a flagrant violation. Accordingly, the Judge erred in assessing a penalty in excess of the statutory maximum for non-flagrant violations.

The remaining issue is whether to remand the penalty for reassessment or to reduce the penalty to $70,000 without a remand. Where the evidence supports only one conclusion, remand on that issue is unnecessary. *See Sedgman*, 28 FMSHRC 322, 331 (June 2006); *Am. Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993). Here, the imposition of a $138,500 penalty clearly indicates that the Judge found that the gravity and negligence associated with the violation (findings which ICG has not challenged) warranted an extremely high penalty.[10] ICG has not challenged the Judge's assessed penalty in Order No. 8316130 except insofar as it exceeded the statutory maximum for non-flagrant violations. We agree with the Secretary that the Judge's decision supports only the conclusion that the Judge intended to assess at least $70,000. Therefore, remand is unnecessary; the penalty assessed for Order No. 8316130 is vacated, and a penalty of $70,000 is imposed.

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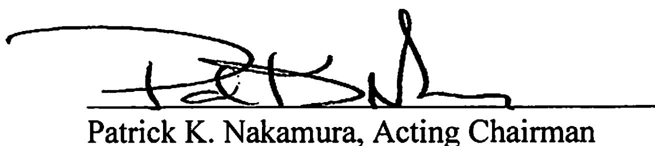
[9] Section 110(k) of the Act states that "[n]o proposed penalty which has been contested before the Commission . . . shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. § 820(k).

[10] The Judge's imposition of an extremely high penalty was justified by the MSHA inspector's findings of inadequate water pressure and missing sprays on a continuous miner. Specifically, the inspector found: (1) only 5 psi of water pressure on the continuous miner instead of the required 60 psi, resulting in only a small trickle of water from the spray; (2) only 3 sprays instead of the required 5 sprays on the front cutter head; (3) only 2 sprays instead of the required 3 sprays on another spray block; (4) only 5 sprays instead of the required 7 sprays on one of the top spray blocks; and (5) only 5 sprays instead of the required 8 sprays on the other top spray block. Slip op. at 17; Tr. 116-22. The Judge agreed with the inspector that the violation resulted in increased dust in the air, and hence the health hazard of greater exposure to respirable dust leading to the crippling diseases of silicosis and pneumoconiosis. Slip op. at 18-19. The Judge also found the violation to be S&S and an unwarrantable failure based on the inspector's testimony that the violation was dangerous in exposing two miners to the hazards of silicosis and pneumoconiosis, that it was extensive and had existed for some time, that it was obvious, and that the operator knew or should have known about the serious violation of its ventilation plan. *Id.*

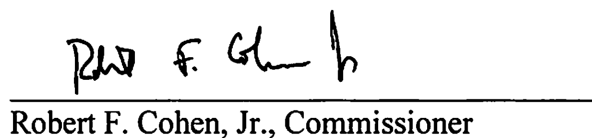
III.

Conclusion

For the foregoing reasons, section 104(d) Order No. 8315597 is modified to a section 104(a) citation, and remanded for reassessment of a civil penalty consistent with a non-unwarrantable failure violation. Additionally, we vacate the $138,500 penalty imposed by the Judge for Order No. 8316130 and, consistent with section 110(a)(1) of the Act, impose a penalty of $70,000.



Patrick K. Nakamura, Acting Chairman



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