FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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WASHINGTON, D.C. 20004-1710

JAN 13 2015

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket Nos. WEST 2010-1390-RM
ADMINISTRATION (MSHA)	:	WEST 2010-1391-RM
	:	WEST 2010-1589-M
v.	:	WEST 2011-315-M
	:	WEST 2011-316-M
SIERRA ROCK PRODUCTS, INC.	:	WEST 2011-747-M
	:	WEST 2011-1029-M

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

DECISION

BY THE COMMISSION:

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("the Act"). Order No. 8561260, the single order remaining before the Commission in this matter, is one of four related electrical violations for which citations or orders were issued to Sierra Rock Products by the Secretary of Labor's Mine Safety and Health Administration ("MSHA"). The Administrative Law Judge modified the section 104(d) order to a section 104(a) citation, removed the unwarrantable failure designation, reduced the degree of negligence attributable to Sierra Rock, and assessed a penalty substantially lower than proposed by the Secretary.[1] In modifying the unwarrantability and negligence findings in the order, the Judge explicitly relied on his reasoning for similarly modifying a related electrical citation, Citation No. 8561252. 35 FMSHRC 49, 57-58 (Jan. 2013) (ALJ).

The Commission granted the Secretary's petition for discretionary review of the Judge's modifications to Order No. 8561260. The issues raised for review are whether the Judge erred in vacating the unwarrantable failure designation and reducing the negligence, and failing to provide a separate unwarrantability and negligence analysis, for Order No. 8561260.

We conclude that, in light of the different standards cited in Order No. 8561260 and Citation No. 8561252, and facts related to the order that were not present when the citation was issued, a separate unwarrantability and negligence analysis was required for the order. Therefore, we vacate the Judge's penalty assessment and underlying unwarrantability and

[1] In relevant part, section 104(d)(1) of the Act 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). 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).

negligence findings with respect to Order No. 8561260, and remand the matter for further consideration consistent with our decision.

I. Factual Background

The facts in this case are largely undisputed. Sierra Rock Products is owned and operated by Jim Hatler. His son, Barry, and two hourly employees also worked on the property on the date the order was issued. Tr. 156. On May 18, 2010, MSHA Inspector William Edminister asked Barry to demonstrate his usual method for "locking out" an outdoor electrical panel. Barry Hatler demonstrated that he or his father would open the panel door, reach inside and throw the breaker switches to de-energize the panel, then close and padlock the door. The inspector noted that the breaker switches were approximately six inches from exposed electrified components, and concluded that anyone reaching inside to throw the breaker switches would be exposed to shock hazards. Accordingly, he issued Citation No. 8561252, which alleges that the panel's controls were not installed in such a way as to be operated without danger of contacting energized conductors, in violation of section 56.12040.[2] 35 FMSHRC at 50-51.

The inspector designated the citation as significant and substantial ("S&S") based on the proximity of the breaker switches to live 480 volt connectors.[3] *Id.* at 51. He also attributed the citation to high negligence and an unwarrantable failure, noting that the operator was aware of the hazard and failed to correct it, that the panel had existed in the cited configuration for some time, and that the hazard was obvious once the panel was open. Tr. 36, 42. The citation was subsequently terminated by installing a breaker switch on the outside of the panel. Tr. 44.

The next day, Jim Hatler voluntarily showed the inspector an electrical panel in the Motor Control Center ("MCC panel") with the identical configuration, asserting that another inspector had terminated a citation issued with respect to that panel when it was in exactly the same configuration 10 to 15 years previously. Tr. 46-47. The inspector testified that Hatler did not reach in to the panel at that time, while Hatler testified that he touched some components in the panel to demonstrate the de-energizing procedure. Tr. 86-87, 168. Finding that the panel had the same configuration as the previously cited panel except that the electrified components were farther from the breaker switches, the inspector informed Hatler that it violated the same standard. Hatler countered that he believed the panel was in compliance, because of his claim that a prior inspector had terminated the citation without requiring changes to the configuration. Hatler further claimed that for ten years, no inspector had found a problem with the configuration or his de-energizing procedure. 35 FMSHRC at 51-52.

Later that day, after checking with his headquarters, the inspector told Hatler that he was going to issue an order despite the lack of past enforcement, and asked him to de-energize the

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[2] Section 56.12040 states that "[o]perating controls shall be installed so that they can be operated without danger of contact with energized conductors." 30 C.F.R. § 56.12040.

[3] The "significant and substantial" language is found in section 104(d)(1) of the Act, which refers to "a violation of any mandatory health or safety standard . . . of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1).

MCC panel so it could be opened and the violative condition documented. The inspector told Hatler that the panel had to be de-energized before it was opened, by turning off the breaker for the plant's main power. Hatler became angry, stated in rude terms that he was not going to shut down the main power for a non-violative condition, aggressively opened the panel door, reached in, and flipped the breakers. Concluding that Hatler had exposed himself to the risk of electrical shock by reaching into the panel, the inspector issued an imminent danger order. 35 FMSHRC at 51-52; Tr. 48-52, 170-71.

The next day, the inspector issued two orders as a result of the events described above. Order No. 8561261 alleges that, like the outdoor panel at issue in Citation No. 8561252, the MCC panel was not configured to protect miners against inadvertent contact with energized components. Order No. 8561260, at issue here, alleges that Hatler failed to de-energize the MCC panel before doing work on circuits inside the panel, in violation of section 56.12017.[4] The inspector designated the violation as S&S, on grounds that Hatler's aggressive manner of reaching into a panel with live 480 volt components was highly likely to result in a fatal injury. He also attributed the violation to unwarrantable failure and reckless disregard, noting that Hatler reached into the energized panel directly after the inspector instructed him to de-energize first, and that Hatler had a responsibility to set an example for his employees. 35 FMSHRC at 52.

II. The Judge's Findings

With respect to Citation No. 8561252, the Judge found that the configuration of the outdoor panel violated section 56.12040, and affirmed the S&S designation. However, he reduced the degree of negligence from high to moderate, removed the unwarrantable failure designation, modified the section 104(d) citation to a section 104(a) citation, and imposed a $6,000 penalty rather than the proposed $12,900 penalty. 35 FMSHRC at 55, 57. He reduced the degree of negligence because he found that MSHA's lack of prior enforcement with respect to the panel's configuration "helped lull Sierra Rock into believing that its procedure was safe and legal." *Id.* at 56. As for unwarrantability, the Judge determined that the panel existed in a violative configuration for a considerable length of time, there was a high degree of danger, and the violation was obvious to a trained electrician. However, he determined that Sierra Rock had not been put on notice that greater efforts were necessary for compliance, and concluded that Sierra Rock had not demonstrated the aggravated conduct required for an unwarrantable failure. *Id.*

With respect to Order No. 8561260, the Judge found that Hatler's actions in reaching into the MCC Panel to flip the breakers violated section 56.12017, and affirmed the S&S designation. Then, "for the same reasons as discussed above," he reduced the degree of negligence from reckless disregard to moderate, removed the unwarrantable failure finding, modified the order to a section 104(a) citation, and imposed a penalty of $6,000 rather than the proposed penalty of $52,600. The Judge also noted that Order Nos. 8561260 and 8561261 were not duplicative,

[4] Section 56.12017 states in relevant part that "[p]ower circuits shall be de-energized before work is done on such circuits unless hot-line tools are used." 30 C.F.R. § 56.12017. The Judge's finding that flipping the breaker switches constituted "work done on such circuits" has not been contested. 35 FMSHRC at 58.

because they cited different standards that imposed separate and distinct duties on the operator. *Id.* at 57-58.

III. Disposition

On appeal, the Secretary challenges the Judge's unwarrantable failure and negligence determinations, contending that the Judge failed to conduct a separate analysis for Order No. 8561260. The Secretary further contends that the Judge ignored significant aggravating factors in his unwarrantable failure determination for this order.

In modifying the unwarrantability and negligence designations associated with Order No. 8561260, the Judge referred to the "reasons discussed above" with respect to Citation No. 8561252. He did not conduct a separate unwarrantability and negligence analysis for the order. We conclude that a separate analysis was required.

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Factors indicating aggravated conduct include (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. *Wolf Run Mining Co.*, 35 FMSHRC 3512, 3520 (Dec. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1350-51 (Dec. 2009).

Emphasizing the need for contextual analysis, the Commission has held that separate unwarrantability analyses are required, even for factually related violations, where the violations involve mandatory standards that impose separate and distinct duties on an operator. *Consolidation Coal Co.*, 23 FMSHRC 588, 597 (June 2001). The relative significance of a fact or circumstance may change when different violative conduct is at issue.[5]

Here, although the panel's configuration and the de-energizing procedure are related, the relevant standards clearly impose separate and distinct duties. The standard at issue in Citation No. 8561252 involves a duty to safely configure electrical controls, while the standard in Order No. 8561260 involves a duty to de-energize before working on circuits.[6] *See* n. 2, 4, *supra.* Facts that were given great weight by the Judge with respect to the configuration violation, such as MSHA's lack of enforcement, do not have the same relevance with respect to a failure to

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[5] It is well recognized that all relevant facts and circumstances of a particular case must be examined to determine whether an operator has engaged in aggravated conduct constituting an unwarrantable failure. *See IO Coal*, 31 FMSHRC at 1351; *Consolidation Coal*, 23 FMSHRC at 593.

[6] The Judge made an implicit finding that the relevant standards impose separate and distinct duties. Citation No. 8561252 and Order No. 8561261 allege violations of the same standard, and the Judge found that Order Nos. 8561260 and 8561261 are not duplicative. 35 FMSHRC at 57; *see Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1003-05 (June 1997) (finding citations non-duplicative where the standards involved impose separate and distinct duties upon an operator).

de-energize before working on circuits.[7] 35 FMSHRC at 56. Other facts shared by the two violative conditions could have more or less significance depending on the cited standard. These include the length of time that the panels existed in their cited configuration, and that the panels were only de-energized in the cited manner once or twice a month. Analysis of a shared factual background is not inherently transferrable where the cited standards address different conduct.

Additionally, several events occurred after the issuance of Citation No. 8561252, but before the issuance of Order No. 8561260. On the morning of May 19, 2010, the inspector saw Hatler open the MCC Panel, may or may not have seen him reach in and touch the breaker switches depending upon the resolution of conflicting testimony, and informed him that the panel's configuration was not in compliance. Apparently, the inspector did not tell him that throwing the breakers did, or would, violate section 56.12017 but, again, there is a difference in testimony as to whether he touched the breakers at that time. Tr. 86-87, 168-69. Further, a few hours later, just before Hatler engaged in the conduct cited in the order by reaching into the MCC Panel and flipping the breaker switches, the inspector informed Hatler that he should turn off the main power switch to de-energize the panel before opening it. Tr. 48-52, 170-71. These interactions are relevant as to whether Sierra Rock was on notice regarding compliance with the cited standard. *See, e.g.*, *IO Coal*, 31 FMSHRC at 1353; *Consolidation Coal*, 23 FMSHRC at 595 (finding that interactions between MSHA and mine personnel regarding a problem serve to put operators on heightened notice that they must increase efforts to comply with the relevant standard).

By merely referring back to his unwarrantability analysis for Citation No. 8561252, the Judge thus failed to consider all of the relevant facts and circumstances with respect to Order No. 8561260. As the D.C. Circuit has emphasized, an articulated decision is essential to the facilitation of judicial review. *Harborlite Corp. v. ICC*, 613 F.2d 1088, 1092 (D.C. Cir. 1979). Thus, the Commission has held that a Judge must analyze and weigh all probative record evidence, make appropriate findings, and explain the reasons for his or her decision. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222 (June 1994). Accordingly, this matter is remanded to the Judge for a separate unwarrantability analysis for Order No. 8561260. The Judge should particularly consider the impact on the unwarrantability factors of the different standard cited and the facts unique to the order.[8]

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[7] The record indicates that the evidence regarding the lack of enforcement was primarily in regard to the panel's configuration. Hatler testified that he raised the issue of lack of past enforcement with the inspector in order to contest the unwarrantability designation for Citation No. 8561252, on grounds that the panel had existed in the same configuration for years without a problem. Tr. 46-47, 89, 167-68. He also stated that he performed the panel de-energizing procedure for inspectors over the years and was never cited. Tr. 173. However, MSHA Inspector John Pereza testified that usually the entire plant was already shut down during inspections. Tr. 225-26.

[8] Sierra Rock argues that the citation and order are sufficiently similar that a separate analysis was unnecessary. Specifically, Sierra Rock claims that the inspector's instruction to de-energize does not affect the outcome of the unwarrantability analysis, because any notice it created does not undo MSHA's lack of enforcement. However, the relative weight of those factors, if any, is

The Secretary argues that a remand is unnecessary because the record compels a finding of unwarrantable failure. *See American Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (finding remand unnecessary where the record supports only one conclusion). Specifically, the Secretary alleges that the inspector's instruction to Jim Hatler to de-energize before opening the MCC panel clearly put Sierra Rock on notice and made any belief of compliance when flipping the internal breaker switches objectively unreasonable. Therefore, the Secretary claims that Hatler's actions constituted willful misconduct which, when combined with other aggravating factors such as the degree of danger posed by the violation, compels a finding of unwarrantable failure.

Sierra Rock, on the other hand, argues that the Judge's finding of no unwarrantable failure should stand because he properly found that Sierra Rock had a reasonable and good faith belief that its conduct complied with the standard. The Commission has held that if an operator has acted on a good faith belief that its cited conduct was in compliance with applicable law, and that belief was objectively reasonable under the circumstances, the operator's conduct will not be considered the result of an unwarrantable failure when it is later determined that the operator's belief was in error. *IO Coal*, 31 FMSHRC at 1357-58 (citation omitted).

We find that the record does not compel a conclusion as to whether Sierra Rock had an objectively reasonable belief regarding compliance with the standard cited in Order No. 8561260, or as to the unwarrantability of the violative conduct more generally. While the record unquestionably establishes that Hatler willfully acted contrary to the inspector's instructions, the issue is whether Hatler willfully or recklessly acted contrary to the cited standard. The record does not conclusively establish whether the instructions put Sierra Rock on notice that de-energizing the panel via the internal breaker switches violated section 56.12017. A determination as to whether Sierra Rock was on notice may also be affected by a factual finding as to whether Hatler reached into the panel and flipped the breakers that morning without comment from the inspector.

Just as the analysis of the unwarrantability factors with respect to Citation No. 8561252 cannot be applied to Order No. 8561260 without further consideration, any finding of an objectively reasonable good faith belief with respect to the citation is not transferrable without additional analysis. On remand, the Judge should consider whether, in light of the totality of circumstances specific to Order No. 8561260, Sierra Rock had an objectively reasonable and good faith belief that its actions were in compliance with the cited standard.

It is ordinarily the province of the Judge to engage in an analysis and balancing of the unwarrantability factors in the context of the cited standard in the first instance. Here, further findings are necessary to reach a conclusion as to Sierra Rock's objective belief in its compliance with the cited standard and the reasonableness of that belief, and that determination must then be weighed against other unwarrantability factors as re-examined in the context of the cited standard. Accordingly, the unwarrantable failure issue should be remanded to the Judge.[9]

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a determination to be made by the Judge.

[9] Commissioner Cohen disagrees with his colleagues' conclusion that the issue of Sierra Rock's alleged reasonable good faith belief should be remanded to the Judge. It is uncontradicted that

As for the Judge's finding of moderate negligence, the Secretary contends that the same facts which compel a finding of unwarrantable failure also compel a finding of reckless disregard. The Commission has recognized that, although unwarrantable failure and negligence are distinct issues, the same factual circumstances may be considered for both. *Black Diamond,* 7 FMSHRC 1117, 1122 (1985); *see also Quinland Coals, Inc.,* 9 FMSHRC 1614, 1622 & n.11 (Sept. 1987). Notably, "reckless disregard" is often provided as a definition of unwarrantable failure. *Emery Mining,* 9 FMSHRC at 2003. The circumstances discussed above do not compel a finding of unwarrantable failure or reckless disregard. However, they may be relevant for a negligence analysis, particularly as they relate to the presence or absence of a reasonable belief with regard to compliance. Accordingly, remand for a separate negligence analysis for Order

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Inspector Edminister told Jim Hatler to de-energize the panel by turning off the main power switch before opening the MCC panel. Tr. 50, 170-71. The fact that Hatler did not do so led to the Inspector's issuance of imminent danger Order No. 8561259 under section 107(a) of the Mine Act. The Judge affirmed the imminent danger order. 35 FMSHRC at 58-59. It is inconceivable that Hatler's angry act of putting his hand inside the electrical panel in defiance of the Inspector's explicit warning, thus creating an imminent danger, could be determined to be characterized as an objectively reasonable act of good faith. *See, Consolidation Coal Co.,* 14 FMSHRC 956, 970 (June 1992) ("[N]o operator is free to take the law into its own hands by deciding for itself what the law means and how it can best be applied"). Sierra Rock's argument that the Judge made a finding of objectively reasonable good faith, Br. at 9-12, is simply bogus. The finding by the Judge which Sierra Rock relies on was that "[t]he fact that several MSHA inspectors examined the electrical panel during previous inspections and did not issue a citation or even comment on the condition helped lull Sierra Rock into believing that its procedures were safe and legal." 35 FMSHRC at 56. This finding, made in connection with Citation No. 8561252, led the Judge to reduce the negligence to moderate and vacate the unwarrantable failure finding with regard to the configuration of the electrical panel under 30 C.F.R. § 56.12040. Contrary to Sierra Rock's assertion, the Judge made no finding that Hatler's act in creating the violation of 30 C.F.R. § 56.12017 cited in Order No. 8561260 could be characterized as being done with objectively reasonable good faith. Indeed, in affirming the imminent danger order as "eminently reasonable," the Judge said:

> Jim Hatler was directly in front of the open electrical panel and he was angry. He had just flipped the breakers to disconnect the power to the stacker and the bypass conveyor while the conductors at the bottom of the panel were electrified. Given Hatler's agitated state, it was not unforeseeable that he would flip the switches back on again to show the inspector how it was done.

35 FMSHRC at 59. Thus, any belief that Jim Hatler may have had -- when he reached into the electrical panel to flip the circuit breakers in the MCC room -- that his action complied with the standard despite Inspector Edminister's explicit warning, may have been in good faith, but it certainly was not reasonable.

Nevertheless, Commissioner Cohen agrees that as to the overall issue of unwarrantable failure, the record does not compel a finding one way or the other, and that the case must be remanded to the Judge for consideration of all the factors bearing on this issue.

No. 8561260 is appropriate. In considering whether Sierra Rock engaged in aggravated conduct constituting unwarrantable failure in light of the order's cited standard and additional facts, the Judge should also consider whether, in light of the same facts and circumstances, Sierra Rock's conduct constituted reckless disregard or high negligence.

As a final matter, in assessing penalties, judges are to consider the six factors set forth in section 110(i) of the Act, including the operator's negligence. 30 U.S.C. § 820(i). In remanding for reconsideration of the unwarrantability and negligence associated with Order No. 8561260, the assessed penalty must also reconsidered in light of any changes to the Judge's findings.

In summary, this matter is remanded to the Judge for a separate consideration of the unwarrantability factors in light of the totality of circumstances specific to Order No. 8561260. In particular, the analysis should address: the impact, if any, of the difference in the cited standards on the various unwarrantability factors; the impact, if any, of the morning interaction between Hatler and the inspector regarding the MCC Panel, and the inspector's instructions to de-energize before opening the panel; and whether Sierra Rock had an objectively reasonable belief, based on the above facts and circumstances, that its conduct was in compliance with the cited standard. This matter is also remanded for reconsideration of the degree of negligence attributable to Sierra Rock with respect to the conduct at issue in the order.

IV. Conclusion

For the reasons above, we vacate the Judge's findings of no unwarrantable failure and moderate negligence with respect to Order No. 8561260, and remand for further analysis in light of the cited standard and the relevant facts and circumstances discussed above. We also vacate and remand the Judge's penalty assessment for Order No. 8561260 for reconsideration in light of any changes to the unwarrantability and negligence findings.

Patrick K. Nakamura, Acting Chairman

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