**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | Docket Nos. LAKE 2008-666 |
| | : | LAKE 2008-667 |
| v. | : | LAKE 2009-6-A |
| | : | |
| THE AMERICAN COAL COMPANY | : | |

BEFORE: Jordan, Chairman; Young, Cohen, and Althen, Commissioners[1]

## DECISION

BY: Young, Cohen and Althen, Commissioners[2]

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). The Department of Labor's Mine Safety and Health Administration ("MSHA") is appealing determinations made by an Administrative Law Judge with regard to three Mine Act violations committed by The American Coal Company ("AmCoal"). The Judge affirmed the violations, but modified the Secretary's negligence, gravity, and unwarrantable failure designations. 36 FMSHRC 1311, 1369-70 (May 2014) (ALJ).

For the reasons that follow, we affirm the Judge's decision in part and reverse the Judge's decision in part. We remand the cases for assessment of penalties consistent with this opinion.

## I.

## General Factual and Procedural Background

AmCoal operates a large underground coal mine in Illinois. The three orders at issue in these cases were issued by MSHA Inspector Steven Miller. The orders involve an electrical violation, an accumulations violation, and an on-shift examination violation. The electrical

[1] Commissioner Patrick K. Nakamura participated in the consideration of these matters, but his term expired before issuance of this decision.

[2] Chairman Jordan joins sections I, II, and IV of this decision.

violation and the accumulations violation were assessed as flagrant violations under section 110(b)(2) of the Mine Act. 30 U.S.C. § 820(b)(2).[3]

The Secretary argues that the Judge erred in concluding that none of the violations resulted from an unwarrantable failure to comply. He also challenges the Judge's modification of the gravity and negligence designations.

Finally, the Secretary maintains that the assessed penalties are too low. The Secretary proposed total penalties of $409,800 for the three orders; the Judge assessed $26,500.

## II.

## Legal Framework for Unwarrantable Failure Violations

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2002-04; *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).

Whether the conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case, including (1) the extent of the violative condition, (2) the length of time that it has existed, (3) whether the violation posed a high risk 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 has been placed on notice that greater efforts are necessary for compliance. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2330 (Aug. 2013), citing *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1350-57 (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); *see also Consol Buchanan Mining Co. v. Sec'y of Labor*, 841 F.3d 642, 654 (4th Cir. 2016). These factors must be viewed in the context of the factual circumstances of a particular case. *Consolidation Coal Co.*, 22 FMSRHC 340, 353 (Mar. 2000).

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[3] Section 110(b)(2) of the Act, 30 U.S.C. § 820(b)(2), provides for a penalty of up to $220,000 for a "flagrant" violation (now adjusted for inflation to $250,433). *See* 30 C.F.R. § 100.5(e). A "flagrant" violation is "a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury." 30 U.S.C. § 820(b)(2). The Judge found that the violations were not flagrant. The Secretary does not contest those findings.

## III.

## The Electrical Violation—Order No. 7490572

### A. Factual and Procedural Background

In September 2007, Maintenance Mechanic Chris Cowsert and Maintenance Foreman John Jones were troubleshooting the electrical panel of a malfunctioning feeder. The panel had been re-energized so that Jones, who had 20 years of mining experience, could troubleshoot it. In accordance with MSHA regulations, Jones wore gloves and a meter while he troubleshot the energized panel. Cowsert stood a safe distance away from Jones. 36 FMSHRC at 1313-14, 1317.

The panel was mounted at waist height in a four-foot-wide, 18 to 20-inch high, and 14-inch deep metal box. The housing door was hinged along the bottom of the box. A breaker and three 480 volt vacuum lugs were on the left half of the panel. From the center to the right, there were other connections, including numerous connections to a bus bar along the bottom of the panel. The other connections were primarily control circuits, which operated at 110 volts or less. The bus bar was equipped with non-conductive fins to prevent accidental contact with the conductors. The power center was approximately 100 to 200 feet away from the panel. *Id.* at 1314, 1318.

After fixing the problem, Jones took off his gloves and meter and began to close the panel door with bare hands. As he closed the door, Jones noticed wires at the bottom of the panel that the door might pinch as it closed. While still using his bare hand, he lifted the wires into the panel and out of the way. *Id.* at 1314.

Inspector Miller saw Jones closing the panel and lifting the wires with his hand. MSHA interprets opening and closing the panel housing as doing "work" that requires that the panel be deenergized, locked, and tagged out. Cowsert and Jones were aware of this policy because AmCoal had adopted MSHA's interpretation as a company policy and incorporated it into its training. Jones admitted to Miller that he was "taking a short cut." *Id.* at 1314-15.

The inspector issued an order alleging a violation of 30 C.F.R. § 75.509, which requires power circuits and electric equipment to be deenergized before they are worked on.[4] The violation was assessed as flagrant and designated as significant and substantial ("S&S")[5] and an unwarrantable failure. The inspector designated the degree of negligence as "reckless disregard" and gravity as likely to cause one fatality. The Secretary proposed a penalty of $161,800 for this order. *Id.* at 1313.

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[4] 30 C.F.R. § 75.509 states that "[a]ll power circuits and equipment shall be deenergized before work is done on such circuits and equipment, except when necessary for trouble shooting or testing."

[5] 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."

The Judge found that Jones' hand came within 10 inches of the uninsulated 110 volt lugs, and even closer to the bus bar at the bottom of the box. However, he also found that although Jones may not have been able to see his hand because the panel door was partially closed, he could see the wires as he lifted them to avoid their being pinched as the panel door closed. *Id.* at 1317-18.

The Judge found a violation of the standard. He deferred to the Secretary's interpretation of section 75.509; the act of closing the panel box was "work" covered by the standard. *Id.* at 1315. The Judge determined that the violation was S&S, the result of high negligence, and that one person was reasonably likely to suffer a serious injury. However, he found it was neither a flagrant nor an unwarrantable failure violation. He assessed a penalty of $15,000. *Id.* at 1367. The Secretary challenges the Judge's findings on unwarrantable failure, negligence, gravity, and the penalty.

## B. Disposition

### 1. Unwarrantable Failure

The Secretary maintains that the Judge erred in several respects in determining that the electrical violation was not the result of an unwarrantable failure. The Secretary contends that these errors also affected the Judge's analysis of the gravity and negligence for this violation, and that as a result, the Commission should reverse the Judge's reductions in gravity and negligence. Finally, the Secretary claims that a higher penalty should be assessed. After considering the Secretary's arguments, we affirm the Judge's findings as supported by substantial evidence.[6]

In analyzing the facts herein under our unwarrantable failure jurisprudence, the Judge properly considered all of the necessary factors described, *supra*, at page 2. The Judge found that the violation was not extensive and had only existed for a few seconds, with no opportunity for the operator to abate the specific occurrence. *Id.* at 1319. He also noted that the company had taken steps to prevent such occurrences by incorporating the Secretary's standard in its training policy and disciplining personnel who violated the policy. *Id.* Additionally, the Judge found the operator had not been placed on notice that greater efforts were needed.[7]

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[6] When reviewing a Judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 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 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

[7] The Judge rejected several arguments made by the Secretary that other citations and previous issues at the mine constituted prior notice. Specifically, one previous citation had been issued for using a feeler gauge in an electrical panel and lights while equipment was energized, and another citation had been issued after an inspector observed that AmCoal had installed relays

In addition to considering the factors discussed above, the Judge considered and discussed the other unwarrantable failure considerations. He noted that Jones' actions in moving the wires into the electrical panel were obvious. *Id.* at 1320-21. Further, the Judge recognized that Respondent had knowledge of the cited condition. *Id.* Finally, the Judge found that Jones' actions met the S&S standard as being reasonably likely to result in serious injury. *Id.* at 1321. However, the Judge found a degree of danger lower than that asserted by the Secretary. *Id.* at 1313, 1321.

In analyzing the potential dangers involved in closing the energized panel and reaching into the panel, the Judge found that Jones was "very familiar" with the layout of the panel and the location of the various energized components. *Id.* at 1318. There was also evidence that Jones received new task training on the feeder in June 2007, a little less than three months before the incident. Resp. Ex. 30 at 4. Further, it was undisputed that Jones had 20 years of mining experience and worked as a maintenance foreman. The Judge's conclusion that Jones was "very familiar" with the layout of the panel appears to be a reasonable inference based on Jones' years of mining experience and position as a maintenance foreman.

The Judge also noted that the electrical connections along the bottom of the panel were recessed between nonconductive fins. Jones was able to see the location of the wires, the wires were insulated, and Jones could see the wires as he lifted them. He also found that Jones was unlikely to contact any of the energized lugs because of the way he was positioned at the panel housing. 36 FMSHRC at 1317-18 (citing Resp. Ex. 27). Substantial evidence supports these factual determinations and reasonable inferences.

Thus, the Judge made factual determinations about the layout of the panel and Jones' positioning near the panel that would mitigate the degree of danger to both Jones and Cowsert. He found that Cowsert, a rank-and-file miner, was standing a safe distance away and not moving. There is no evidence that the ground was unsteady, or that moving persons or machinery were nearby. The Judge also found that even if the miners did come into contact, it was not likely that Cowsert would sustain injuries. Due to the low voltage of the wire Jones was most likely to contact, the miners' clothing would likely have provided enough insulation to prevent injury to Cowsert if Jones were shocked. *Id.* at 1317-18, 1321.

After discussing each of the unwarrantable failure factors independently, the Judge considered all of the facts and circumstances together. The Judge discussed reasonably and thoroughly the relationships among the unwarrantable failure factors. In doing so, the Judge exercised his discretion and determined that the facts relating to the degree of danger, the time the condition existed, the extensiveness of the violation, AmCoal's efforts at abatement, and the lack of notice outweighed other factors.

The Secretary and our dissenting colleague essentially base their positions that the violation must be an unwarrantable failure on two grounds: (1) Jones was a supervisor and (2) he knew or should have known closing the panel and/or touching the insulated wires constituted a

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on a surface panel at its surface facility. 36 FMSHRC at 1319-20. The Judge found that "[t]he incidents of record, two in 14 months, do not support an inference that AmCoal was put on notice that greater efforts to comply with section 75.509 were necessary." *Id.* at 1320.

violation. The gravamen of their position is that Jones' status as a supervisor, by itself, must outweigh every other unwarrantable failure factor. Essentially, they would reject the Judge's careful weighing of all the facts in the record.

Of course, Jones' status as a supervisor is an important consideration. Foremen are held to a high standard of care under the Mine Act. *Midwest Material*, 19 FMSHRC at 35; *Lion Mining Co.*, 19 FMSRHC 1774, 1778 (Nov. 1997). In particular, violations committed by a supervisor in front of rank-and-file miners can be unwarrantable failures because they set a bad example. *Capital Cement*, 21 FMSHRC 883, 893 (Aug. 1999). However, the involvement of a supervisor, standing alone, does not obviate the need for a review of all factors related to the possible occurrence of an unwarrantable failure.[8] "The Commission has made clear that it is necessary for a judge to consider all relevant factors, rather than relying on one to the exclusion of others." *San Juan Coal Co.*, 29 FMSHRC 125, 129 (Mar. 2007). The weighing of facts and circumstances for an unwarrantable failure determination is a matter left to the Judge's discretion. *IO Coal*, 31 FMSHRC at 1350-51.

Here, the Judge's decision not to give decisive weight to the fact that Jones was a supervisor was not an abuse of his discretion because substantial evidence supports his analysis of all the other factors. Another Judge might have placed outcome determinative weight on the fact that Jones was a supervisor, but the Judge's decision not to do so here did not constitute an abuse of his discretion.

In this case, the Judge weighed the evidence and found that the unwarrantable failure factors militated against an unwarrantable failure. Jones' supervisory status is one of many facts and circumstances involved in the citation, several of which militate against a finding of unwarrantable failure. The Judge balanced the seconds-long duration of the violation, the steps AmCoal took to prevent violations, the infrequency of past violations, and a mitigated degree of danger against the knowledge and obviousness of the violation resulting from Jones' supervisory status and the slight possibility of injury to Cowsert. After considering and weighing each factor, the Judge concluded that Jones' high negligence still "did not rise to the level of reckless disregard." 36 FMSHRC at 1322. Similarly, the Judge acknowledged that Jones had knowledge of the standard but found that, when balanced with the other factors, the violation did not constitute unwarrantable failure.

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[8] In *Lion Mining*, 19 FMSHRC at 1774-75, for example, a foreman saw a continuous miner operator violating the mine's roof control plan. Instead of trying to stop the violation, the foreman instructed the continuous miner operator to keep mining coal until a shuttle car with timbers could be brought up and unloaded. *Id.* at 1778. In *Capital Cement*, 21 FMSHRC 884, a foreman was injured when he left a crane cabin and stepped out onto the craneway, without deenergizing the third rail or attaching a safety belt to the craneway. The foreman was injured when he reached over the side of the craneway and contacted the third rail. *Id.* Stepping onto a craneway without deenergizing the third rail or donning fall protection, and then reaching over to the other side, requires a series of intentional, reckless actions. Telling a miner to keep working in dangerous conditions until supplies needed to fix the problem are brought in and unloaded shows a conscious decision to put another miner in danger. In both cases, supervisors purposely disregarded a recognized danger. Unlike the foremen in these cases, however, Jones' actions appear almost reflexive in the context of the work he was doing.

The Judge's opinion gave greater weight to other factors than Jones' knowledge of the violation and his status as a supervisor, which was within his discretion as he considered all of the facts and circumstances in his unwarrantable failure analysis. Had the Judge decided that Jones' supervisory status overrode all other factors, we well may have sustained a finding of unwarrantable failure. But the Judge reasonably evaluated all the factors and reached a different conclusion. *Id.* at 1319-22. Substantial evidence supports the Judge's factual findings and his weighing of those findings.

Finally, the Secretary takes issue with the Judge's statement that the Secretary's interpretation of the standard was not compelled by the regulation and his statement that "[i]t would be extremely difficult to characterize the mere closing of an energized panel as S&S or an unwarrantable failure." *Id.* at 1322. However, the Judge did not base his decision upon disagreement with the Secretary over the interpretation of the standard. To the contrary, the Judge deferred to the Secretary's interpretation, and decided the case before him after considering all of the relevant facts and circumstances.

For the foregoing reasons, we affirm the finding that the violation did not constitute an unwarrantable failure.

**2. Negligence**

MSHA cited the violation as the result of reckless disregard. The Judge found high negligence. The Secretary objects to this reduction in the negligence finding, requesting that the Commission increase the negligence finding to reckless disregard. The Secretary relies upon the same arguments that supported his position on unwarrantable failure.

The Commission evaluates the degree of negligence using "a traditional negligence analysis." *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir. 2016) (citation omitted). Because the Commission is not bound by the Secretary's regulations addressing the proposal of civil penalties set forth in 30 C.F.R. Part 100, the Commission and its Judges are not required to consider the negligence definitions in 30 C.F.R. § 100.3(d). *Id.* at 1263-64.

As with the unwarrantable failure finding, we do not find sufficient reasons to reverse the Judge's considered decision. The Judge's appraisal of Jones' negligence is contained in the conclusion of his unwarrantable failure analysis. His finding of high negligence, therefore, essentially rests upon the same grounds as his unwarrantable failure conclusion. Jones wore gloves in performing the repairs but made a serious error in taking the gloves off prematurely – that is, before closing the panel – and in lifting wires inside the panel with his bare hand. As evaluated by the Judge, this error and violation constituted high negligence but did not rise to the level of reckless disregard. As with the unwarrantable failure analysis, substantial evidence supports this conclusion.

### 3. Gravity

The Secretary claims that the alleged errors in the unwarrantable failure analysis also afflict the Judge's gravity finding. As set forth above, the Judge made factual determinations about the layout of the panel and Jones' positioning near the panel. He found that, while Jones may have been within 10 inches of the 110 volt lugs, Jones was not as close to the 480 volt lugs as Miller thought. He further found that the electrical connections along the bottom of the panel were recessed between nonconductive fins. Additionally, Jones was able to see the location of the wires that might get pinched, and he could see the wires as he lifted them. 36 FMSHRC at 1317-18 (citing Resp. Ex. 27).

The Judge also considered the potential for contact between Jones and Cowsert, noting the very brief duration of the violation. The duration of the violation was so brief – a matter of seconds – that it would have been difficult for human error on Cowsert's part to play a role in the accident. *Id.* at 1318. The Judge also found that the relatively low voltages involved "virtually eliminated" the possibility of the electric current arcing to Cowsert. *Id.* at 1321. Indeed, the Secretary assessed the citation as affecting only one person.

Based upon these considerations and other factors discussed regarding unwarrantable failure, the Judge found it "reasonably likely that one miner would suffer a serious injury." *Id.* at 1322. We conclude that the Judge carefully analyzed factors affecting gravity and that his decision is supported by substantial evidence.

## IV.

## The Accumulations and On-Shift Examination Violations

### A. Factual and Procedural Background

Inspector Miller examined the belts at the mine during an inspection in January 2008. Coal travels by belt several miles from the face to the surface, moving from the longwall belt to the Flannigan No. 3 belt, to the Flannigan No. 2 belt, and then to the Flannigan No. 1 belt. Miller started his inspection at the Flannigan No. 3 belt and worked his way outby.[9] Around the transfer point between the Flannigan No. 2 and Flannigan No. 1 belts, Miller noticed several violations. *Id.* at 1341.

At the No. 2 head drive,[10] the belt's bottom rollers were turning in packed coal fines, and the head drive area was covered with black float coal dust. At the transfer point, where the No. 2

[9] This means that the inspector proceeded away from the mine's face, toward the surface. The Dictionary of Mining, Mineral, and Related Terms defines "outby" as "[n]earer to the shaft, and therefore away from the face, toward the pit bottom or surface; toward the mine entrance. The opposite of inby." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 383 (2d ed. 1997) ("*DMMRT*").

[10] The "head drive" is a conveyor's "driving mechanism"; the term 'head' refers to the drive's position. *DMMRT* at 171. The head end of a drive is "[u]sually the ultimate delivery end

belt head overlapped the No. 1 belt tail, some coal fines were "carry[ing] back" under the No. 2 belt as it wrapped around the head roller and traveled back toward the tailpiece. Loose coal accumulations ranging from six to 24 inches deep existed from the No. 2 belt head drive to crosscut No. 50, which was about 1,200 feet inby the head drive. Along this stretch of the belt, Miller also observed wooden crib ties, plastic buckets, and cardboard boxes. The conditions that Miller found took over 100 man-hours to abate. *Id.* at 1341-42, 1346.

Additionally, approximately one crosscut – about 150 feet – inby the No. 2 belt takeup, a broken bottom roller was clanking loudly and throwing metal shavings into the coal accumulations three feet below it. The Judge found that the broken roller was not a realistic ignition source because it was merely warm to the touch, and there were no indications that the roller was generating significant heat. *Id.* at 1341, 1343 n.34.

AmCoal conducts pre-shift examinations during the three hours before each shift begins and on-shift examinations during each shift. The examination reports indicated that spilled coal in the area around the No. 1 tail and No. 2 head was being cleaned up each day, but the broken roller, the coal fines, and the dust packed under the belt take-up were not noted in any of the on-shift examination reports from January 22 until the orders were issued on January 24. *Id.* at 1349-50, 1353.

Pre-shift reports conducted on those days, including one between 5:00 a.m. and 8:00 a.m. on January 24, did indicate that the tail of the No. 1 belt was dirty. The No. 1 belt tail and the No. 2 belt head are in the same area. *Id.* at 1341, 1349. Additionally, in the "remarks" area of the January 22 day and evening shift pre-shift reports, there were notes that the No. 2 belt was "getting black" from the takeup to crosscut No. 46. The Judge determined that the area had most likely not been rock dusted since then. *Id.* at 1347-48.

The Galatia mine is a "gassy" mine that liberates over three million cubic feet of methane in a 24-hour period, but Miller had never detected methane in the belt entries or the cited area. AmCoal maintained redundant safety systems around the belts, including fire suppression systems at its belt transfer points and carbon monoxide sensors along the belt lines. These safety systems were in good working order on the day of the inspection. AmCoal also had specially trained fire brigades on each shift to respond promptly to ignitions. The air in the belt entry at the Galatia mine flows inby, but is coursed into a return before it reaches the working section. Although the return that the belt air flowed into was a secondary escapeway, the Judge found that miners evacuating the mine would almost certainly use the primary escapeway, which was ventilated with intake air. The mine's air courses were also separated by stoppings designed to contain the airflow in the entries. *Id.* at 1343-44.

In response to these conditions, Inspector Miller issued two orders. The first order ("accumulations violation") alleged a violation of 30 C.F.R. § 75.400, which requires that coal dust, loose coal, and other combustible materials not be allowed to accumulate. This violation

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of the conveyor" and "includes the head section, a power unit, and, if required, the connecting section and a belt takeup." *DMMRT* at 256.

was designated as flagrant, S&S, and an unwarrantable failure. The operator's negligence was designated as high. The Secretary proposed a penalty of $188,000. *Id.* at 1340-41.

The Judge concluded that AmCoal violated section 75.400, and that the violation was S&S and the result of moderate to high negligence, but that the violation was not an unwarrantable failure or flagrant. The Judge assessed a penalty of $7,500. *Id.* at 1368.

The second order ("on-shift examination violation") alleged a violation of 30 C.F.R. § 75.363(b), which requires the operator to record hazardous conditions and corrective actions in an examination book. The violation was designated as S&S and resulting from an unwarrantable failure, and the operator's negligence was designated as high. The Secretary proposed a penalty of $60,000. *Id.* at 1352.

The Judge concluded that AmCoal violated the standard, that the violation was S&S[11] and attributable to moderate to high negligence, but that there was not an unwarrantable failure. The Judge assessed a penalty of $4,000. *Id.* at 1369.

## B. Accumulations Violation—Order No. 6673874

For the reasons that follow, we reverse the Judge's findings of no unwarrantable failure and his negligence and gravity determinations. We vacate and remand the penalty assessment.

### 1. Unwarrantable Failure

The Judge found that the violative conditions were extensive, noting that the accumulations were six to 24 inches deep over a distance of 1,200 feet, and that they required over 100 man-hours to achieve abatement. He further found that AmCoal had been put on notice of a need for greater compliance efforts based on prior violations and Inspector Miller's repeated discussions with AmCoal managers about accumulations violations. *Id.* at 1345-46, 1351. With regard to the length of time the accumulations existed, the Judge found that the float coal dust accumulations had existed for two or three days before Miller's inspection, and that the packed coal fines and dust under the belt and rollers in the area of the No. 2 belt take-up had been accumulating for more than a couple of shifts. *Id.* at 1346-47, 1350. However, the Judge found that the designation of unwarrantable failure was not justified because the conditions did not pose a high degree of danger, because some of the accumulations were not obvious and were not known to AmCoal, and because AmCoal had taken steps to abate a portion of the accumulations. *Id.* at 1351-52.

#### a. Degree of Danger

In affirming the S&S designation, the Judge concluded that "the belts and rollers turning in packed coal presented a viable ignition source and, combined with the other factors identified by Miller, posed a reasonable likelihood of a fire and resultant injuries." *Id.* at 1343. However, in vacating the unwarrantable failure designation, the Judge concluded that the conditions "did not present a high degree of danger." *Id.* at 1346.

[11] Neither of the Judge's S&S determinations was appealed.

In *San Juan Coal Co.*, 29 FMSHRC at 132-33, the Commission concluded that a Judge erred when he determined that a violation of section 75.400 was S&S but failed to relate those findings to the "degree of danger" factor in his unwarrantable failure analysis. Comparably, in the case at hand, the Judge made inconsistent findings when he concluded that a mine fire was reasonably likely to occur as part of his S&S analysis, but then concluded that the accumulations did not present a high degree of danger as part of his unwarrantable failure analysis.

We find that the Judge's S&S analysis and determination in this case are sufficient to establish that the fire hazard posed a degree of danger to miners sufficient to sustain an unwarrantable failure finding. As the Seventh Circuit has held, it is a "common sense conclusion" that a fire would present a serious risk of smoke and gas inhalation to any miners who are present. *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995). The Secretary need not demonstrate that the mine's redundant—and required—safety measures are in a state of disrepair, or prove violations of other standards, in order to show that a violation involves a high degree of danger.

The existence of a trained fire brigade, though laudable, does not sufficiently offset the danger of a mine fire for purposes of the unwarrantable failure evaluation in this case. Despite the existence of a fire brigade, a mine fire is still very dangerous, and the miners on the fire brigade themselves would be exposed to its dangers. Thus, the Judge was not warranted in placing significant reliance upon fire brigades.

Similarly, he erred to the extent he gave weight to the Bentley Report on mine fires.[12] The report cannot provide a reliable basis for determining the potential dangers presented by conditions in, or projecting the consequences flowing from, hazards cited in a particular mine.

b. Knowledge and Obviousness

The Judge found that the obviousness factor weighed in favor of a finding of unwarrantability. 36 FMSHRC at 1351. However, he erred by making an inconsistent finding that the packed fines under the belt rollers were "not obvious," but that a competent examiner should have seen them. *Id.* The packed coal fines in which the belt was turning were the most dangerous accumulations. *Id.* at 1343, 1352. If a competent examiner should have discovered them, as the Judge found, then they were obvious. Hence, the factors of knowledge and obviousness should have been given more significant weight in favor of a conclusion of unwarrantable failure.

It was also error for the Judge to consider AmCoal's regular safety inspections as a mitigating factor. Pre-shift and on-shift examinations are required by law. They are not extra

[12] The report covered the time period from 1980 to 2005, and its conclusion that no fatalities or lost time injuries from belt fires occurred during that period presents a grim irony in light of the 2006 Aracoma Mine fire, which killed two miners. The Judge acknowledged that the Aracoma disaster shows that belt fires can pose a serious threat, but stated in his opinion – without any evidentiary basis – that the conditions in AmCoal's mine were very different from the Aracoma mine. 36 FMSHRC at 1346.

efforts that the operator makes to correct an accumulation problem. As a result, the same considerations that apply to the Judge's consideration of mandatory, redundant safety measures as a mitigating factor apply to the consideration of mandatory pre-shift and on-shift inspections.

Even if safety examinations might be considered mitigating in some abstract sense, in this case the operator was cited for, and admitted to, an inadequate inspection in this area. The Judge found that a serious hazard that should have been obvious to an examiner – belt rollers turning in a large accumulation of coal fines – had not been noted for multiple shifts, even though pre-shift and on-shift examinations were being conducted in the area. *Id.* at 1351. In the face of this evidence, the fact that the areas were being examined regularly is not mitigating.

c. Abatement Efforts Prior to the Issuance of the Order

It was error for the Judge to consider the cleaning crew sent to clean the tail of the No. 1 belt as a mitigating factor for the operator's efforts to abate the violation. First, this was not the area where the cited accumulations were located. The Judge acknowledged that the cleanup crew was sent to clean the tail of the No. 1 belt – not the accumulations under the No. 2 belt take-up, nor the float coal dust, nor the loose coal inby the transfer point. However, the Judge speculated that the broken roller near the loose coal might have gotten the crew's attention and prompted them to correct the other problems.

The No. 2 belt take-up is near the belt head, and the Judge found that the belt head was in the same area as the No. 1 belt tail. *Id.* at 1350-51 (citing Resp. Ex. 76). The Judge discussed the operator's efforts to clean up the hazards, which had been recorded in the pre-shift reports, and noted that "at least the hazardous conditions were being promptly addressed by the mine manager." *Id.* at 1352. However, there is no substantial evidentiary support for abatement of the hazardous accumulations at issue.

Moreover, even if the clean-up crew had been dispatched to the area in question, it is unlikely that the crew would have been adequate for the clean-up of the hazardous accumulations. There is no testimony about the size of the crew that was sent to clean the area, but the accumulations took more than 100 man-hours to abate. *Id.* at 1346. Consequently, there were no mitigating abatement efforts. *See Amax Coal*, 19 FMSHRC 846, 851 (May 1997) (inadequate efforts to clean accumulations not mitigating).

d. Conclusion

We conclude that the Judge erred on issues related to the degree of danger, knowledge and obviousness of the violation, and abatement efforts. We reverse and find that the violation was the result of the operator's unwarrantable failure.

### 2. Negligence

While the Secretary had designated the negligence level as high, the Judge characterized the operator as moderately to highly negligent. As explained in our reversal of the Judge's unwarrantable failure determination, the obvious nature of the accumulations under the belt, combined with AmCoal's inadequate cleanup efforts, reflect a higher level of negligence than the "moderate to high negligence" that the Judge assessed. We thus reverse and find that the level of negligence was high.

### 3. Gravity

The parties took widely divergent but quite specific positions on gravity. The Secretary contended that smoke and fire would contaminate the airways. The Secretary reasoned, therefore, that 10 miners working inby the ignition point were highly likely to suffer fatal injuries. AmCoal, on the other hand, argued that any injuries reasonably likely to result would be no more serious than lost workdays, and that the number of persons affected should be no more than two or three.

After reviewing the arguments of the parties, the Judge accepted AmCoal's position and found the violation was reasonably likely to result in lost workday injuries to two miners. In electing to accept AmCoal's position in this case, the Judge erred by failing to account for the entirety of his findings. More specifically, as set forth above, the Judge did not consider many factual findings he had made in relation to his S&S determination. Moreover, the Judge was not confined to a Hobson's choice between a gravity finding of a few lost workdays or finding fatalities for all inby miners. Rather than narrowly parsing gravity determinations, we have consistently considered gravity holistically, considering "factors such as the likelihood of injury, the severity of an injury if it occurs, and the number of miners potentially affected." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2049 (Aug. 2016).

The grave dangers of a fire are obvious – smoke inhalation and/or burns. If a fire occurs, miners may escape injury entirely, suffer painful and fatal injuries, or suffer injuries between these extremes. The key element of the gravity determination is judging the type and extent of injuries or illnesses reasonably likely to occur based upon the record in the case.

In this regard, the Judge found the existence of accumulations six to 24 inches deep over a distance of 1200 feet, with packed coal fines in which the belt was turning, and with substantial float coal dust. 36 FMSHRC at 1341-42. The Judge specifically concluded that "the belts and rollers turning in packed coal presented a viable ignition source and, combined with the other factors identified by [the inspector], posed a reasonable likelihood of a fire and resultant injuries." *Id.* at 1343. The Judge also found that a significant amount of float coal dust covered the No. 2 head drive and had accumulated under the belt and rollers for more than a couple of shifts. *Id.* at 1341-42, 1347-48. Notably, in *Twentymile Coal Co.*, 36 FMSHRC 1533, 1539 (June 2014), the Commission recognized float coal dust accumulations as so inherently dangerous that they are specifically mentioned in section 75.400 as a material that must not be permitted to accumulate.

In light of the findings discussed above and in the Judge's S&S analysis, we are compelled to conclude that the level of gravity from the occurrence of a fire in this section of the mine is a reasonable likelihood of serious or fatal smoke inhalation or burn injuries to a number of miners.

## C. On-Shift Examination Violation—Order No. 6673876

The Secretary claims that, as a result of the errors in the Judge's findings for the on-shift violation, the unwarrantable failure determination should be reversed. The Secretary also contends that the Judge's reductions in the levels of gravity and negligence were erroneous. Finally, the Secretary claims that a higher penalty should be assessed.

### 1. Unwarrantable Failure

The accumulations violation and the on-shift examination violation arose from the same set of facts, and the underlying hazard is the same for both orders. In light of the extensive detail with which the Judge discussed his findings for the accumulations violation, he properly relied on them when making his determinations for the on-shift examination violation. The relevant considerations for many of the factors in the unwarrantable failure analysis are the same. We discuss some additional considerations below.

#### a. Notice That Greater Efforts At Compliance Were Necessary

The Secretary asserts that the operator had a history of similar violations of examination standards, and was thus on notice that greater efforts were needed to comply. There is evidence in the record that AmCoal had a significant history of similar violations in the 24 months before this order was issued. Sec'y Ex. 1. The Judge did not mention these citations in his analysis of the on-shift examination violation.

#### b. Degree of Danger

The Judge found that the combination of the accumulations of float coal dust, loose coal, and the carry back fines and dust under the belt take-up was extensive. The float coal dust had existed for two days, the loose coal for one shift, and the carry back material for several shifts. 36 FMSHRC at 1348-51. The Judge also found that AmCoal had been put on notice that greater efforts were required to comply with the standard. Further, as the Secretary notes, the failure to note the accumulations in the inspection books and take actions to correct them not only posed a high degree of danger, but also subjected additional crews to that danger. The coal fines packed under the rollers, which the Judge deemed the most dangerous part of the violation, were also the condition that the Judge determined should have been noted in at least two examinations.

With reference to S&S, the Judge found that additional crews were put at risk because the operator failed to report and correct the accumulations for multiple shifts. *Id.* at 1353. However, in considering the factor of degree of danger in his unwarrantable failure analysis, the Judge failed to consider that additional crews were put at risk by the failure to record and correct the hazard.

For these reasons, we conclude that substantial evidence does not support the Judge's degree of danger determination and that there was a high degree of danger.

c. Duration

The Secretary claims that the Judge failed to consider the duration of the violation, which lasted for a minimum of two shifts, thus supporting an unwarrantable failure finding.

The Judge discussed the duration of the violation extensively in his opinion, but in his final analysis he did not determine whether the duration weighed in favor of a finding of unwarrantable failure. *Id.* at 1351-52. In his analysis of the duration of the accumulations violation, however, the Judge accepted Inspector Miller's estimate that the coal fines "had been accumulating for more than a couple of shifts." *Id.* at 1350. Duration, therefore, is an aggravating factor in the unwarrantable failure analysis.[13]

d. Knowledge and Obviousness

The Judge erred by failing to reconcile his finding that the packed fines under the belt rollers were "not obvious," while at the same time finding that a competent examiner should have seen them. *Id.* at 1351. As discussed above, if a competent examiner would have discovered the coal fines, the accumulations were obvious, especially in an area that is inspected multiple times per day.

Moreover, the Judge erred in considering the operator's regular safety inspections as a mitigating factor in evaluating the operator's efforts to abate the violation. *Id.* at 1353. The fact that the operator was conducting pre-shift and on-shift examinations is not mitigating, for the reasons discussed in our analysis of the accumulations violation.

f. Conclusion

The Judge erred in his analysis of whether the operator had notice that greater efforts at compliance were necessary, the degree of danger, the duration of the violation, the operator's knowledge of the violation and the obviousness of the violation. Consequently, we reverse and reinstate the unwarrantable failure designation for this violation.

**2. Negligence**

As with the accumulations violation, the Judge characterized the operator as moderately to highly negligent, whereas the Secretary had designated it as high negligence. The reduction in the level of negligence is not supported by substantial evidence. The purpose of the on-shift inspection is to identify and correct hazards. The Judge found as a fact that the hazard should have been discovered by a competent examiner. The fact that packed accumulations under the belt were not noted by AmCoal's examiner, combined with AmCoal's inadequate cleanup

[13] AmCoal acknowledges that a violation that exists for more than one shift may be an unwarrantable failure. Resp. Br. at 35 n.7.

efforts, reflects a higher level of negligence than the "moderate to high negligence" that the Judge found. We reinstate the designation of high negligence.

### 3. Gravity

Because the same hazard is involved in both the accumulations and on-shift examination violations, it was not error for the Judge to incorporate his gravity analysis from the accumulations violation into his analysis for this examination order. However, the dangers described in our analysis of the accumulations violation apply to this violation as well, and the dangers affected additional crews. Accordingly, we reverse and find the gravity for this violation is a reasonable likelihood of serious or fatal smoke inhalation or burn injuries to a number of miners.

## V.

## Conclusion

We affirm the Judge's decision with regard to the electrical violation, Order No. 7490572, in all respects. We reverse the Judge's decision with regard to the accumulations and on-shift examination violations, Order Nos. 6673874 and 6673876 respectively, and conclude that they resulted from an unwarrantable failure to comply, with high negligence and gravity as set forth above. We remand Order Nos. 6673874 and 6673876 for the imposition of penalties consistent with this opinion.

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

William I. Althen, Commissioner

Chairman Jordan, dissenting:

With respect to the accumulations violation and the on-shift examination violation, I agree with my colleagues' findings regarding unwarrantable failure, negligence, and gravity. However, I would reverse the Judge's ruling on the violation of the electrical standard and find that it too was the result of the operator's unwarrantable failure.

The undisputed facts of this violation paint a stark picture of a supervisor who, in the presence of another miner, blatantly disregarded an MSHA safety standard. Maintenance foreman John Jones had been working on a feeder's electrical panel, which had previously been de-energized and locked and tagged out at the power center, which was approximately 100 to 200 feet away. The electrical panel was de-energized so that Jones could work on it, but he wore gloves and a meter while he did his troubleshooting.

However, after he fixed the problem, he removed his gloves and meter and began to close the panel door without first de-energizing and locking and tagging out the panel. He then noticed wires at the bottom of the panel that could be caught in the door as it closed. He reached into the panel with his bare hands and moved the wires to permit the door to close. 36 FMSHRC 1318 (May 2014). When the inspector reminded Jones that electrical panels must be de-energized, locked and tagged out before they can be opened or closed, Jones acknowledged that he was "taking a short cut." *Id.* at 1314-15.

The inspector issued an order alleging a violation of 30 C.F.R. § 75.509. This standard requires power circuits and electric equipment to be de-energized before work is performed on them.

This is a quintessential example of an unwarrantable failure, which, as we have held, is "aggravated conduct constituting more than ordinary negligence." *Emery Mining Corp.*, 9 FMSHRC 1997, 2001(Dec. 1987). We characterize unwarrantable failure 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. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving the Commission's unwarrantable failure test). The foreman's willingness to cut corners – in full view of another miner – is the epitome of indifference and reckless disregard. In fact, the Judge found that Jones' actions could be characterized as intentional misconduct. 36 FMSHRC at 1321.[1] The Judge also found that the inspector was "undoubtedly correct when he surmised that Jones [was] tired of walking back to the power center to de-energize the panel and lock/tag the circuit." *Id.* at 1320 (citing Tr. 107).

Moreover, under well-established and longstanding Commission law, Jones' position as a supervisor is a critical aggravating factor in supporting a finding that the violation was unwarrantable. *See Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001) (because supervisors are held to a high standard of care, the involvement of a supervisor in a violation is an important factor supporting an unwarrantable failure); *Midwest Material Co.*, 19 FMSHRC 30, 35 (Jan. 1997) (reversing a Judge's finding that a violation was not due to the operator's

[1] His conduct was so egregious that, in my view, it would have supported a charge under section 110(c) of the Mine Act for a "knowing" violation. 30 U.S.C. § 820(c).

unwarrantable failure in part due to the Judge's failure to recognize that the violation took place in the presence of a foreman who, under Commission precedent, is held to a high standard of care); *Lion Mining Co.*, 19 FMSHRC 1774, 1778 (Nov. 1997) (holding that the fact that a foreman observed the violative condition was a factor tending to establish an unwarrantable failure); *S&H Mining, Inc.*, 17 FMSHRC 1918, 1923 (Nov. 1995) (under unwarrantable failure analysis, heightened standard of care required of section foreman and mine superintendent). As a supervisor, Jones was "entrusted with augmented safety responsibility and was obligated to act as a role model." *Capitol Cement Corp.*, 21 FMSHRC 883, 893 (Aug. 1999).

It is of no consequence that all of the criteria that might potentially support an unwarrantable failure determination may not be met here. *Cf. IO Coal Co.*, 31 FMSHRC 1346, 1350-51 (Dec. 2009). We have held that even if many of the factors used to support an unwarrantable failure finding are not present, a violation may still be found unwarrantable. *See e.g., LaFarge Constr. Materials and Theodore Dress,* 20 FMSHRC 1140, 1145-47 (Oct. 1998) (affirming an unwarrantable failure determination based solely on foreman's failure to take extra precautions on observing dangerous condition, even when it was not obvious that the condition was dangerous). Here, for example, the duration factor has no relevance. *See Midwest Material*, 19 FMSHRC at 36 (recognizing that violations that are dangerous and known are "readily distinguishable" from violations where the duration factor is relevant, such as accumulations violations "where the degree of danger and the operator's responsibility for learning of and addressing the hazard may increase gradually over time"). Similarly, the extensiveness of the violation is not a relevant concept to consider under the facts of this violation.

My analysis is not based on a checklist of factors, but rather on the deliberate actions of a supervisor who paid no heed to a safety standard.[2] Given that this is the epitome of an unwarrantable failure to comply, I respectfully dissent.[3]

Mary Lu Jordan, Chairman

[2] I do note that, at a minimum, the *IO Coal* factors of the operator's knowledge and the obviousness of the violation are met here.

[3] For the reasons stated above, I would reverse the Judge's finding of high negligence and reinstate the level of negligence as reckless disregard. However, I agree with my colleagues that the Judge's gravity determination is supported by substantial evidence.

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