FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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MAR 09 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2009-1368
v.	:	
EXCEL MINING, LLC	:	

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

DECISION

BY THE COMMISSION:

In this proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"), Excel Mining, LLC ("Excel") seeks review of a citation and an order issued to it by the Department of Labor's Mine Safety and Health Administration ("MSHA"). At issue are two violations of MSHA's permissibility standard, 30 C.F.R. § 75.507-1(a),[1] for de-watering pumps in a return air course in Excel's Van Lear Mine. Excel disputes the special findings made by the Secretary – in particular, the significant and substantial ("S&S") and unwarrantable failure designations – and the basis for the penalty assessments with respect to the penalty criterion involving size of the controlling entity.

The Administrative Law Judge found that the violations were S&S and the result of Excel's unwarrantable failure to comply. 33 FMSHRC 3221, 3225-27 (Dec. 2011) (ALJ); Jt. Ex. 9, Stips. 14, 21. He also found that Excel was highly negligent and assessed the penalties proposed by the Secretary. 33 FMSHRC at 3227-28.

For the reasons that follow, we affirm the Judge's decision.

[1] 30 C.F.R. § 75.507-1(a), provides that "[a]ll electric equipment, other than power-connection points, used in return air outby the last open crosscut in any coal mine shall be permissible except as provided in paragraphs (b) and (c) of this section." The Judge found no contention that paragraphs (b) or (c) are applicable here. 33 FMSHRC at 3223.

I.

Facts and Proceedings Below

A. Factual Background

Excel's Van Lear Mine is an underground coal mine located in Martin County, Kentucky. The mine liberates 295,000 cubic feet of methane in a 24-hour period from one split of air and was subject to a 15-day spot inspection for methane at the time of the violations at issue in this case. Tr. 42-43.

On May 5, 2011, MSHA Inspector Dale Howell visited the Van Lear Mine to perform an electrical inspection. He was unable to inspect two de-watering pumps[2] – the P-40 and P-70 pumps located in the return air course approximately 60 feet from the VL-2 seals – because they were submerged in three feet of water. The VL-2 seals are breathable, permitting methane to in-gas and out-gas, which means that during times of high barometric pressure, methane is pushed back behind the seals, whereas during times of low barometric pressure, methane is liberated from the seals. Behind the VL-2 seals are an initial set of seals put in place at an earlier time. Before the installation of the VL-2 seals, an explosive mixture of methane was detected behind the seals. With the VL-2 seals in place, there is no way to determine the current condition of the initial seals. The pumps were located in an entry where four entries were compressed into one, causing the air from five returns from active sections to move past the pumps. At the time of Inspector Howell's visit on May 5, he noted that due to the accumulation of water, only two feet of passable airway travel were provided.

Jake Bowen, Excel's Assistant Chief Electrician, indicated to Inspector Howell that the water built up because the power had been off. Howell was concerned that, without the pumps, water would continue to build up, block air flow, and impede travel in the return air course. Inspector Howell indicated to Bowen that he would return to examine the pumps once the water was removed.

On May 11, Howell returned to the mine and found a foot of water surrounding the pumps. Howell examined the pumps for permissibility by using a feeler gauge and pulling on the cable entering the box to see if it moved. Any movement in the cable indicates that the cable is not properly packed. When a stuffing box is not properly packed, it is not permissible because in an explosion, flames could escape the container by traveling past the unsecured cable.

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[2] A de-watering pump consists of the pump itself, which sits on the mine floor, usually in water, and a starter box, which is located 20-30 feet away in a dry location, usually suspended from the roof. The two are connected by an inner machine cable. Where the cable enters the starter box, it is insulated and secured by packing glands, which are filled with fiberglass-type rope.

The permissibility requirements are designed to ensure that ignitions occurring within enclosures on mining equipment which contain electrical circuits will not escape into the mine atmosphere. Specifically, the requirements are intended to prevent the ignition of an explosive air-methane mixture surrounding mine equipment. An ignition inside the enclosure will generate hot gases. When the equipment is permissible, these gases will escape through a flame-arresting path built into the enclosure and will cool as they pass through. Consequently, the gas escaping into the surrounding atmosphere will not ignite any external explosive air. *Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1130-31 (May 2014).

MSHA regulations define permissible equipment as "all electrically operated equipment taken into or used inby the last open crosscut of an entry . . . [that is] designed, constructed, and installed, in accordance with the specifications of the Secretary, to assure that such equipment will not cause a mine explosion or mine fire, and . . . to prevent, to the greatest extent possible, other accidents in the use of such equipment." 30 C.F.R. § 75.2.

During his examination of the pumps, Inspector Howell found that the packing glands were missing from both pump starter boxes and that there was a problem with the handle on one of the boxes. When Inspector Howell pulled on the cables to the starter boxes, they moved back and forth. When he looked into the boxes, he did not see any stuffing. The cable to one of the boxes had been "whittled down with a knife so that it would fit into the pump," and the stuffing boxes did not have proper lead ties to keep the packing glands from loosening. 33 FMSHRC at 3224; Tr. 27, 31-32.

Inspector Howell also found a note on top of the cover of the starter box with a non-functioning breaker handle. If functioning properly, the breaker handle would have enabled the breaker on the starter box to be reset without removing the cover of the box. Inspector Howell understood the note to be a warning to miners not to do anything that would trip the breaker, so as to avoid the need to take the cover off the box to reset it.

Inspector Howell spoke with Bowen, who indicated that he had worked at the mine for about a month and that during that time, the pumps had not been replaced and that no work or repair had been done on the pumps. Inspector Howell confirmed this with Excel's Chief Electrician Rick James and by checking Excel's examination record books, which did not indicate that the pumps had been changed in the weeks preceding Howell's inspection.

Inspector Howell issued a citation for the P-40 pump and an order for the P-70 pump pursuant to section 104(d) of the Mine Act, 30 U.S.C. § 814(d), for failure to maintain the pumps in permissible condition. Howell designated the violations as S&S[3] and a result of Excel's high

[3] 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."

negligence and unwarrantable failure.[4] MSHA proposed penalties of $23,200 for the citation and $25,800 for the order.

B. The Judge's Decision

The Judge noted that Excel conceded the fact of the violations. The Judge concluded that the violations were S&S. Specifically, the Judge credited the testimony of Inspector Howell and MSHA's ventilation expert and supervisor, Craig Plumey. They testified that a spark from inside the pump starter box could escape into the mine atmosphere where it was likely that methane could be present in explosive levels due to the elevated levels of methane, out-gassing of the nearby sealed off area, and the convergence of five returns from active sections into the one entry where the pumps were located. Tr. 25, 30, 41-45, 89, 93-96, 102-04. The Judge found persuasive the weight of the evidence regarding the "existence of serious existing ignition sources in a mine liberating significant amounts of methane" and concluded that the Secretary had proven a reasonable likelihood that the hazard of an explosion contributed to by the permissibility violations would result in serious injury to ten miners, and would result in disruption of ventilation affecting fifty to sixty miners. 33 FMSHRC at 3225-26.

The Judge likewise concluded that the violations were the result of Excel's unwarrantable failure. He credited testimony that the conditions existed for about a month, which he found aggravating as to duration; that Excel had knowledge of them, given the requirement of weekly examinations and the presence of the note acknowledging the malfunctioning breaker handle; and that the conditions were extensive and obvious given that no packing was provided at all. Tr. 28-29, 31-34, 50-54. The Judge rejected Excel's argument that the electrical examiners' negligent conduct could not be imputed to it. 33 FMSHRC at 3226-27.

Having considered the six penalty criteria under section 110(i), the Judge assessed the same penalties the Secretary had proposed for both violations.

II.

Disposition

A. S&S

A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

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

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard — that is, a measure of danger to safety — contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Id. at 3-4 (footnote omitted).

An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *See U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). When examining whether an explosion or ignition is reasonably likely to occur, it is appropriate to consider whether a "confluence of factors" exists to create such a likelihood. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988); *see Eastern Assoc. Coal Corp.*, 13 FMSHRC 178, 184 (Feb. 1991). Some of the factors to be considered include the extent of accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area. *See Utah Power & Light Co., Mining Div.*, 12 FMSHRC 965, 970-71 (May 1990); *Texasgulf*, 10 FMSHRC at 501-03.

Excel challenges the Judge's S&S finding on three grounds: (1) that the Judge erred in failing to apply the "confluence of factors" standard; (2) that the Judge misapplied the consideration of "continued normal mining operations"; and (3) that the Judge erred in relying on "could" statements to support a finding of reasonable likelihood of the hazard contributed to by the violation resulting in an injury. Each of these arguments is related to step three of the *Mathies* test.

We conclude that the Judge properly applied the Commission's *Mathies* analysis to the circumstances of this case and that substantial evidence supports the Judge's findings that the violations were S&S.

Although the Judge did not specifically identify his findings under each step of *Mathies*, he made explicit findings tantamount to an analysis of each step. The Judge clearly found a violation under step one, as he noted that the parties conceded the fact of a violation. 33 FMSHRC at 3221, 3223. Regarding the fourth step of *Mathies*, a reasonable likelihood that the injury in question would be of a reasonably serious nature, the Judge credited the testimony of Inspector Howell that he "would expect to see fatal injuries from a resulting methane explosion and injuries from burns and smoke inhalation from a mine fire." 33 FMSHRC at 3225; Tr. 48-49. Substantial evidence supports the Judge's finding. Inspector Howell testified that ten people would be affected by a methane explosion, and up to fifty or sixty people would be affected in the event of a disruption in the mine's ventilation system. 33 FMSHRC at 3225; Tr. 48-49.

While the Judge did not explicitly identify the hazard under step two of *Mathies*, he clearly understood that the hazard was the danger of a spark being released from the starter box into the mine atmosphere, thereby providing an ignition source for methane. 33 FMSHRC at 3223 (citing to Howell's testimony that "when a stuffing box is not properly packed, it is not permissible because, in the event of an explosion, the flames can escape the container by traveling past the unsecured cable").

The Judge focused his S&S analysis on the third step of *Mathies* – whether there is a reasonable likelihood that the hazard contributed to will result in an injury. 33 FMSHRC at 3224-26. Excel argues that the Judge misapplied applicable Commission precedent. Excel contends that the Judge erred by relying on "could" statements, arguing that the Commission has held that "statements that [a methane ignition] *could* occur, standing alone, do not support a finding that there was a reasonable likelihood of an ignition." *See Zeigler Coal Co.*, 15 FMSHRC 949, 954 (June 1993) (emphasis added) (citing *Eastern Assoc. Coal Corp.*, 13 FMSHRC at 184-85; *Union Oil Co. of CA*, 11 FMSHRC 289, 298-99 (Mar. 1989)).

We conclude that the Judge properly applied Commission precedent in his S&S analysis.[5] The Judge explicitly credited testimony of Inspector Howell and ventilation expert Plumey regarding the hazardous conditions created by the violation. Having found that there were multiple sources of methane and specific evidence as to the potential for explosive accumulations, he concluded that there was a reasonable likelihood that an ignition or explosion would occur given the ignition sources of the non-permissible pumps. 33 FMSHRC at 3225-26.

The circumstances in this case, therefore, are similar to the issues addressed by the Commission in *Knox Creek Coal Corp.*, 36 FMSHRC 1128 (May 2014). In *Knox Creek*, the Commission concluded that the confluence of circumstances presented by the violative conditions

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[5] Cases relied upon by Excel are clearly distinguishable from the present case. In *Zeigler*, the Judge had merely summarized the testimony without analyzing the confluence of factors necessary to establish a reasonable likelihood of an ignition. *Id.* at 954. Because the Judge failed to make necessary findings and reconcile conflicting testimony, the Commission vacated the Judge's S&S determination and remanded for further analysis. *Id.* at 954-55. The Commission noted that speculative testimony, "standing alone," does not support a finding of a reasonable likelihood of an ignition. *See id.* at 953-54. The Commission also recognized that the S&S terminology in section 104(d)(1) of the Mine Act refers to a violation which "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard . . ." (emphasis added), and that the "Secretary is not required to prove that the hazard contributed to will actually result in an injury causing event." *Id.* at 953 nn. 5-6 (citing *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 678 (Apr. 1987)). In *Eastern Associated* and *Union Oil*, the Commission found that the evidence was speculative and failed to support a finding of the reasonable likelihood of the hazard resulting in an injury. Here, the Judge did make findings as to the reasonable likelihood of the violative conditions contributing to an ignition, crediting Inspector Howell's testimony.

sufficiently established that there was a reasonable likelihood of an ignition resulting from the non-permissible continuous mining equipment. The Secretary had presented expert testimony regarding the scope and nature of the hazardous conditions posed by the non-permissible equipment in the mine which liberated excessive methane. *Id.* at 1132-37.

The Judge's decision also is consistent with longstanding Commission precedent. In *U.S. Steel Mining Co.*, 6 FMSHRC 1866 (Aug. 1984), the Commission upheld an S&S finding for a permissibility violation involving headlights, even though at the time of the violation there appeared to be adequate ventilation in the mine, and mining was not taking place at the precise moment the citation was issued. *Id.* at 1869.

Similarly, in *U.S. Steel Mining Co.*, 8 FMSHRC 1284 (Sept. 1986), the Commission affirmed the Judge's S&S findings regarding a permissibility violation involving electric face equipment. The inspector had observed a bolt missing on the cover plate of the control compartment of a shuttle car. The control plate was designed to keep an ignition confined and the missing bolt could permit methane to enter the control compartment, causing an ignition. *Id.* at 1289-90. The mine liberated more than one million cubic feet of methane in a 24-hour period, and there had been a methane ignition in the year preceding the hearing. The Commission concluded that this was sufficient to uphold the S&S designation. *Id.*

The record in this case demonstrates an even greater potential for the hazard of methane ignition to occur. The Secretary's witnesses offered extensive testimony of potential methane sources. It is undisputed that this mine liberated high levels of methane. Tr. 42. The location of these pumps was in close proximity to a sealed off area known to release explosive amounts of methane. Tr. 42-43, 89. The pumps were also located in an entry where four entries converged into one, causing the air from five returns from active sections to move past the pumps. Tr. 103-04. Inspector Howell testified that methane could also escape from cracks in mine strata, such as in areas where there has been a roof fall, and that the mine had experienced a roof fall only one break inby the seals. Tr. 44.

Inspector Howell and Plumey, MSHA's ventilation expert, also testified as to their concerns about the reduced space for air to travel through the entry where the pumps were located due to the accumulation of water. 33 FMSHRC at 3225; Tr. 29-30, 49-50, 93-94. The egregiousness of the violations is heightened by the fact that the boxes contained no packing material at all. Without any packing material, the boxes could not properly contain any internal combustion. Tr. 25. Also significant is the fact that one of the cables into the box had been whittled down to fit into the opening. Tr. 32. Hence, substantial evidence supports a finding that there was a reasonable likelihood that the hazard of a spark being released from the starter box would result in a methane explosion causing serious injury.

The Judge's consideration of these factors demonstrates that he correctly considered the "confluence of factors" that could result in an ignition. As mentioned earlier, the confluence of factors analysis requires consideration of the particular circumstances in the mine, including the

possible ignition sources, the presence of methane, and the type of equipment in the area. *See Utah Power & Light Co.*, 12 FMSHRC at 970-71; *Texasgulf*, 10 FMSHRC at 501-03. As discussed previously, the Judge acknowledged the multiple sources of methane in the entry where the pumps were located and that the non-permissible pumps posed an ignition hazard. 33 FMSHRC at 3225-26.

Excel's argument regarding continued normal mining operations is also unpersuasive. Excel appears to be arguing that, in considering continued normal mining operations, the Judge failed to take into account contrary evidence it presented that the ventilation was adequate and that it was unlikely that an explosive level of methane would be present in the mine. Excel's complaint that the Judge did not consider its witnesses' countervailing testimony is unavailing, as the Judge explicitly stated that he did consider this testimony. However, he found it unconvincing and credited the Secretary's witnesses. 33 FMSHRC at 3226.

Commission Procedural Rule 69(a) requires that a Commission Judge's decision "shall include all findings of fact and conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record." 29 C.F.R. § 2700.69(a). A Judge is required to 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). The Judge has adequately done so here.

Substantial evidence supports the Judge's conclusion that under continued normal mining operations there was a reasonable likelihood that the hazard would contribute to serious injuries to miners. As discussed above, the non-permissible pumps created potential ignition sources during continued normal mining operations. Water accumulation in the entry where the pumps were located obstructed air flow and potentially compromised ventilation in the mine. Water was an ongoing problem in this area of the mine. The entry where the pumps were located was the merging point of five active entries. If airflow diminished, the likelihood of explosive levels of methane accumulating would increase. Also, the location of the pumps was close to a sealed area known to liberate explosive levels of methane. Previously, a roof fall had occurred at the mine only one break inby the seals, from which methane could liberate. 33 FMSHRC at 3225. Thus, even if one were to accept the testimony of Excel's witnesses that the mine had sufficient velocity and volume of air at the time of the violations, the Judge credited the overwhelming testimony of Inspector Howell and MSHA ventilation expert Plumey demonstrating the potential for Excel's ventilation to be compromised and thus not adequately move and dilute methane. We conclude that the Judge's credibility determinations are reasonable and find no basis to overturn them.[6]

[6] A Judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981).

B. Unwarrantable Failure

In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

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. *See Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1350-57 (Dec. 2009).

Excel contends that the Judge failed to consider all the unwarrantable failure factors. However, the Judge did make findings on unwarrantable failure factors, including duration, extensiveness, obviousness, knowledge, danger, and lack of abatement. He found each of these factors to be aggravating. The Judge found that the conditions were obvious and extensive because the boxes lacked any packing at all. Regarding the danger of the violations, he found that the violations involved high gravity. He found that Excel's failure to correct the condition was particularly egregious given the presence of a note on the P-70 pump which indicated that the breaker handle was not functioning, putting the operator on notice of the need for repair and maintenance. The Judge also relied on the fact that a simple examination would have informed the examiner that the pumps were not compliant. 33 FMSHRC at 3227. Substantial evidence supports the Judge's findings as to these factors.

Likewise, substantial evidence supports the Judge's finding as to duration and knowledge. Excel disputes the evidence that the conditions lasted for more than a month but can cite no record evidence in support of that position. Inspector Howell testified that Excel's Assistant Chief Electrician James Bowen told him that the pumps had not been changed out and the mine's record books corroborated this. Tr. 50-51. There was no indication that the pumps had been changed out or repaired between March 28 and May 11, 2009. Chief Electrician Rick James testified that the pumps must have been changed out between the last examination and Howell's inspection, but provided no proof. Tr. 122-25. The Judge credited Inspector Howell's testimony. In concluding that the conditions lasted for more than a month, the Judge drew an inference, which is reasonable and supported by the record. 33 FMSHRC at 3226. Such circumstantial evidence can suffice to satisfy the substantial evidence test to support a Judge's finding. *See*

Mid-Continent Res., Inc., 6 FMSHRC 1132, 1138 (May 1984) (holding that "the substantial evidence standard may be met by reasonable inferences drawn from indirect evidence").

Regarding the issue of knowledge, the Judge relied on the note on the starter box as putting Excel on notice that there was a problem with the pump. Excel contends that there is no evidence as to when the note was present or whether its agent wrote or saw the note. Regardless of whether Excel's examiner saw the note during the last inspection of the pumps, the examiner should have been aware of the violation, given its obviousness. Also, the evidence with regard to duration established that the violations existed for more than a month, putting Excel on notice. Hence, the Judge's finding that Excel knew or should have known of the violations is supported by substantial evidence.

The Judge did not address whether Excel was on notice that greater compliance efforts were necessary. As Excel points out, there is no evidence in the record that it had been previously cited for this condition or otherwise placed on notice. However, given the Judge's other findings that the conditions were dangerous, long standing, extensive, obvious, and that the operator knew or should have known of them, any potential mitigation related to notice of greater compliance could not overcome the overwhelming evidence here of other aggravating circumstances. *See Manalapan*, 35 FMSHRC at 294 ("The factor of dangerousness may be so severe that, by itself, it warrants a finding of unwarrantable failure."); *Jim Walter Res., Inc.*, 19 FMSHRC 480, 486-89 (Mar. 1997) (finding that evidence of obviousness and extensiveness of violations sufficient to support finding of unwarrantable failure).

Excel's argument regarding the imputation of negligence for unwarrantable failure purposes is misplaced. Here, the key points are the failure of Excel to provide the packing material initially in order to make the pumps permissible, the failure of Excel's examiners to note this deficiency, and the failure of Excel to correct it. The negligence of Excel's examiners is imputable to Excel for unwarrantable failure purposes. *See Mettiki Coal Corp.*, 13 FMSHRC 760, 772 (May 1991) (certified electrician acts as an agent when performing electrical inspections); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 197 (Feb. 1991) (miner who failed to make examinations found to be agent of operator for purposes of unwarrantable failure). Thus, the Judge did not err by imputing high negligence to Excel under the circumstances of this case.

Given the Judge's findings of aggravating circumstances, substantial evidence supports the Judge's conclusion that the violations amounted to Excel's unwarrantable failure to comply with the cited standard. Thus, we affirm the Judge's findings of unwarrantable failure and high negligence.

C. Penalties

Excel's argument as to the consideration of "controller points" in calculating the appropriate penalties also lacks merit. Excel claims that MSHA erred in calculating the

applicable points for a controlling entity under its regulations in 30 C.F.R. Part 100 and that the Secretary provided no evidence to support his assessment on this factor.[7]

As the Commission has recently emphasized, the Secretary's Part 100 penalty regulations are not binding on the Commission. *Jim Walter Res. Inc.*, 36 FMSHRC 1972, 1975 n.4 (Aug. 2014) ("The Secretary's Part 100 regulations apply only to the Secretary's penalty proposals, while the Commission exercises independent authority to assess penalties pursuant to section 110(i) of the Mine Act.") (citations omitted); *see also Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984), *aff'g, Sellersburg Stone Co.*, 5 FMSHRC 287 (Mar. 1983) ("[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties . . . we find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also govern the Commission.").

The Judge considered all six factors under section 110(i) of the Mine Act, as required. The Judge found that Excel is a large operator with a significant history of violations. 33 FMSHRC at 3227. In fact, Excel conceded that it was a large operator. *See* Jt. Ex. 9, Stip. 6. The Judge also found that Excel abated the violations in good faith and that there was no evidence that the penalties would adversely affect Excel's ability to remain in business. The Judge referred to his previous analysis of the violations, where he concluded that they involved high gravity and high negligence, resulting from Excel's unwarrantable failure to comply. 33 FMSHRC at 3227. Thus, the Judge correctly applied section 110(i) and independently assessed penalties for the violations.

Excel does not dispute the Judge's decision with regard to his application of section 110(i) or his findings on the penalty criteria. Substantial evidence supports the Judge's findings. Accordingly, we see no grounds for disturbing the Judge's penalty assessments. Because the Judge was not bound by the Secretary's Part 100 regulations in assessing penalties, he was not required to explicitly address Excel's argument regarding the "controller points."

Accordingly, we affirm the Judge's penalty assessments.

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[7] The Secretary did present an exhibit attached to his Petition for Assessment of Penalty, which provided the production details related to Excel and its controlling entity, Alliance Resource Partners LP, for purposes of assigning points to calculate the proposed assessment under Part 100. Thus, contrary to Excel's assertion, there is evidence in the record to support the Secretary's proposed assessments.

III.

Conclusion

For the foregoing reasons, we affirm the Judge's decision concluding that the violations were S&S and resulted from Excel's unwarrantable failure to comply. We also affirm the penalty amounts.

Patrick K. Nakamura, Acting Chairman

Robert F. Cohen, Jr., Commissioner

William I. Althen, Commissioner

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