FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 08 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. KENT 2011-1223
TRIVETTE TRUCKING	:	

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

DECISION

BY: Jordan, Chairman; Young, Nakamura, and Althen, Commissioners

This case involves two orders issued to Trivette Trucking ("Trivette") by the Department of Labor's Mine Safety and Health Administration ("MSHA") in connection with a fatal accident in which a coal truck hit a berm and turned over. Pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"), MSHA issued orders alleging violations of 30 C.F.R. § 77.1607(b)[1] (requiring full control of moving equipment) and 30 C.F.R. § 77.1605(b)[2] (requiring adequate brakes).

The Administrative Law Judge found a violation of section 77.1607(b) but held that the Secretary did not meet his burden of establishing that the violation was the result of an unwarrantable failure. The Judge vacated the order alleging a violation of section 77.1605(b). 35 FMSHRC 1934, 1943–45, 1951 (June 2013) (ALJ).

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[1] 30 C.F.R. § 77.1607(b) requires that "[m]obile equipment operators shall have full control of the equipment while it is in motion."

[2] 30 C.F.R. § 77.1605(b) provides that "[m]obile equipment shall be equipped with adequate brakes, and all trucks and front-end loaders shall also be equipped with parking brakes."

For the reasons that follow, we affirm the Judge's decision.[3]

I.

Factual and Procedural Background

Premier Elkhorn Coal Company ("Premier") operates a surface coal mine in Kentucky and a nearby preparation plant. In December 2009, Steve Johnson, chief mechanic of contract trucking company Trivette Trucking, was hauling coal from the mine to Premier's plant in a 2006 International Paystar coal truck. During his first trip to the plant, Johnson began to experience problems with his truck's power steering after his truck was loaded with coal. Johnson notified a fellow coal truck driver of the steering problem over the CB radio and pulled his truck over so that he and the other driver could inspect the steering system. They were not able to identify any defects, so Johnson resumed driving to the plant.

The section of haulage road on which Johnson was traveling was a relatively straight, but steep, gravel road flanked with berms on both sides. After about 1300 feet at a downward grade of 15–18%, the road leveled out for approximately two miles. While descending the steep section of the road, Johnson's truck left the normal travelway and started heading directly towards the left berm. Before the truck began to make contact with the berm, Johnson jumped out of the truck's cab but was unable to clear the vehicle. Johnson became ensnared in the back left tandem wheels and was dragged down the hillside until the truck ultimately flipped over. Johnson's injuries were fatal.

Following its fatality investigation, MSHA issued two orders to Trivette, the independent contractor that owned and maintained Johnson's truck.[4] Order No. 8230314 alleges a violation of 30 C.F.R. § 77.1607(b) for failure to maintain full control over the haulage truck while it was in motion. The order contends that Johnson's truck was overloaded by 37,600 pounds based on the maximum gross vehicle weight rating ("GVWR") recommended by the truck's manufacturer and that the overloading contributed to Johnson losing control of his vehicle. Order No. 8230315 alleges a violation of 30 C.F.R. § 77.1605(b) for failure to maintain the truck's brakes in adequate condition. The order notes that axle grease was present on the left and right brake drums and that the brake on the right rear tandem axle was not functional. MSHA designated

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[3] On this same date, the Commission is also issuing a decision in a companion case which arose from the same incident. *Premier Elkhorn Coal Co.*, 38 FMSHRC ___, No. KENT 2011-827 (July 8, 2016); *see also infra* note 4.

[4] Premier, the owner of the mine, was also issued two citations for violating the same standards. *See generally Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151 (D.C. Cir. 2006) (the Secretary's decision to cite the owner-operator of a mine and/or its independent contractor, is an unreviewable exercise of prosecutorial discretion).

both violations as S&S and involving unwarrantable failures attributed to high negligence.[5]

The orders issued to Trivette did not go to a hearing. Instead, the parties agreed to adopt the record developed in the *Premier* case and filed cross-motions for summary decision. 35 FMSHRC at 1935; *see also Premier Elkhorn Coal Co.*, 35 FMSHRC 150 (Jan. 2013) (ALJ).

In his decision, the Judge upheld the order alleging failure to maintain control over the truck, but removed the unwarrantable failure designation. The Judge found the Commission's decision in *Clintwood Elkhorn Mining Co.*, 35 FMSHRC 365 (Feb. 2013), to be controlling and thus held that Trivette violated § 77.1607(b) when Johnson failed to maintain control of his truck. 35 FMSHRC at 1942–43.[6] However, the Judge attributed no negligence to Trivette and vacated the unwarrantable failure designation. The Judge reasoned that the Secretary's theory of negligence had been premised on the unproven allegation that Johnson's truck was overloaded and found that there was insufficient proof to establish that Trivette could have done anything to prevent the fatal accident. *Id.* at 1944–45.

With regard to the order alleging inadequate brakes, the Judge suggested that a violation of section 77.1605(b) could be found if the Secretary could prove either: (1) that the condition of the brakes of Johnson's truck caused the accident, or (2) that the defects in the brakes were significant enough to cause the brakes to fail during typical usage of the vehicle. 35 FMSHRC at 1951. The Judge, however, found that the accident was most likely attributable to a steering problem or another problem that caused the brakes and steering to fail simultaneously. *Id.* In addition, the Judge credited the testimony of Premier's expert witness that the brakes, while suffering from minor defects, would have been adequate to stop Johnson's truck at an estimated speed of 10 mph.[7] Accordingly, the Judge found that the Secretary had not met his burden of proof to show that the brakes on Johnson's truck were inadequate.

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[5] The S&S and unwarrantable failure 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," and 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."

[6] *Clintwood Elkhorn* was issued shortly after the Judge's decision in *Premier Elkhorn* but before his decision in *Trivette Trucking*. In *Clintwood Elkhorn*, the Commission found that section 77.1607(b) did not require the Secretary to prove "a causal or contributing factor for the loss of control" of a vehicle. 35 FMSHRC at 370.

[7] The Judge found the Secretary's expert witness's testimony to the contrary to be unconvincing. 35 FMSHRC at 1951.

The Commission granted the Secretary's petition for discretionary review ("PDR"). In his PDR, the Secretary argued that the Judge erred by removing the unwarrantable failure designation from Order No. 8230314 and vacating Order No. 8230315.

II.

Disposition

A. Exclusion of Evidence

The Secretary argues that the Judge erred in his analysis of whether Johnson's failure to maintain control of his truck constituted an unwarrantable failure by Trivette Trucking to comply with a mandatory safety standard. In particular, the Secretary contends that his case was prejudiced by a series of evidentiary rulings that resulted in the exclusion of several key pieces of evidence.

At the *Premier Elkhorn* hearing, the Judge did not admit Secretary's Exhibit 29, a vehicle manual purported to apply to the truck Johnson was driving. The Secretary had sought to introduce this evidence to establish that he truck's manufacturer warned that overloading in excess of the GVWR of 82,600 pounds could cause "component failure, result in property damage, personal injury, or death." Tr. 222. The Judge also excluded Secretary's Exhibits 13–17, which purported to demonstrate that Premier regularly loaded trucks in excess of 120,000 pounds. These exhibits included truck weight tickets for the trucks loaded immediately before Johnson's truck on the day of the accident and for loads that Johnson had taken a couple of weeks prior to the accident. Tr. 53.

The Commission's procedural rules and other federal rules generally place a low bar on the relevancy of evidence that can be admitted. 29 C.F.R. § 2700.63(a); 5 U.S.C. § 556(d); Fed. R. Evid. 401; *see also In re: Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 782–83 (3d Cir. 1994) (finding Rule 401 to have "a low threshold of relevancy"). However, an error in admitting or excluding evidence is generally deemed harmless if a party's substantial rights have not been affected. Fed. R. Civ. P. 61.

For the reasons set forth in our decision in *Premier Elkhorn*, we find that the failure to admit the truck manual[8] and the weight tickets constituted harmless error. *Premier Elkhorn Coal Co.*, 38 FMSHRC ___, No. KENT 2011-827 (July 8, 2016).

[8] While the threshold for admissibility is low, a party seeking to introduce evidence must nonetheless provide a proper foundation to establish its relevance. In the case of the truck manual, Commissioner Young questions whether this was done. He notes that the Judge may have foreclosed the Secretary's efforts to provide a foundation for admissibility. Had the exclusion of evidence been prejudicial, preventing a party from offering facts demonstrating its relevance would be reversible error. *See Gray v. North Fork Coal Corp.*, 35 FMSHRC 2349, 2359–60 (Aug. 2013) (noting an abuse of discretion standard for evaluating the Judge's exclusion of evidence, but characterizing

B. Order No. 8230314 – Failure to Maintain Full Control of the Truck

Although he had vacated a nearly identical citation issued to Premier, the Judge changed his mind in his *Trivette Trucking* decision because of our decision in *Clintwood Elkhorn*. 35 FMSHRC at 1942–43, citing 35 FMSHRC at 370. Thus the only issue before us is whether the Judge erred in removing the unwarrantable failure designation.

We conclude that the Judge's factual findings and credibility determinations are supported by the record and preclude a finding that the violation resulted from an unwarrantable failure. 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 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001.

The Secretary's allegations of a heightened degree of negligence were predicated on the theory that Johnson's loss of control of his vehicle was caused, or contributed to, by the overloading of his truck. However, the Judge determined that the record was insufficient to establish the Secretary's theory.

The Secretary's evidence that Johnson's truck was loaded in excess of 120,000 pounds is, at best, circumstantial. The fact that the Secretary only relied on weight tickets of the truck involved in the accident from four dates prior to the accident, and weight tickets of a different type of truck from the day of the accident, calls into question the reliability of any inference as to the weight of Johnson's truck on the day of the accident. Moreover, the Secretary was unable to convincingly establish that the GVWR set by the manufacturer was a reliable measure for determining the maximum load that this particular truck could safely transport. It is thus difficult to discern what the operator could have done differently to prevent or mitigate a hazardous condition or practice.

Even considering the excluded evidence and assuming that Johnson's truck was loaded in excess of the manufacturer's GVWR, the Judge's findings do not support the Secretary's theory. Importantly, the Judge credited the testimony of Premier's expert witness, Steve Rasnick, who testified that Johnson's truck was capable of safely handling a 120,000 pound load. 35 FMSHRC at 1942. We see no basis for overturning the Judge's determination on this point. *See, e.g.*, *Farmer v. Island Creek Coal Co.*, 14

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exclusion of critical evidence as an "'extreme' sanction"). Conversely, if the Secretary had not effectively made a record of the evidence's relevance, his objection to the exclusion of that evidence may be deemed waived. *See Cavataio v. City of Bella Villa,* 570 F.3d 1015, 1021 (8th Cir. 2009) (the requirement of making an offer of proof to preserve the issue for appeal is "[o]ne of the most fundamental principles in the law of evidence."); *but see Waltzer v. Transidyne Gen. Corp.*, 697 F.2d 130, 134 (6th Cir. 1983) (the failure to make an offer of proof is not fatal where the "substance of the excluded evidence is apparent from context within which the questions were asked.").

FMSHRC 1537, 1541 (Sept. 1992) (stating that Judge's credibility determinations are entitled to great weight and may not be overturned lightly). Consequently, we find that the Secretary has failed, as a threshold matter, to meet his burden of proof as to the unwarrantable failure designation.

C. Order No. 8230315 – Failure to Equip Truck with Adequate Brakes

To find a violation of section 77.1605(b), the Judge determined that the fact of the violation could be established on either of two separate grounds. First, the Secretary could show that the condition of the brakes on Johnson's truck caused the fatal accident. If the brakes played a role in the accident, the Judge reasoned that the inadequacy of the brakes would be self-evident. Failing to establish the brakes' role in the accident, the Secretary could also prove a violation by showing that the defects in the brakes were significant enough to cause the brakes to fail during typical usage of the vehicle. 35 FMSHRC at 1951. The Judge ultimately found that the Secretary had failed to establish either theory and vacated the order.

On appeal, the Secretary argues that the Judge should be reversed because his analysis concerning this second order was predicated on his prior finding that the Secretary had failed to prove that the truck was overloaded. The Secretary also contends that the Judge should not have credited the testimony of Premier's expert witness over his expert witness.

We conclude that the Judge's finding that the brakes did not cause the fatal accident is supported by substantial evidence.[9] The events leading up to the accident were not indicative of an accident caused by a brake failure. Prior to the accident, Johnson complained that he was having difficulty steering his vehicle. Tr. 139–40. The problem was serious enough that Johnson felt the need to pull the truck temporarily out of service to examine the vehicle.[10] Additionally, at the scene of the accident there were no skid marks to indicate that Johnson had unsuccessfully attempted to slow or stop his vehicle. Rather, the tire tracks indicated that Johnson drove straight into the berm.

Furthermore, Premier's expert witness advanced a plausible theory of causation that better fit the evidence in the record. The expert hypothesized that Johnson's truck

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[9] When reviewing an Administrative Law 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)).

[10] We note that during the accident investigation, it was discovered that the truck's steering system was not well maintained. Several seals on the truck's steering mechanism had been installed backwards, resulting in a leakage of power steering fluid. 35 FMSHRC at 1948.

may have been stuck in idle mode, causing both the brakes and steering to be simultaneously rendered ineffective. 35 FMSHRC at 1949–50. While the expert's testimony did not definitively conclude that the accident was caused by the truck slipping into idle mode, the existence of the expert's alternate theory of causation substantially detracts from the Secretary's theory of the case. [11]

Next, we examine the Judge's finding that the defects in the truck's brakes were not significant enough to cause the brakes to fail in typical usage. It was stipulated that the service brakes on Johnson's truck had some defects, but that alone is insufficient to constitute a violation of section 77.1605(b). *See* 35 FMSHRC at 1937. Neither party's expert witness testified that the defects were great enough to render the brakes completely inoperable. Rather, the disagreement lies in whether the brakes, in the condition in which they were found during MSHA's investigation, would have been adequate to stop Johnson's truck on the roads it typically travels.

The crux of the Judge's analysis on this point is the weight he gave to the testimony of each party's expert witness. The Secretary's expert witness testified that the faults in the truck's service brakes would have prevented Johnson from safely stopping his vehicle and that it was likely that the truck was traveling at a speed of more than 10 miles per hour. However, the Judge gave little weight to this opinion due to the witness' lack of experience with steering systems, inconsistencies in his testimony concerning the speed of the truck and the condition of the parking brake, and "generally poor reasoning." *Id.* at 1951. The Judge also considered the fact that the Secretary's expert appeared to have changed his mind on whether the speed at which the truck was driven contributed to the accident. *Id.* at 1946.

At the same time, the Judge found that the testimony of Premier's expert witness was well explained. *Id.* at 1951. Premier's expert witness testified that the defects in the service brakes were not extensive, with only one of the six drum brakes too worn to have functioned. Notwithstanding this defect, the expert testified that Johnson should have been able to stop his vehicle traveling at a rate of 10 miles per hour. *Id.* Similarly, Premier's expert testified that the presence of grease on the brake drums and evidence of past overheating would not have a meaningful effect on the brake's performance. *Id.* at 1947.

A Judge's determinations of the weight given to expert opinions may not be overturned lightly. *Farmer*, 14 FMSHRC at 1541; *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). The Commission has recognized that, because the Judge "has an opportunity to hear the testimony and view the witnesses[,] he [or she] is ordinarily in the best position to make a credibility determination." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)).

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[11] Of course, as a general matter, in order to prove a violation of this standard requiring adequate brakes, the Secretary is not required to prove that the violation caused an accident.

Although the Secretary offered some evidence that the brakes on Johnson's truck were incapable of stopping the truck, such evidence was mainly derived from testimony from a witness that the Judge determined not to be credible. We see no reason to take the extraordinary step of disturbing the Judge's credibility determination. Accordingly, we affirm the vacation of Order No. 8230315.

III.

Conclusion

For the foregoing reasons, we affirm the Judge's decision removing the unwarrantable failure designation for failure to maintain full control of the truck and vacating the order alleging a failure to equip the truck with adequate brakes.

Mary Lu Jordan, Chairman

Michael G. Young, Commissioner

Patrick K. Nakamura, Commissioner

William I. Althen, Commissioner

Commissioner Cohen, dissenting:

This case involves a fatal accident to Steve Johnson, the chief mechanic of Trivette Trucking ("Trivette"). Trivette was an independent contractor, hauling coal for Premier Elkhorn Coal Company. On the day of the accident, Johnson was driving a Trivette-owned truck and lost control of his vehicle on a road with a 15–18% grade.

Following an investigation, MSHA issued citations to both Trivette and Premier Elkhorn, charging both companies with violations of 30 C.F.R. § 77.1607(b), which requires operators to maintain full control of moving equipment, and 30 C.F.R. § 77.1605(b), which requires adequate brakes on mobile equipment. The Premier Elkhorn case came before a Commission Judge who conducted a hearing, following which he dismissed all charges. *Premier Elkhorn Coal Co.*, 35 FMSHRC 150 (Jan. 2013) (ALJ). In critical part, the Judge excluded significant evidence offered by the Secretary which tended to show that the truck Johnson was driving was grossly overloaded, that the trucks driven by Trivette employees in hauling coal for Premier Elkhorn were routinely overloaded, and that the manufacturer of the truck had issued a prominent warning that driving an overloaded truck can cause component failure leading to injury and death.

Following the issuance of the *Premier Elkhorn* decision, the Secretary and Trivette agreed, before the same Judge, that the *Trivette* case could be decided on cross-motions for summary decision, based on the evidentiary record made in the *Premier Elkhorn* case and joint stipulations. The Judge then issued his decision in this case, (1) upholding the section 77.1607(b) violation against Trivette but reducing the negligence from high to none, eliminating the designation of unwarrantable failure, and reducing the penalty to $1,000, and (2) dismissing the order which charged a violation of section 77.1605(b). *Trivette Trucking*, 35 FMSHRC 1934 (June 2013) (ALJ). The Secretary appealed both decisions, and the Commission directed review.

Earlier today, the Commission released its decision in *Premier Elkhorn Coal Co.*, 38 FMSHRC __, KENT 2011-827 (July 8, 2016). Because I could not conclude that the Judge's erroneous exclusion of evidence constituted harmless error, and because I disagreed with my colleagues' consideration of the Judge's handling of the two citations, I dissented from the majority opinion in that case. 38 FMSHRC __, slip op. at 13–18.

I incorporate my dissenting opinion in *Premier Elkhorn* herein. For the same reasons expressed therein, I renew my dissent here. I would vacate and remand this case so the Judge[1] could properly consider all of the Secretary's evidence in analyzing the

[1] Judge Jeffrey Tureck, who decided this case, has retired. I would direct Chief Judge Robert Lesnick to appoint another Judge to handle this case on remand.

level of Trivette Trucking's negligence in the section 77.1607(b) violation and in determining whether the company committed a violation of section 77.1605(b).

Robert F. Cohen Jr., Commissioner

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