FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. KENT 2013-196-R KENT 2013-197-R
CAM MINING, LLC	:	

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

DECISION

BY: Jordan, Chairman; Nakamura and Althen, Commissioners

These contest proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). At issue are a citation and order which the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to CAM Mining, LLC ("CAM"). The citation alleges a violation of 30 C.F.R. § 75.220(a)(1)[1] for the failure to follow the mine's approved roof control plan by leaving insufficient stumps during retreat mining. The order alleges a violation of 30 C.F.R. § 75.360(b)(3)[2] for failing to document the aforementioned hazard during the preshift examination. MSHA designated both violations as being "significant and substantial" ("S&S") and resulting from an unwarrantable failure to comply.[3]

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[1] 30 C.F.R. § 75.220(a)(1) states that:

> Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered.

[2] 30 C.F.R. § 75.360(b) requires that preshift examinations be conducted in working places and approaches to worked-out areas where miners will work or travel during the subsequent shift.

[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."

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

The Administrative Law Judge affirmed the citation and order as written. He found that both the citation and order were "validly issued" to CAM but did not specifically address the S&S and unwarrantable failure allegations. 36 FMSHRC 2204, 2223 (Aug. 2014) (ALJ). On review, CAM challenges the Judge's findings as to the validity of the preshift examination order and the S&S and unwarrantable failure designations for both violations.

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

I.

Factual and Procedural Background

CAM operates an underground coal mine in Kentucky. The mine has an approved roof control plan that permits it to engage in retreat mining, whereby CAM makes cuts in the pillars of coal that were originally left for roof support as mining advanced into the coal seam. The roof control plan permits CAM to take two to three cuts on each side of a 60-by-50 foot pillar, forming a chevron pattern. *See* CAM Ex. G. Cuts must be made at least six feet away from the corners of the pillar so that sufficient coal remains to help temporarily support the roof. The remaining coal on the outby side of the pillar is referred to as a "stump."

On October 17, 2012, MSHA Inspector Carl Little was inspecting the seven entries along the 001/003 super-section of the mine that was engaged in retreat mining. 36 FMSHRC at 2218; Tr. 257–58. At the breaker line,[4] Little looked across the intersection and noted that the stumps appeared significantly less than the six-foot minimum required by the roof control plan. Tr. 58–59, 68–70, 260. Little estimated that the stumps measured between one to five feet, with over half of the stumps measuring three feet or less. 36 FMSHRC at 2215 (citing Sec'y Ex. 5, Tr. 321, 322).

The row of columns in the worked-out area adjacent to the active workings had been mined during the previous day. Since mining began on the row, CAM had performed two preshift examinations of the area. Tr. 270. When Little reviewed the preshift reports, he found no mention of the inadequately sized stumps.

Based on these observations, Little issued Citation No. 8273702, alleging a violation of 30 C.F.R. § 75.220(a)(1), and Order No. 8273703, alleging a violation of 30 C.F.R. § 75.360(b)(3). Sec'y Exs. 1–2. Citation No. 8273702 states that the operator failed to leave the minimum size stumps as required in the approved roof control plan. Order No. 8273703 states

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"an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

[4] The breaker line is the most inby point of each entry on the working section where timbers are set to help temporarily support the roof during the retreat mining process. Miners are not permitted to work or travel inby the breaker line. *See* 36 FMSHRC at 2206, 2211–12; CAM Ex. G.

that CAM failed to conduct an adequate preshift examination because the conditions for which Citation No. 8273702 was issued were not observed by the preshift examiner, reported to the operator, or corrected prior to the beginning of the shift. Both of the violations were designated as S&S and as unwarrantable failures with high negligence. *Id.*

In his decision, the Judge affirmed both the citation and the order. Crediting the testimony of Inspector Little, the Judge found that CAM had taken three cuts from each side of the pillars, and, in doing so, had failed to leave the six-foot stumps required under the roof control plan. The Judge rejected CAM's arguments that the reduced size of the stumps could be explained by sloughage or permitted rounding of the pillar's corners. Instead, the Judge concluded that the evidence of greatly undersized stumps, some only one to three feet wide, strongly suggested that CAM had mined more coal from the pillars than the roof control plan allowed. The Judge credited the Inspector's testimony and found that the inadequate stumps could reduce the stability of the roof in the active workings and would pose a hazard to miners working outby in the next row of pillars. 36 FMSHRC at 2215–16.

Concerning the preshift examination, the Judge found that CAM was required to examine the stumps from the breaker line because sections 75.360(b)(3) and (11)(i) specifically require that the preshift examination be conducted in "approaches to worked-out areas" and that such examinations identify roof control violations. The Judge did not fully articulate how subsection 75.360(b)(3), the cited standard, could be interpreted to include areas outside the approach to the worked-out area in the preshift examination. Rather, the Judge concluded that 30 C.F.R. § 75.360(b)(11) requires the preshift examiner to examine the entire subsection, regardless of whether miners will work or travel in that area. 36 FMSHRC at 2222.

II.

Disposition

A. Order No. 8273703 – Failure to Perform an Adequate Preshift Examination

Section 75.360(b) states in relevant part:

> The person conducting the preshift examination shall examine for hazardous conditions and violations . . . *at the following locations*:
> . . . .
> (3) Working sections and areas where mechanized mining equipment is being installed or removed, if anyone is scheduled to work on the section or in the area during the oncoming shift. The scope of the examination shall include the working places, *approaches to worked-out areas* and ventilation controls on these sections and in these areas, and the examination shall include tests of the roof, face and rib conditions on these sections and in these areas.

30 C.F.R. § 75.360(b)(emphasis added).

The parties disagree as to the meaning of section 75.360(b)(3).[5] CAM argues that the preshift examination is limited to the areas specified in section 75.360(b)(3), i.e., working places, approaches to worked-out areas, and ventilation controls on these sections and in these areas. CAM contends that an examiner is not responsible for reporting hazards or violations that exist outside the areas expressly identified in section 75.360(b)(3). The Secretary, however, disagrees and argues that requiring the examiner to include all hazards visible from the examination area is consistent with the history and purpose of the standard.

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). If, however, a "regulation is silent or ambiguous with respect to the specific point at issue, we must defer to the agency's interpretation as long as it is reasonable." *Tenet HealthSystems Healthcorp. v. Thompson*, 254 F.3d 238, 248 (D.C. Cir. 2001). *See generally Auer v. Robbins*, 519 U.S. 452, 457 (1987).

The plain purpose of the regulation is to protect miners on working sections and where mechanized equipment is being installed or removed. It would be antithetical to that purpose if a preshift examiner could turn a blind eye to observable conditions that create hazards within the designated areas merely because the source of the hazard is in an area outside the specific area the examiner must traverse. Section 75.360(b)(3) requires that a preshift examination be conducted "at" the approaches to worked-out areas. "At" is an imprecise term that can mean "in" or "near" a specified location. *The American Heritage Dictionary of the English Language* 112 (4th ed. 2009). Nothing in the standard excludes a preshift examiner from reporting a hazard to miners in working areas because the hazard arises from outside the specific areas traveled in the preshift. Therefore, we conclude that section 75.360(b)(3) requires preshift examiners to report observable conditions regardless of where the condition is located if the condition creates a hazard within working sections or an area where mechanized equipment is being installed or removed.

Were we uncertain of the proper interpretation, we would find the regulation ambiguous and recognize that the Secretary's interpretation is reasonable and must be accorded controlling deference. The Secretary's interpretation does not, as CAM argues, require the examiner to enter

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[5] In its reply brief, CAM claims that the order should be vacated because it was not given fair notice of the Secretary's interpretation of the preshift standard. The Secretary filed a motion to strike CAM's fair notice argument, claiming that the issue was not raised in CAM's Petition for Discretionary Review. To the extent that the issue of notice was raised in the petition, it was limited to the argument that the Secretary was advancing a new position under a 2012 revision to 30 C.F.R. § 75.360(b) which added section 75.360(b)(11). PDR at 2. Because our holding is based on section 75.360(b)(3), which predated the 2012 revisions, we need not address issues arising from the Judge's consideration of section 75.360(b)(11). Accordingly, the Secretary's motion to strike is moot.

the worked-out area. The Judge found that the stumps were clearly visible from the breaker line while the examiner was making other required observations. 36 FMSHRC at 2221. This interpretation does not require a preshift examination of the entire mine.

If a hazardous condition that would affect miners outby can be seen from the examination area, then our and the Secretary's interpretation of section 75.360(b)(3) requires such a condition to be recorded during the preshift examination and abated before the start of the shift. As stated, such an interpretation is consistent with the standard's plain language and furthers the purpose of the preshift examination—to prevent miners from being exposed to hazardous conditions created during the prior shift. *See* 57 Fed. Reg. 20,868, 20,893 (May 15, 1992) (codified at 30 C.F.R. pt. 75) (the preshift examination "allows miners on the oncoming shift to be notified if hazards exist and allows corrective actions to be taken"). We note that CAM's interpretation is inconsistent with its own practice of checking the roof and timbers located in the intersection beyond the breaker line. Tr. 185–86.

Based on the foregoing, we find that the Secretary's interpretation is reasonable and deserving of controlling deference. Accordingly, we affirm the fact of the violation.

B. Citation No. 8273702 and Order No. 8273703 – S&S and Unwarrantable Failure

The Judge concluded that Citation No. 8273702 and Order No. 8273703 were "validly issued to CAM Mining LLC." 36 FMSHRC at 2223. However, the Judge did not expressly make findings as to S&S or the unwarrantable failure designation. Both the Secretary and CAM acknowledge that the Judge erred in failing to provide any analysis of these issues.

Pursuant to Commission Rule 69(a), a Judge is responsible for addressing "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). The Commission requires that its Judges analyze and weigh all probative evidence, make appropriate findings, and explain the reasons for their decisions. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222 (June 1994); *Martin County Coal Corp.*, 28 FMSHRC 247, 262–63 (May 2006) (reversing and remanding ALJ's decision to uphold violation, S&S and unwarrantable failure because the opinion "fails to articulate the basis for his conclusion and omits necessary findings.").

Because the Judge failed to address S&S and unwarrantable failure in his decision, we would normally remand the case to make these findings. However, we need not do so where the record so clearly supports the Secretary's S&S and unwarrantable failure allegations. *See American Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (where evidence supports only one conclusion, remand on that issue is unnecessary) (citing *Donovan v. Stafford Constr. Co.*, 732 F.2d 954, 961 (D.C. Cir. 1984)).

1. S&S

First, we address whether the violations were S&S. In *Mathies Coal Company*, the Commission explained:

> 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.

6 FMSHRC 1, 3–4 (Jan. 1984) (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

The record is clear that CAM's failure to leave adequate stumps severely jeopardized the integrity of the roof, exposing miners to the hazard of working under an inadequately supported roof. At the time of the inspection, the roof conditions had deteriorated to the point where it was possible to hear the roof working, and timbers were starting to fail in the area that had been mined during the previous shift. Tr. 265. The danger of the roof was so pronounced that Inspector Little found it necessary to require CAM to skip an entire row of pillars in order to abate the hazard.

The Judge credited Inspector Little's assessment of the risk posed by the inadequate stumps and Graduate Engineer Robert Bellamy's testimony that even a one-foot reduction in the stump size across an entire row would be a "big concern." 36 FMSHRC at 2211. The Judge also credited the inspector's testimony that the failure of the roof in the worked out area could adversely affect the miners mining the next pillar and that the conditions were "likely to cause a very serious accident or fatality if the practice continues." *Id.* at 2210. Given these findings, it is reasonably likely that the hazard could result in an injury of a reasonably serious nature. *See Halfway, Inc.*, 8 FMSHRC 8, 12–13 (Jan. 1986) (affirming an S&S determination for failing to comply with the mine's roof control plan when miners could have worked or traveled in areas with inadequately supported roof).

2. Unwarrantable Failure

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is characterized by "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,* 52 F.3d at 136 (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). These factors need to be viewed in the context of the factual circumstances of a particular case. *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). All of the relevant facts and circumstances of each case must be examined to determine if an operator's conduct is aggravated or whether mitigating circumstances exist. *Id.*

As discussed above in our S&S analysis, the record is clear that the failure to maintain adequate stumps created a high degree of danger. In addition, CAM should have known about the deficient stumps because the hazardous condition was so extensive and obvious. All of the stumps on the 001/003 super-section were less than the six-foot minimum, and many of them were significantly deficient. Four of the stumps were two feet or less in width. 26 FMSHRC at 2215.

Such a striking difference in size should have been obvious during even the most cursory exam. Yet, despite the fact that the Judge found that it was "entirely possible to observe and estimate the size of the stumps from the breaker line," examiners traveled to the breaker line but did not report observable conditions across the crosscut during two separate preshift examinations. *Id.* at 2221.

Moreover, CAM's repeated failure to report the inadequate stumps and abate the hazard exposed at least two shifts of miners to highly dangerous conditions. The row of pillars had been cut during the day shift the day prior to the MSHA inspection. Tr. 59–60. That means that the hazardous condition had lasted in excess of 24 hours before the hazardous condition could be abated. *See generally Windsor Coal Co.*, 21 FMSHRC 997, 1001–04 (Sept. 1999) (finding that a duration in excess of one shift weighs in favor of finding an unwarrantable failure).

While the record does not contain any evidence that CAM was placed on notice that greater efforts were required to comply with its roof control plan or preshift examination requirements, the evidence supporting the other factors overwhelmingly weighs in favor of the unwarrantable failure designations. Accordingly, we affirm the Judge's S&S and unwarrantable failure determinations.

III.

Conclusion

For the foregoing reasons, we affirm the Judge's finding of a violation for failing to perform an adequate preshift examination. We also conclude that the record supports the S&S and unwarrantable failure designations for both Citation No. 8273702 and Order No. 8273703.

Mary Lu Jordan, Chairman

Patrick K. Nakamura, Commissioner

William I. Althen, Commissioner

Commissioners Young and Cohen, concurring in part and dissenting in part:

We agree with the majority's reasoning and its decision in affirming the Judge's finding of a violation. We also agree with the conclusion that the nature of the violation as S&S is irrefutably established by the record. However, we do not join in its short-circuiting—well-intentioned and understandable though it may be—of the review process on the unwarrantable failure findings.

Our principal concern is the lack of any analysis or even an express conclusion on the unwarrantable failure issue by the Judge. The determination of an unwarrantable failure is inherently a judicial function. It is both fact-intensive and committed to the subjective discretion of the trier of fact. *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009) (vacating and remanding ALJ's finding for failure to address all the elements of unwarrantable failure, and failure to identify the relevant factors that affected his finding); *see also Martin County Coal Corp.*, 28 FMSHRC 247, 261 (May 2006) ("The Commission requires that a judge analyze and weigh all probative record evidence, make appropriate findings, and explain the reasons for his or her decision."). While the majority correctly notes that the record clearly contains substantial evidence that would support a finding of unwarrantable failure, the operator did, in fact, contest the issue, both before the Judge and on review, and argued at length that the finding was not appropriate. *See* CAM Post Hrg. Br. at 33–36; PDR at 22–25. As the operator notes, and as the Secretary acknowledges,[1] the Judge's opinion doesn't discuss "unwarrantable failure" beyond noting the inspector's designation of the violation as such in the order. Thus, there is no exposition of the specific criteria or the weight given to those criteria in determining that the violations here arose from the operator's unwarrantable failure.

The Commission, citing the D.C. Circuit Court of Appeals, has noted that "'[p]erhaps the most essential purpose served by the requirement of an articulated decision is the facilitation of judicial review.'" *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009) (quoting *Harborlite Corp. v. ICC*, 613 F.2d 1088, 1092 (D.C. Cir. 1979)). "Without findings of fact and some justification for the conclusions reached by a judge, the Commission cannot perform its review function effectively." *Id.* (citing *Anaconda Co.*, 3 FMSHRC 299, 299–300 (Feb. 1981)). The credibility of the Commission's deliberative process depends on the transparency afforded by clearly articulated bases in our decisions.

In this case, the operator expressly noted the Commission's well-established requirement that the factors relevant to the determination of the unwarrantable failure issue must all be at least acknowledged, and that relevant factors must be discussed.

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[1] The Secretary did not argue that the Commission should conclude that the violations were established as S&S and unwarrantable by the record, requesting instead that the issues be remanded for determination.

As the majority notes, there is no evidence in the record that the operator was on notice that greater efforts at compliance were necessary. Slip op. at 7. Arguably, then, this is a factor weighing in favor of the operator. The Judge's failure to either decide that the factor is not relevant or is outweighed by the other factors requires remand because the evaluation of the relative weight assigned to various factors is the province of the Judge. *Sierra Rock Prods., Inc.*, 37 FMSHRC 1, 6 (Jan. 2015) (noting that "[i]t is ordinarily the province of the Judge to engage in an analysis and balancing of the unwarrantability factors in the context of the cited standard in the first instance."). In *Sierra Rock Products*, the Commission remanded the case to the Judge for further consideration of the operator's good faith belief, recognizing that consideration of that sole factor needed to be "weighed against other unwarrantability factors as re-examined in the context of the cited standard." *Id.* at 6–7. As we have held:

> These factors need to be viewed in the context of the factual circumstances of a particular case, and some factors may be irrelevant to a particular factual scenario. But all of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether the level of the actor's negligence should be mitigated.

Consolidation Coal Co., 22 FMSHRC 340, 353 (Mar. 2000); *see also Martin County Coal*, 28 FMSHRC at 257 (stating that "fact-finding is not the province of the Commission") (citing *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222–23 (June 1994) (holding remand appropriate when the Judge failed to adequately address evidentiary record)).

A remand would reinforce the important and central contribution Judges make in weighing the totality of evidence presented in order to establish or refute a charge of unwarrantable failure. Unlike an S&S determination, which often involves a somewhat simpler, or at least more direct, analysis of the danger presented by a hazard and the violation's contribution to it, unwarrantable failure requires an assessment and weighing of various different factors. The fact that it involves weighing factors reinforces the need to show how the Judge's conclusion is grounded on objective facts in the record and their relative values under the unique circumstances presented in each case.

We, therefore, would remand the case for the Judge to make and support an express finding on the unwarrantable failure issue. Such an outcome would be consistent with the requirements we have established and our general practice to remand a decision to the Judge for further consideration when decisions do not conform to those requirements in deciding whether a violation did or did not result from the operator's unwarrantable failure.

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Robert F. Cohen, Jr., Commissioner

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