FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 12 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. CENT 2016-95-M
v.	:	
ARNOLD STONE, INC.	:	

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

DECISION

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

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"), and involves a citation issued to Arnold Stone, Inc. ("Arnold Stone") by the Department of Labor's Mine Safety and Health Administration ("MSHA"). MSHA alleged that a malfunctioning lockout system on a skid loader constituted a violation of 30 C.F.R. § 56.14100(b). MSHA further alleged that the violation was reasonably likely to cause a permanently disabling injury, was significant and substantial ("S&S"),[1] was the result of reckless disregard for the safety of miners, and was an unwarrantable failure to comply with the relevant standard.[2]

The Judge found that the violation was S&S. However, she held that the violation was not an unwarrantable failure and was the result of high negligence rather than reckless disregard and imposed a reduced penalty of $10,000. The Secretary of Labor filed a petition for discretionary review challenging the Judge's determination as to unwarrantable failure and the penalty assessment, which we granted.

All four Commissioners would reverse the Judge's unwarrantable failure determination. Acting Chairman Althen, Commissioner Young, and Commissioner Jordan would find that the operator failed to abate a known, obvious, S&S danger encountered daily by miners. Therefore,

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[1] 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."

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

they would conclude that the operator's failure to protect its miners from the danger was the result of its unwarrantable failure. However, while Commissioner Cohen would also reverse the Judge's unwarrantable failure determination, he writes separately on the issue of unwarrantable failure.

Acting Chairman Althen and Commissioner Young would affirm the Judge's penalty assessment, while Commissioners Jordan and Cohen would vacate and remand the Judge's penalty assessment. The position of Commissioners Jordan and Cohen on remanding the penalty is set forth in Commissioner Cohen's separate opinion. Therefore, because there is no majority on this issue, the Judge's assessment of penalty shall stand as if affirmed. *Pennsylvania Elec. Co.*, 12 FMSHRC 1562, 1563 (Aug. 1990), *aff'd on other grounds,* 969 F.2d 1501 (3d Cir. 1992).

I.

Factual and Procedural Background

A. Facts

The mine in question is a surface limestone mine located in Texas and owned by Mike Arnold. 38 FMSHRC 1746, 1746-47 (July 2016) (ALJ). In August 2015, an MSHA inspector inspected a skid steer loader used at the mine since 2014. The loader utilized a large bucket to haul stone to a splitter 100 feet away. Tr. 20. The loader had four wheels, and was operated by a driver in a small compartment with controls and a seat.

Because of the tight space in the compartment, a driver could accidentally touch the controls while entering or exiting the loader. The loader had a lockout system comprised of a seatbelt lockout and a lockout switch. The purpose of the lockout system was to prevent the equipment from functioning if an operator touched the controls while not wearing a seatbelt. 38 FMSHRC at 1747.

The inspector met with two miners: the driver of the skid loader, Marcus Sanchez, and the site supervisor, Dennis Sorrells. *Id.* The inspector testified that only two miners typically work at the mine. Tr. 27. Sanchez informed the inspector that there had been an intermittent problem with the lockout system for a lengthy period but that the defect had become permanent in the months preceding the inspection. Specifically, Sanchez demonstrated to the inspector that the lockout system was not working. Therefore, if the loader's engine was running and a driver accidentally touched the controls, the loader would move forward even if the seat belt were unbuckled. 38 FMSHRC at 1748.

Sanchez told the inspector that miners were aware of the lockout defects on the loader and exercised safety precautions when working near the loader. Sanchez claimed that miners generally kept their distance from the equipment and that the driver turned off the engine of the loader before exiting the machine. *Id.* As long as the engine was turned off, the loader would not move, even if a driver accidentally touched the controls.

Although Sorrells, the site supervisor, knew about the longstanding lockout defects, the operator did not try to fix the defects prior to the inspection on August 12. *Id.* at 1749-50. According to the testimony, only Mike Arnold, the owner, had authority to provide for the repair of the defects, and Sorrells never informed him of the problem. *Id.* at 1753.

The inspector believed that if the loader unexpectedly lurched forward, it could throw the driver from the machine and also might hit anyone standing nearby, resulting in injury to miners. *Id.* at 1747-48, 1751. Moreover, he noted that inspection records of the operator did not identify the defect, even though the loader was used daily and was subject to a routine pre-operation inspection. *Id.* at 1748; Resp't Ex. D. He issued the citation alleging that the violation was significant and substantial, and an unwarrantable failure to comply with the cited standard. MSHA proposed a special assessment of $63,000 for this violation. 38 FMSHRC at 1746.

B. The Judge's Decision

The Judge found that the operator had violated section 56.14100(b).[3] *Id.* at 1749-50. In addressing the unwarrantable failure issue, the Judge applied each factor of the traditional seven-factor unwarrantable failure test to the facts presented. *Id.* at 1751-54; *see also IO Coal Co.*, 31 FMSHRC 1346, 1350-57 (Dec. 2009). Specifically, the Judge considered the length of time the violation existed, extensiveness of the violation, whether the operator had received notice that greater efforts were necessary for compliance, the operator's efforts (or lack thereof) to abate the violation, the degree of danger posed by the violation, the obviousness of the violation, and the operator's knowledge of the existence of the violation. 38 FMSHRC at 1751-54.

The Judge found key factors significantly aggravating. According to the Judge, "the violation was obvious to the miners who operated the machine. Instead of having the switch repaired, they learned to work carefully around it to avoid injury." *Id.* at 1754. Moreover, the violation had existed, at least intermittently, for 18 months prior to the inspection – a factor the Judge specifically cited as aggravating. *Id.* at 1753, 1754. Further, the Judge recognized the "well-settled law that an operator's knowledge of the existence of a violation may be established not only by demonstrating actual knowledge, but also by showing that the operator 'reasonably should have known of the violative condition.'" *Id.* at 1754 (quoting *IO Coal*, 31 FMSHRC at 1356-57). Applying this principle, the Judge found knowledge to be an aggravating circumstance because Sorrells, the site supervisor and an agent of the operator, knew that the lockout system was broken. 38 FMSHRC at 1754. In sum, the Judge found the operator, through its agent, knew for 18 months of an obvious and S&S violation, and, nonetheless took no action to abate the violation.

Regarding other unwarrantable failure factors, the Judge did not make any findings that mitigated the known, obvious, and longstanding S&S violation. Indeed, the Judge essentially only found other factors not especially aggravating. For example, because the individual owner lacked knowledge of the violation, the Judge held that the failure to abate was not

[3] 30 C.F.R. § 56.14100(b) states: "Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons."

"significant[ly] aggravating" and that, because only two miners worked around the equipment, the degree of danger was not "especially high." *Id.* at 1753-54. These are not "mitigating" findings. Finally, the Judge found that because MSHA had not previously cited the operator for this type of violation, the operator had not been placed on notice that greater efforts were necessary for compliance. *Id.* at 1753.

Despite finding several factors highly aggravating and other factors either not relevant or only not especially aggravating, the Judge concluded that the violation was not the result of an unwarrantable failure. *Id.* at 1754. She assessed a penalty of $10,000 rather than the proposed penalty of $63,000. *Id.* at 1755.

II.

Unwarrantable Failure to Comply

In *Emery Mining Corporation.*, 9 FMSHRC 1997, 2001 (Dec. 1987), the Commission explained 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).

The operator has not disputed on review that the violation existed for many months, that it had knowledge of the violation through its site supervisor, and that the violation was obvious. Nor does the operator dispute that the violation was reasonably likely to result in reasonably serious injuries. Therefore, these findings by the Judge constitute the law of the case, and demonstrate the occurrence of a known and obvious violation that resulted for more than a year in a reasonable likelihood of a miner being hit by the skid loader thereby causing serious injury or death. *See Manalapan Mining Co.*, 36 FMSHRC 849, 852 (Apr. 2014) (stating that when a Judge's decision on certain issues is not challenged on appeal, the Judge's decision on such issues continues to govern); *see also Concrete Works of CO, Inc. v. City and Cty. of Denver*, 321 F.3d 950, 992-93 (10th Cir. 2003); *United States v. Bell*, 988 F.2d 247, 250 (1st Cir. 1993).[4]

Under these facts, there is no need for a mechanical recitation or lengthy discussion of other unwarrantable failure factors. Without doubt, the violation was the result of the operator's unwarrantable failure.

Here, the Judge found and the operator has not challenged that the operator had actual knowledge of an obvious S&S violation for a period as long as 18 months and did not take any actions to abate the violation or the danger. It is difficult to conceive of circumstances in which

[4] In recounting the facts, the Judge noted that the site supervisor informed the inspector that management had told the miners to continue to use the skid loader because it was too expensive to fix. The testimony did not specify who in management was told of the problem.

other factors could serve to mitigate such conduct.[5] If mitigation were somehow possible, it certainly is not present here.

The Judge found lack of abatement was "not a significant aggravating factor" because only the owner had authority to authorize repair, and he did not know of the violation. 38 FMSHRC at 1753. It may be correct that, under the operator's policies, the corporate owner was the only person with authority to fix the defect. An operator, however, may not insulate itself against the duty to address known hazards by placing the authority to authorize repairs necessary for safety in one (or several individuals) and then permit agents with knowledge of the defects to fail to report the defects in a timely manner to individuals responsible for authorizing repairs. It is the duty of the operator to make agents aware of their obligation to prevent and correct violations, especially when the violations are S&S. Therefore, the operator's failure to abate a long-existing, obvious, known, dangerous violation is an aggravating factor lending additional support to an unwarrantable failure finding.

The violation was S&S – that is, reasonably likely to result in a serious injury – and the degree of danger increases when an operator ignores a chronic problem. The Judge's finding that "only" two miners were exposed to this obvious and known danger over a lengthy period does nothing to mitigate the neglect demonstrated in this case. Under the facts of this case, substantial evidence does not support the Judge's decision. To the contrary, the facts mandate an unwarrantable failure designation.

When the evidence presented on the record supports no other conclusion, remand is unnecessary. *Am. Mine Servs., Inc.* 15 FMSHRC 1830, 1834 (Sept. 1993). Because the evidence overwhelmingly weighs in favor of an unwarrantable failure determination, it is unnecessary to remand this issue. Therefore, we reverse the Judge's determination. The violation in this case is an unwarrantable failure.

III.

Penalty Assessment[6]

The Judge below properly based the penalty assessment upon the statutory criteria. Further, the Commission and the Secretary have accepted the Judge's determinations on the penalty criteria. Therefore, we do not find any basis for remanding the Judge's discretionary determination of the appropriate penalty.

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[5] We do not see the need to rely on the Secretary's suggestion that we adopt a presumption of unwarrantable failure in these circumstances. Our decision rests upon and is limited to the facts of this case, which support only the conclusion that the violation was unwarrantable.

[6] Commissioner Jordan would remand the penalty assessment to the Judge and joins in Commissioner Cohen's opinion with regard to this issue. Therefore, this portion of the opinion represents only the views of Acting Chairman Althen and Commissioner Young.

Under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), Judges must consider six criteria in assessing a penalty: "[1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation."

The Commission has held that Judges must make findings of fact based on these statutory penalty criteria. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Once these findings have been made, a Judge's penalty assessment is an exercise of discretion "bounded by proper consideration of the statutory criteria and the deterrent purpose underlying the Act's penalty assessment scheme." *Id.* at 294; *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000). A penalty assessment is reversible if it lacks record support, is plainly erroneous, or otherwise constitutes an abuse of discretion.

The record supports the Judge's penalty assessment, and we do not find any basis to find the Judge erred or abused her discretion in setting the penalty. Indeed, she explicitly considered all penalty criteria.

The Judge found expressly that the operator had "little history of violations," was a small family operated business, had recently emerged from bankruptcy so the proposed penalty would constitute a hardship, and abated the violation in good faith. 38 FMSHRC at 1755. Record evidence introduced by the Secretary or a stipulation of the parties supports each of these findings. Obviously, these factors support the Judge's assessment.

Regarding negligence, MSHA asserted that the violation exhibited reckless disregard. The Judge found that the violation was a result of the operator's high negligence. The Secretary did not petition for review of this modification to MSHA's assessment and, thus, did not dispute this modification for purposes of the penalty assessment.

Finally, there is some discordance in the Judge's decision regarding degree of danger analysis for purposes of unwarrantable failure versus the penalty assessment. As found in our common decision, in considering degree of danger in the unwarrantable failure context, the Judge found the "degree of danger" was not "especially high," whereas in the penalty consideration, the Judge affirmed the inspector's finding of a reasonable likelihood of a permanently disabling injury. Of course, for purposes of evaluating the Judge's penalty determination, her finding in the penalty portion of her decision is the important finding. There, the Judge accepted the inspector's evaluation of gravity.

Although the gravity evaluation in the penalty portion of her opinion works to the detriment of the unwarrantable failure determination, it does not adversely affect but, in fact, sustains the penalty determination. In the Judge's unwarrantable failure analysis, she focused upon the "degree" of danger. She found that the exposure of only two miners to the defective equipment tempered the degree of danger rather than the gravity of the violation. The Judge's findings on S&S and gravity confirm that she found the violation created a grave danger, albeit

to two miners. We find no basis to remand with a suggestion that in assessing a penalty the Judge should find gravity greater than the assessment of the inspector.

Assessment of penalties is not science. The Judge must consider and address the six specific criteria. Here the Judge conducted the necessary analysis addressing every penalty criterion. MSHA has not argued for error in any of her findings, including her reduction of reckless disregard to high negligence. Certainly, MSHA cannot object to her acceptance of the inspector's gravity determination in her penalty analysis. We cannot find an abuse of discretion in an assessment of a $10,000 penalty upon a small and financially endangered operator that abated the penalty in good faith and whose pre-citation failure to abate, the Judge found, resulted from a flawed system for reporting equipment defects — a flaw that a $10,000 penalty to a small operator should be sufficient to correct.

Moreover, the Secretary has not challenged, and we have accepted, all of the Judge's findings on the statutory penalty criteria related to the penalty assessment. Indeed, the Secretary did not even argue that the Judge erred in evaluating any of the penalty criteria but simply requested in the last paragraph of his petition for discretionary review and brief that "for similar reasons" we should remand for a new penalty determination. PDR at 32.

An unwarrantable failure determination is a separate and distinct finding under the Mine Act. Such a violation results in its own distinct and separate enhanced sanction under section 104 of the Act.[7]

The record and the Judge's findings amply support the $10,000 assessment, and the decision most certainly is not plainly erroneous. We conclude that the Judge's penalty assessment does not constitute an abuse of discretion and find no reason for a remand to

[7] The Commission has held repeatedly that 30 C.F.R. Part 100, which governs the Secretary's proposal of penalties, does not bind Commission Judges. *Brody Mining, LLC*, 37 FMSHRC 1687, 1701-04 (Aug. 2015); *Wade Sand & Gravel Co.*, 37 FMSHRC 1874, 1876-77 (Sept. 2015); *Excel Mining, LLC*, 37 FMSHRC 459, 468-69 (Mar. 2015). That determination applies with full force to the penalty conversion calculator in Table XIV of Part 100. At the same time, we have held that when a Judge's penalty assessment varies substantially from MSHA's proposed assessment, the Judge should explain the reason for the variance. *Cantera Green*, 22 FMSHRC at 622; *Sellersburg Stone*, 5 FMSHRC at 293. Although the Judge did not offer such an explanation here, the reason for the variance is readily ascertainable.

MSHA specially assessed the penalty proposal pursuant to 30 C.F.R. § 100.5. That decision had the effect of increasing the MSHA-proposed penalty by approximately 600 percent over application of the regular point table — that is, from approximately $11,000 to $63,000. However, if the accepted change from reckless disregard to high negligence were taken into account, the MSHA proposed penalty under the regular point schedule would have been about $3,500 and under its special assessment calculation approximately $24,000. Under these circumstances, the MSHA proposed assessment should not disturb the Judge's eminently reasonable final assessment.

reconsider an issue the Judge has thoroughly considered and adequately explained. Therefore, we would affirm the Judge's assessment of a $10,000 penalty.

IV.

Conclusion

In sum, we hereby reverse the Judge's determination that the violation was not the result of an unwarrantable failure. The Judge's assessment of penalty for this violation shall stand as if affirmed.[8]

William I. Althen, Acting Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

[8] As stated above, while Acting Chairman Althen and Commissioner Young would affirm the Judge's assessment of penalty, Commissioners Jordan and Cohen would remand the penalty assessment. *See* slip op. at 2, 5 n.6.

Commissioner Cohen, concurring in part:

I agree with the majority that the record in this case compels a finding that Arnold Stone demonstrated an "unwarrantable failure . . . to comply with . . . mandatory health or safety standards" within the meaning of section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1). However, I disagree with my colleagues, Acting Chairman Althen and Commissioner Young, that, in view of the reinstatement of the unwarrantable failure designation, the Judge's assessment of the penalty as $10,000 should not be vacated and remanded for further consideration.

I write separately on the unwarrantable failure issue because I believe that the majority decision does not represent an adequate and complete analysis of this issue. The Judge's Decision and Order contains a complete description and analysis of the seven factors which the Commission repeatedly has identified as central to an understanding of why the designation of unwarrantable failure is or is not appropriate in a particular case. *See, e.g., San Juan Coal Co.*, 29 FMSHRC 125, 128 (Mar. 2007); *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009); *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013). However, the majority, under the rubric of "substantial evidence", has short-circuited the analysis which we require of Commission Judges. In doing so, the majority decision, in my view, fails to fulfil the Commission's institutional responsibility to specifically review the Judge's legal conclusions for error.

A. The Judge's Decision

The Judge found that Arnold Stone, Inc. violated 30 C.F.R. § 56.14100(b). In addressing the unwarrantable failure issue, the Judge applied each factor of the traditional seven-factor unwarrantable failure test to the facts presented. *See IO Coal*, 31 FMSHRC at 1350-57. Specifically, the Judge considered the length of time the violation existed, extensiveness of the violation, whether the operator had received notice that greater efforts were necessary for compliance, the operator's efforts (or lack thereof) to abate the violation, the degree of danger posed by the violation, the obviousness of the violation, and the operator's knowledge of the existence of the violation.

First, the Judge found that the violation had existed, at least intermittently, for 18 months prior to the inspection. Therefore, the Judge found that the violation had existed for a lengthy period and treated the length of time as an aggravating circumstance.

Second, the Judge found that "only one miner operated the skid loader at a time and there were only a handful of [miners] working around the machine at any given time." 38 FMSHRC at 1753. Citing *Dawes Rigging and Crane Rental*, 36 FMSHRC 3075, 3079-80 (Dec. 2014), the Judge found that the number of miners affected by a violation is relevant to determining extensiveness. The Judge then concluded that the violation was not extensive because few miners were affected. Therefore, the Judge weighed the extensiveness factor against an unwarrantable failure designation.

Third, the Judge found that because MSHA had not previously cited the operator for this violation or for similar violations, the operator lacked notice that greater efforts were necessary for compliance. As a result, the Judge concluded that the notice factor weighed against finding an unwarrantable failure.

Fourth, the Judge found that the operator did not seek to abate the citation prior to the inspection. However, the Judge found that the site supervisor's failure to inform the individual owner of the corporate operator of the violation hampered any potential abatement efforts because only the owner had authority to order repairs of equipment defects. Finding the individual owner lacked knowledge of the violation, the Judge held that the failure to abate was "not . . . significant[ly] aggravating". 38 FMSHRC at 1753.

Fifth, the Judge found that the violation did not pose an "especially high" degree of danger despite separately finding that the violation was "significant and substantial' ("S&S") and chronic.[1] *Id.* at 1754. The Judge reasoned that the violation did not pose a high degree of danger because few miners worked at the mine, a small family run operation, and thus the violation affected only a few miners. The Judge found that degree of danger did not weigh in favor of an unwarrantable failure finding.

Sixth, the Judge found that "the violation was obvious to the miners who operated the machine. Instead of having the switch repaired, they learned to work carefully around it to avoid injury." *Id.* The Judge treated obviousness as an aggravating circumstance.

Seventh, the Judge found that the operator was aware of the violation prior to the inspection. The Judge recognized the "well-settled law that an operator's knowledge of the existence of a violation may be established not only by demonstrating actual knowledge, but also by showing that the operator 'reasonably should have known of the violative condition.'" *Id.* Applying this principle, she found knowledge to be an aggravating circumstance because Sorrells, the site supervisor and an agent of the operator, knew that the lockout system was broken.

After reviewing each of the seven factors separately, the Judge weighed them together, and concluded that the violation was not the result of an unwarrantable failure because the mitigating circumstances offset the aggravating circumstances. She assessed a penalty of $10,000 rather than the proposed penalty of $63,000. *Id.* at 1755.

B. Unwarrantable Failure

In *Emery Mining Corporation.*, 9 FMSHRC 1997, 2001 (Dec. 1987), the Commission explained that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. Unwarrantable failure is characterized by such conduct as "reckless disregard,"

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[1] 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."

"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).[2]

Whether 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 was placed on notice that greater efforts were necessary for compliance. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2330 (Aug. 2013) (citing *Manalapan Mining*, 35 FMSHRC at 293; *IO Coal,* 31 FMSHRC at 1350-57). These seven 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. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000).

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[2] On appeal the Secretary states that the term "unwarrantable failure" in section 104(d) of the Mine Act, should include any failure by an operator to abate an obvious and known S&S violation for a significant period of time absent unusual mitigating circumstances. Leaving aside the question of whether we should consider this proposed statutory interpretation given that the Secretary raises it for the first time on appeal, I reject it.

Essentially, this is an attempt to create a new presumption: If "an operator [fails] to abate an obvious and known S&S violation for a significant period of time," the violation is necessarily an unwarrantable failure "unless unusual mitigating factors are present." PDR at 14. Under the Secretary's formulation, the factors of extensiveness, notice and efforts to abate the violation do not have to be considered. Additionally, the Secretary offers no explanation of the meaning of "unusual mitigating factors."

I do not think that the Secretary's attempt to establish a new presumption is at all helpful. The Commission has a well-established and quite serviceable approach: the Judge looks at seven factors. He or she does not have to give them equal weight. Indeed, the Judge is free to determine that in the particular circumstances of the case, one or more of the factors may be irrelevant. The Commission rightly has concluded that consideration of all seven factors serves two very important functions – first, it focuses the attention of the parties and the Judge on those factors which may be relevant to a determination of unwarrantable failure; second, it provides a full basis for the Commission to fulfill its review function if the Judge's decision is appealed.

The Secretary's proposal would add a new level of analysis. The Secretary would be able to prove unwarrantable failure through the traditional method of analysis, or – if he was unable to do so – if the violation was S&S, he could take a shortened approach to his burden of proof, and place a rebuttal obligation on the operator. This would greatly complicate analysis of unwarrantable failure issues, with no gain in clarity or accuracy.

In this case, the Judge found that the defective safety switch had not functioned properly for 18 months and that the mine supervisor, and thus the operator, knew of the violative condition during this period. The Judge also found that the violation was obvious, was reasonably likely to result in reasonably serious injuries, and that no efforts had been made to address the defects. There is no reason to disturb these findings by the Judge. However, the Judge erred in determining that the abatement, extensiveness, degree of danger, and notice factors weigh against an unwarrantable failure determination.[3]

The majority relies on the factors of duration, knowledge and obviousness, together with the fact that the violation was S&S. The majority then states, "[u]nder these facts, there is no need for a mechanical recitation or lengthy discussion of other unwarrantable failure factors." Slip op. at 4. In so saying, the majority undercuts the system of unwarrantable failure analysis which the Commission has carefully crafted over many years. The discussion of the factors is not "mechanical", and it certainly need not be "lengthy".[4] Rather, it serves to focus the parties and the Judge on a set of factors which may be relevant to a determination of unwarrantable failure. As the Commission said in *Manalapan Mining*:

> These seven 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. Nevertheless, 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.

35 FMSHRC at 293 (citations omitted).

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[3] The majority characterizes the Judge's decision as finding that these factors were "either not relevant or only not especially aggravating". Slip op. at 4. This description is grossly incorrect. While the Judge did find that the operator's efforts to abate the violative condition "was not a significant aggravating factor," and that the degree of danger was not "especially high," she expressly found that the violation was not extensive and that the operator had not been placed on notice that greater efforts were necessary. 38 FMSHRC at 1753-54. Moreover, in the paragraph where she weighed all of the factors together, the Judge expressly stated that "there are a number of factors that weigh against a finding of unwarrantable failure." *Id.* at 1754. In this regard, she stated, "[t]he extent of the violation was limited and it did not pose a high degree of danger. Further, the person with authority to repair the defect, Mike Arnold, was not aware of it, and had no notice that greater efforts toward compliance were necessary." *Id.* The majority ignores the fact that the Judge clearly considered the factors of danger and efforts to abate the violation as mitigating, and weighed them, along with extensiveness and notice, against the factors she found to be aggravating.

[4] My discussion of the four factors where I believe the Judge erred, *infra,* is quite brief.

I conclude that the Judge erred in considering that abatement, extensiveness, danger and notice were factors cutting against a finding of unwarrantable failure, and further conclude that a finding of unwarrantable failure is required in this case, for the following reasons:

1. Abatement

In discussing the operator's knowledge of the existence of the violation in a separate part of her opinion, the Judge concluded that the operator reasonably should have known of the violation because the site supervisor was aware of it. 38 FMSHRC at 1754. That finding is consistent with our precedent that an operator's knowledge is established when an operator reasonably should have known of the violation. *See Emery,* 9 FMSHRC at 2002-04; *Drummond Co.,* 13 FMSHRC 1362, 1367-68 (Sept. 1991). Indeed, the Judge found knowledge to be an aggravating factor. Despite finding the operator had knowledge of the violation, however, the Judge concluded that the operator's lack of abatement efforts was excusable because the individual owner of the corporate operator was the only person with authority to fix the defects and he was unaware of the violation.[5]

This finding constitutes error. An operator may not avoid, intentionally or unintentionally, the duty to address known hazards by placing an institutional firewall between the agents with knowledge of the violative conditions and the individuals with the authority to authorize necessary repairs. Such corporate balkanization cannot serve as a defense to an unwarrantable failure allegation. Regardless of the size of an operator, when an agent of the operator becomes aware of violations, a system must exist to authorize and undertake necessary repairs. Specifically, when an agent of the operator becomes aware of an equipment defect violating a mandatory safety standard, the operator must undertake repairs or discontinue use of the equipment. The operator must make its agents aware of their obligation to prevent and correct violations. In the present case, the mine owner's professed ignorance of this long-standing, known, obvious and dangerous defect is not an excuse for inaction, but rather an

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[5] In support of their abbreviated analysis, the majority finds that an unidentified manager of Arnold Stone told the miners to continue using the defective skid loader because the defect was "too expensive to fix". Slip op. at 4 n.4. Such a fact, if true, would indeed be damning. But the Judge's decision cannot support such a finding. The Judge found that Arnold Stone is a "family-operated business", 38 FMSHRC at 1755, and further determined that owner Mike Arnold – the only person with authority to authorize repairs – "credibly testified that he did not know about the defect." *Id.* at 1753. In view of these findings, which neither the Secretary nor the majority challenged, no other manager could have the authority to determine whether the defect would be repaired, and Mike Arnold could not have made the statement because he was unaware of the problem. In her description of the testimony, the Judge noted that MSHA Inspector Fitzgerald testified that site supervisor Sorrells told him that "management had told the miners to continue using the machine because it was too expensive to fix." *Id.* at 1748. However, in her actual fact-finding, the Judge did not credit this double-hearsay statement, or even mention it. Indeed, to have credited it would have been inconsistent with the Judge's credibility finding that Mike Arnold was not aware of the problem.

indictment of the operator's insufficient procedures for reporting and addressing hazards at the mine.

Therefore, I reject the Judge's finding that the operator's lack of abatement efforts was excusable. Instead, the failure to abate this known violation for several months is an aggravating factor. *IO Coal,* 31 FMSHRC at 1350-51 ("Aggravating factors include . . . the operator's efforts in abating the violative condition").

2. Extensiveness

The Judge found that if the loader unexpectedly lurched forward, it could throw the driver from the machine and hit anyone standing nearby. 38 FMSHRC at 1751. Nonetheless, the Judge concluded that the violation was not extensive because it would only affect a small number of miners.

We have held that extensiveness "is a fact question concerning the material increase in the degree of risk to miners posed by the violations." *E. Associated Coal Corp.*, 32 FMSHRC 1189, 1196 (Oct. 2010). The extensiveness of violative conduct has traditionally been determined by examining the extent of the affected area, as it existed at the time of the citation. Extensiveness does not involve the degree of danger or obviousness but rather it measures the magnitude or scope of the violation. *See* at 1195.

Typically, extensiveness deals with such issues as the size of a violation (e.g., accumulation violations) or extent of area affected (e.g., roof control violations). The Judge's finding that the violation was not extensive incorrectly focused on the absolute number of affected miners. It failed to take into account that the loader was used every day that the mine was in operation. Tr. 29. Hence, one or both of the miners were exposed to the hazard every day, a factor that in this case bears directly upon extensiveness because it is a measure of the magnitude of the violation.

Every miner is entitled to the protection of the Act and regulations. When a known violation that creates a reasonable likelihood of serious injury persists for several months, a finding that only two miners worked under such an ongoing danger does little to diminish the magnitude – that is, the extensiveness – of the violation.

Our decision in *Dawes,* 36 FMSHRC at 3079-80, does not dictate a different result. *Dawes* involved a contractor that was constructing a large crane for a mine operator. During this process, one of the contractor's employees passed directly beneath the boom of the crane to protect another employee from a hazard, resulting in a violation of the relevant standard. That movement was momentary – two or three seconds at most. The Commission ruled that this circumstance was not extensive for purposes of an unwarrantable failure designation because the danger to that one employee was very brief and occurred in the context of reflexive protection of a fellow employee. The Commission's finding on extensiveness, therefore, was that the scope of the very brief (momentary) hazard to one employee was not extensive. In contrast, the violation in this case had effectively endangered everyone working in or around the skid steer loader for 18 months.

Under these circumstances, the fact that at a given time only one or two miners faced the hazard does not mean such ongoing hazard was not extensive. Therefore, I reject the Judge's finding that extensiveness was a mitigating factor and instead conclude that it was aggravating.

3. Danger

The operator has not disputed the Judge's finding that the violation was S&S and "chronic." Further, the Judge recognized that the degree of danger increases when an operator ignores a chronic problem.[6] She also found that the violation would be reasonably likely to result in a serious injury. 38 FMSHRC at 1750-51, 1754. Nonetheless, the Judge found that "[w]hile the violation was S&S, I do not find the degree of danger to be especially high given the small number of miners working at the mine." *Id.* at 1754.[7] For the reasons discussed in my analysis of the extensiveness factor, *supra,* this was error.

The danger that a miner would be reasonably likely to be seriously injured or killed supports rather than undercuts an unwarrantable failure designation.

4. Notice that Greater Efforts Were Needed for Compliance

The Commission has held that "[r]epeated similar violations may be relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard." *Amax Coal Co.,* 19 FMSHRC 846, 851 (May 1997); *see also Consolidation Coal Co.,* 23 FMSHRC 588, 595 (June 2001). We have also recognized that "'past discussions with MSHA'" about a problem "'serve to put an operator on heightened scrutiny that it must increase its efforts to comply with the standard.'" *IO Coal,* 31 FMSHRC at 1353 (quoting *San Juan,* 29 FMSHRC at 131; *Consol,* 23 FMSHRC at 595). In addition, however, the Commission has held that an operator's own notes and knowledge of a violation can provide it with notice that greater efforts are necessary to ensure compliance with a safety standard. *See Peabody Coal Co.,* 14 FMSHRC 1258, 1262 (Aug. 1992).

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[6] Indeed, the Commission has found that ignoring a "chronic" problem can increase the level of danger. *See Manalapan Mining,* 35 FMSHRC at 294 (remanding the Judge's analysis of degree of danger in light of S&S finding); *Consolidation Coal Co.,* 35 FMSHRC at 2343, 2344 (citation omitted) (stating that "chronic" problem is relevant to degree of danger because "the more times you do something wrong, you increase the likelihood of something bad happening because of you doing something wrong").

[7] In setting the penalty, however, the Judge stated that she affirmed the inspector's finding of gravity. 38 FMSHRC at 1755. As noted above, the inspector found the gravity of the violation was reasonably likely to result in a permanently disabling injury. Gov't Ex 1. This later finding by the Judge obviously conflicts with the Judge's earlier findings and supports an unwarrantable failure finding.

In this case, it is undisputed that MSHA had not previously cited Arnold Stone for this violation or similar violations. In addition, the record does not indicate that MSHA personnel had previously discussed this violation with Arnold Stone. At the same time, however, the failure to maintain the seatbelt lockout is a clear violation that, in this case, was obvious to and known by the operator. Under these circumstances, the absence of a prior citation is of no relevance in the unwarrantable failure analysis.

5. The Record Mandates a Conclusion of Unwarrantable Failure

The Commission has previously determined that when all of the factors except notice are aggravating, the record supports a determination of unwarrantable failure. *Cam Mining, LLC.*, 38 FMSHRC 1903, 1909-10 (Aug. 2016). Specifically, we held that "[t]he evidence . . . overwhelmingly weigh[ed] in favor of . . . unwarrantable failure" when an operator, who lacked notice, did not make any efforts to abate a violation which should have been known to the operator, existed for a lengthy period of time, was obvious, extensive, and posed a high degree of danger. *Id* at 1909.

In this proceeding, all unwarrantable failure factors other than the irrelevant notice factor support a finding of an unwarrantable failure. I thus conclude that the evidence in this case mandates a determination of unwarrantable failure. When the evidence presented on the record supports no other conclusion, remand is unnecessary. *Am. Mine Servs., Inc.* 15 FMSHRC 1830, 1834 (Sept. 1993). Because the evidence overwhelmingly weighs in favor of an unwarrantable failure determination, it is unnecessary to remand this issue. Therefore, I join with the majority in reversing the Judge's determination. The violation in this case was an unwarrantable failure to comply with mandatory safety standards.

C. Penalty Determination[8]

In this case the Judge found that the violation, involving a dangerous malfunctioning lockout system on a skid loader, was not the result of the operator's unwarrantable failure to comply with the relevant standard. She then lowered the proposed penalty from $63,000 to $10,000 – a reduction of over 70%.[9] The Commission has unanimously reversed the Judge's

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[8] Commissioner Jordan joins in this section of Commissioner Cohen's opinion.

[9] I acknowledge that there were other reasons, in addition to the deletion of the unwarrantable failure designation, for the Judge's lowering of the penalty. In pertinent part, the Judge stated:

> There was limited evidence as to the size of the mine, but the operator asserts that it is a family-operated business with a number of pits located in Texas. The mine has little history of violations. Respondent indicated that it recently emerged from bankruptcy and is paying debts according to the bankruptcy plan, and that paying a penalty as high as suggested by the Secretary would therefore be a

unwarrantable failure determination, concluding that the record in this matter cannot support any other result. In light of that ruling, I find that the Judge's penalty assessment needs to be revisited. Consequently, I would vacate the penalty and remand for the assessment of a new penalty.

The Commission's reinstatement of the unwarrantable failure finding is an important modification, reflecting a much higher level of operator responsibility than was found by the Judge. My colleagues' reluctance to vacate the Judge's penalty and remand to permit her to factor this into a penalty determination ignores the significance of the unwarrantable failure designation.

The Commission has consistently considered the unwarrantable failure determination to be relevant in assessing a penalty. *See, e.g.*, *Consolidation Coal*, 22 FMSHRC at 334 (reversing the Judge's finding that the violation was not an unwarrantable failure and remanding the proceeding for assessment of an appropriate penalty); *Kellys Creek Res., Inc.*, 19 FMSHRC 457, 465 (Mar. 1997) (reversing the Judge's determination that the violation was not S&S or the result of unwarrantable failure and remanding the case for assessment of an appropriate civil penalty in light of those determinations); *see also Spartan Mining Co.*, 30 FMSHRC 699, 725 (Aug. 2008) (holding that it was appropriate for the Judge to raise the penalty significantly based on his findings of extreme gravity and unwarrantable failure).

Acting Chairman Althen and Commissioner Young contend that for purposes of determining a penalty assessment, consideration of unwarrantable failure is subsumed in the other section 110(i) factors, particularly negligence. I note that Commission Judges regularly combine their analyses of negligence and unwarrantable failure. Indeed, the Judge did just that in this case. *See* 38 FMSHRC 1751 ("C. Negligence and Unwarrantable Failure"). After a detailed analysis of the seven unwarrantable failure factors, the Judge concluded, "Based upon my review and consideration of all of the factors, I find that the negligence of the operator was high, but I do not find the violation to be a result of an unwarrantable failure to comply." *Id.* at 1754. The Commission has said in decisions that a finding of high negligence suggests an unwarrantable failure. *See, e.g., San Juan,* 29 FMSHRC at 136. Here, in finding high negligence *but not* unwarrantable failure, the Judge seems to have indicated that in her view the violation had a lesser degree of severity than if she had found high negligence *with* unwarrantable failure. Perhaps not. Perhaps the Judge would have assessed the same $10,000 penalty if she had found unwarrantable failure. But we cannot know unless we remand the case and give the Judge the opportunity to assess a penalty with the understanding that the violation was an unwarrantable failure.

> hardship for the mine. The parties stipulated that the citation was abated in good faith.

38 FMSHRC at 1755.

For the reasons set forth above, I would vacate the Judge's penalty assessment and remand for the reassessment of a penalty.

Robert F. Cohen, Jr., Commissioner

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