FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 30, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2008-737
v.	:	A.C. No. 15-18267-144079
MANALAPAN MINING COMPANY, INC.	:	

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

DECISION

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

This proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act") is before the Commission a second time on appeal from the Judge's decision on remand. 35 FMSHRC 1377 (May 2013) (ALJ) (*ALJ Dec. II*). The Judge's initial decision, in relevant part, considered two section 104(d)[1] orders issued by the U.S. Department of Labor's Mine Safety and Health Administration ("MSHA") to Manalapan Mining Company, Inc. for combustible coal accumulations in violation of 30 C.F.R. § 75.400.[2] 32

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[1] Section 104(d)(1) of the Mine Act provides in pertinent part:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act.

30 U.S.C. § 814(d)(1).

[2] 30 C.F.R. § 75.400 states that "Coal dust, including float coal dust deposited on

FMSHRC 690, 701-03, 705 (June 2010) (ALJ) (*ALJ Dec. I*). The Judge affirmed the violations, but determined that they were not the result of the operator's unwarrantable failure to comply with mandatory health or safety standards. *Id.* The Commission granted the Secretary of Labor's petition for discretionary review challenging the Judge's decision. In its initial decision, the Commission vacated the Judge's unwarrantable failure determinations and remanded the matter to him to make findings on all the relevant unwarrantable failure factors and to apply the correct legal standard. 35 FMSHRC 289, 290, 297-98 (Feb. 2013) (*Manalapan I*).[3]

In his decision on remand, the Judge found that the first of the two violations, Order No. 7511472, resulted from the operator's unwarrantable failure to comply with the Secretary's standard. *ALJ Dec. II*, 35 FMSHRC at 1380. However, he vacated the second violation, Order No. 7511478, concluding that the Secretary had failed to prove a violation, despite the fact that in his initial decision he had ruled that a violation had occurred. *Id.* at 1382-83. The Commission has again granted the Secretary's petition for discretionary review challenging the Judge's decision.

For the reasons that follow, we conclude that by reversing his initial finding of a violation, the Judge violated the "law of the case" doctrine. We therefore reverse the Judge's ruling on the fact of violation for Order No. 7511478, vacate his decision, and remand for further consideration of several factors relevant to the unwarrantable failure issue for that violation.

I.

Factual and Procedural Background

A thorough discussion of the background facts and the Judge's initial decision is found in our *Manalapan I* decision. 35 FMSHRC at 290-293. To briefly summarize, at the time of the subject citation, Manalapan operated an underground coal mine in Pathfork, Kentucky. Coal was extracted from the working face by a continuous miner and transported out of the mine by a series of conveyor belts that were approximately 2,300 feet in total length. The extracted material was transferred in turn from the No. 4 belt at the face to the No. 3 and No. 2 belts and ultimately to the No. 1 belt nearest the surface. The conditions in the mine were constantly wet because of percolation of water through old works and the mine floor and ribs, and by the use of water for dust control at the face. Despite the presence of water pumps, water was never completely removed, and the mine floor remained muddy at all times.

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rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein."

[3] In *Manalapan I*, Commissioner Young dissented in part from the majority opinion. He agreed that the Judge erred with regard to one violation (Order No. 7511472), but concluded that the Judge's decision in the other violation (Order No. 7511478) was supported by substantial evidence and consistent with the law. Hence, he would have affirmed the Judge's decision as to Order No. 7511478. 35 FMSHRC at 299-301.

On October 2, 2007, before conducting his inspection of the mine, MSHA Inspector Daniel Lewis reviewed the preshift and onshift examination books. He observed notations under the column entitled "Hazardous," entered from August 30 through October 2, 2007, noting generally wet and muddy conditions on a daily basis along the four belts. The books noted "working on" and "shoveling" as actions taken to correct the conditions. At the time of the inspection, four men were assigned to work on the beltline.

The issues on appeal in *Manalapan I* involved Belt Nos. 3 and 2, but this appeal concerns only Belt No. 2. Belt No. 2 was 500 feet long. In the order, Lewis noted that the accumulations along Belt No. 2 were one to 12 inches deep and that ten bottom rollers were rubbing on the accumulations. Inspector Lewis testified that the conditions along Belt No. 2 were so wet and muddy that they constituted a "borderline situation" in terms of establishing a violation. Tr. 150-52. Superintendent Miniard testified that there was no coal spillage along the belt. Tr. 337. Photos of the area depicted a "wet, soupy mixture of mud and water." *ALJ Dec. I*, 32 FMSHRC at 703; R. Ex. 9.

Lewis issued Order Nos. 7511472 (Belt No. 3) and 7511478 (Belt No. 2) for violations of the mandatory safety standard in section 75.400 and designated the cited violations as "significant and substantial"[4] and attributable to Manalapan's unwarrantable failure to comply.[5] The Secretary proposed a $60,000 penalty for each violation. Upon the issuance of the citation and orders, the belts were shut down, and abatement took 18 employees seven to eight hours.

In his initial decision, the Judge determined that the accumulations along Belt No. 3 were an S&S violation, but declined to find that the violation resulted from an unwarrantable failure. 32 FMSHRC at 700-01. The Judge upheld Order No. 7511478, finding that there was an adequate basis to constitute an accumulations violation. He determined that the violation along Belt No. 2 was not S&S because the testimony indicated that the accumulation was soupy and more liquid than muddy, and thus the hazard posed by the condition was unlikely to cause serious injury. *Id.* at 702-03. The Judge also declined to find that the violation was an unwarrantable failure, relying on the inspector's testimony that the violation was "borderline," that it was unlikely to cause a fire, and that the evidence reflected no more than a moderate degree of negligence. *Id.* at 703. Consequently, the Judge modified both orders and assessed penalties of $12,000 for Order No. 7511472 (Belt No. 3), and $4,000 for Order No. 7511478 (Belt No. 2). *Id.* at 702, 704.

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[4] The "significant and substantial" ("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."

[5] 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 *Manalapan I*, the Secretary appealed only the finding that the two orders were not the result of unwarrantable failures. 35 FMSHRC at 293.[6] The Commission vacated the Judge's unwarrantable failure determinations and remanded the case to him to "explicitly consider and weigh all the relevant factors as to whether Manalapan's conduct constituted unwarrantable failures." *Id.* at 297-98. The Commission decision expressly set forth the unwarrantable failure factors the Judge should have considered and the relevant evidence related to each factor, as well as the necessary findings the Judge would need to make on remand. *Id.* at 294-97.

On remand, with regard to Order No. 7511472 (Belt No. 3), the Judge held that high negligence supported a finding of an unwarrantable failure and increased the penalty from $12,000 to $16,000. *ALJ Dec. II*, 35 FMSHRC at 1380-81. As to Order No. 7511478 (Belt No. 2), the Judge stated that reconsidering unwarrantable failure caused him "to revisit the facts surrounding the cited violation." *Id.* at 1382. Believing that he "retained jurisdiction over all elements of Order No. 7511478 since no final decision had been rendered," the Judge did not view "the Commission's remand of the unwarrantable failure issue as a determination . . . concerning the fact of the violation." *Id.* at 1382, n.3. The Judge proceeded to reevaluate the same evidence he had already considered in his first decision, including the inspector's testimony that the conditions on Belt No. 2 were "borderline," and concluded that the Secretary failed to meet his burden of proving the violation. *Id.* at 1382-83. Accordingly, the Judge vacated Order No. 7511478.

II.

Disposition

The Secretary contends that the Judge erred by failing to follow the Commission's remand instructions for Order No. 7511478. Instead of conducting a proper analysis of the unwarrantable failure factors, the Judge reconsidered and reversed his earlier finding that the cited conditions constituted a violation. The Secretary points out that this issue was not appealed by either party and was not addressed by the Commission or remanded to the Judge. As a result, the Secretary argues that the Judge's initial, unappealed finding that the accumulations on Belt No. 2 constituted a violation of section 75.400 became the law of the case and could not be revisited by the Judge on remand.

A. The "Law of the Case" Doctrine

We conclude that the Judge erred by revisiting his earlier finding of a violation of Order No. 7511478 and reversing that finding on remand. His initial ruling upholding the violation constituted the law of the case. That doctrine provides that when a decision is made at one stage of litigation and not challenged on appeal, it continues to govern. *See Concrete Works of Colorado, Inc. v. City and Cnty. of Denver*, 321 F.3d 950, 992-93 (10th Cir. 2003); *United States v. Bell*, 988 F.2d 247, 250 (1st Cir. 1993); *see also Pepper v. United States*, 131 S. Ct. 1229, 1250 (2011) (stating that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case."). It is clear that here the law of the

[6] The operator did not seek review of any part of the Judge's decision.

case principles governed the question of whether the accumulations on Belt No. 2 constituted a violation of section 75.400. In his initial decision, the Judge concluded that the conditions on Belt No. 2 constituted a violation. 32 FMSHRC at 702-03. Neither party appealed this finding to the Commission after the Judge's initial decision. Thus, this finding was not before the Commission in *Manalapan I*, and was not remanded to the Judge for reconsideration. It is the law of the case. *See Douglas R. Rushford Trucking*, 23 FMSHRC 790, 793 (Aug. 2001) (holding that judge's original findings of gross negligence and unwarrantable failure were not appealed, were not subsequently remanded, and thus became the law of the case).

The Commission has explained that "[l]aw of the case rules have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." *E. Ridge Lime Co.*, 21 FMSHRC 416, 421 (Apr. 1999). The doctrine "operates to protect the settled expectations of the parties and promote orderly development of the case. . . . [and] 'ensures judicial efficiency and prevents endless litigation.'" 18B Wright, Miller & Cooper, *Federal Practice and Procedure* § 4478, at 638 n.7 (2d ed. 2002) (citing *Suel v. HHS*, 192 F.3d 981, 984-85 (Fed. Cir. 1999)).

The doctrine of "law of the case" is not jurisdictional but rather a rule of policy and practice. It permits a "modicum of residual flexibility" in exceptional circumstances. *United States v. Rivera-Martinez,* 931 F.2d 148, 151 (1st Cir. 1991), *cert. denied* 502 U.S. 862 (1991); *United States v. Bell*, 988 F.2d at 251. However, exceptions to the rule are narrow, and are limited to circumstances such as presentation of substantially different evidence, a change in applicable precedent since the issuance of the Judge's initial decision, or a showing that the prior decision was "clearly erroneous and would work a manifest injustice." *Rivera-Martinez*, 931 F.2d at 151; *Concrete Works of Colorado*, 321 F.3d at 993.

Neither the Judge nor Manalapan has cited any evidence of extraordinary circumstances warranting revisiting the issue. In fact, the Judge simply reconsidered evidence he had already considered in his first decision. In both decisions, the Judge noted – indeed, he rested his decision upon – the testimony by Inspector Lewis that the conditions along Belt No. 2 were a "borderline situation." 32 FMSHRC at 702-03; 35 FMSHRC at 1381-83. In the first decision, the Judge found that this testimony "provide[d] an adequate basis for concluding there was [sic] sufficient combustible accumulations, although extremely wet, to constitute a violation of section 75.400." 32 FMSHRC at 703. In his second decision, the Judge found this same evidence to be "inconclusive," and that the Secretary had failed to carry his burden of proof. 35 FMSHRC at 1383. The fact that the same evidence might be susceptible to different interpretations does not render the first decision "clearly erroneous" so as to justify an exception to the law of the case doctrine.

While Manalapan claims a manifest injustice in the imposition of a penalty where no violation exists, Manalapan never appealed this finding and thus cannot now claim that it is inherently unjust or plainly erroneous. Accordingly, we vacate the Judge's decision as to the fact of violation and reinstate his initial finding that the cited conditions on Belt No. 2 constituted a violation of section 75.400.

B. Consideration of Unwarrantable Failure Factors on Remand

Having reinstated the violation for Belt No. 2, we must once again remand the case to the Judge to address whether the violation amounts to an unwarrantable failure of Manalapan to comply with section 75.400. The Judge has addressed several of the unwarrantable failure factors on remand with regard to the accumulations on Belt No. 3. While he failed to consider the evidence bearing upon those factors for the violation on Belt No. 2 since he vacated that order, his findings with regard to several of the unwarrantable failure factors are equally applicable to both violations and constitute conclusive findings for the Judge's reconsideration of the issue on remand.

Specifically, in his analysis of Belt No. 3, he stated that "the relevant criteria for an unwarrantable failure designation were, for the most part, present. The accumulations were obvious, of significant duration, and known to Manalapan, as evidenced by the pertinent notations in the examination book." 35 FMSHRC at 1379. Hence, the Judge found these factors to be aggravating. Because the notations in the examination books applied to all the belts, the Judge's findings that the obviousness, duration, and the operator's knowledge of the Belt No. 3 violation are aggravating factors apply equally to the Belt No. 2 violation.

Regarding whether the operator had notice that greater efforts of compliance were necessary, the Judge did not explicitly address this factor in reconsidering the unwarrantable failure issue of Belt No. 3 in his decision on remand. However, the record compels the conclusion that the operator was on notice and that this served as an aggravating factor. In *Manalapan I,* we concluded that the Judge had considered Manalapan's history of past accumulations violations in an inconsistent manner. We further stated that, given the Judge's findings in his analysis of Belt No. 4 regarding Manalapan's past history of accumulations violations, the operator's history should likewise be an aggravating factor as to Belt Nos. 3 and 2. 35 FMSHRC at 295-96. The Judge's findings as to Belt No. 4 were unappealed and – like his findings that conditions at Belt No. 2 constituted a violation – are now law of the case. Thus, we conclude that the evidence compels only one conclusion – that the operator was on notice, and that this also is an aggravating factor in the Judge's consideration of the unwarrantable failure designation of the Belt No. 2 violation. *See American Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (remand not necessary when record supports no other conclusion).

On remand, the Judge need therefore consider only the evidence related to the factors of the degree of danger, the extent of the violation, and the operator's efforts to abate the violation specifically as to Belt No. 2, as we had explicitly instructed in *Manalapan I.* 35 FMSHRC at 294-97. The Judge should make the requisite findings and determine whether these factors are aggravating or mitigating and then determine whether Manalapan's conduct amounted to an unwarrantable failure to comply with the standard.

III.

Conclusion

For the foregoing reasons, we vacate and reverse the Judge's finding that Order No. 7511478 did not constitute a violation of section 75.400, and reinstate his initial finding of a violation. We remand for reconsideration of the evidence related to the factors of the degree of danger, the extent of the violation, and the operator's efforts to abate the violation related to the unwarrantable failure designation of Order No. 7511478 under the correct legal standard, and for assessment of a penalty as appropriate.

Mary Lu Jordan, Chairman

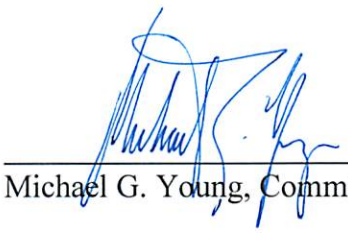
Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

William I. Althen, Commissioner

Commissioner Young, concurring in part, dissenting in part:

I agree with the majority's analysis of the law of the case doctrine, but I would not have remanded the case in the first instance. Because I believe the issue was addressed properly in the Judge's original decision, I would vacate his holding of no violation on remand and reinstate his original finding that the violation did not result from the operator's unwarrantable failure and would reinstate the penalty he originally imposed for the violation.



Michael G. Young, Commissioner

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