FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June13, 2014

SECRETARY OF LABOR,	:	Docket Nos. WEST 2008-788-R
MINE SAFETY AND HEALTH	:	WEST 2008-1093-R
ADMINISTRATION (MSHA)	:	WEST 2008-1094-R
	:	WEST 2009-333
v.	:	WEST 2009-579
	:	WEST 2009-1174
TWENTYMILE COAL COMPANY	:	

BEFORE: Jordan, Chairman; Young, Cohen, and Nakamura, Commissioners[1]

DECISION

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

These consolidated proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). The case originally involved a number of citations and orders issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Twentymile Coal Company at its Foidel Creek Mine in Colorado. 32 FMSHRC 1431, 1432 (Oct. 2010) (ALJ). Remaining at issue before the Commission are two orders that alleged accumulations of coal dust in violation of 30 C.F.R. § 75.400,[2] as well as a citation issued in connection with one of the orders, alleging an inadequate preshift examination in violation of 30 C.F.R. § 75.360(a)(1). 32 FMSHRC at 1439-48, 1451-56, 1448-51. The specific issues presented on appeal are whether the Judge properly found that all three violations were significant and substantial ("S&S") violations of the Mine Act, and that the violations underlying the two orders were attributable to Twentymile's unwarrantable failures to comply with the standard.

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[1] Commissioner William I. Althen is recused in this matter.

[2] Section 75.400 provides: "Coal dust, including float coal dust deposited on 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." While Twentymile did not contest the existence of those violations, it did contest the special findings in the orders and the Secretary of Labor's proposed penalties.

For the reasons that follow, we affirm the Judge's two unwarrantable failure determinations and one of his S&S findings, and vacate and remand his other two S&S findings.

I.

Order No. 7622426

A. Factual and Procedural Background

1. MSHA's Inspection

On March 12, 2008, MSHA Inspector Art Gore visited the Foidel Creek Mine for a methane spot inspection of its longwall area there. 32 FMSHRC at 1451-52. The mine is considered to be "gassy," in that it liberates large quantities of methane.[3] *Id.* at 1444. Consequently, the mine is usually on a 10-day spot inspection cycle. *Id.* at 1444 & n.3.

While he found no methane problems that day, Inspector Gore observed that the longwall tailgate was black with dark float coal dust.[4] Gore found that the conditions extended 1700 feet outby the No. 1 Entry return, with heavy coal dust concentrations on the floor, ribs, and the "cans" used for supplemental roof support,[5] as well as into the crosscuts. He also determined that the trickle duster in the tailgate, which should have been blowing rock dust into the air current so that it would mix with any coal dust, was not working at that time. 32 FMSHRC at 1452, 1454 n.7; Tr. 284-87. According to Gore, the float coal dust he observed was heavy and triple the amount necessary to establish a violation. 32 FMSHRC at 1452.

In order to determine whether a withdrawal order under section 104(d)(2) of the Mine Act should issue, Inspector Gore reviewed weekly examination records, preshift examination records,

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[3] Section 103(i) of the Act provides in pertinent part that a coal or other mine liberating in excess of one million cubic feet of methane or other explosive gases during a 24 hour period is subject to a minimum of one spot inspection every five working days, and a mine that liberates in excess of five hundred thousand cubic feet of methane or explosive gases during a 24 hour period is subject to a spot inspection every 10 working days at irregular intervals. 30 U.S.C. § 813(i).

[4] "Float coal dust" is defined as "coal dust consisting of particles of coal that can pass a No. 200 sieve." 30 C.F.R. § 75.400-1(b). This is in contrast with ordinary "coal dust," which is defined as "particles of coal that can pass a No. 20 sieve." 30 C.F.R. § 75.400-1(a); Tr. 205-06. Thus, float coal dust is much finer than ordinary coal dust. Inspector Grosely testified that when he scraped the float coal dust into a pile and touched it, "it flowed like water, a very fluid material, a very fine-grain material." Tr. 127. For this reason, it is more explosive than ordinary coal dust, and hence more dangerous. Tr. 147-48, 201.

[5] The "cans" are steel tubes, filled with aerated concrete. Tr. 285.

and the "dates, times and initials" he found on the various cards or boards in that area of the mine indicating that examinations had been done. *Id.*; Tr. 289-90, 296-97. The weekly examination book stated that, as of a shift on March 8, 2008, the entire tailgate area for the No. 1 Entry needed rock dusting. Tr. 291. However, Gore noted that the corrective actions taken in the ensuing three days did not include the area he found to be black with coal dust. 32 FMSHRC at 1452; Tr. 291-92, 294-95; Gov't Ex. 21. Because Twentymile had continued mining between March 8 and 12 and the trickle duster was not operating at the time of his inspection, Gore issued an order alleging that the coal dust accumulation violated section 75.400, was S&S, and was attributable to Twentymile's unwarrantable failure to comply. 32 FMSHRC at 1451-53; Tr. 296-99, 301. The Secretary later proposed a penalty of $70,000. 32 FMSHRC at 1452.

2. The Judge's Decision

The Judge concluded that the Secretary had established that the violation was S&S. *Id.* at 1454-55. He found that float coal dust is highly explosive and at its most dangerous when suspended in the mine atmosphere. The conditions cited therefore posed a discrete safety hazard contributed to by the conceded violation of section 75.400, particularly given the amount and concentration of the dust that had accumulated. *Id.* at 1443-44 (relying on his findings in the other accumulations violation on review here); 1454. He further found that it was reasonably likely that a significant methane ignition in the longwall face would cause the float coal dust in the tailgate to go into suspension. *Id.* at 1454. He found a reasonable likelihood that such a methane ignition would occur during the life of the mine, and that the hazard contributed to by the violation would result in a serious injury or fatality. *Id.* at 1454-55.

The Judge also concluded that the Secretary had established that the violation of section 75.400 was attributable to Twentymile's unwarrantable failure, in that it was the result of a serious lack of reasonable care and aggravated conduct on the part of the operator. *Id.* at 1455-56. The Judge's conclusion was based on his findings that the violation was serious, that it had existed over a large area of the tailgate over the course of several shifts, and that Twentymile management was aware of the accumulations and had been put on notice that greater efforts to comply with section 75.400 were necessary. *Id.* at 1456. Consequently, the Judge assessed a penalty of $50,000. *Id.*

B. Disposition

1. Significant and Substantial

The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum*

Co., 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

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

Id. at 3-4 (footnote omitted); *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). Under the Commission's *Mathies* test, it is the contribution of the violation at issue to the cause and effect of a hazard must be significant and substantial. *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984). In evaluating that contribution, it is assumed that normal mining operations will continue. *See U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574-75 (July 1984); *see also U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

Twentymile contends that the record does not support the conclusion that there was a reasonable likelihood of a fire or methane explosion spreading to the tailgate, and thus substantial evidence does not support the conclusion that the third element of the *Mathies* test was satisfied in this instance. Twentymile argues that the Judge's reliance on methane ignitions occurring at the face at some point in the future is misplaced, both because there is no history of such ignitions at the mine in question, and because there is no evidence that the accumulation of coal dust would continue to exist for the life of the mine. T. Br. at 30-31.

Our review of the record discloses that substantial evidence supports the Judge's conclusions regarding the S&S nature of the accumulations violation at the Twentymile longwall tailgate.[6] Contrary to Twentymile's position, the record supports the Judge's conclusions that, notwithstanding the mine's history, there was ample reason to fear the occurrence of a methane ignition at the face. As Inspector Gore detailed in his analysis of the S&S nature of the violation, the mine is considered to be "gassy." Tr. 299. The Judge's finding that a sudden release of methane in such a mine can occur without warning is consistent with Commission case law. *See U.S. Steel Mining*, 7 FMSHRC at 1130.

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[6] When reviewing an administrative law Judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the Judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

Gore testified about the methane ignition sources that existed at the face and the likelihood of such an ignition. Tr. 299. In particular, he discussed the sparks produced by the operation of the longwall shearer and the shearer possibly cutting the quartz present in the mine's roof, the fire from the torches used by miners during maintenance shifts, and the sparking that could occur from roof bolts breaking during a roof fall. Tr. 305, 318. The Judge specifically credited Gore on this issue (32 FMSHRC at 1454), and nothing in the record gives us reason to overturn the Judge's credibility determination.[7]

We can likewise discern no basis to overturn the Judge's crediting of Gore over Twentymile's witnesses on the issue of the concentration of the rock dust. As it did below, Twentymile continues to argue that rock dust had mixed with the float coal dust in sufficient quantities to prevent an explosion. T. Br. at 30-31. In so doing, it ignores the Judge's findings that the coal dust accumulations were "heavy" and that rock dusting had not been effective in the area covered by the order. 32 FMSHRC at 1454.[8] In addition, Inspector Gore testified that the coal dust had accumulated in the cited area to a thickness that was "triple" that which he considered to constitute a violation of section 75.400. Tr. 286-87.

Finally, we reject the notion that the Judge's analysis is only reliable if the cited accumulations remain unaddressed until such time that a methane ignition actually occurs. In cases involving violations which may contribute to the hazard of methane explosions or ignitions, the Commission has held that the likelihood of an injury resulting from the hazard only depends on whether a "confluence of factors" exists that could trigger an explosion or ignition. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988). To the extent that Twentymile argues that a coal dust accumulation can only be S&S if it is shown that the specific cited condition will continue to exist until a methane ignition actually occurs, we do not read our precedent to erect such a high bar for the violation of section 75.400 to be S&S. It would be particularly inappropriate to do so in this case, where the mine may have allowed the conditions to exist for

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

[8] Twentymile also argues that the Judge erred in failing to take into account the humidity in the tailgate area. Its witnesses' testimony was that in such an environment, dust would not travel as far as in a less humid environment. Tr. 330. However, that analysis focuses on the dust produced during the mining process and not whether the humidity would prevent coal dust from being suspended by a methane ignition. Consequently, we are not persuaded that it was error for the Judge to do no more than acknowledge the humid conditions, which he did. *See* 32 FMSHRC at 1454.

as many as eight production shifts, with the longwall cutting coal at the face. 32 FMSHRC at 1454; Tr. 291-92. Accordingly, Twentymile's argument is without merit.[9]

2. Unwarrantable Failure

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987), the Commission determined 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 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

The Commission has recognized that whether conduct is "aggravated" in the context of unwarrantable failure is determined by considering the facts and circumstances of each case to determine if any aggravating or mitigating circumstances exist. 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 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 had been placed on notice that greater efforts were necessary for compliance. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2330 (Aug. 2013); *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1351-57 (Dec. 2009); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999).

Twentymile takes issue with three of the factors the Judge relied upon in concluding that the operator's conduct had been aggravated in this instance. First, it continues to disagree with Inspector Gore as to the gravity of violation, citing the testimony of its witnesses who did not view the accumulations in the cited area to constitute a hazard. However, the Judge found Gore to be much more persuasive than the Twentymile witnesses regarding how heavy the coal dust was and the extent, if any, to which it had been diluted by rock dust. 32 FMSHRC at 1455. Moreover, we have affirmed the Judge's S&S finding. Consequently, we remain unconvinced that there are grounds to disturb the Judge's finding that the violation was serious.

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[9] As discussed *infra*, the mine in question had a history of accumulation violations, and there was evidence of inconsistent notations of the need to rock dust coal dust accumulations. Moreover, Twentymile chose to start spreading rock dust on the tailgate area accumulations outby, when the heaviest accumulations were inby. Tr. 301. Given that, we are not persuaded that the cited accumulations should not be considered S&S because Twentymile would have addressed them before a methane ignition could occur.

Twentymile also maintains that the Judge erred in finding that it had been put on notice that greater efforts on its part to comply with section 75.400 were necessary. T. Br. at 23-26, 33-34. We disagree and find that the record and Commission precedent amply supports the Judge's conclusion. The Secretary relied on previous citations to the operator for violations of the standard. While the evidence does not specifically identify which of those citations prior to March 2008 may have been for float coal dust accumulations, the Commission has rejected the notion that cited accumulations must be of the same material as in previous instances to be relevant to the question of whether the operator had been put on notice that greater compliance efforts were necessary. *See Enlow Fork Mining Co.*, 19 FMSHRC 5, 11-12 (Jan. 1997). Moreover, Inspector Gore testified that he had had multiple prior discussions with Twentymile management about accumulations at this mine. Tr. 302.

Moreover, float coal dust is considered so dangerous that it is specifically mentioned in section 75.400 as a material that an operator must not permit to accumulate. We do not see why the previous citations under the standard should be discounted in the consideration of a subsequent serious violation.[10] The operator could have drawn a distinction demonstrating an anomaly but failed to rebut the Secretary's contention that the prior violations did, in fact, put the operator on notice.

Finally, we reject Twentymile's contention that the Judge's finding of aggravated conduct is erroneous in light of the evidence that the operator was preparing to rock dust the cited area. T. Br. at 33. The Judge discussed the operator's rock dusting efforts, outby the cited area, that were undertaken after the March 8 notation in the examination book regarding the need for rock dusting. 32 FMSHRC at 1455. He also credited the testimony of the operator's witnesses that before rock dust could be applied by hand in the cited area, Twentymile first had to install a second row of cans as supplemental roof support along the center of the entry (Tr. 351-54), and that preparations for that project were underway. *Id.* However, the Judge rejected the contention that this evidence outweighed the other evidence of aggravated conduct. The evidence of aggravated conduct included the previously discussed seriousness of the violation; the geographic extent of the accumulated coal dust; the fact that the condition had been in existence for at least several shifts, if not longer; the fact that management had been aware of it since at least March 8; and the fact that management had been put on notice that greater efforts to comply with the standard were necessary.

In deciding whether an unwarrantable failure has been established, a Judge may determine that some factors are less important than other factors under the circumstances. *IO Coal Co.*, 31 FMSHRC at 1351. Because Twentymile does not dispute the Judge's findings

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[10] Our decision in *Enlow Fork* also disposes of Twentymile's contention that 45 accumulation citations over the course of the 15 months prior to May 2008 (Tr. 155) did not provide a sufficient basis to put the operator on notice. In that case, the Commission found that 60 accumulation citations in over two years put the operator on notice that it needed to make a greater effort to comply with section 75.400. 19 FMSHRC at 16-17.

on a number of the other unwarrantable failure factors, and substantial evidence supports those findings as well as the findings which Twentymile does dispute, no basis exists to second guess the Judge's ultimate conclusion that aggravated conduct on the part of the operator had been established.

II.

Order No. 6686312 and Citation No. 6686313

A. Factual and Procedural Background

1. MSHA's Inspection

The order and citation were each issued on May 6, 2008, by MSHA Inspector Barry Grosely. 32 FMSHRC at 1439, 1448. His review of the mine's preshift examination books at the outset of his inspection disclosed entries from the operator regarding accumulations, including entries from earlier in the week with regard to the No. 3 Entry, the mine's main conveyor belt entry. *Id.* at 1439, 1446; Gov't Ex. 13.

The inspector testified that coal was being produced when he arrived at the mine that morning, but that there had been minimal production on the previous shift. *Id.* at 1439; Tr. 115, 140-41. His physical inspection of the mine began on the surface, in the transfer building and the drive building, which resulted in the issuance of three citations for accumulations of float coal dust and coal fines. 32 FMSHRC at 1439. From there, the inspector traveled into the mine through the portal for the belt entry. *Id.* Grosely testified that he immediately noticed accumulations of float coal dust and, as he traveled further inby, the accumulations became "more pronounced." *Id.*; Tr. 122-23. He estimated that the coal dust had accumulated to a depth of 1/16th of an inch in some locations, and he described the dust as very fine, and that atop electrical installations it "flowed like water" when touched. 32 FMSHRC at 1440; Tr. 126-27, 134-35.

The inspector determined that the accumulations extended some 3,400 feet, to Crosscut 34, and were heavier in the crosscuts. 32 FMSHRC at 1439. Grosely explained that with the entry being on intake air at a rate of 350 feet per minute, most of the rock dust that was being injected into the entry traveled down the belt line instead of into the crosscuts. *Id.*

Consequently, Grosely issued Order No. 6686312, alleging an S&S violation of section 75.400 that was attributable to Twentymile's unwarrantable failure. *Id.*; Gov't Ex.10. The order describes the accumulations as present over the ribs, roof, floor, belt hardware, pipes and hoses, drive motors, belt structures, and electrical control boxes in the belt entry. 32 FMSHRC at 1439, Gov't Ex. 10. The violation was subsequently abated by the application of three tankers of rock dust, over the course of two shifts, by three to five miners. Tr. 157-59, 239. The Secretary later proposed a penalty of $50,700 for the violation. 32 FMSHRC at 1439.

Grosely also issued Citation No. 6686313, alleging that the accumulations must have been present during the most recent preshift examination that included the belt entry, which was conducted between 2:00 and 3:00 that morning, but there was nothing noted about accumulations in the preshift examiner's book for that time period. 32 FMSHRC at 1446, 1448; Gov't Ex. 11. The latter citation was also designated S&S, but not unwarrantable.[11]

2. The Judge's Decision

Twentymile did not contest MSHA's allegation that the accumulations constituted a violation of section 75.400. 32 FMSHRC at 1441. The Judge found that the accumulations of float coal dust constituted a hazard to miners, particularly because the operator had failed to apply sufficient rock dust to render the coal dust safe, and because the mine liberates extensive quantities of methane. *Id.* at 1443-44, 1450. In light of the evidence that the coal dust had been deposited over a number of shifts and that the violation was obvious, the Judge concluded that a reasonably prudent miner would have noted the hazardous accumulation in the preshift examination book and recommended rock dusting in the area. *Id.* at 1442, 1450. Because that did not occur as part of the preshift examination that most recently preceded the MSHA inspection, the Judge upheld the citation alleging that the preshift exam was inadequate under section 75.360(a)(1). *Id.* at 1450.

As to the issue of whether the section 75.400 accumulations violation was S&S, the Judge rejected the Secretary's position that the uncontested accumulations violation was S&S because the rate of frequency of failure of rollers on the belt, as well as the areas of the belt where the inspector observed the belt rubbing against belt hangers, had the potential to result in the generation of heat that would ignite the coal dust. *Id.* at 1443. Taking into account the "confluence of factors" present, the Judge was not persuaded that in this instance the belt, or its constituent parts, such as rollers or electrical components, would be a source that would ignite the coal dust in the area. *Id.* The Judge also found that there was no methane detected in the area of the belt, and that it was unlikely that methane would be found in that area of the mine. *Id.* at 1442-43.

Nevertheless, the Judge concluded that the accumulations violation was S&S. The Judge focused on the possibility that the float coal dust would be put in suspension in the mine atmosphere as a result of a methane explosion at the face and the blast force traveling to the area of accumulations. *Id.* at 1443-44. The Judge was also concerned that such force could so severely disrupt the mine's ventilation system as to cause air to stop flowing through entries, which would result in the dust remaining in suspension, increasing its volatility. In that event, the dust could provide fuel for a methane explosion occurring at the face to continue down the entries for a considerable distance beyond the presence of the methane. *Id.* at 1444.

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[11] The citation was originally an order for which the Secretary proposed a penalty of $50,700, but at the hearing he modified it to a citation under 30 U.S.C. § 814(a), alleging high negligence. 32 FMSHRC at 1448-49.

Additionally, the Judge noted that if the float coal dust is placed in suspension, the ignition sources in the area of the suspended dust could ignite it independent of a methane explosion further inby. *Id.* at 1444, 1445. Because the Judge found that it is reasonably likely that there will be at least one serious methane ignition or explosion over the life of a gassy coal mine such as the Foidel Creek Mine, he concluded that the presence of the accumulated float coal dust significantly increased the hazard to miners and thus that the violation of section 75.400 was S&S. *Id.*

With regard to whether the preshift examination violation was also S&S, the Judge found that the examiner contributed to a serious safety hazard when he failed to perform an adequate examination. *Id.* at 1450. The Judge concluded that this failure prevented a foreman from knowing of the need to rock dust the No. 3 belt entry, and the hazard contributed to by the violation would result in an accident in which there would be serious injury. *Id.*

The Judge also concluded that the accumulations violation was attributable to Twentymile's unwarrantable failure, in that the accumulations resulted from aggravated conduct and a serious lack of reasonable care on the part of the operator. *Id.* at 1445-48. The Judge did so on the basis of his findings that the accumulations of float coal dust were obvious, extensive, and hazardous. *Id* at 1447. He also found that the accumulations had occurred over the course of several preceding shifts, yet during those shifts many of the preshift examiners did not consider the accumulations of float coal dust to be hazardous and did not even note the condition in the examination book. *Id.* Finally, the Judge recognized that Twentymile had been cited about 45 times in the preceding 15 months by MSHA for accumulation violations, and, in October 2006, had been specifically advised by MSHA that it needed to make greater efforts to combat float coal dust accumulations in another of its belt entries. *Id.*

For the accumulations violation, the Judge found the negligence to be high and assessed a penalty of $50,000. *Id.* at 1448. For the preshift violation, the Judge concluded that the negligence had not been shown to have been high, and assessed a penalty of $5,000. *Id.* at 1451. On appeal, Twentymile challenges the Judge's two S&S findings, his unwarrantable failure finding with regard to the accumulations violation, and the penalties accordingly assessed, but does not challenge his finding that the preshift examination conducted was inadequate.

B. Disposition

1. Whether the Violations were Significant and Substantial

As discussed with respect to the earlier accumulations violation, the conclusion of the reasonable likelihood of a methane ignition at the face during continued normal mining operations is supported by the record in this case and by Commission precedent. However, unlike the other accumulations violation, the accumulations at issue here were not near the face, but a substantial distance away, along the belt as it approached a portal to the mine. The Judge nevertheless concluded that the force of methane ignition at the face could be sufficient to put the

accumulations in question into suspension, increasing the volatility of the dust and possibly serving to propagate the initial methane explosion further. He further found that this could increase the likelihood that the dust would be ignited by local ignition sources because the dust would cover a much greater area of the mine when in suspension. 32 FMSHRC at 1444.

While we agree with the Judge that float coal dust is highly dangerous when put into suspension, we are constrained by the record in this case regarding how the cited accumulations could have been put into suspension. The Judge's conclusion is based on his finding that forces unleashed by a methane explosion at the face can travel "long distance[s]" down mine entries, "for a considerable distance beyond the presence of the methane." *Id.* Nowhere in the Judge's decision, however, does he address how far the cited accumulations were from the face. Testimony at the hearing was that the mine's longwall panels alone were between 10,000 and 20,000 feet in length. Tr. 346. The mine had a belt system that Grosely estimated totaled at least 12 miles in length, while the operator's witness stated it was 8-1/2 miles. Tr. 187, 224. At oral argument before us, the Secretary's counsel estimated the distance between the longwall and the accumulations as seven miles. Oral Arg. Tr. 45-46.

There is no record evidence that explosive forces would travel so far in the mine in question. Both Inspector Grosely, with respect to the instant violation, and Inspector Gore, with regard to the earlier violation, testified repeatedly regarding the danger posed by coal dust once it is put into suspension. Tr. 201-02, 204, 299, 307-08, 309. No testimony or other evidence was presented, however, on whether accumulations along the belt, miles away from the face, could be put into suspension by a methane explosion or ignition at the face. Because S&S determinations are based on the particular facts surrounding a violation, we cannot find that substantial evidence supports the Judge's conclusion that the accumulations along the belt were an S&S violation of section 75.400 due to the risk of a methane explosion at the face.

However, the possibility remains that the violation could be characterized as S&S. Grosely testified that local forces including air velocity could put the float coal dust into suspension. Tr. 201. Based on the operator's preshift reports, he cited that velocity as approximately 350 feet per minute from the portal into the mine along the belt, and concluded that this velocity was sufficient to liberate the float coal dust as coal moved along the belt. Tr. 127-28, 200-01. He further identified another source of liberated float coal dust as that fine material which returns into the mine on the bottom side of the belt when scrapers designed to clean the belt outside the mine fail to entirely do so. Tr. 128. He testified that, given the speed at which the belt at issue moves – 800 to 900 feet per minute – such material would tend to dry and fall off the belt, thus further contributing to the accumulations. Tr. 128-29.

It has long been recognized that a large expanse of float coal dust accumulations, such as in the instant case, can lead to the dust being put into suspension from normal mining operations. In *Freeman Coal Mining Co. v. Interior Bd. of Mine Ops. Appeals*, 504 F.2d 741, 746-47 (7th Cir. 1974), the court upheld a decision of the Commission's predecessor, the Interior Board of Mine Operations Appeals ("Board"), that float coal dust accumulations of approximately 7,200

feet along a belt in a gassy mine constituted an imminent danger that necessitated the issuance of a withdrawal order.[12] In doing so, the court found substantial evidence to support the Board's decision that the accumulations constituted an imminent danger, given that the dust is so lightweight that it can be easily disturbed and suspended into the air during the course of normal mining operations. *See Freeman Coal Mining Corp.*, 80 Int. Dec. 610, 615, 2 IBMA 197, 211 (1973). The court was persuaded that because coal was being moved by the belt, there was an increased likelihood that coal dust would be kicked up into the air where it could be ignited by local ignition sources. 504 F.2d at 746-47 & n.13.

In light of the decisions in *Freeman*, we are remanding this case to the Judge to review Grosely's testimony as well as the remainder of the record and determine whether there is sufficient evidence to establish that local forces could have put the dust accumulation in the belt entry and crosscuts into suspension in sufficient amounts to risk a local ignition or explosion. If so, the Judge will then need to address whether there was sufficient evidence of local sources that could have ignited the suspended dust.[13]

The Secretary would have us avoid remand and reverse the Judge's conclusion that there was insufficient evidence that the belt or its components could ignite the dust where it had accumulated.[14] The Judge, however, was not persuaded that the ignition sources Inspector Grosely discussed were either sufficiently intense or located close enough to sufficient quantities of the dust to result in a fire that would be hazardous to miners. 32 FMSHRC at 1443 ("[t]here is no evidence that piles of loose coal and coal fines had accumulated under the belt, or under or near the rollers such that a localized ignition . . . could start a fire that would spread"). We find that substantial evidence supports the Judge's conclusion.

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[12] Similar to the present case, at the time of the inspection of the Freeman Coal mine, there was no concentration of methane. *Id.* at 746 & n.12.

[13] In his initial decision, the Judge appeared to determine that there was such evidence. *See* 32 FMSHRC at 1444 ("[i]n addition, other ignition sources in the immediate area of the coal dust can ignite the suspended float coal dust."), 1445 ("[i]n addition, there were ignition sources in the area that could independently ignite float coal dust if it were suspended in the mine atmosphere . . ."). Twentymile contends that this conflicts with the Judge's finding, discussed below, that there was insufficient evidence to establish that the belt and its parts could serve as ignition sources. Remand will permit the Judge to further explain his reasoning regarding the potential local ignition sources for the coal dust upon it being put into suspension.

[14] The Secretary is well within his right to do so, because the prevailing party below may urge in support of the decision under review even those arguments the Judge considered and rejected. *See, e.g., Sec'y on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1529 (Aug. 1990).

The Secretary further points to Grosely's testimony regarding the existence of coal dust clinging to the belt rollers, the fact that 65 such rollers fail and thus need replacing during an average day at the mine, and that there could be a hot spot on the belt from it rubbing against metal components. Tr. 130-31, 133, 139, 142-44, 146. The Judge addressed this evidence, but found that the operator's program of frequent replacement of rollers, coupled with the fact that the rollers or a hot spot on the belt would come in contact with only a small amount of dust, substantially reduced the likelihood of a fire. 32 FMSHRC at 1443. It was within the province of the Judge to require evidence of a heat source close enough to sufficient quantities of dust as a prerequisite to concluding that there was a likelihood of a fire from the accumulations. Here, the Judge appeared to be presented with evidence that the ignition sources would only come into contact with a minimal amount of dust, and thus would not pose a risk of igniting the cited accumulations.

In summary, we vacate and remand for further proceedings the Judge's findings that the violations contained in Order No. 6686312 and Citation No. 6686313 were S&S. Should he find the violations to not be S&S on remand, the Judge will need to reassess the penalties for the order and citation.

2. Whether the Accumulations Violation Resulted from an Unwarrantable Failure to Comply

We reject Twentymile's contention that it was improper for the Judge to consider the role played by the operator's preshift examiners in the accumulation of coal dust over such an undisputedly large area of the belt entry and crosscuts. Twentymile's argument appears to be predicated on the belief that there was nothing more than an honest disagreement between those examiners and MSHA over whether the accumulated coal dust constituted a violation. In asserting a good faith belief as a defense to an unwarrantable failure charge, however, the operator must show that the belief was reasonable under the circumstances. *IO Coal*, 31 FMSHRC at 1357-58. Here, the overwhelming weight of the evidence credited by the Judge was that the dust had not been diluted by rock dust and had accumulated over an extensive area, and thus constituted a violation of the specific prohibition in section 75.400 against the accumulation of float coal dust. 32 FMSHRC at 1445. Indeed, there is evidence that, because of the way the mine's ventilation interacted with the operator's rock dusting methods,[15] the coal dust that had accumulated in the crosscuts was at its greatest depth, and had been there for weeks. 32 FMSHRC at 1442; Tr. 123, 127, 141. Consequently, the record supports the Judge's

[15] Inspector Grosely testified that when rock dust is blown down a main course, like the belt entry in this instance, the air velocity can be so high that the rock dust bypasses the crosscuts. Tr. 129.

treatment of the preshift examiners' actions and opinions in this instance and demonstrates that the good-faith-belief argument has no merit.[16]

We uphold the judge's finding that Twentymile had been put on notice that greater efforts on its part to comply with section 75.400 were necessary. We have already rejected some of the operator's arguments in our review of the earlier accumulations violation. In the instance of this cited accumulation, there was even a greater basis for the Judge to find that the operator should have been making greater efforts to combat accumulations – because the float coal dust accumulations order previously discussed had been issued just less than two months earlier.

Moreover, the Judge was persuaded by evidence specific to this accumulations order. First, Inspector Grosely had issued an unwarrantable failure citation to Twentymile in October 2006 for float coal dust accumulations in the mine's No. 7 belt entry. 32 FMSHRC at 1447. Second, that same month MSHA had notified Twentymile and the other mines in that district that the agency would be focusing its enforcement efforts on belt lines. *Id.* While Twentymile argues that such evidence is too remote in time and nonspecific to put it on notice (T. Br. at 23, 26), we disagree, given that the order at issue here cited Twentymile for float dust accumulations in a belt entry. *See Enlow Fork*, 19 FMSHRC at 12 (remanding for Judge to address all relevant evidence of Secretary and operator on issue of notice). Consequently, substantial evidence supports the Judge's finding that Twentymile's conduct was unwarrantable in this instance based in part on the notice the operator had received regarding the need to address accumulations problems at the mine.

Accordingly, we affirm the Judge's determination that the violation of the standard was attributable to the operator's unwarrantable failure.[17]

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[16] Twentymile also argues that it was possible that the dust had accumulated during the brief time the mine had resumed production since the last preshift examination. Inspector Grosely rejected the position that such a large amount of dust could accumulate in such a short period of time (Tr. 141), and the Judge credited his testimony. 32 FMSHRC at 1442. Such an inference is inherently reasonable, and thus provides further support for the Judge's determination that the accumulations occurred over a number of shifts. *See Mid-Continent Resources, Inc.*, 6 FMSHRC 1132, 1138 (May 1984).

[17] Because we are remanding the Judge's S&S determination with respect to the belt accumulations violation, Commissioner Young would also remand the unwarrantable failure determination, because that determination relied in part on the Judge's S&S determination. The Chairman and the other Commissioners do not agree that this is necessary, however, given that so many other unwarrantable failure factors are either conceded by Twentymile, such as the obviousness and extent of the violative condition, or have been upheld upon review.

III.

Conclusion

For the reasons set forth above, we: (1) affirm the unwarrantable failure determinations for Order Nos. 7622426 and 6686312 and the S&S determination for Order No. 7622426; and (2) vacate and remand for further proceedings consistent with this decision the S&S determinations for Order No. 6686312 and Citation No. 6686313.

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