FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

October 13, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEVA 2007-335
v.	:	
EASTERN ASSOCIATED COAL CORP.	:	

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

DECISION

BY: Jordan, Chairman; Young and Cohen, Commissioners

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act" or "Act"). Eastern Associated Coal Corp. ("Eastern") was charged by the Department of Labor's Mine Safety and Health Administration ("MSHA") with violating the roof control requirements of 30 C.F.R. § 75.202(a).[2] After a hearing, Judge Avram Weisberger affirmed the violation and its designation as significant and substantial ("S&S"), but concluded that the violation was not attributable to the operator's unwarrantable failure to comply with the regulation. 31 FMSHRC 174 (Jan. 2009) (ALJ).[3]

---

[1] Commissioner Patrick K. Nakamura assumed office after this case had been considered at a Commission meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218 (June 1994). In the interest of efficient decision making, Commissioner Nakamura has elected not to participate in this matter.

[2] Section 75.202(a) provides that "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." 30 C.F.R. § 75.202(a).

[3] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." The unwarrantable failure terminology is taken from the same section, and establishes more severe

The Commission subsequently granted the Secretary of Labor's petition for discretionary review challenging the judge's determination that the section 75.202(a) violation was not caused by an unwarrantable failure. For the foregoing reasons, we vacate the judge's decision, and remand the case to him so that he can further consider two of the relevant unwarrantable failure factors and whether, in light of all of the relevant factors, Eastern's conduct in violating section 75.202(a) was aggravated under the circumstances.

I.

Factual and Procedural Background

The violation occurred at Eastern's Federal No. 2 Mine, an underground coal mine in West Virginia, where Eastern uses an entry mined in the 1970s to store mine cars. 31 FMSHRC at 174-75; Tr. 68, 132, 150; E. Ex. 1 (main mine map). The entry is approximately 7,000 feet long and 16 feet wide. 31 FMSHRC at 175; Tr. 60, 145, 163-64. The stored cars are ones the mine is not currently using, so the track is referred to as the "7 Right empty track." Tr. 7.

The track consists of two rails running down the center of the entry, spaced 42 inches apart. 31 FMSHRC at 175; Tr. 27-28, 30. A trolley wire that supplies power to vehicles traveling on the rails runs overhead on the side of the entry between the rails and left rib (the "wire side"). 31 FMSHRC at 175; Tr. 26; Gov't Ex. 3-4, 5-8. The other side of the entry, between the rails and the right rib, is used as a walkway for foot traffic (the "walkway side"). 31 FMSHRC at 175; Tr. 28; Gov't Ex. 3-4, 5-8.

Roof control at the time the entry was mined consisted of the installation, every five feet, of three roof bolts, spaced across the center of the entry (and thus over the area of the floor where there are now rails), with straps between the bolts. 31 FMSHRC at 175; Tr. 147-48. The bolts were installed so that the outside bolts were no farther than six feet from the nearest rib, and that remains the maximum allowable distance under Eastern's roof control plan for that part of the mine. Tr. 156. Since the time the entry was mined, supplemental roof support has been added, including additional bolts, straps installed between bolts, and posts and cribs. 31 FMSHRC at 175; Tr. 146, 147-50, 184.

In July 2006, Eastern was mining the Eight Left longwall panel. Tr. 153-54; E. Ex. 1. Various miners would work or travel in the 7 Right empty track entry, such as motormen and the two maintenance men assigned to the area. 31 FMSHRC at 180 n.10; Tr. 115, 117, 146. Roof maintenance would be performed by miners using bolting machines on the tracks when the tracks were unoccupied. Tr. 116, 146, 149. Examiners would travel the entry daily, and, depending on the work to be done, repairmen and pumpers would need to travel and work on both the walkway and wire sides of the entry. 31 FMSHRC at 180; Tr. 146, 166, 171.

sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

On July 17, 2006, Inspector Jason Rinehart, as part of MSHA's quarterly inspection of the mine, walked all the way through the 7 Right empty track. 31 FMSHRC at 174; Tr. 18-23; E. Ex. 1. He was accompanied by both management representative Dan Kurry, the mine's safety supervisor, as well as a miners' representative, Eastern roof bolter Kevin Luketic. 31 FMSHRC at 177, 180 n.9; Tr. 23, 148. Empty cars did not occupy the track on the day of the inspection, as they had been deployed elsewhere. Tr. 78, 144.

As a result of his inspection, Rinehart issued Order No. 6602108 under section 104(d)(2) of the Mine Act, alleging an S&S violation of section 75.202(a) attributable to Eastern's unwarrantable failure to comply with that roof control standard. 31 FMSHRC at 174; Gov't Ex. 1, at 1-2. According to Rinehart, the roof and/or ribs had deteriorated at seven locations in the entry, resulting in the roof not being adequately supported at those locations. 31 FMSHRC at 175; Gov't Ex. 1. The roof deficiencies were enumerated in the order,[4] and six of the seven were further explained later by Rinehart in his testimony at the hearing later held on this matter. Tr. 27-64; 76-92; 101-04.

To abate the order, Eastern installed a total of 66 bolts and three steel jacks. Tr. 69; Gov't Ex. 1, at 3. The Secretary subsequently proposed a civil penalty assessment of $4,100 for the violation.

Two types of roof control deficiencies were cited by Rinehart. The most common was sloughage of material off the ribs, which resulted in an expansion of the overall width of the entry. Such expansion increased the distance between the rib and the nearest roof bolts. Tr. 30, 32-33, 58, 64, 77, 164. The increase was approximately a foot in each instance, thus increasing the distance between the rib and the bolts from the original six feet to seven feet. 31 FMSHRC at 177, 180.

The other deficiency was "potting out" of the roof around roof bolts. This occurs when so much roof material falls away from around a bolt that the bearing plate between the bolt and the roof becomes loose. Tr. 38-39, 41-42. Bolts that are loose and bearing plates that are not up against the roof do not provide the intended roof support. 31 FMSHRC at 179; Tr. 38-39, 47-50; Gov't Ex. 4A.

---

[4] In the order, locations in the 7 Right empty track were for the most part indicated by "car marker" numbers. Car markers were spaced 21 feet apart and the numbers were in descending order in the direction of Rinehart's inspection route in the entry. 31 FMSHRC at 176 n.4; Tr. 78-79. The only exception is with respect to the first roof deficiency, which was noted to be at the "5-Left rectifier." Tr. 27; Gov't Ex. 1, at 1, & 3. A rectifier is used in mines to convert alternating current to direct current. *Dictionary of Mining, Minerals, and Related Terms* 448 (2d ed. 1997). The reference to the area was outdated, as the area no longer included a rectifier. Tr. 155-56.

At the hearing, Inspector Rinehart described the dangers of the roof deficiencies, both with respect to any roof weakened because a wider area was unsupported due to rib sloughage as well as any roof weakened because potting out had lessened the support provided by the roof bolts. According to Rinehart, both conditions increased the likelihood that material would fall from the roof, putting miners immediately below at risk. 31 FMSHRC at 175-76; Tr. 30-31, 51.

Rinehart further alleged that falling roof material could pull out the bolts in the roof, increasing the area of roof that was subject to roof falls. Tr. 31, 82. Inadequately supported roof near intersections was particularly susceptible to this problem, according to Rinehart. 31 FMSHRC at 176; Tr. 51-52.

The judge affirmed the order alleging a violation of section 75.202(a) on the ground that a preponderance of the evidence established that a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided additional roof support in each of the areas in question. 31 FMSHRC at 179-81. The judge further found that the violation was S&S. *Id*. at 181-83.

With regard to whether the violation of section 75.202(a) was attributable to Eastern's unwarrantable failure, the judge found that the condition of the roof was obvious and, based on his S&S finding, posed a high degree of danger to miners. *Id*. at 184, 185. He also concluded that the conditions had existed for more than a few days, though there was insufficient evidence regarding their existence "beyond that limited time period." *Id*. The judge further found that the area affected by the cited conditions was not extensive in comparison with the total roof in the entry, and that Eastern was neither aware of the conditions nor had been put on notice that greater compliance efforts on its part were required. *Id*. at 185. As a result, the judge held that it had not been shown that the violation was the result of Eastern's unwarrantable failure, and assessed a penalty of $3,000. *Id*. at 186.

II.

Disposition

The Secretary, who adopted her petition for discretionary review as her opening brief, urges the Commission to reverse the judge on the question of whether the violation was attributable to Eastern's unwarrantable failure and to remand the case for a recalculation of the penalty. PDR at 7, 13-14. The Secretary argues that reversal is appropriate because the judge's factual findings were flawed with respect to the extent of the violative conditions, Eastern's knowledge of the conditions, and the operator's knowledge that greater compliance efforts were necessary on its part. *Id*. at 7-11; S. Reply Br. at 1-5. The Secretary also maintains that the existence of the roof conditions for more than a few days weighs in favor of finding those conditions unwarrantable. *Id*. at 12-13.

Eastern responds that the judge's conclusion that the violation was not attributable to unwarrantable failure is amply supported by substantial evidence, and that all of the Secretary's contentions would require the Commission to impermissibly reweigh evidence. E. Br. at 2, 10, 13-24. Eastern further argues that the judge's findings that the conditions were obvious and posed a high degree of danger are not supported by substantial evidence. *Id*. at 25-30.

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. 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. Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) ("*Consol*"); *Cyprus Emerald Res. Corp*., 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 43 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992).

All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353. A judge may determine, in his discretion, that some factors are not relevant, or may determine that some factors are much less important than other factors under the circumstances. *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009).

Here, the judge addressed all of the relevant factors, and the Secretary does not take issue with the relative weights he placed on those factors in concluding that the violation was not unwarrantable. Rather, the Secretary challenges the judge's conclusions as to four of the factors, arguing that the record evidence does not support the judge's conclusions.[5] In turn, while

---

[5] 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*

defending those findings, Eastern takes issue with findings the judge made as to two factors that he concluded were aggravating in this instance. Consequently, we address these six factors.[6]

A. The Extent of the Violative Conditions

The Commission has viewed the extent of a violative condition as an important element in the unwarrantable failure analysis. *IO Coal*, 31 FMSHRC at 1351-52. Below, the judge found the violation not to be extensive, based on his calculation that the areas of the roof described in the order as being inadequately supported because of the rib sloughage or potting out were not significant in comparison to the total of approximately 112,000 square feet of roof in the 7 Right empty track. 31 FMSHRC at 183-84.

On review, the Secretary argues that the judge erred in calculating the actual area of roof that was inadequately supported. With respect to the instances of rib sloughage, the Secretary maintains that the judge should have calculated the area of inadequately supported roof to include not just the immediate area of additional roof resulting from the rib sloughage, but rather the entire width of the entry. This is because, in finding a violation and concluding that it was S&S, the judge had credited Rinehart's testimony that the increases in width in the entry due to such sloughage weakened the roof support from rib to rib in those locations. PDR at 8-9 (citing 31 FMSHRC at 179-80). The Secretary also takes issue with the judge's calculation of the area of roof affected by the potting out around the roof bolts, arguing that the judge took into account only two of the three such areas described in the order. *Id*. at 9-10. According to the Secretary, altogether the judge was off by nearly a factor of seven in his calculation of the total area of roof that should have been considered inadequately supported in this instance. *Id*. at 10.

Eastern responds that calculating the extent of the violation using the entire width of the entry would convert the factor into one directed at the degree of hazard, when the factor is actually directed at the obviousness of a violation. E. Br. at 15-16. Eastern argues that even using the Secretary's method of calculation, the total area that was affected was still quite small compared to the total area of roof in the entry, and that the number of bolts compromised or subject to compromise by the potting out, as well as the number of additional bolts installed to abate the order, are relatively few in comparison to the 4,200 bolts that were initially installed in the entry. *Id*. at 17-19.

In her reply brief, the Secretary objects to Eastern's characterization of the purpose of the extensiveness criteria in the unwarrantable failure analysis. S. Reply Br. at 4. According to the

---

Coal Co., 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

[6] With regard to the seventh factor the judge addressed, Eastern's efforts to abate the violative conditions, the Secretary did not argue below that those efforts were deficient. 31 FMSHRC at 185. Accordingly, the judge did not consider it an aggravating factor. *Id*.

Secretary, the purpose of the criteria is to take into account the scope or magnitude of a violation, and other factors already account for a violation's obviousness and danger. *Id*.

We agree with the Secretary that the purpose of taking the extensiveness of a violation into account under the unwarrantability analysis is not to give additional consideration to the factors of danger or obviousness, but rather to factor in the scope or magnitude of a violation. *See Peabody*, 14 FMSHRC at 1261 (holding that five accumulations of loose coal and coal dust were extensive); *Quinland Coals, Inc.*, 10 FMSHRC 705, 708 (June 1988) (listing different roof control deficiencies where operator was charged with an unwarrantable violation of predecessor to section 75.202). Other unwarrantable failure factors already take the danger posed by a violation into account, and whether the violation was obvious.

We also agree with the Secretary that the judge's analysis contains errors. For instance, the judge acknowledged that there were three areas of roof cited as having potted out, but he only included in his calculation the square footage of two of them. *See* 31 FMSHRC at 183.

More fundamentally, however, we reject the judge's analysis that the question of the extensiveness of a roof control violation should be addressed by simply measuring the area of inadequately supported roof and comparing it to the relevant area examined by the inspector. Here the judge used the size of the entire entry as a basis for determining extensiveness. While the entry was dedicated to the storage of empty cars, that consideration does not mandate that the entire entry should thus serve as the area of comparison for determining extensiveness. The nature of mine roof is such that roof over a mile away that is in good condition does not lessen the degree of violation posed by roof needing repair that is immediately overhead.

As explained in the preamble to MSHA's roof control regulations, roof control in mines is quite idiosyncratic. *See* 53 Fed. Reg. 2354 (Jan. 27, 1988) ("Prevention or control of roof falls continues to be a difficult task because of the variety of conditions encountered in coal mines that can affect the stability of various types of strata."). That there are a myriad number of different types of mine roofs is why, under 30 C.F.R. § 75.220, each mine is required to submit, have approved by MSHA, and follow a roof control plan tailored to that mine. *See* 53 Fed. Reg. at 2369 ("The roof control plan concept, which has been used effectively throughout the coal mining industry, grew out of a need for flexibility to address the unique conditions of each mine."). Thus, the question of whether a roof control violation can be considered "extensive" in a particular mine should not be resolved simply by comparing the area of roof immediately affected by the violative condition with the area of the relevant entries or section. *See IO*, 31 FMSHRC at 1352 (more than 15 unsupported or inadequately supported kettle bottoms in the roof of a mechanized mining unit section totaling approximately 2100 linear feet can be found to be extensive). Not all roof control violations should be presumed to have the same effect because not all mine roofs are the same.

Using the entirety of the entry as the sole basis for comparison also tends to obscure where in the entry the bad roof was found. Three of the instances of sloughage that Rinehart cited included 54 linear feet within an approximately 100 linear foot area. Gov't Ex. 1, 6-8 (specifying

sloughage at car marker numbers 110 to 108, 108 to 107, and 105). The violative conditions thus could easily be considered much more extensive within this smaller (approximately 1700 square foot) area, and the judge should have taken this into account in his analysis of the extensiveness of the violation. *See IO*, 31 FMSHRC at 1352 (remanding unwarrantability issue to take distribution of roof plan violations into account).

Another relevant consideration in determining whether the roof control violation could be considered extensive is the abatement measure taken to terminate the citation. In this case it was 66 roof bolts and three steel jacks. Gov't Ex. 1, at 3. The Secretary argued that the number of bolts and jacks established that the violation was extensive in this instance, but the judge did not address the issue, instead relying solely on his calculation of relative area of roof in the entry affected by the cited conditions. *See* 31 FMSHRC at 183-84. The number of roof bolts installed, and the employment of jacks, is too significant in this instance to ignore in analyzing whether the violation was extensive.[7] *See Peabody*, 14 FMSHRC at 1263 (extensiveness shown by significant abatement efforts that were required to terminate citation).

Consequently, we are remanding this case to the judge for a finding on whether the extensiveness of the violation was an aggravating factor. The judge's analysis of the factor should not be limited to just a mathematical calculation of the roof area impacted by the violation in comparison to the size of the roof in the 7 Right empty track, but rather should take into account a wider scope of the circumstances surrounding the violation. Because the issue of extensiveness involves the degree of the violation, it ultimately is a fact question concerning the material increase in the degree of risk to miners posed by the violation. Various considerations, such as those previously discussed, are relevant to that question.

Remand will also permit the judge to resolve a clear contradiction in his decision with respect to the extensiveness of the sloughage. For purposes of determining whether the cited conditions constituted a violation of section 75.202(a), the judge accepted the Secretary's position that the widening of the entry due to sloughage led not only to an inadequately supported roof in the area of the extra foot of roof between the rib and the bolts, but it also "compromise[d] the integrity of the roof support system." 31 FMSHRC at 180 (increase of one foot in roof must be considered in context of the bolt support system's design to create compression from rib to rib).[8]

---

[7] While Eastern argues that there is no evidence that all the additional bolts and jacks were used to abate the roof control violation (E. Br. at 19), if some were used in areas of the entry that were not cited by Rinehart, it was incumbent upon Eastern to show that at trial. It made no attempt to do so.

[8] Eastern questions whether the judge should have credited Rinehart's testimony regarding the effect a wider roof would have had in this instance, given the inspector's qualifications and his failure to take into account the additional roof support that Eastern had installed, both throughout the entry and in some of the areas cited in particular. E. Br. at 16-17. The Secretary maintains that, given Rinehart's education, experience, and training, the judge

Yet when he calculated the extent of the violation in determining that it was not unwarrantable, the judge only took into account the extra foot of unsupported roof resulting from the sloughage. *Id*. at 183. Given the judge's findings crediting Rinehart's testimony that the roof support system was compromised in the areas of sloughage, it follows that the judge must address whether the entire width of the entry in these areas should be considered as to extensiveness. *See Consol*, 22 FMSHRC at 362-63 (instructing that on remand scope of unwarrantability analysis must match scope of violation).

Our dissenting colleague correctly notes that we are not to substitute a competing version of the facts for a view reasonably reached by the judge. Slip op. at 19 n.3 (citing *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983)). Yet our quarrel is not with the judge's view of the facts – given that he accepted in its entirety the Secretary's evidence that the roof conditions cited constituted a violation, and that he also found that the violation was an obvious hazard that presented a high degree of danger to miners. Rather, we take exception to his misapprehension of how those facts must be applied to determine whether the violative condition was so extensive as to constitute an aggravating factor for purposes of determining whether Eastern's conduct rose to the level of being an unwarrantable failure. A conclusion may not be said to be supported by substantial evidence where the judge has not applied a correct legal standard. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 11-12 (Jan. 1997) (remanding unwarrantable failure determination where judge employed an incorrect legal analysis with respect to certain

---

correctly credited Rinehart regarding the effect that an increase in the width of the entry has across the entry, S. Reply Br. at 3-4.

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). The Commission has also recognized that, because the judge "has an opportunity to hear the testimony and view the witnesses[,] he [or she] is ordinarily in the best position to make a credibility determination." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998). Nonetheless, the Commission will not affirm such determinations if they are self-contradictory or if there is no evidence or dubious evidence to support them. *Id.* at 1881 n.80; *Consolidation Coal Co.*, 11 FMSHRC 966, 974 (June 1989).

Here, the judge had more than adequate grounds to credit Rinehart on the issue, because Kurry conceded on cross-examination that the additional one foot of roof resulted in the amount of roof exceeding the original design of the roof support system with regard to those locations where rib sloughage had been found. 31 FMSHRC at 180; Tr. 164. In addition, while Eastern is correct that at car marker No. 239 two additional posts had been installed, that was not an area in which the Secretary relied upon the rib sloughage to argue that there was roof stress across the entire width of the entry. S. Reply Br. at 3.

record evidence). Even if a simple calculation of area were an appropriate metric for determining extensiveness – and we have held (and our colleague's dissent acknowledges, slip op. at 18) that it is not – the judge's formulation on the extensiveness issue dilutes the threat posed by the hazard by using an unreasonably large area as the denominator for his calculation. Thus, his view of the facts may not be considered to have been reasonably reached because it does not attach any realistic proportion to the threat the condition posed to miners working in proximity to the hazard.

Furthermore, given the judge's finding that the hazard was highly dangerous and obvious, the extensiveness must be weighed appropriately in the context of those factors, as well as the duration factor and the other factors found to be in mitigation or aggravation. *Jim Walter Res., Inc.*, 21 FMSHRC 740, 744-45 (July 1999). It is not possible for us to adequately review the conclusion reached by the judge without his appropriate application of each of the relevant factors. Nor is it appropriate for us to infer a conclusion that he has not reached on one of the factors, and then to further infer, solely from his finding that the hazard did not result from the operator's unwarrantable failure, that he must have appropriately applied this missing factor.

B. The Duration of the Violative Conditions

The Commission has emphasized that the duration of the violative condition is a necessary element of the unwarrantable failure analysis. *See Windsor Coal Co.*, 21 FMSHRC 997, 1001-04 (Sept. 1999) (remanding for consideration of duration evidence of cited conditions). In his decision, the judge, referring to Rinehart's estimate that the conditions had existed for a week because the sloughage and potting out processes were gradual ones, concluded that the "conditions had existed for more than a few days." 31 FMSHRC at 184 (citing Tr. 72). The judge further held that there was "insufficient evidence regarding their existence beyond that limited time period." *Id*. at 185.

As the Secretary states in her brief, it is not clear from the foregoing statements whether the judge found the duration of the violative conditions to weigh in favor of, or against, the conclusion that the violation was unwarrantable. PDR at 11-12. However, we read the judge's decision as holding that in order for the duration of the violative conditions to establish unwarrantability in this instance, that duration would have had to be longer than the Secretary had established.

We cannot uphold the judge on this factor because, in reaching this conclusion, he did not address the testimony of Luketic that the conditions had been present for at least a week. Tr. 126-27. Because the case is being remanded for the judge to correct errors in his analysis of the extensiveness factor, the issue of the duration of the violation may become a more important factor regarding whether the judge finds on remand that the violation was attributable to Eastern's unwarrantable failure. Consequently, on remand the judge should also reexamine the issue of the duration of the violation.

C. Eastern's Knowledge of the Existence of the Violation and Whether It Had Been Put on Notice That Greater Compliance Efforts Were Necessary

We address these two factors together because the Secretary cites the same evidence as establishing both factors. The judge found that the Secretary had failed to establish that Eastern had knowledge of the violative conditions or that the operator had been put on notice of the need for greater efforts by it to achieve compliance with section 75.202(a). 31 FMSHRC at 185. The judge concluded that it was significant that the record contained no evidence that Eastern had actual knowledge of the cited conditions. *Id*. The judge was further persuaded by the lack of a history of roof falls in the entry at issue and the fact that MSHA had not previously communicated to Eastern that it needed to make additional efforts to comply with section 75.202(a). *Id*.

The Secretary argues that the judge's findings are erroneous, based on Kurry's testimony that he knew that the roof in the entry had been subject to normal weathering over the previous 30 years. PDR at 10 (citing Tr. 150). Eastern responds that it acted conscientiously to counter the normal weathering of the roof in question by providing additional roof support over the years where it was needed throughout the entry. E. Br. at 22.

Nothing in the record establishes that Eastern knew of the violative conditions for which it was cited. The Secretary made no attempt to establish actual knowledge of the cited conditions. Moreover, the operator's knowledge that the roof was subject to normal weathering does not necessarily lead to the conclusion that the operator should have known of the cited conditions. The Secretary made no attempt to show that Eastern's overall roof maintenance in the entry was insufficient; she only established that the operator had failed to detect the conditions that were cited in this instance. Thus, the Secretary failed to establish the predicate circumstances necessary to conclude that Eastern reasonably should have known of the violative conditions. *See Emery,* 9 FMSHRC at 2002-04; *compare Coal River Mining, LLC*, 32 FMSHRC 82, 92 (Feb. 2010) (operator's knowledge of the specifics of its operations should have led it to conclude that violation charged would eventually occur).

The Secretary also argues that Eastern's experience in maintaining the roof in the entry put it on notice that greater efforts at compliance were necessary with respect to the roof. The Secretary specifically points to the 15 supplemental roof bolts the operator installed in the entry on the day prior to the inspection. PDR at 11. However, the Secretary made no attempt to show that MSHA had put Eastern on notice that its roof maintenance efforts were inadequate, either through the citation issuance process or more informally, by a warning from an MSHA representative.[9]

---

[9] The Commission has stated that repeated similar violations are 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. *IO Coal*, 31 FMSHRC at 1353-55; *Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997); *see also Consolidation Coal Co.*, 23 FMSHRC 588, 595 (June 2001) ("a high number of past violations of section 75.400 serve to

Moreover, we view the evidence of Eastern's efforts to combat the weathering process not as an aggravating factor, but rather as a mitigating one. The new roof bolts installed during the prior day were just the most recent supplemental roof control measure taken by Eastern in that entry. As Kurry detailed, additional roof bolts, steel and wooden straps, and posts and cribs had been installed over the years in the entry since its original mining. Tr. 146-49. To agree to the Secretary's suggestion and hold Eastern's efforts against it in this instance would not further the cause of safety. Consequently, we affirm the judge's conclusions as to Eastern's lack of knowledge of the violation and the lack of prior notice to Eastern that greater efforts at compliance were necessary.

D. Whether the Violative Conditions Were Obvious

The judge found that the roof conditions were obvious, because Inspector Rinehart testified that he could see the conditions when he walked up the entry, and Eastern safety supervisor Kurry, who accompanied Rinehart, did not contradict that testimony. 31 FMSHRC at 184. Eastern argues that the record does not support the judge's conclusion regarding the obviousness of the roof conditions.[10] According to Eastern, when there are cars on the track, examiners have to travel on the walkway side of the track, and thus would have difficulty detecting any expansion of the roof on the wire side of the track. E. Br. at 29.

Substantial evidence supports the judge's finding that the conditions were obvious. Only one of the cited seven instances of inadequately supported roof solely involved conditions on the wire side of the track. Gov't Ex. 1, 3-4, 5-8. There is no record evidence that the presence of the cars would have obscured the other conditions cited, which involved, in whole or part, roof potting out over the track or walkway-side rib sloughage.

Moreover, the evidence is that the conditions on the wire side would not have been so obscured once the cars were moved. The number of cars in the entry varied from zero to 200 (Tr. 132-33), and the amount at any time was clearly controlled by Eastern. When the operator's

---

place an operator on notice that it has a recurring safety problem in need of correction.") (citations omitted). The purpose of evaluating the number of past violations is to determine the degree to which those violations have "'engendered in the operator a heightened awareness of a serious . . . problem.'" *San Juan Coal Co.*, 29 FMSHRC 125, 131 (Mar. 2007) (citing *Mid-Continent Res., Inc.*, 16 FMSHRC 1226, 1232 (June 1994)). The Commission has 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." *Id.* (citing *Consolidation Coal*, 23 FMSHRC at 595).

[10] As the party defending the judge's determination that the violation was not attributable to unwarrantable failure, Eastern can argue bases that the judge rejected in support of that determination. *See Sec'y on behalf of Price & Vacha v. Jim Walter Res., Inc.*, 14 FMSHRC 1549, 1552 n.2 (Sept. 1992).

actions have caused a condition not to be obvious, the Commission has not been persuaded that the lack of obviousness is a mitigating factor in the determining whether a violation is attributable to the operator's unwarrantable failure. *See Coal River*, 32 FMSHRC at 94.

Eastern also maintains that the judge should not have found the violative conditions to be obvious because Eastern's personnel believed that roof in the entry was well-supported and safe. E. Br. at 29-30. Regardless of the overall condition of the roof, however, Eastern had a duty to protect miners from areas of the roof that were inadequately supported. Furthermore, on direct examination, Eastern safety director Kurry, who accompanied Rinehart, had an opportunity to dispute Rinehart's account of the deficiencies he found in Eastern's roof control measures. But Kurry agreed with Rinehart's measurements of the distances. Tr. 162. On cross-examination, Kurry went further, and stated that the distances between the ribs and the nearest bolt in the areas affected by sloughage exceeded the maximum distance permitted by the mine's roof control plan. Tr. 167. Consequently, we affirm the judge's conclusion that the violation was obvious.

E. The Degree of Danger Posed by the Violative Conditions

The Commission has relied upon the high degree of danger posed by a violation to support an unwarrantable failure finding. *See BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992) (finding unwarrantable failure where unsaddled beams "presented a danger" to miners entering the area); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992) (finding violation to be aggravated and unwarrantable based upon "common knowledge that power lines are hazardous, and . . . that precautions are required when working near power lines with heavy equipment"); *Quinland Coals*, 10 FMSHRC at 709 (finding unwarrantable failure where roof conditions were "highly dangerous").

Here, the judge, referencing his S&S findings, came to the conclusion that the violative roof conditions posed a high degree of danger to miners. 31 FMSHRC at 184. Eastern argues that the degree of danger at the time of the inspection was not nearly as high as the judge found. E. Br. at 26-28.

The judge's S&S findings focused partly on the danger posed to miners should roof conditions continue to deteriorate over time without being addressed. *See* 31 FMSHRC at 182-83. While it may not be clear that the roof conditions would have continued to deteriorate under normal operations, which are presumed in an S&S analysis, the judge's ultimate conclusion does not require such a finding. The judge's S&S findings are adequately supported by evidence of the present danger that miners faced.

The judge found that miners were working and traveling in the entry. *Id*. He also took into account the size of the materials that had already fallen from the roof. *Id*. According to Rinehart, there were softball- and basketball-sized pieces on the mine floor in the areas of inadequately supported roof. *See id*. at 179; Tr. 39. The judge also correctly noted that in one of the areas where roof potting had occurred, some bolts were loose, and their bearing plates were no

longer in contact with the roof, and thus were not providing support. 31 FMSHRC at 179, 182; Tr. 38-42; Gov't Ex. 4A.

Moreover, elsewhere in his decision the judge does not qualify his description of the dangers posed by the roof conditions as only occurring at some point in the future. *See* 31 FMSHRC at 179-80. Accordingly, we affirm the judge's finding that the danger posed to miners by the violative conditions was an aggravating factor in this case.

III.

Conclusion

For the foregoing reasons, we vacate and remand the judge's conclusion as to whether the section 75.202 violation was attributable to Eastern's unwarrantable failure, the issue of the operator's degree of negligence in connection with the violation, and the amount of the penalty the judge assessed for that violation. On remand the judge should reexamine the factors of extensiveness and duration of the violation and then determine whether the Secretary has established that the violation of section 75.202(a) was attributable to Eastern's unwarrantable failure. Should he reach a different conclusion than in his original decision, he would also need to reassess the penalty for the violation.

____
Mary Lu Jordan, Chairman

____
Michael G. Young, Commissioner

____
Robert F. Cohen, Jr., Commissioner

Commissioner Duffy, dissenting:

Because I cannot agree remand is justified in this instance, I must respectfully dissent from the decision of my colleagues.

The question before the judge was whether the Secretary had established that Eastern's violation of the roof control requirements of 30 C.F.R. § 75.202(a) was attributable to the operator's unwarrantable failure. *See Peabody Coal Co.*, 18 FMSHRC 494, 499 (Apr. 1996) (citing *Virginia Crews Coal Co.*, 15 FMSHRC 2103, 2107 (Oct. 1993)). Consequently, the judge analyzed each of the many factors that the Commission requires its judges to review each time a citation or order is alleged to result from an operator's unwarrantable failure. 31 FMSHRC at 183-85; *see also* slip op. at 5. After doing so, he concluded that Eastern's degree of negligence in connection with the roof control violation did not reach the level of aggravated conduct that constitutes unwarrantable failure under the Mine Act. 31 FMSHRC at 185-86.

In the face of such an analysis and holding, the only issue this case presents is whether the judge's ultimate conclusion is supported by substantial evidence. *See* 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)).

In my opinion, the majority errs in concluding that, because the judge's analysis as to one of the seven factors he examined was faulty (the extent of the violative condition), and the judge failed to expressly address all of the record testimony with respect to another factor (the duration of the violation), the case must be remanded for a cure of these defects. The majority's approach entirely ignores whether substantial evidence supports the judge's *overall* conclusion that the Secretary failed to establish that the violation was attributable to unwarrantable failure.

Taking the duration of the violation factor first, I cannot agree with the majority that the judge's analysis of this factor falls short of what we expect of our judges. The majority instructs the judge that on remand he needs to address the testimony of miners' representative Luketic that the violative condition had been present for at least a week. Slip op. at 10 (citing Tr. 126-27). However, a careful reading of the judge's decision and the record reveals that it is not surprising that the judge did not consider this testimony, because the judge did not credit *any* of Luketic's testimony on the evidence of Eastern's alleged unwarrantable failure. The judge only credited Luketic's testimony regarding the existence of the condition, and then just partially so. *See* 31 FMSHRC at 180 n.9.

The judge had ample opportunity to credit Luketic on the unwarrantable failure evidence, but passed in every instance. For instance, Luketic stated that Eastern had "neglected" roof

control in the 7 Right empty track. Tr. 120. As both the judge concluded and the Commission concurred, the evidence is quite to the contrary. *See* 31 FMSHRC at 184-85*;* slip op. at 11-12.[1]

Moreover, with regard to the duration factor, the judge stated that "there is insufficient evidence" the violative condition existed beyond a few days. 31 FMSHRC at 185. I read this as a barely veiled finding refusing to credit Luketic's testimony that the violation had existed for a week or more.

The judge also ignored Luketic's testimony that cut in favor of the operator with regard to unwarrantable failure. Luketic testified that big lumps of coal had *not* fallen out of the areas of inadequately supported roof to the mine floor. Tr. 127. The judge instead credited Rinehart regarding the material that had fallen from the roof. *See* 31 FMSHRC at 179, 182. Rinehart testified that he observed softball- and basketball-size roof pieces on the mine floor (Tr. 39), and the judge relied on that testimony to find the violation to be S&S and thus be an aggravating factor in his unwarrantable failure analysis, as it established that the violation posed a high degree of danger to miners. *See* 31 FMSHRC at 182, 184. If remand for the judge to consider Luketic's testimony is called for with respect to the duration factor, it is thus also called for with respect to the danger factor, to resolve the conflict between Luketic's testimony and Rinehart's testimony on the material that had fallen from the roof.

In light of the foregoing, I can only conclude that the judge made an implicit negative credibility finding as to Luketic's testimony on the unwarrantable failure evidence. This, of course was well within the judge's discretion to do.[2] Because the Secretary has advanced no

---

[1] Eastern was cited for a roof control violation in an area of the mine, the Right 7 empty track, in which it had no history of such violations before, and there is not an iota of evidence that MSHA had put the operator on notice that greater roof control efforts were needed there. *See* 31 FMSHRC at 184-85. As the majority finds, this was not a coincidence. The operator had an ongoing roof maintenance program in that area of the mine. *See* slip op. at 12. I thus agree with the majority that this mitigates Eastern's level of negligence in this instance. That the Secretary believed that she had to attempt to convert a mitigating factor into an aggravating factor in order to establish unwarrantability in this instance, first below and then on review, undermines her credibility here. As the majority properly concludes, the primary consideration under the Mine Act is furthering the cause of safety. *Id*. It appears that may have been forgotten by the Secretary in formulating her litigation strategy in this case.

[2] 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). The Commission has recognized that, because the judge "has an opportunity to hear the testimony and view the witnesses[,] he [or she] is ordinarily in the best position to make a credibility determination." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting

reason to overturn this credibility resolution, I do not join my colleagues in remanding the case to the judge to merely do explicitly what he clearly did implicitly in his original decision.

That leaves only the factor of the extent of the violation at issue in this case. I agree with the majority that the judge's approach to determining the extent of the violation – calculating the square footage of inadequately supported roof and dividing it by the entirety of roof in the relevant area of the Right 7 empty track – should not be countenanced. Slip op. at 7. Roof control in a mine is too idiosyncratic a subject to properly capture the extent of the condition with such a formulaic analysis.

However, I do not believe that the Commission's unwarrantable failure precedent necessarily requires that a case be remanded for a judge to correct an analytical error he made with respect to a single individual factor. Moreover, I cannot agree that the more complex analysis of the extensiveness factor that the Commission apparently expects upon remand will lead to an improved decision the second time around. *See* slip op. at 7-8.

First of all, remand is only necessary if the error the judge made was not harmless to his overall conclusion. As I believe the judge's failure to conduct a more exhaustive analysis of the extent of the violation does not significantly detract from his overall conclusion that the violation was not unwarrantable, I do not believe that remand is necessary in this instance.

My belief in that regard is buttressed by the substance of the majority's remand. While the majority points out the evidence the judge could consider in this instance with regard to the extensiveness of the violation, it hardly provides clear instructions to the judge as to how to conduct an extensiveness analysis. *See id*. That is perfectly understandable, because of the nature of roof control violations. Unlike, for instance, accumulation violations, there are no readily accepted and calculable standards for determining whether roof control violations should be considered extensive.

Accordingly, it is much less complicated, and thus appropriate, to look at a roof control violation in question in the context of Commission precedent. In *Quinland Coals, Inc.*, 10 FMSHRC 705 (June 1988), the Commission, in affirming the judge that a roof control violation was attributable to the operator's unwarrantable failure, stated that:

> The conditions indicating that the roof was not adequately supported were extensive and visually obvious. The judge credited the inspector's testimony that, in addition to the broken posts that had not been replaced and were lying on the floor of the entry, there was a large roof fall near the intersection of the entry and the crosscut, there were cracks in the roof running from the intersection

---

Ona Corp. v. NLRB, 729 F.2d 713, 719 (11th Cir. 1984)), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998).

> to and over the seal, and one side of the seal was being crushed by the weight of the roof.

10 FMSHRC at 708. In contrast, in *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission reversed a judge's finding of unwarrantable failure because the violation only involved four roof bolt bearing plates that had popped off in a track entry in which the operator had been diligent in its roof control efforts. *Id*. at 2004-05.

Here, the extent of the roof control violation in the 7 Right empty track fell somewhere in between those two cases, as it was clearly less than in *Quinland Coals*, but greater than in *Emery*. Because there is substantial evidence in the record to support the conclusion that the violation was closer in extent to *Emery* than it was to *Quinland Coals*, I would not remand the case to the judge for additional analysis.[3]

For the foregoing reasons I thus dissent from the decision remanding this case, and would instead affirm the judge on the ground that substantial evidence supports his conclusion that the Secretary did not establish that the roof control violation was attributable to Eastern's unwarrantable failure in this instance.

____
Michael F. Duffy, Commissioner

---

[3] If the judge had determined that the Eastern roof control violation was extensive, I would have found substantial evidence in the record to uphold that determination, given the number of instances of sloughage and potting out noted by Inspector Rinehart. However, the judge found that the violation was *not* extensive, and the only question is whether the evidence in the record supports that finding. In applying the substantial evidence standard, the Commission may not "substitute a competing view of the facts for the view that the ALJ reasonably reached," even if there is also support in the record for the Commission's own view. *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983).

Distribution

R. Henry Moore, Esq.
Jackson Kelly, PLLC
Three Gateway Center, Suite 1340
401 Liberty Avenue
Pittsburgh, PA 15222

Whitney G. Clegg, Esq.
Jackson Kelly, PLLC
1144 Market St., Suite 400
P.O. Box 871
Wheeling, WV 26003

Edward Waldman, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor West
Arlington, VA 22209-2247

Myra James, Chief
Office of Civil Penalty Compliance, MSHA
U.S. Dept. of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Administrative Law Judge Avram Weisberger
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N. W., Suite 9500
Washington, D.C. 20001-2021