FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

September 29, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. LAKE 95-267
AMAX COAL COMPANY	:	

BEFORE: Jordan, Chairman; Marks, Riley and Verheggen, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), raises the issue of whether the conceded failure by AMAX Coal Company ("AMAX") to extend a line curtain to within 40 feet of a working face, a violation of its ventilation plan and thus of 30 C.F.R. § 75.370(a)(1),[1] was the result of the AMAX's unwarrantable failure.[2] Administrative Law Judge Arthur Amchan found the violation unwarrantable. 17 FMSHRC 1747 (October 1995) (ALJ). The Commission granted AMAX's petition for discretionary review challenging that determination. For the reasons that follow, the judge's decision stands as if affirmed.

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[1] Section 75.370(a)(1) provides in part that "[t]he operator shall develop and follow a ventilation plan approved by the district manager." AMAX violated the provision of its ventilation plan which stated that "[w]hen mining on advance utilizing flooded bed scrubber miners and blowing canvas, line curtain will be maintained to within 40 feet of the working face with a minimum airflow of 8,000 cfm behind the curtain." G. Ex. 3; Tr. 26-27.

[2] The unwarrantable failure terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation.

I.

Factual and Procedural Background

On the morning of November 8, 1994, MSHA ventilation specialist Robert M. Montgomery was inspecting an area of the 2 West/Main West-South ("2W/MWS") section of AMAX's Wabash Mine in eastern Illinois. 17 FMSHRC at 1747; Tr. 14, 23. That day, AMAX section foreman Kyle Wethington was in the No. 6 entry of the section prior to the commencement of mining in that entry. 17 FMSHRC at 1749. Wethington, along with William Rowe and Tommy Stephens, the two miners who were to mine in that entry with the remote control continuous miner, had cleaned up gob in the entry before beginning to cut coal. *Id.*; Tr. 109, 112-13. At around the time the miners began cutting the coal, Wethington left the No. 6 entry to examine some stoppings that had been blown at the head of the belt, a condition to which Wethington was alerted by another MSHA inspector present at the mine that day. 17 FMSHRC at 1749; Tr. 110-11, 113-14. At that time, the line curtain in the entry was within 40 feet of the face, consistent with the Wabash Mine's ventilation plan requirement for working faces. 17 FMSHRC at 1749; Tr. 112-13.

In the 40 to 45 minutes that Wethington was away from the No. 6 entry, Rowe had completed three cuts into the coal, and was finishing the fourth and final cut when Wethington returned. 17 FMSHRC at 1749; Tr. 100, 106, 114-15, 202, 224. In mining the first and second cuts, the continuous miner was advanced 20 feet on the right side of the face, then 20 feet on the left. 17 FMSHRC at 1749; Tr. 193. Thereafter the mining machine was moved back to the right to advance another 15 to 20 feet, at which time the line curtain should have been extended to stay within 40 feet of the face. 17 FMSHRC at 1749; Tr. 90, 194. However, Rowe and Stevens admitted that the curtain was never moved from its original position. 17 FMSHRC at 1749; Tr. 200, 203, 224. Thus, the third cut on the right and the fourth and final cut on the left took place while AMAX was in violation of its ventilation plan. 17 FMSHRC at 1749.

Upon his return to the No. 6 entry, Wethington instructed Stevens regarding the miners' next task, which was to cut coal in the No. 5 entry. *Id.* at 1750. Meanwhile, Inspector Montgomery, who was inspecting the working faces of that section of the mine, came upon a ram car waiting to enter the No. 6 entry as soon as another ram car, operated by Robert Scott, left the entry. *Id.* at 1747-48; Tr. 23. When the waiting ram car entered the No. 6 entry, Inspector Montgomery followed it, and saw foreman Wethington walking out of the entry. 17 FMSHRC at 1748. After Wethington noticed the inspector heading into the No. 6 entry he turned around. *Id.*; Tr. 23-24, 40-41. Wethington then walked back to the working face and ordered Rowe to shut down the continuous miner and leave to obtain additional material to extend the line curtain 20 feet. 17 FMSHRC at 1748; Tr. 116-18, 127, 198. Wethington also instructed Stevens to get a ladder so that additional curtain material could be hung. Tr. 216.

Once the face and the line curtain were in his view in the No. 6 entry, Inspector Montgomery immediately noticed that the line curtain was much farther away from the face than

it should have been. 17 FMSHRC at 1748; Tr. 24. Bruce Thompson, an AMAX section supervisor who was accompanying Inspector Montgomery, also recognized that the curtain was not in the proper position. Tr. 172; 182-83. Inspector Montgomery measured the distance from the end of the unextended line curtain to the tail of the continuous mining machine at between 20 and 25 feet. 17 FMSHRC at 1748; Tr. 24. As the continuous miner was approximately 35 feet long, that meant that the end of the curtain was 55 to 60 feet from the face, rather than within 40 feet, as required by AMAX's ventilation plan. 17 FMSHRC at 1748; Tr. 26-28, 81-82, 220.

Inspector Montgomery cited AMAX for a significant and substantial ("S&S")[3] violation of 30 C.F.R. § 75.370(a)(1) due to an unwarrantable failure to comply with the requirements of its ventilation plan. 17 FMSHRC at 1748. The unwarrantable failure designation was based on Inspector Montgomery's belief that Wethington was present for at least one load of coal being loaded onto a ram car while the line curtain out of place, and that, until he saw Inspector Montgomery, Wethington did not intend to correct the problem. Tr. 24, 40-41, 73.

AMAX conceded that it violated the Mine Act, but contested the S&S and unwarrantable failure designations. 17 FMSHRC at 1748. The judge found the violation to be non-S&S. *Id*. at 1753.

On the unwarrantable failure issue, the judge credited the account of ram car operator Scott, who testified foreman Wethington was in the No. 6 entry for approximately five minutes, over that of Wethington, who claimed that he was in the No. 6 entry for only one minute before starting to leave again. *Id*. at 1750 & n.2; Tr. at 116. The judge also found the violation to be an obvious one, on the basis of the testimony of AMAX section supervisor Thompson that, when he accompanied Inspector Montgomery into the No. 6 entry, he immediately recognized that the location of the line curtain was in violation of the Wabash Mine ventilation plan. *Id*. at 1751. In addition, the judge inferred that Wethington's "about-face" upon seeing Inspector Montgomery was precipitated by (1) Wethington's knowledge that the line curtain's location violated the ventilation plan, and (2) Wethington's belief that Inspector Montgomery would immediately notice it. *Id*. Concluding that Wethington was aware that the line curtain was not close enough to the face before he saw Inspector Montgomery, the judge held that "[s]ince Wethington knew that the violation existed and ignored it, his conduct is sufficiently aggravated to constitute an 'unwarrantable failure.'" *Id*.[4]

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

[4] After trial but before the issuance of the judge's decision, a civil penalty proceeding commenced against Wethington under section 110(c) of the Mine Act. Over Wethington's objections, the same judge granted the Secretary's motion to stay that proceeding until the Commission ruled on the instant appeal. 18 FMSHRC 467 (March 1996) (ALJ). In that decision, the judge held that he would not permit Wethington to relitigate in the section 110(c) proceeding

II.

Disposition

AMAX claims that it was improper for the judge to credit the testimony of ram car driver Scott over foreman Wethington regarding the amount of time that Wethington was in the No. 6 entry, in light of Scott's bias against AMAX and the consistency of the testimony of Wethington and miner Stevens. A. Br. at 13 & n.3. AMAX also contends that the judge's inference that Wethington knew of the violation at the time he saw Inspector Montgomery was neither reasonable nor sufficiently supported by the grounds cited. A. Br. at 12-17. AMAX states that application of the proper criteria and relevant precedent leads to the conclusion that the conduct at issue was not unwarrantable (A. Br. at 6-10), and that in reaching the opposite conclusion, the judge erred by applying an improper "should have known" test, relying on knowledge of the existence of a condition as the sole basis for his conclusion that aggravated conduct had occurred, and failing to evaluate all of the appropriate criteria. A. Br. at 17-20. The Secretary responds that the judge's finding of unwarrantable failure is supported by substantial evidence that Wethington's conduct was intentional, in that Wethington knew of the violative condition and intentionally ignored it until he encountered Inspector Montgomery. S. Br. at 6-10. According to the Secretary, when misconduct is found to have been intentional, it is immaterial that the judge failed to consider other factors which also may be relevant to unwarrantable failure determinations. S. Br. at 10-11.

Chairman Jordan and Commissioner Marks would affirm the judge's decision. Commissioners Riley and Verheggen would reverse the judge's decision. Under *Pennsylvania Electric Co.*, 12 FMSHRC 1562, 1563-65 (August 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992), the effect of the split decision is to allow the judge's decision to stand as if affirmed.

III.

Separate Opinions of the Commissioners

Chairman Jordan and Commissioner Marks, in favor of affirming the decision of the administrative law judge:

For the reasons that follow, we conclude that foreman Wethington's conduct was aggravated and therefore the judge properly determined that the violation was unwarrantable.

The judge held that "[s]ince Wethington knew that the violation existed and ignored it, his conduct is sufficiently aggravated to constitute an 'unwarrantable failure.'" 17 FMSHRC at 1751 (citing *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011 (December 1987)). In order to

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the issue of his knowledge of the violation. *Id*. at 468-70.

determine the correctness of the judge's ruling, we must address the following two issues. First, is there substantial evidence in the record to support the determination that Wethington was aware of the violation and yet intentionally chose to ignore it? Second, does a foreman who intentionally ignores a violation engage in "aggravated conduct," even though the violation is expected to be of short duration and poses low risk?[5]

In resolving the first question, we conclude that substantial evidence supports the judge's conclusion that Wethington was aware of the violative condition in the subject No. 6 entry, and that he intentionally failed to order the advancement of the line curtain. The judge based his determination on three factors. First he found that Wethington was in the No. 6 entry for five minutes, instead of for only the one minute alleged in Wethington's version of events. In making this finding, the judge credited ram car driver Scott's testimony over Wethington's testimony. 17 FMSHRC at 1750 n.2. He found Scott to be the more disinterested witness of the two and noted that Scott appeared to have a recollection of the events equal or superior to that of Wethington. *Id*. Amax urges the Commission to overturn this credibility determination, contending that Wethington's testimony on this point was supported by the testimony of Stevens (a miner helper present in the entry), and suggesting that Scott's testimony established that he had a reason for bias against AMAX. A. Br. at 13 n.3.

We have examined Stevens' testimony and do not agree that it is more consistent with Wethington's testimony than it is with Scott's testimony regarding the length of time Wethington was present in the No. 6 entry.[6] We have also examined the testimony which Amax suggests demonstrates Scott's bias and conclude that this testimony is also insufficient to disturb the judge's credibility resolution. It is well established that "a judge's credibility determinations are not to be overturned lightly and are entitled to great weight." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (November 1995), *appeal docketed sub nom., Secretary of Labor v. Keystone Coal Mining Corp.*, No. 95-1619 (D.C. Cir. Dec. 28, 1995).

Our review of the testimony of both Scott and Wethington confirms the judge's conclusion that Scott's recollection of the events was as good as, if not better than, that of Wethington. Scott testified that he saw Wethington in the No. 6 entry on consecutive ram car

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[5] The ALJ determined the violation to be non-S&S and the Secretary did not appeal that ruling.

[6] Contrary to AMAX's claim (A. Br. at 13 n.3), Stevens did not testify that Wethington was in the entry for only the time it took to load one or two ram cars. Rather, in answering a question regarding how long Wethington was "over there," Stevens stated for "one or two" ram cars. Tr. 215. From the context of the questioning, Stevens testimony more likely referred to the amount of time Wethington spent speaking to Stevens than the amount of time Wethington was in the No. 6 entry. Neither Stevens nor Rowe testified that either had noticed Wethington returning to the No. 6 entry or when he began to again leave.

trips Scott made that were approximately five minutes apart. 17 FMSHRC at 1750 n.2; Tr. 95, 97-98, 100, 106, 116. Thus, we conclude that the judge did not abuse his discretion in crediting this testimony, and that substantial evidence supports the judge's finding that Wethington was in the No. 6 entry for approximately five minutes.

The second factor supporting the judge's inference of Wethington's knowledge was the obvious nature of the violation. Although Wethington maintained that he did not notice the position of the line curtain, Amax section supervisor Armstrong testified that the violative condition was immediately obvious once the working face was in view. 17 FMSHRC at 1751.

The third and by far the most compelling basis supporting the inference that Wethington had prior knowledge of the violation was Wethington's conduct when he saw the inspector approaching. At that time he made an "about-face," returned to the subject entry, and immediately directed the crew to advance the line curtain as required by law. *Id*. at 1750.

Amax takes issue with the inference the judge drew from Wethington's "about-face," and his immediate decision to advance the line curtain once Wethington realized that Inspector Montgomery was about to inspect the No. 6 entry. Although Wethington testified that he did not notice that the line curtain was too far back when he was first in the No. 6 entry, the judge concluded Wethington was unlikely to react in such a rapid fashion if he was not previously aware of any violations there. *Id*. at 1750-51.

In considering the evidentiary effect of inferences, the Commission has held that judges may draw inferences from record facts so long as those inferences are "inherently reasonable and there [exists] a rational connection between the evidentiary facts and the ultimate fact inferred." *Garden Creek Pocahontas*, 11 FMSHRC 2148, 2153 (November 1989). While it is possible that other inferences could have been drawn from Wethington's actions, it is for the trier of fact to decide between reasonable inferences, and it is not necessary that the inference drawn by the judge be more likely to be correct than other permissible inferences. *See generally* 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2528 (2d ed. 1995). Accordingly, we conclude that the judge's inference was reasonable and should not be disturbed by the Commission.

Based on the finding that Wethington was in the No. 6 entry for five minutes, Armstrong's testimony regarding the obviousness of the violative condition, and the inference the judge drew from Wethington's "about-face," the judge concluded that Wethington knew that the line curtain had not been extended as the ventilation plan required. 17 FMSHRC at 1750-51. We agree and conclude that the facts as found by the judge provide substantial evidence that Wethington knew of the violative condition.

The remaining issue is whether Wethington's conduct was aggravated and therefore unwarrantable. For the following reasons we affirm the judge's finding of unwarrantability.

In *Emery Mining Corp.*, 9 FMSHRC 1997 (December 1987), the Commission explained that unwarrantable failure should not be equated with ordinary negligence. It requires "aggravated" conduct resulting from more than "inadvertence," "thoughtlessness" or "inattention." *Id*. at 2001. In *Emery* the Commission referred to unwarrantable failure in terms such as "indifference," "willful intent," "serious lack of reasonable care" and "knowing violation." *Id*. at 2003.

Our colleagues claim that under *Virginia Crews Coal Co.*, 15 FMSHRC 2103 (October 1993), a foreman's knowledge of a violation is insufficient to establish aggravated conduct. Slip op. at 10. They contend further that the limited duration and low risk posed by the line curtain violation preclude a finding of aggravated conduct in this case. *Id*. at 10-11. We disagree. Unlike our colleagues, we do not find *Virginia Crews* to be dispositive of this issue given the vast difference in circumstances presented in this case.

In *Virginia Crews*, the inspector designated a roof control violation as unwarrantable even though there was no direct evidence that anyone, other than the preshift examiner, had observed the violation. 15 FMSHRC at 2105. Moreover, the foreman had received the preshift examiner's report only an hour and a half before the inspector's visit, and "[n]o activity occurred in the cited area during that period." *Id*. at 2106. Under these circumstances, the Commission declined to uphold the unwarrantable failure designation because "*there was no credible evidence to establish that [Virginia Crews] deliberately and consciously failed to act or engaged in conduct which one may reasonably conclude was aggravated*." *Id*. at 2107 (emphasis added). The short time between the examiner's report and the inspector's visit, as well as the lack of mining activity during that time, precluded the foreman's behavior from being considered "aggravated conduct."[7]

In stark contrast to *Virginia Crews*, the judge in this case found that credible evidence established that Amax, through its foreman Wethington, not only knew of the existence of the misplaced curtain but also decided to ignore the violation and let mining continue without correcting the violation. Wethington claimed his failure to order the line curtain moved resulted from inadvertence or inattention, but this contention was rejected by the judge, who concluded that Wethington *was* aware of the violative condition and chose to ignore it until he saw the MSHA inspector. Wethington's behavior thus can be accurately characterized as "intentional

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[7] It is worth noting, therefore, that the statement in *Virginia Crews* regarding the insufficiency of a "knew or should have known" test is actually dicta since there was no evidence to show that the foreman whose conduct was under review either knew or should have known about the violation prior to receiving the preshift examiner's report. In *Virginia Crews* the Commission was simply restating the fundamental principle of *Emery* that "a breach of a duty to know is not necessarily an unwarrantable failure." *Id*. at 2107. Indeed, *Virginia Crews* generally has been cited for the proposition that a "should have known" or "had reason to know" standard is insufficient to prove unwarrantability. *See Peabody Coal Co.*, 18 FMSHRC 494, 498 n. 7 (April 1996)*; Wyoming Fuels Co.*, 16 FMSHRC 1618, 1628 (August 1994); *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1614 (August 1994).

misconduct," which the Commission has concluded "is a form of unwarrantable failure for purposes of the Mine Act." *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (February 1991).

The Commission's precedent on such intentional misconduct, regardless of the violation's duration or risk, is clear and consistent. In *Youghiogheny*, the Commission upheld an unwarrantable failure determination because the foreman deliberately violated the roof control plan, even though the Commission also concluded that the violation was not S&S, as it posed minimal risk. 9 FMSHRC at 2011, 2013. In *New Warwick Mining Co.*, 18 FMSHRC 1365 (August 1996), the Commission concluded that a violation resulting from deliberate action was unwarrantable, notwithstanding that the inspector had not even designated the violation as S&S. In our decision, we relied upon neither the duration of the violation nor the risk it posed.[8] *Id*. at 1370-71. *See also Enlow Fork Mining Co.*, 19 FMSHRC 5, 11-12, 16-17 (January 1997); *New Warwick Mining Co.*, 18 FMSHRC 1568, 1572-74 (September 1996) (holding in both cases that accumulations violations were unwarrantable, although not S&S). Moreover, in some cases where a violation has been found S&S, the Commission has based its unwarrantable failure determination on the knowing, indifferent or willful conduct of the supervisory agent, rather than on the gravity of the violation. See *Ambrosia Coal & Construction Co.*, 18 FMSHRC 1552, 1562 (September 1996); *S&H Mining, Inc.* 15 FMSHRC 956, 960 (June 1993).[9]

Accordingly, our colleagues' opinion, focusing as it does on the limited duration and minimal danger posed by the line curtain violation,[10] not only is inconsistent with precedent but

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[8] The case law thus establishes that while the Commission has identified various factors in determining unwarrantability — such as the extent of a violative condition, the length of time that it existed, whether the violation was obvious, and whether the operator had been placed on notice that greater efforts are necessary for compliance — the Commission only uses those factors when the operator's cognizance of the violative condition remains at issue. Where, as here, that issue has been decided, the factors are irrelevant in determining unwarrantability.

[9] It bears noting that section 104(d) of the Mine Act predicates the issuance of withdrawal orders upon successive unwarrantable failure violations, regardless of whether those violations are also deemed to be significant and substantial. *See, e.g., Int'l Union, United Mine Workers of America v. Kleppe*, 532 F.2d 1403, 1407 (D.C. Cir. 1976).

[10] Relying on a stipulation by the Secretary at the outset of the hearing, our colleagues view Amax's "good faith in quickly abating the violation" as an additional factor "militating against an unwarrantable failure finding." Slip. op. at 11. In light of the judge's subsequent finding that Wethington commenced abatement efforts only when faced with imminent discovery by the inspector, we cannot consider those efforts as militating against an unwarrantable failure finding. *See Enlow Fork Mining Co.*, 19 FMSHRC 5, 17 (January 1997) ("[p]ost-citation efforts are not relevant to the determination whether the operator has engaged in aggravated conduct in allowing the violative condition to occur").

also troubling because it conceivably could be read as excusing a foreman's decision to ignore a violation unless the condition poses a significant risk to miners. Such an approach can have disastrous consequences because it ignores the dangerous environment created when management appears to condone violative conduct by employees. Wethington's failure to make any reference to the line curtain as he instructed Stevens on the next task could be viewed by the employees as tacit approval to cut corners.

Miners who decide to ignore a safety requirement may miscalculate the risk involved. Although the area of the mine involved in this proceeding had not experienced methane in any significant amount, methane is unpredictable. The mine itself was a gassy mine subject to 5-day spot checks by MSHA. Indeed, eight or nine months prior to the instant citation, Amax had to discontinue mining in another area of the mine because methane kept exceeding the 1% level. 17 FMSHRC at 1752. These facts underscore the point that these miners might not be as lucky the next time they either deliberately or inadvertently fail to comply with a ventilation requirement.

For the foregoing reasons, we conclude that the judge's determination that the violation was unwarrantable should be affirmed.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

Commissioners Riley and Verheggen, in favor of reversing the decision of the administrative law judge:

In *Emery Mining Corp.*, 9 FMSHRC 1997 (December 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 2002-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991) ("*R&P*"); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). The Commission examines various factors in determining whether a violation is unwarrantable, including the extent of the violative condition, the length of time that it existed, whether the violation was obvious, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's efforts in abating the violative condition. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (February 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (August 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984). The Commission also takes into account the degree of danger posed by a violation and whether supervisory personnel were present when the violation took place. *Midwest Material Co.*, 19 FMSHRC 30, 34-35 (January 1997) (citing cases).

In finding unwarrantable failure, the judge simply held that "[s]ince Wethington knew that the violation existed and ignored it, his conduct is sufficiently aggravated to constitute an 'unwarrantable failure.'" 17 FMSHRC at 1751 (citing *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2107, 2011 (December 1987)). Regardless of whether or not substantial evidence supports the judge's factual finding regarding Wethington's state of mind, we believe that, because the judge took only Wethington's knowledge of the violation into account in finding unwarrantable failure, he failed to apply the proper test for unwarrantable failure and thus committed reversible error.

In *Virginia Crews Coal Co.*, 15 FMSHRC 2103 (October 1993), the Commission held that knowledge of a violation, by itself, is insufficient to establish aggravated conduct. In that case, the Commission explicitly rejected the notion that actual or constructive knowledge alone establishes unwarrantable failure, since such an approach would make unwarrantable failure indistinguishable from ordinary negligence. *Id.* at 2107. As the Commission has long regarded unwarrantable failure as something more than ordinary negligence (*see Emery Mining Corp.*, 9 FMSHRC at 2001), the judge's decision cannot be upheld.[11]

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[11] Relying on *R&P*, the Secretary argues that the judge's decision should be upheld on the ground that Wethington's conduct in ignoring the violation was "intentional." S. Br. at 5-6. *R&P*, involving deliberate misconduct in the form of falsification of weekly examination records (13 FMSHRC at 190-92), is readily distinguishable from the omission at the center of this case. We also note that neither the trial record nor the Secretary's post-hearing brief indicates that the Secretary took the position below that Wethington had actual knowledge of the violation.

Consideration of the following relevant factors leads us to conclude that the record supports only one determination: that AMAX's violation of its ventilation plan was not the result of AMAX's unwarrantable failure. First, it is not disputed that AMAX was in violation of its ventilation plan for a relatively short period of time. Approximately 15 minutes elapsed between the time the line curtain should have been extended and the time the continuous miner was shut down so that it could be extended. Tr. 201. Even the judge described the violation as one of "rather short duration" (17 FMSHRC at 1753), though he failed to account for it as a factor in his unwarrantable failure analysis.

The judge's factual findings in favor of the Secretary's position also support that characterization. The judge found that Wethington was present for no more than five minutes of the time period in which the curtain was out of place. *Id.* at 1750 n.2. Moreover, as it is also clear that AMAX's operations in the No. 6 entry would have been complete in a matter of minutes (*Id.* at 1749; Tr. 100, 106, 114-15, 202, 224), it would not be fair to assume that only the presence of Inspector Montgomery prevented the violative condition from continuing for a much longer period of time.

Another factor militating against an unwarrantable failure finding is AMAX's good faith in quickly abating the violation. That AMAX demonstrated good faith in abating the citation was stipulated by the Secretary at trial. Tr. 7. The Commission has been reluctant to discount stipulations entered into by litigants. *See Mettiki Coal Corp.*, 13 FMSHRC 760, 772 (May 1991). Moreover, while post-citation abatement efforts are generally not relevant to a finding of unwarrantable failure, in this case AMAX started abating the violation before the citation was issued. 17 FMSHRC at 1748. In addition, the Secretary has pointed to no evidence of previous violations of this type by AMAX. While at trial the Secretary submitted a printout of previous citations at the Wabash Mine (G. Ex. 1), she did not state whether any of the violations for which AMAX was cited involved a ventilation plan provision, much less a line curtain placement violation.

The final factor that persuades us that an unwarrantable failure finding is uncalled for is the low degree of danger posed by the violation under the circumstances. The judge held that the violation was non-S&S, finding that an ignition or explosion was unlikely to occur because of the failure to extend the line curtain. 17 FMSHRC at 1753. The Secretary did not appeal this conclusion.

In finding the violation non-S&S, the judge took into account that the section of the Wabash mine where the No. 6 entry is located, 2W/MWS, does not have a history of high methane liberation. *Id.* The judge also considered that the highest reading in the No. 6 entry from the continuous miner's methane monitor was 0.6 percent, and that the great majority of preshift examination methane level measurements in 2W/MWS taken around the time of the violation were at or below 0.3 percent. *Id.* In addition, methane level readings of zero were taken immediately after Inspector Montgomery's discovery of the ventilation plan violation. Tr.

89, 185. Thus, all evidence of 2W/MWS methane levels established that AMAX was in conformance with MSHA requirements.

The only factors which we believe could possibly support a finding of unwarrantable failure are the obviousness of the violation, as was impliedly found by the judge, and Wethington's status as a foreman.[12] Under Commission precedent, however, these two factors, by themselves, have not been sufficient to establish unwarrantable failure. In *Virginia Crews*, knowledge of a roof control plan violation, including by the responsible foreman, was not sufficient to establish unwarrantable failure. 15 FMSHRC at 2103-07. The Commission so held even though the judge had found the violation S&S and that it had been noted during a pre-shift examination conducted at least 30 minutes prior to its discovery by the MSHA inspector. *Id*. at 2106. As the instant violation was found to be not S&S and to have existed for an even shorter period of time, *Virginia Crews* suggests that an unwarrantable failure finding is inappropriate in this case.

While the Commission has found unwarrantable failure where a foreman knew of a violation but failed to appropriately remedy the problem, such cases involved violations which were found to pose a high degree of danger under the circumstances. *See Cypress Plateau Mining Corp.*, 16 FMSHRC 1604 (August 1994) (knowing operation of shuttle car with inoperable brakes S&S violation and unwarrantable); *Cypress Plateau Mining Corp.*, 16 FMSHRC 1610 (August 1994) (ordering miners to work in intersection under roof known to be unsupported in mine with history of roof falls S&S violation and unwarrantable). This is not such a case.

Accordingly, we would reverse the judge's unwarrantable failure finding and remand for assessment of an appropriate civil penalty in light of our decision.

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

[12] In determining unwarrantable failure, the Commission has held foremen to high standard of care. *See, e.g.*, *Youghiogheny*, 9 FMSHRC at 2011 (quoting *Wilmot Mining Co.*, 9 FMSHRC 684, 688 (April 1987)); *S&H Mining, Inc.*, 17 FMSHRC 1918, 1923 (November 1995).