# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

**September 9, 1996**

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | |
| v. | : | Docket No. WEVA 94-19 |
| CONSOLIDATION COAL COMPANY | : | |

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners[1]

## DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). At issue is an order issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") alleging that Consolidation Coal Company ("Consol") violated 30 C.F.R. § 75.340, which sets forth fire protection requirements applicable to underground water pumps.[2] Administrative Law Judge

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[1] Commissioner Holen participated in the consideration of this matter, but her term expired before issuance of this decision. Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

[2] Section 75.340 provides, as pertinent:

> (a) Underground . . . water pumps shall be located in noncombustible structures or areas or equipped with a fire suppression system . . . . This equipment also shall be--
>
> (1) Ventilated by intake air that is coursed into a return air course or to the surface and that is not used to ventilate working places; . . .
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> . . . .
>
> (b) This section does not apply to--
>
> . . . .

William Fauver found that Consol violated section 75.340(a), that neither of the exemptions contained in sections 75.340(b)(4) and (6) applied, that the violation resulted from unwarrantable failure, and that the violation was "serious." 17 FMSHRC 231, 234, 235 (February 1995) (ALJ). The Commission granted Consol's petition for discretionary review. For the reasons that follow, we affirm the judge.

I.

Factual and Procedural Background

On April 7, 1993, Inspector Richard McDorman issued an order under section 104(d)(2) of the Act, 30 U.S.C. § 814(d)(2), charging a violation of section 75.340(a) at Consol's Arkwright No. 1 Mine, an underground coal mine located in West Virginia. 17 FMSHRC at 231; Gov't Exs. 1, 16. McDorman, accompanied by Mike Jackson of Consol's safety department, inspected the No. 68 water pump, an electrically-powered ThroMor pump, located in a crosscut in an intake escapeway on the 2 South longwall development section. 17 FMSHRC at 231, 233; Tr. 26, 72-73.

The pump's purpose was to remove water from a swag (low point) in an abandoned section of the mine adjacent to the 2 South section. 17 FMSHRC at 232; Tr. 74. After one to one-and-a-half weeks, the water was removed from the swag. Tr. 80-81. Although Consol had made preparations to move the pump inby to the next swag as the section advanced, the absence of water on the section made the move unnecessary. Tr. 84.

The pump had 7½ horsepower, and was 14 to 16 inches high, l8 to 20 inches wide, and 6 feet long. 17 FMSHRC at 232; Tr. 73. It weighed 300 to 350 pounds, and was located about 20 crosscuts from the working face and about 1800 feet from the loading point. *Id.*

The water pump was not located in a noncombustible enclosure or equipped with a fire suppression system. 17 FMSHRC at 231. The air ventilating the water pump was not coursed into the return air entry; rather it was used to ventilate the working section. *Id.* at 231-32. For these conditions, McDorman issued the order charging the violation. Gov't Ex. 1. He designated the violation not significant and substantial. *Id.* The Secretary proposed a civil penalty assessment of $2,400.

At trial, Consol did not dispute that its pump failed to comply with the requirements of section 75.340(a). C. Posthearing Br. at 1-2. Rather, Consol argued to the judge that the pump was exempt from the regulation under either sections 75.340(b)(4) or (6). *Id.*

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(4) Pumps located on or near the section and that are moved as the working section advances or retreats; [and]

. . . .

(6) Small portable pumps.

The judge concluded that Consol violated the regulation, determining that neither the (b)(4) nor the (b)(6) exemption applied. 17 FMSHRC at 233-35. The judge concluded that the (b)(4) exemption was inapplicable because the pump was about 1800 feet outby the loading point and did not advance with the working section.[3] *Id.* at 234. He ruled that the (b)(6) exemption was inapplicable because the pump was not a "small portable pump." *Id.*

The judge also concluded that the violation resulted from Consol's unwarrantable failure. *Id.* at 234-35. He determined that it was not reasonable, without first inquiring into MSHA's enforcement position, for Consol to rely on the exemptions because the pump was "too heavy to lift to be considered a 'small portable pump,' and because it was not moved as the working section advanced or retreated." *Id.* at 234. The judge also concluded that Consol's claims of exemption under (b)(4) and (6) appeared to be after-the-fact litigation positions, and that Consol had been operating without knowing that the safety standard governing pumps had changed five months before the violation. *Id.* at 234-35.

Although the judge noted that Inspector McDorman designated the violation as not significant and substantial, he nevertheless concluded that the violation was serious. *Id.* at 234. He found that in the event of a fire reaching the pump's fuel tank, the resulting smoke would have contaminated the intake entry and escapeway with a reasonable likelihood of serious injury. *Id.* The judge assessed a civil penalty of $2,400. *Id.* at 239.

II.

Disposition

With respect to the (b)(4) exemption, Consol argues the judge erred in finding that "the pump was not moved as the working section advances or retreats." C. Br. at 2. It asserts that the pump was removed from service, and that it was unnecessary to move the pump as the section advanced because of the absence of water on the advancing section. *Id.* Concerning the (b)(6) exemption, Consol contends that the judge erred in finding that the pump was not a "small portable pump." *Id.* It submits the judge's reliance on the pump weight was material error. *Id.* at 2, 5-7. With respect to the judge's unwarrantable failure finding, Consol argues that its interpretation of the regulation was plausible and found support in the preamble and other MSHA documents disseminated to the industry. *Id.* at 2, 5. With respect to the judge's finding that the violation was serious, Consol argues the pump did not have a fuel tank and was not in operating

[3] The judge inadvertently characterized this as the (b)(6) exemption.

condition at the time the order was issued, and thus there was no proof that a hazard existed. *Id.* at 2, 8, 9.[4]

The Secretary argues that, with regard to the (b)(4) exemption, the pump was not located "at or near" the working section, and that the pump was not "moved as the working section advanc[ed]." S. Br. at 11-13. With regard to the (b)(6) exemption, the Secretary submits that the pump was not portable, and that weight is a legitimate factor in the determination of portability. *Id.* at 7-11. With respect to the judge's unwarrantable failure finding, the Secretary argues that it was not reasonable for Consol to have believed its pump qualified for an exemption. *Id.* at 15 n.5, 16. He submits that Consol was aware that pumps such as the No. 68 ThroMor were required to be in compliance with the cited standard. *Id.* at 15. With respect to the judge's finding that the violation was serious, the Secretary emphasizes that the pump was in operating condition, and that there was one gallon of oil in the pump's motor. *Id.* at 7 n.2.

A. Consol's Motion to Strike

1. Ventilation Meeting Materials

The Secretary's brief contained an attachment consisting of ventilation information meeting sign-in sheets and notices and internal MSHA memoranda setting forth schedules for informational meetings on the Secretary's ventilation regulations. Consol seeks to strike these materials on the ground that they were not before the judge and because Consol did not have the opportunity of cross-examination with regard to the authenticity, veracity and relevance of the materials. C. Mot. to Strike at 1-3.

The Commission has made clear that "the adjudication process is best served if the judge is first given the opportunity to admit and examine all the evidence before making his decision." *Climax Molybdenum Co.*, 1 FMSHRC 1499, 1500 (October 1979). As the Commission has noted, "it is the obligation of parties to prove their case *before the judge*, not on review by

[4] Consol also argues that the language of section 75.340(b)(4) and (6) failed to give fair warning of the Secretary's interpretation of the regulation, and that Consol therefore should not be held to have violated the regulation or engaged in unwarrantable conduct. C. Br. at 4, 5-6, 7-8. However, Consol did not raise this argument in its PDR and the Commission did not direct *sua sponte* review of the issue. Under section 113(d)(2)(A)(iii) of the Mine Act, 30 U.S.C. § 823 (d)(2)(A)(iii), the Commission's review is limited to those questions raised by the PDR. *See also* 29 C.F.R. § 2700.70(f) (1995); *Chaney Creek Coal Corp. v. FMSHRC*, 866 F.2d 1424, 1429 & n.7 (D.C. Cir. 1989). Accordingly, we do not reach the notice argument. Furthermore, Consol did not raise this argument before the judge, another prerequisite for review under section 113(d)(2)(A)(iii) of the Mine Act. The Commission has declined to address arguments not presented to the judge. *E.g., Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1316-17 (August 1992).

reference to detailed material not presented to the judge and not subject to the rigors of cross-examination." *Union Oil Co. of Cal.*, 11 FMSHRC 289, 301 (March 1989) (emphasis in original). This rule of procedure under the Mine Act accords with settled principles of law limiting the record on review to that developed before the trier of fact. *Id.; see also* Fed. R. App. P. 10(a); *United States v. Sanga*, 967 F.2d 1332, 1335-36 n.2 (9th Cir. 1992).

Because the materials were not part of the record before the judge, we grant Consol's motion to strike them, and consequently do not rely on them or on references to them contained in the Secretary's brief.

2. *Webster's Third New International Dictionary (Unabridged)* (1986) *("Webster's Third")*

Consol also asks the Commission to strike the references in the Secretary's brief to the definitions of "portable" and "mechanize" contained in *Webster's Third.* In his brief to the Commission and post-hearing brief to the judge, the Secretary relied on similar definitions in *The American Heritage Dictionary* (New College ed. 1980) and *Webster's New World Dictionary* (Second college edition, 1980). S. Br. at 10; S. Posthearing Br. at 11-12. The Commission has relied on *Webster's Third* in its decisions. *See, e.g., Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996); *Ideal Cement Co.*, 12 FMSHRC 2409, 2410 n.2 (November 1990); *Consolidation Coal Co.*, 11 FMSHRC 1935, 1938 (October 1989). The Commission has never held that a party is limited to citing only those authorities previously cited to the judge.

Accordingly, we deny Consol's motion to strike the Secretary's references to definitions of "portable" and "mechanize" in *Webster's Third*.

B. Violation of section 75.340(a)

As Consol concedes that its pump did not comply with the requirements of section 75.340(a), its challenge to the judge's determination that it violated section 75.340 centers on whether the judge correctly concluded that the pump was not exempted from the mandatory standard under section 75.340(b)(4) and (b)(6).

The Commission has recognized that where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning. *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (October 1989), citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). We think it clear that Consol's cited pump is not covered by the section 75.340(b)(4) and (6) exemptions and, accordingly, we resolve this case on the basis of the plain language of the regulation.

1. The section 75.340(b)(4) exemption

Under section 75.340(b)(4), section 75.340(a) "does not apply to . . .[p]umps located on or near the section *and* that are moved as the working section advances or retreats." 30 C.F.R. § 75.340(b)(4) (emphasis added). The judge concluded that this exemption did not apply to Consol's pump because "[t]he pump was about 1800 feet outby the loading point and did not advance with the working section." 17 FMSHRC at 234.

The parties agree that "pumps located on or near the section" refers to the "working section." C. Br. at 7-8; S. Br. at 11. The "working section" is the area "[f]rom the section loading point, being the tail piece and back to the working faces." Tr. 29; 30 C.F.R. § 75.2. Because the pump was about 1800 feet outby the loading point, we conclude that it was clearly not "on" the working section. We also think that, at a distance of 1800 feet outby the loading point, the pump was clearly not "near" the working section. Inspector McDorman testified that "near" would be two to three crosscuts outby the loading point. Tr. 40. He also suggested that "near" could possibly be four crosscuts outby the loading point, referring to 30 C.F.R. § 75.214(a), which requires supplementary roof support materials to be within four crosscuts of each working section. Tr. 55. The pump was approximately 2000 feet or 20 crosscuts outby the working face, and approximately 18 crosscuts outby the loading point. 17 FMSHRC at 232; Tr. 26-27 (based on Inspector McDorman's estimate of 100 feet from crosscut to crosscut). Even when the pump was closest to the working section, at the time of its installation about two weeks earlier, it was still more than "1,000 feet from the pump to the face" and "[a]pproximately 800 feet" from the pump to the section loading point. Tr. 43, 62-63. Accordingly, substantial evidence supports the judge's conclusion that the pump was not located on or near the working section.[5] 17 FMSHRC at 234.

As to the (b)(4) prerequisite the pump be "moved as the working section advances or retreats," the pump had been stationary throughout the entire two weeks subsequent to its installation, while the section advanced approximately 1,000 feet during this same period. 17 FMSHRC at 234; Tr. 43, 62-63. Inspector McDorman testified there was no indication the pump was to move with the working section, because the entire purpose of the pump's presence was to dewater the old works adjacent to the section. Tr. 61, 64. Mike Jackson of Consol's safety department testified that the pump would have been left in the location in which the inspector found it "so long as it kept pumping water out of the adjacent area." Tr. 90. Based on this

[5] The Commission is bound by the substantial evidence test when reviewing an administrative law judge's factual determinations. 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 (November 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). We are guided by the settled principle that, in reviewing the whole record, an appellate tribunal must also consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

evidence, Consol did not meet the plain requirement of (b)(4) that the pump be moved in order to qualify for the exemption. Jackson testified that Consol was entitled to the (b)(4) exemption because it *intended* to move the pump with the section as needed to pump out water, but since there was no need to pump out the water as the face moved, the pump remained where it was cited. Tr. 84-85. We agree with the judge that an intent to move the pump does not satisfy the prerequisite for the (b)(4) exemption. 17 FMSHRC at 234.

Consol also argues that it had removed the pump from service for about one week prior to the citation, and therefore was not required to move it as the working section advanced. C. Br. at 2. The judge found that the pump was energized and ready to operate. 17 FMSHRC at 232. Inspector McDorman's testimony supports the judge's finding. Tr. 21, 43, 47. To the extent Consol's witness Jackson testified to the contrary, Tr. 79, and Consol's electrical examination reports indicated the pump was out of service, Gov't Ex. 4, the judge essentially made a credibility determination. A judge's credibility findings should not be overturned lightly and are entitled to great weight. *In Re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (November 1995). We therefore decline to disturb the judge's finding that the pump had not been removed from service.

In sum, we conclude that the judge correctly determined that Consol did not fall within the (b)(4) exemption.

2. The section 75.340(b)(6) exemption

Under section 75.340(b)(6), section 75.340(a) "does not apply to . . . [s]mall portable pumps." We think the judge correctly concluded that, because of its 300 to 350 pounds of weight, Consol's pump was not a small portable pump within the meaning of section (b)(6). *See* 17 FMSHRC at 234. The preamble to the final rule indicates the Secretary's intention that such pumps be "easily relocated without the aid of mechanized equipment; capable of being moved frequently; and installed in such a manner to facilitate such movement." 57 Fed. Reg. 20,868, 20,889 (May 15, 1992). This language is similar to the language describing "small portable pumps" in MSHA's Program Policy Letter P91-V-12 (effective July 17, 1991) ("PPL"), which was issued under section 75.340's predecessor standard, 30 C.F.R. 75.1105 (1992). Tr. 31-32; Gov't Ex. 2; C. Ex. 4. Under the PPL, "[p]ortable pumps are: small normally permissible or submersible pumps; easily relocated without the aid of mechanized equipment; capable of being moved frequently; and installed in such a manner to facilitate such movement." Gov't Ex. 2; C. Ex. 4. These definitions are consonant with the normally understood meaning of "portable," which is defined as "capable of being . . . easily or conveniently transported" and "light or manageable enough to be readily moved." *Webster's Third* at 1768.

Substantial record evidence supports the judge's conclusion that Consol's pump was not a small portable pump. Neither Consol nor the Secretary disputes the judge's finding concerning the weight of the pump. Tr. 26, 74. Inspector McDorman indicated it would take five or six people with ropes to pull the pump. Tr. 38. As to the preamble's declaration that an exempt

pump be "easily relocated without the aid of mechanized equipment," McDorman testified that the pump was usually moved by a scoop, which is a mechanized piece of equipment. Tr. 37-38. Mike Jackson of Consol's safety department testified that if a scoop had been available, it would have been used to load the pump up and move it. Tr. 81. Jackson also testified that lacking a scoop, they would probably jack the pump up, put it on a four-wheel cart, move it down the heading, and reset it. *Id*. McDorman further stated that two to three people could move the pump on a small pulley cart with wheels. Tr. 59. Accordingly, McDorman testified that the pump was not a small portable pump in light of the description in the preamble to the final rule. Tr. 30, 31. Thus, the plain language of the exemption clearly makes it inapplicable to Consol's pump.

We reject Consol's argument that weight is not a legitimate criterion for assessing the applicability of the exemption. Weight is an essential element in considering portability and comports with common usage, regulatory history and common sense.

C. Unwarrantable failure

Unwarrantable failure constitutes aggravated conduct exceeding ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (December 1987). 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 Corp.*, 13 FMSHRC 189, 193-94 (February 1991).

In *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (February 1994), the Commission set forth the following factors among those to be considered in making an unwarrantable failure analysis: "the extensiveness of the violation, the length of time that the violative condition has existed, the operator's efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance."

Substantial record evidence supports the judge's finding. As to the length of time the violative condition existed, the inspector testified that he designated the violation unwarrantable failure because the pump had been in the same location for over two weeks. Tr. 42-44. Weekly electrical examinations had been conducted on March 25 and April 2. Tr. 44-45. As to the extensiveness of the violation, the pump did not have fireproof housing. Tr. 43. Consol did not meet the fire suppression requirements in lieu of the housing. *Id*. The pump was not ventilated properly, coursing the intake air into the return airway. *Id*. The pump was ready to be used. Tr. 21. The record does not indicate compliance with any of the other alternatives in section 75.340(a)(2) and (3). As to Consol's efforts to eliminate the violative condition, the record indicates Consol made none.

The Commission has recognized that "if an operator reasonably believes in good faith that the cited conduct is the safest method of compliance with applicable regulations, even if it is in error, such conduct is not aggravated conduct constituting more than ordinary negligence."

*Southern Ohio Coal Co.*, 13 FMSHRC 912, 919 (June 1991), citing *Utah Power & Light Co.*, 12 FMSHRC 965, 972 (May 1990)). The operator's good faith belief must be reasonable under the circumstances. *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1615-16 (August 1994).

Consol argues that it reasonably relied upon an interpretation of the regulation that had definite plausibility and found support in the preamble and other MSHA documents that were disseminated to the industry. C. Br. at 2, 5. The (b)(4) and (b)(6) regulatory exemptions are clearly contrary to Consol's proffered interpretations. Further, Consol does not cite the Commission to specific language in the preamble or to other record evidence of the "other MSHA documents that were disseminated to the industry." Moreover, Consol had placed similar pumps located in other areas of the mine in fireproof enclosures. Tr. 90. Thus, we conclude that Consol's belief in the plausibility of its interpretation was unreasonable under the circumstances.

Consol also argues that the judge erred in stating that it was not reasonable to assume "without first inquiring into MSHA's enforcement position, that the pump qualified for an exemption." C. Br. at 2, 4, 5 (citing 17 FMSHRC at 234). Consol seems to suggest that the judge's finding of unwarrantable failure was significantly predicated on its failure to inquire first into MSHA's enforcement position. In our view, the judge correctly concluded that it was not reasonable for Consol to have believed that the pump qualified for an exemption and that under such circumstances Consol should have inquired into MSHA's enforcement position.

D. "Seriousness" of the Violation

Noting that the inspector cited the violation as not "significant and substantial," the judge concluded that the violation was serious. 17 FMSHRC at 234. He found that, in the event of a fire reaching the pump's fuel tank, the resulting smoke would have contaminated the intake entry and escapeway with a reasonable likelihood of serious injury. *Id.*

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), is often viewed in terms of the seriousness of the violation. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (April 1987). Although the judge did not specifically relate seriousness to gravity, or separately discuss the gravity criterion, he did assess the penalty based on "all of the criteria in section 110(i)." 17 FMSHRC at 238. Accordingly, we infer that the penalty was based in part on the judge's conclusion that the violation was serious.

Consol argues that because the pump was out of service, substantial evidence does not support the judge's conclusion that the violation was serious. C. Br. at 8. As previously discussed, substantial evidence supports the judge's finding that the pump was not out of service. Consol also argues that the judge erred in finding that the pump had a fuel tank that posed a fire and smoke hazard C. Br. at 2, 8 (citing 17 FMSHRC at 234). Although the pump did not have a fuel tank, we think the judge's finding is harmless error. As the Secretary points out, the pump's motor did carry a gallon of flammable oil. S. Br. at 7 n.2; Tr. 83. In addition, the pump was not

permissible. Tr. 29. The focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs. *Cf. Quinland Coals, Inc.*, 9 FMSHRC 1614, 1622 n.11 (September 1987) ("gravity" penalty criteria and special finding of S&S not identical although frequently based on same or similar factual circumstances). We conclude that, in light of the presence of combustible material, substantial evidence supports the judge's conclusion that the violation was serious.

III.

Conclusion

For all of the foregoing reasons, we affirm the judge's decision.

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Mary Lu Jordan, Chairman

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Marc Lincoln Marks, Commissioner

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James C. Riley, Commissioner