# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 16, 1996

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | |
| | : | Docket No. WEVA 93-129 |
| v. | : | |
| DOSS FORK COAL COMPANY | : | |

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

## DECISION

BY: Jordan, Chairman; Doyle, Holen and Marks, Commissioners

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"), and involves three orders and one citation issued to Doss Fork Coal Company ("Doss Fork") by the Department of Labor's Mine Safety and Health Administration ("MSHA") pursuant to sections 104(a) and (d) of the Mine Act, 30 U.S.C. §§ 814(a) & (d). Administrative Law Judge Gary Melick determined that two violations giving rise to orders were not the result of the operator's unwarrantable failure. 16 FMSHRC 797 (April 1994) (ALJ). He also vacated a third order based on his determination that the underlying regulation was not in effect at the time of the alleged violation. *Id.* at 812. He determined that another cited violation was the result of the operator's high negligence. *Id.* at 812-14. The Commission granted the Secretary's petition for discretionary review ("PDR") challenging these determinations.

[1] Commissioner Riley assumed office after this case had been considered and decided at a Commission decisional meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Riley has elected not to participate in this matter.

The issues on review are whether the judge erred (1) in determining that two violations were not the result of Doss Fork's unwarrantable failure, (2) in vacating the third order based on his determination that the underlying regulation was no longer in effect, and (3) in failing to address the Secretary's assertion that one of the cited violations resulted from the operator's reckless disregard. For the reasons that follow, we vacate and remand for further analysis the judge's determination that two violations were not the result of unwarrantable failure. We reverse the judge's determination that the regulation giving rise to the third alleged violation was not in effect at the time of the order, vacate his order of dismissal, and remand for analysis of the evidence as to that violation. We affirm the judge's finding of high negligence as to the last cited violation.

I.

Order No. 3554292

On October 26, 1992, MSHA Inspector James Graham, accompanied by MSHA Supervisor Clyde Ratcliff, observed that loose coal, mixed with pieces of rock, had been pushed into ten crosscuts in the right return air course of Doss Fork's Seminole Mine in McDowell County, West Virginia. 16 FMSHRC at 809-810; Tr. I-194-97.[2] Inspector Graham issued Order No. 3554292[3] under section 104(d)(1) of the Act alleging a "significant and substantial" ("S&S")[4]

[2] The hearing was conducted over a period of five days. A separate transcript volume was prepared for each day.

[3] Order No. 3554292 stated in part:

> Loose coal and coal dust was stored at spot locations in the left and right cross-cuts in the right return air course starting one cross-cut inby survey station No. 375 and extended inby this point to within ten crosscuts of the face on the 002-0 section, a distance of approximately 1,200 feet. The loose coal and coal dust ranged in depth of up to 26 inches.

16 FMSHRC at 809.

[4] 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 in nature any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard . . . ."

violation of 30 C.F.R. § 75.400.[5] 16 FMSHRC at 809. He also charged that the violation was the result of Doss Fork's "unwarrantable failure." *Id.*

The judge concluded that the cited material constituted a violation but determined that the Secretary had not proven the violation was S&S, finding that "[t]here is insufficient evidence of the combustibility of this admitted mix of rock, mud and coal and of the likelihood of an ignition source." 16 FMSHRC at 810. The judge also found that section foreman Carl Dalton had a "good faith belief that the material was not a violative 'accumulation,'" and that "[t]he testimony of Dalton that the material had only recently been pushed into the crosscuts is also undisputed." *Id.* On those bases, he concluded that the violation was not the result of Doss Fork's unwarrantable failure. *Id.*

The Secretary seeks review of the judge's determination that the violation was not unwarrantable, arguing that the violation was obvious and extensive. S. Br. at 10-11. Contrary to the judge's finding that the accumulation had "only recently" occurred, the Secretary asserts that the accumulations had existed for more than three weeks. *Id.* at 13; *see* 16 FMSHRC at 810. The Secretary also asserts that the judge failed to consider that, during a previous inspection on June 3, 1992, the operator had been cited three times for storing coal in crosscuts. S. Br. at 14. The Secretary further argues that the judge erred in concluding that the violation was not unwarrantable based on the operator's "good faith" belief that the accumulations were not violative. *Id.* at 15-20. The Secretary urges that a good faith belief must also be "reasonable." *Id.*

Doss Fork argues that it believed the accumulation was non-violative because it consisted primarily of mud and rock; the entries were extremely wet and contained "shaley clod-rock," which, when exposed to water, turns to mud. D.F. Br. at 5-6. Doss Fork also argues that, prior to the issuance of the subject order, two other inspectors had traveled through the same return without issuing a warning or taking enforcement action. *Id.* at 6-7. The operator further states that the "good faith" defense to unwarrantable failure should not include an additional requirement of "reasonableness." *Id.* at 9-12.

The unwarrantable failure terminology is taken from section 104(d) of the Act and refers to more serious conduct by an operator in connection with a violation. 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,"

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[5] 30 C.F.R. § 75.400 provides:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

"indifference" or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991).

The Commission has identified several factors to be considered in analyzing whether a violation resulted from unwarrantable failure: among these are "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." *Mullins and Sons Coal Co.*, 16 FMSHRC 192, 195 (February 1994).

As to extensiveness of the violation, the judge found that there were accumulations of up to 26 inches in depth in ten crosscuts. 16 FMSHRC at 809. As to the length of time the violative condition had existed, the record does not support the judge's finding that the violative accumulation was a recent occurrence. Section foreman Dalton testified that the material was pushed into the crosscuts during the last week of September or the first week of October, thereby conceding that the accumulation had existed for at least three weeks. Tr. IV-119.

The judge did not discuss the operator's efforts to eliminate the violative condition or whether Doss Fork had been placed on notice that greater efforts were necessary for compliance. Concerning the latter factor, the Commission has examined, inter alia, whether an operator has been previously cited for a similar violation. *See, e.g., Youghiogheny and Ohio Coal Co.*, 9 FMSHRC 2007, 2011 (December 1987). Here, the record indicates that the operator was on notice that the storing of coal, mixed with rock and mud, was violative. Prior to issuance of the subject order, the operator was cited on June 3 and October 21, 1992, for three violations of the same standard. 16 FMSHRC 802-03. In addition, MSHA warned the operator on October 15 about similar accumulations. *Id.* There is no indication that the judge considered this evidence in his analysis.

The Commission has held that, to serve as a defense to a finding of unwarrantable failure, an operator's good faith belief that his actions were not violative must also be reasonable. *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1615 (August 1994) (holding that the judge erred in failing to consider the reasonableness of an operator's belief). Although the judge concluded that the operator maintained a good faith belief that the cited condition was not violative, he did not analyze whether that belief was reasonable. On remand, the judge shall provide such analysis.

In addition, the judge's determination that this violation was not unwarrantable is inconsistent with his disposition of another accumulation violation (Order No. 3554286, issued five days earlier on October 21, 1992), decided by the judge at the same time but not challenged before the Commission. 16 FMSHRC at 801-05. In determining that that violation resulted from an unwarrantable failure to abate, the judge considered very similar factual circumstances relating to accumulations in the mine where damp conditions existed and where the operator also asserted that it believed the cited material was non-violative rock and mud. The judge rejected the operator's defense and concluded that the violation was unwarrantable. This apparent

inconsistency must be reconciled by the judge. *See Drummond Co.*, 13 FMSHRC 1362, 1369 (September 1991).

Accordingly, we vacate the judge's determination and remand for further analysis consistent with this opinion.

II.

Order No. 3554293

On October 26, 1992, Inspector Graham, accompanied by MSHA Supervisor Ratcliff, issued a section 104(d)(1) order[6] alleging an S&S violation of 30 C.F.R. § 75.202(a),[7] based on his observation of inadequate roof support in the left return air course of the mine. 16 FMSHRC at 810-11. Inspector Graham charged that the violation was the result of Doss Fork's unwarrantable failure. *Id*. at 811.

The judge concluded that the cited condition constituted an S&S violation but determined that the Secretary had not proven unwarrantable failure. 16 FMSHRC at 812. Relying on the testimony of section foreman Dalton that he "had performed the weekly examination in the return air courses on October 17, 1992, and at that time did not observe any hazardous roof conditions," and the fact that "the mine roof in this area of the mine could deteriorate rapidly," the judge concluded that the Secretary had not proven that the "deteriorated conditions found on October 26 had existed at the time of the previous weekly examination." *Id.*

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[6] Order No. 3554293 stated in part:

> The mine roof in the left return air course is not adequately supported at spot locations starting at cross-cuts outby survey station no. 65 and extended outby this point to within 3 cross-cuts of the surface portal. There were several roof bolts at each location that were damaged to a point they no longer adequately supported the roof.

16 FMSHRC at 810.

[7] 30 C.F.R. § 75.202(a) provides:

> The 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.

The Secretary seeks review of the judge's finding and argues that the judge's conclusion is based on erroneous facts. S. Br. at 20-21. The Secretary maintains that, according to the record, the cited area was examined on October 21, not October 17, as found by the judge. *Id.* The Secretary also maintains that section foreman Webb, not Dalton, performed the relevant weekly examination. *Id.* at 20. Doss Fork agrees with the Secretary that Webb conducted the weekly examination on October 21, but argues that the judge's error is not relevant because no roof defects were observed during Webb's examination. D.F. Br. at 14-15.

In support of his conclusion that the roof conditions were violative, the judge credited the testimony of both MSHA inspectors, and stated that "Graham's testimony is corroborated in essential respects by the testimony of . . . Ratcliff." 16 FMSHRC at 811. Inspector Graham testified that, during his inspection of the left return air course, "several places existed where roof bolts were hanging down and exposing 24 inches between the roof and the plate." *Id.*; Tr. II-6-7. Graham also described three particular areas where groups of 6, 10, and 12 adjacent defective bolts were observed. *Id.*; Tr. II-10-12. Additionally, Graham testified that there were many other damaged bolts throughout the area "with cracked and loose rock in the roof with much of the loose roof left hanging." *Id.*; Tr. II-14. The judge also noted Graham's conclusion that the condition had existed for at least several weeks because of the state of deterioration. *Id.*; Tr. II-18. Indeed, Graham disputed that the deterioration could have occurred within the five days since the last weekly examination. Tr. II-27. MSHA Supervisor Ratcliff testified that the conditions he observed were similar to an earthquake, with "fallen material in any direction you looked." Tr. II-132. He observed areas of major roof falls that he believed had existed for weeks because "[r]oof transition that excessive doesn't occur in a matter of days." Tr. II-135-37.

Section foreman Webb testified that he made the last weekly examination on October 21, five days before the conditions were observed and cited by MSHA, and that he did not observe any violative conditions at that time. Tr. V-4-5.

The parties agree that the judge erroneously based his finding of no unwarrantable failure on a weekly inspection date of October 17, instead of October 21, and on testimony from section foreman Dalton rather than section foreman Webb. Because the judge failed to consider the correct testimony regarding this violation and because the elapsed time between the weekly examination and the day of inspection and citation appears to be relevant, we vacate the judge's negative conclusion as to unwarrantability and remand for his consideration of the appropriate testimony.

III.

Order No. 3554294

On October 26, 1992, after concluding from the weekly examination book that adequate

examinations had not been conducted, Inspector Graham issued a section 104(d)(1) order[8] alleging an S&S violation of 30 C.F.R. § 75.305.[9] The judge concluded that the cited standard was no longer in effect on the day the order was issued and vacated the order. 16 FMSHRC at 812.

The Secretary asserts that the judge erred in determining that section 75.305 was not in effect on the day of citation. PDR at 9-10. The Secretary states that the regulation remained in effect until November 16, 1992, the effective date of its final rule revising section 75.305. *Id.*, *citing* 57 Fed. Reg. 34,683 (August 6, 1992). He urges that the order be remanded to the judge for disposition on the merits. *Id.* Doss Fork, without commenting on whether the standard was in effect at the time of citation, also urges remand to the judge. D.F. Br. at 17.

As maintained by the Secretary, section 75.305 was among the standards that were revised in the final rule, which did not become effective until November 16, 1992. Thus, the cited standard was in effect on October 26, 1992, the date the order was issued. Accordingly, we vacate the judge's order dismissing this violation and remand for analysis of the record evidence as to this alleged violation.

IV.

Citation No. 3981551

On November 23, 1992, after observing Doss Fork's roof bolter James Wright move under unsupported roof while installing a roof support strap, Inspector Graham issued an

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[8] Order No. 3554294 stated in part:

> Adequate weekly examinations for hazardous conditions in the return air courses of this coal mine are not being conducted. There were obvious violations that were observed and there was no report made of these violations in the weekly examination book.

[9] 30 C.F.R. § 75.305 (1991) provided in part:

> [E]xaminations for hazardous conditions . . . shall be made at least once each week . . . . [I]f any hazardous condition is found, such condition shall be reported . . . promptly. . . . A record of these examinations . . . shall be recorded . . . in a book . . . and the record shall be open for inspection . . . .

imminent danger order and the subject section 104(a) citation[10] alleging an S&S violation of 30 C.F.R. § 75. 202(b).[11] 16 FMSHRC at 812-13. He also charged that the violation was the result of Doss Fork's high negligence. *Id.* at 813.

In his post-hearing brief, the Secretary urged the judge to assess the proposed civil penalty of $3,000, asserting that it was "consistent with the criteria set forth in the Act." S. Post Hearing Br. at 91. He also urged "the Court to modify the citation to conform to the evidence establishing that a negligence finding of 'reckless disregard' is appropriate in this case, and to adjust the penalty accordingly." *Id*. at 96.

The judge found that an S&S violation was proved as charged, and that the violation was "the result of high operator negligence." 16 FMSHRC at 813. The judge assessed the $3000 penalty proposed by the Secretary. *Id.* at 814.

In his PDR, the Secretary asserts that the judge erred because he failed to address the Secretary's request that the citation be modified to reflect a finding of reckless disregard. PDR at 11. The Secretary notes that, notwithstanding his post-hearing request for modification of the citation by the judge, the Secretary was merely requesting that the judge consider the record evidence and "make his own determination as to whether the operator's violation should be considered 'reckless disregard.'" S. Br. at 23 n.11.[12] Doss Fork defends the judge's finding of

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[10] Citation No. 3981551 states in part:

> A roof bolt machine operator was observed traveling inby permanent roof supports in the face of the No. 3 cross-cut on the 001-0 section. The roof bolting machine had been moved into the face of the No. 3 cross-cut and the machine operator traveled inby permanent roof supports to position a metal roof support strap before the T.R.S. [temporary roof support] had been installed against the roof.

16 FMSHRC at 812-13.

[11] 30 C.F.R. § 75.202(b) provides:

> No person shall work or travel under unsupported roof unless in accordance with this subpart.

[12] The Secretary also states, however, "[I]n sum, the evidence fully supports the Secretary's request that [the citation] be modified to reflect a finding of 'reckless disregard' and that the penalty be adjusted accordingly." S. Br. at 24-25.

high negligence on both procedural and substantive grounds, arguing that the Secretary's attempt to seek modification of the citation only after completion of the evidentiary hearing was untimely and prejudicial. D.F. Br. at 18-19.

The Commission has de novo authority in assessing civil penalties and is not bound by the Secretary's proposed penalties under section 110(i) of the Act. *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-93 (March 1983), *aff'd*, 736 F.2d 1147, 1151-52 (7th Cir. 1984). Thus, the issue before the Commission is whether the level of negligence found by the judge is supported by substantial evidence and whether the penalty he assessed is consistent with the six penalty criteria set forth in section 110(i), one of which is the operator's negligence, *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992), not whether the judge expressly responded to the Secretary's request for a finding of reckless disregard.[13]

In reaching his conclusion of high negligence, the judge credited the testimony of MSHA Inspectors Graham and Ratcliff over that of former superintendent Dillon as to Dillon's prior knowledge that miners were going inby permanent roof support when installing roof support straps. Graham's testimony was accurately summarized by the judge: "Dillon told him en route to the section that the straps could not safely be installed and that it was causing workers to go inby permanent supports." 16 FMSHRC at 813; Tr. II-74-75. Ratcliff's testimony was similarly summarized by the judge: on November 16, 1992, Ratcliff received a call from Dillon, who "complained about the necessity of miners to go inby the last row of permanent support in order to install the straps." 16 FMSHRC at 813; Tr. II-163-164. The judge rejected Dillon's denial that he had spoken to the inspectors about miners' exposure to unsupported roof before the cited condition occurred. 16 FMSHRC at 813-14. The judge also relied upon the testimony of James Wright, who admitted that, for two or three weeks prior to the instant citation, he had reached inby permanent roof support to install the roof straps. *Id*. at 813; Tr. V-50-52. Thus, the record evidence on which the judge relied is substantial and supports his conclusion of high negligence.

Accordingly, we affirm the judge's determination of high negligence.

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[13] Commissioners Doyle, Holen and Marks are of the opinion that the judge did not err in failing to respond to the Secretary's request for modification of the citation, which was set forth in his post-hearing brief. They believe that a request for modification is in the nature of an appeal for an order and therefore is properly made on motion. *See Wyoming Fuel Co.*, 14 FMSHRC 1282, 1289 (August 1992) (citing *Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (May 1990)) (footnote omitted) ("The Commission has previously analogized the modification of a citation to an amendment of pleadings under Fed. R. Civ. P. 15(a)"). Chairman Jordan would treat the Secretary's request as one for modification of the penalty in light of the record evidence. *See* S. Br. at 23 n.11. She believes that such a request need not be presented by motion.

V.

Conclusion

For the foregoing reasons, we vacate and remand the judge's determination as to unwarrantable failure regarding Order Nos. 3554292 and 3554293 and his dismissal of Order No. 3554294. We affirm the judge's determination of negligence with respect to Citation No. 3981551.

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Mary Lu Jordan, Chairman

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Joyce A. Doyle, Commissioner

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Arlene Holen, Commissioner

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Marc Lincoln Marks, Commissioner