FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 14, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. SE 95-140
JIM WALTER RESOURCES, INC.	:	

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

DECISION

BY THE COMMISSION:

These consolidated civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994) (AMine Act@ or AAct@). At issue is Commission Administrative Law Judge T. Todd Hodgdon=s determination that Jim Walter Resources, Inc. (AJWR@ or AJim Walter@), violated 30 C.F.R. '' 75.323 and 75.342 and that the violations were the result of JWR=s unwarrantable failure.[1] 18 FMSHRC 21 (January 1996) (ALJ). The Commission granted JWR=s petition for discretionary review (APDR@) challenging those findings. For the reasons that follow, we affirm the judge=s decision.

I.

Factual and Procedural Background

The No. 2 longwall in JWR=s No. 7 Mine, an underground coal mine in Alabama, was inspected by Kirby Smith, an MSHA inspector, on August 25, 1994. 18 FMSHRC at 23. While walking the length of the No. 2 longwall, from headgate to tailgate, at about the longwall=s mid-point Smith began noticing that plastic line curtains had been rolled out on the mine floor. *Id.*; Tr. 40-41, 145. The width of the curtain covered the area from the longwall chain line, across the longwall pontoons, to the place where the longwall shield jacklegs joined the pontoons. 18

[1] The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. ' 814(d)(1), which establishes more severe sanctions for any violation that is caused by Aan unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards.@

FMSHRC at 23. Because there was loose coal, water and muck on the mine floor, the inspector was not certain that the curtains were continuously deployed on the floor. Tr. 46-47.

Farther down the longwall, Smith saw that line curtains had also been hung on the longwall from where the jacklegs joined the shield down to the pontoons. 18 FMSHRC at 23; Tr. 47-48. The curtains were so hung for a length of 20 or 25 shields, past shield 184, the final shield. *Id.*; Gov=t Ex. 4. Thus, the curtain extended past the tailgate methane monitor, located between shields 183 and 184. 18 FMSHRC at 23; Tr. 49, 51; Gov=t Ex. 1.[2] Methane monitors are required to sound an alarm when detecting 1% or more of methane and trigger an automatic shut down of power to the longwall when 2% or more methane is detected. 30 C.F.R. ' 75.342.

During his inspection Smith took methane measurements with his hand-held detector. 18 FMSHRC at 23; Tr. 34-35. At roughly the mid-point of the longwall, he detected .4% methane 12 inches from the mine roof and 1.1% methane 12 inches from the mine floor. 18 FMSHRC at 23; Tr. 80. Behind the curtains hanging from shield 184 he detected 2.2% methane, while at the tailgate sensor he detected 1.2% methane. 18 FMSHRC at 23; Tr. 38-39, 61. Those measurements were later confirmed by bottle samples that Smith took at the time of his inspection. *Id.*; Gov=t Ex. 3.

During the course of his inspection, the inspector learned that JWR had been having problems controlling methane bleeding from the mine floor at the No. 2 longwall. Tr. 42-43, 46. The effect of JWR=s deployment of line curtains was to direct the methane along the floor and behind the curtains hung from the shields, diverting the methane away from the tailgate methane monitor and into the longwall gob and tailgate entry, which was serving as a return. Tr. 25, 43, 51-53, 69-70, 149. The deployment of the line curtains on the mine floor explained why, at the mid-point of the longwall, Smith found the level of methane at the mine floor to be higher than at its roof. Tr. 144-45. Methane, being lighter than air, is normally found in higher concentrations closer to the mine roof. Tr. 145.

[2] There was also a methane sensing element on the longwall shear. Tr. 26-28; Gov=t Ex. 1.

The inspector consequently issued Order No. 3189434 under section 104(d)(2), 30 U.S.C. ' 814(d)(2), alleging that JWR violated section 75.323.[3] 18 FMSHRC at 23-24; Gov=t Ex. 2 at 1.

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[3] Section 75.323(b) provides:

> (1) When 1.0 percent or more methane is present in a working place or an intake air course, . . . **C**
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> (i) Except intrinsically safe atmospheric monitoring systems (AMS), electrically powered equipment in the affected area shall be deenergized, and other mechanized equipment shall be shut off;
>
> (ii) Changes or adjustments shall be made at once to the ventilation system to reduce the concentration of methane to less than 1.0 percent; and
>
> (iii) No other work shall be permitted in the affected area until the methane concentration is less than 1.0 percent.
>
> (2) When 1.5 percent or more methane is present in a working place or an intake air course, including an air course in which a belt conveyor is located, or in an area where mechanized mining equipment is being installed or removed **C**
>
> (i) Everyone except those persons referred to in ' 104(c) of the Act shall be withdrawn from the affected area; and
>
> (ii) Except for intrinsically safe AMS, electrically powered

Section 75.323(b) sets forth the actions that must be taken when various maximum methane levels are exceeded. When 1.0% or more methane is present in a working place, electrical equipment must be deenergized and ventilation changes made to reduce methane below 1.0%, with no work permitted until methane is so reduced. 30 C.F.R. ' 75.323(b)(1). At trial, the Secretary contended that, because the operator failed to take the prescribed actions until the inspector alerted JWR personnel to his measurements of impermissibly high levels of methane, JWR violated the regulation. S. Post Hearing Br. at 9-10.

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equipment in the affected area shall be disconnected at the power source.

The inspector also issued Order No. 3189435 under section 104(d)(2) charging a violation of section 75.342(b),[4] on the ground that by deploying line curtain to divert accumulations of methane outby the tailgate methane sensor, JWR rendered inaccurate the methane monitor=s response to methane along the longwall face. 18 FMSHRC at 24; Gov=t Ex. 5. At trial, the Secretary alleged that JWR=s use of line curtain in such a manner violated section 75.342(a)(4)=s requirement that A[m]ethane monitors shall be maintained in permissible and proper operating condition@ Tr. 216-17. JWR contended that, because there was nothing physically wrong with the tailgate methane monitor, the regulation had not been violated. JWR Post Hearing Br. at 4.

The judge rejected JWR=s argument that there was no violation of section 75.342. 18 FMSHRC at 25-26. The judge concluded that, while JWR had met many of the requirements of the regulation, by deliberately directing the methane away from the tailgate methane monitor JWR had intentionally precluded the monitor from performing its function. *Id*. Because the judge found JWR=s actions to be the equivalent of rendering the monitor inoperable, he determined that JWR had failed to maintain the monitor in proper operating condition. *Id*.

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[4] Section 75.342 provides:

> (a)(1) MSHA approved methane monitors shall be installed on all face cutting machines, continuous miners, longwall face equipment, loading machines, and other mechanized equipment used to extract or load coal within the working place.
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> (2) The sensing device for methane monitors on longwall shearing machines shall be installed at the return air end of the longwall face. An additional sensing device also shall be installed on the longwall shearing machine, downwind and as close to the cutting head as practicable. . . .
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> . . . .
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> (4) Methane monitors shall be maintained in permissible and proper operating condition . . . .
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> . . . .
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> (b)(1) When the methane concentration at any methane monitor reaches 1.0 percent the monitor shall give a warning signal.
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> (2) The warning signal device of the methane monitor shall be visible to a person who can deenergize the equipment on which the monitor is mounted.
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> (c) The methane monitor shall automatically deenergize the machine on which it is mounted when **C**
>
> (1) The methane concentration at any methane monitor reaches 2.0 percent; or
>
> (2) The monitor is not operating properly.

The judge determined that JWR had also violated section 75.323. *Id*. at 26-27. The judge found, based on the testimony and the relevant longwall section report, that the equipment at the longwall was energized when the inspector took his methane readings and issued the orders. *Id*. at 26 n.2. The judge concluded that JWR Ashould have known that methane of 1.0 percent or more was present in the working area,@ because either Asomeone with a methane detector could have taken a reading, or . . . one of the monitors on the longwall could have sensed it.@ *Id*. at 26-27. The judge held that JWR violated the regulation because A[h]aving taken steps to make the methane monitor not operate properly, Jim Walter cannot now claim that it did not comply with Section 75.323 because it did not know that methane was present. The fact is that it would have but for its actions to avoid knowing.@ *Id*. at 27.

In addition, the judge concluded that both violations resulted from JWR=s unwarrantable failure. *Id*. at 28-29. In determining that the violations were unwarrantable, the judge found the line curtain to have been intentionally deployed for the purpose of preventing the detection of methane in order that longwall operations could continue. *Id*. The judge also found it significant that none of the non-JWR witnesses had ever heard of using line curtain in that fashion. *Id*. at 29.

II.

Disposition

A. Violations

1. Section 75.342

JWR contends that the judge erred in finding that the placement of the line curtain along the longwall face constituted a violation of section 75.342, as nothing in the regulation prohibits using line curtain to direct methane away from a methane sensing unit and its tailgate methane monitor met all the requirements of section 75.342, including the maintenance requirement of section 75.342(a)(4). JWR PDR at 2-4.[5] The Secretary argues that, because the judge interpreted section 75.342 in a manner which furthers the purpose of that regulation, his decision should be upheld. S. Am. Br. at 6-9.

The issue before us is whether the judge correctly concluded that an operator violates section 75.342 by intentionally routing air the operator has reason to believe contains methane on a path which prevents a monitor from detecting that methane. The Commission has recognized that, where the language of a regulatory provision is clear, the terms of the provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning. *See, e.g., 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)). It is only when the meaning is doubtful or ambiguous that the issue of deference to the Secretary=s interpretation arises. *See Pfizer Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984). Similarly, if a statute is clear and unambiguous, effect must be given to its terms. *Chevron*, 467 U.S. at 842-43. *Accord Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994).

Section 75.342(a)(4)=s requirement that A[m]ethane monitors shall be maintained in permissible and proper operating condition@ is derived from section 303(l) of the Mine Act, 30 U.S.C. ' 863(l), which provides that methane monitors Ashall be kept operative and properly maintained.@ The language of section 75.342(a)(4) and section 303(l) of the Act is sufficiently clear to establish that JWR violated the standard by using line curtain to deflect methane away from a methane monitor. In the absence of statutory or regulatory definitions or technical usage, we apply the ordinary meanings of words chosen by the drafters. *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996). The term Amaintain@ is not defined in 30 C.F.R. Part 75, but one of the dictionary meanings is Ato keep in a state of repair, efficiency or validity.@ *Webster=s Third New International Dictionary (Unabridged)* 1362 (1986). Similarly, the dictionary meaning of the term Acondition,@ which is likewise undefined in 30 C.F.R. Part 75, is not limited to merely

[5] JWR designated its PDR as its brief.

physical attributes, but includes Aa mode or state of being.@ *Id*. at 473. Lastly, the statutory term Aoperative@ is not defined in the Mine Act, but its primary dictionary definition is Aproducing an appropriate or designed effect.@ *Id*. at 1581.

Any methane monitor knowingly deployed in a fashion that renders it unable to accomplish its intended purpose **C** to detect and alert miners to the presence of methane **C** cannot be said, under the terms of the regulation, to be Ake[pt] in a state of . . . efficiency@ or in a Aproper operating state of being.@ Likewise, such a monitor is in violation of the standard=s statutory source, as in such an instance the monitor would not be capable of Aproducing the appropriate or designed effect@ of alerting miners when methane reaches dangerous levels. Because JWR deployed its longwall tailgate methane monitor in a manner that defeated its intended purpose, we conclude that the monitor was not being Amaintained@ in Aproper operating condition.@ *Cf. Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 998 (June 1997) (where dictionary definitions include functional component indicating that term means that item will be adequate to achieve intended purpose, functional interpretation is consistent with plain meaning of language of standard).

Interpreting section 75.342 to proscribe deflecting methane from a monitor is also consistent with the intent of the standard=s drafters. The language of section 303(l) of the Mine Act was carried over without change from section 303(l) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. ' 863(l) (1976). Its legislative history reveals the emphasis Congress placed on the function served by methane monitors:

> Experience has shown that in almost every instance when ignitions and explosions occur, it was because dangerous concentrations of methane accumulate before miners are aware of the condition. Thus, the need for a methane monitor on electric face equipment, particularly the continuous miner and cutting machine, is evident. *Even more important, it must be kept operative to be effective.* The monitor would include a methane detector or sensing device which would *continuously* sample the atmosphere . . .

S. Rep. No. 411, 91st Cong. 1st Sess. 60 (1969), *reprinted in* Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I, *Legislative History of the*

Federal Coal Mine Health and Safety Act of 1969, at 186 (1975) (emphasis added).[6] Accordingly, we affirm the judge=s conclusion that JWR violated section 75.342.

2. Section 75.323

According to JWR, section 75.323 is only violated when an operator fails to act upon learning methane exceeds the levels set forth in that standard. JWR PDR at 6. JWR argues that, because it did not know of the excessive methane at the No. 2 longwall until the inspector pointed out the condition, it did not violate section 75.323. *Id*. at 5-6. JWR also contends that substantial evidence does not support the judge=s conclusion that the longwall was energized at the time the inspector issued the orders. *Id*. at 4-5.

The Secretary takes the position that Smith=s detection of excessive methane established a violation, based on the judge=s finding that JWR would have known that methane was present but for its actions to avoid knowing. S. Am. Br. at 10-11 & n.7. The Secretary also maintains that substantial evidence supports the judge=s finding that the longwall was energized when the methane was found by the inspector. *Id*. at 10.

[6] MSHA similarly explained its intent in promulgating section 75.342 as part of revising its ventilation regulations in 1992, stating that A*[c]onstant* monitoring of methane during mining activities is an important safeguard against methane ignitions and explosions that could endanger miners.@ 57 Fed. Reg. 20,868, 20,890 (1992) (emphasis added). Consequently, MSHA based its adoption of some of the requirements of section 75.342 on its desire to Amaximize the effectiveness of monitoring sensors,@ and Aensure that monitors provide accurate monitoring of methane.@ *Id*.

Section 75.323(b)(1) obligates an operator to take specified actions A[w]hen 1.0 percent or more methane is present in a working place or an intake air course.@ Taken literally, the standard would seem to be applicable upon the mere presence of methane above that level. However, MSHA has taken the position that the provision should not be read literally.[7] In further revising its ventilation regulations in 1996, but leaving untouched the language at issue in section 75.323, MSHA agreed with comments submitted in that rulemaking that

> a methane problem cannot be corrected unless it has been detected and that the mere presence of methane does not constitute a violation [of section 75.323]. Only the failure to [take the actions required by section 75.323] once being made aware of the presence of methane in excess of allowable levels is a violation.

61 Fed. Reg. 9,764, 9,778 (1996). Consequently, JWR can only be held to have violated section 75.323 if there is substantial evidence to support the conclusion that it had knowledge of excessive methane and failed to take any of the required actions.[8]

a. Whether Section 75.323(b) Requires Actual Knowledge of Methane

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[7] Section 75.323(b)(1) was promulgated by MSHA in 1992 as part of a revision of its ventilation regulations. Prior to that, the required actions were expressly conditioned upon the presence of methane found by a test. *See* 30 C.F.R. ' 75.308 (1991) (methane accumulations in face area).

[8] 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). ASubstantial evidence@ means A>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)).

The judge never reached the question of whether JWR had actual knowledge of the presence of methane at actionable levels prior to the time that Inspector Smith issued the order alleging a violation of section 75.323. Rather, the judge concluded that any lack of such actual knowledge was the result of JWR=s own actions in preventing the tailgate monitor from detecting methane. 18 FMSHRC at 27. JWR does not contest that conclusion, which is supported by substantial evidence.[9]

We interpret the judge=s conclusion as a finding that JWR had constructive knowledge of the actionable levels of methane. JWR, however, argues that a section 75.323(b) violation was not established because it did not have actual knowledge of the presence of methane. Section 75.323(b) paraphrases section 303(h)(2) of the Mine Act, 30 U.S.C. ' 863(h)(2). While MSHA has stated that knowledge of methane is a prerequisite to the obligations imposed by section 75.323(b), neither section 75.323(b) nor its statutory source address whether only actual knowledge triggers those obligations.

Because Congress has not directly spoken to the issue, we examine whether MSHA=s interpretation is a reasonable one. *See Chevron*, 467 U.S. at 842-44; *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 n.2 (April 1996); *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 13 (January 1994). Deference is accorded to Aan agency=s interpretation of the statute it is charged with administering when that interpretation is reasonable.@ *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron*, 467 U.S. at 844). The agency=s interpretation of the statute is entitled to affirmance as long as that interpretation is one of the permissible interpretations the agency could have selected. *Chevron*, 467 U.S. at 843; *Joy Technologies, Inc. v. Secretary of Labor*, 99 F.3d 991, 995 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1691 (1997). *See also Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275, 1277 (10th Cir. 1995).

We find the Secretary=s interpretation of section 75.323(b) reasonable. Looking first at the language of the regulation and its statutory source, we note that neither explicitly contains a requirement of operator knowledge at all, much less actual knowledge. Thus, the Secretary=s interpretation is consistent with the regulatory language. We also conclude that the Secretary=s

[9] At trial, JWR=s foreman, Maynard Thomas, admitted that JWR=s deployment of line curtains was intended to prevent methane that it knew was seeping from the mine floor from being detected by a methane monitor. Tr. 270-71. Thomas also stated that JWR had used line curtain in such a fashion in its No. 7 Mine on many occasions in the past in order to cover up a methane bleeder in the floor that was Aclose to a sniffer[,]@, i.e., a methane monitor. Tr. 286-87, 291-94.

interpretation here is a sensible one that furthers the safety-promoting purposes of the Mine Act in general and section 75.323(b) in particular. That section=s thrust is to require operators to take specified measures once they are aware that methane has reached certain levels, in order to minimize the likelihood of explosion. We agree with the Secretary that to permit an operator to evade the required measures by taking intentional steps to keep itself ignorant of methane levels would permit circumvention of section 75.323 Aby [a] cynical expedient.@ *See* S. Am. Br. at 10-11 n.7.

Moreover, the Secretary=s construction of section 75.323 is consistent with Commission and court interpretations of the term Aknowingly.@ In *Kenny Richardson*, 3 FMSHRC 8, 16 (January 1981), *aff=d on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983), the Commission interpreted Aknowingly@ as used in section 110(c) of the Mine Act, 30 U.S.C. ' 820(c), to mean Aknowing or having reason to know.@ The D.C. Circuit recently deferred to this interpretation in *Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 363-64 (1997). In affirming the Commission, the court noted that Acourts have . . . found that >knowingly= encompasses more than actual knowledge.@ *Id.* at 363 (citations omitted).

b. Whether JWR Failed to Take any Measure Required by the Standard

JWR contends that the judge also erred in finding a violation of section 75.323 because the evidence does not support his conclusion that the longwall was energized when Smith took his methane measurements in the tailgate area. We need not address that question. Section 75.323(b) requires that, when excessive methane levels are encountered, in addition to de-energizing the longwall, *an operator must make ventilation changes or adjustments to reduce methane below 1%*. 30 C.F.R. ' 75.323(b)(1)(ii). Below, the Secretary contended that JWR made no such changes or adjustments, even though it was aware it had a methane problem, while JWR argued that it satisfied the standard by making the required ventilation changes or adjustments after it learned of the excessive methane levels from the inspector. S. Post-Hearing Br. 10-14; JWR Post-Hearing Br. at 6. Because he found the longwall was energized, the judge did not address the subject.

JWR continues to take the position that it complied with section 75.323(b) by making the required ventilation changes or adjustments upon learning of the excessive methane levels from the inspector. JWR PDR at 5-6. However, our conclusion that JWR had knowledge of excessive methane prior to that time means that JWR should have been making such changes or adjustments earlier. JWR=s failure to do so establishes a violation of the standard, regardless of whether the

longwall was energized during the inspection.[10] Accordingly, we affirm in result the judge=s finding of a section 75.323(b) violation.

[10] The Secretary having raised this argument below, we are free to rely on it as a basis for review. *See* 19 James Wm. Moore et al., *Moore=s Federal Practice* ' 205.05[1] (3d ed. 1997) (citing *United States v. Williams*, 504 U.S. 36, 40 (1992)).

B. Unwarrantable Failure

JWR maintains that its conduct in violating section 75.342 was not aggravated, as line curtain has been used in mines to route air around methane monitors for many years. JWR PDR at 4. It also contends that, because it immediately acted to correct the problem upon learning of the methane buildup, its good faith precludes a finding of aggravated conduct in connection with the section 75.323 violation. *Id*. at 6. The Secretary asserts that the judge=s finding of unwarrantable failure is supported by JWR=s intentional actions and his finding that JWR was engaging in a dangerous practice. S. Am. Br. at 11-14.

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 (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 Areckless disregard,@ Aintentional misconduct,@ Aindifference,@ or a Aserious lack of reasonable care.@ *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (February 1991) (A*R&P*@); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission=s unwarrantable failure test). In addition, 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 (August 1992) (finding unwarrantable failure where unsaddled beams Apresented 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 Acommon knowledge that power lines are hazardous, and . . . that precautions are required when working near power lines with heavy equipment@); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988) (finding unwarrantable failure where roof conditions were Ahighly dangerous@).

Substantial evidence supports the judge=s finding that JWR acted intentionally in using line curtain to attempt to avoid application of sections 75.342 and 75.323, and therefore engaged in aggravated conduct. *See R&P*, 13 FMSHRC at 194 (intentional conduct may be aggravated and constitute unwarrantable failure). Foreman Thomas acknowledged that JWR intended to avoid detection of excessive methane. 18 FMSHRC at 28; Tr. 270-71. Moreover, as the judge found, JWR took evasive action because, with the amount of intake air already at the maximum allowable amount of 131,000 cubic feet per minute, it otherwise would have had to shut down the longwall until the amount of intake air relative to the amount of methane was sufficient to dilute the methane below 1 percent. 18 FMSHRC at 25, 28-29; Tr. 264. Thus, in order to continue production, a conscious decision was made to evade a device designed to act as an important preventive safeguard.

We reject JWR=s contention that, because it was simply engaging in Aa common practice that has been used in the mines for many years@ (JWR PDR at 4), its violation of section 75.342 was not the result of aggravated conduct. The only evidence JWR presented in support of that claim was its foreman=s testimony that he had used line curtain on mine floor methane bleeders 50

to 100 times previously. Tr. 292. Although an operator=s good-faith, albeit mistaken, belief that cited conduct complied with the Mine Act is a defense to an unwarrantable failure allegation, the Commission has held that such a belief must be reasonable. *Cypress Plateau Mining Corp.*, 16 FMSHRC 1610, 1615-16 (August 1994). Given the clear commands of section 75.342 and the high degree of danger posed to miners by JWR=s conduct,[11] we do not think the record supports a conclusion other than that any such belief of JWR=s foreman was unreasonable. *See, e.g., id.* (unreasonable belief that roof plan permitted miners under unsupported roof no defense to unwarrantable failure).

We also reject JWR=s argument that its immediate abatement of the section 75.323 violation establishes that it acted in good faith. JWR undertook to abate the violative condition only after Inspector Smith issued the verbal orders. APost-citation [abatement] efforts are not relevant to the determination whether the operator has engaged in aggravated conduct in allowing the violative condition to occur.@ *Enlow Fork Mining Co.*, 19 FMSHRC 5, 17 (January 1997).

[11] Even JWR described it as Aa potentially dangerous situation.@ JWR PDR at 6.

III.

Conclusion

For the foregoing reasons, we affirm the judge=s determinations that JWR violated sections 75.342 and 75.323 and that both violations were the result of unwarrantable failure.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner