FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 19, 1996

JIM WALTER RESOURCES, INC.	:	
	:	
v.	:	
	:	Docket No. SE 94-244-R
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	

BEFORE: Jordan, Chairman; Doyle, Holen, Marks and Riley, Commissioners

DECISION

BY: Doyle and Holen, Commissioners

This contest proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), involves a citation and withdrawal order issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Jim Walter Resources, Inc. ("JWR") alleging a violation of 30 C.F.R. § 75.400.[1] The Commission granted the petition for discretionary review ("PDR") filed by the Secretary of Labor, which challenged Administrative Law Judge Gary Melick's decision that the Secretary had not met his burden of proving either that the violation was significant and substantial ("S&S")[2] or that it had

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[1] 30 C.F.R. § 75.400 states:

> 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.

"Active workings" is defined in 30 C.F.R. § 75.2 as "[a]ny place in a coal mine where miners are normally required to work or travel."

[2] 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 . . . ."

resulted from JWR's unwarrantable failure to comply with the standard.[3] 16 FMSHRC 1511 (July 1994) (ALJ). We affirm the judge's determinations.

I.

Procedural and Factual Background

On January 24, 1994, MSHA Inspector Thomas Meredith cited JWR for a violation of section 75.400 because of trash accumulations in the No. 2 entry of JWR's No. 7 Mine. Tr. 29-30; Govt. Ex. 3. *See* 16 FMSHRC at 1514.

On January 31, 1994, the date of the citation at issue, Meredith conducted a follow-up inspection and confirmed that JWR had abated the conditions that led to the issuance of the January 24 citation. Tr. 31. During the inspection, he observed in the No. 3 entry an accumulation of trash at the check curtain, which directed ventilation across the longwall face and also separated the active outby area from the inactive inby area. Tr. 16; 64. The judge found that the trash in the outby area consisted of "[a] garbage bag, one box and one rock dust bag . . . ." 16 FMSHRC at 1513. Inby the curtain, there was a larger accumulation of trash that extended for 250 feet and included paper bags, rags, rock dust bags, wooden pallets and large cable spools. Tr. 21-24; Gov't Ex. 2. The materials on both sides of the curtain were combustible. Tr. 24. *See* 16 FMSHRC at 1512.

Inspector Meredith issued a citation, which charged a violation of section 75.400, and a withdrawal order, pursuant to section 104 (d)(2) of the Act, 30 U.S.C. § 814 (d)(2). The inspector designated the violation as S&S and alleged that it was due to the operator's unwarrantable failure to comply with the standard. 16 FMSHRC at 1511-13; Govt. Ex. 2.

JWR challenged the citation and, following hearing, Judge Melick affirmed the violation. Although he noted that the existence of accumulations inby and outby the check curtain was undisputed, the judge concluded that "the inactive inby area cited in the order was not within the 'active workings' and the accumulations located therein were therefore not in violation of the cited standard." *Id.* at 1512. He further concluded that the evidence concerning combustible material outby the line curtain was insufficient to establish that the violation was S&S. 16 FMSHRC at 1512-13. The judge also determined that the evidence was insufficient to establish that the violation was due to the operator's unwarrantable failure. *Id.* at 1513-14.

II.

[3] 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 "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards . . . ."

Disposition

The central issue as to both the S&S and unwarrantability designations of the violation is the consideration to be given the trash accumulation inby the check curtain. The inspector cited this accumulation, along with the trash outby the curtain (*see* Govt. Ex. 2), and considered it in designating the violation S&S and unwarrantable. Tr. 51-52, 53-56. Before the judge, the Secretary argued that the area inby the check curtain was not "an inactive area." Tr. 73. The judge, however, held that, because the area inby the check curtain was not within the "active workings of the mine," the trash accumulation in that area was not violative of section 75.400. 16 FMSHRC at 1512. The Secretary contends on review that the judge erred in failing to consider accumulations on the inby side of the check curtain. PDR at 3.[4] The Secretary notes that miners traveled inby the curtain after the materials accumulated in the entry and that the judge's interpretation of section 75.400 in ignoring the inby accumulations defeats the purpose of the regulation. *Id*. at 8-12. The Secretary has not appealed the judge's determination as to the non-violative nature of the inby accumulation, however, and, thus, it is not in issue in this proceeding. 30 U.S.C. § 823(d)(2)(A)(iii). The Secretary nevertheless relies on the inby trash accumulation to substantiate his S&S and unwarrantability allegations. Thus, we must decide the effect, if any, of the non-violative trash accumulation.

A. Significant and Substantial

In challenging the judge's S&S determination, the Secretary argues that he failed to address certain evidence relating to the reasonable likelihood of injury under the criteria of *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984). PDR at 2-3. The Secretary also asserts that the judge did not address uncontradicted testimony that the check curtain was placed directly on top of combustible material, that the trash was highly combustible, that the mine had a history of methane ignitions and problems with spontaneous combustion, and that the accumulations in the No. 3 entry were close to the face, increasing the possibility of fires. *Id*. at 6-8.

JWR responds that an accumulation in the inactive area is not a violation, that the Secretary's argument in support of S&S focuses on that non-violative accumulation, and that the limited amount of material in the active area was not reasonably likely to result in an injury. JWR Br. at 4. In response to the Secretary's argument that the judge failed to address testimony regarding spontaneous combustion, methane emissions, and fires at the face, JWR states that the judge properly discounted such possibilities based on Inspector Meredith's own testimony. *Id*. at 5.

A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, the Commission further explained:

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[4] The Secretary designated his PDR as his brief.

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

6 FMSHRC at 3-4. *See also Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

In finding that the violation was not S&S, the judge concluded that the Secretary failed to meet his burden of proof as to the third element of *Mathies*. 16 FMSHRC at 1513. We agree. As the judge noted, the Secretary's evidence "referenced the massive accumulations in the inactive area and evidence was not elicited as to whether the few combustible items found in the active area at issue constituted a 'significant and substantial' violation." *Id*. The judge concluded that the inby accumulation was not violative (*id*. at 1512) and the Secretary failed to appeal the judge's determination on that issue. Thus, it is not before us on review. Because section 104(d)(1) expressly provides that an S&S determination arises from *the nature of a violation*, the inby, non-violative accumulation cannot support an S&S designation as to the outby, violative accumulation. *Cf. Consolidation Coal Company*, 17 FMSHRC 250, 254 (March 1995) (S&S determination depends upon validity of underlying citation). The dissenting Commissioners would impermissibly use the Secretary's evidence as to the seriousness of non-violative conduct to establish that the violative conduct was S&S. Slip op. at 9-10.

B. Unwarrantable Failure

In support of his position that the judge erred in not finding the citation to have resulted from the operator's unwarrantable failure, the Secretary argues that the judge failed to consider the inby accumulation and JWR's trash accumulation in the adjacent entry cited the previous week. PDR at 13-14. The Secretary further argues that the judge improperly discounted a statement from JWR's longwall coordinator that JWR had failed to clean up the accumulation because of a manpower shortage. *Id.* at 14-15.

JWR argues that the determination of whether an accumulation is unlawful turns on whether it is located in "active workings," i.e., a place where miners are normally required to work or travel. JWR Br. at 3. It contends that an accumulation in the inactive inby area does not violate section 75.400 and cannot support a finding of unwarrantability. *Id.* at 4.

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. This determination was derived, in part, from the plain meaning of "unwarrantable" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate

action"), and "negligence" (the failure to use such care as a reasonably prudent and careful person would use, characterized by "inadvertence," "thoughtlessness," and "inattention"). *Id.* 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).

We agree with the judge that the Secretary did not meet his burden of proving unwarrantable failure. 16 FMSHRC at 1514. The Secretary again primarily relies on the trash accumulation in the inby area. The operator's conduct in permitting that non-violative accumulation cannot, however, support a finding of unwarrantable failure as to the violative accumulation. Section 104 (d)(1) expressly provides that it is the conduct of the operator *in causing the violation* that is to be considered in determining unwarrantable failure. The Commission has recognized a number of factors that are relevant to determining whether a violation is due to an operator's unwarrantable failure. *See, e.g., Mullins and Sons Coal Co., Inc.*, 16 FMSHRC 192, 195 (February 1994), *citing Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (August 1992) (extensiveness of the *violation*, length of time that the *violative* condition has existed, operator's efforts to eliminate the *violative* condition, and whether operator has been placed on notice that greater efforts are necessary for compliance) (emphasis added). These factors are directly related to the violation. Here, the judge properly limited his consideration to the accumulation that was violative of section 75.400.

Further, we see no error in the judge's conclusion that no inference as to gross negligence or unwarrantable failure could be drawn solely from one prior violation of section 75.400. 16 FMSHRC at 1514. We also find, as did the judge, that the remarks of JWR's longwall coordinator, James Brooks, that he did not know why the material had not been cleaned up and that he had not had outby people for over a week, were ambiguous and do not support a finding of aggravated conduct. *Id.*

As in their S&S analysis, the dissenting Commissioners would impermissibly use the Secretary's evidence as to non-violative conduct to establish that the violative conduct here was unwarrantable. Slip op. at 11. The rationale they set forth to explain their disagreement with this opinion would, in effect, change the law on unwarrantable failure. Although they acknowledge that the judge should consider "operator conduct *relevant to the violation* in determining if the violation resulted from unwarrantable failure," *id.* (emphasis added), they ignore that statement as well as the language of section 104(d)(1) of the Mine Act and the factors relevant to a determination of unwarrantable failure set forth in *Mullins*, 16 FMSHRC at 195, in refusing to confine consideration of JWR's conduct to the violation at issue. Moreover, *FMC Wyoming Corp.*, 11 FMSHRC 1622, 1627-28 (September 1989), relied on by the dissent for support, is readily distinguishable. There, the Commission considered the operator's conduct in one part of its plant in taking steps to reduce asbestos hazards while ignoring asbestos hazards in other parts of the plant. The Commission held that, as to the violative conduct, disregard by the operator of its asbestos policy indicated aggravated conduct. *Id.* at 1628.

III.

Conclusion

For the foregoing reasons, we affirm the judge's determination that JWR's violation of 30 C.F.R. § 75.400 was not significant and substantial and was not due to its unwarrantable failure.

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Joyce A. Doyle, Commissioner

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Arlene Holen, Commissioner

Commissioner Riley, concurring:

I concur with the majority holding with respect to the limited issues before the Commission. Record evidence pertinent to the violation on appeal will not support reversal of the judge's determination. The small accumulation outby the check curtain in the No. 3 entry, found to be violative of 30 C.F.R. § 75.400, simply cannot, by itself, justify designation as "significant and substantial" or "unwarrantable failure."

As the majority notes, the larger accumulation inby the same check curtain is no longer at issue in these proceedings. The Secretary failed to appeal the judge's determination that the inby accumulation was non-violative. The Secretary now asks the Commission to cure both deficiencies in framing the appeal and the inadequacy of applicable regulations.

As the record indicates, the inspector originally cited a large inby accumulation together with a much smaller outby accumulation, separated only by a check curtain, which may have rested on some of the accumulated trash, and characterized the situation as a "significant and substantial" violation under section 104(d) of the Act. Suspecting that a large portion of the combustible debris inby the check curtain of the No. 3 entry was the same trash accumulation he had observed and cited the previous week in an active working area of the nearby No. 2 entry, the inspector designated the accumulation on both sides of the curtain as an "unwarrantable failure." Fortunately, as a consequence of the inspector's diligence, all trash accumulated on both sides of the check curtain was promptly removed from the mine.

We hope responsible operators would not resort to sweeping their problems behind a curtain separating "active workings" from inactive areas. While such a move may comply with the letter of applicable regulations, it falls short of the spirit of the law, which is intended to prohibit the accumulation of combustible materials that present an avoidable risk to miners. Whether such a scheme was at work in this case, as the inspector and the Secretary seem to believe, is no longer a compliance issue this Commission may reach on appeal.

The only question before the Commission is whether a situation determined not to be an offense under applicable law can be an aggravating circumstance with respect to characterization of a related violation. I am unable to make that leap. I find it difficult to understand how a situation allowed to go unchallenged as not offensive to worker health and safety law can nonetheless be construed to be so at odds with civil administrative order that it transforms another, somewhat ordinary violation into a grave and aggravated threat to workers.

Notwithstanding the regulatory language, the Secretary argues that certain accumulations outside of "active workings" should be prohibited because their proximity to areas where miners normally work or travel presents a collateral risk, similar to the one the regulation seeks to avoid. He asks the Commission to treat otherwise inactive areas the same as "active workings" if it can be demonstrated they were visited by anyone at anytime. The Secretary also suggests that a barrier more substantial than a ventilation curtain is needed to segregate combustible

accumulations from "active workings." The Commission appreciates that the regulation may not fully effectuate statutory purposes. However, if the Secretary sincerely believes the regulation is deficient, he should clarify its language through rulemaking, rather than ask the Commission to rewrite the regulation by adjudication.

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James C. Riley, Commissioner

Chairman Jordan and Commissioner Marks, dissenting:

Our colleagues correctly state that the "central issue" regarding the S&S and unwarrantable designations of the violation is the "consideration to be given" to the accumulations observed by the inspector inby the check curtain. Slip op. at 3. However, they incorrectly resolve that issue by concluding that the judge properly ignored that evidence. *Id.* at 4-6. We disagree and, for the reasons set forth below, we dissent.

I.

Significant and Substantial

The Secretary asserts that the judge erred by failing to consider the accumulation in the inactive area inby the check curtain in connection with his analysis of the likelihood of an injury resulting from the violation. Contrary to our colleagues, we agree with the Secretary's contention. We also think that the judge erred in failing to consider evidence relevant to the issue of whether the violation was significant and substantial ("S&S").

A. Failure to consider the accumulation inby the check curtain.

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1625 (August 1994). A violation is S&S if, "*based on the particular facts surrounding the violation*, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or illness of a reasonably serious nature." *Id.*, *citing Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825-26 (April 1981) (emphasis added). In *Mathies Coal Co*., 6 FMSHRC 1 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

6 FMSHRC at 3-4 (footnote omitted). *See also Austin Power Co. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* formula criteria).

The judge refused to consider the accumulation inby the check curtain in his S&S analysis. 16 FMSHRC at 1513. In determining whether a violation is S&S, however, a judge is required to consider the particular facts surrounding the violation. *National Gypsum Co.*, 3 FMSHRC at 825; *Wyoming Fuel Co.*, 16 FMSHRC at 1625; *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April

1988) (a determination of whether a violation is S&S must be based on the particular facts surrounding the violation). Our colleagues, while citing *National Gypsum* for this proposition, fail to give it full effect by concluding that "the inby, non-violative accumulation cannot support an S&S designation as to the outby, violative accumulation." Slip op. at 4. Although the inby accumulation was not the basis of the violation -- because the judge concluded that it was not in an active working and the Secretary did not appeal that conclusion -- the inby accumulation abutted the violative outby accumulation and was separated from it by merely a check curtain made of "curtain or heavy blind" material. Tr. 18-20, 34. Uncontradicted testimony established that the accumulation on both sides of the check curtain was combustible, the materials outby the check curtain were "just [a] continuation of everything that was in by [sic] the curtain[,]" and the miners' dinner hole area was immediately adjacent to the curtain. Tr. 18-22, 51-52; Gov't Ex. 1. At the very least, the extensive 250 feet of accumulation inby could have fueled a fire in the adjacent active workings. Consideration of the environment within which the violative condition exists is always relevant to the seriousness of the cited violation. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984) (section 104(d)(1) specifies that a violation is to be designated S&S if it "significantly and substantially contribute[s]" to a mine hazard in light of the "relevant dynamics of the mining environment"). Accordingly, we conclude that the judge erred in failing to consider the accumulation inby the check curtain in his risk analysis.

B. Failure to address relevant evidence.

The Secretary contends that the judge failed to consider the operator's history of methane ignitions at the working face of the mine, including recent ignitions. PDR at 7. We agree. Notwithstanding the record evidence regarding the operator's history of methane ignitions at the face (Tr. 47, 67-68, 71), the judge's decision contains no indication that he considered such evidence. This testimony is relevant to the S&S determination and should have been considered.

Further, there is merit to the Secretary's contention that the judge failed to consider the proximity of the accumulation in the No. 3 entry to the working face and that the cited materials burned at a lower temperature than coal. PDR at 8; Tr. 51-52; Gov't Ex. 1. The judge did not explicitly address this probative record evidence, nor is it apparent that he considered it. These facts are relevant to the S&S determination here and should have been considered.

Our case law is clear that a judge must analyze and weigh the relevant testimony, make appropriate findings, and explain the reasons for his decision. *Wyoming Fuel Co.*, 16 FMSHRC at 1627; *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994). Because the judge failed to consider the relevant evidence, we conclude that he erred.

II.

Unwarrantable Failure

The Secretary asserts that the judge erred when he disregarded the extent of the non-violative accumulation in the inactive area inby the check curtain in making his unwarrantable failure determination. Contrary to our colleagues, we agree with the Secretary's contention.

The unwarrantable failure terminology is taken from section 104(d) of the Mine Act and refers to more serious conduct by an operator in connection with a violation. *Wyoming Fuel Co.*, 16 FMSHRC at 1627. Unwarrantable failure is aggravated conduct constituting more than mere negligence, such as reckless disregard, intentional misconduct, indifference or serious lack of reasonable care. *Id.* Further, the Commission has recognized that a number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure, such as 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. *See, e.g., Mullins and Sons Coal Co.*, 16 FMSHRC 192, 195 (February 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (August 1992).

We disagree with our colleagues' conclusion that the operator's conduct in permitting the non-violative accumulation cannot support an unwarrantable finding in connection with the violative accumulation. *See* slip op. at 5-6. The Commission has stated that in resolving unwarrantable failure questions, the operator's total conduct in relation to a violation must be examined. *The Helen Mining Co.*, 10 FMSHRC 1672, 1676 n.4 (December 1988), *citing Emery Mining Corp.*, 9 FMSHRC 1997 (December 1987); *see also FMC Wyoming Corp.*, 11 FMSHRC 1622, 1627-28 (September 1989) (evidence of *nonviolative conduct* in another area of a plant is relevant to an unwarrantable failure determination). Further, a judge may consider past violations in determining whether a current violation is the result of unwarrantable failure. *Peabody Coal Co.*, 14 FMSHRC at 1263-64. Thus, a judge should consider all operator conduct relevant to the violation in determining if the violation resulted from unwarrantable failure.

Accordingly, we conclude that the judge erred in failing to consider the adjacent, non-violative accumulation in making his unwarrantable failure determination.

III.

Conclusion

For the foregoing reasons, we would vacate the judge's holdings that the violative condition was not S&S and not a result of the operator's unwarrantable failure and remand those issues to the judge for reconsideration.

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Mary Lu Jordan, Chairman

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Marc Lincoln Marks, Commissioner