FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

November 21, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. PENN 94-71-R
LION MINING COMPANY	:	

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

DECISION

BY THE COMMISSION:

This contest proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994) (AMine Act@ or AAct@), involves a roof control plan violation by Lion Mining Company (ALion@). At issue here is Administrative Law Judge T. Todd Hodgdon=s determination on remand that the conceded violation was a result of Lion=s unwarrantable failure.[1] 18 FMSHRC 1260, 1263-69 (July 1996) (ALJ). The Commission granted Lion=s petition for discretionary review challenging that determination. For the reasons that follow, we affirm the judge=s determination of unwarrantability.

I.

Factual and Procedural Background

On November 17, 1993, MSHA Inspector Kenneth Fetsko was inspecting the 4-1/2 right pillar (A4-1/2@) section at Lion=s Grove No. 1 underground coal mine near Jennerstown, Pennsylvania. 18 FMSHRC at 696. While he was standing at the crosscut between pillar block (Ablock@) 37 and block 44, Fetsko observed a continuous miner loading coal into three or four

[1] Remand was of the judge=s earlier decision that the violation was neither unwarrantable nor significant and substantial (AS&S@). 18 FMSHRC 695 (May 1996), *vacating and remanding* 16 FMSHRC 641 (March 1994) (ALJ). On remand, the judge found the violation to be both unwarrantable and S&S. 18 FMSHRC at 1263, 1269. Lion has appealed only the unwarrantability determination.

shuttle cars in the roadway between blocks 37 and 38. *Id*. From his vantage point, Fetsko could not see the front of the continuous miner to determine from where the coal was coming. 16 FMSHRC at 642. Fetsko did notice mine superintendent Art Jones and section foreman Ted Marines across the roadway standing in the crosscut between blocks 38 and 39. 18 FMSHRC at 696. Marines left for a short time and, upon returning, ordered roadway posts delivered to the crosscut. *Id*.

Recognizing that roadway posts had not been installed, Fetsko went to the crosscut between blocks 38 and 39. *Id*.; 16 FMSHRC at 642. At that point Fetsko observed the continuous miner make a notch cut from the right side of block 37. 18 FMSHRC at 696. Because note 7 to drawing A of Lion=s roof control plan required that roadway posts be installed in roof bolted entries, rooms, and crosscuts to limit the roadway width to 18 feet, Fetsko issued a citation to Lion under section 104(d)(1) of the Act for violating its roof control plan, and thus 30 C.F.R. ' 75.220(a)(1),[2] by failing to install roadway posts in the 38/39 crosscut before making the notch cut. 18 FMSHRC at 696 & n.3. Fetsko designated the violation S&S[3] and alleged that it was the result of Lion=s unwarrantable failure. *Id*. at 696. Lion abated the violation by installing four roadway posts in the crosscut. *Id*.

In his first decision, in addition to concluding that the violation was not S&S, the judge determined that the violation did not result from Lion=s unwarrantable failure, but rather from moderate negligence. 16 FMSHRC at 647-48. He concluded that the record was insufficient to demonstrate either that mine superintendent Jones or section foreman Marines Adeliberately and consciously failed to act or engaged in aggravated conduct.@ *Id*. at 647.

In remanding the case to the judge for reconsideration of his negative S&S and unwarrantable failure determinations, the Commission held that the judge had erred in determining that Lion had never been cited for failing to install roadway posts. 18 FMSHRC at 700. Among the reasons the Commission gave for remanding the unwarrantability issue was the judge=s failure

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[2] Section 75.220(a)(1) requires that A[e]ach mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine.@

[3] 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 any violation that Acould significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.@

to consider evidence that foreman Marines observed the violation in progress and failed to immediately order cessation of mining. *Id*. at 701. In addition, the Commission took issue with the judge=s decision to discount superintendent Jones= role based on Jones= testimony that he did not know about the roof control plan provisions concerning roadway posts and was not required to know all provisions of the plan. *Id*. at 700-01. The Commission noted that Jones also witnessed the notch being mined and did not order mining stopped. *Id*. at 700.

On remand, the judge concluded that the roof control plan violation was S&S and a result of Lion=s unwarrantable failure. 18 FMSHRC at 1263, 1269. The judge summarized his findings in support of his unwarrantability determination as follows:

> [T]he miner operator mined a notch out of block 37 with no apparent intent of stopping after the notch was removed; no one told him to stop mining; Jones, Marines and [mine foreman] Lambert were all present while this occurred; at a minimum both Marines and Lambert knew what the roof control plan required, yet no action was taken to install the roadway posts until after the notch was mined, and the reason for installing them then was at least partially the result of the inspector being present. Further, as the Commission has already held, the company=s previous roof control violations and roof falls should have put it on notice that greater efforts were necessary for compliance.

Id. at 1269 (footnote omitted). The judge also concluded that he did not need to address whether Jones= professed ignorance of the roof plan requirements constituted more than ordinary negligence, given that other Lion supervisory personnel with knowledge of the roof control plan requirements were present when the violation occurred. *Id*. at 1267.

II.

Disposition

Focusing on the short duration and limited extent of the violation, Lion urges reversal of the judge=s finding of unwarrantable failure. L. Br. at 16-17. Arguing that there is no evidence that it has ever been previously cited for failure to timely install roadway posts, Lion contends that the judge erred in taking previous violations into account in determining unwarrantability. *Id*. at 16. Lion describes as further error the judge=s consideration of foreman Marines= presence during the violation, stating that A[a] reasonable and logical reading of Mr. Marines[=] testimony shows that he did not observe the actual cutting of the notch.@ *Id*. at 14-15.

In response, the Secretary contends that the judge=s unwarrantable failure determination is supported by the evidence of the numerous roof control violations and roof falls on the 4-1/2 section, as well as by evidence that both Jones and Marines stood by and permitted the violation

to take place. S. Br. at 15. The Secretary also requests the Commission to overturn the judge=s finding that superintendent Jones did not know that he was witnessing a roof control plan violation. *Id*. at 9 & n.3. The Secretary claims that, based on Jones= experience in other mines and his testimony, it would have been unreasonable for Jones to think otherwise. *Id*. at 9-12.

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); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission=s unwarrantable failure test). In determining whether a roof control violation is unwarrantable, the Commission has taken into account the high degree of danger normally posed by such violations and whether the operator had been placed on notice that greater roof control efforts were needed. *See, e.g., Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). In addition, the Commission has considered whether supervisory personnel were present when the roof control violation took place. *See, e.g., Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011 (December 1987); *S&H Mining, Inc.*, 17 FMSHRC 1918, 1923 (November 1995).

A. Whether Lion Had Prior Notice of a Need for Greater Roof Control Efforts

In its original decision, the Commission found that Lion had received two citations for failing to install roadway posts on the 4-1/2 section within 2 months of the citation at issue, had been cited for four other roof control violations on the section during the preceding 9 months, and had experienced five roof failures on the section within 2 years of the citation, including one the day before the subject citation was issued. 18 FMSHRC at 700. The Commission concluded that such a history of roof violations and falls should have placed Lion on notice that greater efforts were necessary for compliance with its roof control plan. *Id*.

Nevertheless, Lion objects to the judge having taken this history into account in finding the instant violation unwarrantable. L. Br. at 16. Lion made the same argument to the judge that it makes here, but the judge did not address it, relying simply on the Commission=s earlier conclusion that Athe company=s previous roof control violations and roof falls should have put it on notice that greater efforts were necessary for compliance.@ 18 FMSHRC at 1269.

The judge correctly declined to revisit the previous history question. Under the law of the case, he was precluded from reaching a different result on the issue. *See Secretary of Labor on behalf of Mullins v. Consolidation Coal Co.*, 4 FMSHRC 1622, 1624 n.2 (September 1982) (issues and questions resolved by higher authority become unassailable law of the case). The issue having already been decided by the Commission, Lion=s proper recourse was to move the Commission to reconsider its original decision, rather than making the argument on remand to the judge, and then again on further appeal. Because the time for such a motion has long since

passed, we will not reconsider the issue, but will simply rely on the Commission=s earlier finding. *See* 29 C.F.R. ' 2700.78 (petition for reconsideration of Commission decision must be filed within 10 days).

B. Whether Foreman Marines Observed the Violation

Because of the high standard of care to which foremen and other supervisory personnel are held, the Commission takes into account whether such personnel were present when the violation took place in determining unwarrantability. *See Youghiogheny*, 9 FMSHRC at 2011 (quoting *Wilmot Mining Co.*, 9 FMSHRC 684, 688 (April 1987)); *S&H Mining*, 17 FMSHRC at 1923. We reject Lion=s claim that the record does not support the judge=s finding that Marines observed the violation taking place. Marines testified that the miner operator was extracting coal from the pillar when he returned to the area, that he then told the shuttle car operator to bring timber up to the face because the miner operator had Astarted to notch out the 37 stump,@ and that he instructed the miner operator to cease mining only after the operator had completed the loading of a shuttle car. Tr. 133-34, 137. Thus, Marines witnessed the violation yet did not act to immediately stop it.[4] The judge therefore correctly considered Marines= conduct as a factor tending to establish an unwarrantable failure on the part of Lion.

3. Other Factors

Though not addressed by the judge, a third factor supporting the judge=s unwarrantability determination is the high degree of danger posed by the violation. That the roof control violation posed a high degree of danger under the circumstances is implicit in the judge=s S&S determination. The judge based that determination on the well-known danger posed by even good mine roofs, the documented history of roof falls in the mine at issue, and evidence that the rib was rolling between blocks 38 and 39, the precise area where the roadway posts should have been installed prior to the notch being cut. 18 FMSHRC at 1262-63.

[4] Lion does not contest the judge=s conclusion that Marines understood the roof control plan to require that the posts be erected before any mining was performed. 18 FMSHRC at 1267 & n.4.

While, as Lion contends, its roof control violation may have been brief and not extensive, under Commission precedent the Secretary satisfies her burden of establishing the unwarrantability of a roof control violation where a foreman knew of the violative condition, the violation occurred in a mine with a history of roof falls, and the violation created a hazard characterized by high danger. *See Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610 (August 1994). Because all of those elements are present here, we conclude that substantial evidence supports the judge=s unwarrantability determination.[5] That Lion=s violation may have been brief in duration and not extensive does not compel a different result. *See id*. at 1611-12, 1616 (unwarrantability finding where installation of ventilation tubing under unsupported roof took only several minutes to complete).[6]

III.

Conclusion

For the foregoing reasons, we affirm the judge=s determination that Lion=s violation was the result of its unwarrantable failure.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

[5] 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)).

[6] In light of our holding, there is no need to take up the parties= request that we address other findings that the judge made in his decision on remand.

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

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