FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 23, 1996

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

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

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) ("Mine Act" or "Act"), involves a citation issued to Lion Mining Company ("Lion") alleging a violation of 30 C.F.R. § 75.220(a)(1) (1995) for failure to comply with its approved roof control plan.[2] Administrative Law Judge T. Todd Hodgdon concluded that Lion violated the standard, but that the violation was not significant and substantial ("S&S") and was not the result of Lion's unwarrantable failure. 16 FMSHRC 641 (March 1994) (ALJ). The Commission granted the Secretary of Labor's petition for discretionary review, which challenges the judge's S&S and unwarrantable failure determinations. For the reasons that follow, we vacate those determinations and remand.

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[1] Commissioner Doyle participated in the consideration of this matter but resigned from the Commission before its final disposition.

[2] Section 75.220(a)(1) provides in pertinent part:

> Each 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. . . .

I.

Factual and Procedural Background

On November 17, 1993, Inspector Kenneth Fetsko of the Department of Labor's Mine Safety and Health Administration ("MSHA") inspected the four and one-half right pillar section ("4½ section") at Lion's Grove No. 1 underground coal mine near Jennerstown, Pennsylvania. 16 FMSHRC at 641; Gov't Ex. 9. He was accompanied by Lion's safety director, Mike Bittner. Tr. 32-33. At the 37/44 crosscut, between Pillar Block ("Block") 37 and Block 44, Fetsko observed a continuous miner loading coal into three or four shuttle cars in the roadway between Blocks 37 and 38. 16 FMSHRC at 641-42. Fetsko also saw Mine Superintendent Arthur Jones and Section Foreman Ted Marines across the roadway in the crosscut between Blocks 38 and 39. *Id.* The 38/39 crosscut had been roof bolted and breaker posts and radius turn posts had been installed, but roadway posts had not. *Id.* at 642, 646. Fetsko then observed the continuous miner make a notch cut from the right side of Block 37. *Id.* at 642; Joint Ex. 1; Tr. 71. Marines left for a short time and, upon returning, ordered roadway posts delivered to the crosscut. 16 FMSHRC at 647. Fetsko issued a citation to Lion under section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), for violating its roof control plan by failing to install roadway posts in the 38/39 crosscut before making the notch cut.[3] 16 FMSHRC at 642; Gov't Ex. 1. Fetsko designated the violation S&S and alleged that it was the result of Lion's unwarrantable failure. *Id.* Lion abated the violation by installing four roadway posts in the crosscut. 16 FMSHRC at 642; Gov't Exs. 1, 4; Tr. 74, 86-87.

Lion conceded the violation but contested the S&S and unwarrantable failure designations. 16 FMSHRC at 643. Accordingly, the judge found a violation. *Id.* The judge concluded, however, that the violation was not S&S. *Id.* at 645-46. He found that the Secretary failed to establish that a serious injury was reasonably likely to have resulted from Lion's failure to install the roadway posts. *Id.* at 645. The judge determined that Lion, at the time, had several other means of preventing a roof fall. *Id.* at 646. He emphasized that the area in question had been completely roof bolted and that breaker posts and radius turn posts had also been installed. *Id*. Additionally, the judge stated it was not clear that the sole, or even the primary function, of roadway posts was roof support. *Id.* at 645. The judge also concluded Inspector Fetsko was mistaken in believing Block 37 had been mined previously, before the notch was cut. *Id.* at 646 & n.4.

The judge additionally concluded the violation did not result from Lion's unwarrantable failure, but rather resulted from moderate negligence. *Id.* at 647-48. He concluded record evidence was insufficient to demonstrate either that the mine superintendent or the section foreman "deliberately and consciously failed to act or engaged in aggravated conduct." *Id.* at

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[3] Lion's roof control plan requires that roadway posts be installed in roof bolted entries, rooms, and crosscuts to limit the roadway width to 18 feet. Gov't Ex. 2, note 7 to Drawing A (Plan for Installing Roof Supports for Pillar Recovery).

647. Furthermore, he found that additional mining of Block 37 would not have taken place until after the roadway posts were installed. *Id.*

II.

Disposition

A. Significant and Substantial

The Secretary argues the judge erroneously determined the violation was not S&S because he failed to find that the function of roadway posts was roof support and because he improperly gave weight to Lion's compliance with other parts of the roof control plan. S. Br. at 5, 7-8. The Secretary also argues that the judge failed to consider adequately the history of roof falls in the 4½ section and roof conditions at the time of the citation and that he failed to consider general evidence that roof falls are the leading cause of fatalities in mines. *Id.* at 5-6.

In response, Lion submits that substantial evidence supports the judge's finding that the violation was not S&S. L. Br. at 7-16. Lion points to other roof support in the area. *Id.* at 10. It also argues that, at the time of citation, only a small part of the pillar had been mined and that further mining would not have taken place until after roadway posts were installed. *Id.* at 10-11.

The S&S terminology is taken from section 104(d)(1) of the Act and refers to more serious violations. 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 Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825-26 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission further 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.

Id. at 3-4 (footnote omitted). *See also Buck Creek Coal, Inc. v.* FMSHRC, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

Substantial evidence does not support the judge's S&S determination.[4] The judge's approach to weighing record evidence was unduly restrictive and reflects a misunderstanding as to the purpose of roadway posts. In concluding that the Secretary had not satisfied the third *Mathies* element, the judge emphasized that the area was completely roof bolted and contained breaker and radius posts. 16 FMSHRC at 646. Under the roof control plan, however, Lion was required to install roadway posts before it could commence mining Block 37, which would cause a reduction in roof support. *Id.* at 643; L. Posthearing Br. at 6; S. Posthearing Br. at 4-5. The judge failed to recognize that roof bolting and other posts were adequate support for roof conditions only *before* mining of the pillar. Thus, we conclude the judge erred in placing undue weight on the operator's compliance with the applicable roof bolting, breaker, and radius post requirements.

The judge also failed to understand that the function of required roadway posts was to provide roof support. The judge stated:

> [A]ccording to the *Dictionary of Mining, Mineral, and Related Terms* 931 (1968) ["*DMMRT*"], roadway supports, which include roadway posts, serve two functions, to: "(1) ensure safety by preventing falls of ground, and (2) maintain the maximum possible roadway size by resisting the tendency of the roadway to contract and distort." It is not at all clear from Lion Mining's roof control plan that the sole, or even the primary, function of the roadway posts in this case was to serve as roof support.

16 FMSHRC at 645 (footnote omitted). The judge erred in failing to find that a principal function of roadway posts is roof support. He apparently did not realize that "falls of ground," cited by the *DMMRT* as a hazard against which roadway supports protect, refers to "[r]ock falling from the roof into a mine opening." *DMMRT* at 410. He also noted that section 75.207(c), 30 C.F.R. § 75.207(c), does not require installation of roadway posts until mining on the final stump commences, which had not occurred here. 16 FMSHRC at 645 n.3. The judge's reliance upon

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[4] The Commission is bound by the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989), *quoting Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). While we do not lightly overturn a judge's factual findings and credibility resolutions, neither are we bound to affirm such determinations if only slight or dubious evidence is present to support them. *See, e.g., Krispy Kreme Doughnut Corp. v. NLRB*, 732 F.2d 1288, 1293 (6th Cir. 1984); *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1263 (7th Cir. 1980). We are guided by the settled principle that, in reviewing the whole record, an appellate tribunal must also consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

section 75.207(c) is misplaced. That standard specifies procedures for pillar recovery that are required "unless otherwise specified in the roof control plan."[5] Lion concedes that its plan required roadway posts to be installed before pillars are mined in order to provide additional roof support. *See* Tr. 26, 38, 129; L. Br. at 4.

We agree with the Secretary that the judge also erred in failing to consider the history of roof falls in the section. The area experienced roof falls on five occasions within two years prior to the instant violation. Gov't Exs. 3, 5, 6; Tr. 43; S. Br. at 6-7. Indeed, the previous day a roof fall occurred only two pillar blocks away from Block 37.[6] Tr. 43, 50-51; Gov't Exs. 3, 5, 6. We reject the Secretary's argument, however, that the judge erred in failing to consider general evidence on the danger of roof falls. The Commission has held that an S&S determination must be based on the particular facts surrounding the violation, including the nature of the mine. *See Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988).

For the foregoing reasons, we vacate the judge's S&S determination and remand for further analysis.

B. Unwarrantable Failure

The Secretary argues that the judge failed to address adequately evidence that Lion had a history of roof falls and roof control plan citations in the section, including several for failing to install roadway posts. S. Br. at 9-11. The Secretary also notes that both the mine superintendent and the section foreman observed the continuous miner removing coal from the pillar in violation of the roof control plan without ordering mining to cease. *Id.* at 9-12.

Lion avers that, as soon as the section foreman became aware of the cited condition, he immediately ordered cessation of mining and the delivery of posts to the area. L. Br. at 18. Lion also submits that the mine superintendent was not negligent because he had only recently been employed at the mine and was not familiar with all details of the roof control plan. *Id.* at 18-19.

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[5] Section 75.207 provides in pertinent part:

> Pillar recovery shall be conducted in the following manner, unless otherwise specified in the roof control plan:
>
> . . . .
>
> (c) Before mining is started on a final stump . . . .

[6] Inspector Fetsko testified that, between Blocks 38 and 39, he observed that the "rib was rolling," i.e., that pieces of the rib were breaking off. Tr. 39, 65-66. While the judge generally referred to this testimony in his decision, 16 FMSHRC at 645, he apparently did not consider it in his S&S analysis. On remand, he should do so.

Lion further argues that the violation existed for only the last ten seconds of the 20- to 30-minute period the inspector observed the continuous miner working. *Id*. at 20.

The unwarrantable failure terminology is taken from section 104(d)(1) 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," "indifference" or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Corp.*, 13 FMSHRC 189, 193-94 (February 1991); *see also Buck Creek Coal, Inc. v. FMSHRC,* 52 F.3d at 136 (approving Commission's unwarrantable failure test).

In *Mullins and Sons Coal Co.,* 16 FMSHRC 192, 195 (February 1994), the Commission set forth factors to be considered in making an unwarrantable failure analysis: "the extensiveness of the violation, the length of time 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." The Commission has also examined conduct of supervisory personnel in determining unwarrantable failure. A heightened standard of care is required of such individuals. *See Youghiogheny & Ohio Coal Co.,* 9 FMSHRC 2007, 2011 (December 1987); *S&H Mining, Inc.*, 17 FMSHRC 1918, 1923 (November 1995).

The judge erroneously determined that Lion had never been cited for failing to install roadway posts. *See* 16 FMSHRC at 647. Lion received two such citations within two months of the subject citation for violations on the same section. Gov't Ex. 8. In addition, during the preceding nine months, MSHA cited Lion for four other roof control violations in the section. *Id.* There were also five roof failures in the section within two years of the citation, including one roof fall the day before the citation. Gov't Exs. 3, 5, 6; Tr. 43; S. Br. at 6-7. This history of roof violations and roof falls should have placed Lion on notice that greater efforts were necessary for compliance. *See Youghiogheny & Ohio,* 9 FMSHRC at 2010-11; *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (August 1992).

The judge also observed that record evidence was not sufficient to establish that Mine Superintendent Jones and Section Foreman Marines "deliberately and consciously failed to act or engaged in aggravated conduct."[7] 16 FMSHRC at 647. Superintendent Jones saw the notch being mined and did not order mining to be stopped. Tr. 125, 128. The judge, however, noted 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. 16 FMSHRC at 647, *citing* Tr.

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[7] A "deliberate and conscious failure to act" is not determinative of an unwarrantable finding. *See S&H,* 17 FMSHRC at 1923. The judge, however, references and applies the correct test for determining unwarrantability. 16 FMSHRC at 646-47. *See Emery,* 9 FMSHRC at 2003-04; *Rochester & Pittsburgh*, 13 FMSHRC at 193-94.

124. Accordingly, the judge found that, even if Jones had a duty to know the roof control plan and breached that duty, the breach was "not necessarily an 'unwarrantable failure.'" 16 FMSHRC at 647. The judge did not consider that Jones had approximately 21 years of mining industry experience, had been employed by Lion as mine superintendent for eight months, and was in charge of safety and health at the mine. Tr. 121-22, 125. Jones also conceded that erecting roadway posts was "a common part of the roof control plan." Tr. 127. In addition, the judge should consider Jones' testimony that he believed the roof control plan allowed roadway posts to be erected after pillar extraction began (Tr. 128-29) and whether that interpretation was reasonable. *See Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1615 (August 1994). Consideration should also be given to the Secretary's admission that the plan did not expressly require that roadway post installation should occur before commencement of pillar extraction. S. Br. at 8 n.5.

With respect to Foreman Marines, the judge found that Marines "left [the] area for a short time . . . and that when he returned the last shuttle car was being loaded, including coal from the notch" and that "he told the shuttle car operator to return with timber to install the roadway posts . . . ." 16 FMSHRC at 647. Marines testified that he saw the notch being cut and did not order mining to cease "till [the continuous miner operator] finished that shuttle car." Tr. 134, 135, 137. The judge should have considered in his analysis that Marines observed the violation in progress and failed to immediately order cessation of mining. The continuous miner operator also testified that he intended to continue mining at the time in question. Tr. 112. The judge should reconsider his findings in light of this testimony.

The judge did not determine whether Inspector Fetsko's presence served as the impetus for ordering the roadway posts. Although he relied on Marines' testimony that the inspector did not explicitly remind him to install the posts, 16 FMSHRC at 647, the judge did not evaluate the potential influence of the inspector's presence. Moreover, the inspector had conversations with other management officials in which he pointed out the lack of roadway posts.[8] In reconsidering his finding that "further mining of Pillar Block 37 would not have taken place until after the roadway posts were installed," the judge should take into account the inspector's presence and the conversations between the inspector and mine officials. *Id.*

We vacate the judge's determination and remand for further analysis of whether the violation resulted from Lion's unwarrantable failure. Clarification by the judge of the chronology of events will be relevant to his analysis. A judge must analyze and weigh the relevant testimony of record, make appropriate findings, and explain the reasons for his decision. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994).

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[8] According to the inspector's notes and testimony, immediately after he pointed out the problem to one of the management officials, that official looked over to where Jones and Marines were in the crosscut and then went over and started measuring for posts. Gov't Ex. 5; Tr. 34-36. During the time Inspector Fetsko observed the area, he could see that Jones was in the crosscut between Blocks 38 and 39 the entire time, while Marines left the area and returned. Tr. 40.

III.

Conclusion

For the foregoing reasons, we vacate the judge's determinations that the violation was not S&S and not the result of unwarrantable failure. We remand for analysis consistent with this opinion.

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Mary Lu Jordan, Chairman

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Arlene Holen, Commissioner

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Marc Lincoln Marks, Commissioner

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James C. Riley, Commissioner