

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

January 21, 1997

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. LAKE 94-126-M
	:	
MIDWEST MATERIAL COMPANY	:	

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners¹

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises 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 whether former Commission Administrative Law Judge Arthur J. Amchan properly concluded that a violation of 30 C.F.R. ' 56.14211(a)² by Midwest Material Corporation (AMidwest Material@), involving the use of improper and unsafe procedures in dismantling a crane boom that resulted in the death of miner Thomas Reaska, was not the result of unwarrantable failure. 17 FMSHRC 636, 640 (April 1995) (ALJ). The Commission granted the Secretary of Labor's petition for discretionary review. For the reasons that follow, we reverse the judge's determination that the violation of section 56.14211(a) was not the result of Midwest Material's unwarrantable failure, and remand this matter for penalty assessment.

¹ Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

² Section 56.14211 provides, in relevant part:

- (a) Persons shall not work on top of, under, or work from mobile equipment in a raised position until the equipment has been blocked or mechanically secured to prevent it from rolling or falling accidentally.

I.

Factual and Procedural Background

In April 1993, Midwest Material acquired a sand and gravel plant on Route 26 in Lacon, Illinois from Midwest Sand & Gravel Company (Midwest Sand & Gravel), an unrelated company. 17 FMSHRC at 636-37. Following the acquisition, Jerry Henry, the owner of Midwest Sand & Gravel, served as a consultant for Midwest Material at the Lacon site. *Id.* at 637. In addition, Midwest Material hired some of the individuals previously employed by Midwest Sand & Gravel at the Lacon facility, including Edward Schumacher, a working foreman, and miner Reaska. *Id.* Schumacher and Reaska had both worked in the sand and gravel business for 15 to 20 years, primarily for Jerry Henry and Midwest Sand & Gravel. *Id.* at 639.

In May 1993, Midwest Material was preparing to move the Lacon plant across Route 26, to a site near the river bed from which it extracted sand and gravel. *Id.* at 637. The company planned to use an American 599C mobile crawler crane to disassemble and move the plant. *Id.* In order to accomplish this task, it was necessary to add a 20-foot extension to the crane boom. *Id.* On the morning of May 27, Richard Walsh, an on-site superintendent, instructed Schumacher and Reaska to extend the length of the crane boom. *Id.* Walsh designated Schumacher to be the foreman in charge of the boom extension project. *Id.* at 639. Schumacher and Reaska had both extended crane booms during their previous employment with Midwest Sand & Gravel, and were therefore familiar with the correct procedures for accomplishing this task. *Id.* at 637, 639.

The standard procedure for extending the crane boom is to first lower the tip of the boom to the ground. *Id.* at 637. Next, the suspension lines that run from the top of the cab of the crane along the length of the boom are relaxed and connected to the top, far end of the first section of the boom by the cradle, a device attached to the suspension lines. *Id.*; Tr. 43-46; Gov't Ex. 1, inside cover (diagram). After the first section of the boom is secured in this manner, lifting tension is again taken up on the suspension lines and those parts of the boom suspension lines that go with the remaining sections of the boom are unfastened. 17 FMSHRC at 637; Tr. 43, 46; Resp. Ex. 2, at 2. The lower set of retaining pins connecting the first and second sections of the boom can then be driven out of their holes without danger since the boom will not flex, bend or separate when the lower pins are removed. 17 FMSHRC at 637; Tr. 43, 46; Resp. Ex. 2, at 2. Lifting tension in the boom suspension lines is then slowly released, causing the boom sections to pivot on the upper set of retaining pins and to separate at the bottom (where the retaining pins have been removed) as the boom is lowered to the ground. 17 FMSHRC at 637; Tr. 43, 46-47; Resp. Ex. 2, at 2. At this point, the upper set of retaining pins is removed, thus completing the process of separating crane boom sections. 17 FMSHRC at 637; Tr. 44, 47; Resp. Ex. 2, at 2. The crane and the first section of the boom, safely supported by the crane's suspension lines, are then backed away from the dismantled sections of the boom, and new sections can be safely added. 17 FMSHRC at 637.

On the morning of May 27, Schumacher began the project by entering the cab of the crane

and lowering the boom. *Id.* Reaska signaled Schumacher to stop lowering the boom when it was still about five feet off the ground, contrary to standard procedure. *Id.* Schumacher left the cab and went to his truck, located about 50 feet away, to get a cable come-along for use in pulling down the cradle so it could be connected to the first section of the boom. *Id.*; Tr. 49, 73. While Schumacher was at his truck, and prior to securing the first section of the boom, Reaska, from underneath the boom, began driving out the pins that connected the first and second sections. 17 FMSHRC at 638; Tr. 49, 52. This was also contrary to standard procedure. Tr. 74-75, 96.

Consultant Jerry Henry then drove up and had a short conversation with Schumacher on an unrelated manner. 17 FMSHRC at 638; Tr. 49-51. After a minute or two, Schumacher and Henry walked back to the crane and watched Reaska complete the process of driving out the connecting pins from the boom. 17 FMSHRC at 638; Tr. 51-52. Schumacher placed his hand over the bottom angle of the boom. Tr. 52. Schumacher made no effort, however, to warn Reaska not to drive out the pins connecting the boom sections until the boom could be properly secured. Tr. 197. When Reaska drove out the second of two lower retaining pins connecting the first and second sections of the boom, the boom pivoted downward on the upper pins and the first section of the boom fell on top of Reaska, pinning him to the ground. 17 FMSHRC at 638; Govt Ex. 1, at 1, 3. Henry was knocked down by second section of the boom, but was not seriously injured. 17 FMSHRC at 638; Govt Ex. 1, at 3. Reaska died at the scene. 17 FMSHRC at 638.

Jerry Spruell, an inspector from the Department of Labor's Mine Safety and Health Administration (MSHA), investigated the accident and issued a citation pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), alleging a significant and substantial and unwarrantable violation of section 56.14211(a) for permitting an employee to work under a crane boom that had not been blocked or mechanically secured. 17 FMSHRC at 636, 638; Govt Ex. 2. The Secretary of Labor proposed a penalty of \$20,000 for the alleged violation. 17 FMSHRC at 636. Midwest Material challenged the proposed assessment, contending that it had not violated the standard and, alternatively, that any violation was not the result of its unwarrantable failure.

Following an evidentiary hearing, the judge concluded that Midwest Material had committed a significant and substantial violation of section 56.14211(a), but that the violation was not the result of unwarrantable failure. *Id.* at 638, 640, 642 & n.2. The judge therefore affirmed the citation under section 104(a) of the Mine Act, 30 U.S.C. § 814(a), rather than under section 104(d)(1), and assessed a civil penalty of \$1,500. *Id.* at 640, 642.

The judge found that the negligence of foreman Schumacher in connection with the improper dismantling of the crane boom was imputable to Midwest Material, but concluded that Schumacher's conduct was not sufficiently aggravated to rise to the level of unwarrantable failure. *Id.* at 639-40.³ The judge noted that although the hazard was obvious, it existed only briefly

³ The judge concluded that only Schumacher's conduct was relevant in determining whether the violation was the result of unwarrantable failure, noting that the Secretary had not

before the accident, and therefore was distinguishable from situations where an operator allowed an obvious hazard to persist for a significant period of time. *Id.* at 640. The judge also relied on the lack of any evidence in the record that Reaska and Schumacher were under pressure to dismantle the crane quickly or that Midwest Material gained any production advantage from performing this task improperly. *Id.* While finding that Schumacher was aware that the correct procedures for disassembly of the crane boom had not been followed, the judge concluded that Schumacher's conduct is better described as "thoughtless" or "inattentive," rather than "inexcusable or aggravated." *Id.* The judge concluded that the evidence did not support an unwarrantable failure finding, but rather indicated only that "two competent, experienced miners who knew how to do this job properly did it improperly for inexplicable reasons." *Id.*

The Commission granted the Secretary's petition for discretionary review, which challenged the judge's finding that the violation of section 56.14211(a) was not the result of unwarrantable failure.

II.

Disposition

The Secretary argues that the evidence regarding the improper manner in which the boom disassembly operation was performed compels a finding that Schumacher's conduct was intentional and deliberate, which qualifies as "aggravated conduct" under the test for establishing unwarrantable failure. *S. Br.* at 6-7. The Secretary also contends the judge failed to adequately consider evidence that the violative conduct was extraordinarily dangerous, and that the hazardous condition that resulted, and the operator's failure to respond to it, were visually obvious. *Id.* at 7-8. In addition, the Secretary contends the judge failed to correctly apply the legal test for determining the existence of unwarrantable failure. *Id.* at 5-6, 8-10. The Secretary argues that the judge improperly relied upon the inexplicable nature of Schumacher's negligent conduct as evidence of a lack of aggravated conduct. *Id.* at 8-9. The Secretary also contends the judge erred in finding that Schumacher's conduct was not unwarrantable because the violative condition existed only for a brief period before the fatal accident. *Id.* at 9-10.

alleged negligence on the part of superintendent Walsh or any other company official, including consultant Jerry Henry. *Id.* at 639.

In response, Midwest Material argues that the judge correctly determined that its violation of section 56.14211(a) was not the result of unwarrantable failure.⁴ Midwest Material contends that the judge's ruling on the unwarrantability issue should not be overturned because it was based upon his direct assessment of the testimony of witnesses who were at the scene of the fatal accident.

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. 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 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 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).

We conclude that the judge misapplied the applicable standard for determining whether the violation of section 56.14211(a) was the result of unwarrantable failure, and that his finding that the violation was not due to unwarrantable failure is not supported by substantial evidence.⁵ First, the judge failed to adequately consider that the negligent conduct of foreman Schumacher resulted in a highly dangerous situation, a miner working directly underneath unsecured heavy equipment to dismantle that very same equipment. The high degree of danger inherent in the situation is evidenced by the fatal accident that resulted when Reaska removed the last pin connecting the first and second sections of the boom. The Commission has relied upon the high degree of danger posed by a violation to support an unwarrantable failure finding. See *Beth Energy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (August 1992) (finding unwarrantable failure where the unsaddled beams presented a danger to miners entering the area); *Warren Steen Construction, Inc.*, 14 FMSHRC 1125, 1129 (July 1992) (finding violation to be aggravated

⁴ The position of Midwest Material is set forth in a letter dated May 28, 1995 submitted by its president, Paul Williams, in opposition to the Secretary's petition for discretionary review, as explained in a subsequent letter from Williams dated September 23, 1995.

⁵ The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I). The term "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)). In reviewing the whole record, an appellate tribunal must 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).

and unwarrantable based upon common 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 highly dangerous).

The judge's decision also fails to recognize that the violation took place in the presence of a foreman, who, under Commission precedent, is held to high standard of care. *See Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011 (December 1987) (A section foreman is held to a demanding standard of care in safety matters) (quoting *Wilmot Mining Co.*, 9 FMSHRC 684, 688 (April 1987)); *S&H Mining, Inc.*, 17 FMSHRC 1918, 1923 (November 1995) (heightened standard of care required of section foreman and mine superintendent).

In view of the extreme danger posed to a miner working directly underneath the crane boom left in an unsecured position, five feet off the ground, and the high level of responsibility to which he is held, foreman Schumacher had a duty to exercise extreme caution and care until the hazardous condition could be eliminated. In our view, Schumacher breached that duty in several important respects. First, he failed to lower the crane boom completely to the ground, in accordance with standard procedure. In addition, he left Reaska in the immediate vicinity of a crane boom that he knew was unsecured, several feet off the ground, without warning him about the danger that existed or instructing him not to work under the crane boom. Finally, he watched Reaska drive out connecting pins from under the unsecured boom without providing any warning of the disastrous consequences that could, and in fact did, occur.

In addition, the judge did not take adequate account of the obvious nature of the hazard created by Schumacher's negligent conduct, which is a further indication that the violation involved a serious lack of reasonable care. Even a casual observer at the accident scene could have perceived that Reaska was being placed in a precarious and highly dangerous position as a result of the failure to adhere to proper procedures for disassembly of the crane boom.⁶ Certainly Schumacher, given his experience and familiarity with this task, and the high degree of care required of him, should have appreciated the obvious hazard that existed and insisted on adherence to proper procedures by, at a minimum, warning Reaska not to remove the connecting pins or work underneath the crane boom until it could be properly secured. We have relied upon the obvious nature of a hazard in making an unwarrantable failure determination. *See, e.g., Cyprus Plateau Mining Corp.*, 16 FMSHRC 1604, 1608 (August 1994) (inoperable brakes on shuttle car); *Quinland Coals*, 10 FMSHRC at 708-09 (obvious nature of poor roof conditions).

⁶ As even Schumacher acknowledged, anyone walking up to the scene of the accident would have recognized that a critical step in the process of dismantling the boom C attaching the crane's suspension lines by the cradle to the first section of the boom C had not been completed when Reaska removed the connecting pins. Tr. 96.

Further, we agree with the Secretary's contention that Schumacher's inability to provide any explanation for his negligence and the lack of safety precautions that resulted in this fatal accident supports, rather detracts from, an unwarrantable failure finding. Although Schumacher was familiar with the proper procedure for dismantling the crane boom, as well as the hazard of working under a raised load, he testified that in the period immediately prior to the accident neither he, Henry nor Reaska noticed they had missed a critical step in the process of the dismantling the boom C attaching the cradle and the suspension lines to the first section of the boom. Tr. 74-75, 148, 163. In explaining the failure to notice that the appropriate procedures had not been followed, Schumacher testified as follows: A[N]obody noticed anything. We [were] all just brain dead or just mentally blocked.@ Tr. 52.⁷ This lapse of judgment or presence of mind on the part of the mine foreman with respect to the proper procedures for dismantling the crane boom, in our view, qualifies as the type of Aindifference@ or Aserious lack of reasonable care@ that constitutes unwarrantable failure, particularly in light of the extremely dangerous position that Reaska was placed in as a result. Therefore, we conclude that the judge erred in finding that the Athoughtless@ and Ainattentive@ character of Schumacher's conduct supports a finding that his conduct was not sufficiently aggravated to amount to unwarrantable failure.

In addition, we find that several other elements of the judge's analysis of Schumacher's conduct are faulty, and further undermine his conclusion that the violation of section 56.14211(a) was not the result of unwarrantable failure. The judge's reliance on the relatively brief duration of the violative conduct was misplaced, in view of the high degree of danger posed by the hazardous condition and its obvious nature. Given the extreme hazard created by Schumacher's negligent conduct, that misconduct is readily distinguishable from other types of violations C such as those involving the accumulation of coal dust C where the degree of danger and the operator's responsibility for learning of and addressing the hazard may increase gradually over time. Moreover, the judge failed to recognize that the hazardous condition existed for a brief period of time only because it culminated in the collapse of the boom on Reaska, resulting in his death.

In finding that this violation was not unwarrantable, the judge also relied upon the lack of evidence in the record that Schumacher failed to insist on proper procedures because the miners were under pressure to dismantle the crane quickly or that Midwest Material gained any sort of production advantage from performing this task improperly. 17 FMSHRC at 640. This analysis is also erroneous, however, because even though the record does not support the Secretary's contention that Schumacher's conduct was intentional and deliberate, this does not preclude a finding that Schumacher's reckless indifference to the safety of a fellow miner is aggravated conduct that constitutes unwarrantable failure. It is well established that intentional and deliberate conduct is not a condition precedent to a determination of unwarrantable failure. *See Emery*

⁷ In addition, MSHA Inspector Jerry Spruell testified that, when he questioned Schumacher about the failure to follow proper procedures for dismantling the crane boom, Schumacher stated, A[w]e drew three blank minds@ C referring to himself, Reaska, and Henry. Tr. 147.

Mining, 9 FMSHRC at 2003-04; *Rochester & Pittsburgh*, 13 FMSHRC at 193-94; *S&H Mining*, 17 FMSHRC at 1923.

Based on these considerations, we conclude that the judge misapplied the unwarrantable failure test, and that the record as a whole does not support the judge's determination that Midwest Material did not engage in aggravated conduct. Rather, the record compels the conclusion that Schumacher's conduct reflected reckless indifference and a serious lack of reasonable care. Accordingly, we reverse the judge's determination that the violation was not the result of Midwest Material's unwarrantable failure, convert the section 104(a) violation to a section 104(d)(1) violation, and remand this matter to the Chief Administrative Law Judge for assignment to a judge for penalty assessment.⁸

III.

Conclusion

For the foregoing reasons, we reverse the judge's determination that the violation of section 56.14211(a) was not the result of Midwest Material's unwarrantable failure, and remand this case for assessment of an appropriate civil penalty.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

⁸ Judge Amchan has since transferred to another agency.