FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20006

April 19, 1996

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. KENT 93-318-R
	:	KENT 93-319-R
PEABODY COAL COMPANY	:	KENT 93-320-R
	:	KENT 93-437

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

DECISION

BY: Doyle, Holen and Riley, Commissioners

This consolidated contest and civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), raises the issue of whether violations of 30 C.F.R. § 70.100(a) (1995)[1] by Peabody Coal Company ("Peabody") were caused by its high negligence and unwarrantable failure[2] to comply with the standard. Administrative Law Judge Arthur Amchan determined that the violations were the result of Peabody's high negligence and unwarrantable failure. 16 FMSHRC 42 (January 1994) (ALJ). For the reasons that follow, we reverse and remand.

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[1] 30 C.F.R. § 70.100(a) provides in part:

> Each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of each mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air . . . .

[2] 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 . . . ."

I.

Factual and Procedural Background

Peabody operates the Camp No. 1 mine, an underground coal mine in Morganfield, Kentucky. On January 6, 1993, Arthur Ridley, an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA"), issued a citation and an order, pursuant to section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), alleging significant and substantial ("S&S") and unwarrantable violations of section 70.100(a) based on analysis of dust samples collected pursuant to 30 C.F.R. § 70.207 (1995).[3] 16 FMSHRC at 43; Tr. 17, 78, 104. Dust samples from the period November 1-December 31, 1992, revealed that the continuous miner operators for mechanized mining unit ("MMU") 044 and MMU 056 had been exposed to average dust concentrations of 2.4 milligrams of respirable dust per cubic meter of air ("mg/m^3"). 16 FMSHRC at 43. On January 20, the inspector issued an order, pursuant to section 104(d)(2) of the Act, 30 U.S.C. § 814(d)(2), alleging an S&S and unwarrantable violation of the same standard based on analysis of samples collected during the period January 1-February 28, 1993, which showed that the continuous miner operator of MMU 047 had been exposed to an average dust level of 2.2 mg/m^3. *Id.*

Inspector Ridley testified that he designated the violations as unwarrantable because Peabody had violated the standard numerous times in the past and he thought that sterner measures might induce compliance. Tr. 39, 42, 65, 101-02. In the two years preceding issuance of the subject citation and orders, Peabody had received a citation or an order alleging excessive dust exposure for the operator of MMU 044 during four of the nine bimonthly cycles in which coal had been produced, for the operator of MMU 056, during four of eleven cycles and, for the operator of MMU 047, during two of four cycles. 16 FMSHRC at 44; Gov't Exs. 1, 2, 3. Inspector Ridley testified that, at least twice during this period, he informed Peabody personnel that they needed to "do more than just take . . . samples." Tr. 40, 68-69, 134-36.

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[3] 30 C.F.R. § 70.207 is entitled, "Bimonthly sampling; mechanized mining units." Subsection (a) provides in part:

> Each operator shall take five valid respirable dust samples from the designated occupation in each mechanized mining unit during each bimonthly period beginning with the bimonthly period of November 1, 1980. Designated occupation samples shall be collected on consecutive normal production shifts or normal production shifts each of which is worked on consecutive days.

After collecting the samples, Peabody sent them to the Pittsburgh Health Technology Center ("PHTC") for evaluation. Tr. 17, 21, 77-78. The PHTC weighed the samples and sent reports of the results to Peabody and MSHA. Tr. 104.

In order to abate the citation and orders, Peabody was required by the inspector to designate additional personnel to supervise sampling. Tr. 55-56, 72-73, 96. The inspector believed that respirable dust could be maintained within required limits if Peabody complied with its plan. Tr. 54-56. His belief was based, in part, on the fact that, when MSHA had supervised sampling in 1991 and 1992, Peabody had achieved compliance with section 70.100(a).[4] Tr. 49, 69-70, 89. When samples of MMUs 044, 056, and 047 taken under supervised conditions showed respirable dust within acceptable limits, the citation and orders were terminated.[5] J. Exs. 4, 5, 6.

Peabody conceded that it had violated section 70.100(a) in all three instances and that the violations were S&S, but disputed that the violations had been caused by its unwarrantable failure to comply with the standard. Peabody presented evidence that in January 1992, approximately a year before the subject citation and orders were issued, it began taking extensive measures to increase water flow and improve dust control. Water flow gauges were installed to monitor the quantity of water going to the sprays and scrubbers on continuous miners. 16 FMSHRC at 45. Peabody also began working with the equipment manufacturer to reduce water and air restrictions within the continuous miners. *Id.* at 46. Over a period of six to seven months, beginning in February 1992, Peabody increased the size of fittings on several miles of water lines leading to the continuous miners and replaced plastic pipe with steel pipe, which could tolerate greater water pressures. *Id.* at 45. In March 1992, it increased the size of the water line leading to the continuous miners from one inch to one-and-a-half inches and increased water volumes on the continuous miners by 25% or 50%, depending upon the type of machine. *Id.* In July 1992, Peabody replaced existing water pumps with special pumps that would increase water pressure and volume. *Id*. To increase scrubber efficiency, commencing in November 1992, Peabody installed water sprays inside the ductwork of the continuous miners. *Id.*

The judge found that, given Peabody's compliance history and the Mine Act's emphasis on preventing respiratory disease, Peabody's "failure to leave any stone unturned" in resolving its noncompliance with section 70.100(a) amounted to aggravated conduct, exceeding ordinary negligence. 16 FMSHRC at 48. He explained that a prudent employer would have undertaken a comprehensive investigation, which would have revealed that employee work practices were deficient. *Id.* Relying on his finding that, in January 1993, Inspector Ridley found three of Peabody's six MMUs to be in violation of the dust standard, the judge concluded that Peabody's "compliance record during 1991 and 1992, create[d] a rebuttable presumption that the violations

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[4] MSHA had supervised sampling for MMU 044 on March 28, 1991, and for MMU 047 on September 10, 1992. Tr. 47-48, 89. Analysis of those samples revealed average dust levels of 1.1 mg/m^3 and 0.8 mg/ m^3, respectively. Tr. 48, 89.

[5] After the citations and orders had been terminated, Peabody continued to assign additional personnel to supervise sampling. Tr. 190. Supervisors observed that miners sometimes failed to correctly use line brattice and to position themselves in an area of least possible exposure to dust. Tr. 214-15.

were due to an unwarrantable failure." *Id.* at 48-49. He stated that, had Peabody shown it had "taken every conceivable step to rectify the problem," he would have been inclined to find ordinary negligence. *Id.* at 49. The judge further determined that sampling by MSHA in 1991 and 1992 had put Peabody on notice that it could have achieved compliance without altering its equipment and that other efforts were necessary. *Id.* Accordingly, the judge concluded that the violations had resulted from Peabody's unwarrantable failure and high negligence. *Id.* at 48-49. The judge assessed civil penalties of $15,000, noting, by analogy, that the Occupational Safety and Health Act ("OSHAct") provides for increased penalties for repeated violations. *Id.* at 46.

The Commission granted Peabody's petition for review and allowed amicus curiae participation by twelve organizations.

II.

Disposition

Peabody asserts that the judge erred in concluding that its violations were caused by high negligence or unwarrantable failure.[6] It argues that there was no evidence it had failed to comply with its dust control plan, it could not know whether it was in compliance until it was too late to avoid a violation, and it had taken extensive and reasonable remedial measures to improve dust control. PDR at 5-7. It contends further that the judge erred in creating a rebuttable presumption of unwarrantable failure based on its compliance history. *Id.* at 11-12. It also contends that the judge erred in relying on the OSHAct in assessing civil penalties. *Id.* at 16-17.

The Secretary asserts that the judge, in effect, applied the correct standard for unwarrantable failure. S. Br. at 17-18 n.15, 20-21 n.17. He further contends that substantial evidence supports the judge's findings of high negligence and unwarrantable failure because Peabody knew or had reason to know of a persistent compliance problem based on its past violations and warnings from MSHA. *Id.* at 10-14. The Secretary asserts Peabody had ample opportunity to take reasonable and effective remedial measures and failed to do so. *Id.* at 14-21.

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 2003-04. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care."[7] *Id. Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (February 1991). The Commission has required that an operator's good faith efforts in trying to achieve compliance with a standard must be

[6] The amici filed a joint brief generally supporting Peabody's position.

[7] Contrary to the Secretary's assertions (S. Br. at 10-14), a "had reason to know" standard is not determinative of unwarrantable failure. *Virginia Crews Coal Co.*, 15 FMSHRC 2103, 2107 (October 1993); *Cyprus Plateau*, 16 FMSHRC at 1614.

reasonable. *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1615 (August 1994). Where an operator reasonably believes in good faith that its conduct is the safest method of compliance, such conduct is not aggravated conduct constituting more than ordinary negligence. *Utah Power and Light Co.*, 12 FMSHRC 965, 972 (May 1990) ("*UP&L*").

We conclude that the judge erred in finding unwarrantable failure based on the operator's "failure to leave any stone unturned" and take "every conceivable step" in attempting to eliminate the violations. 16 FMSHRC at 48-49. The judge, after referring to the proper standard for unwarrantable failure set forth in Commission precedent, failed to apply it. In effect, he imposed a standard for unwarrantable failure close to one of strict liability.

The judge further erred by creating a rebuttable presumption, in effect, that the violations resulted from Peabody's unwarrantable failure based on its compliance history and his finding that three of six MMUs were out of compliance during the inspector's visits in January 1993. *Id.* Commission case law does not recognize a presumption of unwarrantable failure based on an operator's history of noncompliance. Under Commission precedent, various factors are examined to determine whether a violation is unwarrantable. *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (August 1992) (citations omitted). Repeated similar violations may be relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that "greater efforts are necessary for compliance" with a standard. *Id.* That an operator has received such notice, however, is not dispositive of whether a subsequent violation of the standard is unwarrantable. An operator's good faith efforts in attempting to achieve compliance must be examined in making that determination. *UP&L*, 12 FMSHRC at 972 ; *see Westmoreland Coal Co.*, 7 FMSHRC 1338, 1342 (September 1985).

Further, contrary to the judge's finding, the inspector did not find three of the six units out of compliance during any one sampling cycle. MMUs 044 and 056 had been in violation during the November-December 1992 cycle, while MMU 047 had been in violation during the January-February 1993 cycle. Gov't Exs. 1, 2, 3.

The judge essentially found that Peabody's remedial efforts were insufficient to overcome high negligence and unwarrantable failure findings because previous instances of supervised sampling should have indicated to Peabody that water flow alterations were unnecessary and that "something else, such as closer attention to proper work practices, was necessary." 16 FMSHRC at 49. The judge erred in failing to recognize the relationship between an increased water supply and dust control, testified to by witnesses of both parties.[8] Tr. 50, 202-03. Furthermore, the record shows that Peabody did, in fact, address work practices by reviewing provisions of its dust control plan with miners during safety meetings and annual refresher training. Tr. 213. In addition to its ordinary training measures, in May 1992, Peabody's superintendent, chief mine

[8] The judge stated that "it is unclear what, if any, relationship exists between the measures taken by Respondent to increase water supply to its working sections and the numerous citations issued to it for respirable dust violations." 16 FMSHRC at 48.

manager, and safety supervisor went to each working section of the mine and explained the dust control plan in great detail to miners, informing them that they were expected to comply with the plan at all times. Tr. 213-14.

The record also shows that Peabody's efforts to increase water flow were extensive, sustained, and intended to control dust at all times, not only during sampling. The judge seemed to construe Peabody's considerable investment of time and expense toward achieving a systematic engineering solution as the modern day equivalent to fiddling while Rome burned. Peabody's persistence in attempting to reduce respirable dust levels through engineering controls rather than relying on work practice reforms, which depend for success on individual worker compliance with the dust control plan at all times, was entirely reasonable. Moreover, the evidence indicates that Peabody had reason to believe that its remedial efforts were working. As to MMU 044, dust levels had been in compliance according to samples taken in the March-April 1992 and May-June 1992 sampling periods, the two most recent sampling periods during which MMU 044 was in production prior to the November-December 1992 reading that led to the January 6 citation.[9] J. Ex. 2. With respect to MMU 056, dust levels were also in compliance during the three sampling periods immediately preceding the November-December sampling that gave rise to the January 6 order. *Id.* As to MMU 047, it was either in compliance or out of production for every sampling period except one between May 1991 and the January-February 1993 sampling period that gave rise to the January 20 order. *Id.*

We conclude that Peabody's remedial measures clearly demonstrate a good faith, reasonable belief that it was taking the steps necessary to solve its dust problems and this record cannot support a finding of high negligence or unwarrantable failure.

We disagree with the dissenting Commissioners that an operator bears the burden of proving significant compliance efforts to avoid a determination that a violation is unwarrantable, slip op. at 10, or that the seriousness of a violation is relevant in a determination of unwarrantable failure. *Id.* at 10-11. Commission precedent has established that the Secretary bears the burden of proving that an operator's conduct, as it relates to a violation, is unwarrantable. *Virginia Crews*, 15 FMSHRC at 2107. Commission precedent has also established that various factors are considered in determining whether conduct by an operator is unwarrantable, irrespective of the seriousness of a violation. Further, the Mine Act, in setting forth the terminology of unwarrantability, establishes more severe sanctions for an unwarrantable violation, irrespective of its seriousness. Section 104(d)(1) provides that a withdrawal order is to be issued whenever "the Secretary finds another violation of *any* mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply . . . ." 30 U.S.C. § 814(d)(1) (emphasis added).

[9] MMU 044 was idle from July through October 1992.

We also disagree that "the success or failure of an operator's effort to achieve compliance is a factor that must be considered" in determining unwarrantable failure. Slip op. at 8. If the operator's effort had been successful, there would have been no violation.

III.

Conclusion

For the foregoing reasons, we reverse the judge's high negligence and unwarrantable failure findings and remand for reassessment of civil penalties.[10]

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

James C. Riley, Commissioner

[10] Given our disposition, we need not reach Peabody's arguments that the judge erred in assessing penalties. We caution the judge, however, against relying on OSHAct concepts in assessing penalties.

Chairman Jordan and Commissioner Marks, concurring in part and dissenting in part:

We agree with our colleagues that the judge's failure to appreciate the significance of water in controlling dust prevented him from evaluating the reasonableness of Peabody's remedial measures and that, therefore, his unwarrantability determination cannot be upheld. However, by deciding to reverse, rather than vacate, the judge's determination, our colleagues take the view that this record would not permit the conclusion that the respirable dust violations at issue resulted from more than ordinary negligence. We do not agree. Because we are not convinced that this record, viewed as a whole, cannot support a finding of unwarrantable failure under the standard enunciated in *Emery Mining Corp.*, 9 FMSHRC 1997 (December 1987), and its progeny, we would vacate the judge's determination and remand that issue for further analysis.

In deciding that the instant violations were caused by the operator's unwarrantable failure to comply, the judge placed great weight on the operator's history of violations, attributing virtually no significance to the operator's efforts to come into compliance during the course of the two years in question. In deciding to reverse the judge's determination, however, we fear our colleagues have approached the record from an opposite but equally narrow focus. The majority accords controlling weight to the operator's unsuccessful engineering changes, but attaches little if any significance to this operator's dismal compliance record, or to the operator's continuing failure to come into compliance a full year after it had begun to implement the remedial measures upon which it relies. Regarding this aspect of the evidence, our colleagues opine that Peabody was not "fiddling while Rome burned." Slip op. at 6. We submit that the majority pays too little heed to the charred remains of the Eternal City. The majority ignores the fact that the success or failure of an operator's effort to achieve compliance is a factor that must be considered in deciding whether the operator acted reasonably and in good faith.

The data in the margin reveals the scope of Peabody's compliance problem and illuminates why, on January 6, 1993, Inspector Ridley resorted to the more severe sanctions associated with the unwarrantable failure provisions of the Act.[11] During nine of the thirteen sampling cycles that occurred between January 1991 and February 1993, respirable dust exceeded the mandatory limit for at least one of the three MMUs. Gov't Exs. 1-3. Over 48% of the samples taken at these MMUs during active mining were out of compliance. *Id.* During four test periods, the respirable dust exceeded permissible levels for two out of three MMUs. *Id.* The excessive dust levels resulted in Peabody receiving nine citations and one withdrawal order prior to the issuance of the instant citation and orders alleging unwarrantable failure. *Id.*

Peabody began implementing the environmental controls it relies on in this preceding during January 1992, approximately one year before the subject citation and orders were issued. 16 FMSHRC at 45. These efforts continued though mid-December 1992. *Id.*; Tr. 185-87. During this same time period, however, Peabody received four more citations for exceeding the respirable dust standard. Gov't Exs. 1-3.

A citation was issued on October 7, 1992, when Peabody's bimonthly sample for MMU 047 revealed an average dust level of 2.4 mg/m^3. Gov't Ex. 3. A few weeks earlier, on September 10, 1992, the Department of Labor's Mine Safety and Health Administration

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[11] Gov't Exs. 1, 2 and 3 establish the following average dust concentrations. Sampling periods during which an MMU was not in compliance with the 2.0 mg/m^3 maximum permitted by section 70.100(a) are shown in bold.

Sampling Period	MMU 044	MMU 056	MMU 047	Results
Jan.-Feb. '91	**3.3**	**2.2**	Non producing	**104(a) cits. 2/6/91, 2/8/91**
Mar.-Apr. '91	**2.2**	2.0	**3.0**	**104(b) order 3/28/91; 104(a) cit. 5/2/91**
May-June '91	1.4	**2.7**	Non producing	**104(a) cit. 7/19/91**
July-Aug. '91	1.9	1.8	Non producing	
Sept.-Oct. '91	1.5	2.0	Non producing	
Nov. - Dec. '91	**2.7**	1.7	Non producing	**104(a) cit. 12/2/91**
Jan.- Feb. '92	**2.8**	**2.9**	Non producing	**104(a) cits. 2/3/92, 2/11/92**
Mar.-Apr. '92	1.8	**2.6**	Non producing	**104(a) cit. 4/29/92**
May-June '92	1.5	1.3	Non producing	
July - Aug. '92	Non producing	1.2	1.9	
Sept.- Oct. '92	Non producing	1.6	**2.4**	**104(a) cit. 10/7/92**
Nov.-Dec. '92	**2.4**	**2.4**	1.4	**104(d)(1) cit. 1/6/93; 104(d)(1) order 1/6/93**
Jan.-Feb. '93			**2.2**	**104(d)(2) order 1/20/93**

("MSHA") had taken a sample at the very same location and had obtained a dust level of only 0.8 mg/m^3. Tr. 89.

The bimonthly sample taken during November - December 1992 showed MMU 047 to be in compliance, but revealed violative respirable dust levels for MMUs 044 and 056, thus prompting the issuance, on January 6, 1993, of the section 104(d)(1) citation and section 104(d)(1) order which are before us in this proceeding. Gov't Exs. 1-3. The next bimonthly sampling revealed MMU 047 to be back out of compliance, thereby precipitating the issuance of the third enforcement action under review, the section 104(d)(2) order issued on January 20, 1993.

Our colleagues agree that an operator's compliance history is a factor to be considered in the unwarrantable failure determination. Slip op. at 5. In this case, however, the majority concludes that the judge erred in concluding that Peabody's poor compliance record created a "rebuttable presumption" of unwarrantable failure. *Id.* The judge's reference to a rebuttable presumption should not obscure the importance of the compliance history, particularly in a case involving a respirable dust violation. The Commission has refused to restrict the use of evidence of compliance history in unwarrantable failure determinations. *See Peabody Coal Co.*, 14 FMSHRC 1258, 1263 (August 1992). In light of the compliance record here, the judge did not need the assistance of a rebuttable presumption to accord it significant weight.[12] Once the Secretary presented evidence of this operator's repeated failure to comply with respirable dust levels, along with evidence of the extent and duration of the violation, it was up to Peabody to come forward with convincing evidence of its attempts to come into compliance or risk an adverse ruling on the issue of unwarrantability. As our colleagues point out, Peabody did come forward with evidence; however, while we agree that the evidence of Peabody's remedial efforts fairly detracts from the weight that might otherwise be accorded to the operator's poor compliance record, we are not prepared to say that such evidence *requires* the conclusion that the operator's conduct was not unwarrantable.

In determining the reasonableness of the operator's efforts, our colleagues fail to consider the significance of the judge's observation that "the record in this case suggests that Respondent's employees have been regularly exposed to respirable dust levels above those allowed by the standard [30 C.F.R. § 70.100(a)] for a two year period." 16 FMSHRC at 47. In evaluating that fact, we must bear in mind that each violation citing overexposure to respirable dust is deemed serious because of the cumulative nature of the risk posed. *See Consolidation Coal Co.*, 8 FMSHRC 890, 898-99 (June 1986). In contrast with a violation that may temporarily expose a miner to the risk of injury or death, but that leaves the miner no worse off once the violation is corrected and the hazard removed, the effects of a violation involving overexposure to respirable dust remain with the miner even after compliance with the standard is achieved, increasing his risk of contracting black lung and other respirable diseases. *Id.* at 893-

[12] Commissioner Marks agrees with the judge's recognition of a rebuttable presumption in light of Peabody's previous history of violations.

94. As one commentator has observed: "The amount of care demanded by the standard of reasonable conduct must be in proportion to the apparent risk. As the danger becomes greater the actor is required to exercise caution commensurate with it." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 34, at 208 (5th ed. 1984). In light of the cumulative effects posed by dust exposure, an operator's repeated failure to maintain compliance with maximum allowable dust levels during a two year period poses a grave danger to its miners' health and such operator should be expected to defend against an unwarrantable failure charge by demonstrating considerable efforts to come into compliance in order for its actions to be considered reasonable and undertaken in good faith.[13]

We find it notable, as do our colleagues, that the various engineering changes Peabody implemented are intended to control dust at *all* times. *See* slip. op. at 6. However, we also find it notable, as did the judge, that as early as March 1991, prior to Peabody's implementation of any changes in dust suppression measures, MSHA was able to obtain a sample which revealed an average dust level of only 1.1 mg/m^3 for MMU 044. Tr. 47-48; *see* 16 FMSHRC at 49. MSHA's sample was taken on the heels of operator samples showing excessive dust levels for two consecutive cycles. These violative samples had triggered a section 104(b) failure to abate order, issued the same day Inspector Ridley obtained his low reading. Tr. 47-48. Inspector Ridley made Peabody aware of his sampling results in a letter to Mr. Englehart, Peabody's president, dated April 10, 1991. Tr. 48.

However reasonable it might have been for Peabody to conclude initially that engineering changes would correct the dust problem, that position became increasingly less defensible as MSHA continued to cite Peabody and confront it with MSHA's own samples indicating that compliance with the standard was achievable with the equipment already on site. The low reading obtained by MSHA as early as March 1991, without engineering changes, and the continued exposure of employees to excessive dust levels for the next 18 months, prevent us from concluding that this record cannot, as a matter of law, support a determination of aggravated conduct constituting unwarrantable failure.

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[13] Our colleagues are correct that the violation of any safety or health standard may give rise to a determination of unwarrantable failure. Slip op. at 6-7. It does not follow, however, that the seriousness of a violation is never relevant in determining whether an operator unwarrantably failed to comply with a standard. Contrary to the assertion of our colleagues, neither Commission precedent nor section 104(d)(1) of the Act preclude a judge who is attempting to evaluate the reasonableness of an operator's unsuccessful efforts to come into compliance with a standard from considering the nature of the hazard against which that standard is designed to protect. We are mindful of the judge's observation below that "the record in this case suggests that Respondent's employees have been regularly exposed to respirable dust levels above those allowed by the standard for a two year period." 16 FMSHRC at 47. Unlike our colleagues, we consider the potential impact of these repeated exposures to be a relevant factor in evaluating the operator's conduct.

In light of the compliance history in this case, it is inescapable that Peabody was on notice that not only greater, but *different* efforts were necessary to attain compliance with the standard. Yet the record shows that Peabody hewed to its reliance on water sprays to correct the problem, and there is no indication that Peabody undertook to conduct any investigation to determine why "its sampling results exceeded the permissible exposure limit on a regular basis," 16 FMSHRC at 48, or why MSHA was able to obtain such dramatically lower sampling results. Indeed, it does not appear that Peabody engaged in any discussion with MSHA about the discrepancy in sampling results, nor did Peabody even inform MSHA of its efforts to improve water flow until after MSHA issued the orders which are the subject of this proceeding. Tr. 193-95. In our view, Peabody's failure to engage in any investigation or discussion detracts from its claim that it made reasonable and good faith efforts to come into compliance. Unlike our colleagues, therefore, we are unwilling to conclude that the remedial measures implemented by Peabody *must* defeat a finding of unwarrantable failure as a matter of law.

In concluding that Peabody's remedial measures "[were] entirely reasonable," slip op. at 6, our colleagues may have been influenced by the contrast between Peabody's efforts, unsuccessful as they were, and the unreasonable approach urged by the MSHA inspector. To abate the section 104(d) order under review, Inspector Ridley required Peabody to assign additional personnel who could watch the employees while the dust samples were taken, to ensure that the employees were properly positioning themselves and using the line curtain or brattice to direct intake air to the working face. Tr. 55-57, 72-73. The problems with this form of "abatement" are obvious and were aptly pointed out by the judge in his opinion:

> Section 70.100(a) requires that each operator shall *continuously* maintain the average concentration of respirable dust at or below 2.0 mg/m^3. Pursuant to 30 C.F.R. § 70.207, sampling is to be taken during a normal production shift. This suggests that the sampling is to be representative of an employee's regular daily exposure to respirable dust . . . .
>
> Sampling that is artificially low because supervisory personnel are constantly watching and directing the sampled employees would appear to be violative of section 70.207.

16 FMSHRC at 47.

Admittedly, *any* approach to dust suppression may appear, at first blush, to be reasonable when compared to a procedure which may produce samples that are not representative of the mine atmosphere. But the fact that Peabody's systemic, albeit unsuccessful, effort to control dust

is preferable to a method which appears to violate the Act, does not necessarily establish that Peabody has acted reasonably and in good faith.[14]

For the foregoing reasons, we would vacate the judge's unwarrantable failure holding and remand for reanalysis.

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Mary Lu Jordan, Chairman

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Marc Lincoln Marks, Commissioner

[14] The record offers reason to believe that employees' work practices may still be creating a risk of overexposure at Camp No. 1 mine. Peabody safety supervisor Brent Roberts testified that the operator continues to conduct the supervised sampling required by MSHA to abate the orders under review. Tr. 214. He acknowledged that during such times he has had occasion to correct prohibited work practices that led to the problem in this case, including the failure to use curtain or line brattice to direct air to the continuous miner, and miners' positioning themselves on the dustier, exhaust side of the working place. Tr. 214-15. 30 C.F.R. § 75.330 (1995) requires the use of ventilation control devices such as brattice to direct air to the working face, and the dust control plan requires miners to position themselves so that they are exposed to the least amount of dust possible. Tr. 215. From this evidence, it is possible to conclude that employees may still be engaging in prohibited work practices that result in overexposure to respirable dust. Unfortunately, due to the supervised sampling technique insisted upon by MSHA, such overexposure is likely to go undetected.