

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 3, 2000

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
	:	
v.	:	Docket Nos. PENN 94-23
	:	PENN 94-166
CYPRUS EMERALD RESOURCES	:	
CORPORATION	:	

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

ORDER

BY THE COMMISSION:

In this 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”), Cyprus Emerald Resources Corporation (“Emerald”) challenged the “significant and substantial” (“S&S”)¹ designation of a citation alleging a violation of 30 C.F.R. § 50.11(b), which requires an operator to investigate any mine accident. Among other grounds, Emerald argued that because section 50.11(b) is not a mandatory health or safety regulation, it could not be designated S&S, because the Mine Act refers to S&S violations only of mandatory health or safety standards. *See* 30 U.S.C. § 814(d)(1), (e).

Administrative Law Judge William Fauver rejected that argument, stating:

[T]he citation was issued under § 104(a), not 104(d). An allegation of a “significant and substantial” violation in a § 104(a) citation is an allegation of gravity, not an assertion of jurisdiction to apply the sanctions of § 104(d). Accordingly, I do not reach the issue whether the sanctions of § 104(d) apply to a violation of Part 50.

17 FMSHRC 2086, 2099 (Nov. 1995) (ALJ). The judge found that, with respect to the accident at issue, continuing operations without investigating the accident could contribute significantly and substantially to another accident with a risk of serious injury, and that such an accident had

¹ 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 “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.”

occurred in case. *Id.* Finding that the violation was also due to Emerald’s high negligence, and stating that he had taken into account all of the civil penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i), the judge assessed a penalty of \$3,000. *Id.* at 2099-2100.

On review of the judge’s decision, the Commission, at the request of the parties, reached the issue that the judge did not. 20 FMSHRC 790, 801 (Aug. 1998). After affirming the judge’s finding of a violation of section 50.11(b), a Commission majority held that violations of non-mandatory health or safety standards could be designated as S&S under sections 104(d) and 104(e) of the Act. *Id.* at 798-809 (Chairman Jordan and Commissioner Beatty), 822 (Commissioner Marks). That Commission majority also affirmed the judge’s finding that Emerald’s violation of section 50.11(b) was S&S. *Id.* at 810, 822. Commissioners Riley and Verheggen, in dissent, held that under the plain meaning of the Mine Act, only violations of mandatory health and safety standards could be designated as S&S. *Id.* at 826-30.

Emerald subsequently petitioned the United States Court of Appeals for the District of Columbia Circuit for review of this issue. The court held “that a ‘significant and substantial’ finding is permissible in a citation charging a violation of a mandatory health and safety standard only[.]” *Cyprus Emerald Resources Corp. v. FMSHRC*, 195 F.3d 42, 44 (D.C. Cir. 1999). Accordingly, the court granted Emerald’s petition, reversed the Commission’s S&S determination, and remanded the case to the Commission for further action. *Id.* at 46.

Pursuant to the court’s order, we modify Citation No. 3658696 to delete the S&S designation. We otherwise affirm the citation and remand to the Chief Judge for reassignment and assessment of an appropriate penalty based upon consideration of, and findings regarding, all of the criteria in section 110(i) of the Act.

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Jordan and Commissioner Marks, dissenting:

We would modify the citation to delete the S&S designation, but would otherwise affirm the citation and the judge's \$3000 penalty assessment. While the court held that the violation at issue could not be designated S&S under the terms of the Mine Act, the factual findings that underlay the judge's S&S determination were not disturbed, and were viewed by all Commissioners as sufficient support for the judge's finding on the gravity of the violation. *See* 20 FMSHRC at 810 (opinion of Chairman Jordan and Commissioner Beatty), 822 (concurring opinion of Commissioner Marks), 829-30 (opinion of Commissioners Riley and Verheggen, dissenting on other grounds). Previously, the Commission has held that a penalty need not necessarily be reduced when a special finding is vacated. *See Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 881-82 (June 1996) (vacating judge's S&S determination as beyond his authority, but nevertheless affirming penalty based in part on high gravity finding as supported by substantial evidence); *Austin Powder Co.*, 21 FMSHRC 18, 21 (Jan. 1999) (decision vacating judge's unwarrantable failure determination as beyond his authority does not necessarily require judge to find on remand lower level of negligence or to reduce his earlier penalty assessment). In these circumstances, therefore, there is no need to remand for a reassessment of the penalty, and therefore, we respectfully dissent.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

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