FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

November 30, 1995

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. SE 93-9
	:	SE 93-10
S&H MINING, INC.	:	SE 93-98

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

DECISION

BY THE COMMISSION:

These civil penalty proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1988) (AMine Act@ or AAct@), involve two roof control plan violations. Administrative Law Judge Jerold Feldman concluded that the first violation was not significant and substantial (AS&S@) and that the second violation was not the result of unwarrantable failure. 15 FMSHRC 2196, 2198-99 (October 1993) (ALJ). The Commission granted the Secretary of Labor=s petition for discretionary review, which challenges those determinations. For the reasons that follow, we vacate and remand.

I.

Factual and Procedural Background

During an inspection at the No. 7 underground coal mine of S&H Mining, Inc. (AS&H@), an inspector of the Department of Labor=s Mine Safety and Health Administration (AMSHA@) issued two withdrawal orders pursuant to section 104(d) of the Mine Act, 30 U.S.C. ' 814(d), alleging violations of 30 C.F.R. ' 75.220 for failure to comply with the approved roof control plan.[1] The inspector designated the alleged violations to be S&S and the result of unwarrantable

[1] Section 75.220 states in relevant part:

> (a)(1) Each mine operator shall develop and follow a roof control plan . . . .

failure. The operator stipulated to the occurrence of both violations but contested the S&S and unwarrantable failure designations.

A. Order No. 3382962

On July 22, 1992, MSHA Inspector Don McDaniel, accompanied by Charles White, superintendent of S&H mines, observed a coal pillar that had not been mined in conformity with the roof control plan. 15 FMSHRC at 2199. Although the plan limited initial pillar cuts to a width of 13 feet, the initial cut of the pillar had been made about 20 feet wide.[2] *Id.*; Tr. II 67-68.[3] White told Inspector McDaniel that the pillar had not been mined according to the plan because the continuous mining machine was too large to be maneuvered to cut the pillar according to the plan=s cut sequence. 15 FMSHRC at 2199; Tr. I 187, 192-93. Following McDaniel=s issuance of a section 104(d) order, S&H=s roof control plan was revised to permit it to round off a corner of the pillar and then make an initial pillar cut 15 feet wide. 15 FMSHRC at 2199; Tr. II 77-78. The judge concluded that this violation was not S&S. 15 FMSHRC at 2199.

B. Order No. 3382964

On the following day, Inspector McDaniel, again accompanied by White, noticed section foreman Steve Phillips operating a continuous miner to clean up loose waste material (Agob@) in an entry. 15 FMSHRC at 2198; Tr. I 199. Phillips loaded a shuttle car with gob and, as another shuttle car arrived, positioned the miner against the side of a pillar and began cutting coal without having first installed roof support timbers. Tr. I 199-200. Before Phillips was stopped, he had made a 12-foot-wide, 38-inch-deep, wedge-shaped cut in the pillar. 15 FMSHRC at 2198; Tr. I 200, 204. Phillips told McDaniel that he was still cleaning up gob and had cut the pillar unintentionally. Tr. I 205. The judge concluded that this violation was not the result of unwarrantable failure. 15 FMSHRC at 2198.

II.

Disposition

A. Whether the violation cited in Order No. 3382962 was S&S

[2] The pillars are approximately 35 feet square. Tr. I 182, 205.

[3] The hearing was conducted on September 28 and 29, 1993. ATr. I@ refers to the September 28 hearing and ATr. II@ refers to the September 29 hearing.

The judge concluded that the violation was not S&S because the roof control plan was subsequently modified to Aessentially conform@ to the operator=s method of initial pillar cut, thus precluding him from finding that the cited Amining . . . was structurally unsound.@ 15 FMSHRC

at 2199. He also found the evidence did not show that miners were exposed to unsupported roof. *Id.*

The Secretary argues that the judge=s S&S determination is not supported by substantial evidence and is contrary to precedent. S. Br. at 9-12. He asserts that the judge failed to address McDaniel=s testimony regarding the danger of roof fall and the exposure to hazards of miners who traveled in this area. *Id.* at 10-11. He also contends that, contrary to the judge=s impression, 15 FMSHRC at 2199, the subsequently revised roof control plan would not have allowed the operator to make the pillar cut for which it was cited. *Id.* at 11-12.

S&H responds that substantial evidence supports the judge=s S&S determination. S&H Br. at 8-9. It points out that, although Inspector McDaniel testified generally that the violation would expose miners to the hazard of roof fall, he responded negatively when the judge asked him whether there was exposure to unsupported roof in connection with the violation. *Id.* at 8. S&H further asserts that the 20-foot-wide cut would not have violated the modified roof control plan. *Id.* at 9.

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. ' 814(d), 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 (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), *aff=g* 16 FMSHRC 540, 541-43 (March 1994) (ALJ); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988), *aff=g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (August 1985).

We conclude that the judge=s S&S determination is contrary to law. The judge failed to set forth or apply the *Mathies* criteria and failed to examine the likelihood of injury in the context

of continued mining operations as set forth in *U.S. Steel*. Further, his findings are not supported by substantial evidence.[4]

The first and second *Mathies* elements are established: S&H concedes the violation of its roof control plan and the record contains unrebutted evidence that the violation created a roof fall hazard. Tr. I 8-9, 207. With respect to the fourth *Mathies* element, the undisputed evidence clearly establishes that injury resulting from a roof fall would be serious in nature. Tr. I 207; Gov=t Ex. 14.

The only issue in dispute, therefore, is the third element of the *Mathies* criteria, whether there was a reasonable likelihood that the hazard contributed to will result in an injury. The judge found that the operator=s use of an initial 20-foot pillar cut was not structurally unsound because the roof control plan was subsequently modified to Aessentially conform@ to that method of cutting. 15 FMSHRC at 2199. McDaniel testified without contradiction, however, that the modified roof control plan requires the operator to limit the initial cut to a width of 15 feet. Tr. II 77-78. Thus, the record does not support the judge=s implied finding that a 20-foot-wide cut was permitted under the modified roof control plan and, hence, that the operator=s mining method did not compromise roof support.

The judge=s finding that miners were not exposed to unsupported roof is also without evidentiary support. 15 FMSHRC at 2199. McDaniel testified that the area where the violation occurred was a travelway and that miners in the area were exposed to the hazard of roof fall. Tr. I 188, 207, Tr. II 61-62. He explained, without contradiction, that failure to follow the cut sequence in the roof control plan could cause a roof fall. Tr. I 207. Subsequently, the judge

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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). ASubstantial evidence@ means Asuch 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)). We are guided by the settled principle that, in reviewing the whole record, an appellate tribunal must also consider anything in the record that Afairly detracts@ from the weight of the evidence that supports a challenged finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

asked McDaniel, "Do you have an opinion whether or not there was any exposure of unsupported roof for the [order] . . . at issue?" Tr. II 80. McDaniel answered "No." *Id.* The judge continued: "They were not under unsupported roof?" *Id.* McDaniel answered "No, sir." *Id.* These questions apparently referenced exposure to unsupported roof *at the time McDaniel issued the order*. The judge's determination that there was no evidence of exposure is based on McDaniel's responses to his questions, even though McDaniel's earlier testimony made clear his opinion that the overcutting posed a continuing hazard to miners using the affected travelway. Commission precedent requires that the likelihood of injury be examined in the context of continued normal mining operations. *U.S. Steel*, 7 FMSHRC at 1130. The judge's decision does not indicate that he considered the likelihood of such exposure during continued operations.

Accordingly, we vacate the judge's determination that the violation was not S&S and remand for further analysis of the third *Mathies* element in light of Commission precedent and the record evidence.

B. Whether the violation cited in Order No. 3382964 resulted from unwarrantable failure

The judge concluded that the violation was not the result of unwarrantable failure because he found it "inconceivable" that the continuous miner operator, knowing that the inspector was present, would intentionally mine a pillar without setting timbers. 15 FMSHRC at 2198. He also determined that, in view of the "angle and size of the cut (38 inches in width)," [5] the Secretary failed to prove the violation was "a willful rather than a negligent act." *Id.*

The Secretary argues that the judge's finding that it was inconceivable Phillips, knowing McDaniel was present, would mine a pillar without setting timbers has no support in the record. S. Br. at 7-8. The Secretary also contends that the judge drew an unreasonable inference in finding the angle of the cut indicated that the operator's mining was unintentional. *Id.* at 5-6 n.3. The Secretary points out that the judge failed to discuss the 12-foot width of the cut, and that the cut was made by a foreman in the presence of a mine supervisor. *Id.* at 5-7. He asserts that the judge erred as a matter of law in assuming a violation can be found unwarrantable only if it is "intentional." *Id.* at 8-9.

S&H responds that the judge properly reasoned that Phillips would not intentionally violate the roof control plan knowing of the inspector's presence. S&H Br. at 7-8. It also argues that no proof was presented regarding the angle for making cuts under the roof control plan. *Id.* at 7. S&H maintains the violation was an accident, indicative of nothing more than ordinary negligence. *Id.* at 6.

[5] Notwithstanding the judge's use of the term "width," the record indicates that he was referring to the depth of the cut. *See* Tr. I 200, 204-05.

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. This determination was derived, in part, from the plain meaning of Aunwarrantable@ (Anot justifiable@ or Ainexcusable@), Afailure@ (Aneglect of an assigned, expected or appropriate action@), and Anegligence@ (the failure to use such care as a reasonably prudent and careful person would use, characterized by Ainadvertence,@ Athoughtlessness,@ and Ainattention@). *Id.* 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 Corp.*, 13 FMSHRC 189, 193-94 (February 1991); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d at 136, *aff=g* 16 FMSHRC at 543-47 (approving Commission=s unwarrantable failure test). This determination was also based on the purpose of unwarrantable failure sanctions in the Mine Act, the Act=s legislative history, and judicial precedent. *Emery*, 9 FMSHRC at 2002-03.

The judge=s unwarrantable failure determination turned on whether the operator=s conduct was Awillful@ rather than negligent. 15 FMSHRC at 2198. The Commission has held that conduct that is not intentional may nevertheless be aggravated and, thus, constitute unwarrantable failure. *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011 (December 1987). As noted, the Commission has held that conduct characterized by indifference, serious lack of reasonable care, or reckless disregard may support a finding of unwarrantable failure. Because the judge did not analyze the evidence in light of this precedent, he erred.

Further, the judge=s findings are not supported by substantial evidence. His finding that it was Ainconceivable@ that the continuous miner operator, knowing the inspector was present, would intentionally mine a pillar without setting timbers, 15 FMSHRC at 2198, lacks record support. There is no evidence that Phillips knew McDaniel was watching him at the time he committed the violation.

The judge=s reliance on the angle and depth of the cut in determining that unwarrantable failure had not been established is also misplaced. Inspector McDaniel testified that Phillips could not have traveled 12 feet by accident. Tr. I 206-07. The judge did not indicate why he rejected the inspector=s conclusion that, given the width of the pillar cut, it could not have been accidental. In addition, the judge did not discuss the fact that the cut was made by a section foreman and observed by a mine superintendent. A heightened standard of care is required of such individuals. *See Youghiogheny & Ohio*, 9 FMSHRC at 2011 (in overseeing compliance with the roof control plan, the section foreman is held to a demanding standard of care). On remand, the judge shall address these issues.

Accordingly, we vacate the judge=s determination that the violation was not the result of unwarrantable failure and remand for further analysis in light of Commission precedent and the record evidence.

III.

Conclusion

For the foregoing reasons, we vacate the judge=s determinations that the violation in Order No. 3382962 was not S&S and that the violation in Order No. 3382964 was not the result of unwarrantable failure. We remand for analysis consistent with this opinion.

Mary Lu Jordan, Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Marc Lincoln Marks, Commissioner