FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 29, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. SE 94-244-R
JIM WALTER RESOURCES, INC.	:	

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

DECISION

BY: Jordan, Chairman; Marks and Beatty, Commissioners

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 by the Department of Labor's Mine Safety and Health Administration ("MSHA"), alleging a violation of 30 C.F.R. § 75.400[1] because of a trash accumulation in an entry of the No. 7 Mine of Jim Walter Resources, Inc. ("JWR"). Administrative Law Judge Gary Melick concluded that the violation was neither significant and substantial ("S&S") nor due to JWR's unwarrantable failure. 16 FMSHRC 1511 (July 1994) (ALJ). The Commission affirmed the judge's determination. 18 FMSHRC 508 (Apr. 1996). The Secretary appealed, and the court of appeals affirmed the Commission's S&S determination but reversed the unwarrantable failure determination and remanded the case for further proceedings. *Secretary of Labor v. FMSHRC and Jim Walter Resources, Inc.*, 111 F.3d 913 (D.C. Cir. 1997). The Commission then vacated its unwarrantable failure determination and remanded the issue. 19 FMSHRC 1377 (Aug. 1997). On remand, the judge again concluded that

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[1] 30 C.F.R. § 75.400 states:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on . . . electric equipment therein.

"Active workings" is defined in 30 C.F.R. § 75.2 as "[a]ny place in a coal mine where miners are normally required to work or travel."

the violation was not due to the operator's unwarrantable failure. 19 FMSHRC 1646 (Oct. 1997) (ALJ). The Commission granted the Secretary's petition for review. For the reasons that follow, we vacate the judge's decision and remand for further consideration.

I.

Factual and Procedural Background

On January 24, 1994, MSHA Inspector Thomas Meredith cited JWR for a violation of section 75.400 because of a trash accumulation in the No. 2 entry at JWR's No. 7 Mine near Birmingham, Alabama. 18 FMSHRC at 509. On January 31, Meredith conducted a follow-up inspection to ascertain whether JWR had abated the conditions that led to the January 24 citation. *Id.* While in the No. 3 entry, Meredith observed trash around a check curtain, which provided ventilation to the face and separated the active outby section from the inactive inby section. *Id.* Essentially, the check curtain ran across the top of a pile of trash dividing the pile in two parts. 111 F.3d at 916. The bulk of the trash, which extended for 250 feet and included paper bags, rags, rock dust bags, wooden pallets and large cable spools, was on the inby inactive side of the curtain. 18 FMSHRC at 509. A smaller amount of trash, including a garbage bag containing sandwich wrappers and oily rags, rock dust bags, a cardboard box, and sandwich bags, was on the outby active side of the curtain. *Id.*; 16 FMSHRC at 1512; 111 F.3d at 916. The materials on both sides of the curtain were combustible. 18 FMSHRC at 509.

Inspector Meredith issued a withdrawal order and a citation charging a violation of § 75.400 because of the trash on both sides of the curtain. *Id.* at 509; 111 F.3d at 916. Meredith designated the citation S&S[2] and determined that it was the result of JWR's unwarrantable failure to comply with the standard.[3]

_____JWR filed a notice of contest and a hearing was held before an administrative law judge. The judge affirmed the citation as to the outby area but vacated the citation as to the inby area, because the inby area was not in the "active workings" of the mine as specified by § 75.400. 16 FMSHRC at 1512. The judge concluded that the evidence was insufficient to support either the S&S or unwarrantable failure designation of the citation based on the few items of trash that were in the outby section. *Id.* at 1512-14.

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[2] 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."

[3] 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."

The Secretary appealed the judge's S&S and unwarrantability determinations. The Commission affirmed the judge's determination that the violation was not S&S, holding that the judge correctly refused to consider evidence of the non-violative trash accumulation on the inby inactive side of the curtain. 18 FMSHRC at 510-11. With regard to the unwarrantable failure determination, the Commission concluded that the judge also properly limited his consideration to the trash accumulation in the outby active area. *Id.* at 511-13. The Commission further held that JWR's prior violation of § 75.400 and a remark by JWR's longwall coordinator regarding JWR's cleanup efforts were insufficient to support the unwarrantable failure designation. *Id*.

The Secretary appealed the Commission's decision to the U.S. Court of Appeals for the District of Columbia Circuit. The court affirmed the Commission's holding that the violation was not S&S and rejected the Secretary's argument that in making that determination the Commission should have considered the surrounding non-violative trash accumulation in the inby area. 111 F.3d at 917-18. On the question of unwarrantability, the court concluded that the Mine Act was ambiguous on whether the non-violative conditions could be considered. *Id.* at 914-15. Accordingly, the court determined that it was required to defer to a reasonable interpretation of the Secretary. *Id.* at 914-15, 919-20, *citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-45 (1984). The court held that the Secretary's interpretation, which allowed consideration of conditions that do not violate health and safety standards, was a reasonable construction of the Mine Act. 111 F.3d at 919-20. The court remanded the case to the Commission to determine whether, applying the Secretary's interpretation of the statute, "the record contains sufficient evidence of causation and culpability to support an 'unwarrantable failure' finding." *Id.* at 920.

Following the court's remand, the Commission vacated its prior decision and remanded the proceeding to the judge to consider the non-violative accumulations in the inactive area of the mine in determining whether the violation was unwarrantable. 19 FMSHRC at 1378. Specifically, the Commission directed the judge to consider the "massive" accumulations in light of the factors that the Commission may examine in determining whether a violation is unwarrantable, "including the extent of a violative condition, the length of time that it has existed, whether the violation is obvious or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance and the operator's efforts in abating the violative condition made prior to the issuance of the citation or order." *Id.* at 1379 (citations omitted).

On remand, the judge stated :

> Before proceeding with an analysis of the issues on remand it should be observed that two issues in this case have now been resolved through the appellate process, i.e., that the accumulations cited in the inactive area were not violations and that the violative accumulations in the active area were not the result of "unwarrantable failure" or high negligence based upon consideration of those violative conditions alone. Accordingly, those issues are not

reconsidered here.

> The limited issue on remand, then, is whether or not the non-violative accumulations were the result of operator negligence (culpability) and, if so, whether that negligence was of such an aggravated nature as to constitute more than ordinary negligence. If such non-violative accumulations were the result of such negligence, the issue then is whether the record contains sufficient evidence of causation to support an "unwarrantable failure" finding as to the violative condition.

19 FMSHRC at 1648-49 (footnote omitted).

In addressing the non-violative accumulations, the judge noted that the duties of a mine operator are defined by regulation and the absence of a legally defined duty may be considered on the issue of negligence. *Id.* at 1650. The judge concluded that the operator was "at least minimally negligent to have allowed the non-violative accumulations to exist." *Id*. The judge considered the amount of the trash accumulation and the length of time that it might have existed. *Id.* With regard to the prior withdrawal order involving trash accumulations, the judge noted that it involved an active area and would not have provided notice that the operator needed to clean up non-violative trash accumulations. *Id.* The judge concluded that the facts fell short of establishing reckless disregard or gross indifference with regard to the non-violative accumulation. *Id.* at 1650-51. Finally, the judge found that the Secretary had failed to address the issue of causation, which was an essential element in the court's remand. *Id.* at 1651. However, the judge noted that, even if the Secretary had a theory of causation, it would be irrelevant because the level of negligence was minimal. *Id.* Thus, the judge concluded the level of negligence associated with the non-violative accumulations "would not enhance the negligence in regard to the violative accumulations sufficiently to justify unwarrantable failure findings." *Id.*

The Secretary appealed to the Commission, stating that the judge's decision was legally erroneous and not supported by substantial evidence, S. PDR at 1, and the Commission granted review.

II.

Disposition

The Secretary argues that the judge erred when he examined the operator's negligence only in relation to the non-violative accumulation. S. PDR at 10-11.[4] Further, the Secretary argues that when the judge found the operator's negligence mitigated, he relied too heavily on the fact that the accumulation in the inby area was not violative. *Id.* at 12-13. Rather than just looking at whether

[4] The Secretary designated her petition for discretionary review as her brief.

the non-violative accumulations were unwarrantable, the Secretary argues, the judge should have looked at the facts in relation to both the violative and non-violative accumulations to ascertain whether the operator's conduct was "aggravated." *Id.* at 13-14. The Secretary contends that the judge did not consider that the operator had received a withdrawal order for a trash accumulation in an adjacent area just seven days before the issuance of the citation at issue. *Id.* at 15-16. The Secretary argues that the judge failed to address or inadequately addressed other evidence relating to the operator's unwarrantable failure, including the operator's knowledge of the violation and lack of corrective action to clean it up. *Id.* at 16-20. Finally, the Secretary contends that she did not waive the issue of causation and that, more significantly, the Commission's remand order did not direct the judge to separately consider the issue of causation. S. Reply Br. at 1-4.

In response, JWR argues that substantial evidence supports the judge's decision. JWR Resp. Br. at 4-5. JWR further argues that the judge's decision must be affirmed because the Secretary failed to address the issue of "causation" with regard to the non-violative accumulations. *Id.* at 5-6. Further, JWR contends that the judge did not err by looking primarily at the non-violative accumulations in determining unwarrantability and that he properly considered the non-violative accumulations in light of the unwarrantability factors. *Id.* at 6-8. JWR also argues that the prior withdrawal order provided no notice relating to the accumulations in inactive areas that were legal. *Id.* at 8-9. Lastly, JWR contends that, contrary to the Secretary's argument, the judge considered and addressed evidence relating to JWR's knowledge of the accumulation, testimony regarding JWR's efforts to clean up the trash accumulation, and the length of time during which the trash had accumulated. *Id.* at 9-11.

We conclude that the judge erred by analyzing the operator's conduct under the law of negligence to the exclusion of any examination of the criteria that the Commission generally considers in an unwarrantable failure analysis. Further, the judge misstated the issue before him on remand and failed to consider the impact of the violative, as well as the non-violative, conditions.

The judge defined the issue on remand as whether or not the non-violative accumulations resulted from operator negligence and, if so, whether it was aggravated negligence. 19 FMSHRC at 1648-49. By focusing only on the non-violative accumulations, the judge erred. The primary issue in this case since the judge's initial decision has been the extent to which the non-violative accumulations could be considered in conjunction with the violative accumulations to ascertain unwarrantability.[5] *See* 18 FMSHRC at 510-513; 111 F.3d at 919-20. Even JWR concedes that "the unwarrantability factors by definition apply only to the actual *violative* conditions, . . . which remain the focal point of this entire matter." JWR Resp. Br. at 4 n.3 (emphasis in original). Thus, it is

[5] We disagree with the dissent that the judge was simply following the Commission's remand instructions when he examined only the non-violative accumulations. Slip op. at 13. The remand clearly directed the judge to consider the non-violative accumulations "in light of the other factors that the Commission may examine in determining whether a violation is unwarrantable," including various factors relating to the violative accumulations. 19 FMSHRC at 1378-79.

apparent from the judge's decision that the scope of his factual analysis was too narrow. The judge's overly restrictive examination of the trash accumulations led him to place undue emphasis on the fact that those accumulations in the inby inactive areas were not in violation of the regulation and, therefore, erroneously concluded that JWR's "negligence was . . . strongly mitigated." 19 FMSHRC at 1650.

In addition to this clear error, the judge focused on traditional concepts of negligence — causation and culpability — while largely ignoring the factors that the Commission directed him to consider in its decision directing remand.[6] The Commission instructed the judge to consider the factors set forth in *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994), including "the extent of [the] violative condition, the length of time that it has existed, whether the violation is obvious or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance and the operator's efforts in abating the violative condition made prior to the issuance of the citation or order." 19 FMSHRC at 1379. While the judge referenced these factors in his decision, 19 FMSHRC at 1649 n. 2, he made no considered analysis of them in relation to the record evidence. For instance, the judge never discussed whether the operator was put on notice of the trash accumulation as a result of the inby conditions or whether the accumulation was obvious because of the inby conditions.[7] The judge also does not appear to factor into his analysis of the unwarrantability of the violation his own conclusions that management "knew or should have known" of the inby trash and that the trash was extensive. 19 FMSHRC at 1650. Moreover, the judge's error in focusing solely on the non-violative accumulations led him to discount the prior withdrawal order resulting from trash accumulations in an adjacent entry ("presumably in an active area," *id.*). *See Peabody Coal Co.,* 14 FMSHRC 1258, 1263-64 (Aug.

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[6] In addressing the court's decision, the dissent has presented an overly narrow impression of what the judge was required to do. Thus, we disagree with the dissent's view that the judge, by focusing on culpability and causation, was simply following remand instructions of the D.C. Circuit that somehow altered or superseded the existing Commission test for determining whether a violation is unwarrantable. Slip op. at 12, 13. The court's reference to causation and culpability occurs in the context of a more comprehensive discussion of unwarrantability, with a citation to the Commission's seminal decision in *Emery Mining Corp.,* 9 FMSHRC 1997 (Dec. 1987). In addition, both the Secretary and JWR fully briefed and argued the applicability of the *Mullins* factors to the court. In this circumstance, we do not read the court's references to causation and culpability in its remand instructions as anything more than a shorthand reference requiring a comprehensive analysis to determine whether the violation was the result of the operator's unwarrantable failure. *See* 111 F.3d at 919-20.

[7] The evidence suggests that, because of the inby conditions, the violation was obvious and JWR must have been aware of it. For instance, the inspector testified without contradiction that the operator had placed a ventilation curtain on top of the trash accumulation, splitting open a garbage bag and spilling its contents on the outby side of the curtain. Tr. 19-20, 65. The inspector testified that the accumulation that was outby the curtain was "just the continuation of everything that was inby the curtain." Tr. at 19.

1992) (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).

JWR argues that the judge's remand decision in which he addressed only the non-violative inby accumulations must be read in conjunction with his July 1994 decision, in which he addressed only the violative outby accumulations.[8] *See* JWR. Br. at 6-7, 9-11. However, we vacated the prior unwarrantability determination (19 FMSHRC at 1378) because the judge and the Commission had applied an interpretation of unwarrantability that the court of appeals rejected. *See* 16 FMSHRC at 1513-14. The bifurcated approach suggested by JWR is contrary to the Secretary's interpretation approved by the court of appeals. Accordingly, it is necessary for the judge to evaluate the totality of the operator's conduct on remand, including both the violative and non-violative accumulations, in order to make an unwarrantability determination.

JWR also argues that, in his remand decision, the judge fully considered the record evidence concerning unwarrantability. JWR R. Br. at 9-11. However, to the extent that the judge considered this evidence, he did so only in weighing the operator's negligence in relation to the non-violative accumulations, which, as we have stated, was too narrow in scope.[9]

In addition, although the issue was neither raised nor briefed by the parties, the dissent questions whether JWR's due process rights were violated because it did not have an opportunity to adequately defend against "a retroactive application of the Secretary's expansive interpretation of section 104(d)." Slip op. at 14.[10] There is good reason why JWR has not raised this issue. From the

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[8] The judge's only consideration of key testimonial evidence concerning whether JWR was on notice of the accumulations and what effort had been made to clean them up was in his first decision that was vacated. *See* 16 FMSHRC at 1514.

[9] Our dissenting colleagues err in quoting from the court's decision (slip op. at 16) to support their argument that the Secretary somehow improperly relies on non-violative conditions to support an unwarrantability determination. As the dissent recognizes, this quotation pertains to the Secretary's S&S analysis, not the unwarrantability analysis at issue here. 111 F.3d at 916-17. In contrast to the section of the opinion cited by the dissent, the court concluded, in a subsequent passage, that the Secretary's interpretation of section 104(d)(1), 30 U.S.C. § 814(d)(1), to include consideration of inby, non-violative trash accumulations was "reasonable." 111 F.3d at 920.

[10] The dissent suggests (slip op. at 14 n. 8) that the judge's passing reference to "due process" in regard to whether non-violative coal accumulations presented a hazard (19 FMSHRC at 1650 & n. 3) is sufficient to preserve this question for Commission review, even though no party has raised the issue. This approach is at odds with the Mine Act, 30 U.S. C. § 823(d)(2)(A)(iii), and with well-settled appellate procedures. *See Wyoming Fuel Co.*, 16 FMSHRC 1618, 1623 (Aug. 1994). While the dissent's citation of the "due process" reference in the judge's decision suggests that the judge's concern was with "the Secretary's new and expansive reading of section 104(d)(1)," the judge was actually referring to the question of the

beginning of this proceeding, MSHA cited JWR because it permitted trash accumulations on the inby and outby sides of a check curtain. 18 FMSHRC at 509; Pl. Ex. 2 (Citation No. 3182848). MSHA included with the citation its determination that the violation was the result of JWR's unwarrantable failure. 18 FMSHRC at 509. The dissent simply fails to accept the factual predicate of this proceeding — which has always been that both the inby and outby accumulations were the basis for the unwarrantability determination. Accordingly, the dissent's suggestion that JWR did not have an opportunity "to make a record" on the impact of the inby accumulations on the issue of unwarrantable failure (slip op. at 15) is at odds with the history of the case. Moreover, the dissent's approach would have us ignore the D.C. Circuits's decision, which adopted the Secretary's interpretation, reversed the Commission on this issue, and is the law of the case. This we will not do.[11]

Moreover, we have no difficulty rejecting the dissent's concern that this amounts to an impermissible retroactive application. *See Sewell Co. Co. v. FMSHRC*, 686 F.2d 1066, 1070 (4th Cir. 1982) ("retroactive application of a novel principle expounded in an adjudicatory proceeding does not infringe the rights secured by the due process clause").[12] We simply note that the issue has

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operator's negligence in allowing the non-violative accumulations to exist. 19 FMSHRC at 1650 & n. 3.

[11] The dissent's further suggestion that application of the Commission's "reasonably prudent person" test shields JWR from liability for unwarrantable failure is also misplaced. Slip op. at 15-16 n. 10. The Commission's reasonably prudent person test pertains to whether an operator had fair notice of an agency's *regulatory interpretation. E.g., General Electric Co. v. EPA,* 53 F.3d 1324, 1330-31 (D.C. Cir. 1995); *Ideal Cement Co.,*12 FMSHRC 2409, 2415 (Nov. 1990) (interpreting and applying broadly worded standards). This case, in contrast, presents the issue of whether the facts surrounding a violation establish aggravated conduct rising to the level of unwarrantable failure. *See, e.g., Emery Mining Corp.,* 9 FMSHRC 1997.

[12] Commissioner Beatty notes that, to support their retroactivity/due process argument, Commissioners Riley and Verheggen rely on their dissenting opinion, and his concurring opinion, in *Topper Coal Co.*, 20 FMSHRC 344, 371, 378-79 (Apr. 1998). In *Topper*, Commissioner Beatty agreed with Commissioners Riley and Verheggen that it would be unfair on review to apply a presumption that a violation was S&S where the Secretary's counsel had first argued for the application of a presumption in her post-hearing brief, thereby depriving the operator the opportunity to adduce evidence at the hearing to rebut the presumption. *Id.* Commissioner Beatty concludes that *Topper* is not controlling here, since it is distinguishable from this case in several important respects. First, as shown above, unlike the operator in *Topper*, JWR did have an opportunity to make a record on the impact of the inby accumulations on the issue of unwarrantable failure. Although the Secretary's theory of how those accumulations might support a finding of unwarrantability necessarily changed as a result of the judge's initial decision, it is unlikely that the evidence that JWR would have introduced to show that those accumulations were not indicative of unwarrantable failure would have been any

been fully briefed and argued to both the Commission and the D.C. Circuit. Additionally, as discussed above, the Secretary's retroactive application of its theory of unwarrantability has the express approval of, and is in fact directed by, the reviewing court on appeal.

In sum, because the judge did not analyze the unwarrantability factors and the operator conduct that he was directed by the Commission to consider, his decision must be vacated and the proceeding remanded. *See Doss Fork Coal Co.,* 18 FMSHRC 122, 125-26 (Feb. 1996). On remand, in making an unwarrantable failure determination for the violation at issue, the judge must consider the violation and "mine conditions beyond the violation itself, including conditions not themselves violating mine safety and health standards." 111 F.3d at 920.

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different. More importantly, *Topper* involved a far different issue, the retroactive application of a presumption — a procedural device designed to "'shift[] the burden of producing *evidence.*'" *Id*. at 378 (*quoting* 2 *McCormick on Evidence* § 343, at 454) (emphasis in original). This case, by contrast, involves the "retroactive application of a novel principle expounded in an adjudicatory proceeding," which has been consistently held not to violate due process rights. *Sewell Coal Co. v. FMSHRC*, 686 F.2d at 1069-70 (*citing NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947)); *see also Molina v. INS*, 981 F.2d 14, 23 (1st Cir. 1992) ("retroactive application of new principles in adjudicatory proceedings is the rule, not the exception.") (*citing SEC v. Chenery*, 332 U.S. 194 (1947)).

III.

Conclusion

For the foregoing reasons, we vacate the judge's decision and remand the proceeding to the judge for further consideration consistent with this decision.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

Robert H. Beatty, Jr., Commissioner

Commissioners Riley and Verheggen, dissenting:

The majority fails to provide a meaningful basis for its remand order sending this case back to the judge once again. We therefore respectfully dissent. For the reasons set forth below, we would affirm the judge's decision.

In a decision issued on May 2, 1997, the U.S. Court of Appeals for the District of Columbia Circuit remanded this case to the Commission with instructions "to determine whether, applying the Secretary's interpretation of the statue, the record contains sufficient evidence of causation and culpability to support an 'unwarrantable failure' finding." *Secretary of Labor v. FMSHRC*, 111 F.3d 913, 920 (D.C. Cir. 1997).[1] The Commission, in turn, issued its decision and instructions to the administrative law judge as follows:

> Pursuant to the court's order, we vacate the judge's unwarrantable determination and remand to the judge to consider the non-violative accumulations in the inactive area of the mine. The judge is to consider these accumulations, which his decision refers to as massive, in light of the other factors that the Commission may examine in determining whether a violation is unwarrantable, including the extent of a violative condition, the length of time that it has existed, whether the violation is obvious or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance and the operator's efforts in abating the violative condition made prior to the issuance of the citation or order.

19 FMSHRC at 1378-79 (citations omitted).

In accordance with these instructions, the judge addressed the non-violative trash accumulations in the inactive area of the mine. 19 FMSHRC at 1648-49. He considered those facts and circumstances relevant to a determination of unwarrantable failure, including the extent and duration of the accumulations, and found that the operator "was not without negligence in allowing these non-violative accumulations to exist." *Id*. at 1650. However, as to culpability, the judge concluded that the operator's conduct, while negligent, did not rise to the level of aggravated conduct[2] because there was no legal duty on the part of the operator to prevent such accumulations.

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[1] According to the court, the Secretary's interpretation of section 104(d)(1) of the Mine Act allows consideration of "mine conditions beyond the violation itself, including conditions not themselves violating mine safety and health standards," in determining whether a violation is the result of unwarrantable failure. 111 F.3d at 920.

[2] Unwarrantable failure is defined as aggravated conduct constituting more than ordinary negligence, and is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Emery Mining Corp.*,

19 FMSHRC at 1650. Finally, the judge noted that the Secretary failed to offer any evidence on the issue of causation, and considered this failure an abandonment of her claim and a default. *Id*. at 1651.

We find that the judge's decision closely adheres to both the court's and the Commission's instructions, which are the binding law of the case. *See Lion Mining Co.*, 19 FMSHRC 1774, 1777 (Nov. 1997). The judge limited his inquiry on remand to the non-violative trash accumulations in the inactive area of the mine, as directed by the Commission. 19 FMSHRC at 1648-49. He also fully considered those factors, as directed by the Commission, relevant to determining "unwarrantable failure," including extent, duration, notice, and efforts to abate. *Id*. at 1650.

The judge's finding with respect to the operator's culpability, made at the direction of the appeals court, is also legally sound. It is undisputed that the operator had no legal duty to remove or clean up trash in the inactive workings of the mine. In the absence of a legal duty, there can be no finding of aggravated conduct. *See Lafarge Construction Materials*, 20 FMSHRC 1140, 1148 (Oct. 1998) ("The aggravated conduct required for a finding of unwarrantable failure is the kind of conduct that . . . results in a breach of duty."). The appeals court also directed the Commission (and hence, the judge) to make a finding with respect to causation (111 F.3d at 920), but on remand the Secretary declined to address the issue. 19 FMSHRC at 1651. Since the Secretary failed to adduce any evidence with respect to causation, which the appeals court specifically directed the Commission to consider in its unwarrantability determination, she failed to meet her burden of proof in this case. *Peabody Coal Co.*, 18 FMSHRC 494, 499 (Apr. 1996) ("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."). On this basis alone we would affirm the judge's decision.

The majority, however, asserts that the judge committed two errors, neither of which have any basis in the record before us. First, our colleagues assert that "the judge erred by analyzing the operator's conduct under the law of negligence to the exclusion of any examination of the criteria that the Commission generally considers in an unwarrantable failure analysis." Slip op at 5. The judge, they argue, "focused on traditional concepts of negligence — causation and culpability — while largely ignoring the factors that the Commission directed him to consider." *Id*. at 6.

The judge, however, cannot be faulted for "focusing" on the "traditional" negligence concepts of causation and culpability for the simple reason that the District of Columbia Circuit specifically directed the Commission to bring such a focus to bear on this case. Indeed, the judge was duty bound to "determine whether . . . the record contains sufficient evidence of causation and culpability to support an 'unwarrantable failure' finding." 111 F.3d at 920. Nor can it be said that the judge failed to examine the criteria used by the Commission to weigh allegations of unwarrantable failure. In fact, the judge analyzed a number of the factors as directed by the Commission. As to extent and duration of the non-violative trash accumulations, the judge found

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9 FMSHRC 1997, 2001, 2003-04 (Dec. 1987); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991).

them to be extensive and that some of the materials may have accumulated over a period as long as a week. 19 FMSHRC at 1650. As to notice, the judge acknowledged that another withdrawal order had been previously issued for accumulations in an adjacent entry, but found that this order would not have put the operator on notice that accumulations in an inactive area of the mine had to be removed. *Id*. Finally, with respect to abatement efforts, the judge found no evidence that the operator attempted to clean up the non-violative accumulations. *Id*. To say that the judge "largely ignor[ed] the factors," or "made no considered analysis" of them (slip op. at 6), is simply inaccurate.[3]

Secondly, our colleagues argue that the judge erred "[b]y focusing only on the non-violative accumulations." Slip op. at 5. Yet, this is *precisely* what we directed the judge to do. The Commission's remand instructions direct "the judge to consider the non-violative accumulations in the inactive area of the mine," and do not refer to the violative accumulations in the active outby section.[4] 19 FMSHRC at 1378. Notwithstanding these instructions, our colleagues argue that the non-violative conditions should have been considered "in conjunction with" the violative conditions, since even the operator concedes that this case is really about whether the latter is unwarrantable. Slip op. at 5. Clearly, the judge recognized this when he concluded that his findings with respect to the non-violative accumulations "would not enhance the negligence in regard to the violative accumulations sufficient to justify unwarrantable failure findings." 19 FMSHRC at 1651. Based on the Commission's own instructions,[5] the judge properly limited his consideration to the non-violative conditions.

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[3] A judge is not required to consider all of the unwarrantability factors, but only those that are relevant to the facts and circumstances of a particular case. *Lafarge*, 20 FMSHRC at 1147. It is also worth noting that our instructions were at best less than a model of clarity, if not downright confusing and inconsistent with the direction of the court. While we directed the judge to consider the non-violative conditions, our instructions with respect to the factors refer only to violative conditions, not non-violative conditions. *See* 19 FMSHRC at 1379 (directing the judge to consider "the extent of a *violative* condition, the length of time *it* has existed, whether the *violation* is obvious or poses a high degree of danger . . . and the operator's efforts in abating the *violative* condition.") (emphases added). Thus, even if the judge had declined to give any consideration to the factors — which he most certainly did not in this case — his decision would have been consistent with the Commission's remand order, and he would not have committed any error.

[4] Nonetheless, our colleagues, with the benefit of hindsight, now direct the judge to evaluate "both the violative and non-violative accumulations" (slip op. at 7) despite the fact our original instructions provided no such direction.

[5] If any deficiency is to be found here, it is not in the judge's decision but rather in the lack of clarity in our original instructions to the judge. The majority attempts to explain these instructions as follows: "The remand clearly directed the judge to consider the non-violative accumulations 'in light of the other factors that the Commission may examine in determining whether a violation is unwarrantable,' including various factors relating to the violative accumulations." Slip op. at 5 n.5 (quoting 19 FMSHRC at 1379). What exactly this means is hardly clear. In fact, we find it as confusing and inconsistent as we find the original remand instructions.

The majority's remand is all the more unnecessary given the judge's ruling on causation. In the unlikely event, based on the majority's remand instructions, the judge reverses his culpability finding, the result of his decision will remain unchanged. He still has no basis for making a finding on causation, because the Secretary has provided none.[6] The Secretary claims she did not waive the causation issue, but at the same time inconsistently argues that, in fact, she need not address it. S. Resp. Br. at 1-3 & n.2. According to the Secretary, unwarrantable failure cases have never required a showing of causation separate from culpability. *Id.* However, the appeals court clearly required such a showing in this case.[7] The Secretary's complaint that such a showing is unnecessary is a complaint more appropriately directed at the court. The judge in this case, however, was duty bound to follow the law of the case and make a determination on causation.

Even had the judge been able to make such a finding, however, his analysis would still not have been complete. If he had found that the violation was due to the operator's unwarrantable failure, he still would have been required to determine whether the operator was ever afforded the opportunity to defend itself against the Secretary's interpretation of the statute (i.e., that non-violative conditions should be considered in determining unwarrantable failure), or whether instead the operator's due process rights would be violated by what would amount to a retroactive application of the Secretary's expansive interpretation of section 104(d). *See* 19 FMSHRC at 1650 n.3 ("this issue was first raised by the Secretary on appellate review and was not squarely presented at trial . . . . Because of the result in this case, however, 'due process' concerns in this regard are moot").[8] As the Supreme Court has held, "[r]etroactivity is not favored in the law," *Bowen v.*

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[6] Our colleagues inexplicably decline to address directly the issue of causation in their opinion, even though it is one of the two issues the court directed the Commission to consider. Instead, our colleagues claim in a footnote that the court's specific direction to make findings on causation is merely a "shorthand reference" for a comprehensive unwarrantable failure analysis. Slip op. at 6 n.6. In other words, the majority claims that the court said what it really did not mean.

[7] Notwithstanding the arguments of the Secretary and the majority to the contrary, the appeals court clearly directed the Commission to make a specific finding on causation, namely, to "determine whether . . . the record contains sufficient evidence of causation." 111 F.3d at 920. Indeed, it is clear that the court envisioned causation to be an integral element of an unwarrantable failure analysis. Section 104(d)(1) requires the Secretary to find "such violation to be *caused* by an unwarrantable failure of [the] operator to comply with such mandatory health and safety standards." 30 U.S.C. § 814(d)(1) (emphasis added). According to the court, the language of this section "directs decisionmakers to consider the *cause* of the violation." 111 F.3d at 920 (emphasis added).

[8] On this point, the majority states that the judge's due process concern was not with the Secretary's interpretation, but that instead he "was actually referring to the question of the operator's negligence in allowing the non-violative accumulations to exist." Slip op. at 7 n.10. This assertion is logically flawed. The judge on remand would never have even passed on "the operator's negligence in allowing the non-violative accumulations to exist" had it not been for

Georgetown University Hosp., 488 U.S. 204, 208 (1988) (citations omitted), a maxim the Court has repeatedly reaffirmed. *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 946 (1997); *Lynce v. Mathis*, 519 U.S. 433, 439 (1996); *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994). *Cf. Topper Coal Co.*, 20 FMSHRC 344, 371, 378-79 (Apr. 1998) (majority of Commissioners rejecting retroactive application of S&S presumption because operator "had no notice" of the Secretary's theory at trial (Commissioner Beatty, concurring with Commissioners Riley and Verheggen)).

As the majority concedes (slip op. at 8-9), the Secretary failed to advance her interpretation in the adjudicatory proceeding in which the record of the case was made. The operator was never presented *at trial* with the issue of how non-violative conduct could be used by the Secretary to prove unwarrantable failure, nor was the operator ever given the opportunity to defend itself against an allegation based on such a theory. Put another way, as we review on appeal the Secretary's new interpretation of section 104(d)(1), we have no evidentiary record adduced at trial addressing the elements of the Secretary's theory.[9] To now apply this theory against the operator without providing it any opportunity to make a record to the contrary we find unfair and inequitable.[10]

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the Secretary advancing her new interpretation of section 104(d)(1) on appeal to the D.C. Circuit and the Commission. The majority also states that our focus on due process concerns "would have [the majority] ignore the D.C. Circuit's decision, which adopted the Secretary's interpretation, reversed the Commission on this issue and is the law of the case." Slip op. at 8. Our concerns, however, are not inconsistent with the law of the case as handed down by the D.C. Circuit. Instead, while acknowledging that the Secretary's interpretation is the law of the case, like the judge, we recognize that the next step in the analysis — a step the D.C. Circuit never had to reach and a step the majority ignores — is to determine whether retroactive imposition of any legal requirements arising from the Secretary's interpretation conforms to the law of retroactivity as set forth in *Bowen* and its progeny.

[9] As the majority concedes, this issue has only been "briefed and argued to both the Commission and the D.C. Circuit" (slip op. at 9), but *not* tried before a judge in a Commission hearing.

[10] On the question of notice, which is closely related to the problem of retroactivity, the Commission has applied an objective standard, i.e., the reasonably prudent person test. *See, e.g., Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990); *Otis Elevator Co.*, 11 FMSHRC 1896, 1906 (Oct. 1989), *aff'd*, 921 F.2d 1285, 1291 (D.C. Cir. 1990); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982). Under this legal framework, we find it difficult, if not impossible, to imagine circumstances that could support a finding that a reasonably prudent person familiar with the mining industry would have been aware of the Secretary's interpretation here, particularly when a majority of this Commission initially found it to be an impermissible reading of the statute. 18 FMSHRC at 512.

Finally, we believe that a remand is unwarranted here because this case has simply gone on too long. It has been over five years since the Secretary cited the operator. The reason this litigation has taken so long is due at least in part to the Secretary's failure at the outset to appeal the judge's initial determination that the inby accumulation was non-violative. *See* 18 FMSHRC at 514 (Commissioner Riley, concurring). Since then, the Secretary has spent years trying to fit the square peg of non-violative conduct (accumulations outside the active workings) into the round hole of a section 75.400 violation applying only to active workings. At every step of the process, the Commission and the courts have warned of the inadequacy of this regulation, warnings which bear repeating one more time. As the District of Columbia Circuit stated when referring to the significant and substantial finding in the Commission's original decision:

> Underlying the Secretary's arguments, both statutory and evidentiary, is [her] concern that dangerous accumulations of trash outside active workings will go unchecked if the Commission's decision is allowed to stand. If collections of trash outside active workings can be both permissible and hazardous, the fault lies neither with the Mine Safety Act nor with the Commission's legal reasoning, but with the Secretary's combustible materials regulation, which forbids accumulations of combustible materials in active workings. The regulation does not prohibit such accumulations in inactive areas. We think . . . "the regulation may not fully effectuate statutory purposes. However, if the Secretary sincerely believes the regulation is deficient, [she] should clarify its language through rulemaking, rather than ask the [decisionmaker] to rewrite the regulation by adjudication."

111 F.3d at 918 (citations omitted). These words remain equally applicable today, where accumulations outside active workings but near enough to present a risk to miners can still be both "permissible and hazardous." *Id*.

Rather than perpetuate this misbegotten litigation, in the interests of justice and for all of the foregoing reasons, we would affirm the judge's decision.

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

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