FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

April 22, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. VA 96-21-M
EASTERN RIDGE LIME COMPANY, L.P.	:	

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

DECISION

BY THE COMMISSION:

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"), involves citations issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") against Eastern Ridge Lime Company, L.P. ("Eastern Ridge"). Administrative Law Judge Avram Weisberger concluded that Eastern Ridge violated 30 C.F.R. §§ 57.3360[1] and 57.3201[2] and that both violations were significant and substantial ("S&S") and resulted from Eastern Ridge's unwarrantable failure. 19 FMSHRC 398 (Feb. 1997) (ALJ). The judge assessed penalties totaling $85,000. *Id.* at 407, 409, 410. The Commission denied Eastern Ridge's petition for review. Eastern Ridge appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed in part and vacated and remanded in part the Commission's decision. *Eastern Ridge Lime, L.P. v. FMSHRC*, 141 F.3d 1158 (table), 1998 WL 169213 (4th Cir. 1998).

[1] Section 57.3360 provides in pertinent part: "Ground support shall be used where ground conditions, or mining experience in similar ground conditions in the mine, indicate that it is necessary."

[2] Section 57.3201 states: "Scaling shall be performed from a location which will not expose persons to injury from falling material, or other protection from falling material shall be provided."

By order dated July 2, 1998, the Commission remanded the case to the administrative law judge for further consideration consistent with the court's decision. 20 FMSHRC 1333 (Dec. 1998). On remand, the judge reiterated his initial findings and again imposed penalties totaling $85,000. 20 FMSHRC 758, 758 (July 1998) (ALJ). Eastern Ridge appealed, and the Commission directed review. For the reasons that follow, we vacate the judge's decision and remand for further consideration.

I.

Factual and Procedural Background

A. Initial Proceedings before the Commission

Eastern Ridge operates an underground limestone mine in Ripplemead, Virginia. 19 FMSHRC at 398. Limestone is extracted by the random room and pillar mining method. *Id.* at 399. By this process, rooms are created by blasting and removing the loose rock. 1998 WL 169213 at 1. Pillars are left in the rooms to provide roof support. *Id.* The tunnels and rooms are not set out in grid fashion because geological conditions at the mine are inconsistent. Tr. 1168.

Beginning in 1993, Eastern Ridge made several attempts to mine in the 200 entry section that had to be stopped because of poor roof conditions. 19 FMSHRC at 399-400. In December 1993, Eastern Ridge attempted to advance the 204E section. *Id.* at 399. However, mining in section 204E ceased after scalers working in the section[3] concluded that the roof was unsound and told Eastern Ridge management that it was unsafe to work in the section. *Id.* at 399-400, 404.

In May or June 1994, Eastern Ridge returned to the 204E section. *Id.* at 400. Scalers observed that the top of the heading was checkered with wide mud seams. Scaling could not be completed due to unsafe ground conditions. *Id.* at 400. Mine management was advised that the top was leaking mud, and the section was condemned. *Id.* at 404. After the 204E section was condemned, in late June or early July 1994, Eastern Ridge began development of the 11S section, which was to the right of the 204E heading. *Id.* at 400. Eastern Ridge supervisor Barry Snider marked the opening for the 11S heading on the right rib of the 204E section, about 15 feet away from its face. *Id*. at 404. The right rib of the 204E section was to form the left rib of the new 11S section. Tr. 219, 224-25.

[3] Scaling is a process of removing loose rock from roof or walls, usually with a long metal bar, which also allows the scaler to determine whether the roof is sound. 1998 WL 169213 at 1.

From July 21 through July 24, 1994, several miners observed seams in the 204E/11S sections. 19 FMSHRC at 401-02. On July 25, driller Milton Conley showed Snider the seam encircling the 204E section and told him that there was no support for the roof. *Id.* at 402. After the conversation, Snider instructed driller Jeffrey Morgan to bring the jumbo drill to scale down loose rock in the roof near the intersection of the right rib of section 204E and the left rib of section 11S. *Id*. Morgan extended the boom of the drill 40 feet out in front of the cab in which he was sitting. *Id.* Snider was standing approximately 15 to 20 feet to the left and in front of the cab. *Id.* Morgan placed the drill bit on the rock and allowed the drill to vibrate or "rattle" the rock in an effort to scale it down. As Morgan began to do so, the entire roof in the 204E and 11S sections collapsed burying Snider and partially crushing the drill cab in which Morgan was sitting. Tr. 989-90. As a result of the roof collapse, Snider was killed and Morgan was seriously injured. 19 FMSHRC at 402

Following an investigation, MSHA issued citations charging Eastern Ridge with violating section 57.3360, which requires ground support when ground conditions indicate that it is necessary, and section 57.3201, which requires that scaling shall be performed from a location which will not expose persons to injury from falling materials. 1998 WL 169213 at 1. Both violations were designated S&S, and were attributed to Eastern Ridge's unwarrantable failure. Gov't Exs. 7-8.

Eastern Ridge contested the proposed penalties, and a hearing was held before an administrative law judge. The judge concluded that Eastern Ridge violated section 57.3360 when it failed to install ground support, notwithstanding repeated warnings concerning conditions in the 204E/11S sections. 19 FMSHRC at 403-05. The judge credited the opinion of MSHA's expert witness, Joseph Cybulski, that conditions in the 204E/11S area prior to the fatal roof fall indicated that ground support was necessary. *Id.* at 404-05. In discrediting Eastern Ridge's expert, Jack Parker, who testified that ground support was not necessary, the judge noted that Parker's theory of the cause of the roof fall was not the issue before him; rather, the judge found that Parker did not dispute miner testimony concerning the conditions in sections 204E and 11S, noting in particular that scaler/blaster Marvin Wright opined that the pillar between the section 204E face and the 11S left rib was too small. *Id.* Therefore, the judge concluded that the record established that ground support was necessary. *Id.* He also affirmed the unwarrantable failure designation of the citation in light of the repeated concerns that miners had expressed to Snider. *Id.* at 407. In addressing the designation of the violation as S&S, the judge noted that Eastern Ridge's failure to provide ground support contributed to the hazard of roof fall. *Id.* at 406. The judge further concluded that, "considering the fact that a roof fall did occur in the area causing a fatality and seriously injuring another miner," the third and fourth elements of *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), had been established. *Id.* at 406-07. In assessing a penalty, the judge noted that the gravity of the violation was high, as it contributed to a fatal roof fall. Further, he found the level of Eastern Ridge's negligence was aggravated. *Id.* at 407. Taking into account remaining section 110(i) penalty criteria, the judge imposed a $50,000 penalty. *Id.*

With regard to the citation charging a violation of section 57.3201, the judge relied on record evidence establishing that, prior to the accident, conditions indicated the need for ground support in the 240E/11S area, and that Morgan was exposed to the hazard of a roof fall even though he was located 40 feet from the rock that he was rattling. *Id.* at 408. Further, the judge held that the cab in which Morgan was sitting did not provide protection from the roof fall. *Id.* The judge also concluded that the violation occurred as a result of the operator's unwarrantable failure because management was aware that scaling was being performed in an area with no roof support; indeed, just prior to the roof fall a miner had pointed out the circular seam in the roof to Snider. *Id.* Finally, in addressing the S&S designation, the judge relied on the ground conditions indicating the need for support and that scaling was being performed in an area that had no ground support. *Id.* Noting that Eastern Ridge's negligence was aggravated and "the fact that the violation . . . contributed to a fatality," the judge imposed a penalty of $35,000 for the second violation.[4] *Id.* at 409. The Commission thereafter denied a petition for discretionary review filed by Eastern Ridge.

B. The Fourth Circuit's Decision

Following the Commission's denial of review, Eastern Ridge filed a petition for review in the Fourth Circuit, which affirmed in part and vacated and remanded in part the Commission's decision. The court upheld the findings of violation (1998 WL 169213 at 2-3), but on a 2-1 vote concluded that the S&S determinations were incorrectly based on factual findings which the judge did not make. In granting the petition for review in part and remanding the case, the court majority stated:

> In the case of the § 57.3360 violation, the ALJ appropriately found the first two *Mathies Coal* prongs satisfied, holding that "the essence of the violation, i.e., failure to provide ground support, contributed to the hazard of a roof fall." In making these findings on the third and fourth prongs, however, the ALJ considered the "combination of ground conditions . . . and . . . *the fact that a roof fall did occur in the area causing a fatality* and seriously injuring another miner." (Emphasis added). The ALJ's usage of the roof fall as a relevant event is unsupported. Because the ALJ never found whether the failure to provide roof support was the cause of the accident, [his] holding that the accident indicated that Eastern Ridge "significantly and substantially" violated § 57.3360 is a non sequitur. In order to rely on such a finding, the ALJ would need to have found that the failure to provide ground support caused the accident; otherwise, the actual

[4] The judge dismissed a third citation which alleged, in essence, that Eastern Ridge misused the jumbo drill by using the drill bit to rattle rock. *Id.* at 409-10.

> fact of a roof fall indicates nothing relevant about Eastern Ridge's actions.
>
> This logical error becomes most consequential in the ALJ's imposition of penalties. In assessing a penalty for the § 57.3360 violation, the ALJ noted that "the gravity of the violation was of a very high level as the *violation contributed to a fatal roof fall*." (Emphasis added). Similarly, in assessing a penalty under § 57.3201, the ALJ considered "the fact that the *violation herein contributed to a fatality*." (Emphasis added). . . . By relying on the fact that Eastern Ridge's actions contributed to the roof fall and the fatality in making [his] penalty assessments, the ALJ inappropriately took account of factors extrinsic to [his] own findings.
>
> For these reasons, we grant Eastern Ridge's petition for review and remand this case for further factfinding and analysis of the penalties to be assessed. Our ruling should not, however, be understood to imply that causation must be found in every case. The Commission may impose penalties without any reference to whether a roof fall or fatality occurred. But where an ALJ relies on the supposition that a mining company's failure to act was a contributing factor in a fatal roof fall, he must first find that the failure to act was actually a contributing factor.

Id. at 3-4.

C. Proceedings on Remand before the Commission

On July 2, 1998, we issued an order remanding the case to the judge. On remand, the judge's entire findings and analysis was as follows:

> I find that, in assessing a penalty, and evaluating the level of gravity of the cited violations, it is not necessary to make a specific finding of causation. The high level of gravity is based on the fact that the violation contributed to a fatal roof fall. Further, in evaluating a penalty, I place most weight on my finding that, for the reasons discussed in the original decision, the level of Respondent's negligence constituted aggravated conduct. Specifically, the record establishes that Respondent repeatedly ignored the warnings of its workers regarding observed unsafe conditions. Accordingly, I reiterate my initial findings regarding the penalty to be assessed.

20 FMSHRC at 758.

II.

Disposition

_____Eastern Ridge contends that by failing to make a finding of causation of the roof fall but, nevertheless, basing his S&S and unwarrantability determinations and enhanced civil penalties on the conclusion that the violations contributed to the roof fall, the judge repeated the same error contained in his initial decision, thereby ignoring the Fourth Circuit's remand instructions. ER PDR at 3-4; ER Br. at 16-17. Eastern Ridge further argues that substantial evidence does not support the judge's determination that its failure to provide ground support was either S&S or due to its unwarrantable failure. *Id.* at 17-25. Eastern Ridge also asserts that substantial evidence does not support the judge's finding that its failure to provide protection from falling material to miners was S&S and due to its unwarrantable failure. *Id.* at 26-31.

_____The Secretary contends that the determinations that the violation of section 57.3201 (location for performing scaling) was S&S and a result of the operator's unwarrantable failure and that the violation of section 57.3360 (inadequate roof support) resulted from the operator's unwarrantable failure, were briefed and argued before the Fourth Circuit without reversal and are now the law of the case. S. Br. at 19-21. She asserts that these determinations were "implicitly affirmed" and, therefore, the Commission cannot reconsider them. *Id.* at 21-24. Alternatively, the Secretary argues that those determinations are supported by substantial evidence. *Id.* at 25-34, 36-39. With regard to the S&S designation of section 57.3360, the Secretary contends that the judge failed to make a specific finding on remand, and therefore the Commission must either decide the issue or remand it to the judge for further analysis. *Id.* at 34. The Secretary argues that she does not have to prove that the violation caused the roof fall, but only that the violation was reasonably likely to result in an injury-causing event. *Id.* at 35. Finally, the Secretary asserts that in reviewing the penalty on remand, the judge declined to make a finding that the violation caused the roof fall but rather concluded the violation contributed to the hazard of a roof fall. *Id.* at 39-40. The Secretary suggests that if the Commission concludes that the judge did not follow the court's remand instructions, it should remand the case to the judge. *Id.* at 40.

"Law of the case rules have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." 18 Wright, Miller & Cooper, *Federal Practice and Procedure,* § 4478 at 874 (2d ed. Supp. 1999). "The 'law of the case' doctrine mandates, . . . , that where issues have been . . . decided on appeal, the district court is obliged, on remand, to follow the decision of the appellate court." *United States v. Minicone*, 994 F.2d 86, 89 (2d Cir. 1993). The law of the case applies to issues decided by implication, as well as to matters decided explicitly. *Id.; Hanna Boys Center v. Miller*, 853 F.2d 682, 686 (9th Cir. 1988).

We agree with the Secretary that the decision of the court of appeals established the law of the case and precludes us from reviewing the unwarrantable failure determinations of the

section 57.3201 and 57.3360 violations. The unwarrantable failure determinations were raised, briefed, and argued to the court. While the court did not specifically discuss those issues in its decision, it clearly addressed the underlying violations (19 WL 169213 at 2-3), the judge's S&S determinations (*id*. at 3), and his imposition of penalties as to both violations (*id.* at 3-4). Implicit in the court's decision, therefore, is affirmance of the unwarrantable failure determinations it did not explicitly address. Therefore, we cannot review these issues.[5]

With regard to the judge's S&S determinations, it is apparent from a careful reading of the court's decision that the S&S determinations as to both violations[6] were sent back to the judge because of inadequate factual findings, mainly with respect to the third and fourth elements of the S&S test set forth in *Mathies Coal Co*.[7] While the court majority saw those factual

---

[5] Commission Riley disagrees with the majority holding that the circuit court's decision disposed of the unwarrantable failure determinations. He believes the court decision is much too vague and ambiguous on the question of unwarrantability to be held up as the "law of the case." Coupled with what he now regards as a less than precise remand order from the Commission to the judge and a seriously misguided decision on remand by the judge, Commissioner Riley opines that we have the ingredients for legal confusion, not good law. He believes that to gloss over this issue, merely guarantees protracted litigation of an important question in this case. He thinks it behooves the Commission to resolve this issue here so as not to leave it open as another avenue of appeal. Therefore, he would remand to the judge for further consideration the unwarrantable failure determinations, along with the S&S determinations and the assessment of penalties. Commissioner Verheggen concurs with Commissioner Riley in finding that the Fourth Circuit's decision did not dispose of the judge's unwarrantable failure determination, and that this issue should also be remanded.

[6] A close reading of the judge's decision on review before the court indicates that he relied on the lack of adequate ground support as a consideration in the S&S determinations involving the violations of both section 57.3360 (19 FMSHRC at 406-07) and section 57.3201 (*id.* at 408).

[7] 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. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 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)

findings as most directly impacting the level of penalties, those findings cannot be revisited without addressing the S&S determinations that provided the context in which the findings were initially made. Further, the Commission's remand decision states explicitly that the court decision held that "the judge's S&S determinations were inadequately supported because, while the judge did not make a finding that the violations caused the fatal accident, he relied on the contribution of the violations to the accident in reaching his S&S determination." 20 FMSHRC at 1133-34. Thus, the Commission's remand should have eliminated any confusion on the scope of issues before the judge.[8]

The judge's remand decision clearly does not address the issue of whether the violations of sections 57.3360 or 57.3201 were S&S. Nor does it address the record facts relevant to the judge's evaluation of the *Mathies* criteria that led to the court's remand. Further, in addressing the penalties assessed for the violations, the judge repeated virtually the same language that led the court majority to vacate and remand his prior decision. The court majority stated: "[T]he ALJ noted that 'the gravity of the violation was of a very high level as *the violation contributed to a fatal roof fall*.'" 1998 WL 169213 at 3 (emphasis in original). In the remand decision, while the judge stated that he was not making a finding of causation, he also stated: "The high level of gravity is based on the fact that *the violation contributed to a fatal roof fall*." 20 FMSHRC at 758 (emphasis added). We conclude that the judge failed to conduct the additional "factfinding and analysis of the penalties to be assessed" (1998 WL 169213 at 4) that the Fourth Circuit required. Accordingly, we vacate the judge's decision and remand for further consideration.

On remand, we direct the judge to state whether he is relying on the failure to provide adequate ground support as a cause of the accident and as support for his S&S and penalty determinations and, if so, to indicate the basis in the record for doing so. We also remind the judge that he does not have to find that the violation led to the ground fall which caused a fatality in order to conclude that the violation was S&S. *See Arch of Kentucky,* 20 FMSHRC 1321, 1330 (Dec. 1998).

> 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); *accord Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

[8] Commissioner Marks agrees that the S&S as well as the penalty issues be remanded to the judge. However, for the reasons set forth in his concurring opinions in *United States Steel Mining Co.,* 18 FMSHRC 862, 868-75 (June 1996), and *Buffalo Crushed Stone, Inc.,* 19 FMSHRC 231, 240-41 (Feb. 1997), he believes that the ambiguous language of the Commission's *Mathies* test, 6 FMSHRC at 3-4, should be replaced with a clear test that is consistent with Congressional intent.

III.

Conclusion

For the foregoing reasons, we vacate the judge's decision and remand the S&S determinations and penalty assessments for further consideration consistent with this decision.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

Distribution

Thomas B. Weaver, Esq.
Armstrong, Teasdale, Schlafly & Davis
One Metropolitan Square, Suite 2600
St. Louis, MO 63102

Robin A. Rosenbluth, Esq.
Yoora Kim, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Administrative Law Judge Avram Weisberger
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041