FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

August 30, 2001

SECRETARY OF LABOR	:	
	:	
v.	:	Docket No. WEVA 98-39
	:	
EAGLE ENERGY INC.	:	

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

DECISION

BY: Riley and Beatty, Commissioners

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"), Administrative Law Judge Jerold Feldman determined that Eagle Energy Inc. ("Eagle Energy") committed a significant and substantial ("S&S")[1] violation of 30 C.F.R. § 75.380(d)(1)[2] when water accumulations occurred in an escapeway. 21 FMSHRC 1235, 1244-46 (Nov. 1999) (ALJ). He found that the violation was not caused by the operator's unwarrantable failure. *Id.* at 1251. The judge assessed a penalty of $2,500. *Id.* The Commission granted the Secretary of Labor's petition for discretionary review challenging the judge's finding of no unwarrantable failure. For the following reasons, we vacate the judge's unwarrantable failure determination and penalty assessment, and remand for further consideration.

---

[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."

[2] Section 75.380(d)(1) provides, in pertinent part: "(d) Each escapeway shall be — (1) Maintained in a safe condition to always assure passage of anyone, including disabled persons . . . ." 30 C.F.R. § 75.380(d)(1).

I.

Factual and Procedural Background

Eagle Energy owns and operates Mine No. 1, an underground coal mine in Boone County, West Virginia. 21 FMSHRC at 1238; Gov't Ex. 2. Mine No. 1 is an extremely wet mine with recurring water accumulation problems. 21 FMSHRC at 1236. Water flows down to the mine from the surface and seeps in from an adjacent abandoned mine which is inundated with water. *Id.* at 1238. Over 100 pumps have been used throughout the mine. *Id.* at 1236. Production director John Adkins testified that approximately 5 million gallons of water were pumped out every day and that water rapidly collected at locations of chronic accumulations. *Id.* at 1245; Tr. IV 141.[3]

Eagle Energy developed the 10 Left Section of the mine with three parallel entries using a continuous miner. 21 FMSHRC at 1238; Gov't Ex. 32. While the continuous miner was advancing in the section, the No. 1 entry was the return air entry, the No. 2 entry served as the beltline and track entry, and the No. 3 entry was the primary escapeway and intake air entry. 21 FMSHRC at 1238. The operator installed an incoming six-inch diameter fresh water line in the No. 2 belt/track entry to bring fresh water to the working face and to provide fire protection along the beltline. *Id.* The three entries were separated by stoppings. *Id.* While the 10 Left Section was in production, water was removed from the section by pumping it onto the beltline through discharge hoses. *Id.* The water was absorbed by the coal on the beltline and carried to the surface. *Id.*

On July 9, 1997, Eagle Energy completed mining in the 10 Left Section and temporarily suspended production in anticipation of bringing in the longwall from another section of the mine. *Id.* On that same day, the continuous miner in the 10 Left Section was removed and Eagle Energy began dismantling the beltline to move it from the No. 2 entry to the No. 1 entry of the 10 Left Section. *Id.* By dismantling the beltline, Eagle Energy could no longer use it to pump water out of the section. *Id.*

On July 10, 1997, Inspector Albert "Benny" Clark of the Department of Labor's Mine Safety and Health Administration ("MSHA") began an inspection of the mine. *Id.* He traveled to the No. 3 escapeway entry of the 10 Left Section to determine if Citation No. 7160006 issued by MSHA Inspector Andrew Nunnery on June 24, 1997, should be terminated. *Id.* Citation No. 7160006 had cited a non-S&S violation of section 75.380(d)(1) for water accumulations in the 10 Left escapeway ranging "in depth from 1" to 14" with slick and muddy bottom at crosscut 49 to 48 for a distance of approx. 100 feet." *Id.*; Gov't Ex. 29. Nunnery had characterized Eagle Energy's degree of negligence as "moderate." 21 FMSHRC at 1238. When Nunnery issued the

[3] The transcript contains a separate volume for each day of the six day hearing. Transcript references note the appropriate hearing day by Roman numeral I through VI followed by the page number of the transcript for that day's hearing.

citation, normal mining operations were in progress and the beltline was operational and available for removing water from the escapeway. *Id.*

During his inspection, Clark found there was water at the same location cited in Citation No. 7160006. *Id.* at 1239. Believing it was the same water cited by Nunnery, Clark issued 104(b) Order No. 7163178 on July 10, 1997, for Eagle Energy's alleged failure to abate Citation No. 7160006. *Id.* However, 104(b) Order No. 7163178 was subsequently vacated on procedural grounds by an MSHA conference officer. *Id.*; Tr. III 18.

Also on July 10, Inspector Clark found water accumulations between 1 and 24 inches in depth for a distance of 200 feet between the 69 and 71 crosscuts in the 10 Left escapeway. 21 FMSHRC at 1239. He issued Citation No. 7163177 for an S&S violation of section 75.380(d)(1) for the accumulations. *Id.* Clark testified that he believed the violation was due to Eagle Energy's unwarrantable failure because there were notations in the weekly examination book of similar water accumulations in the same area for the preceding five weeks. *Id.*; Tr. III 12-15. However, Clark testified that he was persuaded by safety director Jeffrey Bennett and then superintendent Stan Edwards to issue Citation No. 7163177 as a 104(a) citation rather than an unwarrantable 104(d) citation because of their assurances that future escapeway water problems would be prevented. 21 FMSHRC at 1239.

Despite Eagle Energy's assurances about improving its water problems, it was apparent that it could not abate Citation No. 7163177 because it had dismantled the beltline which it used to discharge water in the 10 Left escapeway. *Id.* At Inspector Clark's suggestion, Eagle Energy converted the section's fresh water line to a discharge line to deal with the water accumulations. *Id.* On July 11, Clark terminated Citation No. 7163177 after the cited water accumulations had been discharged through the newly converted discharge line. *Id.*

On August 13, while continuing his inspection, Clark found water accumulations in the 10 Left escapeway measuring 1 to 15 inches in depth with a slick and muddy bottom and extending for 220 feet between crosscuts 97 to 99. *Id.* at 1240. He issued Citation No. 7163218 for an S&S violation of section 75.380(d)(1) for the water accumulations. *Id.* He did not designate the violation unwarrantable. On August 14, the citation was terminated after the water was pumped and discharged through the converted discharge line. *Id.*

From August 30 through September 1 (Labor Day weekend), hourly workers did not work at the mine. *Id.* Instead, it was staffed by 20 to 30 management personnel who had decided to complete the longwall move on their own. *Id.* At approximately 4:00 p.m. on August 31, the converted discharge line was changed back to a fresh water line to facilitate the impending longwall operation. *Id.* According to Eagle Energy, the fresh water line was needed to power up the longwall's shields, for dust suppression, and could not be turned back to a discharge line without interfering with the longwall start-up schedule. *Id.*

On September 1, Eagle Energy started the beltline but it pulled apart at several locations and had to be repaired. *Id.* At approximately 7:00 a.m. on September 2, Eagle Energy again attempted to start the beltline but it again pulled apart at several locations. *Id.*

At approximately 8:30 a.m. on September 2, Inspector Clark arrived at the mine, accompanied by MSHA Supervisor Terry Price, to continue the inspection. *Id.* After reviewing the preshift and onshift books, Clark and Price traveled to the 10 Left Section, accompanied by safety director Bennett. *Id.* Upon arriving in the 10 Left Section, Clark and Price noted general damp and wet conditions and that the No. 1 belt entry had several water accumulations and was generally damp; the No. 2 track entry also contained several areas of water accumulations, soft ribs, and an uneven bottom in several places; and the No. 3 escapeway entry was damp to wet, had several water accumulations, loose ribs at different locations, and an uneven bottom in some locations. *Id.*; Tr. III 83-84.

At crosscut 70 in the No. 2 track entry, the inspection party found a large water accumulation, which extended into the crosscut right up to the stopping between the track entry and the No. 3 escapeway entry. 21 FMSHRC at 1241. Based on the amount of water he observed at the 70 crosscut in the track entry, Inspector Clark concluded that there would also be water at the 70 crosscut in the No. 3 escapeway entry. *Id.*

Using the nearest mandoor between the two entries, the inspection party traveled to the 70 crosscut in the No. 3 escapeway and Clark observed a water accumulation at the crosscut extending from rib to rib and approximately 110 feet long and up to at least 15 inches deep. *Id.* The inspection party started walking the No. 3 escapeway in an outby direction. *Id.* At crosscut 60, Clark observed another water accumulation extending from rib to rib that was approximately 90 feet long and up to at least 15 inches deep. *Id.* Between crosscuts 51 and 52, Clark observed a water accumulation extending from rib to rib that was approximately 40 feet long and up to at least 12 inches deep. *Id.* Finally, in the vicinity of crosscuts 48 and 49, Clark observed a water accumulation approximately 120 feet long and up to at least 15 inches deep. *Id.* at 1242. Clark found that all the water accumulations were characterized by muddy water, slick bottoms, and the presence of loose coal. *Id.*; Gov't Ex. 26.

Once the inspection party arrived on the surface, Clark checked the weekly examination books and found reports, dated August 15, 22, and 29, of water accumulations in the 10 Left escapeway. 21 FMSHRC at 1242. However, he did not find any indication in the examination reports that remedial action (i.e., pumping) had been taken to correct the hazardous conditions. *Id.* The judge credited Clark's testimony that he had previously warned Eagle Energy about failing to show remedial action in its weekly examination books. *Id.* at 1251 n.8. Clark concluded that no remedial action had been taken in the 10 Left escapeway since the water accumulations had been reported in the examination books on August 15, 22, and 29. *Id.* at 1242. His conclusion was based, in part, on his finding that, when water accumulations in other sections were reported in the weekly examination books, they were accompanied by reports of remedial action, such as "being pumped" or "pumped down." *Id.* Production director Adkins

and superintendent Harry Walker testified that pumps were used to discharge the water accumulations in the 10 Left escapeway until the discharge line was converted back to a fresh water line at 4:00 p.m. on August 31. *Id.* at 1243; Tr. IV 167-70; Tr. V 100-01.

Based on his observations, Inspector Clark issued a 104(d)(1) citation (No. 7163242), alleging an S&S violation of section 75.380(d)(1) due to the water accumulations in the 10 Left escapeway. 21 FMSHRC at 1243. He found that the violation resulted from Eagle Energy's unwarrantable failure because it was aware of the water accumulations, it had been warned previously about water accumulations in its escapeways, there was no evidence that remedial actions had been taken, and it had a history of previous violations for the same violative condition. *Id.* Eagle Energy contested the finding of the violation, the S&S and unwarrantable failure designations, and the proposed penalty.

Following a hearing, the judge found an S&S violation of section 75.380(d)(1) by Eagle Energy for the water accumulations in the 10 Left escapeway. *Id.* at 1244-46. He concluded that the violation was not unwarrantable because the Secretary did not demonstrate the operator's longstanding failure to eliminate the cited accumulations. *Id.* at 1247-48. The judge suggested that the MSHA inspector undercut his unwarrantable failure designation by attributing the violation to the operator's "high degree of negligence" rather than its "reckless disregard." *Id.* at 1248. He also determined that the operator's actions were mitigated because (1) it had no means of discharging the water at the time of the cited violation; (2) the Secretary had not found a similarly cited violation in the past to be unwarrantable; (3) the mine was only staffed by management personnel at the time of the cited violation (Labor Day Weekend); and (4) roof falls requiring the attention of mine management occurred at the mine prior to the cited violation. *Id.* at 1249-50.

II.

Disposition

The Secretary argues that the judge erred in determining that the operator's negligence was mitigated because there was no means for discharging water in the cited escapeway from August 31 to September 2. S. Br. at 11-18. She contends that the judge also erred in basing his negative unwarrantability conclusion on the ground that MSHA did not cite a similar violation as unwarrantable in the past. *Id.* at 18-19. The Secretary also contends that the judge erroneously grounded his conclusion of no unwarrantable failure on the fact that the inspector checked off the "high negligence" box instead of the "reckless disregard" box on the citation form. *Id.* at 19-20. Further, she argues that the judge improperly discounted the operator's history of similar violations because the mine was a wet mine. *Id.* at 21-24. In addition, the Secretary contends that the judge failed to properly consider the operator's prior discussions with MSHA about the need for greater compliance. *Id.* at 24-25. She further contends that the judge inadequately addressed evidence concerning whether the water accumulations were the same as accumulations noted previously in the operator's examination books. *Id.* at 25-28. The Secretary asserts that

the judge erred in concluding that the operator's negligence was mitigated because only management personnel worked on the Labor Day Weekend when the violation at issue occurred, and in determining that roof falls at the mine were a mitigating factor. *Id.* at 28-30. Finally, the Secretary contends that the judge failed to consider the various unwarrantable failure factors taken together. *Id.* at 30-32.

Eagle Energy responds that the judge's finding of no unwarrantable failure is supported by substantial evidence. EE Br. at 2. It contends that there are no regulatory requirements supporting the Secretary's assertion that Eagle Energy should have established an additional method for discharging water or determined that the beltline was fully operational before it disconnected its discharge water line. *Id.* at 12. It argues that substantial evidence supports the judge's determination that it had no reason to expect that the water would accumulate to hazardous depths before it planned to resume pumping. *Id.* The operator contends that, contrary to the Secretary's assertion, an unwarrantable failure finding requires more than a showing that the operator failed to avoid a violation about which it "knew or should have known." *Id.* at 12-13.

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 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 13, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator' efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000), *appeal docketed*, No. 01-1228 (4th Cir. Feb. 21, 2001) ("*Consol*"); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353.

A. Unwarrantable Failure Factors

1. Efforts to Abate the Violative Condition

We conclude that the judge failed to adequately consider whether, apart from pumping water on to the reassembled beltway or through the converted discharge line, there was another way of discharging water from the escapeway before the longwall was put into operation. Inspector Clark testified that the operator could have discharged water from the escapeway by running a discharge line, up to 1,000 feet in length, from the escapeway to a discharge source in the Mudlick Mains, another section of the mine. Tr. V 290-91. The judge found that, after discussing the possibility with management, the inspector concluded that 1,000 feet was too great a distance to run a discharge line. 21 FMSHRC at 1239. The judge quoted the inspector as testifying: "We discussed if we could run it over to Mudlick, and there was no way. It was too far." *Id.*; Tr. III 90. However, it is not clear from this testimony whether the inspector concluded that it was too far or whether he was only reporting management's response that it was too far. On a subsequent day of the hearing, the inspector testified that it was management that responded that it was too far to run a discharge line to the Mudlick Mains. Tr. V 291-92. He also testified that the operator should have run a discharge line from the escapeway to the Mudlick Mains when it converted the discharge line back into a fresh water line prior to restarting the beltway. Tr. V 295-99. Based on the evidence, it does not appear that substantial evidence[4] supports the judge's finding that it was impractical to run a discharge line from the escapeway to the Mudlick Mains.

We further conclude that the judge erred in finding that Eagle Energy's failure to pump water out of the escapeway from the afternoon of August 31 to the afternoon of September 2 was mitigated because it did not have a means for pumping out the water. 21 FMSHRC at 1250. The operator lacked a way to pump out water because it had disconnected both its primary and secondary means of discharging water in order to facilitate its longwall move.[5] There is no

---

[4] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Midwest Material*, 19 FMSHRC at 34 n.5 (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

[5] When Eagle Energy dismantled the beltline on July 9, 1997, it did so with no apparent thought to an alternative means of disposing of escapeway water until the beltline would be reassembled after the longwall move. When this oversight resulted in a citation, Eagle Energy was the fortuitous benefactor of an inspector's insightful suggestion to convert the fresh water

evidence why the operator could not have reassembled the beltline and had it in operating condition before it reconverted the discharge line back to a fresh water line. The record evidence also does not refute the possibility that the operator could have run an additional discharge line to the surface, as it did with the existing fresh water line.

Despite the chronic water accumulation problems in the escapeway,[6] the operator made no attempt to abate accumulations in the escapeway from the afternoon of August 31 to the morning of September 1, even though it knew in advance that the discharge line and the beltline would both be unavailable for pumping during this time. The operator attempted unsuccessfully to restart the beltline on the morning of September 1, which would have allowed it to pump water out on the beltline.[7] *Id.* at 1237. When its attempt to restart the beltline failed, it had no alternative means of pumping out the water until the beltline was restarted on the afternoon of September 2 because it had chosen to disconnect the converted discharge line in order to facilitate its longwall move and because it chose not to run a discharge line to the Mudlick Mains. Thus, the means to abate the water accumulations cited on September 2 were within the operator's control but it chose not to use them when it decided to have both the discharge line and the beltline unavailable for pumping starting on the afternoon of August 31.

Under Commission precedent, an operator's failure to take remedial action within its control to abate a known hazard is an aggravating circumstance that supports an unwarrantable failure conclusion. *See New Warwick Mining Co.*, 18 FMSHRC 1568, 1574 (Sept. 1996) (holding operator's failure to abate known water accumulations was unwarrantable); *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1562 (Sept. 1996) (finding unwarrantable failure due to foreman's failure to abate known brake defect); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129-30 (July 1992) (affirming unwarrantable violation where operator failed to abate known

---

line into a discharge line for purposes of pumping out the water, which proved to be a cost-effective and simply solution. While the old adage "once burned, twice learned" comes to mind, such a lesson was apparently lost on Eagle Energy for they proceeded to reconvert the discharge line back to a fresh water line without a means to discharge escapeway water from an extremely wet mine.

[6] Production director Adkins testified that parts of the escapeway needed to be pumped at least three or four times a day and that, without pumping, the water would eventually reach the roof of the escapeway. Tr. IV 174, 274, 277. Because of the history of water accumulation problems in the escapeway and the need for frequent pumping, the record fails to support the operator's argument that it "had no reason to expect that water would accumulate in the escapeway to hazardous depths" between the time it disconnected the discharge line on August 31 and the time it planned to resume pumping water onto the beltline on September 1. EE Br. at 12.

[7] When operational, the beltline could be used to pump water out of the escapeway even when no coal was being produced on the section. Tr. V 141-42.

electrical hazard); *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1604,1607-08 (Aug. 1994) (affirming unwarrantable failure where operator aware of brake malfunction but failed to remedy problem). Accordingly, as a matter of law, the operator's elimination of all means of pumping water from the afternoon of August 31 to the afternoon of September 2 was an aggravating rather than mitigating circumstance for unwarrantable failure purposes.[8]

In addition, substantial evidence does not support the judge's conclusion that the operator's failure to abate the violative condition was mitigated by two roof falls at the mine. The roof falls were cleared by the evening of August 29, well before the operator decided to reconvert the discharge line back to a fresh water line on the afternoon of August 31. 21 FMSHRC at 1250. The record is void of any evidence indicating that the roof falls impeded the operator from addressing the cited water accumulations in the escapeway.

On remand, the judge must reconsider his negative unwarrantable failure determination in light of the operator's lack of abatement efforts, and consider as an aggravating factor that the operator did not run a discharge line to the Mudlick Mains. In his analysis, the judge should also consider the operator's lack of a means to pump water in the escapeway during the period in question as an aggravating, not a mitigating, factor, and take into account that the roof falls were not a mitigating circumstance.

---

[8] Contrary to Chairman Verheggen's suggestion (slip op. at 19), we are not asking the judge to second guess the efforts of Eagle Energy to use the belt as a means of discharging water. Rather, we are asking the judge to consider whether the operator, knowing the mine would be understaffed over the Labor Day weekend, was reckless in deciding to rely solely on the yet to be assembled belt to remove well documented excess water accumulations in the escapeway. Apparently assuming that no problems would arise during the complex operation of reassembling the belt, Eagle Energy decided to forego any alternative means of water removal, such as an additional discharge line to the surface or to another section. But, as complicated endeavors often do, difficulties arose and a day and a half was lost (September 1 through the morning of September 2) while Eagle Energy struggled with numerous problems in reassembling and operating the belt. We find it significant that during this day-and-a-half period, Eagle Energy made no attempt to use other methods to remove the excess water from the escapeway, such as reconnecting the water discharge line or installing an additional discharge line. The question here is not whether the judge failed to consider as an aggravating factor the fact that Eagle Energy was unsuccessful in preventing hazardous water accumulations. The question is whether the judge failed to consider as aggravating Eagle Energy's failure to have an alternative method of discharging water readily available in case of problems in assembling the belt and, when such problems arose, its failure to use other methods to remove the excess water.

2. Other Factors

We conclude that the judge also erred by failing to consider the obviousness and danger[9] posed by the cited accumulations in his unwarrantable failure analysis. *See BethEnergy Mines*, 14 FMSHRC at 1243 (finding violation unwarrantable where unsaddled beams "presented a danger" to miners entering the area); *Windsor Coal Co.*, 21 FMSHRC 997, 1006-07 (Sept. 1999) ("The judge should . . . have addressed whether the accumulations were obvious."). On remand, the judge must explicitly consider these factors in his unwarrantability analysis.

Substantial evidence supports the judge's finding (21 FMSHRC at 1245, 1249) that the accumulations cited on September 2 were extensive. On review, Eagle Energy does not dispute the judge's finding in this regard. The four accumulations extended from 40 to 120 feet in length and from up to 15 inches or more in depth. *Id.* The judge's finding that the violative condition was extensive "fairly detracts" from his negative unwarrantable failure finding. *Midwest Material*, 19 FMSHRC at 34 n.5 (citation omitted).

The judge's finding (21 FMSHRC at 1249) that the operator was on notice of the need for greater compliance efforts is also supported by substantial evidence. On review, Eagle Energy does not dispute the judge's finding regarding notice. The record evidence shows that the mine had chronic water accumulation problems. The operator had received seven citations for water accumulations in the 10 Left escapeway between May and August 1997. Gov't Exs. 28-31, 38-40. The operator's weekly examination books showed water accumulations in the escapeway on August 15, 22, and 29. The operator was also warned by MSHA in July and August about its water accumulation problems. Tr. III 12-16, 25.

However, we conclude that the judge erred by considering as a mitigating factor that MSHA did not find unwarrantable failure when issuing previous citations for water accumulations in the same escapeway. 21 FMSHRC at 1249. Under Commission precedent, prior citations, even if not designated as unwarrantable, place operators on notice that greater compliance is required. *Peabody Coal*, 14 FMSHRC at 1263-64; *Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997). Accordingly, rather than being a mitigating factor, the judge should have treated Eagle Energy's previous citations as an aggravating factor for the purposes of notice of the need for greater compliance efforts. In light of this precedent, the judge's finding that the

---

[9] We conclude that the judge erred in considering as a mitigating circumstance that only management personnel worked at the mine over the Labor Day Weekend, from August 30 through September 1. Under section 3(g) of the Mine Act, 30 U.S.C. § 803(g), a miner is defined as "any individual working in a coal or other mine" and includes both supervisory and non-supervisory employees. *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1532 (Aug. 1990). Thus, the preeminent statutory concern of the Mine Act, the health and safety of miners (30 U.S.C. § 801(a)), covers both management personnel and rank-and-file employees. Accordingly, we conclude that a violation of section 75.380(d)(1) is not mitigated because it endangers management, as opposed to rank-and-file, personnel.

operator was on notice of the need for greater compliance efforts "fairly detracts" from his negative unwarrantable failure determination. On remand, the judge must reanalyze the unwarrantable failure issue, taking into consideration the operator's prior water accumulation citations as an aggravating factor.

We agree with the judge (21 FMSHRC at 1245) that the record is unclear on how long the water accumulations were in violation of section 75.380(d)(1) prior to being cited by the inspector on September 2.[10] Thus, it is not clear whether the duration of the violation was an aggravating factor. However, the Commission has found unwarrantable failure when the duration of the violation was unclear. *See Jim Walter Res., Inc.*, 19 FMSHRC 480, 487, 489 (Mar. 1997) (holding that unwarrantable failure can be found even when duration is in question).

B. Characterization of Conduct

We conclude that the judge erred in predicating his negative unwarrantable failure determination on the fact that, when recording the violation on the citation form, the MSHA inspector checked the "high negligence" box rather than the "reckless disregard" box. 21 FMSHRC at 1248. The Commission has defined unwarrantable failure as "aggravated conduct constituting more than ordinary negligence," and has characterized such conduct not only as "reckless disregard" but also as "indifference" or a "serious lack of reasonable care." *Emery*, 9 FMSHRC at 2003-04. Thus, contrary to the judge's analysis, a finding of unwarrantable failure does not require a finding of "reckless disregard." The Commission has also previously recognized that a finding of high negligence suggests unwarrantable failure. In *Eastern Associated Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991), the Commission stated: "'Highly negligent' conduct involves more than ordinary negligence and would appear, on its face, to suggest an unwarrantable failure. Thus, if an operator has acted in a highly negligent manner with respect to a violation, that suggests an aggravated lack of care that is more than ordinary negligence." In addition, the Commission has found unwarrantable failure for violations, like the violation in the instant case, that were designated as "high negligence" on the citation form. *See Cyprus Emerald*, 20 FMSHRC at 793, 813-15 and 17 FMSHRC 2086, 2100, 2104 (Nov. 1995) (ALJ) (affirming unwarrantability finding for refuse pile violations checked as "high negligence" on citation form). On remand, the judge must reconsider, consistent with Commission precedent, whether the operator's highly negligent conduct in this case amounts to an unwarrantable failure.

---

[10] Substantial evidence supports the judge's finding that the Secretary did not demonstrate that the water accumulations in the 10 Left escapeway noted in the weekly examination books during August were the same as the water accumulations in the escapeway cited on September 2. It is undisputed that water accumulations could occur rapidly in the mine. In addition, witnesses for the operator testified that pumping had occurred in the escapeway up to August 31. Tr. IV 167-70; Tr. V 100-01. In light of these facts, we do not think the operator's failure to note any remedial efforts in the weekly examination books conclusively shows that no pumping occurred or that the water accumulations before August 31 were the same as those found on September 2.

In sum, we remand this matter for reconsideration of the judge's negative unwarrantable failure finding. The judge must reconsider the operator's lack of abatement efforts, including his finding that it was impractical to run a discharge line to the Mudlick Mains, that the operator's lack of a means to pump water in the escapeway during the period in question was an aggravating factor, and taking into account that the roof falls were not a mitigating circumstance. The judge must also consider the danger factor, taking into account that the danger was not mitigated because only management personnel worked at the mine during the period in question. In addition, he must consider the obviousness of the cited accumulations. The judge must also explain how the operator's notice of the need for greater compliance efforts and the extensiveness of the violation affect the unwarrantable failure determination. Finally, the judge must reconsider the effect of the operator's highly negligent conduct on the unwarrantable failure issue.

III.

Conclusion

For the foregoing reasons, we vacate the judge's determination that Eagle Energy's violation of section 75.380(d)(1) was not the result of its unwarrantable failure, and the assessed civil penalty. We remand for further analysis consistent with this opinion, and reassessment of the civil penalty.

____
James C. Riley, Commissioner

____
Robert H. Beatty, Jr., Commissioner

Commissioner Jordan, concurring:

Although Eagle Energy was well aware that it had a longstanding water accumulation problem in its escapeway, it nonetheless made the deliberate decision to forego any means of discharging water in order to facilitate its longwall move. Its utter indifference to the safety concerns posed by the considerable accumulation of water that plagued the mine is a classic example of unwarrantable failure.

For the reasons stated below, I would reverse the judge's finding that the escapeway violation was not the result of Eagle Energy's unwarrantable failure. However, to avoid the effect of a divided decision, which would allow the judge's finding to stand, I join Commissioner Riley and Commissioner Beatty in remanding this case for further consideration.

Eagle Energy does not dispute the judge's finding that it had been on notice for a lengthy period of time regarding the water accumulation problem it faced in its mine. This finding is supported by substantial evidence. As Commissioner Riley and Commissioner Beatty acknowledge, it had received seven water accumulation citations in the escapeway between May and August 1997, which my colleagues correctly conclude constituted an aggravating factor in terms of the unwarrantable failure analysis. Slip op. at 10, citing Gov't Exs. 28-31, 38-40. Eagle Energy's own weekly examination books indicated water accumulations in the escapeway on August 15, 22, and 29. 21 FMSHRC 1235, 1242 (Nov. 1999) (ALJ). Its own witness, John Christopher Adkins, Eagle Energy past president and the director of production for Massey Coal Services (which had provided technical services to Eagle Energy), testified that "[t]his is a wet mine. This is the wettest mines [sic] I've ever been in." Tr. IV 275.

In addition, Inspector Albert "Benny" Clark had discussed the problem with mine officials on at least two occasions, July 10 and August 13. Tr. III 12-16, 25. Clark testified that during his conversation in July, Jeff Bennett, Eagle Energy's safety director, asked him not to issue a 104(d)(1) citation and Stanley Edwards, Eagle's superintendent, told Clark that "this would never happen again . . . if [he] changed it to a 104(a) citation." Tr. III 14. And yet, Edwards was wrong. The water accumulation problem was not dissipated, despite his promise, and the inspector found another accumulation in the escapeway when he returned on September 2.

Moreover, in his deposition, Edwards admitted that, because of other problems at the mine, the removal of water from the escapeway was "real low on [its] priority list." Gov't Ex. 45 at 92 (Dep. Tr. of Stanley Edwards). The Commission has made clear that when an operator has notice of a violation, the level of priority it places on abatement is a proper factor to consider in determining whether the violation was a result of unwarrantable failure. *Consolidation Coal Co.*, 22 FMSHRC 328, 333 (Mar. 2000), *appeal docketed*, No. 01-1228 (4th Cir. Feb. 21, 2001) ("*Consol*"). In fact, the attitude of the operator in the *Consol* case, in which we reversed the judge's finding that the violation was not the result of unwarrantable failure, is strikingly similar to the nonchalance displayed by Eagle Energy. In *Consol*, the operator failed to respond

effectively to rectify a violative condition (inadequate roof support) of which it was aware. *Id.* at 332. Our rationale for reversing the judge in *Consol* is apt in the instant case as well:

> [O]nce Consol became aware that it was in violation of the regulation and its roof control plan, it was under an obligation to expeditiously remedy the condition that gave rise to the citation. Relegating the request for additional posts to the routine supply system so as not to interfere with production was a conscious decision by mine management. Attaching no special significance to an order for materials necessary to bring the mine into compliance with a mandatory safety standard is an indication that this operator should reexamine its priorities. . . . Taken together, the company's actions reflect the kind of indifference to a violation that constitutes an unwarrantable failure to comply with the regulation.

Id. at 333.

Commissioners Riley and Beatty agree that the judge's finding that Eagle Energy was on notice of the need for greater compliance efforts is supported by substantial evidence. Slip op. at 10. Moreover, they agree that the Secretary has met her burden of proving some of the other *Mullins* factors. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994). For instance, they agree that substantial evidence supports the judge's finding that the accumulations were extensive. Slip op at 9-10. Regarding abatement efforts, they recognize that Eagle Energy "had no alternative means of pumping out the water until the beltline was restarted . . . because it had chosen to disconnect the converted discharge line in order to facilitate its longwall move and because it chose not to run a discharge line to the Mudlick Mains. Thus, the means to abate the water accumulations . . . were within the operator's control but it chose not to use them . . . ." *Id.* at 8. And yet, despite this acknowledgment, my colleagues are reluctant to reverse the judge's determination that the violation was not the result of unwarrantable failure.

Reversal is warranted based upon the factors discussed above, and upon examination of the remaining *Mullins* factors. In discussing the issue of danger, for example, my two colleagues correctly conclude that the judge was wrong to consider as a mitigating circumstance the fact that only management personnel worked at the mine from August 30 through September 1. *Id.* at 10, n.9. Regarding this issue, the record compels only one conclusion – that the accumulations had created a dangerous condition. As the judge found, they were located in the primary escapeway by which miners would escape in an emergency. 21 FMSHRC at 1239-40, 1244. They were large, extending up to 120 feet in length (*id*. at 1242), and ranging up to 15 or more inches in depth (*id*.; Tr. III 209). They contained muddy water and had slick, uneven bottoms. 21 FMSHRC at 1239, 1240, 1243, 1246. There were pieces of wood floating in the water, and coal deposits and discharge lines sticking out of the water. 21 FMSHRC at 1242. Both Clark and MSHA supervisor Terry Price testified that the accumulations posed a tripping hazard (Tr. II 201;

Tr. III 218, 232), and Price stated repeatedly that "you couldn't see the bottom" (Tr. III 211, 218). The potential safety problems caused by these conditions were exacerbated, according to assistant superintendent Harry Walker, who testified (in agreement with Inspector Price), that there were greater safety concerns during a longwall move. Tr. V 96.

The record also compels the conclusion that the water accumulations were obvious. As I have noted, they were extensive and occurred several times along the escapeway. In addition, production director Adkins testified that he traveled along the escapeway on September 1, the day before the accumulations were cited. Tr. IV 177. Given that some of the accumulations were at least 15 inches deep on the morning of September 2, and given the rate of accumulation of approximately eight inches every 24 hours (21 FMSHRC at 1244-45), it should have been obvious to Adkins when he traveled the escapeway on September 1 that the accumulations were rapidly approaching hazardous conditions in an area known for its chronic accumulation problems.

Regarding duration, the judge credited testimony by production director Adkins, not challenged on review by Eagle Energy, that water accumulated in the escapeway at depths of approximately eight inches per day.[1] *Id.* Based on this testimony, the water in the escapeway must have been permitted to accumulate for approximately two days in order to have reached the 15 inches depth on September 2. The water must have reached several inches to a foot in depth on the previous day when production director Adkins traveled along the escapeway.[2] Tr. IV 177. Although it is not clear from the record when the cited accumulations became violative, given the chronic water problems in the escapeway and the rapidly growing accumulations on September 1, the evidence compels the conclusion that the operator knew for over a shift that the water accumulations were either hazardous or rapidly approaching hazardous conditions.

Despite this record evidence, my colleagues send the case back to the judge. But I see no need for a remand when there is agreement that the operator's conduct was highly negligent, that several of the *Mullins* factors were satisfied, and that the factors the judge found mitigating were either not mitigating or, as in the case of abatement, were aggravating. Slip op. at 7-11.

In *Jim Walter Resources, Inc.*, 19 FMSHRC 480 (Mar. 1997), a case in which the record evidence was similarly compelling, we reversed the judge's finding that three coal accumulation violations were not the result of unwarrantable failure, explaining that:

---

[1] Later in the hearing, Adkins tried to recant this testimony by claiming the rate of accumulation was less than eight inches per day. Tr. IV 226. I find that the judge implicitly rejected his recantation by crediting his eight inches per day testimony. 21 FMSHRC at 1244-45.

[2] Adkins testified that the water in the escapeway on September 1 was not in excess of his boot height. Tr. IV 177.

> [o]ur review of this record as a whole - particularly the undisputed evidence regarding the prior warnings and the extensive and obvious nature of the violation - leads us to conclude that there is not substantial evidence to support the judge's finding that no aggravated conduct occurred. In such a case, the proper course of action is reversal, not remand.

19 FMSHRC at 489 n.8.

Notwithstanding the well-recognized role of the trial judge as the initial finder of fact, the law is equally clear that when the evidence supports only one conclusion, a remand to the judge serves no purpose. *See Am. Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (affirming judge's finding of no unwarrantable failure, despite judge's error in not addressing some of the Secretary's evidence). There are simply instances when an appellate body, faced with a record as staggering as the one in this case, need not prolong litigation by insisting on a remand. *See Walker Stone Co. v. Sec'y of Labor*, 156 F.3d 1076, 1085 n.6 (10th Cir. 1998) (court rejects operator's contention that the Commission erred in not remanding case when essential facts were not in dispute).[3]

The opinion of my colleagues Commissioners Beatty and Riley has correctly established that Eagle Energy was highly negligent and on notice of the need for greater compliance, that the accumulations were extensive, and that the operator's elimination of a way to pump water for three days was an aggravating factor. Since I concur with these determinations, this is now the law of the case. Given that the matter is currently in this posture, and taking into account the additional record evidence regarding danger, obviousness, and duration, a remand to the judge on the question of unwarrantable failure is simply not necessary. Looking at the record as a whole, there is not substantial evidence to support the judge's determination that no aggravated conduct occurred.

The use of the unwarrantable failure 104(d)(1) order as an enforcement tool was included in the Mine Act to remedy precisely the type of scenario that occurred at the Eagle Energy mine: an operator who is repeatedly warned, receives multiple citations, and yet is still not motivated to cure a safety problem. Eagle Energy's cavalier indifference to the water accumulations at its mine constitutes aggravated conduct.

---

[3] In *Donovan v. Stafford Construction Co.*, 732 F.2d 954 (D.C. Cir. 1984), the court, in reversing the Commission's decision finding no discrimination, considered the issue of whether an operator had satisfied its burden of proving its affirmative defense in a discrimination case, when neither the judge nor the Commission had addressed the question. Explaining that "[s]ince all the evidence bearing upon the issue is contained in the record before us, . . . we believe that a remand on this issue would serve no purpose. This is particularly so in light of our ultimate holding that only one conclusion would be supportable." *Id.* at 961.

For the reasons stated above, I would reverse the decision of the judge and find that the violation was the result of the operator's unwarrantable failure. Nonetheless, to avoid a divided decision, I join in the opinion remanding the case for further consideration.

____
Mary Lu Jordan, Commissioner

Chairman Verheggen, dissenting:

For the reasons I set forth below, I would affirm Judge Feldman's finding that Eagle Energy's S&S violation of section 75.380(d)(1) was not the result of the operator's unwarrantable failure to comply with the standard. I therefore dissent from my colleagues decision to remand the unwarrantable failure question.

In determining that Judge Feldman properly found that the Secretary failed to prove that Eagle Energy's violation of section 75.380(d)(1) was unwarrantable, I am guided by several well established principles. First is the fundamental principle that the Mine Act imposes upon the Secretary the burden of proving an alleged violation by a preponderance of the credible evidence. *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989). A logical corollary to this rule of law is that if a judge finds such proof lacking, that is the end of the matter — the judge is under no obligation to go any further.

Second is the substantial evidence test by which the Commission is statutorily bound when reviewing an judge's findings of fact. 30 U.S.C. § 823(d)(2)(A)(ii)(I); *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994). My colleagues state that "substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion,'" and that the Commission "must consider anything in the record that 'fairly detracts' from the weight of the evidence that supports a challenged finding." Slip op. at 7 n.4 (citations omitted). I note further that under the substantial evidence test, the Commission may not "substitute a competing view of the facts for the view [an] ALJ reasonably reached." *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983). As the Fourth Circuit explained when overturning a Commission decision that had reversed a judge's findings in a discrimination case:

> The fact that evidence exists in the record to support [the complainant's] position is not determinative. Rather, the Commission's review was statutorily limited to whether the ALJ's findings of fact were supported by substantial evidence. The "'possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'"

Wellmore Coal Corp. v. FMSHRC, No. 97-1280, 1997 WL 794132, at *3 (4th Cir. Dec. 30, 1997) (citations omitted).

Turning to the issue presented here on appeal, for the reasons set forth below, I find that substantial evidence supports the judge's unwarrantable failure determination. Looking at all the relevant facts and circumstances of this case, first, I note that as to duration, I agree with my colleagues that the record does not support a finding one way or the other as to how long the cited water accumulations existed. *See* slip op. at 11. Thus, the Secretary failed to meet her

burden to show that the duration of the water accumulation was an aggravating factor. I also find, however, as do my colleagues, that substantial evidence supports the judge's findings that the accumulations were extensive and that Eagle Energy had notice of the need for greater compliance efforts. *See id*. at 10.

I differ from my colleagues, however, in my consideration of the judge's findings on mitigating factors. It is clear from the record that Eagle Energy's management personnel were anticipating using the belt to dewater the area of the mine where they were installing the longwall. *See* 21 FMSHRC at 1240. But they encountered serious problems with keeping the belt up and running. It pulled apart at several locations when started up on September 1. *Id*. Attempts to repair the belt that day were unsuccessful. *Id.* An attempt to start up the belt during the morning of September 2 was also unsuccessful. *Id*. It was not until the afternoon of September 2 that the belt was successfully repaired and available for use in dewatering the mine. *See* 21 FMSHRC at 1243.

I find the problems Eagle Energy encountered with its primary mode of dewatering the mine the single most important mitigating factor presented by this record, in addition to the fact that the operator was making every effort to repair the belt. With the benefit of hindsight, it is easy for my colleagues to speculate that "the operator could have run an additional discharge line to the surface" or "could . . . have reassembled the beltline and had it in operating condition before it reconverted the discharge line back to a fresh water line." Slip op. at 8. Certainly, in retrospect the operator's reliance on the belt to dewater the mine was misplaced. But this is clear *only* in retrospect. In light of the operator's efforts to get the belt running, it is hardly fair to ask the judge to second guess their efforts on remand. I find that Eagle Energy's efforts support the judge's conclusion that the operator's conduct, though negligent, did not rise to the level of reckless disregard.

Further, I find the judge's decision reasonable in light of the fact that the mine was understaffed at the time the water accumulated. I disagree with my colleagues' conclusion that "the judge erred in considering as a mitigating circumstance that only management personnel worked at the mine over the Labor Day Weekend" because the violation "is not mitigated because it endangers management, as opposed to rank-and-file [miners]." *Id*. at 10 n.9. I believe my colleagues miss the point, which is that at the time the water accumulated, there was a shortage of workers in the mine, and thus fewer miners available to bring up the belt. The shortage of workers could only have been exacerbated by the confusion and strain on resources created by the roof fall that occurred soon before the cited violation. 21 FMSHRC at 1249-50.

In sum, I conclude that a reasonable trier of fact could conclude from this record that Eagle Energy's violation of section 75.380(d)(1) was not the result of the operator's unwarrantable failure. I recognize, of course, that the operator's actions were negligent. But the record provides support for a finding — a judgment call — that its negligence was not aggravated. Our obligation is to uphold such judgment calls, not second guess them. Accordingly, I would affirm the judge's decision.

____
Theodore F. Verheggen, Chairman

Distribution

David J. Hardy, Esq.
Maris E. McCambley, Esq.
Jackson & Kelly, PLLC
P.O. Box 553
Charleston, WV 25322

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

Administrative Law Judge Jerold Feldman
Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, VA 22041