FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20006

March 27, 2000

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. WEVA 98-111
CONSOLIDATION COAL COMPANY	:	

BEFORE: Jordan, Chairman; Marks, Riley, and Verheggen, Commissioners[1]

DECISION

BY: Jordan, Chairman; Marks, and Riley, Commissioners

This is a 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"). At issue is whether the violation, charged in the citation issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") against Consolidation Coal Company ("Consol"), was the result of the operator's unwarrantable failure. Administrative Law Judge Jacqueline Bulluck concluded that it was not (21 FMSHRC 612 (June 1999) (ALJ)), and the Secretary appealed. For the reasons that follow, we reverse the judge's determination and remand the case for assessment of the appropriate penalty.

I.

Factual and Procedural Background

Consol owns and operates Robinson Run No. 95, an underground coal mine in West Virginia. 21 FMSHRC at 613. On January 15, 1998, MSHA inspector Charles Thomas was conducting a Triple-A inspection at the mine. *Id.* While in the 12-D section of the mine to check on safety equipment, Thomas noticed the absence of any centrally located supplementary roof support, including posts, caps, wedges, and a saw. *Id.* As a result, Thomas spoke with Consol day shift foreman Kevin Carter. *Id.* Thomas asked Carter about the location of the supplementary

[1] Commissioner Beatty recused himself in this matter and took no part in its consideration.

roof support and number of roof posts. *Id.* at 613-14; Tr. 14. According to Carter, Thomas told him "to count your posts." Tr. 96, 113-14. Carter told Thomas that he would "take care of it." 21 FMSHRC at 614. As Thomas left the mine, accompanied by miner safety representative Dave McCullough, Thomas also spoke with Consol safety director Robert Church and told him that attention was needed to address supplementary roof support in the 12-D section. *Id.*; Tr. 15.

Subsequently, during his shift on January 15, Carter counted the posts and caps along the supply track and found that there were only 11. 21 FMSHRC at 614. Carter then spoke with mine foreman Tom Harrison and requested additional posts and other roof support materials. *Id.* Around 3:30 or 4:00 that afternoon, Harrison ordered the posts from the supply yard, which is located about 10 miles from the 12-D section. *Id.*

MSHA inspector Thomas returned to the mine to continue his Triple-A inspection on January 17 during the midnight shift, 2 days and four shifts after he left the mine on January 15. *Id.* Consol foreman Frank Slovinsky was substituting for the regular foreman of section 12-D. *Id.* Thomas asked Slovinsky where the emergency roof supports were located. *Id.* Slovinsky responded that they should be in the tool car.[2] *Id.*; Tr. 15. When the posts could not be located there, the two searched along the supply track outby four crosscuts of the section. 21 FMSHRC at 614; Tr. 25. They eventually located 11 posts and some cap pieces and wedges, but never found a saw. 21 FMSHRC at 614; Tr. 26.

Inspector Thomas then issued Order No. 4888994 charging Consol with a violation of 30 C.F.R. § 75.214 for failing to maintain a supply of supplementary roof support material at a readily accessible location within four crosscuts of the 12-D section. 21 FMSHRC at 614. Section 75.214 provides:

> **Supplemental support materials, equipment and tools.**
>
> (a) A supply of supplementary roof support materials and the tools and equipment necessary to install the materials shall be available at a readily accessible location on each working section or within four crosscuts of each working section.
>
> (b) The quantity of support materials and tools and equipment maintained available in accordance with this section shall be sufficient to support the roof if adverse roof conditions are encountered, or in the event of an accident involving a fall.

Consol's roof control plan for the Robinson Run mine further specified that "[t]he quantity of

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[2] It was customary at the Robinson Run mine to maintain supplementary roof support for a working section on a "sled" or tool car at the power center or track entry near the section. 21 FMSHRC at 613 n. 2; Tr. 16-17.

supplementary roof support material required by [section] 75.214(b) shall consist of a minimum of twenty (20) posts of proper length with sufficient cap pieces and wedges." 21 FMSHRC at 615.

The inspector designated the violation as significant and substantial (S&S) and alleged that it was the result of Consol's unwarrantable failure. *Id.*; Ex. P-1. The violation was abated between 3:30 and 5:00 a.m. the following morning when miners were able to locate additional posts along the supply and main tracks, and stored 20 posts, along with wedges, cap pieces, and a saw, in the No. 11 crosscut. 21 FMSHRC at 614.

Consol contested the citation, and a hearing was held before an administrative law judge. The judge held that it was clear that Consol had failed to maintain a supply of 20 posts and related materials at a readily accessible location in the 12-D working section or within four crosscuts. *Id.* at 615. The judge further concluded that the violation was S&S. *Id.* at 616. With regard to unwarrantable failure, the judge noted that Consol was aware of the requirements of the standard and that, on January 15, it had been put on notice that remedial efforts were necessary to achieve compliance. *Id.* at 617. The judge found that, on January 15, foreman Carter and general mine foreman Harrison acted promptly in ordering additional supplies. *Id.* The judge further reasoned that "Consol assumed the risk of being cited by failing to ensure delivery to the section during the supply crew's first available shift, i.e., the day shift of January 16th." *Id.* However, the judge concluded that Consol's lack of follow-up until the midnight shift on January 17 did not constitute intentional misconduct, recklessness, or a serious lack of reasonable care, amounting to more than ordinary negligence and, therefore, was not the result of Consol's unwarrantable failure. *Id.*

II.

Disposition

The Secretary argues the record compels a finding that the violation was due to Consol's unwarrantable failure. S. Br. at 7. She avers that MSHA inspector Thomas notified the day shift foreman, the general foreman, and the safety director at the mine about the problem as well as the need for corrective action, thus Consol was on notice that greater efforts were necessary to address the cited condition, yet no meaningful effort was made to remedy the situation. *Id* at 7-10,12-13. The Secretary also asserts that the cited condition posed a high degree of danger in the event of a roof fall. *Id.* at 13-17. Finally, the Secretary argues that Consol's efforts to correct the violation were ineffective, and the failure of three members of management to follow through with corrective action before a citation issued demonstrated an attitude of indifference toward abatement of the condition and the hazard it created. *Id.* at 10, 17-24.

In response, Consol argues that substantial evidence supports the judge's conclusion that the violation was not the result of its unwarrantable failure. C. Br. at 6-7. Consol further argues that the Secretary is essentially asking the Commission to overturn the judge's credibility resolutions. *Id.* at 8-9. Consol argues that management reacted to the inspector's January 15

comment concerning the supplemental roof post prudently and in a good faith manner. *Id.* at 9-11. Consol further notes that there were other means of roof support available and that the 12-D section where the violation occurred had a history of good roof conditions. *Id.* at 11. The delay in getting the supplemental roof posts, Consol contends, was inadvertent, unintentional, and unavoidable. *Id.* at 13. Finally, Consol argues that there was no prior history of similar violations; rather, Consol made a good faith effort to maintain posts in the 12-D section but they were removed for other purposes. *Id.* at 13-14.

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. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). The Commission "has recognized that a number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure, such as the extensiveness of the violation, the length of time that the violative condition has existed, the operator's efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance." *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994) (*citing Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992)).

Not all of the *Mullins* criteria are applicable to the violation at issue. However, a determination of unwarrantable failure is amply supported by the relevant criteria. It is undisputed that, when he was at the mine on January 15, MSHA inspector Thomas informed several Consol officials, including the day shift foreman and safety director, that they needed to check the number of roof posts, caps, and wedges in the 12-D section to comply with the mine roof control plan. However, neither day shift foreman Carter nor safety director Church took action to ensure the violative condition was remedied.

Ideally, Carter should have immediately addressed the violative condition brought to his attention by searching for the required safety equipment and materials. Instead, Carter contacted mine foreman Harrison to have posts ordered from Consol's general supply. Carter's trial testimony explaining his actions is revealing:

> Q. Is there some reason why you just didn't drop everything and go out looking for posts elsewhere?

A. We were in production at that time and it wasn't any emergency situation that presented itself. I did have eleven . . . to use, and we have good top conditions, so I didn't see any reason to stop everything to get nine posts.

Tr. 100.

Harrison, in turn, treated Carter's request for the supplementary roof support as a routine supply request. As Harrison explained in his hearing testimony, Carter "indicated to me that as far as the law is concerned he needed a few more [posts], but that he did have posts on the section, so it didn't [s]eem to be urgent to me." Tr. 136-37. Harrison admitted that he could have had a "special supply crew" assigned to gather the posts but, "[i]t's just not as efficient . . . ." Tr. 137. While obtaining more posts through the normal supply chain should have put them in place on January 16, inexplicably the posts were not delivered. Carter was present on the day shift on January 16 but had no explanation for the delay in the delivery of the posts. Tr. 120-21. More significantly, he took no action on January 16 to inquire about the whereabouts of the posts or to ensure prompt shipment of the posts once it was apparent that they had not been received.

In short, Consol failed to respond effectively to rectify a violative condition of which it was aware. Notwithstanding the passage of four intervening shifts after inspector Thomas' initial admonition, Consol failed to place twenty posts at a central location to serve as supplementary roof support as required. Consol now appears to believe that "good intentions" should be enough to shield the company from an unwarrantable charge. Good intentions, however, and good faith are not the same. Good faith requires vigilance about one's responsibilities, commitment to finding the resources to get the job done, and accountability for failure.

While the record shows Consol officials made some effort to address the violation, clearly their efforts were inadequate and by January 16, it should have been evident that greater efforts were needed to correct the problem. However, no further action was taken because neither Carter, Church, nor Harrison saw any urgent need to eliminate the violative condition for which Consol was later cited.

The inadequacy of Consol's response to finding an insufficient number of posts on January 15 is in stark contrast to its response when it discovered a similar problem on December 15, 1997. On the prior occasion, Carter made an entry into the pre-shift examination log when it was ascertained there were insufficient posts on the working section, and the problem was eliminated by the next shift. Tr. 93-96; R. Ex. 1. In contrast, on January 15, after inspector Thomas alerted Carter to the shortage of posts in the 12-D section, Carter did not enter the shortage in the log so other foremen on subsequent shifts could ensure that remedial action was taken. Thus, on the midnight shift of January 17, foreman Slovinsky was not even aware of the hazard of inadequate supplementary roof support. Understandably, he made no attempt to address or alleviate the violative situation.

We have held that, "[w]here an operator has been placed on notice of [a] . . . problem, the level of priority that the operator places on addressing the problem is a factor properly considered in the unwarrantable failure analysis." *Jim Walter Resources, Inc.*, 19 FMSHRC 480, 487 (Mar. 1997). By January 15, 1998, Consol was specifically alerted to the presence of a violation. Thus, by January 17, when the citation was issued, Consol had clearly been put on notice that greater efforts were needed to comply with the regulation. The Commission has, in a prior case, concluded that the passage of one day, following an MSHA inspector's informing an operator of an accumulation problem, constituted unwarrantable failure because the operator's "allowing the accumulation to continue to exist established its aggravated conduct . . . . " *Southern Ohio Coal Co.*, 12 FMSHRC 1498, 1502-03 (Aug. 1990) ("*SOCCO*"). *See also Mid-Continent Resources, Inc.*, 16 FMSHRC 1226, 1233 (June 1994) (failure to address coal accumulations contained in examination reports for two shifts constituted unwarrantable failure). Here, the violation was in existence for two days after the inspector put the operator on notice that he would be checking on the number and location of posts. We also find relevant Carter's concession that he was aware of the existence of a violative condition at the time the inspector gave him the head's up to check his posts.[3] Carter admitted to Thomas even then that the posts were not centrally located as required, but were scattered along the tracks.[4] Tr. 24, 37; *see* Tr. 100-101.

In sum, once 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. Failing to follow up the inspector's admonition in such a way as to insure that the request for required roof control supplies did not get lost in the company's own bureaucracy is inexcusable. Finally, nothing in the record suggests that anyone was held accountable for this error. Taken together, the company's actions reflect the kind of indifference to a violation that constitutes an unwarrantable failure to comply with the regulation.

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[3] Although the dissent attempts to distinguish this case from *SOCCO*, in part because there the violative condition had existed before the MSHA inspector alerted the operator (slip op. at 10), Carter's statement makes clear that he, too, had knowledge of a safety problem before being warned by the inspector.

[4] As the Commission has noted in prior cases, a foreman is held to a high standard of care. *LaFarge Construction Materials*, 20 FMSHRC 1140, 1145 (Oct. 1998), *citing Midwest Material Co.*, 19 FMSHRC 30, 35 (Jan. 1997).

III.

Conclusion

For the foregoing reasons, we reverse the determination of the judge and conclude that the violation was the result of Consol's unwarrantable failure. We remand the proceeding to the judge for assessment of an appropriate penalty.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Commissioner Verheggen, dissenting:

I find that substantial evidence[1] supports the judge's conclusion that the Secretary failed to prove that the violation of 30 C.F.R. § 75.214 was the result of Consol's unwarrantable failure. I would affirm her decision, and therefore I respectfully dissent.

The Commission has recognized that a number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure, such as the extensiveness of the violative condition, the length of time the violative condition has existed, the operator's efforts to eliminate the violative condition, and whether the operator has been placed on notice that greater efforts are necessary for compliance. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992). There is no dispute here that the operator was placed on notice by Inspector Thomas during his inspection on January 15, 1997. However, in finding that the Secretary failed to prove the operator's unwarrantable failure, the judge focused on two of the other factors — the length of time the condition existed and the operator's efforts to eliminate the condition — factors which are central to this case. Each of the judge's findings on these factors is supported by the record evidence.

First, with respect to the length of time the violative condition existed, substantial evidence supports the judge's conclusion that the condition had not existed since October of 1997, as the Secretary had alleged.[2] 21 FMSHRC 612, 617 (June 1999) (ALJ). Based on the pre-shift report of December 15, 1997, and the credited testimony of foreman Frank Carter, the judge concluded that supplemental posts had been available on the section prior to January 15, 1997. *Id.* Second, as to the efforts to eliminate the condition, the judge found "that foreman Carter and general mine foreman Harrison acted promptly on January 15th in assessing the deficiency and ordering additional supplies." *Id*. Carter testified that, upon being told by Inspector Thomas to count the posts, he did so, and thereafter called Harrison to order additional posts in accordance with established mine procedure. Tr. 96-97. Harrison testified that, upon receiving Carter's call, he ordered the posts from the supply yard for delivery to the section by the supply crew. Tr. 132-37.

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[1] 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)).

[2] According to the citation, "section [12D] has been in coal production since October of 1997 and no supply of supplementary roof support has been stored within four crosscuts of the face." Ex. P-1. Inspector Thomas testified that his decision to cite the operator for unwarrantable failure was based, at least in part, upon the reports of two miners that supplemental posts had never been available in section 12D since work began there in October 1997. Tr. 62-63.

The judge concluded that any lack of additional follow-up until the time of the citation on January 17 did not amount to unwarrantable failure. She reached this conclusion after crediting Carter's testimony that the lack of delivery on January 16 "did not cause him concern, but that no delivery on the next day shift, January 17th, would have merited his attention." 21 FMSHRC at 617.

A judge's credibility findings are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). There is no basis in this case to question the judge's credibility findings. Because the record contains "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion" (*Rochester & Pittsburgh*, 11 FMSHRC at 2163 (quoting *Consolidated Edison*, 305 U.S. at 229)), I would affirm the judge's decision.

Regrettably, the majority, in reversing the judge's decision, ignores the judge's factual findings in this case, including her credibility determinations. Worse still, the majority ignores the substantial evidence test altogether, resulting in an opinion that provides, in my view, a classic example of de novo factfinding by an appellate body, contrary to settled principles of law. *Island Creek Coal Co.*, 15 FMSHRC 339, 347 (Mar. 1993) ("It would be inappropriate for the Commission to reweigh the evidence in [any] case or to enter de novo findings based on an independent evaluation of the record."); *Wellmore Coal Corp. v. FMSHRC*, No. 97-1280, 1997 WL 794132 at *3 (4th Cir. Dec. 30, 1997) ("'[T]he ALJ has sole power to . . . resolve inconsistencies in the evidence'") (citations omitted), *cert. denied,* 119 S.Ct. 600 (1998). For example, notwithstanding the judge's contrary findings, the majority concludes that while Consol made some effort to address the violation, "clearly their efforts were inadequate and by January 16, it should have been evident that greater efforts were needed to correct the problem." Slip op. at 5.[3]

Time and again the courts have reminded us that this 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). While it is possible that a reasonable trier of fact could have concluded that Consol's remedial efforts in this case were so inadequate as to constitute "reckless disregard," this judge did not so find. The standard is not whether the judge could have reached a different conclusion under these facts, but whether there is sufficient

[3] The majority declares, with the benefit of hindsight, that "[i]deally, Carter should have immediately addressed the violative condition brought to his attention by searching for the required safety equipment and materials." Slip op. at 4. I agree. It does not follow, however, that the actions taken by Consol, insufficient as they may have been, amounted to a less than good faith effort, as the majority appears to suggest. *Id*. at 5 ("Consol now appears to believe that 'good intentions' should be enough to shield the company from an unwarrantable charge. Good intentions, however, and good faith are not the same.").

evidence in the record to support the judge's conclusion. *See Wellmore*, 1997 WL 794132 at *3 ("the Commission's review [is] statutorily limited to whether the ALJ's findings of fact [are] 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.'") (citation omitted).

If the majority believes the judge erred by failing to properly analyze the adequacy of Consol's remedial efforts, their only recourse under well settled Commission precedent would be to remand this case to the judge rather than substitute their own judgement for that of the judge. Notably, in another case where the adequacy of an operator's abatement efforts were questioned in similar circumstances, this Commission remanded the case to the judge. *See Windsor Coal Co.*, 21 FMSHRC 997, 1006 (Sept. 1999).[4]

The majority also finds the operator's conduct unwarrantable because the violative condition was not eliminated four shifts after it was placed on notice, citing as authority *Southern Ohio Coal Co.*, 12 FMSHRC 1498, 1502-03 (Aug. 1990) ("*SOCCO*"). My colleagues' reliance on *SOCCO* is misplaced. First, unlike this case, there was evidence in *SOCCO* that the violative condition, an accumulation of coal in a tailgate entry, had existed for some time prior to the operator being warned by an MSHA inspector. *Id*. More importantly, in *SOCCO*, the Commission was not reversing the judge's finding of unwarrantable failure, but *affirming* his finding on substantial evidence grounds. Those grounds included the operator's failure to take meaningful action to eliminate the accumulation after being notified one day earlier, as well as, among other things, the judge's credibility findings against the operator. *Id*.

It is one thing to find that the failure to remedy a violation after the passage of one day may support a finding of unwarrantable failure. But it is another thing altogether to find, as my colleagues do, that the passage of four shifts compels a finding of unwarrantable failure and reversal of the judge. Once again, my colleagues substitute their judgement for the judge's in this case, finding de novo that Consol's actions, or lack thereof, over four shifts constituted aggravated conduct. It is not our role, however, to reweigh the evidence or to enter findings based on an independent evaluation of the record. *Island Creek*, 15 FMSHRC at 347. Furthermore, as we have recently recognized, "[t]he possibility of drawing two inconsistent conclusions from the evidence does not prevent . . . [a] finding from being supported by substantial evidence." *Secretary of Labor on behalf of Clay Baier v. Durango Gravel*, 21 FMSHRC 953, 958 n.6 (Sept. 1999) (citing *Secretary of Labor ex rel. Walmsley v. Mutual Mining, Inc.*, 80 F.3d 110, 113 (4th Cir. 1996)).

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[4] In *Windsor*, I concluded that remand was unnecessary since it was obvious that the operator's "efforts were not 'adequate' — had they been, there would have been no violation. The question is rather whether [the operator's] efforts were *so* inadequate that the company's conduct rose to a reckless, aggravated level of negligence. The judge concluded they were not, and substantial evidence supports this conclusion." 21 FMSHRC at 1012 (Comm'r Verheggen, dissenting). The same holds true in this case.

For the foregoing reasons, I would affirm the judge's finding that Consol's violation was not unwarrantable. Accordingly, I respectfully dissent.

Theodore F. Verheggen, Commissioner

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