FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 02 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. CENT 2015-128
	:	CENT 2015-365
v.	:	CENT 2015-401
ALCOA WORLD ALUMINA, LLC	:	

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

DECISION

BY THE COMMISSION:

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). The dockets involve an accident that occurred at a mine operated by Alcoa World Alumina, LLC. While employees of a contractor were attempting to clean a pipe that was blocked by a rock-like substance ("scale"), caustic liquid began to spew from the pipe and burned one of the contractor's employees. Steven Alvarado, an employee of Alcoa, was in the area watching the contractor's employees at the time of the accident.

The Department of Labor's Mine Safety and Health Administration ("MSHA") issued a citation and two orders to Alcoa in connection with this accident. Citation No. 8778037 asserts that the operator, by failing to ensure that a pipe was empty, failed to block hazardous movement of liquid in the pipe.[1] Order Nos. 8778038 and 8778039 assert that the operator failed to ensure that all contractors were wearing proper personal protective equipment and that all contractors had safe access to the piping system. MSHA designated all three charged violations as significant and substantial ("S&S").[2] MSHA also designated the alleged violations as resulting from the operator's high negligence and unwarrantable failure to comply with mandatory safety

[1] This citation, initially issued as an order, was subsequently modified by MSHA to a citation. Citation No. 8778037-02.

[2] The S&S terminology is taken from section 104(d)(1) of the Mine 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."

standards.[3] MSHA claimed that Alcoa's employee Alvarado supervised the contractors and was an agent of Alcoa during the accident and alleged violations.

Alcoa did not dispute the existence of the three violations, or that they were S&S, but did argue that the violations were not the result of high negligence and unwarrantable failure. After a hearing on the merits, a Commission Administrative Law Judge determined that Alvarado was not an agent of Alcoa because he did not supervise the contractors during the accident. Therefore, the Judge did not impute Alvarado's conduct to Alcoa when assessing the operator's negligence and determining whether there was an unwarrantable failure. 39 FMSHRC 128, 147 (Jan. 2017) (ALJ). He ruled that none of the violations was the result of the operator's unwarrantable failure, reduced the negligence determination for each violation, and significantly lowered the penalties.

The Secretary petitioned the Commission to review the Judge's decision. On appeal, the Secretary contends that the Judge erred in finding that Alvarado was not Alcoa's agent. The Secretary also argues, in the alternative, that if Alvarado was not an agent, Alcoa's failure to designate someone to supervise the contractors itself constituted high negligence and unwarrantable failure.

We conclude that substantial evidence supports the Judge's determination that Alvarado was not an agent of the operator in connection with the accident. We further conclude that the Secretary did not properly raise his alternative argument. Therefore, we affirm the Judge's findings as to negligence and unwarrantable failure for the citation and orders.

I.

Factual Background

Alcoa operates an alumina plant in Texas. Alumina is used to produce aluminum metal. Alcoa's facility extracts alumina from bauxite. As part of this process, pipes in the press building transport liquid bauxite to presses.[4] While the liquid bauxite travels through the pipes, it cools and hardens. The hardening of the bauxite can result in scale, a rock-like substance, building up within the pipes. To clean scale, the operator removes pipes from the production process, drains liquid from within the pipes, locks and tags out the piping system, and treats the pipes with a caustic solution (referred to simply as "caustic"). 39 FMSHRC at 139-40.

[3] The unwarrantable failure terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

[4] Presses are long tube-shaped devices with a series of screens that capture and filter solid materials like sand and mud from the slurry. 39 FMSHRC at 140 n.11.

During caustic cleaning, two metal plates—a blind plate and a Dutchman plate—are placed at opposite ends of a T-pipe. The T-pipe is then connected to two risers.[5] The blind, a round metal plate, is placed in the T-pipe to stop the flow of caustic into the riser which remains in production. The Dutchman, a metal plate with a hole, is placed in the T-pipe to allow caustic to flow into the riser designated for cleaning. Once the first pipe has been cleaned, the caustic is transferred to the second pipe through a blind swap, a process by which the blind plate swaps positions in the T-pipe with the Dutchman. Before performing a blind swap, the pipes at issue must be empty, the T-pipe connecting them must be removed, and the piping system must be locked and tagged out. After the blind swap is complete, the second pipe is then cleaned with the caustic. *Id.* at 141.

Alcoa periodically uses a contractor, Turner Industries, for certain tasks. On the morning of September 3, 2014, three contractor employees of Turner—Rusty Morales, Dominic Cano, and Leo Gaytan—arrived at the mine to perform a blind swap, *i.e.*, a transfer of caustic, between Riser 27, which had just been cleaned, and Riser 25. Upon arriving, the contractors met with Jeff McCaskill, an Alcoa supervisor, and discussed the hazards presented by the task. Employees of Alcoa, including McCaskill, drained, locked, and tagged out the piping system because contractors were not authorized to lock out/tag out pipes. McCaskill also told Alcoa employee Steven Alvarado "to keep an eye" on the contractors while they performed the blind swap.[6] McCaskill then left the mine around lunchtime. Tr. 130, 309; 39 FMSHRC at 142-43, 145.

Following McCaskill's departure, Morales, Cano, and Gaytan went to the press building. Alvarado reviewed the isolation points for the piping system with Morales prior to the blind swap. The contractors then removed the relevant T-pipe and blind only to discover that a chunk of scale was blocking the opening to Riser 25. Cano and Gaytan began to jackhammer the scale to remove it from the pipe.[7] While jackhammering, Gaytan used a stand. Cano, however, did not use the stand but knelt directly on the piping system. At some point, the jackhammer broke through and created a hole in the scale. Alvarado, who was standing nearby, noticed liquid spewing from this hole and shouted to Cano and Gaytan to stop jackhammering. At this moment, Morales, who was not wearing proper personal protective equipment, was struck in the back by the leaking liquid and severely burned. Alvarado immediately pulled Morales into a chemical safety shower to rinse off the liquid. Tr. 384-85; 39 FMSHRC at 143-44.

After investigating the accident, MSHA issued the citation and orders to Alcoa. MSHA designated all three violations as S&S. MSHA also designated these violations as resulting from Alcoa's high negligence and unwarrantable failure, in part because MSHA asserted Alvarado was an agent of Alcoa and therefore imputed his conduct to the operator.

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[5] The pipes that connect to presses are referred to as risers. 39 FMSHRC at 140.

[6] Although Alvarado had served as a Temporary Acting Supervisor ("TAS") in the past, McCaskill did not designate Alvarado as an acting supervisor on the day of these events. 39 FMSHRC at 145.

[7] Alvarado had previously reminded Gaytan to remove scale from the pipe. Tr. 384.

Citation No. 8778037 was issued because liquid in a pipe was not blocked against hazardous motion resulting in accidental burning of a contractor. MSHA alleged that Alcoa violated 30 C.F.R. § 56.14105, which requires that "[r]epairs or maintenance of machinery or equipment shall be performed only after the power is off, and the machinery or equipment blocked against hazardous motion." The citation stated that "Alcoa's management engaged in aggravated conduct constituting more than ordinary negligence in that they did not verify that the [piping] system was completely blocked against hazardous movement of liquor." Citation No. 8778037.

Order No. 8778038 was issued for a failure to require Morales to use proper personal protective equipment ("PPE") and for Alvarado's failure to wear proper PPE. MSHA alleged that Alcoa violated 30 C.F.R. § 56.15006, which requires that "[s]pecial protective equipment and special protective clothing shall be provided, maintained . . . and used whenever hazards of process or environment, chemical hazards, radiological hazards, or mechanical irritants are encountered in a manner capable of causing injury or impairment." The order stated that "Alcoa's management engaged in aggravated conduct constituting more than ordinary negligence in that [an] agent was present during the work and observed the [contractor's] supervisor not wearing the proper equipment. The . . . agent failed to wear the required PPE as well." Order No. 8778038.

Order No. 8778039 was issued for the operator's failure to ensure that Cano, who kneeled on the piping system while jackhammering, had safe access to Riser 25. MSHA alleged that Alcoa violated 30 C.F.R. § 56.11001, which requires that "[s]afe means of access shall be provided and maintained to all working places." The order stated:

> A miner gained access to the scaled up line by climbing on top of the [pipe] . . . . This . . . expose[d] the miner to falling from the pipe to the concrete floor as well as a sudden release of hot liquor from the scaled up line . . . . Alcoa's management engaged in aggravated conduct constituting more than ordinary negligence in that the . . . agent observed the practice and failed to act.

Order No. 8778039.

II.

The Judge's Decision

The Judge noted that under the Mine Act, the conduct of an agent of the operator, but not of a rank-and-file miner, can be imputed to the operator. The Judge recognized that Alvarado was neither designated nor paid as a Temporary Acting Supervisor, despite having been so designated in the past. The Judge also recognized that when considering agency, the Commission has historically focused on the miner's function rather than his job title. After considering the evidence, the Judge determined that Alvarado was not an agent, and did not impute Alvarado's conduct to Alcoa for purposes of negligence and unwarrantable failure. 39 FMSHRC at 135, 145-47.

First, the Judge considered whether McCaskill delegated supervisory authority when he instructed Alvarado to "keep an eye" on the contractors. The Judge credited Inspector Brett Barrick's testimony that it is normal for a supervisor to instruct rank-and-file employees to "keep an eye" on contractors. The Judge also credited Alvarado's testimony that instead of serving as an agent, he was merely present in the area because he had a task to complete (cleaning Riser 25 with caustic) following the blind swap. Therefore, the Judge found that McCaskill's instruction did not delegate supervisory authority. Tr. 337-40, 403; 39 FMSHRC at 145.

Second, the Judge considered whether Alvarado's tag-out authority indicated supervisory authority. The Judge recognized that Alvarado, in contrast to the contractors, possessed authority to tag out certain equipment. However, the Judge determined that the Secretary failed to show that Alvarado's tag-out authority ("Level 2" tag-out authority) differed from that of other rank-and-file miners employed by the operator. Therefore, the Judge concluded that Alvarado's tag-out authority did not indicate supervisory authority. 39 FMSHRC at 145-46.

Third, the Judge considered the testimony of the Turner employees regarding Alvarado's status. Morales testified that he perceived Alvarado to be a supervisor and that McCaskill had designated Alvarado as the supervisor for the blind swap. However, the Judge noted that Morales had filed a lawsuit against Alcoa and Alvarado as a result of injuries Morales suffered from the accident. Therefore, the Judge determined that Morales would have an incentive to blame Alvarado for his injuries by testifying that Alvarado had supervisory responsibility. The Judge also noted that Morales' testimony was contradicted by the testimony of other witnesses. For these reasons, the Judge discredited Morales' testimony regarding Alvarado's supervisory status. *Id.* at 146.

In addition, the Judge discredited Gaytan's testimony that he perceived Alvarado to be "in charge" of the contractors. The Judge found that Gaytan perceived Alvarado to be a supervisor merely because Alvarado had reminded Gaytan to remove scale from the piping system. The Judge dismissed Gaytan's testimony because Gaytan was already aware of this assignment prior to Alvarado's instruction. *Id.* at 147.

Gaytan also testified that Alcoa would normally assign one of its employees to supervise the blind swap. However, the Judge noted testimony to the contrary by Dwayne Maly, the training superintendent of Alcoa, who testified that Alcoa normally would not assign an employee to supervise this task. While the Judge did not explicitly discredit Gaytan's testimony regarding Alcoa's normal practice, the Judge ultimately concluded that Alvarado was not an agent. *Id.* at 145-47.

Because the Judge concluded that Alvarado was not acting as an agent of Alcoa during the time in question, he did not impute Alvarado's conduct to Alcoa for purposes of the operator's negligence and unwarrantable failure. The Judge further disagreed with the MSHA inspector that the violations were a result of the operator's high negligence and unwarrantable failure. The Judge found that the operator exhibited low negligence for Citation No. 8778037

and Order No. 8778038, and moderate negligence for Order No. 8778039, and that none of the violations resulted from the operator's unwarrantable failure.[8] *Id.* at 147, 163-64.

III.

Disposition

A. Substantial evidence supports the conclusion that Alvarado was not an agent of the operator in connection with the relevant violations.

1. Citation No. 8778037

The citation alleges that the operator failed to ensure that Riser 25 was properly drained and empty. MSHA designated the citation as resulting from high negligence and an unwarrantable failure. In making these assertions, the Secretary seeks to impute Alvarado's conduct to the operator, arguing that Alvarado, a rank-and-file employee, supervised contractors from Turner on September 3, 2014. However, the citation, which by its terms only involves conduct by Alcoa's employees in draining the pipe and tagging out the piping system, does not encompass any conduct by the contractors.[9]

Furthermore, there is no evidence that any of the employees from Turner, who lacked tagging authority, assisted the operator's employees in draining and tagging out the piping system, and thus the issue of Alvarado's alleged supervisory role during the subsequent blind swap is not relevant. Accordingly, there is no basis for the Secretary's imputation of Alvarado's actions to the operator based on the allegation that he supervised the contractors.[10]

At trial, the Secretary argued that the operator was highly negligent because it failed to use special 3x2 drains or flush verification (flushing pipe with water) when draining Riser 25. While the Judge found that the operator was negligent in failing to use special 3x2 drains and flush verification for Riser 25, he concluded that such failures reflected low rather than high negligence because flush verification would not have prevented the accident, and the operator reasonably believed that flush verification was unnecessary. 39 FMSHRC at 151-52. The Secretary has not challenged these findings on appeal. Therefore, we cannot consider them here.

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[8] At the end of his decision, the Judge reduced the total penalty for these three violations from $69,831 to $6,224, partially due to his negligence and unwarrantable failure findings. 39 FMSHRC at 162-63.

[9] The record indicates that three employees of Alcoa—McCaskill, Alvarado, and Rudy Pena—were involved in isolating the piping system at issue and draining the pipes. Tr. 412, 414-18.

[10] The Judge found that although Gaytan mentioned a leak from the line when Alvarado was nearby, "[i]t was not established that Alvarado knew that the system was not properly verified." 39 FMSHRC at 154. The Secretary has not challenged that finding, and so even if Alvarado were an agent, he had no knowledge to impute to the operator.

2. Order Nos. 8778038 and 8778039

Order No. 8778038 was issued because a contractor, Morales, failed to wear proper personal protective equipment. Order No. 8778039 was issued because a Turner employee, Cano, unsafely knelt on a pipe while jackhammering scale. Each order alleges that Alcoa engaged in aggravated conduct because an agent (Alvarado) observed the violative conduct but failed to take action. MSHA designated both orders as resulting from the operator's high negligence and unwarrantable failure, in part because MSHA imputed Alvarado's conduct to Alcoa. However, the Judge determined that Alvarado was not an agent of the operator. This finding is supported by substantial evidence.[11]

Section 3(e) of the Mine Act defines an "agent" as "any person charged with responsibility for the operation of all or part of a . . . mine or the supervision of the miners in a ... mine." 30 U.S.C. § 802(e). In determining whether a miner was an agent of the operator, the Commission has focused on the miner's function rather than his job title. *REB Enterprises Inc.*, 20 FMSHRC 203, 211 (Mar. 1998). A Judge must make a factual determination when assessing whether the miner's function reflected supervisory responsibility. *Martin Marietta Aggregates*, 22 FMSHRC 633, 639 (May 2000).

The Secretary argues that the Judge ignored certain evidence that Alvarado supervised the Turner employees and thus acted as an agent for Alcoa. In particular, the Secretary claims that the Judge ignored McCaskill's instruction that Alvarado "keep an eye" on the contractors, and Gaytan's testimony that Alvarado observed and instructed the contractors.

We conclude that the Judge did consider these circumstances when determining Alvarado's supervisory status. 39 FMSHRC at 145-47. The Judge found that McCaskill's instruction did not delegate supervisory authority to Alvarado. Specifically, the Judge credited Alvarado's testimony that he was in the vicinity of the contractors not to supervise them but simply because he needed to insert caustic into Riser 25 after the blind swap had been completed. Tr. 403, 459; 39 FMSHRC at 145. We find no reason to set aside the Judge's decision to credit Alvarado's explanation for why he was near the contractors.

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[11] When reviewing a 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)). Substantial evidence has been found to be more than a scintilla, but less than a preponderance of the evidence. *Dynamic Energy, Inc.*, 32 FMSHRC 1168, 1173 (Sept. 2010) (citing *Richardson v. Perales*, 402 U.S. 389, 401 (1971)). The Commission has recognized that the "possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Id.* (quoting *Sec'y on behalf of Wamsley v. Mutual Mining, Inc.*, 80 F.3d 110, 113 (4th Cir. 1996)).

The Judge explained why he discredited the contradictory testimony of the Turner employees.[12] Morales testified that Alvarado supervised the contractors following McCaskill's departure from the mine. The Judge discredited his testimony because the Judge found that Morales, who had filed a lawsuit against Alvarado as a result of the accident, had an incentive to place supervisory responsibility on Alvarado. Gaytan testified that Alcoa's normal practice was to assign one of its employees to supervise the blind swap. However, the Judge implicitly credited the contradictory testimony of Maly, Alcoa's training supervisor, that Alcoa normally does not assign one of its employees to supervise a blind swap, but trusts the contractors to complete the assigned task. We find no reason to set aside the Judge's credibility determinations.[13] Tr. 164; 39 FMSHRC at 146-47.

The Judge further recognized that the Secretary had failed to show that Alvarado's tag-out authority differed from that of other rank-and-file miners. 39 FMSHRC at 145-46. The substantial evidence standard is met where the record is not "wholly barren of evidence" to sustain the Judge's finding. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). We conclude that the record supports his finding that Alvarado's authority was no different than that of any other rank-and-file miner.

Therefore, we conclude that the Judge's determination that Alvarado was not an agent of Alcoa during the accident on September 3, 2014, is supported by substantial evidence.

B. The Secretary failed to properly raise his alternative argument that Alcoa's failure to assign a supervisor to oversee the blind swap itself constituted high negligence and unwarrantable failure.

On appeal, the Secretary argues that even if Alvarado were not an agent, the operator's failure to assign a supervisor for these violations itself indicated high negligence and unwarrantable failure. Therefore, the Secretary maintains, even if Alvarado were not an agent, we must remand the Judge's negligence and unwarrantable failure findings.

Although the Commission liberally provides leave to amend citations and orders, *Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (May 1990), the Secretary never availed himself of the opportunity to add this alternative theory of negligence to the pleadings. Similarly, counsel for the Secretary did not present the theory at the hearing.

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[12] When evaluating evidence, we have stated that "credibility determinations reside in the province of the administrative law judge's discretion, are subject to review only for abuse of that discretion, and cannot be overturned lightly." *Dynamic*, 32 FMSHRC at 1174.

[13] In addition, Gaytan testified that he perceived Alvarado to be a supervisor because Alvarado instructed him to remove scale from a pipe. The Judge discounted this testimony, finding that Gaytan was aware that he needed to remove scale prior to Alvarado's instruction. In essence, the Judge implied that Alvarado's reminder to Gaytan to complete a preexisting assignment did not indicate that Alvarado exercised supervisory authority. 39 FMSHRC at 147. Under the deferential standard governing the review of credibility determinations, *see supra* note 12, we do not disturb this finding.

Because the Secretary failed to present the alternative theory of negligence at trial, the operator lacked sufficient notice of the charges to mount a defense against them. Due to the Secretary's failure, we decline to consider this alternative theory at this stage of the proceeding. *See Black Beauty Coal Co.*, 37 FMSHRC 687, 693-95 (Apr. 2015); *Oak Grove Res., LLC*, 33 FMSHRC 2657, 2664 (Nov. 2011); *Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1321 (Aug. 1992).

IV.

Conclusion

In the absence of this alternative argument, we are limited to considering only the agency argument made by the Secretary below. Upon reviewing the evidence in the record, we conclude that substantial evidence supports the Judge's determination that Alvarado was not an agent of the operator in connection with the accident on September 3, 2014. Therefore, we affirm the Judge's findings that Citation No. 8778037 and Order No. 8778038 involved low negligence while Order No. 8778039 involved moderate negligence. We also affirm his determination that none of the violations were a result of Alcoa's unwarrantable failure to comply with safety standards.

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