

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20004-1710

SEP 29 2016

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

KNIGHT HAWK COAL, LLC

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Docket Nos. LAKE 2014-121-R
LAKE 2014-575

Before: Jordan, Chairman; Young, Cohen, and Althen, Commissioners¹

DECISION

BY THE COMMISSION:

This consolidated contest and civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act” or “Act”), involves the death of a coal miner who was crushed while operating mining equipment. Knight Hawk Coal, LLC (“Knight Hawk”) was charged with failing to keep the miner out of the “red zone” surrounding the continuous mining machine, which constituted a violation of the mine’s approved roof control plan under 30 C.F.R. 75.220(a)(1).² The Administrative Law Judge ruled that this violation was the result of Knight Hawk’s high negligence and unwarrantable failure to comply.³ 37 FMSHRC 632 (Mar. 2015) (ALJ). Knight Hawk appealed this decision and also challenged the Judge’s penalty determination.

For the reasons discussed below, we affirm the Judge’s decision.

¹ Commissioner Patrick K. Nakamura participated in the consideration of this matter, but his term expired before issuance of this decision.

² 30 C.F.R. § 75.220(a)(1) states: “Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered.”

³ The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, and 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.” 30 U.S.C. § 814(d)(1).

I.

Factual and Procedural Background

A. Facts

Knight Hawk operates the Prairie Eagle South Mine, a large underground coal mine in Illinois. On February 13, 2013, Miner Timothy Chamness was remotely operating a continuous mining machine when he entered the red zone of the machine and was fatally crushed between the continuous miner's conveyor tail and the right rib of the entry.⁴ There were no witnesses to the accident. 37 FMSHRC at 633. Chamness, a former roof bolter, had been a continuous miner operator for four months at the time of the accident. Tr. 166, 168, 187.

In November 2013, MSHA issued its investigation report on the accident and cited Knight Hawk for violating its approved roof control plan by failing to keep Chamness out of the red zone of the continuous miner.⁵ The inspector designated the violation as "significant and substantial" ("S&S"),⁶ involving high negligence, and the result of the Knight Hawk's unwarrantable failure. MSHA proposed a specially-assessed civil penalty of \$70,000. S. Ex. 1; 37 FMSHRC at 633.

Knight Hawk construed the term red zone as used at its Prairie Eagle South Mine more broadly than MSHA's regulatory use of the term. Knight Hawk defined red zone to include a danger zone or pinch point area around all mobile equipment, whereas MSHA's definition of red zone is confined to the danger zone around a continuous mining machine.⁷ Prior to the issuance of the citation, MSHA was not informed that its definition of red zone, as used in Knight Hawk's roof control plan and as enforced under the Act, was different and narrower than the definition used for training and warning posters at the mine. The differences in these definitions constitute the central underpinnings of the dispute between the parties in this case.

⁴ According to MSHA, the "red zone" is the pinch point area where any part of the continuous mining machine can hit a miner during a move. Tr. 51; S. Br. at 3-4 n.2. It is not a set position, but is relative to the location of the continuous miner as the machine moves. *See* MSHA 2005 Summer Prop/Red Zone Special Safety Initiative, Bulletin 3.

⁵ Knight Hawk's approved roof control plan states in pertinent part: "Safety Precautions for Remote Control Mining: . . . No one shall be in the red-zone when continuous miners are being trammed from place to place or being re-positioned in the working place." *See* Sec'y Exs. 1, 3 at 6.

⁶ The S&S terminology is also 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."

⁷ MSHA refers to the danger zone or pinch point areas around other mobile equipment as "no go zones." S. Br. at 4; KHC Ex. H at 169-72, 176-81.

In the course of the accident investigation, MSHA interviewed 10 miners. Five rank-and-file miners stated that they had seen employees in the “red zone” before, even though they had been trained to stay out of the red zone. Tr. 52-53. Knight Hawk Foreman Richard Pasquino, Chamness’ immediate supervisor, stated that he had also seen miners in the “red zone” of various mobile machines and that he himself had breached the red zone before with a ram car and with a roof bolter. Tr. 193-94. The miners described the red zone encounters as sporadic, intermittent, and inadvertent.⁸

Pasquino said that before becoming Chamness’ supervisor, he had observed Chamness in what Pasquino called the red zones of a shuttle car, ramcar/scoop, and a roofbolter on three separate occasions. After becoming foreman, Pasquino observed Chamness in the red zone on two more occasions, first around a ramcar, and then around a roof bolter five months later. Pasquino testified that, after he became a foreman, he verbally counseled Chamness on the importance of staying out of the red zone in the two latter instances he observed but did not report any of the five incidents to higher management. Pasquino testified that he never observed Chamness in the red zone of a continuous miner. Tr. 196-98, 207-10; 37 FMSHRC at 636.

Knight Hawk witnesses testified that the company had a progressive disciplinary policy in place that began with verbal counseling and allowed for more severe consequences for repeat violators. According to this safety policy, unsafe practices or deviations from company safety standards were to be reported to the immediate supervisor, who would then report them to the safety director.⁹ However, Knight Hawk had only twice disciplined miners for actions related to the company’s red zone policy.¹⁰ Tr. 157-58; 252. In addition, Mine Superintendent Dale Winters confirmed that no violations of the mine’s broader red zone policy were ever reported to mine management. Tr. 140-41, 205; 37 FMSHRC at 635.

Knight Hawk provided training on red zone safety involving mobile equipment during new miner training, experienced miner training, annual refresher training, and during weekly safety talks. The operator had conducted annual refresher training covering red zone dangers four days before the fatal accident. Knight Hawk also hung “Keep Out of the Red Zone” posters

⁸ Knight Hawk representatives, including Mine Safety Director William Jankousky, were present during the interviews but were not allowed to participate. Tr. 239, 245.

⁹ Section 2.01 of Knight Hawk’s safety policy states: “Knight Hawk . . . will not tolerate unsafe practices or deviation from Knight Hawk, state or federal MSHA standards. . . . [A]ny deviations from standards and procedures, as well as any unsafe condition should be immediately reported to your immediate supervisor. The supervisor will then report it to the Safety Director.” KHC Ex. I at 272.

¹⁰ Knight Hawk was cited for a red zone violation in 2009 when a continuous miner operator pinched his arm doing a place change. In 2011, a miner intentionally trammed his continuous miner toward a co-worker. In the first incident, the operator did not consider it a red zone violation but issued the miner a letter of reprimand after MSHA cited it for a red zone violation. In the second incident, Knight Hawk discharged the employee. Tr. 122-29; KHC Ex. J; 37 FMSHRC at 635-36.

in several areas of the mine cautioning miners to avoid red zones around mobile equipment. 37 FMSHRC at 635, 642.

After Chamness was killed, Knight Hawk modified the remote control box for the continuous miner to add a second function to prevent the miner from accidentally activating the tail swing. It also installed proximity devices on all nine of its continuous miners, at a cost of \$80,000 per machine. Of the 36 violations issued to the operator in the 15 months prior to the incident, only two were S&S violations. The record reveals no specific evidence that Knight Hawk was ever warned by MSHA that its efforts to deter red zone violations at the Prairie Eagle South Mine were inadequate.

Knight Hawk filed a notice of contest challenging the Secretary's high negligence finding, as well as the unwarrantable failure designation and the proposed penalty amount. It stipulated to the fact of the violation and that it was S&S. The parties also stipulated to the operator's good faith and timely abatement. On March 18, 2015, the Judge issued a decision upholding the Secretary's high negligence and unwarrantable failure determinations, and assessing a penalty of \$70,000.

B. The Judge's Decision

In affirming the high negligence determination, the Judge found it compelling that Pasquino had observed Chamness in the red zone of mobile equipment on multiple occasions, but had only verbally counseled him. Discounting the testimony of Mine Superintendent Winters and Pasquino, who stated that they had no reason to believe Chamness would enter the red zone, she concluded that Chamness' conduct was foreseeable.

The Judge found that Knight Hawk's practice of counseling employees for repeated red zone violations was inadequate and that the operator should have taken "more definitive action to prevent miners from repeatedly entering the red zone, as defined by the mine operator or by MSHA." She concluded that the mine imposed no consequences on miners when they violated the mine's red zone policy. She also found no evidence that Knight Hawk had established any specific policies or procedures for addressing red zone breaches or disciplinary approaches designed to discourage repeat violations. 37 FMSHRC at 637-38.

The Judge rejected Knight Hawk's assertion that the interviewed miners' statements about red zone violations were of minimal value because they were speaking of the red zone as broadly applied by Knight Hawk and did not understand that MSHA was referring only to the zone around the continuous miner. Based on the context in which the miners' statements were made and the training materials and posters, the Judge found that most, if not all, of the miners' statements to MSHA referred to the red zone of a continuous miner. In addition, because the miners' statements indicated that red zone policy violations were not uncommon at the mine, the Judge inferred that at least a portion of the reported violations occurred in the red zone of a continuous miner. Nonetheless, she stated that her findings would be the same under either usage of the term "red zone." *Id.*

The Judge found that although Knight Hawk provided some training on red zone dangers, the failure to enforce its own policies by disciplining errant miners rendered the training and supervision of those miners meaningless. She concluded that "the mine was highly negligent in

its training, supervision, and discipline regarding red zone violations,” and the training, therefore, did not mitigate Knight Hawk’s negligence. *Id.* at 638.

In affirming the Secretary’s unwarrantable failure determination, the Judge found that while it is not clear how long Chamness was in the red zone, the duration of the violation ended only because the miner was fatally injured by engaging in the prohibited conduct. She stated that “[e]ven if this violation only existed for a short time, red zone violations can result in serious consequences in a short time and have been an ongoing issue at this mine since it opened in 2009.” 37 FMSHRC at 639.

The Judge further found that although the operator took some steps to abate red zone issues by providing training and weekly safety meetings, there was no follow-through or enforcement, beyond counseling, in support of its policy against entering red zones. *Id.* at 642. She also determined that Knight Hawk was aware that greater compliance efforts were necessary because MSHA inspectors routinely discussed red zone hazards, and Knight Hawk’s management knew that MSHA placed great emphasis on the topic. As support, the Judge pointed to MSHA’s recently published final rule, which requires proximity detectors on continuous miners. 80 Fed. Reg. 2188 (Jan. 15, 2015) (codified at 30 C.F.R. § 75.1732). She also took official notice of MSHA’s online publications addressing red zone hazards and safety. *Id.* at 641.

Finally, although the Judge stated that Knight Hawk abated the violation in good faith and commended it for installing the proximity devices, she nonetheless found the \$70,000 proposed penalty to be appropriate in this case. She noted that the operator stipulated that the penalty would not affect its ability to continue in business, and that the gravity, negligence, and history of violations were addressed previously in her decision. *Id.* at 645. The Judge also acknowledged the operator’s commendable violation history for the previous 15 months but did not make express findings in her penalty analysis. *Id.* at 640, 645.

II.

Disposition

A. Definition of “Red Zone”

Knight Hawk argues that during the investigative interviews, the miners who testified to seeing other employees in the red zone were not referring to the danger zone of the continuous miner as defined by MSHA, but to the danger zone of other mobile equipment as applied under the operator’s broad red zone policy.¹¹ It maintains that MSHA should have informed the miners who were interviewed during its investigation that MSHA’s definition of red zone was limited to the continuous miner. It further argues that this alleged confusion about what constituted a red zone led the Judge to conclude incorrectly that it was highly negligent and had engaged in an unwarrantable failure to comply.

¹¹ For purposes of this discussion and to avoid confusion, we hereafter use the terms “danger zone” or “pinch point area” to generally refer to the dangerous area around all mobile equipment at the Prairie Eagle South Mine. The term “red zone” refers only to the pinch point area of a continuous mining machine, which is MSHA’s interpretation of the term.

We reject this argument and conclude that substantial evidence supports the Judge's finding "that most, if not all, of the discussion of the red zone during the investigation, related to the red zone . . . [of] the continuous miner."¹² 37 FMSHRC at 637.

Although support for Knight Hawk's position can be found in Pasquino's statement to investigators describing seeing miners in the red zone of various pieces of mobile equipment (KHC Ex. R at 5; Tr. 63-64), the miners were being questioned in the context of an investigation about a miner who had just been killed in the red zone of a continuous miner. William Kendrick, an experienced continuous miner operator of 12 years and the miner who helped train Chamness, testified that he knew that when asked about the red zone, the investigative team was referring to the continuous miner. Tr. 178, 180. He also indicated that when discussing fatalities and red zone violations at training, the information provided to the miners concerned continuous mining machines. Tr. 173. Similarly, Safety Director Jankousky testified that he knew the investigators were referring to a continuous miner when they were discussing the red zone even though he believed the other miners did not. Tr. 245. He also stated that the miners are briefed on the roof control plan and that they understand that red zone in the roof control plan refers to the continuous miner. Tr. 247.

Additionally, Knight Hawk agents present for the interviews not only failed to inform MSHA of any suspected confusion, but neglected to inform investigators that the company used the term "red zone" more broadly at the Prairie Eagle South Mine. Tr. 245-46. While the operator's representatives asserted they were barred from actively participating in the interviews, there is no evidence that they were prohibited from speaking with investigators before or after the interviews were completed. Knight Hawk did not call the five rank-and-file miners interviewed by MSHA as witnesses at the hearing to rebut MSHA's assertion that the miners understood red zone to mean the pinch point area of a continuous miner.¹³

Lastly, any misunderstanding about the definition of red zone was the direct result of Knight Hawk's actions, not the Secretary's. The operator chose to use the term "red zone" more broadly, even though it knew that MSHA only applied the term to the danger zone around

¹² 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); *Jim Walter Res., Inc.*, 28 FMSHRC 983, 989 (Dec. 2006); *DQ Fire & Explosion Consultants, Inc.*, 36 FMSHRC 3090, 3095 (Dec. 2014); *Mach Mining, LLC*, 36 FMSHRC 1525, 1526-27 (June 2014); *Topper Coal*, 20 FMSHRC 344, 349 (Apr. 1998). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the Judge's] conclusion." *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1991 n.9 (Aug. 2014).

¹³ The operator also contends that the Judge improperly relied on vague and speculative hearsay statements of the interviewed miners. However, hearsay evidence is admissible in our proceedings so long as it is material and relevant. *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1135-36 (May 1984); *Richardson*, 3 FMSHRC 8, 12 n.7 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir.1982), *cert. denied*, 461 U.S. 928 (1983). The statements by Knight Hawk employees to investigators were clearly material and relevant to the issues being considered. Thus, the Judge did not err in admitting and relying on the testimony of Investigator Wilcox concerning what he was told by the five rank-and-file miners during the investigation.

energized continuous miners. Mine Superintendent Winters acknowledged that MSHA's definition of red zone is widely understood in the mining industry, and Jankousky stated that under MSHA regulations, the only equipment defined as having a red zone is the continuous miner.¹⁴ Tr. 102; 235-37.

In addition, the Commission has recognized that “[r]ed zone’ issues involve procedures regarding the avoidance of a zone around a continuous miner, intended to address the hazards of moving equipment.” *Prairie State Generating Co.*, 35 FMSHRC 1985, 1987 n.4 (July 2013) (emphasis added); see also *Kennedy v. Joy Techs., Inc.*, 269 F. App’x 302, 306 (4th Cir. 2008) (acknowledging red zone as being within the “turning radius of the [continuous] mining machine”). As the only party having knowledge of the dueling “red zone” definitions and the party who implemented the broad policy, it was incumbent upon Knight Hawk to ensure that miners understood what red zone meant for purposes of the MSHA investigation.

B. The Relevance of Similar Danger Zone Violations

Knight Hawk contends that because its roof control plan only prohibits miners from entering the “red zone” of a continuous miner, evidence of miners entering the danger zone of other equipment is irrelevant to whether the operator, in this instance, was highly negligent and whether there was an unwarrantable failure to comply with section 75.220(a). We disagree.

Because we are not bound by MSHA's Part 100 definitions, the Commission and its Judges employ a traditional negligence analysis in support of an independent determination on the issue.¹⁵ *Mach Mining, LLC v. Sec’y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir. 2016) (citing *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015)). Under this analysis, “an operator is negligent if it fails to meet the requisite standard of care—a standard of care that is high under the Mine Act.” 37 FMSHRC at 1702. Considerations include “what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulations.” *Id.*; see generally *U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984).

In the instant case, the record demonstrates that prior to becoming Chamness’ supervisor, Pasquino personally observed Chamness on three occasions enter the danger zone of a shuttle car, a ramcar/scoop, and a roof bolter. After becoming foreman, Pasquino witnessed Chamness enter the danger zone of a ramcar, after which he counseled Chamness on the importance of

¹⁴ In the MSHA slides used by Knight Hawk in its training, MSHA refers to the dangerous area around various pieces of mobile equipment, including the continuous miner, as “no go zones” (KHC Ex. H at 169-72, 176-81), but the term “red zone” only appears on slides depicting a continuous miner. KHC Ex. H at 173-75; Tr. 141-47; *contra* Tr. 111-13.

¹⁵ Part 100 regulations apply only to the *proposal* of penalties by MSHA and not to the *assessment* of penalties by the Commission. *Brody Mining, LLC*, 37 FMSHRC 1687, 1701-02 (Aug. 2015); *Jim Walter Res. Inc.*, 36 FMSHRC 1972, 1975 n.4 (Aug. 2014); *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984) (“[N]either the ALJ nor the Commission is bound by the Secretary’s proposed penalties . . . we find no basis upon which to conclude that [MSHA’s Part 100 penalty regulations] also govern the Commission.”).

staying out of pinch point areas. Despite this counseling, five months later, Pasquino again observed Chamness standing in the danger zone of a roof bolting machine while working as a roof bolter.

Of course, due to MSHA's definition of the red zone, these incursions into danger zones other than a continuous mining machine did not violate section 75.220(a). Nonetheless, they are highly relevant to whether Knight Hawk's actions were reasonable and prudent under the circumstances. Specifically, from the perspective of Knight Hawk's training and disciplining of miners, the previous instances evidenced a common carelessness with the violative conduct – entering the danger zone of mobile equipment – that ultimately led to Chamness' death. On five occasions before his fatal accident, Chamness was in direct violation of Knight Hawk's red zone policy – a policy that equally encompassed the red zone of the continuous miner. Indeed, according to the witnesses, many miners violated Knight Hawk's red zone policy without facing any discipline.

It is laudable when an operator goes beyond regulatory requirements in its safety program. However, when it does so and then utterly fails to enforce those policies, the actual lesson to the miners may well be, as it apparently and tragically was here, that the policies are not important and that entry into pinch point areas is not a matter of particular concern to the operator. A safety policy mimicking a mandatory standard that is not enforced creates a dangerous situation. Here, Chamness' *sixth* incursion into a danger zone was fatal.

The prior occurrences are also relevant to the unwarrantable failure analysis. As set forth in detail below, such events are directly relevant to many of the unwarrantable failure factors. Because the "unwarrantable failure" clause directs decision makers to consider the cause of the violation, the statute's language permits an interpretation that considers mine conditions beyond the violation itself, including conditions that do not themselves violate mine safety and health standards. *Sec'y of Labor v. Jim Walter Res., Inc.*, 111 F.3d 913, 919-20 (D.C. Cir. 1997); *see also Jim Walter Res., Inc.*, 21 FMSHRC 740, 742 (July 1999); *Rock of Ages Corp. v. Sec'y of Labor*, 170 F.3d 148, 157 (2d Cir. 1999).

Congress intended a broad reading of "unwarrantable failure," to accomplish the Act's purpose of protecting miners from health and safety hazards. *See Jim Walter*, 111 F.3d. at 920, citing S. Rep. No. 95-181, at 31-32 (1977), *reprinted* in Senate Subcomm. on Labor, Comm. on Human Res., Leg. Hist. of the *Federal Mine Safety and Health Act of 1977*, at 619-20 (1978). Accordingly, the Judge properly considered prior violations of Knight Hawk's red zone policy in her negligence and unwarrantable failure analyses.

C. Negligence

High negligence "suggests an aggravated lack of care that is more than ordinary negligence." *Brody Mining*, 37 FMSHRC at 1703 (quoting *Topper Coal*, 20 FMSHRC at 350). A Commission Judge "is not limited to an evaluation of allegedly 'mitigating' circumstances" and should consider the "totality of the circumstances holistically." *Id.* For that reason, high negligence may be found, in spite of mitigating circumstances . . ." *Id.* at 1702-03.

We have held that the negligence of a rank-and-file miner cannot be attributed to the mine operator for civil penalty purposes. *Western Fuel-Utah, Inc.*, 10 FMSHRC 256, 262

(Mar. 1988). Instead, the Commission looks to the operator's actual or constructive knowledge of the violative condition or practice and its supervision, training, and disciplining of its employees to determine if the operator has taken reasonable steps necessary to prevent the rank-and-file miner's violative conduct. *See, e.g., Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (Aug. 1982).

Knight Hawk's red zone policy effectively treated all pinch point areas as having equal degrees of danger and care required. As such, it was imperative that the operator consistently enforce its policy through proper discipline, supervision, and training. Substantial evidence supports the Judge's finding that this did not occur. 37 FMSHRC at 638.

When asked to explain the company's policy for dealing with miners who violate the red zone policy, Pasquino stated: "One, you talk to him; two, you discipline him; and, three, you discharge." Tr. 213. He described it as a "zero tolerance" policy. Tr. 213. However, after personally witnessing Chamness violate the red zone policy on five separate occasions, including twice as Chamness' foreman, Pasquino never progressed beyond verbal counselling. He did not order supplemental training or closer supervision of Chamness' work. He also failed to follow Knight Hawk's safety policy, which required that "any deviation from standards and procedures, as well as any unsafe condition should be immediately reported to your immediate supervisor. The supervisor will then report it to the Safety Director." KHC Ex. I at 272.

Even though entering the danger zone of mobile equipment was undoubtedly a deviation from company safety standards, Pasquino testified that he "just didn't feel like it was necessary to report it" because he "thought it was unintentional."¹⁶ Tr. 207-08, 210. This was woefully inadequate. A miner's repeated violation of the company's red zone policy would have caused a reasonably prudent foreman under similar circumstances to take more stringent disciplinary action to address the problem or, at least, report the occurrences to mine management. *See Black Beauty Coal Co. v. FMSHRC*, 703 F.3d 553, 561-62 (D.C. Cir. 2012) (affirming high negligence determination, in part, because miner failed to alert management of potential hazard). Being subjected to disciplinary action might have impressed upon Chamness the severity of his actions and served as a deterrent for breaching the red zone of a continuous miner.

Further, as the Judge also noted, "Knight Hawk's alleged expanded view of the red zone may [have] in fact, dilute[d] the need for extra caution in the red zone around the continuous miner." 37 FMSHRC at 638. Counsel for Knight Hawk acknowledged that the operator adjusted its training after this accident to refer only to areas around continuous miners as "Red Zones" and to indicate that areas around other pieces of equipment are considered "danger zones." Tr. 24. The failure to distinguish hindered rather than advanced the goal of the mandatory standard to keep miners out of the highly lethal red zone of the *continuous mining machine*.

¹⁶ Prohibited red zone violations can be intentional or result from inattentiveness, i.e., "just forgetting where you are at in relation to [a] machine." Tr. 52-53, 84. To avoid red zone dangers, MSHA requires that continuous miners remain non-operational when miners are within the pivot point or the turning radius of the machine. *See MSHA 2005 Summer Prop/Red Zone, Bulletin 3.*

Moreover, although the miners were trained to stay out of the danger zone of mobile equipment, they often did not obey the training, and when miners were found in violation, they were not disciplined beyond verbal counseling. Therefore, even though Knight Hawk trained its miners in red zone dangers during new miner training, experienced miner training, annual refresher training, and weekly safety talks, the company failed to enforce the training. The Judge appropriately declined to weigh the training as a mitigating factor.¹⁷

Knight Hawk further maintains that punishing it for its expanded red zone rule, which was designed to provide added protection for miners, creates a bad policy and will deter operators from enacting additional safety measures for fear of it being used against them. We disagree. As noted above, an expanded application of the term “red zone,” standing alone, is an improvement to any underground mine’s safety plan. However, the Commission cannot ignore the flaws in an operator’s “heightened” safety policy. Knight Hawk’s broadly applicable but unenforced red zone policy appears to have worked, albeit unintentionally, in a manner contrary to MSHA’s red zone provision because it diminished the level of caution required when in the red zone of a continuous miner.

Accordingly, considering the totality of the circumstances, the actions that a reasonably prudent foreman familiar with the mining industry would have taken under these circumstances, the relevant facts of this case, and the protective purpose of MSHA’s red zone standard, we conclude that the substantial evidence supports the Judge’s finding of high negligence.

D. Unwarrantable Failure

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). It 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 133, 136 (7th Cir. 1995) (approving Commission’s unwarrantable failure test).

Whether conduct is “aggravated” in the context of unwarrantable failure is determined by considering all of the facts and circumstances of each case to see if any aggravating factors exist, including (1) the extent of the violative condition, (2) the length of time that the violative condition existed, (3) whether the violation posed a high degree of danger, (4) whether the

¹⁷ It was reasonable for the Judge to infer that at least a portion of the violations witnessed by miners occurred in the red zone of a continuous miner. 37 FMSHRC at 637-38. The Commission has held that “‘the substantial evidence standard may be met by reasonable inferences drawn from indirect evidence’ . . . ‘provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred.’” *Consolidation Coal Co.*, 20 FMSHRC 315, 320 n.4 (Apr. 1998) (citing *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984)). Here, six miners told investigators that they had seen miners in red zones, and Pasquino acknowledged having found himself in the red zone as well. The statements were made during the course of an investigation regarding a miner who had just died from walking in the red zone of the continuous miner. In addition, none of the miners indicated that their statements excluded the red zone of a continuous miner.

violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator had been placed on notice that greater efforts were necessary for compliance. *See Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1351-57 (Dec. 2009).

The Judge's determination of unwarrantable failure is amply supported by these criteria. 37 FMSHRC at 640; *see also Consolidation Coal Co.*, 22 FMSHRC 328, 331 (Mar. 2000). Knight Hawk conceded that the violation posed a high degree of danger, and that the violation should have been obvious to Chamness. KHC Post H. Br. at 25.

As to the length of time the violative condition existed, the brief duration of a violative condition is not a mitigating factor and does not militate against a finding of unwarrantable failure if the hazardous condition is "readily distinguishable from other types of violations" due to the "high degree of danger" it poses and its "obvious nature." *Midwest Material Co.*, 19 FMSHRC 30, 36 (Jan. 1997). As the Judge found, it is unclear how long the decedent was in the red zone prior to the fatal accident. However, standing in the "red zone" of a continuous miner for any length of time will at *all* times pose an unacceptably high risk of death to the person standing there. We agree with the Judge that the duration of the violation ended at that time only because Chamness was fatally injured while engaging in the prohibited conduct of standing in the red zone. *See* 37 FMSHRC at 639, relying on *Midwest Material*, 19 FMSHRC at 36 (finding that "the hazardous condition existed for a brief period of time only because it culminated in the collapse of the boom on [the miner], resulting in his death.").

Regarding notice of the violative condition, Chamness had demonstrated a propensity for placing himself in harm's way of mobile equipment. The prior acts of indiscriminately violating danger zones under Knight Hawk's red zone policy placed Pasquino on notice that there was a likelihood that Chamness would enter the pinch point areas of other equipment, including a continuous miner. Under Commission case law, simply knowing that a miner *might* take a dangerous action can support a conclusion that the miner needs additional supervision. *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15-16 (Jan. 1983); *see also Spartan Mining Co.*, 30 FMSHRC 699, 710 (Aug. 2008).

The operator's prior abatement efforts were insufficient under the circumstances. Although Knight Hawk trained its miners, hung safety posters, and expanded its red zone policy in an effort to increase safety, the company's efforts in discouraging danger zone intrusions fell far short of what was required, especially after learning of Chamness' propensity for endangering himself. Pasquino, as the first line supervisor, failed to implement any meaningful disciplinary or corrective measures aimed at discouraging the decedent from entering red zones.

It is worth noting that Chamness' behavior and Pasquino's inadequate concern for repeated danger zone infractions were reflected in the indifference displayed by Knight Hawk's upper management. In particular, Safety Director Winters testified that if he saw a miner enter the red zone on two separate occasions seven months apart, he would only verbally reprimand him and "*maybe*" bring it to the attention of the mine superintendent. Tr. 155 (emphasis added). He further stated that if a miner was found in the red zone five times over four years, it would not raise flags in his mind. Tr. 148-49, 162.

The operator's disciplinary approach reflects this attitude. In particular, MSHA Investigator Wilcox testified that the accident investigation uncovered no evidence that disciplinary action had been taken against any miner found in violation of Knight Hawk's red zone policy. Tr. 50, 53-54. This is further supported by the testimony of Pasquino, who stated that in his two-and-a-half years as foreman at Knight Hawk, he had never disciplined a miner for violating a safety standard, and the testimony of Mine Superintendent Winters and Safety Director Jankousky, who each confirmed that no employee had ever been disciplined for being in the red zone, and that no red zone violations were ever reported to management. Tr. 211-12.

With regard to whether the operator was on notice that greater efforts were needed, there is no evidence that MSHA had previously warned the operator of problems with red zone compliance at the Prairie Eagle South Mine. It was improper for the Judge to rely on MSHA's online publications, such as the Rules to Live By, aimed at encouraging red zone safety industry-wide as specific evidence that Knight Hawk was on notice that greater efforts were necessary at its mine. Generally available MSHA publications do not supply the specific notice contemplated by this factor. MSHA's emphasis on the seriousness of red zone violations does not, by itself, establish that a particular operator was on notice that greater efforts were necessary at its mine. *See Dawes Rigging & Crane Rental*, 36 FMSHRC 3075, 3080-81 n.5 (Dec. 2014) ("we examine the operator's [individual] history of violations, warnings from inspectors, and other forms of specific warnings to determine if the operator has been placed on notice of a persistent unsafe condition or practice at its mine").¹⁸

Nevertheless, Knight Hawk was on notice that miners repeatedly walked unsafely in danger zones in violation of its red zone policy, which included the red zone of the continuous miner as described in its roof control plan. *Compare with Dawes Rigging*, 36 FMSHRC at 3081 (noting that operator was not alerted in any other way that employees engaging in prohibited conduct represented an ongoing problem requiring corrective measures).

We conclude that Knight Hawk acted with aggravated lack of reasonable care in the administration of its broader red zone policy, and nothing in the record suggests that the operator employed a greater degree of care for the continuous miner. Accordingly, substantial evidence supports the Judge's determination that the violation was the result of Knight Hawk's unwarrantable failure to comply with the terms of its roof control plan, as required under section 75.220(a)(1). 37 FMSHRC at 644.

¹⁸ We do observe, however, that Judges may take official notice of the existence or truth of a fact or other extra-record information that is not the subject of testimony but is commonly known, or can safely be assumed, to be true. *See McCormick on Evidence*, 3rd Ed. §§ 329, 330 at 923-927, 1028-1032; Fed. R. Evid. 201; *Union Oil Co. of California*, 11 FMSHRC 289, 300 n.8 (Mar. 1989). The Commission may take judicial notice of MSHA's public documents. *Brody Mining, LLC*, 36 FMSHRC 2027, 2030 n.4 (Aug. 2014), citing *Jim Walter Res., Inc.*, 7 FMSHRC 1348, 1355 n.7 (Sept. 1985).

E. Penalty

Administrative Law Judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). A Judge's penalty assessment is reviewed under an abuse of discretion standard. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 601 (May 2000) (citing *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984)); *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222 (June 1994). In assessing civil monetary penalties, Section 110(i) of the Act requires that the Commission consider the six statutory penalty criteria:

[1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

The Judge discussed her findings related to five of the penalty criteria. She was clearly aware of the operator's history of previous violations, but she did not make express findings regarding this history in the context of her discussion of the assessed penalty. 37 FMSHRC at 640, 645. Although we could remand these proceedings to the Judge to make the required findings, we see no need to do so here. The Commission has held that although a Judge is charged with finding facts on each of the penalty criteria in the first instance, findings may be entered by the Commission on review based on undisputed record evidence. *See Sellersburg*, 736 F.2d at 1153; 29 C.F.R. § 2700.30(a). Therefore, in the interest of judicial economy, based on the undisputed record evidence, we find that of the 36 violations issued to Knight Hawk in the previous 15 months, only one citation was for a violation of its roof control plan and only two citations were S&S.

The operator's safety record weighs in favor of a penalty less than the \$70,000 maximum. However, the Judge's findings regarding the other criteria support her penalty assessment.¹⁹ In particular, the gravity of the violation was found to be S&S and was undisputed. Additionally, a reading of the Judge's entire opinion indicates that significant weight was given to the operator's

¹⁹ While Judges have broad discretion in assessing penalties, Commissioners Young and Althen question whether the maximum penalty imposed here conforms to the Commission's requirement that Judges fully explain their reasoning. In addition to the operator's history of violations, which appeared to reflect a commendable general safety record, the operator appears not to have been credited at all for its good-faith abatement, which was acknowledged by the Judge. Both factors are expressly required to be considered by Section 110(i). In establishing maximum penalties under the Act, Congress clearly was aware of the duty it had imposed on the Commission to consider these factors, yet the maximum penalty was imposed here despite their obvious mitigation. A Judge may properly find that mitigating factors are outweighed by other considerations, but the Judge's failure to expressly explain how they were in this case is troubling.

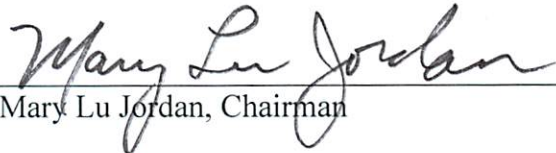
negligence, the high degree of danger posed by miners entering danger zones and Knight Hawk's complete failure to enforce its policy. We have recognized that in assessing a civil penalty, a Judge is not required to assign equal weight to each of the penalty assessment criteria. Rather, "[j]udges have discretion to assign different weight to the various factors, according to the circumstances of the case." *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001) (citing *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997)). Indeed, the Commission has held that Judges have not abused their discretion by more heavily weighing gravity and negligence than the other penalty criteria. *Signal Peak Energy, LLC*, 37 FMSHRC 470, 485 (Mar. 2015); *Lopke Quarries, Inc.*, 23 FMSHRC at 713.

Accordingly, based on a reading of the Judge's entire opinion and the undisputed facts, we conclude that the Judge did not abuse her discretion in reaching her penalty determination.

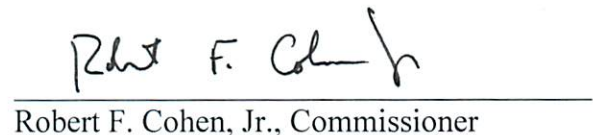
III.

Conclusion

For the reasons set forth herein, we conclude that substantial evidence supports the Judge's findings that the violation was a result of the operator's high negligence and was due to its unwarrantable failure to comply. We also affirm the Judge's penalty assessment of \$70,000. Accordingly, the Judge's decision is affirmed.


Mary Lu Jordan, Chairman


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


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