

U.S. Department of Labor

Office of the Solicitor
Division of Mine Safety & Health
1100 Wilson Boulevard
Arlington, Virginia 22209-2296



February 26, 2009

Lisa M. Boyd
Executive Director
Federal Mine Safety and Health
Review Commission
601 New Jersey Avenue, NW, Suite 9500
Washington, DC 20001
Attn: Docket Office

Re: Secretary of Labor v. Eastern Associated Coal Corp.
FMSHRC Docket No. WEVA 2007-335

Dear Ms. Boyd:

Enclosed for filing in the above-captioned case please find the original copy of the Secretary of Labor's Petition for Discretionary Review, a copy of which was sent to you today by facsimile transmission to (202) 434-9954. Please enter appearances for the undersigned and W. Christian Schumann on behalf of the Secretary.

Thank you for your assistance in this matter.

Sincerely,

A handwritten signature in cursive script that reads "Edward Waldman".

Edward Waldman
Attorney
(202) 693-9344

Enclosure

cc: R. Henry Moore, Esq.

FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION

SECRETARY OF LABOR,)
MINE SAFETY AND HEALTH)
ADMINISTRATION (MSHA),)
Petitioner,)
v.) Docket No. WEVA 2007-335
EASTERN ASSOCIATED COAL)
CORPORATION,)
Respondent.)

PETITION FOR DISCRETIONARY REVIEW

The Secretary of Labor hereby petitions the Federal Mine Safety and Health Review Commission to review the administrative law judge's January 27, 2009, decision in the above-captioned case. The Secretary seeks review pursuant to Section 113(d)(2)(A)(ii) of the Federal Mine Safety and Health Act of 1977 ("the Mine Act" or "the Act"), 30 U.S.C. § 823(d)(2)(A)(ii), on the grounds that material findings of fact are not supported by substantial evidence, necessary conclusions of law are erroneous, and the decision is contrary to law.

ISSUE

Whether the ALJ erred in finding that a violation of 30 C.F.R. § 75.202(a), in the form of seven obvious and dangerous areas of inadequately supported roof that existed

for a week, was not caused by the operator's "unwarrantable failure."

STATEMENT OF THE FACTS

On July 17, 2006, an MSHA inspector inspected the Seven Right Empty Track Entry ("the Entry") as part of the regular quarterly inspection of the Eastern Associated Coal Corporation's ("EACC") Federal No. 2 Mine, an underground coal mine. ALJ's Decision ("Dec.") at 1; Transcript ("Tr.") at 19-20. The Entry, which was mined decades ago, is used to temporarily store unused coal cars. Dec. at 2; Tr. at 144. Tracks run down the center of the Entry, and there is a trolley wire on one side and a walkway on the other. Dec. at 2; Tr. at 26. Examiners traverse the 7,000 foot Entry daily; repair and maintenance persons must access the track and the wire side of the Entry, respectively; and pumpers are required to repair and inspect three pumps in the Entry. Dec. at 7.¹

The inspector observed seven areas of inadequately supported roof, four of which resulted from rib sloughage, two of which resulted from potting out around the roof bolts, and one of which resulted from a combination of the two. Dec. at 2-4. He issued an order under Section

¹ Roof falls on the wire side can bring down the trolley wire which, in turn, could ignite a fire. Tr. at 51-52.

104(d)(2) of the Act (30 U.S.C. § 814(d)(2)), Order No. 6602108, alleging a "significant and substantial" ("S&S") and "unwarrantable failure" violation of 30 C.F.R. § 75.202(a), and designated the operator's negligence as "high." Dec. at 2-4. MSHA specially assessed a civil penalty of \$4,100.

FINDINGS OF THE ADMINISTRATIVE LAW JUDGE

The ALJ affirmed that EACC violated Section 75.202(a) and that the violation was S&S. Dec. at 4-10. The ALJ, however, rejected the "unwarrantable failure" designation. Dec. at 10-13.²

In so doing, the ALJ found that the areas of unsupported roof were obvious and posed a high degree of danger. Dec. at 11. Additionally, he found that "the cited conditions had existed for more than a few days," although he also found "insufficient evidence regarding their existence beyond that limited time period." Dec. at 12. Outweighing those factors, however, the ALJ found that the violative condition was not extensive, that EACC had no actual knowledge of the violation and had not been put on notice that greater compliance efforts were necessary, and

² The ALJ also vacated Order No. 6603046, which alleged a violation of 30 C.F.R. § 75.360(a)(1) (inadequate pre-shift examination), and granted the Secretary's motion to settle nine citations. Those aspects of the decision are not at issue in this appeal.

that there was no deficiency in the operator's abatement effort. Dec. at 10-12.

In finding that the violative condition was not extensive, the ALJ reasoned that the areas of unsupported roof "were not extensive compared with the total area of the roof in the entry in question." Dec. at 10-11.

Specifically, the ALJ stated:

Three of the cited locations . . . involved conditions of potting in areas of approximately seventy feet and forty-nine feet respectively. The remaining four areas cited each contained an area approximately fifteen feet in length where the allowable maximum width set forth in the applicable roof control plan had been exceeded by one foot, or a total of ninety square feet in five separate locations. I find that the total area cited was not significant compared to the total roof area of the entry in question . . . , i.e., 112,000 square feet of roof.

Dec. at 10-11 (emphasis in original; footnote omitted).

The ALJ noted that the inspector observed sloughage on both ribs (i.e., both sides of the track) in one of the four areas affected solely by sloughage; he thus considered there to be five areas affected solely by sloughage, Dec. at 11 n. 12, measuring approximately fifteen square feet each, totaling 75 square feet. Adding an additional 15 square feet, to account for the one area affected by both sloughage and potting, yields the approximately 90 square-foot area the ALJ found to be inadequately supported due to sloughage.

Additionally, the ALJ found that EACC was not aware of the violation or of the need for greater compliance efforts. Dec. at 12. In so finding, the ALJ rejected the Secretary's reliance on the fact that EACC installed fifteen supplemental roof bolts the day before the inspection, reasoning that the supplemental bolting was performed 1,000 feet away from the nearest cited area. Dec. at 12. Similarly, the ALJ rejected the Secretary's reliance on the testimony of EACC's safety supervisor, Daniel Kurry, that the entry was approximately twenty years old and had undergone weathering. The ALJ reasoned that Kurry characterized the weathering as "normal" and testified that it had not resulted in any roof falls that had pulled out any bolts. Dec. at 12.

For the reasons discussed above, the ALJ concluded that the violation was not the result of EACC's "unwarrantable failure." Dec. at 13. Having found no "unwarrantable failure," the ALJ reduced the negligence level from "high" to "moderate" and reduced the penalty from \$4,100 to \$3,000. Dec. at 13.

ARGUMENT

THE ALJ ERRED IN FINDING THAT SEVEN OBVIOUS AND DANGEROUS AREAS OF UNSUPPORTED ROOF THAT EXISTED FOR A WEEK WERE NOT THE RESULT OF THE OPERATOR'S "UNWARRANTABLE FAILURE"

The ALJ applied the correct legal standard for determining whether an "unwarrantable failure" occurred, but substantial evidence does not support his factual findings. The Secretary therefore urges the Commission to reverse the ALJ's rejection of the "unwarrantable failure" designation.

An "unwarrantable failure" consists of "aggravated conduct involving more than ordinary negligence." E.g., Buck Creek Coal, Inc. v. MSHA, 52 F.3d 133, 136 (7th Cir. 1995) (quoting Emery Mining Corp., 9 FMSHRC 1997, 2001, 2004 (1987)). Such conduct may be established by showing "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." Buck Creek, 52 F.3d at 136; Emery Mining, 9 FMSHRC at 2003-04. To determine whether an operator's conduct was aggravated, the ALJ must consider all the facts and circumstances, including the length of time the violation existed, the extent of the violative condition, whether the operator was placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating

the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation. Lopke Quarries, Inc., 23 FMSHRC 705, 711 (2001).

The ALJ's factual findings concerning three of the above-listed factors are flawed: the extent of the violative condition, EACC's knowledge of the violation, and EACC's knowledge that greater compliance efforts were necessary. Indeed, the evidence supports only one reasonable conclusion: that in light of all the circumstances, EACC's violation of Section 75.202(a) resulted from its "unwarrantable failure."

A. The Violative Condition Was Extensive.

The ALJ's finding that the violative condition was not extensive is neither consistent with the findings he made in affirming the violation of Section 75.202(a) and the S&S designation nor supported by substantial evidence.

In vacating the "unwarrantable failure" designation, the ALJ -- without citing any precedent -- relied primarily on the fact that "the total area cited was not significant compared to the total roof area of the entry . . . i.e., 112,000 square feet of roof." Dec. at 11. Specifically, he found the total area affected by rib sloughage to be approximately 90 square feet, i.e., six distinct areas

approximately 15 feet long each in which sloughage had increased the width of the Entry by one foot; and he found the total area affected by potting out to be approximately 119 square feet (i.e., 70+49). Dec. at 10. Thus, the total affected area, according to the ALJ, was 209 square feet.

In affirming that the areas of unsupported roof violated Section 75.202(a), however, the ALJ recognized that the addition of one foot to the width of the Entry due to rib sloughage weakened support for the entire width of the Entry in the affected areas. Specifically, the ALJ properly credited the inspector's testimony that the one-foot increases in the width of the Entry caused by the rib sloughage "ma[de] it more susceptible to roof failure." Dec. at 6. Similarly, the ALJ properly credited the inspector's testimony that "the increase in width of the cited entries due to sloughage compromises the integrity of the roof support system" over Safety Supervisor Kurry's testimony that a one-foot increase was not likely to cause the roof to fall. Dec. at 7. The ALJ emphasized that Kurry conceded on cross-examination that the roof bolt system was designed to create a compression beam from rib to rib, and that the original design for a sixteen-foot span was being exceeded due to the sloughage. Dec. at 7.

Similarly, in affirming the S&S designation, the ALJ stated that "the increase in the width of the entries due to sloughage at three different areas compromises the integrity of the roof support system." Dec. at 9.³ Having properly recognized this principle, the ALJ erred in ignoring it for purposes of the "unwarrantable failure" issue.

Properly applying this principle compels the conclusion that the area of inadequately supported roof caused by sloughage totaled 1,290 square feet -- that is, five areas measuring 15 feet long by 17 feet wide (including the one-foot increase caused by the sloughage), plus one area measuring 15 feet long by 18 feet wide (including a one-foot increase caused by sloughage on both ribs).

Additionally, the ALJ erred in calculating the area affected by potting out. He found that "[t]hree of the cited locations . . . involved conditions of potting in areas of approximately seventy feet and forty-nine feet respectively." Dec. at 10. Clearly, the ALJ neglected to

³ The meaning of the ALJ's reference to "three different areas" is unclear in light of his earlier finding that there were six distinct areas of sloughage (i.e., the four locations affected solely by sloughage, one of which the ALJ counted as two because there was sloughage on both ribs, plus the one area affected by both sloughage and potting).

include the third area of potting out. That area measured approximately 8 to 10 feet wide and over sixteen feet long, Dec. at 6, thus totaling between 148 and 160 square feet. Adding 148 square feet to the 1,290 square feet affected by the sloughage yields a total of 1,438 square feet of inadequately supported roof -- about seven times the 209 square feet found by the ALJ.

Fourteen hundred and thirty-eight square feet of inadequately supported roof represents an extensive violative condition. The fact that EACC had to install 66 roof bolts and three jacks to abate the violation underscores that extensiveness. The ALJ erred in finding otherwise.

B. EACC Knew That the Violation Existed and That Greater Compliance Efforts Were Necessary.

The ALJ erred in finding that EACC did not know that the violative condition existed or that greater efforts were needed for compliance. Kurry's testimony that the Entry was approximately twenty years old and had undergone "weathering" shows that EACC knew additional roof support was needed. The ALJ erred in finding otherwise based on Kurry's characterization of the "weathering" as "normal." The ALJ's finding in this regard is especially unreasonable in light of the fact that EACC had installed posts and

cribs over the years to reinforce support of the roof, and had just installed 15 supplemental roof bolts the day before the inspection. Dec. at 2; Tr. at 182. Thus, EACC clearly understood that "normal weathering" of a decades-old roof requires reinforcement of the roof support system.

The ALJ found that EACC's installation of the supplemental roof bolts the day before the inspection did not indicate any knowledge that the violation existed, or that greater compliance efforts were necessary, merely because they were located 1,000 feet away from the nearest cited area. Dec. at 12. The supplemental installation, however, underscores not only that EACC knew the roof was inadequately supported, but that EACC had indeed begun to reinforce it. EACC's actions clearly imply that it knew the violation existed and that greater compliance efforts were necessary. See San Juan Coal Co., 29 FMSHRC 125, 131 (2007) (a previous violation need not have occurred in the same area as a later violation to put the operator on notice that greater compliance efforts were necessary).

C. The Evidence Compels the Conclusion That EACC's Violation of Section 75.202(a) Resulted From Its "Unwarrantable Failure" To Comply.

Even if none of the above errors alone would require reversal of the ALJ's finding, together they do. The only factor other than those discussed above that the ALJ even

arguably found to weigh against a finding of "unwarrantable failure" was the length of time the violative condition existed.⁴ The ALJ found that the violative condition existed for "more than a few days," but that there was "insufficient evidence regarding their existence beyond that limited time period." Dec. at 12. This factor, however, should have weighed in favor of an "unwarrantable failure" finding.

If "limited time period" means one week, the length of time the violative condition existed undeniably weighs in favor of an "unwarrantable failure" finding. See, e.g., Consolidation Coal Co., 23 FMSHRC 588, 594 (2001) (existence of violative condition for several shifts supports an "unwarrantable failure" finding). If "limited time period" means anything less than one week, the ALJ erred because he credited the inspector's testimony on this issue and the inspector opined that the condition had existed for a week. Dec. at 12; Tr. at 72. Additionally, the ALJ failed to even mention the uncontradicted testimony of the miners' representative, who is a roof bolter in the

⁴ The ALJ did find that there was no deficiency in EACC's abatement efforts. Dec. at 12. In his discussion of how all the relevant factors weighed together, however, the ALJ did not mention abatement. Moreover, the fact that EACC installed 66 roof bolts and three steel jacks to abate the violation illustrates how extensive the violation was. Dec. at 12.

Entry, that the violative condition had existed for "at least" one week. See, e.g., U.S. Steel Mining Co., 27 FMSHRC 435, 440 (2005) (ALJ erred by failing to consider relevant testimony).

In sum, seven obvious, highly dangerous areas of unsupported roof covering an extensive area of the Entry existed for a week. The only reasonable conclusion is that there was an "unwarrantable failure" on EACC's part. The Secretary urges the Commission to reverse the ALJ's finding and affirm the inspector's "unwarrantable failure" designation. Consequently, the Commission should also reinstate the "high" negligence rating and the \$4,100 civil penalty assessment. See Quinland Coals, Inc., 9 FMSHRC 1614, 1622 & n. 11 (1987) (the penalty criterion of negligence is frequently based "on the same or similar factual circumstances" as an "unwarrantable failure" finding).

CONCLUSION

For the reasons discussed above, the Secretary urges the Commission to reverse the ALJ's rejection of the "unwarrantable designation" on Order No. 6602108, reinstate the "high" negligence rating, and reinstate the assessed penalty of \$4,100.

Respectfully submitted,

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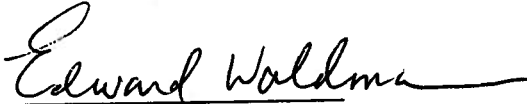
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CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2009, a copy of the foregoing petition for discretionary review was served by facsimile transmission and first-class U.S. mail on:

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