

FEDERAL MINE SAFETY & HEALTH COMMISSION
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**FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION**

SECRETARY OF LABOR, MINE)	ON APPEAL
SAFETY AND HEALTH)	TO THE COMMISSION
ADMINISTRATION,)	
)	Docket No. WEVA 2007-335
Petitioner,)	
)	Case No. 000111046
v.)	
)	
EASTERN ASSOCIATED COAL)	
CORP.,)	
)	
Respondent.)	Mine: Federal No. 2

BRIEF OF EASTERN ASSOCIATED COAL CORP.

NOW COMES Eastern Associated Coal Corporation (“Eastern”), by its undersigned counsel, and submits its brief in the above-referenced matter.

The Secretary has sought review of the January 27, 2009, decision of Administrative Law Judge Avram Weisberger (“ALJ”) finding that Eastern’s violation of 30 C.F.R. § 75.202(a) was not the result of its unwarrantable failure to comply with the standard. The Secretary argues that three of the ALJ’s factual findings with regard to the unwarrantable failure issue were not supported by substantial evidence: 1) the violative condition was not extensive, 2) Eastern did

not have knowledge of the violative condition, and 3) Eastern did not have notice that greater compliance efforts were necessary. Eastern asserts that the ALJ's determination of no unwarrantable failure is amply supported by substantial evidence and is not erroneous.

Issue

1. Whether the ALJ's finding that Eastern's violation of 30 C.F.R. § 75.202(a) was not caused by its unwarrantable failure to comply with the standard was supported by substantial evidence.

Statement of Facts

The 7 Right Empty Track

This case involves a portion of Eastern's Federal No. 2 Mine known as the 7 Right empty track (Tr. 20; G-1),¹ and its July 17, 2006 inspection by MSHA inspector Jason Rinehart. The 7 Right empty track is used to store empty mine cars (Tr. 68, 132), although during the inspection, the mine was on a vacation period, and there were no cars in the track entry (Tr. 144). The 7 Right empty track contains a trolley wire that supplies power to vehicles traveling on the rails

¹ References to the parties stipulations are designated "Stip." References to the Secretary's exhibits are designated "G." References to the exhibits of Cumberland are designated "R." Reference to the transcript of the hearing are designated "Tr." References to the ALJ's decision are to the reported decision at 31 FMSHRC 174. References to the Secretary's Petition for Discretionary Review (which was submitted in lieu of a brief) are designated "SPDR."

(Tr. 26). The track is approximately 7,000 feet long (Tr. 145). The area was mined in the 1970's (Tr. 150). The roof was originally roof bolted with three bolts spaced across the 16 foot wide entry (G-3 thru G-8). The original bolting has been supplemented over the years with additional bolting, posts, cribs and straps between the bolts (Tr. 146, 148, 149, 184, 189).² The straps installed between the originally installed bolts in the 7 Right empty track aided in the support of the roof, especially the immediate roof (Tr. 147-48).

The roof in the area of the 7 Right empty track is generally in good condition (Tr. 150-52). The height in the area has remained at the height of the original mining, indicating that there is little pressure on the roof (Tr. 150-52).³ Two people are assigned to maintain the entry, as weathering of the roof does occur in the track entry and may cause localized adverse roof conditions (Tr. 146, 150-52). In fact, on July 16, 2006, the day before the inspection by Mr. Rinehart, fifteen

² The drawings offered by the Secretary (G-3 thru G-8) do not show the supplemental support that has been added but are representative versions of the original support (Tr. 147-49).

³ The ALJ discounted Dan Curry's testimony concerning the fact the roof height has not changed the area was mined because he has only been at the mine for 5½ years. 31 FMSHRC at 179 n.7. The ALJ ignored in this discussion the fact that the height of the roof had not changed in 5½ years as well as the fact that an employee like Mr. Curry would talk to other more tenured miners who would impart such knowledge.

roof bolts were installed in the 7 Right empty track at the top end of the track (Tr. 181-82; R-3, p. 31).

There have been no roof falls in the 7 Right empty track that have pulled out roof bolts, nor have there been any “reportable” roof falls, i.e., falls above the anchorage point (Tr. 151). As of July 17, 2006, there was no evidence of stress in the roof or the pillars in the 7 Right empty track, such as floor heave, changes in the roof height, or cracks (Tr. 152, 185). To the extent the distance from the last row of roof bolts to the rib has increased since the original installation of roof bolts, such increase has been minimal, and thus, any material that would fall from the roof in that area would not be likely to cause a roof fall to propagate out of the areas cited by Mr. Rinehart (Tr. 156).

During the pre-shift examination conducted on the midnight shift of July 17, 2006, there was no evidence of cracking in the roof or heaving in the floor in the 7 Right empty track that would indicate pressure on the mine roof or floor (Tr. 175, 184-85). There was no evidence of working roof in the 7 Right empty track, where the roof would be cracking or small pieces would be falling (Tr. 159).

The cars that are usually stored in the 7 Right empty track are 54 inches high, and the roof in the area is 6 feet high (Tr. 124-25, 70). Individuals traveling through the track entry use what is known as the walkway side of the track, which

is on the opposite side from the trolley wire (Tr. 80, 157). If cars are present, an examiner must look across to the rib and roof on the other side of the cars in order to conduct an examination of the area, and his or her vision would be obstructed by the trolley wire, a 2-inch feeder line, and a 13-inch wide guarding that hangs down approximately 8 inches from the roof (Tr. 157, 172-73). From the walkway side of the track, it would be difficult to differentiate between distances of six and seven feet without actually measuring the area (Tr. 193-94).

The empty track is a considerable distance from the areas of active mining (Tr. 154; R-1). There is little traffic in the area, and it is not used as a typical route to any other location in the mine (Tr. 165). Rather, the primary route of travel through this portion of the mine is the 3 South haulage track, which runs parallel to the 7 Right empty track (Tr. 131, 144-45, 165).

The weekly examiners do not travel the 7 Right empty track to get to other areas of the mine (Tr. 97). In July of 2006, coal producing crews traveled into the mine via a route different than the 7 Right empty track (Tr. 129).⁴ When empty mine cars are stored on the track, other track-mounted vehicles cannot use the 7 Right empty track to travel to another place in the mine (Tr. 97).

⁴ The Secretary's witness, Kevin Luketic, could not even remember when he was last in the area because he worked in producing sections (Tr. 129).

The only people who would regularly travel in the 7 Right empty track area would be mine examiners, a pumper on the afternoon shift (who was capable of conducting his own examinations where he traveled), and two maintenance people (Tr. 117, 146, 166, 171).

The July 17, 2006 Inspection

On July 17, 2006, MSHA Inspector Jason Rinehart conducted a regular quarterly inspection of the 7 Right empty track (Tr. 20). He was accompanied by a UMWA walkaround, Mr. Luketic, and a management walkaround, Mr. Curry (Tr. 23). During the inspection, there were no personnel present in the 7 Right empty track other than the inspection party (Tr. 161).

Mr. Rinehart is an industrial hygienist for MSHA, and he had limited experience or training on roof control issues (Tr. 74). Mr. Rinehart holds no mine foreman or similar certifications from the State of West Virginia, nor has he ever conducted a pre-shift examination in a coal mine (Tr. 74). In the course of his inspection, Mr. Rinehart did not consult with any other MSHA inspectors who had previously inspected the 7 Right empty track, nor did he examine any history of roof falls in the track entry or any history of injuries in that track entry (Tr. 75).

During the course of his inspection, Mr. Rinehart issued a 104(d)(2) order, No. 6602108, which alleges a S&S violation of 30 C.F.R. § 75.202(a) (G-1). The

order identified seven areas in which the roof was alleged to be inadequately supported:

The roof was not adequately supported or otherwise controlled to protect miners on the 7-Right empty track in the following locations: 1) At the 5-Left rectifier there is an unsupported area 7 feet wide and 15 feet long. 2) At the No. 239 Car Marker on the wire side there are two areas on the inby and outby corner unsupported. The areas are 10 feet by 8 feet and 8 feet by 8 feet. 3) At the No. 215 Car Marker there is a 6 feet by 12 feet area unsupported. Coal has potted out around the bolts. 4) At the No. 108-110 Car Marker 7 feet exists between the bolt and the rib line on both sides for a distance of 15 feet. 5) At the No. 108-107 Car Marker on the off wire side, 7 feet exists between the bolt and the rib line for a distance of 12 feet. 6) At the No. 105 Car Marker, 7 feet exists between the bolt and the rib line for a distance of 12 feet. 7) Between No. 14 and No. 13 Car Marker there is an area 7 feet by 7 feet not bolted. The roof has deteriorated and potted out in these areas (G-1).

Five of the cited areas involved rib sloughage, and two areas involved places where the roof had “potted out,” namely items 3 and 7 in the Order but in one of those areas the roof bolts were still providing support for the roof (Tr. 32, 36, 55, 58, 61, 64; G-1).

The roof bolts cited by Mr. Rinehart as having portions of the roof potted out around the bolt beyond the bolt plate were still supporting the roof because the presence of the roof bolt plate in contact with the roof shows that the bolt is still pressurized against the top (Tr. 158, 177; G-4A). In areas where there the roof has potted out around the bolt itself, the bolt plate can obscure whether there is actually

any of the bolt exposed (Tr. 100). There was no visual evidence that any of the roof bolts installed in the cited areas were faulty or otherwise unsatisfactory (Tr. 119).

The conditions cited by the Inspector were not identified in the preshift examinations of the area (R-3). Eastern's mine examiners identified other conditions which were recorded in the examination record book. At the No. 142 Car Marker, there was an "ARS" (area requiring support) recorded in the book for the trolley wire side of the track entry (Tr. 178-79; R-3, p.36), even though Mr. Rinehart did not include that area in his order (G-1).

Even in the areas that Mr. Rinehart judged as having inadequate roof support, which were depicted by shaded drawings of the areas and presented by Mr. Rinehart at the hearing, the evidence showed that in the event of a roof fall in those shaded areas, it is unlikely that such a roof fall would propagate beyond the shaded area because the roof support remains intact beyond the shaded area (Tr. 158).

MSHA returned to abate the conditions on July 31, 2006, at which time sixty-six roof bolts and steel jacks had been installed in the areas (Tr.125; G-1). The details of the specific locations and of the amounts of the bolts were not part of the record (Tr. 135).

ALJ's Decision

The ALJ found that a violation of 30 C.F.R. § 75.202(a) existed. 31 FMSHRC at 177-81. He found that the violation was significant and substantial because “eventually the roof support bolts in the area will no longer be in contact with the roof.” 31 FMSHRC at 182 (emphasis supplied). He further found that it was S&S based on the assumption that “given continued mining operations, accompanied by the passage of time it was more likely than not there was a reasonable likelihood that the cited violative conditions contributing to the hazard of a roof fall will result in an injury-producing event, i.e., material falling from the roof.” 31 FMSHRC at 183.⁵ In making his finding that no unwarrantable failure existed, the ALJ analyzed factors that the Commission considered relevant in Consolidation Coal Co., 23 FMSHRC 588, 593 (Rev. Comm. June 2001). 31 FMSHRC at 183. He found that the cited area was not extensive compared to the total roof area of the 7 Right empty track. 31 FMSHRC at 184. He found that the conditions had existed for “more than a few days.” 31 FMSHRC at 184. He found that the operator did not have knowledge of the condition and had not been placed on notice that greater efforts were necessary for compliance. 31 FMSHRC at 184-

⁵ The ALJ was perhaps overstating the likelihood of an injury because even if material fell from the roof, it will not produce an injury unless a person is under it at that moment in time.

85. He found that there was no deficiency in Eastern's abatement efforts. 31 FMSHRC at 185.

He summarized his decision on the unwarrantable failure issue as follows:

In the context of all of the above, I find that the violative conditions were obvious and posed a high degree of danger. However, the violative area of the roof cited was not extensive in comparison with the total area of the roof in the entry. Moreover, it has not been established that Eastern had knowledge of the conditions, or was aware that greater efforts were needed for compliance. Further, although the conditions existed for more than a few days, there is insufficient evidence regarding their existence beyond that limited time period. Thus, I find that Eastern's negligence was mitigated and did not reach the level of aggravated conduct.

31 FMSHRC at 185.

Argument

I. The ALJ Was Correct in Finding That Eastern's Violation of 30 C.F.R. § 75.202(a) Was Not Caused By Its Unwarrantable Failure to Comply With the Standard.

The Secretary does not argue that the ALJ applied an incorrect legal standard to determine if an unwarrantable failure existed but instead argues that his finding was not supported by substantial evidence (SPDR 6). All of the Secretary's contentions are factually based and do not raise issues of law. All require a weighing and assessment of factual evidence and testimony, a function which is assigned in the Act to the ALJ. Determinations reached by the Judge that are factually based must be affirmed by this Commission if supported by

substantial evidence in the record. See Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (Rev. Comm. Nov. 1989). In Chaney Creek Coal Corp. v. Federal Mine Safety & Health Review Comm'n, 866 F.2d 1424 (D.C. Cir. 1989), the Court stated:

. . . Our only task in reviewing substantial evidence questions is to determine whether there is “such relevant evidence as a reasonable mind might accept as adequate to support [the judge’s] conclusion.”

866 F.2d at 1431 (citations omitted). A review for substantial evidence does not involve re-weighing conflicting evidence, making credibility determinations, or substituting the Commission’s judgment for that of the ALJ. See v. Washington Metro. Area Transit Auth., 36 F.3d 375, 380 (4th Cir. 1994). The possibility that two inconsistent conclusions can be drawn from the evidence is not a sufficient basis upon which to found reversal of a judge’s decision. Consolo v. Federal Maritime Comm’n, 383 U.S. 607, 620 (1966); Secretary of Labor ex rel. Wamsley v. Mutual Mining, 80 F.3d 110, 113 (4th Cir. 1996). As long as a judge’s decision is “adequately supported by the evidence and not inconsistent with the law[,] the [ALJ’s] determination is conclusive, and it is immaterial that the facts permit the drawing of diverse inferences.” Parker v. Director, Office of Workers’ Compensation Programs, 590 F.2d 748, 749 (8th Cir. 1979). See also Donovan on behalf of Chacon v. Phelps Dodge Corp., 709 F.2d 86, 90, 92 (D.C. Cir. 1983).

Application of these principles as well as the criteria for unwarrantable failure demonstrate the ALJ was correct in finding that Inspector's Order does not meet the criteria for an unwarrantable failure. In Emery Mining Corp., 9 FMSHRC 1997, 2004 (Rev. Comm. Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. This determination was derived, in part, from the plain meaning of "unwarrantable" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" ("the failure to use such care as a reasonably prudent and careful person would . . . characterized by 'inadvertence,' 'thoughtlessness,' and 'inattention'"). 9 FMSHRC at 2001.

Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." Emery Mining Corp., 9 FMSHRC at 2003-04; Rochester & Pittsburgh Coal Co., 13 FMSHRC 189, 193-94 (Rev. Comm. Feb. 1991). According to Commission precedent, a "should have known" standard cannot be used as a basis of an unwarrantable failure finding. Peabody Coal Co., 18 FMSHRC 494, 498, n.7 (Rev. Comm. Apr. 1996); Virginia Crews Coal Co., 15 FMSHRC 2103, 2107 (Rev. Comm. Oct. 1993); Cyprus Plateau Mining Corp., 16 FMSHRC 1610 (Rev. Comm. Aug. 1994).

The Commission has identified a number of factors in determining whether a violation is unwarrantable, “*including the extent of the violative condition, the length of time that it has existed, whether the violation is obvious, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator’s efforts in abating the violative condition.*” Consolidation Coal Co., 23 FMSHRC 588, 593 (Rev. Comm. June 2001); Eagle Energy Inc., 23 FMSHRC 829, 834 (Rev. Comm. Aug. 2001) (emphasis supplied). The Commission also considers whether the degree of danger that the violative condition . . . poses a high degree of danger.” 22 FMSHRC at 876 (citing Windsor Coal Co., 21 FMSHRC 997, 1000) (Rev. Comm. Sept. 1999)).

The Secretary argues that the three factors in italics are the factors that the ALJ erroneously evaluated in order to find that no unwarrantable failure occurred here. Eastern, on the other hand, asserts that the totality of the circumstances surrounding the Inspector’s Order and the alleged violative condition does not warrant a finding of unwarrantable conduct. An application of the pertinent factors to the grounds asserted by the Inspector and to the evidence adduced at hearing demonstrates that the conduct of Eastern was not aggravated, and the ALJ’s decision to vacate the unwarrantable finding was correct.

The substantial evidence shows that Eastern had maintained the roof in the 7 Right empty track on an ongoing and diligent basis since the area had been mined (Tr. 146, 148-49, 184, 189). The overall roof was in good condition and was not showing signs of stress (Tr. 150-52, 185). No reportable roof falls had occurred in the area in the 20 years since the area had been originally mined (Tr. 151). Two people are assigned to maintain the entry as weathering of the roof occurs (Tr. 146, 150-52). The ongoing nature of the process is demonstrated by the fact that the day before bolts were installed in another portion of the entry (Tr. 181-82; R-3, p. 3). An evaluation of the ALJ's decision and the record as a whole indicates that his conclusions are supported by substantial evidence.⁶

A. Extent of the Condition

The ALJ held that the extent of roof areas at issue were not extensive when compared with the total roof area of the 7 Right empty track. 31 FMSHRC at 183-84. He calculated the total square area of the roof area as approximately 112,000 square feet. 31 FMSHRC at 184. He said that the over-wide areas totaled 90 square feet because the width was one foot too wide and the length totaled 90 feet. 31 FMSHRC at 183-84. He found that the potted out areas totaled 139 square feet.

⁶ While the ALJ made certain findings concerning the degree of hazard and S&S and Eastern did not seek review of such findings, Eastern's decision not to seek review should not be construed as agreement with such findings.

31 FMSHRC at 183-84. He found that the areas cumulatively were not extensive.

31 FMSHRC at 184-85.

The Secretary attacks the ALJ's calculations because he apparently left the area from car marker No. 239 out of his calculation. That area comprised a total of 144 square feet and that amount is hardly significant (G-1).⁷

As for the areas that were considered overly wide, the Secretary would calculate these areas differently, using not the area where the entry was over-wide but the entire width of the entry (SPDR 7-16). The ALJ used the extra width of one foot times the total 90 foot distance involved. 31 FMSHRC at 183-84 (G-3 thru G-8). Using the area of the areas described in the Order, the figure for these areas is 417 square feet and a total of 682 square feet for all the areas (G-1; see also G-3 through G-8). This is less than 0.6 percent of the roof area of the 7 Right empty track (G-1).

The Secretary would utilize the whole width of the entry in calculating the areas that were overly wide (SPDR 9) but such approach ignores the purpose of the extensiveness criteria. It is not directed to the degree of hazard but the obviousness of the condition. Unwarrantable failure is a negligence based criterion, not a

⁷ In this calculation the ALJ apparently left out one area that was allegedly potted out. He included car marker 215 (72 square feet) and car marker 13-14 (49 square feet). 31 FMSHRC at 183. He apparently left out the area at car marker 239 (64 + 80 = 144 square feet) (G-1).

hazard based one. But even the Secretary's calculation yields a figure that is only 1.1% of the roof area on the empty track (SPDR 9).

Five of the seven cited areas were areas where rib sloughage had occurred, purportedly increasing the width between the last row of roof bolts and the rib to seven feet (Tr. 32, 36, 55, 58, 61, 64; G-1). However, the Inspector did not know what the roof control plan required at the time these bolts were originally installed in the 1970's (Tr. 77). The present roof control plan requires a maximum of 6 feet between the last row of roof bolts and the rib (Tr. 77), the twelve additional inches attributable to rib sloughage are not considerable, as the ALJ properly found, particularly in light of the difficulty presented in accurately observing such conditions when the track was filled with empty mine cars that would obstruct a mine examiner's view (Tr. 157, 193-94).⁸

The Secretary's argument that the entire entry width should be used in calculating the area is premised on the ALJ's finding that the greater width of the entry creates a greater potential for roof failure (SPDR 9). There are a number of difficulties with this approach. It ignores the language of the Order and her own drawings of the impacted area (G-1, G-3 thru G-8). Further, it goes to the hazard, not the negligence of the operator, in permitting weathered areas. Moreover, there

⁸ The inspector had to actually measure the distance.

is a question as to whether the finding that there was actually a greater potential for roof failure is supported by substantial evidence. The inspector was not qualified to opine as to what effect the greater width that would have (Tr. 74). The Secretary also ignores the fact that the issue was weathering which affects the surface of the roof but not its overall integrity. The roof had remained in place for approximately 30 years without failure (Tr. 150-52). The Secretary further ignores the fact that the inspector did not account for the effect of the supplemental support installed over the years (Tr. 76). That compounds the difficulty of identifying individual bolts in wide areas that affected roof support.

What cannot be discounted in evaluating the extensiveness of the condition is that there was considerable other support in the entries. Straps had been used throughout as had additional roof bolts and parts (Tr. 146, 148, 149, 184, 189). The one intersection that the inspector identified at Car Marker No. 239 already had additional posts in it (G-4). The inspector identified bolts that he believed might become compromised in the future, i.e., the roof material was still intact under the bolt plate (Tr. 84; G-4). These bolts in the use of the potted areas were still fully supporting the roof (Tr. 84).

When that number of bolts that the inspector was compared with a conservative estimate of the number of bolts throughout the 7,000 foot entry (3

bolts minimum per row spaced 5 feet apart) there are approximately 4,200 bolts, without allowing for supplemental or extra bolts. The inspector by contrast identified 21 bolts that were compromised or might be compromised in the future (G-3 thru G-8). This comparison supports the ALJ's finding.

Moreover, the 7 Right empty track can also be viewed in the context of the entire mine. The mine has a track haulage system above that exceeds the length of the 7 Right entry track many times over (R-1). While the ALJ looked solely at the 7 Right empty track, there are many more thousands of feet of track in the mine (R-1). Much of it traveled more frequently and thus meriting more attention (Tr. 129-30).

It can also just as readily be argued that the extent of the affected area should only be viewed linearly, i.e., out of 7,000 feet of track entry 82 feet contained questionable roof conditions (G-3 thru G-8). Travel through the entry is linear in nature, i.e., along the track, and such calculation is perhaps even more appropriate than the one based on square feet the ALJ adopted.

It should also be recognized when discussing these areas that they would be viewed individually by an examiner. All of them are relatively short in distance and when viewed from a moving vehicle or walking, these areas were in the middle of a full array of roof support. This is not a situation where all of these

conditions were in continuous areas; they were spread out over 7,000 feet. Despite any inadvertent mathematical miscalculation of the ALJ, it is clear that his finding that the condition was not extensive is fully supported in this record.

The Secretary also argued that the area was extensive because 66 roof bolts and three jacks were installed to abate the condition. 31 FMSHHRC at 183. The record is devoid of evidence as to where such bolts were installed and it would appear that more bolts than necessary were installed (Tr. 135). Assuming one bolt would be installed for each bolt in the shaded areas of the Secretary's exhibits it appears that only 25 bolts were actually necessary (G-3 thru G-8). Given that the fact that historically Eastern had routinely and regularly installed supplemental support it may well be that the 66 bolts do not indicate that the area was extensive but that Eastern is willing to ensure that the roof in the area is adequately supported.

Under these circumstances and supported by the evidence presented at hearing, the cited areas were not extensive, and the ALJ was correct in finding that this factor mitigates against an unwarrantable failure finding.

B. Whether the Operator was on Notice That Greater Efforts Were Required

The ALJ found that Eastern did not know the condition existed and was not on notice that greater compliance efforts were necessary. 31 FMSHRC at 184-85.

The Secretary argues, however, that Eastern knew that the violation existed and that greater compliance efforts were necessary (SPDR 10). The ALJ's finding is supported by the evidence.

The Commission has recognized that past discussions with MSHA about a particular condition serve to put an operator on heightened scrutiny that it must increase its efforts to comply with the subject standard. See Enlow Fork Mining Co., 19 FMSHRC 5, 11-12 (Rev. Comm. Jan. 1997). Likewise, a high number of past violations of a particular standard can also serve to put an operator on notice that it has a recurring safety problem in need of correction and thus, the violation history may be relevant in determining the operator's degree of negligence (or for these purposes, the degree to which a violation can be deemed unwarrantable). See Peabody Coal Co., 14 FMSHRC 1258, 1263-64 (Rev. Comm. Aug. 1992).

Here, there was no evidence presented that the operator had ever had any prior discussions related to unsupported roof in the 7 Right empty track, as the ALJ noted. 31 FMSHRC at 185. In fact, Mr. Rinehart had never inspected the Federal No. 2 mine and did not consult with any other MSHA inspectors who may have inspected the mine (Tr. 75); thus, Mr. Rinehart had no knowledge of any such discussions to which he could have testified. Mr. Rinehart also testified that he did not examine any history of roof falls or injuries at the mine (Tr. 75). In fact, other

testimony indicated that there had been no reportable roof falls in this area (Tr. 151).

Moreover, no information regarding a relevant violation history was submitted into evidence that would help support an unwarrantable failure finding. To prove notice, the Secretary is required to establish a history of factually similar violations. See, e.g., Drummond Co., 13 FMSHRC 1362, 1368 (Rev. Comm. Sept. 1991); yet here, the Secretary presented no evidence of any prior violations that were factually similar. See Consolidation Coal Co., 15 FMSHRC at 2255, 2277 (ALJ Koutras Nov. 1993) (where inspector testified he had issued several prior violations, but none of the citations were a matter of record and the Government did not produce copies of any prior citations or orders, the ALJ found that the assertion that the operator had been placed on notice was lacking any credible proof).

The Secretary argues that two facts establish that Eastern knew of the violative condition and a need for greater compliance efforts: 1) Eastern's acknowledgement that weathering can occur, and 2) the fact that Eastern installed 15 roof bolts the day before the inspection. In actuality, both these facts lead to the opposite conclusion and establish the absence of unwarrantable conduct.

It is correct that weathering can occur. Eastern, however, has consistently installed supplemental support since the original mining (Tr. 184, 189), as recently as the day before the subject inspection (Tr. 181-82; R-3, p. 31). Additional roof bolts have been installed throughout the length of the entry of the 7 Right empty track (Tr. 149). The roof bolts were supplemented with posts and cribs (Tr. 146). Steel straps and wooden straps were installed between the original bolts that further aided in the support of the bolts and the roof (Tr. 147-48). This is the conduct of a conscientious mine operator, not an indifferent or reckless one.

The Secretary argues that this demonstrates the opposite. According to the Secretary, because the operator has been conscientious, it is therefore negligent. Such argument turns logic on its head.

The Secretary also argues that, because Eastern installed supplemental support in an area 1,000 feet away the day before, it “knew the violation existed and that greater compliance efforts were necessary” (SPDR 11). The ALJ properly rejected this argument, noting that it was 1,000 feet away from the nearest cited area. 31 FMSHRC at 185. Such argument is also without logic. Weathering is a gradual incremental process. Simply because it has affected one area does not mean it has affected another to the extent that remedial action was required.

Moreover, the rib sloughage in one area does not necessarily mean it has occurred in another, particularly given the long period the entry has existed.

Moreover, the argument that Eastern knows that weathering of the roof surface occurs and addresses it is not evidence that it knew of the specific condition in the specific areas. The evidence shows that Eastern was monitoring the area. Mr. Poe, a miner with a wealth of experience,⁹ conducted a pre-shift examination on the midnight shift of July 17th prior to the inspection (Tr. 177; R-3, p. 36). During his pre-shift, he noted an area requiring additional support that was not identified by the Inspector (Tr. 178-79).¹⁰ If Eastern knew of any conditions in the area, it was not at the locations identified by the inspector but that does not mean it was not diligent.

Absent proof of prior discussions or prior factually similar violations, and particularly in light of the above cited testimony and evidence that no reportable

⁹ Mr. Poe has been a miner since 1966 and has 25 years of experience underground. He has worked in the Federal No. 2 mine for four years, is a Certified Mine Foreman in West Virginia (Tr. 169-70). The fact that the standard is a “reasonable person” standard, without prescriptive criteria, makes determination of the existence of a violation subject to a judgment, on which persons can differ and mitigates against an unwarrantable finding.

¹⁰ See Consolidation Coal Co., 15 FMSHRC at 2286 (noting that examiner who found no accumulations requiring correction on one day, but subsequently found the need to take corrective action the next two days, indicated that the examiner was “taking care of business as required and that the examiner was likely to take corrective action if he believed conditions warranted it”).

roof falls had occurred in this area, no finding of unwarrantable failure can be made on this record.

C. Duration

The ALJ evaluated the conflicting evidence concerning the duration of the condition and held that it had existed for more than a few days. 31 FMSHRC at 184. The Secretary argues that it was a week and that this should affect the unwarrantable finding (SPDR 12). She cites the case of Consolidation Coal Co., 23 FMSHRC 588, 594 (Rev. Comm. June 2001) to support this proposition. But the difficulty with the Secretary's argument is that she ignores the fact that the 7 Right empty track was not a high traffic area but was, in many senses, an out of the way portion of the mine, away from the active areas of the mine, especially while it was on vacation (Tr. 129).

With respect to duration, little evidence was provided by the Secretary regarding the length of time the conditions purportedly existed, other than the Inspector's supposition that the conditions had existed for approximately one week (Tr. 70-71). The Inspector based this conclusion on his belief that if fallen material was "fresh," it would have been found on the track (Tr. 70-71). In only two of the seven areas cited did the Inspector note that coal had potted out in an area that overhung the track (G-4, 5). Thus, it would have been highly unlikely that any

material in the cited areas would have fallen onto the track under any circumstances, and certainly could not provide a reasonable basis on which to estimate the duration with which the conditions had existed.

In cases where a condition has been present for a week or more, duration has not necessarily been an aggravating factor of significance. See Good Construction, 21 FMSHRC 201 (ALJ Manning Feb. 1999) (cited for lack of berms on an elevated roadway; condition lasted for about one week; no unwarrantable failure); McElroy Coal Co., 30 FMSHRC 45 (ALJ Zielinski Jan. 2009) (blower motor which ran cooling fans in a belt starter panel went bad; in order to keep panel cool, the large panel cabinet doors were left open; doors were left open for about a three week period; no unwarrantable failure was found). The ALJ properly held that duration was not an aggravating factor here.

D. Whether the Condition Presented its Degree of Danger

The ALJ held that the condition presented a “high” degree of danger. 31 FMSHRC at 182-83. The Secretary does not address that issue except to accept that finding but an evaluation of it calls it into question. In making his S&S finding the ALJ made it clear that he was assuming further weathering would occur and was basing his finding on future potential hazard. He stated that “eventually the roof support bolts in the area will no longer be in contact with the roof.” 31

FMSHRC at 182. He also indicated that sloughage “will continue to increase the width of the entry.” The difficulty with such approach is that it overstates the present hazard; the ALJ was looking more to a future potential hazard and that indicates that this is not a significant aggravating factor here.

There was extensive evidence presented that the 7 Right empty track, including the cited areas, was sufficiently supported and did not present a high degree of danger at the time of the inspection. For example:

- The height of the roof in the Seven-Right empty track has remained at the same height since the original mining occurred in the 1970’s, indicating little pressure on the roof (Tr. 150-52).¹¹
- There was no visible evidence that the bolts in the cited areas were faulty or otherwise unsatisfactory (Tr. 119)
- The 7 Right empty track was maintained by bolting, posts, and cribs (Tr. 146).
- There were steel straps and wooden straps installed between the original bolts that aided in the support of the bolts and the roof (Tr. 147-48).
- Additional roof bolts have been installed throughout the length of the entry of the 7 Right empty track (Tr. 149). Eastern has consistently installed supplemental support since the original mining (Tr. 184, 89).
- Mine personnel have not observed any evidence of stress in the roof or pillars, such as floor heave, changes in the roof height, or cracks (Tr. 152, 185).

¹¹ Even if it had remained stable for 5½ years, as the ALJ found, that is a significant time period.

- To the extent there has been any change in the distance between the last row of roof bolts to the rib, that change has been minimal (Tr. 156).
- Even Mr. Rinehart agreed that some areas he cited had sufficient support:
 - At the No. 239 Car Marker, Mr. Rinehart noted two posts and at least four roof bolts that were in contact with the roof (Tr. 84; G-4).
 - At the No. 215 Car Marker, Mr. Rinehart testified that all bolts were in contact with, and supporting, the roof (Tr. 87-88).

With respect to every area cited by Mr. Rinehart in the Order, he testified only of possibilities, as follows:

- Area 1: A person “could” be hurt by a roof fall (Tr. 31).
- Area 2: A person “could” be injured “if” the intersection would fall in (Tr. 51).
- Area 3: Mr. Rinehart’s only reference to injury was a statement that there was no possibility that someone would be injured outside the shaded area identified on exhibit G-5 (Tr. 57).
- Areas 4 and 5: Mr. Rinehart’s only reference to injury was a statement that a person would have to be located on the walkway side or wire side to be injured (Tr. 58, 61-62; G-6, 7). The Inspector also stated that someone on the track could “possibly” “be exposed to a hazard” (Tr. 59, 61-62).
- Area 6: Anyone in the shaded area is “possibly” at risk (Tr. 64).

- Area 7: Mr. Rinehart offered no testimony whatsoever with respect to even a possibility of injury, much less any reasonable likelihood.¹²

All of this evidence taken together would lead a reasonably prudent person with experience in mining to believe that the area was well supported and did not pose a high degree of danger on the day of the inspection and thus it was not a significant aggravating factor.

E. The Condition Was Not Obvious

Even if it is assumed that there was some lack of support in the cited areas, under the circumstances as detailed previously, any such lack of support would not be obvious. The ALJ found to the contrary but a further evaluation of the evidence undermines this finding as an aggravating factor for unwarrantable failure.

The 7 Right empty track is used to store empty mine cars (Tr. 68, 132), although on the day at issue, July 17, 2006, the mine was on a vacation period and there were no empty cars in the track entry (Tr. 144). This made it possible to ride

¹² Testimony that an injury “could” occur is not normally sufficient for a finding of S&S because it does not meet the “reasonably likely” aspects of the Mathies test. While Eastern did not seek review of the S&S finding, the Secretary’s evidence here fails to support an S&S finding because it is based upon the “potential” that an injury “could” occur. Texasgulf Inc., 10 FMSHRC 498, 500-1 (Rev. Comm. Apr. 1988); see also Zeigler Coal Co., 15 FMSHRC 949, 953-4 (Rev. Comm. June 1993) (“statements that such events could occur, standing alone do not support a finding that there was a reasonable likelihood”) (emphasis supplied).

an open vehicle in the entry (Tr. 144, 179-80). The absence of empty cars made it easier to observe the roof and ribs (Tr. 157).

The cars typically stored in the 7 Right empty track are 54 inches high and the roof in the area is 6 feet high (Tr. 124-25, 70). When persons walk through the track entry they use what is known as the walkway side of the track (Tr. 80, 157). If cars are present, an examiner has to look across to the rib and roof on the other side of the cars during any examination of the area (Tr. 157, 172). From the walkway side of the track, it may be difficult to differentiate between distances of six and seven feet without measuring the area (Tr. 193-94). When examining the 7 Right empty track, an examiner's vision is obstructed when empty cars are stored in the track due to the presence of the trolley wire, a 2-inch feeder line, and 13-inch wide guarding that hangs down approximately 8 inches from the roof (Tr. 172-73). The mine roof is not as depicted in the inspector's idealized drawings but there are straps, entrance bolts and other roof support, which would make identification more difficult.

Finally, as evidenced by the testimony of the operator's witnesses, the mine personnel believed that the area was well supported and safe. This good faith belief mitigates against any finding of unwarrantable failure. See Consolidation Coal Co., 13 FMSHRC 1089, 1094-95 (ALJ Broderick July 1991). Thus, this

factor also mitigates against a finding of unwarrantable failure and is supported by considerable evidence.

F. Abatement

The Federal No. 2 mine moved swiftly and efficiently to abate the conditions that were of concern to Mr. Rinehart and the ALJ found there was no deficiency in Eastern's abatement efforts. 31 FMSHRC at 185. This is not an aggravating factor.

The mine installed roof bolts and jacks in the areas noted by the inspector (Tr.125; G-1), all of which was completed by the time MSHA finally returned to abate the Order on July 31, 2006 (G-1). Under these circumstances, where the operator quickly abated the conditions judged by the Inspector to be in violation, this factor cannot be deemed a basis for finding of unwarrantable failure.

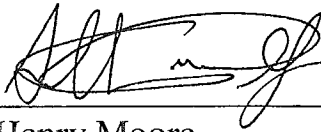
But this factor, in ways, addresses the actions of the operator before enforcement action is taken. This is not a situation where the operator knew of a specific condition and failed to address it. See, e.g., Eagle Energy Inc., 23 FMSHRC at 829 (water in airways). Eastern did not have such specific knowledge. But the 7 Right empty track was consistently maintained, even though it was not an often-traveled area. Further, the extensive evidence of the long-standing stability of the track entry shows that the operator exercised all reasonable

care in maintaining the area and that there was no reason to believe it was anything but sufficiently supported. Accordingly, no finding of unwarrantable failure is justified, and the ALJ's vacation of the unwarrantable failure should be affirmed.

Conclusion

In accordance with the discussion above of the factors necessary to demonstrate an unwarrantable failure, it is clear from the record in this case that, even accepting a violation of § 75.202(a) to have existed, the violation can not be characterized by any reckless disregard, intentional misconduct, or indifference by the operator. For the reasons set forth above, Eastern respectfully submits that the ALJ's Decision to vacate the unwarrantable failure must be affirmed.

Respectfully Submitted,

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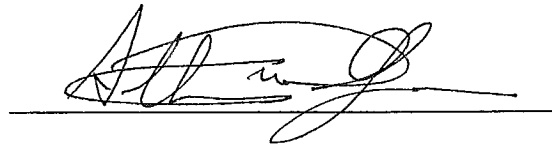
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that service of the Brief of Eastern Associated Coal Corp. has been served on this 1st day of May, 2009, via overnight courier to the following:

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A handwritten signature in black ink, appearing to read "Edward Waldman", is written over a horizontal line.