

U.S. Department of Labor

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



ON APPEAL TO  
THE COMMISSION

Via Facsimile and U.S. Mail

May 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:

Attached please find the Secretary's Reply Brief in the above-captioned case. A copy was also faxed to you, Mr. Moore, and Mr. Clegg today.

Thank you for your attention to this matter.

Sincerely,

Edward Waldman  
Attorney  
(202) 693-9344

Enclosure

cc: R. Henry Moore, Esq. (via facsimile and U.S. mail)  
Whitney G. Clegg, Esq. (via facsimile and U.S. mail)

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. )

REPLY BRIEF

In her opening brief, the Secretary argued that the administrative law judge erred in finding that Eastern Associated Coal Corporation's ("EACC's") violation of 30 C.F.R. § 75.202(a), which consisted of seven areas of inadequately supported roof, was not a result of its "unwarrantable failure." For the reasons set forth below, EACC's arguments to the contrary are unavailing.

ARGUMENT

- I. The ALJ Erred In Calculating the Total Area Affected By EACC's Violation of Section 75.202(a).

One of the factors relevant to an "unwarrantable failure" determination is the extent of the violative condition. E.g., Lopke Quarries, Inc., 23 FMSHRC 705, 711 (2001). The ALJ here found that EACC's violation of

Section 75.202(a) was not extensive because the area of inadequately supported roof "was not significant compared to the total roof area of the entry in question." ALJ's Decision ("Dec.") at 11.

In her opening brief, the Secretary argued that the ALJ miscalculated the affected area and understated it by a factor of seven.<sup>1</sup> EACC responds that the Secretary's method of calculation is inconsistent with the language of the inspector's order and the drawings made by the inspector to illustrate the violation. EACC's Response Brief ("Resp.") at 16. Specifically, EACC argues that the areas described in the order and drawings total 682 square feet.

Initially, EACC's math is wrong. The areas of inadequately supported roof described in the order (Government Exhibit 1), and depicted by shading in the drawings (Government Exhibits 3-8), total 748 square feet, as shown in the following table:

Area 1:	7' x 15' =	105 sq. ft.
Area 2:	(10' x 8') + (8' x 8') =	144 sq. ft.
Area 3:	6' x 12' =	72 sq. ft.
Area 4:	(7' x 15') + (7' x 15') =	210 sq. ft.
Area 5:	7' x 12' =	84 sq. ft.
Area 6:	7' x 12' =	84 sq. ft.
Area 7:	7' x 7' =	49 sq. ft.
TOTAL:		748 sq. ft.

---

<sup>1</sup> The Secretary designated her Petition for Discretionary Review as her opening brief pursuant to 29 C.F.R. § 2700.75(a)(1).

Additionally, and even more importantly, EACC ignores MSHA Coal Mine Inspector Jason Rinehart's testimony that, with respect to the areas where rib sloughing widened the entry, a person would not have to be within the shaded areas to be injured by a roof fall. Rather, the increased entry width caused by the sloughing could cause the roof to fall across the entire width, from one rib to the other. Transcript ("Tr.") at 31 (area 1), 59-60 (area 4), 61-62 (area 5), 63-64 (area 6). The ALJ credited Rinehart's testimony in finding that the violation was established, Dec. at 6-7, and in finding that the violation was S&S. Dec. at 9.

EACC argues that Rinehart was not qualified to opine on the effect rib sloughage would have on roof support because he is "an industrial hygienist . . . [with] limited experience or training on roof control issues." EACC's Resp. at 6, 17.<sup>2</sup> EACC is mistaken: Rinehart testified that he received the standard training all MSHA inspectors

---

<sup>2</sup>EACC does not, however, challenge the ALJ's discrediting of the contrary testimony of its witness, Dan Kurry, on this point. Dec. at 7. The ALJ discredited Kurry's testimony because Kurry agreed on cross-examination that the roof bolt system was designed to create a compression beam from rib to rib, and that the original sixteen-foot beam was being exceeded. *Id.* (EACC only criticizes the ALJ's discrediting of Kurry's testimony on another point, the height of the roof. EACC's Resp. at 3 n.3).

receive. Tr. at 18. Moreover, EACC neglects to mention Rinehart's testimony that he has a bachelor of science degree in safety engineering technology, a master of science degree in safety management, and over ten years' experience as a coal mine inspector for MSHA in the Morgantown, West Virginia, office. Tr. at 16-17. In light of these facts, the ALJ did not err in crediting Rinehart's testimony. See generally Buck Creek Coal, Inc. v. FMSHRC, 52 F.3d 133, 135 (7th Cir. 1995) ("credibility determinations reside in the province of the ALJ").

EACC argues that "the purpose of the extensiveness criteria . . . is not directed to the degree of the hazard but the obviousness of the condition." EACC's Resp. at 15. This argument is untenable in light of the Commission's longstanding teaching that both the extent and the obviousness of the violative condition must be considered in the "unwarrantable failure" analysis. See Lopke, 23 FMSHRC at 711. The extent of a violation is its scope or magnitude, and is a factor in addition to and separate from obviousness or danger.

EACC's reliance on its installation of supplemental roof support over the years is misplaced. EACC's Resp. at 17. As EACC recognizes, the supplemental supports were necessary to maintain the roof support system against the

effects of weathering. EACC's Resp. at 21. That is, the supplemental supports replaced the roof support that had been eroded by weathering over the years -- not the support that was eroded by the present violation, which had existed for approximately one week.<sup>3</sup> Accordingly, the supplemental supports are not a mitigating factor in the "unwarrantable failure" analysis.

In sum, the ALJ erred in finding that the area of inadequately supported roof was not extensive. The ALJ erred in his calculation of the extent of the affected areas by a factor of five. The ALJ's finding therefore cannot be affirmed.<sup>4</sup>

---

<sup>3</sup> EACC points to a distinction between routine maintenance occasioned by weathering and violations implicating the roof's integrity. EACC's Resp. at 23.

<sup>4</sup>The Secretary admits that she made a small error in her opening brief in stating that the total area affected by inadequately supported roof was 1,438 square feet. Secretary's Opening Brief at 10. In fact, the total is 1,198 square feet -- still more than five times the affected area found by the ALJ. The Secretary arrives at this number by using the table shown on page 2, above, with the following modifications to include the full width of the entry for the areas affected by sloughage: (i) increase the width in Areas 1, 5 and 6 from 7' to 17' (to account for the 16' foot width of the entry plus the additional 1' caused by sloughage), and (ii) calculate Area 4 by multiplying the 15' length by a width of 18' (to account for one foot of sloughage on each side of the entry that was originally 16').

II. Substantial Evidence Supports the ALJ's Finding That the Seven Areas With Inadequate Roof Support Were Highly Dangerous and Obvious.

Another factor that must be considered in making an "unwarrantable failure" determination is whether the violative condition poses a high degree of danger or is obvious. E.g., Lopke Quarries, Inc., 23 FMSHRC 705, 711 (2001). The ALJ found that the seven areas with inadequate roof support were both highly dangerous and obvious. Dec. at 11. EACC argues that the ALJ erred in so finding. EACC's Resp. at 25-30.

The basic premise of EACC's argument regarding the danger issue is faulty. EACC asserts that the ALJ "was assuming further weathering would occur and was basing his finding on future potential hazard," as opposed to present danger. EACC's Resp. at 25-26. EACC's logic is flawed. The ALJ's finding that the danger would continue to grow with continued mining is not inconsistent with, and does not detract from, his finding that the situation was already highly dangerous at the time of the inspection.

Nor does the ALJ's crediting of Inspector Rinehart's testimony that rib sloughage eventually leads to potting out, which in turn eventually leads to loose bolts losing contact with the roof, indicate that the ALJ found only a

future danger. Rather, the ALJ found that some bolts had already lost contact with the roof, and that the rib sloughage had already caused a highly dangerous situation by increasing the width of the entry beyond the sixteen feet that the roof support system was designed to accommodate. Dec. at 6-7, 9, 11.

EACC's argument that the violative condition was not obvious fares no better. In finding the condition to be obvious, the ALJ credited Inspector Rinehart's testimony that the roof conditions "were obvious and could be seen when walking up the entry." Dec. at 11; Tr. at 69-70. Additionally, the ALJ observed that Dan Kurry, the EACC representative who accompanied Rinehart during the inspection, "did not contradict [Rinehart's] testimony" on this point. Dec. at 11. The ALJ therefore properly chose to credit Rinehart's testimony on this point. See, e.g., Buck Creek Coal, 52 F.3d at 135 (credibility determinations are within the ALJ's purview as the finder of fact). EACC's arguments (see EACC's Resp. at 28-29) merely summarize the evidence favorable to its position and invite the Commission to reweigh the evidence. This the Commission may not do. See, e.g., Island Creek Coal Co., 15 FMSHRC 339, 347 (1993).

Finally, EACC argues that an "unwarrantable failure" finding is inappropriate because mine personnel had a good-faith belief that the roof was well-supported and safe. EACC's Resp. at 29. Only if a good-faith belief is reasonable, however, does it weigh against an "unwarrantable failure" finding. Cyprus Plateau Mining Corp., 16 FMSHRC 1610, 1615 (1994) (a good-faith belief must be reasonable to mitigate an "unwarrantable failure"). EACC does not argue that the good-faith belief was reasonable. Nor can it where, as here, Kurry admitted that the width of the entry exceeded that for which the roof bolt support system was designed.

CONCLUSION

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

Respectfully submitted,

CAROL A. DE DEO  
Deputy Solicitor for  
National Operations

HEIDI W. STRASSLER  
Acting Associate Solicitor

W. CHRISTIAN SCHUMANN  
Counsel, Appellate Litigation



EDWARD WALDMAN  
Attorney  
U.S. Department of Labor  
Office of the Solicitor  
1100 Wilson Blvd., 22<sup>nd</sup> Fl.  
Arlington, VA 22209-2296  
(202) 693-9344  
(202) 693-9361 (fax)

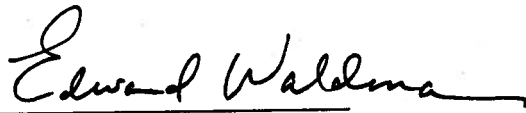
Attorneys for the  
Secretary of Labor, MSHA

CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2009, a copy of the foregoing reply brief was served by facsimile transmission and first-class U.S. mail on:

R. Henry Moore, Esq.  
Arthur M. Wolfson, Esq.  
Jackson Kelly PLLC  
Three Gateway Center  
401 Liberty Ave., Suite 1340  
Pittsburgh, PA 15222  
(412) 434-8062 (facsimile)

Whitney G. Clegg, Esq.  
Jackson Kelly PLLC  
1144 Market St., Suite 400  
P.O. Box 871  
Wheeling, WV 26003  
(304) 233-4077 (facsimile)

  
Edward Waldman  
Edward Waldman