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MSHA V. WESTMORELAND COAL
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SEP 20, 1985
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

Docket Nos. WEVA 82-152-R
WEVA 82-369

v.
WESTMORELAND COAL
COMPANY

BEFORE: Backley, Acting Chairman; Lastowka and Nelson,
Commissioners

DECISION

BY THE COMMISSION:

This consolidated civil penalty and contest proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("Mine Act"). At issue is Westmoreland Coal Company's ("Westmoreland") alleged "unwarrantable failure" to comply with 30 C.F.R. § 75.202, a mandatory roof control standard. 1/ The administrative law judge found that the violation occurred, that it was "unwarrantable," and that an \$8,000 penalty was appropriate. 5 FMSHRC 132 (January 1983)(ALJ).

1/ 30 C.F.R. § 75.202, which is identical to section 302(c) of the Mine Act, 30 U.S.C. § 862(c), provides:

The operator, in accordance with the approved roof control plan, shall provide at or near each working face and at such other locations in the coal mines as the Secretary may prescribe an ample supply of suitable materials of proper size with which to secure the roof of all working places in a safe manner. Safety posts, jacks, or other approved devices shall be used to protect the workmen when roof material is being taken down, crossbars are being installed, roof bolt holes are being drilled, roof bolts are being installed, and in such other circumstances as may be appropriate. Loose roof and overhanging or loose faces and ribs shall be taken down or supported. Except in the case of recovery work, supports knocked out shall be replaced promptly.

(Emphasis added).

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Westmoreland seeks review of these conclusions. For the reasons

that follow, we affirm in part, reverse in part, and remand for reconsideration of the appropriate penalty.

On January 11, 1982, a rib fall at Westmoreland's Eccles No. 6 mine resulted in the death of scoop operator John Clay. The following day the Department of Labor's Mine Safety and Health Administration ("MSHA") conducted an investigation and, pursuant to section 104(d)(1) of the Mine Act, issued an order of withdrawal citing a violation of 30 C.F.R. § 75.202. The order stated:

During a fatal accident investigation it was revealed that the known overhanging rib in the old 2 north entry on 2 south west section (027-0), 55 feet in by survey station No. 9363, was not supported or taken down which resulted in a fatal accident. The section was supervised by Robert Hairston, who was aware of the condition.

The order also alleged that the violation was caused by Westmoreland's unwarrantable failure to comply with 30 C.F.R. § 75.202. 2/ The rib fall occurred in an area of the mine known as the "old works." This area had been last mined in the 1930's and from then until January 1982, no employees of Westmoreland had either worked or traveled in that area. However, on Monday, January 11, 1982, a work crew was sent into the area to build a stopping needed to maintain required ventilation. On

2/ Section 104(d)(1) in relevant part provides:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited

from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. § 814(d)(1).

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January 11, after the crew arrived in the area, the section foreman, Robert Hairston, performed an examination of all of the work places, including where the accident would later occur, and then assigned duties to the crew members. Under the sequence of operations which Hairston assigned, the first person to work in the area was Albert Honaker, a continuous mining machine operator. Honaker cleaned rock and coal from the mine floor with the continuous miner in order to enable the roof bolting crew to come in and install roof bolts where the stopping was to be built. From a distance of 20 feet, Honaker observed a coal formation, which he termed a "brow," protruding from the left rib and forming an arch where the roof and rib met. Honaker did not attempt to cut the brow with the continuous miner because, at that time, to do so would have required working beneath unsupported roof. Honaker alerted the incoming bolting crew about the brow and moved the continuous miner into another work area.

Arthur Burdiss, the bolter helper, bolted the entry and set four bolts within four or five inches of the brow. He attempted to bolt through the brow in order to support it, but the canopy height of the bolting machine restricted access and he was unable to bolt in the brow. Burdiss also tried unsuccessfully to dislodge the brow by exerting pressure on it with the bolter's hydraulic canopy. He and George Ayers, the roof bolter, then unsuccessfully attempted to pry down the brow with a slate bar.

Meanwhile, Honaker informed section foreman Hairston of the presence of the brow. Honaker and Hairston returned to the entry and both tried unsuccessfully to pry down the brow. Subsequently, John Clay and Jim Milam, the miners assigned by Hairston to build the stopping, entered the area. After examining the brow these two miners also attempted, unsuccessfully, to bar it down. Clay and Milam then began the assigned work of constructing the stopping. Shortly thereafter Milam saw a small flake fall. Before he could shout a warning, the brow fell, killing Clay.

Upon notification to MSHA, an investigation was made and the issuance of the contested unwarrantable failure withdrawal order followed. Westmoreland contested the order arguing that the cited standard was not applicable or was unenforceably vague.

Alternatively, Westmoreland argued that it had affirmatively defended against the Secretary's allegation by establishing that compliance was more dangerous than abatement--the so-called "greater hazard" or "diminution of safety" defense. Westmoreland further argued that if a

violation occurred it was not caused by Westmoreland's unwarrantable failure to comply with the standard. The administrative law judge rejected each of these arguments.

On review, Westmoreland asserts that the judge erred. With respect to its applicability/vagueness challenge, Westmoreland contends that in upholding the standard's application to the facts at issue the judge erroneously equated the term "brow" with the term "overhanging rib" used in the standard, and that he erred in requiring that every "brow" must be taken down or supported. We disagree. We find that the judge correctly concluded that the standard's language informs, with sufficient certainty,

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those who must comply with the standard of the nature of its requirements. Great Western Electric Co., 5 FMSHRC 840 (May 1983); U.S. Steel Corp., 5 FMSHRC 3 (January 1983). Moreover, we read the judge's decision as simply holding that under the particular facts of this case the coal formation that was present in the entry was an "overhanging rib" within the meaning of the standard. The judge did not purport to offer an all inclusive interpretation of the standard, nor was he called upon to do so. We further find that the judge's conclusion that the coal formation at issue was an "overhanging rib" is supported by substantial evidence of record and must therefore be sustained. 30 U.S.C. § 823(d)(2)(A)(ii)(I). Regardless of the discrepancies in the witnesses' estimates of the precise dimensions of the coal formation prior to its fall, it is clear from the record that each of the experienced miners here had determined that the formation required their attention and appeared to necessitate being barred down. Although after repeated unsuccessful attempts to remove it they determined to their satisfaction that it was not hazardous (which determination, tragically, turned out to be erroneous), on the facts of this case we find that their first determination, rather than their second, is demonstrative as to the standard's applicability, and viewed in conjunction with the Secretary's evidence as to the nature of the coal formation, constitutes substantial evidence.

Westmoreland also contends that the judge erred in concluding that Westmoreland failed to establish a diminution of safety defense to the violation. Westmoreland argues that the compliance with the standard would have posed safety risks to miners equal to or greater than those posed by the condition itself. The judge applied the three-prong test that the operator must meet to establish the defense: (1) the hazards of compliance are greater than non-compliance; (2) alternative means of protecting miners are unavailable; and (3) a modification proceeding under section 101(c) of the Mine Act would not have been appropriate. Penn Allegh Coal Co. Inc., 3 FMSHRC 1392 (June 1981). See also Sewell Coal Co., 5 FMSHRC 2026 (December

1983). We agree with the judge that Westmoreland failed to establish this defense.

The diminution of safety defense that has been recognized by the Commission is extremely narrow. As the Commission stressed in Penn Allegh and Sewell, the Act's enforcement scheme is premised on the proposition that compliance with mandatory standards adopted by the Secretary will protect, not endanger, miners. For this reason, and because the Act itself provides specific detailed procedures for modifying the application of a standard in light of special circumstances that might exist at a particular mine, the Commission rejected the argument that an operator can unilaterally determine that a mining operation can be conducted in a safer manner by foregoing compliance with the requirements of a mandatory standard. 3/ Therefore, whenever this defense is raised in an enforcement proceeding it must be closely scrutinized and each of the elements must be supported with clear proof.

3/ In Sewell the Commission recognized a potential exception to the need for applying for a modification in "emergency situations ... where the gravity of circumstances and presence of danger may require an immediate response by the operator ... necessitating a departure from the terms of a mandatory standard." 5 FMSHRC at 2020, n.2. No such emergency situation was presented on these facts.

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In rejecting the operator's defense in this case the judge found, among other things, that Westmoreland failed to establish "that it was necessary in the first instance to have required the miners to have erected a stopping beneath the overhanging brow." 5 FMSHRC at 136. We agree and find it sufficient to affirm the judge's rejection of the defense on this basis. A consistent thread throughout the miners' testimony was that until they actually broke through into the "old works" they were unaware that the overhanging rib was present above the area where the plans called for the stopping to be erected. The record gives no indication that upon subsequent discovery of this fact any further thought was given or discussion held regarding whether the ventilation problem being addressed could be resolved in some fashion other than by building a stopping underneath the overhanging rib. Rather, the operator's employees simply proceeded on the same course of action that had been assigned before the potential danger was discovered. The lack of evidence in the record concerning consideration of possible alternatives to building the stopping below the overhanging rib, which we determined above to have violated the applicable mandatory standard, defeats the operator's diminution of safety defense.

Finally, Westmoreland asserts that the judge erroneously

concluded that the violation was the result of Westmoreland's "unwarrantable failure" to comply with the standard. The judge found, "[T]hat (foreman) Hairston had knowledge of the violative condition but failed to correct that condition through indifference or lack of reasonable care." 5 FMSHRC at 137. We find that this conclusion not only lacks substantial support in the record, it is contrary to the overwhelming weight of the evidence.

The record reflects that each and every miner who observed the formation before it fell, including the foreman, attempted to bar it down an accepted and commonly used method to determine the presence of and to eliminate dangerous ground conditions. The crew also attempted to secure the formation with roof bolts and to dislodge it by exerting pressure on it with the roof bolter's hydraulic canopy. The crew was, composed of miners with many years of experience and they attested to the safety consciousness of their foreman. Each of these miners concluded, based on their repeated unsuccessful attempts to dislodge the coal, that the rib was safe. Given the repeated efforts to remove the formation and the consequent good faith belief on the part of all concerned that the formation posed no hazard, we cannot conclude that the foreman's actions in allowing the work to proceed represents the degree of aggravated conduct intended to constitute an unwarrantable failure under the Act. Although we have held that the record fails to establish that Westmoreland had no option other than building a stopping in this location, on these facts we also must conclude that the violation that occurred did not result from Westmoreland's indifference, willful intent, or serious lack of reasonable care. See generally U.S. Steel Corp., 6 FMSHRC 1423, 1437 (June 1984). Accordingly, we hold as a matter of law, that the violation was not caused by Westmoreland's unwarrantable failure and we reverse the judge's contrary finding.

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Because the judge's penalty assessment rested in part on his determination that the foreman acted with indifference and without reasonable care, the case is remanded to the judge for reconsideration of the amount of civil penalty in light of our decision. In all other respects the decision of the judge is affirmed insofar as it is consistent with this decision. 4/

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

4/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

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