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MATHIES COAL V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

MATHIES COAL COMPANY,
CONTESTANT

v.

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

AND

UNITED MINE WORKERS OF AMERICA,
RESPONDENTS

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

v.

MATHIES COAL COMPANY,
RESPONDENT

Contest of Citation

Docket No. PENN 82-3-R
Citation No. 1142334 9/22/81

Mathies Mine

Civil Penalty Proceeding

Docket No. PENN 82-15
A.C. No. 36-00963-03181

Mathies Mine

DECISION

Appearances: David T. Bush, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor H. Juanita M. Littlejohn, Esq., Pittsburgh, Pennsylvania, for Mathies Coal Company

Before: Judge Lasher

A hearing on the merits of this consolidated proceeding was held in New Kensington, Pennsylvania, on April 8, 1982, at which both parties were represented by counsel. On April 8, 1982, after consideration of the evidence submitted by both parties and proposed findings of fact and conclusions of law proffered by counsel during closing argument, a decision was entered on the record. This bench decision appears below as it appears in the official transcript aside from minor corrections.

This matter is comprised of a contest proceeding filed by Mathies Coal Company, herein Mathies, on October 9, 1981, under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., herein the Act, and a civil penalty proceeding initiated by the Secretary of Labor by a filing on December 7, 1981, under section 110 of the Act.

The citation involved in both proceedings which were consolidated for hearing and decision by my order dated April 1, 1982, is numbered 1142334 and was issued by MSHA Inspector Francis E. Wehr on September 22, 1981. The allegedly violative condition described in the citation is that: "One of the four sanding devices provided for the No. 4 self propelled personnel carrier (mantrip) was inoperative which was going to transport personnel from Gamble No. 1 to 4 face, 24 butt parallel section ID054. The sander was empty due to valve that was stuck open. Foreman in charge Ron Pietroboni. Notice to provide safeguard 10WC 12-01-72." The citation also alleged, in addition to the purported violation of 30 C.F.R. 75.1403, that said violation was of such a nature that it could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. This latter allegation was accomplished on the face of the citation by the placement of an X in an appropriate box. The notice to provide safeguard referred to on the face of the citation is dated December 1, 1972, (Exhibit 1b) and it provides: "Sanding devices were not sufficient to supply sand to all wheels in both directions of travel on Lee-Norse Nos. 1, 2, 3 and 4 and Galis Nos. 5, 6, 7, 8 and 9 self propelled mantrip cars." This obviously has reference to a specific situation existent at Mathies on December 1, 1972. Subsequently, this safeguard notice was amended to provide more reasonable guidance and by citation issued August 12, 1980, the original safeguard notice was modified to provide as follows: "This is to modify safeguard number 1 JWC dated 12/01/72 to include that all mantrips at this mine will be provided with properly maintained sanding devices sufficient to sand all wheels in both directions of travel."

If not specifically established in the record, I find from the pleadings herein that on or about 8:20 a.m., on September 22, 1981, approximately five minutes after the citation was issued that Inspector Wehr issued a termination of the citation which indicated: "Adjustment [sic] were made on the valve and sander fill with sand returning the sander to a operative condition."

The general issues involved are whether a violation of section 75.1403 of 30 C.F.R. occurred as alleged by Inspector

Wehr and if so whether such violation was 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 again, if such violation occurred, the amount of civil penalty which should be assessed in consideration of the six standard statutory penalty assessment factors provided in the Act.

Section 75.1403, a general statutory requirement repeated in the codified mandatory standards contained in CFR, provides: "Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided." Authority for the issuance of the aforesaid safeguard notice is contained in section 75.1403-1 and the specific requirement relating to sanding devices on self propelled personnel carriers is provided for in section 1403-6(b)(3).

At the commencement of the hearing the parties provided general stipulations with respect to the ownership of the Mathies Mine wherein the alleged violation occurred and jurisdictional agreements. They further stipulated with respect to four of the six penalty assessment criteria. Two witnesses testified for the Secretary of Labor, Coal Mine Inspector Francis E. Wehr and MSHA Supervisor William A Dupree. Malcolm Dunbar, Safety Supervisor at Mathies Mine, testified for Mathies.

Inspector Wehr testified that on the morning of September 22, 1981, at approximately eight-fifteen a.m. he was standing on the clearance side of the mantrip in question, which I find based on other testimony in the record to be a Lee-Norse self propelled mantrip car, and observed the operator of this mantrip car-who, based upon subsequent testimony in the record, I find to be one Steve Nick-perform a safety inspection after which Mr. Nick engaged the trolley pole thereon. According to Inspector Wehr management personnel had previously left the area when this event occurred. After asking Mr. Nick if he was ready to go and receiving Mr. Nick's answer that he was ready to go but was waiting for the foreman to return, Inspector Wehr conducted his own inspection of the mantrip and determined that one of the four sanders thereon was malfunctioning. The foreman who had left the area had gone to find another person to ride with him on the mantrip. The mantrip was loaded with seven or eight miners at the time Inspector Wehr discovered the inoperative sander and was scheduled to travel from the area where it was observed by Inspector Wehr (called "the bottom") some sixty-five hundred feet to the section. (The bottom is marked point "A" on Joint Exhibit No. 1, a mine map, and the section is marked

point "B" thereon).

Inspector Wehr concluded that Mr. Nick, the operator, had performed his inspection of the mantrip based on his observation that Nick had pulled the levers controlling the sanders and had turned around and looked at various points on the mantrip, for example, the fire extinguisher. When Inspector Wehr checked the malfunctioning sander in question he determined that because a valve was stuck the sand contained in the container constituting part of the sander had been emptied. In other words there was no sand in the sander to be released in the event such might become necessary during the trip to the section.

I footnote at this point that the record indicates that approximately one half a gallon of sand is contained in the sander and that there are sanders above each of the four wheels on the mantrip. The record also indicates that the sand is released on the tracks for the purpose of increasing friction when the brakes of the mantrip are applied thereby increasing the stopping power of the mantrip brakes.

Inspector Wehr indicated that the sander would have been used in the course of going to the section because the mantrip would have had to change directions. Evidence in the record in further explanation of this testimony is to the effect that the mantrip uses only two sanders at any one time determined by the direction of travel of the mantrip. Thus if one sander is inoperable, fifty percent of the sanding capacity of the mantrip is withdrawn insofar as the same relates to its effect on stopping power. Wehr said Mr. Nick, the mantrip operator, did not indicate to him that there was a problem.

Inspector Wehr determined that a violation occurred because the plunger (valve) was open and there was no sand in the sander. Thus, no sand could be applied to the rails. He indicated that he considered the violation to have resulted from the negligence of the mine operator because the condition of the sander should have been known and that as the operator checked it the violative condition should have been discovered. The Inspector indicated that he considered the violation to have been of the "significant and substantial" variety because of various factors which he mentioned were prevalent in the haulageway. He testified that in addition to the sander not working there were hills and grades the mantrip would have to pass over to get to the working section and that the Mathies Mine is a "wet" mine which has pumps all along it's haulageways. Specifically, he indicated that point "D" on Joint Exhibit No. 1 gets water in it and that also point "G" gets water in it. I footnote at this point that Mathies' witness Malcolm Dunbar indicated that there is at least one location along the haulageway where water had been observed on the

track. Mr. Dunbar did not recall the conditions on the track on September 22, 1981, and to the extent there is any substantial conflict between the testimony of Inspector Wehr and Mr. Dunbar on this particular point the more specific testimony of the Inspector is credited.

The Inspector indicated that from point "A" to point "C" on the mine map there is a small down grade and at point "D" there is a dip. According to Mr. Dunbar, between point "D" and "E" there is a 3.4 percent downgrade, from point "E" to point "F" the haulageway is fairly level and from point "F" to point "G" there is an S turn. With respect to visibility the record, in this case the testimony of Mr. Dunbar, indicates that the mantrip (sometimes called portabus) has headlights and that while there is some low top the bus has windows at each end.

The hazard envisioned by Inspector Wehr resulting from the impairment of the sander was a sliding derailment or "slamming" into some object on the tracks. The injuries expected by the Inspector would be broken bones resulting from crushing blows to people who were thrown around or thrown out of the mantrip. In Exhibit M-4, the gravity sheet which Inspector Wehr completed, Inspector Wehr indicated that the injury contemplated by the occurrence of the event in question could reasonably be expected to be "fatal." Although Mathiesin taking his deposition as well as at hearing-has challenged Inspector Wehr's conclusion as to projected injuries from the occurrence of the anticipated hazard (Exhibit C-6), I conclude that Inspector Wehr's testimony is reasonable, logical and credible under all the circumstances. His testimony in this connection was reinforced by the testimony of Mr. Dupree who indicated his awareness of fatalities which had occurred in Utah and Kentucky resulting from sander insufficiency. The Inspector also indicated his awareness of an accident where a miner sustained a back injury after being thrown from a mantrip. I therefore find that with respect to the injury aspect that it is established on this record that upon the occurrence of the hazard contemplated there exists a reasonable likelihood that a resultant injury would be of a reasonably serious nature.

The Respondent, Mathies, contends that no violation occurred in the first place because at the time the Inspector observed the malfunctioning sander the mantrip operator had not completed his process of making safety checks. Significantly, Mathies did not call Mr. Nick as a witness. Mr. Nick would be the best witness in view of his exclusive knowledge with respect to the defense raised by Mathies. Mr. Dunbar testified that after the citation had been issued

by Inspector Wehr he spoke to Mr. Nick and that Mr. Nick told him that he had completed all safety checks except for his check of the sanders. I conclude that the direct knowledge of the Inspector on this vital conflict must be found to overpower the less probative testimony of Mr. Dunbar. As pointed out by the Secretary on cross examination and readily admitted by Mr. Dunbar, Mr. Nick's disavowal to him with respect to not having completed his safety examination of the mantrip might have been with a view toward avoidance of disciplinary action. Secondly, Mathies' position on this point is damaged by virtue of its own system establishing responsibility for making these important safety checks. Mathies has a written policy placing the responsibility for such checks on the section foreman, in this case on Ron Pietroboni, who likewise did not testify. In any event, like Mr. Dunbar, Mr. Pietroboni was not in the area at the time the defective sander was initially discovered by Inspector Wehr, when Inspector Wehr observed Mr. Nick making the safety check, when Inspector Wehr asked Mr. Nick as to the readiness of the mantrip, and when Inspector Wehr made his decision to issue the citation.

Accordingly to Mr. Dunbar, the foreman's responsibility for making safety checks can be delegated to others in the foreman's discretion. Although Mr. Dunbar testified that on September 22 he did not know who had the responsibility to make the safety check or who Mr. Pietroboni had delegated such responsibility to, nevertheless it was Mr. Nick who Mr. Dunbar conversed with to determine if the mantrip had been safety checked. I therefore conclude that Mr. Nick was the responsible person to make the safety checks on behalf of Mathies on the day in question, that he was observed by Inspector Wehr to make those checks, that he did advise Inspector Wehr that the mantrip was ready and that for some unspecified reason the safety check (1) was either not made as it should have been or (2) was negligently performed so as not to have revealed the malfunctioning sander. Although I found Mr. Dunbar to be a sincere and knowledgeable witness his position from which to observe the critical event here was not as close as that of Inspector Wehr whose account of events I find no basis in the record to discount. I therefore conclude that the violation occurred as charged in the citation. The mere occurrence of the defective sander under mine safety law constitutes a violation since liability is imposed on a mine operator without regard to fault. ElPaso Rock Quarries, 3 FMSHRC 35, 38-39 (1981).

Based upon Inspector Wehr's account, I find that Mathies was negligent necessarily in one of three possible regards raised by the circumstances: (1) in failing to specifically

delegate the responsibility to make a safety check of the mantrip in question on September 22, 1981; or (2) in negligently conducting the safety check on the mantrip at that time; or (3) in the failure of the person to whom such responsibility had been delegated to inspect the sanders in question. Because the persons having the responsibility or who may have had the delegated responsibility did not testify, it is impossible to more specifically determine the person who was culpable in this instance.

Although Respondent challenged the Inspector's testimony in various respects on the basis that it was inconsistent with testimony he gave in a prior deposition on October 21, 1981, I find that the discrepancies are not sufficient to result in a repudiation of the quality thereof. Briefly, Respondent during the hearing made a point with respect to the Inspector's testimony that he had not asked if a safety inspection had been performed on the mantrip. It does appear that the Inspector was asked this question on page seventy-six (76) of the deposition (Exhibit C-5). Inspector Wehr answered the question by indicating that, "The individual (Mr. Nick) running it said it was okay." Subsequently, on the same page, the Inspector was asked why he didn't ask Mr. Nick if the safety inspection had been done. I construe his answer-which is not an articulation of precise thinking-to be that by asking Mr. Nick if the bus was ready to go the same subject matter was being solicited from Mr. Nick. Interplay between highly intelligent, articulate attorneys and sometimes less sophisticated witnesses frequently will result in ambiguities and surfaces inconsistencies. I find no basis, on the attempts made by Mathies in this case, to blur the otherwise credible testimony of the Inspector.

We turn now specifically to the question whether or not the violation was of such a nature as can significantly and substantially contribute to the cause and effect of a mine safety or health hazard. In *Secretary of Labor v. Cement Division, National Gypsum Company*, 3 FMSHRC 822, 825 (April, 1981), the Commission defined the phrase "significant and substantial violation" as being one, "if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." I previously found that the actual occurrence of the event or the hazard contemplated would likely result in an injury or illness of a reasonably serious nature. The question I see remaining under the National Gypsum test is whether or not the violation here contributed to the cause and effect of a mine safety hazard. The Commission in *National Gypsum* noted that the Act does not define the key

terms "hazard" or "significantly and substantially." It was determined that the word hazard denotes a measure of danger to safety or health and that a violation "significantly and substantially" contributes to the cause and effect of a hazard if the violation could be a major cause of a danger to safety or health. The Commission also noted that the inspector's "independent judgment is an important element in making 'significant and substantial' findings, which should not be circumvented." The effect of the National Gypsum decision constituted a retreat from the view urged by the Secretary that a violation is of a significant and substantial nature so long as it poses more than a remote or speculative chance that an injury will result, no matter how slight that injury might be. Prior to National Gypsum most violations were treated as "significant and substantial." The National Gypsum case elevated significant and substantial violations to a middle ground between the technical non-serious category of violations and "imminent danger" violations. I footnote here that my own view prior to passage of the 1977 Act was that the phrase "as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard" was a phrase of art which had specific meaning under the 1952 Act which had been picked up in its entirety under the 1969 Act and under normal rules of statutory construction, absent input by interested legislators on both sides of the aisle, would have transferred a meaning carrying a greater degree of seriousness than the intermediate ground chosen by the Commission after the passage of the 1977 Act. In fleshing out its holding in National Gypsum the Commission did indicate that "something more than the violation of a standard itself is required."

In view of the National Gypsum decision I conclude that the Secretary in this case has carried its burden of proof with respect to its "substantial and significant" allegation by showing the wetness, albeit occasional, of the haulageway, the curves and down grades in the mine and the intrinsic danger of haulage travel itself. A violation which affects the braking capacity of a vehicle which carries human beings under the circumstances described in this case is a relatively serious violation by its very nature.

I will comment on the failure that I believe occurred in the record of this proceeding at this point. There was no showing that the Mathies Mine had an unusual number of sanding violations or of braking accidents. There was no expert testimony with respect to the stopping distance loss which would occur by the loss of one sander or two. There is no indication of the speed which mantrips ordinarily travel. The mechanics of how the violation would contribute to the cause

and effect of a violation or accident was not developed. Those deficiencies, however, are not found to totally offset the prima facie case which I conclude the Secretary established primarily through Inspector Wehr's testimony.

Based upon the stipulation of the parties, I find that (a) this is a large coal mine operator which (b) proceeded in good faith to achieve rapid abatement of the violative condition after notification thereof and which (c) will not be adversely affected by the payment of penalty in terms of its ability to continue in business. Mathies, which has a total complement of five hundred and sixty-eight (568) miners working three (3) shifts, has a record of one thousand fifty-nine (1,059) previous violations for the twenty-four (24) month period preceding the commission of the violation in question. I've found that the coal mine operator was negligent in the commission of the violation. I do not find gross negligence or willfulness of any degree in the occurrence of the violation. I find that this was a moderately serious violation under all the circumstances and, as previously noted, have found that it contributed to the cause and effect of a safety hazard as charged by the Secretary. The Secretary, both in its administrative process and the penalty aspect of this case and in this hearing, has sought a penalty of a hundred and thirty (\$130.00) dollars. I find no reason on the basis of this record to reduce or increase that amount. Accordingly, a penalty of one hundred and thirty (\$130.00) dollars is assessed and Mathies is ordered to pay the same to the Secretary within thirty (30) days from the date of the written decision which I will subsequently enter incorporating this bench decision.

CONCLUSION OF LAW

A violation which adversely affects the braking capacity of a personnel-carrying vehicle (mantrip) could significantly and substantially contribute to both the cause and effect of a mine safety hazard where such vehicle is expected to encounter wet conditions and to negotiate curves and downgrades while transporting miners along a mine haulageway.

ORDER

(1) Mathies Coal Company's Notice of Contest is found to be without merit, and Docket No. PENN 82-3-R is dismissed.

(2) Mathies Coal Company, in Docket No. PENN 82-15 is ordered to pay the Secretary of Labor a civil penalty of \$130 within 30 days from the date hereof.

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(3) All proposed findings of fact and conclusions of law not expressly incorporated in this decision are rejected.

Michael A. Lasher, Jr.
Judge