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EAGLE NEST V. MSHA
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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EAGLE NEST, INCORPORATED, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. WEVA 91-293-R
	:	Citation No. 3751114; 3/20/91
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Eagle Nest Mine
	:	Mine ID 46-04789

DECISION ON REMAND

Before: Judge Weisberger

Statement of the Case

On May 20, 1991, I issued a decision dismissing the Notice of Contest at issue, and finding that the violation alleged in the Notice of Contest was not significant and substantial. (13 FMSHRC 843 (1991)). Subsequently, the Secretary's petition for discretionary review was granted by the Commission. On July 28, 1992, the Commission issued its decision vacating my finding that the violation was not significant and substantial, and remanding "...for further analysis and determination of the S&S issue without consideration of whether the hazard could be mitigated by the use of caution." (14 FMSHRC 1119, 1123). In a telephone conference call on August 6, 1991, I initiated with counsel for both parties, both counsel requested the right to submit briefs regarding the issues raised by the Commission's remand. This request was granted, and on September 28, 1992, the parties each filed a brief on remand.

Finding of Fact and Discussion

The citation at issue alleged the following condition as being violative of 30 C.F.R. 75.305 as follows:

> At least one entry of the longwall tailgate return entry could not be made safely in its entirety. Water has accumulated in depth exceeding 16 inches at Survey Spad [N]o. 3777 and various locations outby (sic). This condition creates a hazard to those persons required to make weekly examinations.

In my decision, (13 FMSHRC supra), I found that the accumulation of water presented a hazard to miners who would have to traverse it to make an examination, that this hazardous condition was not immediately corrected and that accordingly, Section 75.305 supra was violated. There was no challenge to these findings.

In analyzing whether the violative condition was properly designated by the inspector as being significant and substantial, I am guided by the following authority as set forth in the Commission's decision (14 FMSHRC supra at 1122):

> A violation is properly designated as S&S "if, based on 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." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:
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> > In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.
>
> The third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury" (U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984)), and also that the likelihood of injury be evaluated in terms of continued normal mining operations (U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984); see also Halfway, Inc., 8 FMSHRC 8, 12 (January 1986). The Secretary is not required to present evidence that the hazard actually will occur. Thus, in Youghiogheny & Ohio Coal Co., 9 FMSHRC 673 (April 1987), the Commission held that:
>
> > In order to establish the significant and substantial nature of the violation, the Secretary need not prove that the hazard

> contributed to actually will result in an injury causing event. The Commission has consistently held that proof that the injury-causing event is reasonably likely to occur is what is required. See, e.g., U.S. Steel Mining Co., 7 FMSHRC at 1125; U.S. Steel Mining Co., 7 FMSHRC 327, 329 (March 1985).
>
> 9 FMSHRC at 678. The question of whether any particular violation is S&S must be based on the particular facts surrounding the violation. Texas Gulf, Inc., 10 FMSHRC 498, 501, (April 1988).

Further, in its decision, 14 FMSHRC supra, the Commission found that the first, second and fourth elements of the Mathies, test were not in issue, with the only issue being the third element of the Mathies, test i.e., whether there was a reasonable likelihood that the hazard of slipping or falling would result in an injury.

I find that on March 19, 1991, there was an accumulation of water approximately 48 inches deep at the No. 23 pump. I further find, based on the uncontradicted testimony of MSHA inspector Ronnie Joe Dooley, that on March 20, 1991, water extending the width of the entry reached a depth of 16 inches. I also find, based on the testimony of Dooley, that the accumulations of water were murky and the bottom could not be seen. Further, the uncontradicted testimony of Dooley establishes that the bottom of the mine floor contained mud, as well as submerged rocks, abandoned pieces of wood from cribs and pallets, lumps of coal, rocks, remnants from concrete stoppings, and a submerged 10 inch water line. Due to the depth of the water, its murky nature which prevented one from observing the bottom, the presence of numerous stumbling and tripping hazards on the bottom, and due to the fact that the area would have to be traversed by an examiner conducting the weekly examination required by Section 75.305, I conclude that there was a reasonable likelihood that the hazard of slipping or falling, contributed to by the fact that the hazard of accumulation of water was not immediately corrected, would result in an injury of a reasonably serious nature. I based this conclusion additionally upon the ground that the Commission, 14 FMSHRC supra, reversed my finding in the intial decision in this case, (13 FMSHRC supra), that the hazard of slipping or falling could be mitigated by walking cautiously to feel for submerged objects so they could be avoided.

Based on the all the above I conclude that it has been established that the violation herein was significant and substantial.(Footnote 1)

Avram Weisberger
Administrative Law Judge

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1In reaching my conclusion I have considered all the arguments advanced by the Operator in its brief, but find them to be without merit. The critical issue for resolution is the likelihood of an injury contributed to by the violation herein i.e. the failure to correct the hazardous conditions of water accumulations. As such, the argument by the Operator that pumps were installed to eliminate past and future water accumulation, is not relevant to a determination of this issue. Also, it has not been established that the fact that the hip boots were provided, lessens the likelihood of an injury as a result of the depth of the murky water hiding from vision submerged hazardous objects. Nor is it relevant that Ronnie Roberts, the longwall coordinator, testified that he "wouldn't" ask anyone to travel in water deeper than hip boots (Tr.266) Further, in analyzing whether the specific violative condition herein was significant and substantial I do not place much weight on the testimony of Roberts who indicated that he did not have knowledge of anyone being injured as a result of slipping in hip level water. This testimony is not probative of the likelihood of the specific hazards presented herein resulting in an injury producing event.