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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 92-783
	:	A.C. No. 46-01816-03805
v.	:	Gary No. 50 Mine
UNITED STATES STEEL MINING COMPANY, INCORPORATED, Respondent	:	

DECISION ON REMAND

Appearances: Javier I. Romanach, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
Billy M. Tennant, Esq., United States Steel Mining Company, Inc., Pittsburgh, Pennsylvania, for the Respondent

Before: Judge Fauver

Beginning in 1981, the Commission has held that a "significant and substantial" violation under 104(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (Footnote 1) requires proof of "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 (1981); Mathies Coal Co., 6 FMSHRC 1,
3-4 (1984). In Mathies the Commission further stated:

> 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

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1 Section 104(d) defines a significant and substantial violation as a violation of such nature as "could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard."

> 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.

In my original decision in this case, I interpreted the Mathies "reasonable likelihood" test to mean that an S&S violation exists if there is a substantial possibility that the violation will result in injury or disease, and that the Secretary is not required to establish that it was more probable than not that injury or disease would result.

The Commission reversed my decision, holding that a "substantial possibility test" is "contrary to Commission precedent" and "does not lend itself to review under the third Mathies standard." It remanded "for proper application of the third Mathies element, i.e., whether there was a reasonable likelihood that the hazard contributed to would result in an injury."

On remand, the parties remain in sharp conflict as to the meaning of the Mathies test. U.S. Steel contends that "an objective reading of Mathies compels the conclusion that the Secretary must prove that it was more probable or likely than not that the hazard contributed to would result in an injury." Respondent's Brief on Remand, p. 4. The Secretary contends that "the Mathies test does not require proof that it is more probable than not that a violation will result in an injury." Secretary's Brief on Remand, p. 3.

The Commission has not resolved this issue. Although it ruled that a "substantial possibility test" is contrary to Mathies, it has not ruled whether the term "reasonable likelihood" in Mathies means "more probable than not" or includes a lesser degree of possibility or probability. To comply with the remand "for proper application of the third Mathies element," it will be necessary to decide this issue.

The parties' conflict is understandable because the term "reasonable likelihood" may convey different meanings. To U.S. Steel, the word "likelihood" governs, and the term "reasonable likelihood" means "more probable than not." To the Secretary, the word "reasonable" modifies "likelihood" to mean a reasonable potential, not "more probable than not."

For the reasons that follow, it is my interpretation that the third Mathies element -- "a reasonable likelihood that the hazard contributed to will result in an injury or illness" -- does not mean "more probable than not."

I begin by noting the Commission's discussion of a "significant and substantial" violation as falling "between two extremes" (in National Gypsum):

> Section 104(d) says that to be of a significant and substantial nature, the conditions created by the violation need not be so grave as to constitute an imminent danger. (An "imminent danger" is a condition "which could reasonably be expected to cause death or serious physical harm" before the condition can be abated. Section 3(j)). At the other extreme, there must be more than just a violation, which itself presupposes at least a remote possibility of an injury, because the inspector is to make significant and substantial findings in addition to a finding of violation. Our interpretation of the significant and substantial language as applying to violations where there exists a reasonable likelihood of an injury or illness of a reasonably serious nature occurring, falls between these two extremes -- mere existence of a violation, and existence of an imminent danger . . . . [3 FMSHRC at 828.]

As the Commission observed, a "significant and substantial" violation in 104(d) is less than an "imminent danger" in 3(j). The legislative history of the Act makes clear that a "imminent danger" is not to be defined in terms of "a percentage of probability":

> The Committee disavows any notion that imminent danger can be defined in terms of a percentage of probability that an accident will happen; rather the concept of imminent danger requires an examination of the potential of the risk to cause serious physical harm at any time. It is the Committee's view that the authority under this section is essential to the protection of miners and should be construed expansively by inspectors and the Commission. * * * (Footnote 2)

It follows that an S&S violation, which by statute is less than an imminent danger, (Footnote 3) is to be defined not "in terms of a percentage of probability" but in terms of "the potential of the risk" of injury or illness (Legislative History cited above). Tests such as "more probable than not" or some other percentage of probability are inconsistent with 104(d) and the Act's legislative history.

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2 S. Rep. No. 95-181, 95th Cong. 1st Sess. (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 626 (1978).

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3 Section 104(d) excludes imminent dangers from its definition of an S&S violation.

This interpretation is also indicated by Commission decisions finding an S&S violation where the facts do not show injury or illness was "more probable than not." For example, in U.S. Steel Mining Co., 7 FMSHRC 327 (1985), the issue was whether the failure to install a bushing for a cable entering a water pump was an S&S violation. The judge found that the pump vibrated, vibration could eventually cause a cut in the insulation, and if the circuit protection systems failed, a worn spot in the cable could energize the pump-frame and cause an electrical shock. The judge found an S&S violation, holding that injury was "reasonably likely" to occur. 5 FMSHRC 1788 (1983). In affirming, the Commission stated, inter alia:

> On review, U.S. Steel argues that the facts indicated that the occurrence of the events necessary to create the hazard, the cutting of the wires' insulation and failure of the electrical safety systems, are too remote and speculative for the hazard to be reasonably likely to happen and, consequently, that the judge erred in concluding that the violation was significant and substantial.
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> * * * The fact that the insulation was not cut at the time the violation was cited does not negate the possibility that the violation could result in the feared accident. As we have concluded previously, a determination of the significant and substantial nature of a violation must be made in the context of continued normal mining operations. U.S. Steel Mining Co., 6 FMSHRC 1673, 1574 (July 1984). The administrative law judge correctly considered such continued normal mining operations. He noted that the pump vibrated when in operation and that the vibration could cause a cut in the power wires' insulation in the absence of a protective bushing. In view of the fact that the vibration was constant and in view of the testimony of the inspector that the insulation of the power wires could be cut and that the cut could result in the pump becoming the ground, we agree that in the context of normal mining operations, an electrical accident was reasonably likely to occur.

In U.S. Steel Mining Co., the finding that injury was "reasonably likely to occur" was based upon a reasonable potential for injury, not a finding that it was more probable than not that injury would result. Indeed, based upon the facts found by the trial judge and relied upon by the Commission, one could not find that it was "more probable than not" that, had a bare spot in the cable touched the frame, the circuit protection systems would have failed to function to prevent injury.

For the above reasons, I conclude that the term "reasonable likelihood" as used in the Mathies test does not mean "more probable than not."

Based on the record as a whole, I find that the violation of the safeguard was significant and substantial. The reliable evidence shows the area in which the violation occurred was lower in height than other areas of the mine and uneven, with grades and swags. These conditions increased the likelihood of injuries resulting from a disconnected trolley pole. When the trolley pole falls off the trolley wire, it de-energizes the vehicle, resulting in an immediate loss of lights, communication, and electrical powered brakes. If the vehicle lost power at the bottom of a rise or dip in the trackway, the vehicle would not be seen by other vehicles. The disconnected trolley pole could strike miners, dislodge rocks from the roof striking miners, or cause sparks that could ignite methane. Also, a wide gauge between the track and trolley wire could tempt employees or supervisors to block out the anti-swing device in order to keep the pole from disconnecting. This would create another hazard of the pole striking miners. Inspector Cook testified that, taken as whole, the hazards presented by this violation made it reasonably likely that serious injuries would result. I find that the reliable evidence supports this finding.

Considering the criteria for a civil penalty in 110(i) of the Act, I find that a penalty of $690 is appropriate.

ORDER

Respondent shall pay a civil penalty of $690 within 30 days of the date of this decision.

William Fauver
Administrative Law Judge

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