FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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March 15, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	)	**CIVIL PENALTY PROCEEDING**
	)	DOCKET NO. KENT 2011-434
Petitioner,	)	
v.	)	A.C. NO. 15-19076-240278
NALLY & HAMILTON ENTERPRISES,	)	Mine Name: Chestnut Flats
Respondent.	)	

DECISION UPON REMAND

Appearances: Schean G. Belton, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner
S. Thomas Hamilton, Jr., Esq., Saltsman & Willett, PSC, Bardstown, Kentucky, for the Respondent

Before: Judge Moran

Procedural Background

In a decision issued on July 19, 2016, the Federal Mine Safety and Health Review Commission ("Commission") reversed this Court's decision, holding that a violation of 30 C.F.R. § 77.1710(i) had been established. *Nally & Hamilton Enterprises,* 38 FMSHRC 1644 (July 2016). As the Commission summarized the incident:

> The citation at issue arose out of an accident on April 21, 2010, in which a rock truck overturned at Nally & Hamilton's Chestnut Flats Mine in Kentucky. ... James Patterson, the driver of the truck, was not wearing a seatbelt at the time of the accident and sustained injuries that resulted in lost work days.

Id., citing the Court's decision, *Nally & Hamilton Enterprises*, 35 FMSHRC 2198, 2199-200 (July 2013) (ALJ).

The standard in issue provides, in relevant part, that, "[e]ach employee ... shall be required to wear protective ... devices [including, within a list of items] ... (i) Seatbelts in a vehicle where there is a danger of overturning and where roll protection is provided." 30 C.F.R. § 77.1710(i).

The Commission affirmed this Court's determination that no negligence was involved. It remanded the matter for the Court to make a more complete analysis of whether the violation was significant and substantial and then to assess a civil penalty, stating,

> Regarding the issue of whether the violation was significant and substantial, the Judge did not engage in sufficient analysis to permit action by the Commission. Because a finding on the issue of whether the violation was significant and substantial could affect the gravity element of the penalty assessment, we remand the case to the Administrative Law Judge for further consideration of whether the violation was significant and substantial and assessment of a penalty.

38 FMSHRC at 1652.

Statement of Law

A violation of the Act is significant and substantial ("S&S") if it 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." 30 U.S.C. § 814(d). It is proper to apply this designation when the facts surrounding the violation demonstrate a reasonable likelihood that the hazard contributed to by the violation "will result in an illness or injury of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 815 (Apr. 1981). In *Mathies Coal Co.*, the Commission explained that,

> 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.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

The Commission recently clarified that the second step of the *Mathies* analysis requires the Secretary both to identify the relevant hazard at which the standard is directed, and to show a reasonable likelihood that this hazard will occur, in light of the facts surrounding the instant

violation. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2038 (Aug. 2016). During the third step, the Secretary must prove that the hazard is reasonably likely to cause injury, with the assumption that the specific hazard identified in the second step exists. *Id.* at 2045 (internal citations omitted). The step three analysis is to assume the continuation of normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (citing *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 161-62 (4th Cir. 2016); *Peabody Midwest Mining, LLC*, 762 F.3d 611, 616 (7th Cir. 2014); *Buck Creek Coal*, 52 F.3d 133, 135 (7th Cir., 1995)). The Commission has emphasized that it is "the contribution of a violation to the cause and effect of a hazard that must be [S&S.]" *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984).

Pertinent Facts Upon Remand

In this Court's July 2013 decision in this matter, it found that the accident occurred near the end of truck driver Patterson's night shift. The driver, who was not wearing his seat belt, incurred an injury to his lower back from the truck overturning incident and missed some work days as a result of his injury.

At the hearing and in its post-hearing brief, "[t]he Secretary ... urged the Court to uphold Inspector Smith's S&S designation, for the injury producing event occurred as a result of Mr. Patterson not wearing his seat belt when his rock truck overturned." 35 FMSHRC at 2206 n. 5. The Respondent maintained that "the evidence does not support an S&S finding because the first two elements of the *Mathies* test were unproven by the Secretary." *Id.* at n. 6.

Post the Commission's remand, the Court invited the parties to submit additional arguments, if any, on the S&S and penalty issues.

The Secretary, via an email response,[1] asserted,

> this matter is S&S. Our position incorporates the information, facts, arguments, and law argued in the briefs previously submitted to both the ALJ and to the Commission. In essence, at trial the Secretary proved that there was a reasonable likelihood that the hazard contributed to would result in an injury of a reasonably serious nature because the hazard did *in fact* result in an injury of a reasonably serious nature - the driver suffered an injury that caused him to miss multiple days of work. *See e.g., S&S Dredging Co,.* 2103 WL 3759791 (Jul.2013)[2] ('Muscle strains, sprained ligaments, and fractured bones are injuries of a reasonably serious nature for the purposed of the fourth element of the *Mathies* test.') [sic] ...

[1] The Secretary's email response is part of the record within the e-CMS file for this docket.

[2] The Secretary's citation to *S&S Dredging Co.* is incorrect. The correct citation is 2013 WL 8562447 (FMSHRC July 11, 2013). The quote from that case actually reads, "muscle strains, sprained ligaments, and fractured bones are injuries of a reasonably serious nature for the *purposes* of the fourth element of the *Mathies* test." *Id.* at *2. (emphasis added).

see also decision *Nally & Hamilton*, 35 FMSHRC 2198, 2200 (2013) (noting Inspector Smith's testimony that he observed a 'big round knot' on Patterson's back; that Patterson was hospitalized for several hours after the accident; and that Patterson missed 'some work days' due to his injury).

E-mail from Secretary to the Court's law clerk, dated August 23, 2016.

On August 24, 2016, the Respondent submitted a post-remand letter to the Court. In that letter, it asserted that "[a] violation of 30 CFR 77.1710 [i] cannot be reasonably calculated to result in an injury, nor can it be reasonably calculated the hazard contributed to in a violation of 30 CFR 77.1710[i] will be of a reasonably serious nature."[3] R's letter at 1.

Analysis

Applying the *Mathies* criteria, and the first factor, the Court begins with the Commission's determination that the standard was violated. Moving to the second factor, whether there was a discrete safety hazard – a measure of danger to safety – contributed to by the violation, the record establishes that the discrete hazard is a vehicular accident. The violation contributed to a measure of danger: by not wearing a safety belt, miners face a higher risk of injury should an accident occur.

The third factor, the reasonable likelihood that the hazard contributed to will result in an injury, is more awkward to apply in this instance, as an accident did occur, and the driver was not wearing his safety belt. Therefore it is hard to apply the analysis in the abstract setting most often encountered.[4] The Commission has not directly addressed the application of *Mathies* when no prognostication is needed because an injury has occurred.

The Court concludes, per the existing *Mathies* standard, and apart from the particular facts in this case, that there is a reasonable likelihood that the hazard contributed to will result in an injury, based on the assumption that there is an inherent risk of an accident's occurrence in the operation of any vehicle. Not wearing a seat belt can't contribute to the hazard of a vehicular accident, but it can contribute to elements 2 and 4 of the *Mathies* analysis. It cannot be gainsaid

[3] The Respondent does not further explain the basis for those conclusions, but rather refers to its post-hearing brief and reply brief.

[4] The "Ironic process theory or the white bear problem refers to the psychological process whereby deliberate attempts to suppress certain thoughts make them more likely to surface. An example is how when someone is actively trying not to think of a white bear they may actually be more likely to imagine one. 'Try to pose for yourself this task: not to think of a polar bear, and you will see that the cursed thing will come to mind every minute.'" *Ironic Process Theory*, Wikipedia (Jan. 6, 2017), https://en.wikipedia.org/wiki/Ironic_process_theory (citing Fyodor Dostoevsky, *Winter Notes on Summer Impressions*, Vremya, 1863); *see also* Joe Zimmerman, Op-Ed, *Don't Think About the White Bear,* N.Y. TIMES, Mar. 11, 2017, at SR2.

that, with any vehicular accident, there is a reasonable likelihood that the injury in question will be of a reasonably serious nature. Accordingly, the Court finds that the violation was S&S.

Penalty Determination

Under section 110(i) of the Mine Act,

> The Commission shall have authority to assess all civil penalties provided in this chapter. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this chapter, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

30 U.S.C. §110(i).

The special assessment process is not applied by the Commission; it is a creation used by the Secretary when he believes such an assessment is "appropriate." 30 C.F.R. §100.5(b). As Commission Judge David F. Barbour noted in a 2017 decision,

> [t]he Commission has recently clarified that the Secretary's special assessment 'does not negate the Judge's duty to exercise his or her independent authority to assess a penalty de novo based on the record and consideration of the section 110(i) criteria.' The Commission has further instructed that, 'Judges must be attentive to the rationale supporting the decision to seek the special assessment and the facts and circumstances supporting that decision, so that the ultimate determination of the penalty conforms to the Judge's findings and conclusions.' *The American Coal Company*, 38 FMSHRC 1987, 1993-94 (Aug. 2016).

Hunter Sand & Gravel v. Sec. of Labor, 39 FMSHRC 239, 278 (Jan. 2017) (ALJ).

History of previous violations

Per Exhibit P3, Respondent Nally & Hamilton's Mill Branch mine has 15 violations in its history report. Exhibit A refers to Respondent's Chestnut Flats mine, and that reflects, without elaboration, 51 violations. The Chestnut Flats Mine has no history of prior violations of the cited standard. The Secretary introduced Ex. P 3, but offered no explanation of the role, if any, as to Exhibit A, which is part of the official file. Unexplained, the information is undecipherable. The Court concludes that, at worst, the Respondent has a modest violation history.

Appropriateness of such penalty to the size of the business

Applying, for the moment, the Secretary's Mine Size criteria, per Part 100, the Respondent is in the range of a high moderate to large mine. However, per the parties' stipulations, the Respondent is deemed to be a large mine operator.

Negligence

The Commission (as well as this Court, in its initial decision) has determined that there was no negligence involved. The absence of negligence has significance in the Court's penalty analysis.

A few observations about negligence made by fellow Commission Administrative Law Judges are mentioned here. Administrative Law Judge L. Zane Gill noted in *Northern Illinois Service Co.* that,

> Negligence is 'conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm.' 30 C.F.R. § 100.3(d). Mine operators are 'required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices.' *Id.* No negligence exists when '**[t]he operator exercised diligence and could not have known of the violative condition or practice.**' *Id.*

Secretary v. Northern Illinois Service Co., 37 FMSHRC 1514, 1518 (July 2015) (ALJ) (emphasis added).

Administrative Law Judge Thomas McCarthy remarked in *Sims Crane*,

> Negligence is not defined in the Mine Act. ... [however] an operator's failure to satisfy the appropriate duty can lead to a finding of negligence if a violation of the standard occurred." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983) ... In determining whether an operator meets its duty of care under the cited standard, the Commission considers what actions would have been taken under the same or similar circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. ... an operator is negligent if it fails to meet the requisite high standard of care under the Mine Act. *Brody Mining*, 37 FMSHRC at 1701.

Secretary v. Sims Crane, 39 FMSHRC 116, 118 (Jan. 2017) (ALJ).

The point is, by finding that Nally & Hamilton was not negligent, the Commission, correctly, in the Court's view, determined that the Respondent met the high standard of care and that there were no other actions that it should have taken. Indeed, at least in this case, short of

extreme and unreasonable measures, such as installing surveillance cameras in all of its trucks and having someone continually monitor the seat belt usage, Respondent did all that it could.

Thus, there can't be any deterrent effect achieved by imposing a significant penalty, as the finding of no negligence means the operator could not have done more. This does not mean that the Respondent need do nothing. Looking forward, it may be that, by imposing a sanction on the employee for his failure to comply with the mine's requirement that seat belts are to be worn, such discipline[5] may heighten the awareness of other employees that compliance is mandatory and the consequences may be significant, if the rule is not followed.

Effect on the operator's ability to continue in business

The parties have agreed that the proposed penalty will not affect Respondent's ability to continue in business. Sec PH Br. at 2.

Gravity of the violation

The Commission has spoken to the criterion of gravity, expressing that it has "consistently considered gravity holistically, considering 'factors such as the likelihood of injury, the severity of an injury if it occurs, and the number of miners potentially affected.'" *Am. Coal Co.*, 9 FMSHRC 8, 20 (Jan. 2017) (internal citation omitted). It has also stated that "[t]he key element of the gravity determination is judging the type and extent of injuries or illnesses reasonably likely to occur based upon the record in the case." *Id.*

In the *Newtown Energy, Inc.* decision, the Commission remarked that "[t]he gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), 'is often viewed in terms of the seriousness of the violation.' ...The gravity analysis focuses on factors such as the likelihood of injury, the severity of an injury if it occurs, and the number of miners potentially affected." 38 FMSHRC at 2049 (citing *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citing Sellersburg Stone Co., 5 FMSHRC 287, 294-95 (Mar. 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987)).)

The inspector marked the gravity as "Occurred" with lost work days, S&S, and one person affected. The Court finds that the inspector's evaluation of the gravity is consistent with the record evidence and, as noted, the Court has found that the violation was S&S.

Demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation

The Secretary admits that the Respondent abated the violation in a timely manner and in good faith. Sec. PH Br. at 1.

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[5] Of course, the suggestion is made under the assumption that the mine's disciplinary procedures are being properly followed.

Conclusion

Upon consideration of each of the penalty factors, the Court imposes a civil penalty of $200.00 (two hundred dollars), an amount which is double the amount it originally considered assessing if the Commission were to reverse the Court' initial determination that no violation had occurred. To impose a larger penalty does not seem warranted or fair. In the Court's view, among the statutory penalty factors, *negligence must be considered the first among equals*. To illustrate this, imagine each of the penalty factors to be as determined in this case and then assume further that a fatality occurred. If one were to conclude that a significant penalty was in order in such a case, it would mean that, though no negligence was attendant, such a penalty was appropriate merely because a fatal event occurred at a large mine, with no history of a prior violation of the standard. Under such circumstances, a hefty penalty would be solely for the purpose of imposing such a penalty for its own sake.

In the Court's estimation, with no deterrent effect possible, the Respondent, negligence-free as it was, could not have reasonably done anything else to avoid the violation's occurrence. With that in mind, the Court concludes that the penalty imposed is appropriate.

ORDER

The Respondent is hereby **ORDERED** to pay the Secretary of Labor the sum of $200.00 (two hundred dollars) within 30 days of the date of this decision.[6]

William B. Moran

William B. Moran
Administrative Law Judge

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[6] Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P.O. BOX 790390, ST. LOUIS, MO 63179-0390

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