# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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| OAK GROVE RESOURCES, LLC,<br>Contestant,<br><br>v.<br><br>SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Respondent. | CONTEST PROCEEDING<br><br>Docket No. SE 2009-261-R<br>Citation No. 7696616; 1/8/2009<br><br>Mine: Oak Grove<br>Mine ID: 01-00851 |
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Petitioner,<br><br>v.<br><br>OAK GROVE RESOURCES, LLC,<br>Respondent. | CIVIL PENALTY PROCEEDING<br><br>Docket No. SE 2009-487<br>A.C. No. 01-00851-180940<br><br>Mine: Oak Grove |

## DECISION AND ORDER UPON REMAND

Before: Judge Moran

This matter is before the Court upon remand from the Commission for the purpose of "assess[ing] an appropriate civil penalty." *Oak Grove Resources, LLC*, 37 FMSHRC 2687, 2687 (Dec. 2015). Three Commissioners formed the majority, and two Commissioners dissented, on different grounds. As the Commission majority recounted in its December 9, 2015, Decision, this matter has a relatively long litigation history. Initially, this Court vacated the citation upon finding that the safeguard was not validly issued. The Commission reversed that determination, concluding that the safeguard was valid and remanding it to the Court. Upon such remand the Court found that the safeguard had been violated and that the violation was significant and substantial ("S&S"). This too was appealed, with the Commission affirming the finding of violation, but reversing the Court's S&S determination and, as noted, sending it back for the assessment of the civil penalty.

In its Decision, the Commission majority, after noting the safeguard procedure — which begins with the issuance of a safeguard and, if there is thereafter a failure to comply with such safeguard, the issuance of a citation — then recounted the facts and procedural background. *Id.* at 2688-90.

Everything associated with this case began with the issuance of the notice to provide safeguard. Issued to Oak Grove on March 3, 1986, it was instituted upon finding that

> [t]he No. 902 battery powered locomotive was being used to push two loaded supply cars consisting of a car of timber and a car of roof bolts down the graded haulage supply mine track entry of the main south area of the mine, near the intersection of the No. 7 and No. 14 section switch and the No. 10 and the No. 5 section switch. Such area is approximately 2100 feet from the main bottom area of the mine and approximately 3600 feet from the No. 7 section and the No. 10 sections, respectively.

*Id.* at 2689 (quoting Gov't Ex. 2 (Safeguard No. 2604892)).

Having observed that practice, a locomotive pushing supply cars down a track entry, the safeguard notice proscribed it, stating:

> This notice to provide safeguard requires **that cars on main haulage roads not be pushed** except where necessary to push cars from the side tracks located near the working section to the producing entries and rooms.

*Id.* (emphasis added).

Accordingly, save the one exception, where it is "necessary to push cars from the side tracks located near the working section to the producing entries and rooms," per the safeguard notice, cars at the Oak Grove mine were no longer to be pushed.

Unfortunately, on May 22, 2008, a car was being pushed and a fatal accident occurred at the mine

> when a motorman was crushed between a derailed haulage car and the locomotive he had been operating. **The haulage car was being pushed** on the main haulage road. **The victim would not have been exposed to the pinch point between the locomotive and the haulage car if the car was being pulled instead of pushed on the main haul road.**

*Id.* (quoting Gov't Ex. 3 (Citation No. 7696616)) (emphasis added).

In the Commission majority's recounting of the facts it noted the following concerning the fatal accident:

> Oak Grove was in the process of transporting the body of a shearing machine to the mine's longwall face. The 24-ton body was placed on a "shearer carrier," **a haulage car** specifically designed for the task. Tandem locomotives led the shearer carrier, **while a second set of tandem locomotives *pushed* the shearer carrier down *the main haulage road*.**
>
> Motor No. 8 led the procession. Connected to its rear by a coupling device was Motor No. 3, establishing a rigid connection. Motor No. 3 was then connected to the shearer carrier by a one inch diameter, *flexible*, wire rope. The shearer carrier was in turn connected to Motor No. 4 by a solid drawbar. Finally, Motor No. 4 was connected to Motor No. 9 by a coupling device, establishing a rigid connection. The wire rope connection between Motor No. 3 and the shearer was the only connection that was not rigid.
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> As the lead motors ascended an incline in the mine floor, the shearer carrier derailed. **It was the fifth time the carrier had derailed during that trip**. The operator of Motor No. 3, miner Lee Graham, exited his motor and walked over to examine the derailed carrier. Graham was standing on the tracks, downhill from Motors No. 3 and No. 8, when the motors rolled down the grade, pinning him against the carrier and inflicting the fatal injuries.

*Id.* at 2688-89 (emphasis added) (footnotes omitted) (citation omitted).

Two footnotes, referencing additional facts, were noted by the Commission. They provided:

> Motors No. 4 and No. 9, **the pushing motors, generated most of the force to move the carrier.** Tr. 99, 104. The wire rope connecting Motor No. 3 to the shearer carrier behind it "was [used to] help pull the equipment" Tr. 104. It was also used "to help guide the carrier, particularly around curves, and to prevent derailments by using tension." Gov't Ex. 4 at 4; see also Tr. 44. The rope was used to pull the carrier back into position on the rails following a derailment. Gov't Ex. 4, at 6; Tr. 106-07.
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> . . . .
>
> The brakes had not been set on either of the lead motors. 33 FMSHRC at 850; Tr. 57-58; Gov't Ex. 8. According to MSHA's Report of Investigation, post-accident tests "revealed that the motors would not move if either the service brakes or the park brakes on either motor were engaged." Gov't Ex. 4, at 8.

*Id.* at 2688 n.2, 2689 n.3 (alteration in original) (emphasis added).

In its earlier decision, this Court expressed the facts somewhat differently, stating:

> Oak Grove was attempting to transport the shearer body using two tandem locomotives: Motors No. 3 and No. 8, to *pull* the shearer carrier and Motors No. 4 and 9 to *push* the shearer carrier. Therefore in terms of their destination to the longwall, Motors No. 3 and 8, since they were pulling, were leading and Motors No. 4 and 9 were following the procession. Each pair of locomotives was connected to one another by a coupling. For the two coupled motors pulling the shearer body, No. 8 was in the lead, and connected to No. 3. The No. 3 itself was connected to the shearer body by a one inch diameter, flexible, wire rope. **Thus, unlike the relatively rigid connection between the motors, through a coupling, the connection for the *pulling* locomotives, utilizing a *wire rope* to the shearer carrier was anything but rigid.** Miner Graham was operating the No. 3 motor. In contrast to the wire rope arrangement connecting the pulling motors to the shearer carrier, the [prohibited] pushing motors were connected to the shearer carrier by a *solid drawbar*.
>
> To recap, if one were standing alongside the transporting effort at the time, such individual would have observed, beginning at the front, [permitted] pulling end, the No. 8 motor, which was connected to the No. 3 motor via a coupling and then the No. 3 motor connected to the shearer carrier by the wire rope. Next would be the shearer carrier itself and on the [prohibited] pushing end, a connection from it, by means of a solid drawbar, to the No. 4 motor. Finally, the No. 9 motor was connected to the No. 4 motor via a coupling in the same fashion as the link between the No. 3 and the No. 8. . . .
>
> To understand how the fatality occurred, picture the procession moving towards its destination, as described, and reaching an upgrade. **Slack then developed in the wire rope connection and the consequence was a derailment of the shearer carrier. Examining the situation, the victim unwittingly placed himself in a dangerous position, standing in the middle of the track, between his locomotive and the derailed shearer carrier. It was then that the coupled motors, Nos. 3 and 8 either slid or rolled downhill with Mr.Graham becoming fatally pinned between those motors and the shearer carrier.**

*Oak Grove Res., LLC*, 33 FMSHRC 846, 847-48 (Mar. 2011) (ALJ) (emphasis added).

The point, which this Court regrets that it failed to adequately express, is that the victim would not have been pinned between the Nos. 3 and 8 motors had there been a rigid connection between those motors and the shearer carrier. Had there been a solid bar connecting the shearer carrier to the No. 3 motor, there would have only been pulling. Instead there was the prohibited pushing coming from the Nos. 4 and 9 motors, with the additional problem of the weak link, the non-rigid wire connection between the shearer carrier and the No. 3 motor.

## I. The Majority's Analysis of the Significant and Substantial Issue[1]

As the Commission noted in its decision,

> [a] violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), the Commission further 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.

*Oak Grove Res.*, 37 FMSHRC at 2691-92 (citing *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria)).

The majority then examined this Court's analysis of the S&S issue. Having agreed that there was a violation, the majority had no issue that the first element or "prong" of *Mathies* had been satisfied. *Id.* at 2692. However, it concluded that neither the second nor third prongs of the *Mathies* test were proved by the Secretary.

As to the second *Mathies* element, that "a discrete safety hazard - that is, a measure of danger to safety - was contributed to by the violation," the majority found that substantial evidence did not support the Court's finding that the second *Mathies* element was met. In this regard, they noted the Court's conclusion that the Secretary established three discrete hazards attendant to the practice of pushing cars. Those identified hazards were that, by the pushing the shearer carrier, that practice contributed to diminished visibility, the creation of a pinch point, and the lack of positive control. *Id.*

The Commission majority concluded that substantial evidence did not support a finding that the violation, that is pushing the shearer carrier, though in contravention of the notice to provide safeguard, contributed to diminished visibility, the creation of a pinch point, or lack of

[1] The majority's analysis and the dissent of Commissioner Cohen is recounted because the Court believes that a decision, issued by the Fourth Circuit in *Knox Creek Coal Corp. v. Secretary of Labor*, 811 F.3d 148 (4th Cir. 2016), *after* the Commission majority's December 9, 2015, decision here, may impact the decision. While the Court fully understands and adheres to its duty to follow the majority's direction that it is to "assess an appropriate civil penalty," in light of the *Knox Creek* decision, it takes the opportunity to more completely explain its rationale for upholding its earlier, but now rejected, S&S determination.

positive control.[2] *Id.* The majority then analyzed the identified hazards, beginning with decreased visibility. For this, the Commission expressed that the "record reflects that decreased visibility was not an issue in the circumstances presented by this case as a miner was operating a motor at the head of the convoy, and was therefore in front of the pushing motors." *Id.* Lee Graham, the deceased miner, was operating the No. 3 Motor (the second car in the procession), and Oak Grove's assistant general mine foreman/day-shift foreman was riding on Motor No. 4 (the fourth car). Tr. 98-100.[3] Thus, the majority concluded that substantial evidence did not support a finding that the pushing violation contributed to the hazard of decreased visibility. 37 FMSHRC at 2693.

Regarding the second identified hazard, the creation of a pinch point, the majority similarly concluded that there was "not substantial evidence in the record to support the finding that pushing the cars contributed to the hazard of a pinch point." *Id.* The majority states that "the inspector did not articulate how *pushing* the shearer carrier contributed to this specific hazard, as required by element two of *Mathies*." *Id.* Instead, the inspector "testified that the use of a wire rope contributed to the hazard of a pinch point [and that the] pinch point was created by the use of wire rope to connect Motor No. 3 and the shearer carrier." *Id.* To remedy the hazard, the inspector testified that the mine operator should "'use a drawbar or tongue [as] the rigid connection between the shearer carrier and the motor and pull it[,]' [and the majority noted that i]n fact, after the accident at the mine, a drawbar was attached in place of the wire rope, and Oak Grove then continued to move [that is to say, to pull] the shearer carrier to the longwall face." *Id.* (first alteration in original) (citation omitted) (quoting Tr. 44).

Speaking to the third hazard, the loss of positive control, the majority stated that "[t]he evidence in this case demonstrates that pushing the shearer carrier did not contribute to the hazard of a loss of positive control of the car [and there was no] evidence that pushing caused the derailment." *Id.* They noted that there was "no testimony regarding the likelihood of derailment when pushing a carrier as opposed to pulling the carrier [and that] the inspector never stated that the lack of control increased the probability of a derailment."[4] *Id.* Rather, he testified that the

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[2] At least in terms of the S&S analysis, it seems fair to state that the majority viewed the events that resulted in the fatality and the failure to comply with the safeguard as coincidental, and therefore that the reasonable likelihood assessments were not tied to the safeguard violation.

[3] The majority notes, with implicit approval, the point made by counsel for Oak Grove contending that "the whole theory that you are sitting behind the supply cars and not being able to see up ahead doesn't apply because you actually have somebody up ahead." 37 FMSHRC at 2692 (quoting Oral Arg. Tr. 11).

[4] The majority did not agree with Commissioner Cohen's view that the safeguard violation contributed to the hazard of a loss of positive control. From their perspective, Commissioner Cohen's support "relies solely on one page of transcript testimony wherein the inspector stated that by pushing the cars, a miner cannot maintain good positive control of the loads." 37 FMSHRC at 2693. The majority concluded that when the inspector made that statement he did so "in the context of his general explanation of the hazards addressed by the safeguard [and] he intertwined the hazard of poor visibility (which, [the majority] explained, did not apply in this case) with the loss of positive control." *Id.* The majority noted that

derailment occurred "because there was slack in the wire rope between the #3 motor and the shearer carrier." Tr. 60. Noting that the Secretary conceded that material on the mine floor most likely caused the shearer carrier to derail, the majority concluded that substantial evidence did not support a finding that the violation of the pushing safeguard contributed to the hazards identified by the Secretary, and therefore that the second *Mathies* prong was not met.[5] 37 FMSHRC at 2963-94.

The Commission majority also determined that the Secretary "failed to meet his burden in proving element three of *Mathies*," because, apart from the death of the motor operator, the Secretary "did not provide evidence of the likelihood of injuries from any of the alleged hazards created by pushing cars in the context of continued normal mining operations." *Id.* at 2694. In relying "entirely on the occurrence of the accident at issue, [the Secretary] produc[ed] no testimony demonstrating that hazards he identified (poor visibility, creation of pinchpoints, and lack of positive control), would have been reasonably likely to cause injury if normal mining operations had continued. *Id.*

As noted, two Commissioners dissented, one, Commissioner Young, on the basis that the safeguard was not violated, while the other, Commissioner Cohen, agreed with the majority that there was a violation of the safeguard, but he also reached the conclusion that the violation was S&S. Commissioner Cohen's analysis began by noting that "[t]he Commission reviews a Judge's factual determinations under the *Mathies* test in accordance with the substantial evidence test," 37 FMSHRC at 2696 (Comm'r Cohen, concurring in part, dissenting in part), and that meeting that test means the presence of "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Id.* (quoting *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989)). Further, the Commission is not to second guess or substitute its view of the evidence, but rather "determine whether a . . . reasonable factfinder could have reached the conclusions actually reached by . . . the ALJ." *Id.* (quoting *Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1104 (D.C. Cir. 1998)). Applying that standard of review, Commissioner Cohen then applied it to the *Mathies* test. Speaking to the second element under *Mathies*, requiring a showing that the violation contributed

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> [t]he inspector testified that "if you're pushing a load and it derails, since your visibility is obstructed, a lot of times you don't know that it's derailed until you've pushed it on farther. You don't have as good control . . . . If you're pulling a load, you can see if it derails and you know to stop immediately. And the severity of the accident would be lessened."

*Id*. (quoting Tr. 43). While the majority recognized that the Secretary contended that pushing the cars is more dangerous than pulling them, it added that part of the associated danger identified by the Secretary related to the need for visibility. Thus, they noted the Secretary's statement that "*because the load was being pushed*, those who were propelling the load forward could not see the build-up." *Id.* (quoting Oral Arg. Tr. 33) (emphasis added).

[5] The majority determined that the record evidence identified "an independent cause of the fatality: the park and service brakes were not set on Motors No. 3 or No. 8 at the time of the accident." 37 FMSHRC at 2694.

to a safety hazard, the Commissioner expressed that "the record contains substantial evidence to support the Judge's decision" that the violation contributed to the three distinct hazards identified by the Secretary.[6] *Id.*

[6] In support of his conclusion that substantial evidence supports the Court's determination that pushing the motor decreased visibility, Commissioner Cohen stated:

> Common sense dictates that a 24-ton shearer carrier would obstruct the vision of a motor operator who was pushing the load along a graded haul road. In fact, the inspector testified that when a miner uses a motor to push rather than to pull a load it is "harder to see the track and the traffic in front of you." Tr. 43. Notably, the inspector was testifying about the visibility of the miner who was actively engaged in pushing the shearer-carrier in violation of the safeguard.

37 FMSHRC at 2696 (Comm'r Cohen, concurring in part, dissenting in part). Noting that "[t]he majority conclude[d] that it was not reasonable for the Judge to rely on the inspector's testimony that pushing the carrier contributed to a visibility hazard," he pointed out that

> the majority independently determine[d] that complete visibility of the track and traffic was not necessary for the miners operating the motors pushing the load. Citing oral argument by Oak Grove's counsel, the majority concluded that the position of the two miners in front of the load rendered the visibility requirements of the pushing motor operators superfluous.

*Id.* at 2696-97. This view "ignores the fact that when a load is being pushed, the power to move it comes from the pushing motors, while the two motors which Oak Grove placed in front of the load were used to guide the shearer carrier and to help prevent derailment of the carrier." *Id.* at 2697. In contrast,

> [w]hen a load is being pulled, the miner who operates the pulling motor can see what is in front of him and react immediately if there is a problem with the track or traffic in front of the motor. Tr. 43. However, with the configuration used by Oak Grove, the miner operating the front motor could see a problem ahead (just as he would if he were operating a pulling motor), but would have to also communicate with the miner operating the pushing motor so that the miner operating the pushing motor could take effective action to avoid the problem. The necessity of communicating as well as seeing thus contributes to a hazard.

37 FMSHRC at 2697 (Comm'r Cohen, concurring in part, dissenting in part).

> Regarding the hazard of the creation of a pinch point, Commissioner Cohen stated that
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> the inspector did testify how pushing the load rather than pulling it contributed to the hazard of the creation of a pinch point. The inspector explained that when a load is pulled, there is a solid bar – a tongue or drawbar – between the motor and the car being pulled. However, with the configuration used by Oak Grove,

Commissioner Cohen also spoke to the majority's view that the record does not support the judge's decision that it was reasonably likely that the hazards contributed to would result in a reasonably serious injury. *See* 37 FMSHRC at 2694. In this regard, he noted that "in reaching this conclusion, the majority restricted their analysis to the evidence relating to the derailment and the fatal accident which followed." 37 FMSHRC at 2698 (Comm'r Cohen, concurring in part, dissenting in part). However, "he observed that it is well established that a Judge's evaluation of the reasonable likelihood of injury should be made *assuming* continued normal mining operations."[7] *Id.*

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> instead of a bar there was a wire rope connecting the car with the load and the motor in front of it. The wire rope was a component of the pushing configuration; it was connected to a forward motor to supply tension to the carrier which would help to prevent the shearer carrier from derailing while the carrier was being pushed, but in turn it created the hazard of a pinch point.

*Id.*

Addressing the hazard of loss of positive control, the Commissioner noted that the Court concluded, relying upon the "inspector's testimony, that pushing heavy equipment decreases the amount of control the operator has over the load." *Id.* He noted that "the inspector testified that pushing a car provides less control as compared to pulling the car," and that the Commission has held that "**[a]n inspector's judgment is an important element in a S&S determination**." *Id.* (emphasis added) (citing *Mathies Coal Co.*, 6 FMSHRC 1, 5 (Jan. 1984)). Noting that "the particular facts surrounding the violation include the configuration of the motors and shearer carrier which Oak Grove used to move the shearer," Commissioner Cohen concluded that "[t]he inspector's testimony about how the pushing of the shearer carrier with that configuration contributed to discrete hazards provides substantial evidence in the record supporting the Judge's finding as to Step 2 of *Mathies*." *Id.* at 2698.

[7] Citing *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985), the Commissioner noted that "[t]he evaluation is made in consideration of the length of time that the violative condition existed prior to the condition and time it would have existed if normal mining operations had continued." 37 FMSHRC at 2698 (Comm'r Cohen, concurring in part, dissenting in part). Applying that approach, the Commissioner expressed his view that

> the record contains substantial evidence to support the conclusion that under continued normal mining operations it was reasonably likely that the hazards would contribute to a reasonably serious injury[, noting that] [i]t is undisputed that Oak Grove transports heavy equipment such as shearers, scoops, shields, and continuous miners on the haulage road a couple of times a year.

*Id.* at 2699. Expressing his view that

> [t]he evidence supports the conclusion that a loss of visibility, or creation of a pinch point, or a loss of control that occurs during the move of a 24-ton piece of equipment (or equivalent) on a graded haulage road would be reasonably likely to

## II. The Fourth Circuit's Opinion in *Knox Creek*

As in this case, an established violation was involved in *Knox Creek Coal Corp. v. Secretary of Labor*, 811 F.3d 148 (4th Cir. 2016).[8] This Court mentions the Fourth Circuit's opinion because, as relevant here, that court held that the Commission should have applied the legal standard urged by the Secretary and, more particularly, because the decision addressed, in an extended the fashion, the application of the test for determining whether a violation is significant and substantial.

That court noted with approval the long-established *Mathies* S&S test. Addressing the second prong, the discrete safety hazard — a measure of danger contributed to by the violation — the Fourth Circuit stated that prong addresses the likelihood that a given violation may cause harm. *Id.* at 162. In order to contribute to a discrete safety hazard, a violation must be at least somewhat likely to result in harm. *Id.* The court explained further that "the second prong of *Mathies* requires proof that the violation in question contributes to a 'discrete safety hazard,' which implicitly requires a showing that the violation is at least somewhat likely to result in harm." *Id.* at 163. This means that insignificant violations will not be S&S, as they will not be "somewhat likely to result in harm." *Id.*

Consequently, in the Fourth Circuit's view, the second prong of the test primarily accounts for the Commission's concern with the *likelihood that a given violation may cause harm*. Likelihood is an assessment of probability. This follows because, for a violation to contribute to a discrete safety hazard, it must be at least somewhat likely, somewhat probable, to result in harm.

Although, as explained above, the Fourth Circuit spoke to the showing needed to establish the second prong, its decision focused chiefly on the third prong of the S&S test — demonstrating a reasonable likelihood that the hazard contributed to by the violation will result in an injury to a miner. In *Knox Creek*, the administrative law judge below had held that the third prong was not established because the likelihood of a triggering arc or spark inside the electrical equipment enclosures had not been established by the Secretary. *Id.* at 154. In contrast, the Secretary asserted that the presence of arcing and sparking within the enclosure should be assumed. *Id.* The hazard for the permissibility violations was the ignition and escape of hot gas through an opening in the enclosure which was impermissibly large. *Id.* The Secretary asserted that the ignition and escape of hot gas through an opening in the enclosure,

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> result in a reasonably serious injury[, and that] the third step under *Mathies* only requires a Judge to determine whether, if a discrete hazard occurs (regardless of likelihood), it is reasonably likely that a reasonably serious injury would result.

*Id.* (citing *Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611, 616 (7th Cir. 2014)). For those reasons, the Commissioner "join[ed] the MSHA inspector and the Judge in concluding that the evidence supports such a conclusion," as "[a] derailment is just one of the events that may occur as a result of a loss of control, creation of a pinch point, or diminished visibility." *Id.*

[8] In fact, there were four established violations involved: three permissibility violations and one accumulations violation.

which was impermissibly large, should be presumed. *Id.* The Commission reversed the ALJ's S&S determinations and remanded for penalty determinations, and Knox Creek appealed the Commission's subsequent denial of Knox Creek's petition for discretionary review following the imposition of the new penalties.[9] *Id.* at 154-55.

The Fourth Circuit stated that the relevant hazard should be assumed[10] and it reminded that the third prong of *Mathies* is whether there is a reasonable likelihood the *hazard contributed to by the violation will cause injury*. *Id.* at 154. It is not about showing a reasonable likelihood that the violation itself will cause an injury.[11] Thus, one is to assume the existence of the relevant hazard when applying the third prong of *Mathies* and then assess whether it was reasonably likely that a reasonably serious injury would result. The third prong therefore measures the probability that a reasonably serious injury would result.

Emphasizing that point, the Fourth Circuit made it clear that the third and fourth prongs are primarily focused on the seriousness (i.e., gravity) of the expected harm. Thus, those prongs are only concerned with likelihood, in the sense of likelihood that the relevant hazard will result in a serious injury. The court held that

> the relevant hazard may be assumed when analyzing *Mathies*' third prong. . . . The test under the third element is whether there is a reasonable likelihood that the *hazard* contributed to by the violation . . . will cause injury. The Secretary need not prove a reasonable likelihood that the *violation itself* will cause injury, as [the operator] argues.

*Id.* at 161. Thus, the court endorsed the Commission's approach of "assum[ing] the existence of the relevant hazard . . . and to consider only 'evidence regarding the likelihood of injury as a result of the hazard.'" *Id.* (quoting *Musser Engineering, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010). Accordingly, for the third prong of *Mathies*, one is to determine "only whether, if the hazard occurred (regardless of the likelihood), it was reasonably likely that a reasonably serious injury would result."[12] *Id.* (quoting *Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611, 616 (7th Cir. 2014)).

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[9] The Fourth Circuit agreed that, in contradistinction to reviewing legal conclusions, the Commission cannot reweigh facts, but rather is to consider whether the findings of fact by the administrative law judge are supported by substantial evidence. *Knox Creek*, 811 F.3d at 156.

[10] In this regard it noted that the Commission itself has stated that the relevant hazard may be assumed when analyzing the third prong of *Mathies*. *Id.* at 161.

[11] The Fourth Circuit added that "the third *Mathies* prong . . . requires evidence that the hazard is reasonably likely to result in an injury-producing event. *Id.* at 163.

[12] In the present matter, no such prognostication, no crystal ball, is required, regarding the likelihood of an injury, nor the likelihood that the injury would be reasonably serious; miner Lee Graham died, and pushing the carrier inherently created a measure of danger to safety contributed to by that act.

The Fourth Circuit noted that "the Commission [has] reasoned that a violation should be considered S&S when it is reasonably *likely* to result in *serious* harm[, and that t]he later-developed *Mathies* test, at its core, also reflects a dual concern for both likelihood and gravity." *Id.* at 162 (citation omitted). Drawing a contrast, that court continued that it thought that

> *Mathies*' third and fourth prongs, which the Commission expected would "often be combined in a single showing," are primarily concerned with *gravity*—the seriousness of the expected harm. To the extent that the third and fourth prongs are concerned with likelihood at all, they are concerned—by their very terms—with the likelihood that the relevant hazard will result in serious injury. *Requiring a showing at prong three that the violation itself is likely to result in harm would make prong two superfluous*.

*Id.* at 162 (second emphasis added) (citations omitted). Thus, the court emphasized that "the third and fourth prongs . . . are concerned . . . with the likelihood that the relevant hazard will result in serious injury." *Id.*

Speaking to the third and fourth prongs of *Mathies*, that court expressed that those prongs focus on the likelihood that the relevant hazard will result in serious injury, adding that assuming the existence of the relevant hazard at prong three is further justified by policy considerations.[13] *Id.*

The Fourth Circuit rejected the argument that its construction would mean that any violation which *could* occur would be S&S; the third prong of *Mathies* "requires evidence that the hazard is reasonably likely to result in an injury-producing event." *Id*. at 163.

On the subject of whether the S&S determination is to be based on the particular facts surrounding the violation and whether that is at odds with the Secretary's method of assuming the hazard for prong three, the court's answer was that under prong two the Secretary must still establish that the violation contributes to a discrete safety hazard and, per prongs three and four, then establish that the hazard is reasonably likely to result in a serious injury. Accordingly, evidence of the likelihood of the hazard is not relevant at prong three. *Id.* at 164.

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[13] The court also stated that

> the legislative history of the Mine Act suggests that Congress did not intend for the S&S determination to be a particularly burdensome threshold for the Secretary to meet. *See Consolidation Coal Co. v. FMSHRC*, 824 F.2d 1071, 1085 (D.C. Cir. 1987) (concluding that the legislative history of the Mine Act "suggests that Congress intended all except 'technical violations' of mandatory standards to be considered significant and substantial").

811 F.3d at 163.

## III. Application of the Fourth Circuit's Opinion in *Knox Creek* to the Case at Hand

To summarize the *Knox Creek* opinion, the Fourth Circuit stated that to meet the second prong, that is, to show a contribution to a discrete safety hazard, *a violation must be at least somewhat likely to result in harm*. As noted above, it explained, "the second prong of *Mathies* requires proof that the violation in question contributes to a 'discrete safety hazard' which implicitly requires a showing that the violation is at least somewhat likely to result in harm." *Id.* at 163.

As for the analyzing the third prong, that court stated that the relevant hazard should be assumed. *Id.* at 164. In that regard, it stated that the analysis is about whether the hazard contributed to by the violation (here, pushing cars), will cause injury, and not that the violation itself will cause an injury. Importantly, the Fourth Circuit stated that both the third and fourth prongs are concerned with the likelihood that the relevant hazard will result in a serious injury. *Id.* at 162.

Apart from the *not inconsiderable reality of the events that transpired*,[14] MSHA Inspector Allen stated that the safeguard was based on criteria set forth in 30 C.F.R. § 75.1403-10(b), and that the "agency set forth that criteria because the agency recognized that *pushing materials on the main haulage roads is a hazard*."[15] Tr. 49 (emphasis added). Therefore, the inspector expressed that not only did the violation contribute to a discrete safety hazard, pushing materials was itself a hazard.[16]

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[14] Nor can the shearer pushing be characterized as a one-off event. Addressing the frequency of the process of moving the shearer, Inspector Allen, when asked how often the shearer would be moved to another location, responded, "Well, every longwall move." Tr. 28. Indeed, during his investigation Allen spoke with then-safety director supervisor Tim Thompson about their practice. Thompson told Allen that the mine had been moving equipment this way for several years. Tr. 51.

[15] The pulling was not effective. Inspector Allen explained that the use of the wire rope violated the safeguard "[b]ecause you can't -- you're required to pull it *and you can't pull this with wire rope in the manner that they were using it*." Tr. 35 (emphasis added). Later, after the fatal accident, when the shearer was moved, Oak Grove used a solid, rigid connection between the No. 3 motor and the shearer carrier, not something flexible such as the wire rope. Tr. 38. Although the majority found otherwise, the inspector expressed that the practice employed by Oak Grove created a pinch point between that motor and the load that that was being carried. If they had been pulling the load, that pinch point would not have been present, as everything would have moved in tandem. Tr. 44.

[16] During the process of the prohibited pushing, the inspector explained that just prior to the fatality as the moving crew was "traveling upgrade, the slack was produced in the wire rope between the #3 motor and the shearer car, shearer carrier. . . . And as that slack was produced, the shearer carrier derailed to the left . . . ." Tr. 25-26. As Commissioner Cohen noted, an inspector's judgment is an important consideration in determining whether a violation is S&S and is entitled to substantial weight. *Oak Grove*, 35 FMSHRC at 3426-27 (citing *Mathies Coal*

**The *Mathies* test is, at its heart, a tool of prognostication. Forecasting is unnecessary when the violative conduct results in an actual injury.**

Particularly in light of the Fourth Circuit's opinion, this Court would observe that, at its heart, the *Mathies* test is, in almost all instances, a tool of prognostication. As such, it is submitted that it is of no value in a case such as this. That is because there is no point or purpose to prognosticating in instances when the mine operator is in the process of engaging in the prohibited action, and a serious accident occurs while engaging in such violative conduct. Reality should not be supplanted by the predictive test *Mathies* provides. Beyond being "somewhat likely" to result in harm, here the violation, pushing, did result in harm. Oak Grove was engaging in activity expressly prohibited by the safeguard notice: pushing cars on a main haulage road. That prohibited activity, pushing cars, literally set in motion the events that resulted in the fatality.

With great respect for the majority's determination, and in full compliance with the Commission's remand direction, as set forth below, the Court should have been more expansive in explaining the basis for its finding that the violation was S&S. This was the Court's failing because the decision should have emphasized that it was the failure to comply with the safeguard notice in the first place that spawned the events which resulted in miner Graham's death.

However, it is noted that, while it should have been more expansive, the Court did address the subject, as it addressed Oak Grove's citation to *Mar-Land Industrial Contractor, Inc*., 14 FMSHRC 754 (May 1992), for the proposition that the occurrence of an accident does not confirm that a condition is reasonably likely to result in an injury. As the Court then stated,

> The problem with this argument is that it is a straw man. Of course the occurrence of an accident does not by itself confirm that a condition was reasonably likely to result in an injury. But, when an accident occurs, and such accident is connected to the cited condition, one then moves beyond the realm of reasonable likelihood. Instead, there is real world evidence of the occurrence and its connection. There is no need, when the accident in fact occurs, to get into the business of predicting the likelihood of its occurrence. To say the least, it would be a perverse outcome to claim that the case for establishing that a violation was S&S is stronger when the prediction is that it is reasonably likely to occur, but not as strong when it happens.

*Oak Grove Res., LLC*, 35 FMSHRC 3422, 3427 n.4 (Nov. 2013) (ALJ). An irony, can it be doubted that if, instead of a derailing and the fatality, an inspector had only observed the shearer being pushed, then issued the safeguard violation for that, that an S&S finding would have been sustained, upon the inspector explaining the hazards associated with pushing, even if such testimony were limited to loss of positive control, decreased visibility, and pinch points?

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*Co*., 6 FMSHRC 1, 5 (Jan. 1984); *Cement Div., National Gypsum Co*., 3 FMSHRC 822, 825-26 (Apr. 1981); *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135-36 (7th Cir. 1995) (stating that the Judge did not abuse his discretion in crediting the opinion of an experienced inspector)); *see also Harlan Cumberland Coal Co*., 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Highland Mining Co.*, 37 FMSHRC 122 (Jan. 2015) (ALJ).

## IV. Assessment of an Appropriate Penalty

Section 110(i) of the Mine Act requires that the Commission consider the following statutory criteria when assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of the penalty to the size of the business; (3) the operator's negligence; (4) the operator's ability to stay in business; (5) the gravity of the violation; and (6) any good-faith compliance after notice of the violation. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000). Judges are not required to give equal weight to each of the criteria, *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997), but must provide an explanation for any substantial divergence from the proposed penalty based on such criteria, *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983).

The Court is not bound by the penalty proposed by the Secretary or by the Secretary's penalty point system. "[N]either the Act nor the Commission's regulations require the Commission to apply the formula for determining penalty proposals that is set forth in section 100.3 of the MSHA regulations." *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1152 (7th Cir. 1984). Instead, the Court must consider the six penalty criteria in section 110(i) of the Mine Act based upon the evidence presented at the hearing.

As the Commission has stated, a judge's independent assessment of the civil penalty must be supported by substantial evidence. *Wade Sand & Gravel Co*., 37 FMSHRC 1874 (Sept. 2015). Further, the Commission noted that

> it is the Commission's final penalty assessment that ultimately governs . . . . The Commission possesses independent authority to assess penalties de novo pursuant to section 110(i) of the Mine Act. 30 U.S.C. § 820(i) ("The Commission shall have authority to assess all civil penalties provided in this Act."). The Commission is bound neither by the Secretary's proposed assessment nor by his Part 100 regulations governing his penalty proposal process. *E.g.*, *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984) ("neither the ALJ nor the Commission is bound by the Secretary's proposed penalties;" also, "neither the Act nor the Commission's regulations require the Commission to apply the formula for determining penalty proposals that is set forth in section 100.3"); *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1980 (Aug. 2014).

*Id.* at 1876-77.

### A. The Parties' Post-Remand Submissions Regarding the Civil Penalty

The Secretary submitted a response following the Commission's December 9, 2015, Decision, which, if nothing else, was brief and to the point. Its entire substantive response to the post-remand issue of the assessment of the civil penalty stated: "The Secretary disagrees with the Commission's decision that the violation was not S&S. The Secretary maintains that the violation, which was issued subsequent to the miner's death, is significant and substantial and that the civil money penalty of $55,000 is appropriate." Sec'y's Resp. 1. To be fair, the Secretary, in earlier briefs, had more fully addressed the civil penalty issue, albeit with the premise that the violation of the safeguard was S&S.

In connection with the December 2015 remand to the Court, Oak Grove also submitted a memorandum addressing the civil penalty issue. After noting that the burden of proof for the civil penalty assessment is on the Secretary, and that the Commission majority determined that the violation was not S&S, Oak Grove then recounted the majority's reasoning in support of its non-S&S finding. Mem. Addressing Civil Penalty on Remand 6-8 ("Oak Grove Mem."). In addition, Oak Grove remarked that as "[t]he remand did not include the negligence finding . . . it would seem that it need not be addressed again." *Id.* at 6 n.3 (citing *Oak Grove*, 35 FMSHRC at 3431). The Court does not agree.

Oak Grove then inserts an irrelevant factor regarding the negligence determination, stating that

> [a]fter the original variance to the safeguard was voided, Oak Grove worked with the UMWA and the local MSHA office to develop an appropriate procedure and that procedure was in place. It was not simply that there were prior citations of the safeguard but the fact that all three parties recognized that moving the equipment carried through the mine was different than what the safeguard initially addressed, moving supplies through the mine.

*Id.* (citation omitted). Thus, Oak Grove tries to resurrect its earlier argument, attempting to undercut the safeguard notice.

Oak Grove then turned to the Part 100 penalty formula, remarking that, upon applying it,

> the Citation, as originally issued would have resulted in a penalty of $17,301 (123 points). If only the likelihood were changed in application of the formula, the assessment would be $705 (83 points). Oak Grove is not proposing such a penalty but would propose a penalty in the $5,000-$10,000 range. The condition, in a sense, is no longer tied to the accident and that should be taken into account in assessing the penalty.

*Id.* at 9.

### B. The Court's Independent Analysis of the Penalty Criteria and Imposition of Civil Penalty

Understanding and applying the majority's decision that the violation was not significant and substantial, the Court proceeds to apply the statutory criteria set forth in section 110(i). It is noted that S&S is not among the identified statutory penalty criteria. Where applicable, the Court's penalty determination takes into account the parties' earlier contentions regarding the penalty, save the S&S finding. Implicitly, the Court was directed to take a fresh look in order to assess an appropriate civil penalty.

### 1. Assessment of Negligence and Gravity Attendant to the Safeguard Violation

Setting aside the Fourth Circuit's view of S&S, it is noted that although the majority has determined that, for S&S purposes, the diminished visibility, the creation of a pinch point, and the lack of positive control failed to establish prongs two and three of the *Mathies* test, but it still remains true that had the pulling requirement been adhered to, per the safeguard's instruction, there would not have been a pinch point. The pinch point hazard resulted in the fatality here. While miner Lee Graham's death did not occur simultaneously with the moment in time at which the pushing process was taking place, that hazardous practice resulted in the derailment and it was in the course of assessing that derailment that the number 3 and 8 motors moved, fatally pinning him. Inspector Allen concluded in his investigation that pushing the shearer carrier contributed to Mr. Graham's death. After all, it was the closely-connected hazardous pushing practice which precipitated the derailment.

Although the S&S component is no longer considered by the Court, the penalty analysis cannot ignore that the closely-connected and hazardous practice of pushing, expressly forbidden by the safeguard, was ongoing at the time of the derailment. The gravity cannot be described as anything other than what Inspector Allen marked on the citation — fatal and occurred. The victim would not have been exposed to any pinch point had a solid bar been employed between the number 3 motor and the shearer carrier.

For this, upon the Court's fresh look, as required by the remand, the Court also finds that high negligence[17] was involved, as Oak Grove should have known of the established violation of the safeguard and there were no mitigating circumstances.[18] As noted, the miner, Mr. Lee Graham, lost his life when he was crushed between the motor and the shearer carrier. Further, a supervisor, Chad Johnson, *the mine's assistant general mine foreman/dayshift foreman*, was involved in the fatal accident, as he was supervising the four motormen who were moving the

[17] The Commission's definition of high negligence requires that such a finding result from "an aggravated lack of care that is more than ordinary negligence." *E. Assoc. Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991). Accordingly, "a Commission Judge may find 'high negligence' in spite of mitigating circumstances." *Brody Mining, LLC*, 37 FMSHRC 1687, 1703 (Aug. 2015).

[18] It is understandable that Oak Grove suggested that there was no need to re-examine the negligence involved. But, neither side, nor the Court, addressed the important negligence consideration that a supervisor, and a significant supervisor at that, was involved, and that there were no mitigating circumstances. Thus, the Court rejects the issuing inspector's view that moderate negligence was involved, nor does it adopt the assertion that Oak Grove had no previous incidents following the issuance of the safeguard. That latter assertion is a distraction and it is potentially misleading. It is a distraction because the penalty analysis for this factor is directed at the event that occurred, not on whether there were or were not previous instances. It is misleading because all that is known is that there were no *cited* previous instances and no previous fatalities. Thus, the claim of no previous incidents is not presumed, nor is there a presumption that there were previous incidents. Thus, there is no finding either way on this question.

shearer. Tr. 26. Here, Respondent was *pushing* a shearer carrier, which was transporting the shearer body to the longwall face, along a main haulage road. Supervisor Chad Johnson admitted this. Tr. 99. Thus, the Court in its independent reassessment of the penalty determines that high negligence applies.

### 2. Evaluation of the Other Statutory Penalty Criteria

#### i. Size of the Business

Exhibit A to the Secretary's Petition for Assessment of Civil Penalty lists the Oak Grove mine's annual tonnage as 1,035,232. Sec'y's Pet. for Assessment of Civil Penalty, Ex. A. In Part 100, the Secretary has designated mines that produce this tonnage of coal as large mines for the purpose of determining civil penalties, assigning that tonnage 14 out of a possible 15 points. 30 C.F.R. § 100.3, Table I. Part 100 designates the size of the controlling entity as large as well, assigning it 8 out of 10 possible penalty points. 30 C.F.R. § 100.3, Table II. Accordingly, Oak Grove is determined to be a large mine.

#### ii. History of Previous Violations

The Secretary introduced Government Exhibit 1, which is Respondent's history of violations for the two years prior to the citation issued in this case. Tr. 15. Respondent objected to the admission of the exhibit to the extent that it contained citations and orders that predated the 15-month period prior to May 21, 2008. *Id.* The Court admitted the exhibit, but only for those violations that occurred in the 15-month period. *Id.* at 15-16.

The Court has reviewed and considered Respondent's history of violations.

#### iii. The Effect of the Penalty on the Operator's Ability to Continue in Business

Respondent agreed, in stipulations submitted to the Court at the hearing, that the total proposed penalty would not affect its ability to continue in business. Stipulations, ¶ 6.

#### iv. The Demonstrated Good Faith in Attempting to Achieve Rapid Compliance

Given the fatality, it is inappropriate to express any good faith attribution to Oak Grove, at least in terms of the penalty analysis.

## ORDER

Accordingly, the violation of 30 C.F.R. § 75.1403-10(b), as identified in Citation No. 7696616, having been previously upheld by the Commission, for the reasons previously discussed applying the statutory penalty criteria, the Court finds that high negligence was involved, that the gravity is characterized as occurred and the severity as fatal, and that applying the other penalty criteria as set forth in section 110(i) of the Mine Act, a civil penalty of $50,000.00 is imposed. Respondent is hereby **ORDERED** to pay the Secretary of Labor that sum within 30 days of the date of this decision.[19]

William B. Moran

William B. Moran
Administrative Law Judge

[19] 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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