

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

June 28, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 96-21-M
Petitioner	:	A. C. No. 44-00040-05559
v.	:	
	:	Eastern Ridge Lime
EASTERN RIDGE LIME COMPANY, L.P.,	:	
Respondent	:	

DECISION ON REMAND

Before: Judge Weisberger

This matter is before me pursuant to the Commission's Decision, 21 FMSHRC 416 (April 1999), vacating my Decision on Remand (20 FMSHRC 758 (July 1998)), on the ground that the decision did not contain the additional "fact finding and analysis of the penalties to be assessed." The Commission set forth the scope of the remand as follows:

On remand, we direct the judge to state whether he is relying on the failure to provide adequate ground support as a cause of the accident and as support for his S&S and penalty determinations and, if so, to indicate the basis in the record for doing so. We also remind the judge that he does not have to find that the violation led to the ground fall which caused a fatality in order to conclude that the violation was S&S. See *Arch of Kentucky*, 20 FMSHRC 1321, 1330 (Dec. 1998).

On April 28, 1999, an order was issued directing the Parties to file briefs regarding the issues framed by the Commission's Remand. On May 26, 1999, Respondent filed its brief on remand. On May 17, 1999, Petitioner filed its brief on remand. Additionally, on May 27, 1999, Respondent filed a Motion for Leave to Adduce Additional Evidence, and Petitioner filed an Opposition to this Motion on June 9, 1999.

1. Respondent's Motion for Leave to Adduce Additional Evidence.

Respondent alleges that subsequent to the hearing in this matter the mine at issue was sold by Respondent, and that subsequent to the sale the mine's records revealed a set of color photographs of the area of the rock fall after the rock fall. It is alleged that these photographs are clearer than the photographs used at the hearing; that they show that conditions observed by some of the miners and relied on by the undersigned "are not borne out by the physical evidence;" and

that the photographs show “how the mechanism of the fall was not related to any condition known to the miners prior to the accident.” It is alleged that Respondent’s counsel was not aware of the existence of the photographs until after the hearing.

Petitioner, in her opposition to Respondent’s motion alleges that on June 13, 1997, Respondent had filed a Motion for Leave to Adduce Additional Evidence with the Court of Appeals of the Fourth Circuit seeking to introduce into the record the exact same photographs that are the subject of the instant motion, and that the motion was opposed by the Petitioner who set forth, inter alia, that the photographs are cumulative, and impeaching in nature. On July 3, 1997, the Fourth Circuit issued an order denying the Motion.

The Motion before me is, in substance, the same Motion that had been filed before the Fourth Circuit.¹ Accordingly, the Fourth Circuit’s Order becomes the law of the case, as it relates to the merits of Respondent’s Motion for Leave to Adduce Additional Evidence. Accordingly, on that basis alone, I must find that Respondent’s Motion be denied.

2. The Failure to Provide Adequate Ground Support Is Not Being Relied Upon as the Cause of the Accident and as Support for Significant and Substantial and Penalty Determinations.

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act 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." 30 U.S.C. § 814(d)(1). A violation is properly designated significant and substantial "if based upon the particular facts surrounding the 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.*,

^{1/} In the instant Motion, Respondent alleges that the color photographs it seeks to introduce were discovered, subsequent to the hearing, “[d]uring a review of those records” after they had shipped to Respondent’s parent’s facilities in Illinois. In contrast, in the motion that had been filed with the Fourth Circuit, Respondent described the photographs as having been found “[d]uring the a routine review of those record.” There is no indication in the order of Fourth Circuit that its decision denying Respondent’s Motion was based, in any part, upon the fact that the photographs were discovered during a “routine” review of their records. I thus find that this difference in the wording of the motions not to be significant or material.

3 FMSHRC 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

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.

In *United States Steel Mining Company, Inc.*, 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

We have explained further that 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). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U. S. Steel Mining Company, Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U. S. Steel Mining Company, Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

I reiterate my earlier findings that Respondent did violate 30 C.F.R. § 57.3360, and that the essence of the violation, i.e., failure to provide ground support, contributed to the hazard of roof fall. I thus find the first two elements set forth in *Mathies*, supra, have been met.

The third element set forth in *Mathies* "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 Company*, 6 FMSHRC 1834, 1836 (August 1984). In applying the third element set forth in *Mathies*, supra, to the instant case, I specifically do not find that either of the violations at issue led to the ground fall which caused a fatality. In the same fashion, although Respondent failed to provide adequate ground support, I am not relying on this as a cause of the accident, and as support for the significant and substantial penalty determinations that I previously made. My conclusion that the third and fourth elements set forth in *Mathies*, supra, have been met, is based on the record which establishes that there was a reasonable likelihood that the hazard of a roof fall was contributed to by the violations. Additionally, the record establishes that there was a reasonable likelihood that the hazard of a roof fall will result in an injury of a reasonably serious nature, based upon the existence of the combination of the following conditions: a cavity in the roof of 204E heading that extended most of the way across the face of the 204E heading, the roof of the 204E heading was "drummy," there was popping and cracking in the roof of the 204E in December 1993 which indicated that the top was not sound, the presence of mud seams, the presence of bad top in the 206 heading prior to the July 25, 1994, roof fall in 204E/11S, and the proximity of the left rib in 11S to the vertical cavity in 204E.

Since there was a reasonable likelihood of a roof fall, I find that even not considering the fatality and serious injuries which resulted as a consequence of the roof fall herein, I conclude that since there was a reasonable likelihood of a roof fall, it is clear that there was a reasonable likelihood that a roof fall will result in injuries of reasonably serious nature to exposed miners. For these reasons, I reiterate my finding that the violation of section 57.5360, supra, was significant and substantial. Further, the existence of the combination of roof conditions in the area in issue, as set forth above, is the basis for the finding that the violation of 30 C.F.R. § 57.3201 was significant and substantial.

Essentially for the reasons set forth above, I find that the violations at issue were of a high level of gravity, as they could have resulted in a fatality or serious injuries to exposed miners.² I thus reiterate my initial findings regarding the penalties to be assessed.

ORDER

It is **ORDERED** that Order No. 4289773 and Citation 4389772 be **AFFIRMED** as written, and that to the extent, if any, that Respondent has not paid any penalties for these violations, it shall, within 30 days of this Decision, pay a total civil penalty of \$85,000.00.

Avram Weisberger
Administrative Law Judge

Distribution:

Robin A. Rosenbluth, Esq., Yoora Kim, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Suite 400, Arlington, VA 22203 (Certified Mail)

Thomas B. Weaver, Esq., Armstrong, Teasdale, Schlafly & Davis, One Metropolitan Square, Suite 2600, St. Louis, MO 63102 (Certified Mail)

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^{2/} The scope of the Commission's remand does not require me to reconsider or make additional findings regarding any of the additional factors set forth in section 110(i) of the Act regarding the assessment of a penalty. Thus, it is not necessary to consider Respondent's arguments regarding what it knew or should have known prior to the accident.