FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 22, 2006

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2003-149
Petitioner	:	A.C. No. 46-08553-03569
v.	:	
ELK RUN COAL COMPANY, INC.,	:	
Respondent.	:	Black King I North Portal

DECISION

Appearances: Daniel M. Barish, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, VA, for the Secretary
David J. Hardy, Esq., Spilman, Thomas & Battle, Charleston, WV, for the Respondent

Before: Judge Weisberger

On December 12, 2005, the Commission issued a decision in this matter vacating the initial decision in *Elk Run Coal Co., Inc.,* (*"Elk Run I"*), 26 FMSHRC 761 (Sept. 2004), that the violation of 30 CFR § 75.220(a)(1), as a result of Elk Run's failure to comply with its roof control plan, was not significant and substantial. *Elk Run I*, 26 FMSHRC, supra, at 762-769 In addition to vacating the initial decision, the Commission remanded the proceeding "... for further consideration." *Elk Run Coal Co., Inc.* ("*Elk Run II*") 27 FMSHRC 899 (December 2005).

I. Elk Run, II, supra

In *Elk Run II*, supra, 27 FMSHRC, supra, the Commission reiterated Commission precedent established in *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984) 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 a reasonably serious nature.

The Commission took cognizance of the finding in the initial decision that the first two elements of *Mathies* had been met. With regard to the third element, the Commission cited the notation in the initial decision of the inspector's testimony regarding the dangers associated with

retreat mining in that numerous people have been killed as a result of that process. The Commission also referred to the finding in the initial decision that the presence of three incomplete rows without supporting timbers increases the risk of exposing miners to a roof fall. The Commission then went on to quote the initial decision which had found "...that there was not any evidence adduced that the roof was undergoing any specific type of stress that could lead to a roof fall. Nor does the record contain evidence that the roof had ever fallen in this particular section of the mine." *Elk Run I,* 26 FMSHRC, supra at 768-769.

The Commission noted the conclusion in the initial decision that the Secretary had failed to establish by a preponderance of the evidence that there was a reasonable likelihood of a roof fall. The Commission, relying on *Bellefont Lime Co. Inc.* 20 FMSHRC 1250, 1254-55 found error in the conclusion in the initial decision that the Secretary had failed to meet her burden by not presenting evidence of roof falls or stress on the roof in that the analysis was "... based solely on mine conditions prior to the violation." *Elk Run II,* 27 FMSHRC, supra, at 906. The Commission in *Elk Run II*, also took cognizance of the conclusions in *Elk Run 1*, supra, that the violation contributed to the hazard of a roof fall, which could have caused serious injury to miners, and that the gravity of the violation was relatively high.

The Commission explained its conclusion as follows:

> This is not to say that a history of roof falls in a mine is not pertinent to the consideration of the reasonable likelihood of an injury. [footnote omitted] The commission has long held that whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.,* 10 FMSHRC 498, 501 (Apr. 1988). [footnote omitted] However, conditions in the mine prior to the citation are not *dispositive* of the S&S designation.[footnote omitted] *See also Buffalo Crushed Stone, Inc.,* 10 FMSHRC 2043, 2046 (Oct. 1994) (in considering whether the failure to provide a berm at a stockpile was S&S, the fact that the stockpiles flat and that there were no equipment problems does not establish that an incident was not reasonably likely to occur).
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> We thus agree with the Secretary, Sup'l Br. At 1-2, that the absence of an injury-producing event when a cited practice has occurred does not preclude an S&S determination. *See Arch of Kentucky*, 20 FMSHRC 1321, 1330 (Dec. 1998) (the Secretary does not have to show that a violation caused an accident in order to prove that a violation was S&S); *Buffalo Crushed Stone*, 10 FMSHRC at 2046 (the absence of previous instances of overtravel does not establish that an accident would not be reasonably likely to occur, given the nature of hazards presented). It follows then, as the Secretary argues, that the absence of evidence of stress or prior roof falls cannot be determinative of whether the cited condition is reasonably likely to cause an injury. See also *Blue Bayou Sand and Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996) (operator's assertions that it had no history of accidents and that equipment had been driven for many months in cited condition

is not dispositive of S&S determination).

> In the instant proceeding, the presence of adverse roof conditions may increase the likelihood of a roof fall but the absence of such adverse conditions does not necessarily eliminate the possibility that a roof fall might occur when an operator fails to follow its roof control plan. Moreover, requiring the Secretary to prove an S&S violation by establishing that the mine roof is under "any specific type of stress that could lead to a roof fall," 26 FMSHRC at 768-69, places an onerous burden of proof on the Secretary. Similarly, any implication that the Secretary needs to show that there had been a roof fall in this section of the mine before a violation can be designated S&S wold unreasonably restrict the ability of the Secretary to prove that a roof control violation is S&S. None of these evidentiary points detracts from the existing core requirement that a roof control plan take into account the specific conditions of the mine in seeking to prevent roof fall accidents [footnote omitted] and the Congressional intent to provide comprehensive protection against roof falls through adherence to MSHA-approved safety measures tailored to the individual mine. (Elk Run, II, supra, at 906-907).

The Commission went on to hold that, "[o]n remand, ... the judge must weigh the record evidence and, assuming that normal mining were to continue, determine whether any miner on any shift would have been exposed to the hazard arising out of the violation, so as to create a reasonable likelihood of injury." *Elk Run II* at 907.

II. Discussion

Based upon the Commission's holding, I find that prior to the violation, the lack of specific stress in the roof that could lead to a roof fall is not *dispositive* of the significant and substantial designation. Further, taking cognizance of the emphasis placed by the Commission in *Elk Run II*, supra, on the need to assume the continuation of normal mining work, I reiterate my previous finding that in Elk Run's operation of retreat mining, generally roof support is weakened due to this type of mining. Further, Elk Run's retreat mining had left three rows of **incomplete** blocks which exacerbated the hazard of stress on the roof. Also, I note that the fact that breaker post had not been installed to prevent any roof fall continuing outby, further contributed to the hazard. I thus reiterate the initial finding that the gravity of the violation was relatively high. Considering the above facts, along with the analysis set forth by the Commission above, in *Elk Run II*, supra, and the continuation of normal mining, I find that the violation herein created a reasonable likelihood of injury by exposure of miners in the area in question to the hazards of a roof fall.

Therefore, upon reconsideration, for all of the above reasons, and following the holding and analysis of the Commission in *Elk Run II*, supra, I am constrained to find the violation herein was significant and substantial.

III. Penalty

The conclusion that the violation herein was significant and substantial, is consistent with the initial finding that the gravity of the violation was relatively high. The Commission in its remand, *Elk Run II*, supra, did not order a reconsideration of the additional factors set forth in 110 (i) of the Act. I thus find that it is not necessary to reassess the penalty set forth in the initial decision, and thus reiterate my initial finding that a penalty of $1,000 is appropriate for the violation found therein.

Avram Weisberger
Administrative Law Judge

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