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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
January 27, 1989

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. WEVA 87-272

BIRCHFIELD MINING COMPANY

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY: Ford, Chairman; and Backley, Commissioner

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1982) ("Mine Act"). The primary issue is whether Birchfield Mining Company ("Birchfield") violated 30 C.F.R. $ 75.303(a), a mandatory safety standard for underground coal mines requiring that all active workings of a coal mine be examined and the results of such examination be reported "before any miner in [any] shift enters the active workings of a coal mine." 1/

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1/ 30 C.F.R. $ 75.303(a) restates section 303(d)(1) of the Mine Act, 10 U.S.C. $ 863(d)(1), and provides in part:

> Within 3 hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings.... Each such examiner shall examine every working section in such workings

and shall make tests in each such working section for accumulations of methane ... and shall make tests for oxygen deficiency ... examine seals and doors to determine whether they are functioning properly; examine and test the roof, face, and rib conditions in such working section; examine active roadways, travelways, and belt conveyors on which men are

Also at issue is whether the violation was significant and substantial in nature and caused by Birchfield's unwarrantable failure to comply with the standard, and whether the administrative law judge assessed an appropriate civil penalty for the violation.

Commission Administrative Law Judge Gary Melick found that Birchfield violated the standard, the violation was significant and substantial, and resulted from an unwarrantable failure by the operator. He assessed a civil penalty of $400 for the violation. 9 FMSHRC 2209 (December 1987)(ALJ). We granted Birchfield's petition for discretionary review. For the following reasons, we affirm the judge's decision respecting the fact of violation, and Birchfield's unwarrantable failure to comply. However, we reverse the judge's finding that the violation was significant and substantial in nature and we remand this matter to the judge for reconsideration of the civil penalty in light of that reversal.

The essential facts are not in dispute. On April 2, 1987, at approximately 7:30 a.m., John Baugh, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted an inspection at Birchfield's No. 1 Mine, an underground coal mine located in Boone County, West Virginia. The inspector observed several miners on the 8:00 a.m. to 4:00 p.m. day shift change into working clothes and enter the mine. Baugh checked the mine examiner's book (the "fireboss

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> carried, approaches to abandoned areas, and accessible falls in such section for hazards; test ... to determine whether the air in each split is traveling in its proper course and in normal volume and velocity; and examine for such other hazards and violations of the mandatory health or safety standards, as an authorized representative of the Secretary may from time to time require.... Such mine examiner shall place his initials and the date and time at all places he examines. If such mine examiner finds a condition which constitutes a violation of a mandatory health or safety standard or any condition which is hazardous to persons who may enter or be in such area, he shall indicate such hazardous place by posting a "danger" sign conspicuously at all points which persons entering such hazardous place would be required to pass, and shall notify the operator of the mine....

Upon completing his examination, such mine examiner shall report the results of his examination to a person, designated by the operator to receive such reports at a designated station on the surface of the mine, before other persons enter the underground areas of such mine to work in such shift. Each such mine examiner shall also record the results of his examination ... in a book ... kept for such purpose in an area on the surface of the mine ... and the record shall be open for inspection by interested persons.

book") and found that no preshift examination report had been recorded for the 8:00 a.m. to 4:00 p.m. day shift. Traveling into the mine, the inspector did not see anyone conducting a preshift examination nor did he observe any dates, times and initials in the areas required to be preshifted that would indicate that the preshift examiner for the day shift had inspected the mine.

At approximately 7:40 a.m., when he arrived at the No. 4 face, the inspector saw the miners that he had observed entering the mine, along with the midnight shift crew and their section foreman, Richard Henderson. Henderson was Birchfield's designated preshift examiner for the day shift. The inspector informed Henderson that a preshift examination would have to be completed for the 8:00 a.m. to 4:00 p.m. shift and that it was a violation of section 75.303(a) for miners to enter the mine prior to a preshift examination being completed.

The inspector issued a citation, pursuant to section 104(d)(1) of the Mine Act, alleging a significant and substantial and unwarrantable failure violation of section 75.303(a). 2/ The citation states in relevant part:

> An inadequate preshift examination was made in the 001-0 graveyard main section in that the results of the examination was not reported to a person designated by the operator to receive such reports at a designated station on the surface of the mine before other persons enter the underground area of such mine to work in such shift. The results were not recorded in the approved record book and ... no dates, time or initials have been placed in conspicuous locations.

At 8:45 a.m., the inspector terminated the citation after observing Henderson record the results of his preshift examination for the day shift in the fireboss book.

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2/ Section 104(d)(1) of the Mine Act, 30 U.S.C. $ 814(d)(1), states in part:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation 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, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this [Act]....

Subsequently, the Secretary proposed a civil penalty for the violation and Birchfield requested a hearing. Birchfield denied that it had violated the standard and challenged the inspector's significant and substantial and unwarrantable failure findings.

Before the judge, Birchfield argued that because the day shift miners had entered the mine during a shift for which a preshift examination had been performed and recorded (i.e., the midnight shift), it had not violated the standard. Rejecting this argument, the judge concluded that under the plain meaning of the standard, the preshift examination must be completed and reported out of the mine before any miner on the oncoming shift for which the preshift examination is required enters the mine. The judge found, based on the inspector's testimony, that the preshift examination for the day shift had not been completed and reported at the time the miners entered the mine. 9 FMSHRC at 2212.13. Therefore, the judge concluded that the violation of section 75.303(a) was proven as charged. 9 FMSHRC at 2212.

On review, Birchfield contends that the judge misconstrued the standard and that an operator complies with section 75.303(a) as long as a preshift examination had been completed and reported for the shift during which the miners enter the mine. Because the miners on the 8:00 a.m. shift entered the mine during the midnight shift, and because a preshift examination had been performed for that shift, Birchfield asserts that it complied with the letter and spirit of section 75.303(a). We disagree.

The inspector testified that the purpose of a preshift examination is to detect hazardous conditions in the mine and to correct or report such hazards before miners enter the active workings of the mine. He testified that if miners enter the mine before the preshift examination is completed and the results reported; there exists a hazard that undetected dangerous conditions could injure incoming miners. Tr. 39-41.

The inspector's concern over undetected and unreported hazards is consistent with that of Congress. The cited standard reiterates section 303(d)(1) of the Mine Act, 30 U.S.C. $ 863(d)(1), which was carried over without change from the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. $ 863(d)(1) (1976). The Senate Report states, "Changes occur so rapidly in the mines that it is imperative that the examinations be made as near as possible to the time the workmen enter the mine." Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I Legislative

History of the Federal Coal Mine Health and Safety Act of 1969, at 183 (1975) ("Coal Act Legis. Hist."). Accordingly, as both the Senate Report and the Conference Report explain:

> No miner may enter the underground portion of a mine until the preshift examination is completed, the examiner's report is transmitted to the surface and actually recorded, and until hazardous conditions or standards violations are corrected.

Coal Act Legis. Hist. at 183 and 1610.

Contrary to Birchfield's assertions, the language of section 75.303(a) clearly requires that the preshift examination be completed "before any miner ... enters the active workings," and that the results of the preshift examination be reported out of the mine "before other persons enter the underground areas of ... [the] mine to work." (Emphasis supplied.) The judge found and it is undisputed that three or four day shift miners were present in the active workings of the mine at approximately 7:40 a.m. on April 2, 1987, before the designated preshift examiner had reported the results of his preshift examination to an operator designated person on the surface of the mine. Thus, we conclude that the judge's interpretation of section 75.303(a) is correct and his finding of a violation is supported by substantial evidence. We turn, therefore, to the question of whether the violation was of a significant and substantial nature and was due to Birchfield's unwarrantable failure to comply.

A violation is properly designated as being of a significant and substantial nature if, based on 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., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory standard is significant and substantial under National GYpsum the Secretary 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.

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," and that the likelihood of injury must be evaluated in terms of continued normal mining operations. U.S. Steel Mining Co., 6 FMSHRC 1573-74 (July 1984): see also, Halfway, Inc., 8 FMSHRC 8, 12 (January 1986).

At the outset, we reject the Secretary's argument on appeal (Br. 10) that any violation of section 75.303(a) is per se significant and substantial in nature. Rather, the proper test is that which we enunciated in Mathies. In applying the Mathies formula to the violation at issue, we have found that substantial evidence supports the judge's finding that Birchfield violated section 75.303(a). Therefore, the first element of the Mathies formula is established. Review of the judge's analysis beyond that point, however, reveals that he effectively ignored the second element of the Mathies formula, i.e., whether the violation presented a discrete safety hazard.

Because the administrative law judge has failed to make findings regarding the second element, and because the record contains insufficient evidence on that issue to satisfy the National Gypsum/Mathies test, we conclude that the violation was not "significant and substantial." Specifically, in evaluating the totality of conditions and circumstances in existence at the time of citation, we do not believe that the violation contributed a "measure of danger to safety."

The record before us demonstrates that the inspector's actual enforcement actions, or lack thereof, belie his judgment that conditions in Birchfield's No. 1 Mine posed such a measure of danger to safety that failure to report and record them prior to the arrival of the day shift miners constituted a significant and substantial violation of the preshift standard. Furthermore, numerous factors not considered by the judge serve to mitigate the "hazardous conditions" relied upon by the judge in upholding the inspector's significant and substantial finding.

First, the miners who prematurely entered the mine before the completion of the preshift examination were all certified firebosses and thus were all qualified to perform preshift examinations. We can infer from this that they would have been more acutely aware of potential hazards than the average miner. Second, the mine had been in operation only six calendar days prior to the day of inspection and had only progressed 150-160 feet from the surface opening, about half the length of a city block. Obviously, there were simply not as many potential sources of hazard as would be present in a large, established mine, such as the one the inspector had once preshifted and where his habit was to place his initials every 1000 feet as the examination progressed (Tr. 14).

Third, for purposes of determining a violation of the cited regulation we have rejected Birchfield's argument that the 8:00 a.m. shift miners entering the mine during the midnight shift were covered by the pre-shift exam for the midnight shift. We think it probative, however, for purposes of settling the significant and substantial issue, to note the lack of enforcement action taken by the inspector to counteract the allegedly hazardous conditions existing on the 001-0 main section. Indeed, it strikes us as peculiar that the miners on the midnight shift would have been exposed to what the inspector deemed hazardous conditions whether or not members of the day shift entered the mine prior to completion of the preshift inspection. Moreover, while entry by the day shift miners prior to the full execution of the preshift examination is clearly violative, it does

not, in and of itself, rise to the level of seriousness that would exist if the mine had been idle prior to the start of the day shift.

In summary, there is a clear lack of symmetry between what the inspector alleged to be a measure of danger to safety and the enforcement measures he actually took or failed to take.

There are also strong factors that serve to mitigate the relative seriousness of the conditions that were extant when the citation was issued and that are relied upon by the judge in reaching his conclusion

that the violation was "significant and substantial."

First, although the No. 1 mine was located in a coal seam known to liberate methane, Birchfield's on-shift methane tests during the midnight shift and the inspector's own tests revealed methane levels in the No. 1 Mine substantially below those that would pose a hazard (Tr. 70, 89).3/ Regarding the lack of test holes twenty feet in advance of the face, serious questions arise as to its relevance to the question whether the inadequate preshift inspection was a significant and substantial violation. 4/ Even so, the preshift report accepted by the inspector as abatement in this case did not mention the lack of test holes, nor did the preshift report for the preceding midnight shift. This is significant because the Secretary appears to accept the preshift examination report for the midnight shift as being in compliance with section 75.303(a).

Birchfield does not dispute that an auxiliary exhaust fan was inoperative, causing a second "blowing fan to stir up dust around the continuous miner. This, however, appears to have been an obvious condition rather than a latent one and would have been readily apparent to any day shift miner coming on the scene. Furthermore, the inspector portrays this condition as an important basis for his significant and substantial finding, but he did not issue a citation charging for instance, a violation of 30 C.F.R. $ 75.401 (referring to excessive levels of dust) (Tr. 68-69). The failure to cite the operator in these circumstances further erodes the "serious hazard" basis of the significant and substantial finding.

For all these reasons, we agree with Birchfield that substantial evidence does not support the judge's finding that the violation of section 75.303(a) was significant and substantial in nature.

We reject, however, Birchfield's challenge to the finding of unwarrantable failure. A violation of a mandatory safety standard is

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3/ The Birchfield No. 1 Mine was adjacent to a bleeder entry for an older underground mine, but the record shows that although that bleeder was not totally passable, it was being ventilated and tests for methane were being conducted at specified evaluation points. (Tr. 78-79).

4/ Whether test holes are required in the circumstances sketchily presented is a matter that need not be decided here. The working face was 140 feet from the older workings, and it is clear that Birchfield was mining away from the adjacent bleeder rather than

approaching it. The record on the test hole citation is confused, but it appears that Birchfield chose not to contest the citation and paid a $20.00 single penalty assessed by the Secretary. (Tr. 82-83; Gov. Ex. A). Furthermore, the record indicates that mining was allowed to proceed without abatement of the test hole citation because Birchfield had filed a petition for modification of the standard. (Tr. 137-38) These enforcement decisions seriously undermine the inspector's assertion that a lack of test holes constituted a "serious hazard" for purposes f determining the seriousness of the preshift violation.

caused by an operator's unwarrantable failure if the operator has engaged in "aggravated conduct constituting more than ordinary negligence." Emery Mining Corp., 9 FMSHRC 1997, 2002 (December 1987); Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1987). The judge found that "[s]ince the requirement [of section 75.303(a)] is set forth in plain and unambiguous language ... the operator's agents should have known of the violation" and accordingly concluded that the violation of section 75.303(a) was the result of "inexcusable aggravated conduct constituting more than ordinary negligence." 9 FMSHRC at 2213.

It is undisputed that Birchfield officials knew that several miners had entered the active workings of the mine before the preshift examination had been completed and the results reported and that this was not an isolated violation of section 75.303(a). Both Henderson's and Bailey's testimony reveals that miners had routinely reported to the face areas of the mine before preshift examinations had been completed. Tr. 107-08, 120. Further, Henderson, admitted that he had not read section 75.303(a), the mandatory safety standard in issue, although he had been performing preshift examinations for approximately 13 years. Tr. 111.

Uncontroverted evidence thus establishes that on this and previous occasions Birchfield officials regularly permitted oncoming shift miners to enter the active workings of the mine before a preshift examination had been completed and reported as required by section 75.303(a). Such conduct, in conjunction with the admission of the designated preshift examiner that he had not read the standard that governs the timing, content, conduct and reporting of preshift examinations, demonstrates aggravated conduct exceeding ordinary negligence.

Birchfield's last contention is that the judge erred in assessing a $400 civil penalty for the violation of section 75.303(a). Birchfield argues that the judge failed to consider two of the six civil penalty criteria mandated by section 110(i), 30 U.S.C. $ 820(i)-the ability of Birchfield to continue in business and the gravity of the violation. Birchfield also contends that the civil penalty assessed is "excessive to the point of arbitrariness." B. Br. 17.

"When a judge's penalty assessment is put in issue on review, we must determine whether it is supported by substantial evidence and whether it is consistent with the statutory penalty criteria." Pyro Mining Co., 6 FMSHRC 2089, 2091 (September 1984). While in his decision the judge did not specifically address the question of

the impact of a penalty upon the operator's ability to continue in business, the parties stipulated at the hearing that "[p]ayment of the assessed civil penalty will not affect [Birchfield's] ability to continue in business." Tr. 7. Therefore, the stipulation establishes this statutory penalty criterion.

As to the gravity of the violation, however, the judge relied on his determination that the violation was "significant and substantial and a serious hazard." 9 FMSHRC at 2214. Since we have reversed the significant and substantial finding, it is appropriate for the judge to determine whether that reversal would have any effect on his assessment of the civil penalty.

For the foregoing reasons, the decision of the judge is affirmed as to the fact of violation, and the finding of unwarrantable failure to comply. The decision is reversed, however, on the issue of whether the violation was significant and substantial and remanded as to whether the reversal of the significant and substantial finding would affect the amount of the civil penalty. The section 104(d)(1) citation is also modified to a section 104(a) citation.

Commissioner Nelson, concurring:

A basic problem in this case causes me to concur with Chairman Ford and Commissioner Backley in reversing the judge's finding that the violation was of a significant and substantial nature. When the inspector observed miners on the 8 a.m. shift at the No. 4 face, he also observed miners from the midnight shift at the same place at the same time. The inspector issued a citation under section 75.303(a) because he found several miners from the 8 a.m. shift in the mine when no record had been made of a preshift examination for the 8 a.m. shift. Indisputably, a preshift examination had been made for the midnight shift. Our colleagues cite a number of threatening circumstances vis-a-vis the 8 a.m. shift miners, but the midnight shift miners were in the same place at the same time and by a quirk in the regulatory requirements the latter workers apparently stand outside the circle of danger as viewed in this circumstance. It is noteworthy that if the 8 a.m. shift miners had not entered the mine prematurely there would be no basis for this citation even if it were conceded that the threatening circumstances obtain.

Consequently, it seems inappropriate to attach to this citation a finding that (in statutory words) "such violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard." That finding might be appropriate if the inspector had cited the kind of threats to safety enumerated by our colleagues but, to repeat, it seems inappropriate here where the inadvertent effect is to divide into two classes miners whose vulnerability to safety hazards is actually equal.

With respect to the significant and substantial finding, I would not argue with Commissioners Doyle and Lastowka concerning an "inspector's independent judgment" and the appropriate weight to be accorded thereto by the judge in proper circumstances. However, for the reasons stated, I cannot conclude from the record that substantial evidence supports the judge's finding that the violation herein was of a significant and substantial nature.

L. Clair Nelson, Commissioner

Commissioners Doyle & Lastowka, concurring in part & dissenting in part:

We agree with the majority that the judge interpreted 30 C.F.R. $ 75.303(a) correctly and that his finding of a violation is supported by substantial evidence. We also agree with the majority that substantial evidence supports the judge's finding that the violation was the result of Birchfield's unwarrantable failure to comply with the mandatory safety standard. We dissent, however, from that part of the majority decision reversing the judge's finding that the violation of 75.303(a) was of a significant and substantial nature.

In Cement Div., National Gypsum Co., 3 FMSHRC 822, 825 (1981) the Commission emphasized that an "inspector's independent judgment is an important element in making significant and substantial findings, which should not be circumvented." 3 FMSHRC at 825-26. Where, as in the present case, an inspector's judgment that a violation of 75.303(a) is significant and substantial in nature is based upon the existence of hazardous conditions that a preshift examination should have detected and reported and which, if undetected, pose a safety hazard to miners, that judgement should be accorded appropriate weight. See generally, Mathies Coal Co., 6 FMSHRC 1, 5 (Jan. 1984); Consolidation Coal Co., 6 FMSHRC 189, 194-95 (Feb. 1984). Citing Mathies the judge accorded due weight to the inspector's judgment and found that "[w]ithin the framework of the evidence," the violation of 75.303(a) was significant and substantial in nature. 9 FMSHRC at 2213. Because the judge's finding of a significant and substantial violation has substantial support in the record and we are bound by a substantial evidence standard of review (30 U.S.C. $ 823(d)(2)(A)(ii)(I)), the majority errs in substituting its judgment for that of the trier of fact. Donovan on behalf of Chacon v. Phelps Dodge Corp., 709 F.2d 86, 94 (D.C. Cir. 1983).

We agree with the majority that the proper test to apply is that set forth in Mathies and that the first element of the Mathies test is established in this case by the fact of violation found by the judge and affirmed by the Commission. The second element in the Mathies test requires that the violation contribute to a measure of danger to safety. In this regard, the inspector testified that in evaluating the violation of 75.303(a) to be of a significant and substantial nature, he considered several factors. The coal seam being mined is known to liberate large quantities of methane. Further, it is adjacent to a bleeder entry of older underground workings that cannot be fully inspected and that are known to liberate methane. Tr. 42, 55, 68-69. Also,

Birchfield was not drilling required test holes in advance of the face, even though the mine was within 140 feet of adjacent older workings. Tr. 79-80. Because of this failure to drill test holes the inspector issued a citation alleging a violation of 30 C.F.R. $ 75.1701. */ Birchfield did not contest this citation and paid the penalty proposed for the violation. In addition,

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*/ This standard provides

> Whenever any working place approaches ... within 200 feet of any workings of an adjacent mine ... boreholes shall be drilled ... at least 20 feet in advance of the working face and shall be continually maintained to a distance of at least 10 feet in advance of the advancing working face....

at the No. 4 face, an auxiliary fan was not functioning, causing dust to be blown over the working miners and posing both a health and an ignition hazard. Tr. 68. All of these hazards, the inspector believed, were subject to observation and reporting during the performance of a preshift examination.

The majority asserts that the inspector failed to take "enforcement actions" against Birchfield for the conditions he relied upon in making his finding that the violation was of a significant and substantial nature and that this failure demonstrates that the conditions did not pose a measure of danger to safety. Slip Op. at 6. This conclusion cannot be drawn from the record in this case. First, the inspector did issue a citation for Birchfield's failure to drill required test holes. a condition that was key to his significant and substantial finding. Second, the inspector personally observed each of these conditions. Thus, the inspector did not base his significant and substantial finding on hypothetical hazards but rather on actual hazardous conditions he found at the time of his inspection. In any event, the Mine Act does not require that, in order for one violation to be considered significant and substantial, other violations must also be in existence or that, in order to support a significant and substantial finding made in one citation, an inspector must issue additional citations.

The majority further concludes that the safety hazards observed by the inspector were "mitigated" by the fact that the individuals who entered the mine before completion of the preshift examination were certified firebosses, the mine was recently developed, and other miners from the previous shift were already present in the mine. Slip op. at 6. In reaching this conclusion the majority simply reweighs the evidence to reach their own conclusion regarding the presence of hazards rather than determining whether substantial evidence supports the judge's crediting of the inspector's significant and substantial finding. In our opinion, there can be little doubt on this record that the failure to complete the required preshift examination prior to the shift entering the mine contributed to the existence of a discrete safety hazard. Therefore, we find the second element of a significant and substantial violation to also be satisfied.

As to the third element of the Mathies test, the inspector believed that because Birchfield was mining in a seam with a history of high methane liberation, less than two hundred feet from an adjacent mine with known concentrations of methane, without drilling required test holes, coupled with the inadequate ventilation at the No. 4 face and the resulting dust problem, it

was reasonably likely that continued violation of section 75.303(a) would result in an injury-causing event. Tr. 66-69. This testimony provides substantial support for a finding that, given continued mining operations (U.S. Steel Mining Co., 6 FMSHRC 1573, 1574 (July 1984)), it was reasonably likely that an accident resulting in an injury or an illness would occur. The Commission has emphasized that "[i]n order to establish a significant and substantial nature of a violation the Secretary need not prove that the hazard contributed to actually will result in an injury-causing event.... [P]roof that the injury-causing event is reasonably likely to occur is what is required." Youghiogheny & Ohio Coal Co.. 9 FMSHRC 673, 678 (April 1987) (citations omitted).

The fourth element of the Mathies test requires that there be a reasonable likelihood that any. resulting injury would be of a reasonably serious nature. The majority concludes that certain factors "serve to mitigate the relative seriousness of the conditions" found by the Inspector. Slip Op. at 6-7. In their view, these factors include the fact that at the time of the citation the methane level was found by the inspector to be acceptable, an inoperative exhaust fan causing coal dust to be stirred up was an "obvious condition rather than a latent one," and citations were not issued for each of these hazards noted by the inspector. Slip Op. at 7. In our opinion. each of these "mitigating" factors lacks merit. Birchfield's failure to take a methane reading during a required preshift examination in a coal seam known to liberate high amounts of methane presents a serious safety hazard in and of itself, regardless of how the results are viewed post hoc. Thus, contrary to the opinion of the majority, the fact that the inspector's methane test did not indicate a high level of methane at the time of his test is not determinative of the seriousness of the danger posed by the operator's failure to perform the test in the first instance. Nor do we see how the fact that the dust hazard caused by faulty ventilation was obvious to the inspector should serve to mitigate the hazard presented. As to the lack of other citations, we have already observed that another citation was issued by the inspector and that, in any event, additional citations are not required to support a significant and substantial finding.

Several other mitigating factors relied upon by the majority to reverse the judge's significant and substantial finding also miss the mark. For example, we derive no solace from the fact that the violation occurred in a recently opened mine. The length of time that a mine has been opened has no bearing on the seriousness of a failure to conduct a preshift examination in such mine. Also, we fail to see how the fact that other miners on the out-going shift may have been exposed to the same hazards as the miners on the incoming shift "mitigates" the seriousness of the hazards posed to the in-coming miners by the failure to complete the required preshift examination. Based on the above, the fourth element of the Mathies test also has substantial record support.

In sum, we find that the majority's after the fact "mitigation" analysis effectively eviscerates the important prophylactic purpose behind requiring preshift examinations in the first place. We therefore conclude that substantial evidence supports the judge's finding that the violation of section 75.303(a) was significant and substantial in nature.

For these reasons, we dissent from that part of the majority's decision reversing the judge's finding that the violation was of a significant and substantial nature.

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