

CCASE:  
RUSHTON MINING V. MSHA  
DDATE:  
19890824  
TTEXT:

FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION  
WASHINGTON, D.C.  
August 24, 1989

RUSHTON MINING COMPANY

v. Docket No. PENN 88-99-R

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

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

DECISION

BY THE COMMISSION:

At issue in this contest proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1982) ("Mine Act"), is whether a violation by Rushton Mining Company ("Rushton") of 30 C.F.R. 75.1704-2(a), requiring that escapeways follow the "safest direct practical" route out of a mine, was significant and substantial in nature. 1/ Commission Administrative Law Judge Avram Weisberger concluded that Rushton violated the regulation but that the violation was not significant and substantial. 10 FMSHRC 713 (June 1988)(ALJ). We granted the Secretary of Labor's petition for discretionary review, which was limited to the issue of whether the judge erred in finding that the violation was not significant and substantial. For the reasons

---

1/ 30 C.F.R. 75.1704-2(a) provides as follows:

In mines and working sections opened on and after January 1, 1974, all travelable passageways designated as escapeways in accordance with 75.1704 shall be located to follow, as determined by an authorized representative of the Secretary, the safest

direct practical route to the nearest mine opening suitable for the safe evacuation of miners. Escapeways from working sections may be located through existing entries, rooms, or crosscuts.

~1433

that follow, we affirm the judge's finding.

Rushton owns and operates the Rushton Mine, an underground coal mine in Pennsylvania employing approximately 257 miners. On December 8, 1987, Donald Klemick, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), inspected the 2N-3 section of the mine. Approximately seven miners were working in rooms 11-15 of that section. Klemick found that the primary escapeway designated for those miners was approximately 2,100 feet in length, was roundabout in nature, and contained four 90 degree turns. See Exh. JX-4.

Klemick believed that Rushton could have designated a shorter, more direct practical route out of rooms 11-15 of the 2N-3 section. Tr. 29-30. Accordingly, he cited Rushton for violating section 75.1704-2. 2/ The citation alleged:

The designated intake escapeway from the 2N-3 002 section to the intake shaft escape facility was not located to follow the safest, direct practical route. The escapeway was designated outby from the section to station 7737, through crosscuts to station 7792, then inby to the shaft a distance of about 2100 feet. The safest, direct practical route would be from the section traveling in a direct route to the shaft of about 500 feet.

Klemick designated the violation to be of a significant and substantial nature because he believed that there would be a reasonable likelihood of serious injury in an emergency situation.

After consultation with MSHA, Rushton abated the violation by designating a new escapeway route from the 2N-3 working section to the No. 2 shaft. This new route was approximately 500 feet in length and involved only one turn. Exhibit JX-4. In the Secretary's view, this new escapeway was not only the most direct route but also the safest and most practical.

After Rushton's mining of rooms 11-15 was completed, mining went outby room 11 to a second set of five rooms, and then continued further outby to a third set of rooms. For these rooms, Rushton reverted to its designation of the original escapeway route for which it had been cited. Use of the original Rushton escapeway for the second set of rooms involved traveling a distance of 1,600-1,700 feet, while use of the escapeway designated for purposes of abatement of the violation at issue would have involved traveling a route of 800 feet. On mining the third set of rooms,

the designated escapeway involved a distance of 1,400

---

2/ Klemick's citation alleged a violation of 30 C.F.R. 75.1704-2(b). At the hearing before the judge, the Secretary, without objection, moved to amend the citation to allege a violation of 30 C.F.R. 75.1704-2(a) in order to conform to the point in time during which the affected area of the mine was opened. The judge permitted the amendment. Tr. 6-7.

~1434

feet, while use of the escapeway designated for abatement of the violation would have involved a distance of 1,200-1,300 feet. Mine Manager Raymond Roeder, Rushton's witness, testified that an inspector (not Klemick) examined Rushton's designated escapeway from the second set of rooms and that, to his knowledge, Rushton was not cited for redesignation of the escapeway originally found to be in violation. Tr. 123-24. Roeder also stated that Klemick examined Rushton's designated escapeway for the third set of rooms but did not issue any citations for the escapeway. Tr. 125-26.

In his decision, Judge Weisberger concluded that Rushton's cited escapeway was in violation of section 75.1704-2(a) because it was not a direct route to the shaft. 10 FMSHRC at 718. He also found that the escapeway designated in order to abate the violation was direct and less than one third the distance of the cited escapeway. 10 FMSHRC at 716-18. 3/ The judge stated:

In the event [of] a hazard necessitating escape from the section, it is clear that an indirect route containing three 90 degree jogs and doubling back on itself, is a greater impediment to a speedy exit from a dangerous situation as opposed to the MSHA escapeway, which is direct and less than one third of the distance of the Rushton escapeway. As such, it must also be considered to be the "safest" within the purview of section 1704-2(a)....

10 FMSHRC at 718. The judge further determined, however, that the violation was not significant and substantial. He stated:

Klemick testified that the use of the Rushton escapeway, as it is longer than the MSHA one, could result in a fatality by a miner being exposed to smoke or could result in falls occasioned by the rush to leave a dangerous situation. However, in essence, he indicated that in the absence of specific information, as to a specific hazard, it would be difficult for him to tell what would occur if one would have to use the Rushton escapeway. As such, I must find that the Respondent [Secretary] has not met its burden in establishing that the violation herein is to be considered significant and substantial (see Mathies Coal Co., 6 FMSHRC 1 (January 1984)).

10 FMSHRC at 718.

---

3/ The judge stated that the length of the cited escapeway was approximately 1,700 feet. 10 FMSHRC at 716. The evidence in the record, however, is that the cited escapeway was approximately 2,100 feet, as stated in the citation. See Exhibit JX-4; Tr. 12, 29, 109-10, 123, 158.

~1435

No issue as to the fact of violation has been raised before us on review. The only question presented is whether the judge erred in concluding that the violation was not of a significant and substantial nature. The Secretary submits that the seriousness of Rushton's violation of the escapeway standard must be evaluated within the context of the occurrence of an emergency and in comparison to the escapeway subsequently designated. In the Secretary's view, use of the cited escapeway in an emergency situation would create a significantly greater likelihood of serious injury than would the shorter, more direct escapeway designated for purposes of abating the violation. The Secretary focuses on the greater length and less straightforward configuration of the cited escapeway, and on the additional escape time needed for use of the Rushton route.

A violation is properly designated "significant and substantial" if, based on the particular facts surrounding that 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 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.

Accord, *Austin Power v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988).

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, 1574 (July 1984). See also *Monterey Coal Co.*, 7 FMSHRC 996, 1001-02 (July 1985). The operative time frame for determining if a reasonable likelihood of injury exists includes both the time that a violative condition existed prior to the citation and the time that it would have existed if normal mining operations had continued.

Halfway, Inc., 8 FMSHRC 8, 12 (January 1986); U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985). The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved. Texasgulf, Inc., 10 FMSHRC 498, 500-01 (April 1988); Youghiogeny & Ohio Coal Company, 9 FMSHRC 2007, 2011-12 (December 1987). Finally, the Commission has emphasized that it is the contribution of a violation to the cause and



~1436

effect of a hazard that must be significant and substantial. U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984).

Under this precedent and based on our review of the record, we conclude that substantial evidence supports the judge's finding that Rushton's violation was not significant and substantial in nature.

The judge's finding of a violation is not at issue on review and, therefore, the first element of the Mathies test has been established. The second element of Mathies requires the Secretary to prove that the violation of section 75.1704 presented a discrete safety hazard. The Secretary submits that the length of the cited escapeway and the purported inability in an emergency situation to exit the mine quickly and directly present a discrete safety hazard. We conclude, however, that the Secretary has failed to show that the distance, travel time, or any inherent qualities of the cited route posed a discrete safety hazard.

The length of a mine escapeway, in and of itself, is not dispositive of the existence of a discrete safety hazard. Insofar as this record reflects, the cited escapeway, approximately 2,100 feet in length, was the shortest escapeway in the Rushton mine. Tr. 109. The length of the primary escapeways to the surface from the other five working sections of the mine were 11,610 feet, 9,600 feet, 7,060 feet, 4,750 feet, and 2,470 feet. Tr. 100-01. The length of the mine's secondary escapeways from all six sections varied from 9,100 to over 14,000 feet. Tr. 101. Nothing in this record indicates that the other escapeways, all longer than the escapeway at issue (some by a quite considerable extent) have been deemed hazardous by MSHA because of their distances. See Tr. 101. Thus, the evidence of the length of the cited escapeway cannot be viewed as establishing per se a discrete hazard 4/.

Additionally, all the evidence of record suggests that the cited escapeway was in safe condition. Klemick's notes on his December 8, 1987 visit to the mine indicate that the cited escapeway was "maintained in good condition." S. Response to Interrogatories. Klemick testified that the escapeway was "in good condition" and that he encountered no obstacles along the course of the escapeway that would impede passage. Tr. 62-63. Further, Klemick did not issue a citation to Rushton for any violation of section 75.1704 requiring that escapeways "shall be

---

4/ Moreover, the Secretary did not introduce any evidence comparing the times required to travel the cited escapeway or the subsequently designated route. Rushton's witness Roeder testified, however, that a person in a hurry could traverse the cited route in seven minutes. Tr. 110. The Secretary has not disputed the accuracy of Roeder's testimony on the time

required to travel the cited route. Although Roeder conceded that it would take less time to travel the new escapeway (Tr. 140), the fact that there would be some difference between the seven minutes travelling the cited route and an unknown, but lesser amount of time travelling the new route is not, by itself, probative of a "meaningful" delay in reaching the surface. See Florence Mining Co., 11 FMSHRC 747, 755-56 (May 1989).

maintained in safe condition." Tr. 62.

While the cited route contains several 90 degree turns, it resembles a rectangle in shape. That configuration was not established to be so intrinsically confusing as to be a discrete safety hazard. Also, other factors indicated advantages of the cited route. Rushton presented evidence through a member of the mine safety committee that the cited route provided access to the alternative (secondary) escape route and possible transportation, but that such access was lacking with respect to the route that was designated for abatement of the violation. Tr. 169-70; Exhibit JX-4. Furthermore, finding that the cited escapeway was located in an intake entry while the MSHA-designated escapeway relied upon leakage of air from a hole around a door in the escapeway, the judge concluded that the cited escapeway "clearly" provided more air. 10 FMSHRC 716-17.

Finally, with regard to the third and fourth elements of the Mathies test, we conclude that the Secretary also has failed to show that the violation created a reasonable likelihood of reasonably serious injury. The Secretary argues that, assuming an emergency, there was a reasonable likelihood of serious injury due to the violation. The reasons set forth above substantiating the Secretary's failure to prove a discrete safety hazard apply with equal force here. The Secretary has failed to show that differences in distance, travel time, or any inherent qualities between the cited route and the new route posed a threat involving a reasonable likelihood of reasonably serious injury in the event of an evacuation. We emphasize in this regard that, as the judge noted (10 FMSHRC at 718), Klemick was extremely vague as to the type of injury that he believed was likely to occur (see Tr. 23-24, 61) and he shed little, if any, light on the likelihood of any injury or its seriousness. For example Klemick stated that "it's very difficult, if not impossible, to state what kind of injury [might occur]." Tr. 24.

~1438

For the reasons set forth above, we conclude that substantial evidence supports the judge's finding that the Secretary did not prove the violation of section 75.1704-2(a) was significant and substantial in nature and we affirm his decision.

Distribution

Colleen A. Geraghty  
U.S. Department of Labor  
Office of the Solicitor  
4015 Wilson Blvd., Suite 400  
Arlington, VA 22203

Joseph Yuhas, Esq.  
Rushton Mining Company  
P.O. Box 367  
Ebensburg, PA 15931