CCASE:
MSHA V. EAGLE NEST
DDATE:
19920728
TTEXT:
July 28, 1992
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. WEVA 91-293-R

EAGLE NEST, INCORPORATED

BEFORE: Ford, Chairman; Backley, Doyle, Holen and Nelson, Commissioners
DECISION
BY THE COMMISSION:
This contest proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. • 801 et seq. (1982)("Mine Act"). At issue is whether a violation by Eagle Nest, Incorporated ("Eagle Nest") of 30 C.F.R. □ 75.305, for water accumulations in a longwall tailgate return entry, was significant and substantial in nature ("S&S"). Commission Administrative Law Judge Avram Weisberger concluded that Eagle Nest violated the regulation but that the violation was not S&S. 13 FMSHRC 843 (May 1991) (ALJ). We We granted the Secretary of Labor's petition for discretionary review. For the reasons that follow, we vacate the judge's finding that the violation was not S&S and remand for further proceedings consistent with this decision.

_____

1 30 C.F.R. • 75.305 provides, in part, as follows:
[E]xaminations for hazardous conditions, including tests for methane, and for compliance with the mandatory health or safety standards, shall be made at least once each week by a certified person designated by the operator in the return of each split of air where it enters the main return, on pillar falls, at seals, in the main return, at least one entry of each intake and return aircourse in its entirety, idle workings, and, insofar as safety considerations permit, abandoned areas.... The person making such examinations and tests shall place his initials and the date and time at the places examined, and if any hazardous condition is found, such condition shall be reported to the operator promptly. Any hazardous condition shall be corrected immediately....

~1120
I.
Factual Background and Procedural History
Eagle Nest's underground coal mine is located in Boone County, West Virginia. The mine has had a history of water accumulation problems. Although Eagle Nest has taken measures to address these problems, water accumulation at the mine has nonetheless persisted.
In the context of the present proceeding, water accumulated in the tailgate return entry of longwall panel A. Eagle Nest had placed four water pumps at locations where it was anticipated that water would collect. The pumps were connected to ten inch water lines that carried the water away from the entry.
On March 14, 1991, accumulations in the entry of water four feet deep were reported in the mine's weekly examination book. The following day, mining began in longwall panel A. On March 19, 1991, Eagle Nest's longwall coordinator traveled the entry to conduct an examination and experienced accumulations of water up to his shirt pocket (about four feet high).
On March 20, 1991, Mine Safety and Health Administration ("MSHA") Inspector Ronnie Joe Dooley made a spot inspection of the longwall A panel. Dooley traveled along the tailgate return entry outby the face, with union representative Franklin Miller and the general mine foreman Jim Lambert. Dooley wanted to see whether the entry was safe for travel by the examiner conducting the weekly examination required under section 75.305. After travelling approximately 600 to 700 feet in the tailgate entry, Dooley, Miller, and Lambert encountered an area of water accumulation extending from rib to rib (approximately 20 feet).
At spad No. 3777, the water reached the top of Dooley's 16 inch boots. Dooley stopped, concluding that it was not safe to proceed. The water hole extended as far as Dooley could see, at least 200 feet outby where he stopped. Dooley asked Lambert whether it was possible to reach the other side of the water accumulation by traveling up the entry from the mouth end, but was told that there were other water accumulations that would prevent the inspection party from reaching that point.
Dooley concluded that the weekly examiner traveling the entry would be exposed to slipping, stumbling, and falling hazards due to water accumulations. His task would be made more difficult by submerged lumps of coal, rocks, remnants from concrete stoppings, the ten inch water line, and pieces of wood from cribs and pallets. According to Dooley, the water was murky and the bottom could not be seen. Dooley was additionally concerned about slick mud, cracks in the bottom of the entry (hooving), and accumulations of mud where the examiner's boots could become stuck. Dooley emphasized that the examiner traveling through the entry would be at the same time inspecting for hazardous conditions, such as entry blockage, ventilation hazards, and methane, as well as observing the condition of the roof and ribs. Tr. 28.

2 The travelway itself was reduced to approximately five feet in width because there were cribs on each side of the entry.

~1121

Accordingly, Dooley issued Eagle Nest a section 104(a) citation for violation of section 75.305 as follows:

At least one entry of the longwall tailgate
return entry could not be made safely in its entirety.
Water has accumulated in depth exceeding l6 inches at
Survey Spad [N]o. 3777 and various locations outby.
This condition creates a hazard to those persons
required to make weekly examinations.

S. Exh. 2. Dooley also found the violation to be S&S.

On March 21, 1991, Eagle Nest attempted an examination of the entry but the presence of water prevented the examiner from proceeding beyond the No. 14 stopping. According to Dooley, the No. 14 stopping was approximately 2,000 feet outby spad 3777.

Judge Weisberger found that the accumulation of water presented a hazard to those miners who would have to traverse it to make an examination. 13 FMSHRC at 846. He also found that this hazardous condition had been initially observed on March 14, 1991, again on March 19, 1991, and had not been corrected as evidenced by its continued existence on March 20, 1991. Id. The judge consequently found that Eagle Nest violated section 75.305 as alleged. Id.

The judge found, however, that the violation was not S&S. 13 FMSHRC at 847. He concluded that the Secretary had failed to establish a reasonable likelihood that an injury due to falling or slipping would occur. Id.

Although a stumbling or falling hazard was present due to the depth and murky nature of the water accumulation, according to the judge, the hazard could be mitigated by walking cautiously to feel for submerged objects so that they could be avoided. Id.

II.

Disposition of Issues

On review, the Secretary submits that the judge erred in concluding that the violation was not S&S. The Secretary argues that the judge erred in finding that the water hazard was not reasonably likely to result in slipping, stumbling, or falling as the examiner attempted to make his way through the

_____

3 The term significant and substantial is taken from section 104(d) of the Mine Act, which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard...." 30 U.S.C. • 814(d)(1).

_____

4 The citation was terminated on April 12, 1991, after the water had been pumped down to a safe level and Eagle Nest had built wooden bridges over two places where the water was more than 16 inches deep. It appears that one of

the bridges was built in the area of accumulation that Dooley observed. See Tr. 244.

~1122

travelway. The Secretary disputes the judge's conclusion that the hazard could be mitigated by exercising caution. We vacate the judge's finding of non S&S for legal error.

A violation is properly designated as S&S "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.

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)), and also that the likelihood of injury be evaluated in terms of continued normal mining operations (U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984); see also Halfway, Inc., 8 FMSHRC 8, 12 (January 1986). The Secretary is not required to present evidence that the hazard actually will occur. Thus, in Youghiogheny & Ohio Coal Co., 9 FMSHRC 673 (April 1987), the Commission held that:

> In order to establish the significant and substantial nature of the violation, the Secretary need not prove that the hazard contributed to actually will result in an injury causing event. The Commission has consistently held that proof that the injury-causing event is reasonably likely to occur is what is required. See, e.g., U.S. Steel Mining Co., 7 FMSHRC at 1125; U.S. Steel Mining Co., 7 FMSHRC 327, 329 (March 1985).

9 FMSHRC at 678. The question of whether any particular violation is S&S must be based on the particular facts surrounding the violation. Texasgulf, Inc., 10 FMSHRC 498, 501 (April 1988).

With regard to the first and second elements of the Mathies test, the judge's findings of a violation of section 75.305 and of a discrete safety

hazard, i.e., a hazard of slipping or falling, are not in issue. With respect to the fourth element of the Mathies test, the likelihood that a resulting injury would be reasonably serious in nature, that element is also not in dispute.

~1123

As to the third element of the Mathies test, whether there was a reasonable likelihood that the hazard of slipping or falling would result in an injury, the judge concluded that, although a stumbling or falling hazard was present due to the depth and murky nature of the water accumulation, the hazard could be mitigated by walking cautiously to feel for submerged objects so they could be avoided. 13 FMSHRC at 847.

We reject the judge's conclusion that the "exercise of caution" may mitigate the hazard. In effect, the judge seeks to add another element to the Mathies test, i.e., that the exercise of substantial additional caution can be presumed and then considered in determining whether there is a likelihood of injury. Consistent with Commission precedent, it is the likelihood of injury that must be evaluated in considering whether a violation is S&S. The hazard continues to exist regardless of whether caution is exercised. The judge therefore erred when he concluded the hazard could be mitigated by caution. We assume that the judge meant that the likelihood of injury could be mitigated by caution. While miners should, of course, work cautiously, that admonition does not lessen the responsibility of operators, under the Mine Act, to prevent unsafe conditions.

The judge, in resting his decision on the possibility of mitigation by the use of caution, failed to address comprehensively the evidentiary record in determining that the Secretary did not establish a reasonable likelihood that an injury would occur. The substantial evidence standard of review requires a weighing of all probative record evidence and an examination of the fact finder's rationale in arriving at the decision. See Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951); Arnold v. Secretary of HEW, 567 F.2d 258, 259 (4th Cir. 1977). A judge must analyze and weigh the relevant testimony of record, make appropriate findings, and explain the reasons for his decision. Anaconda Co., 3 FMSHRC 299, 299-300 (February 1981). Accordingly, we vacate the judge's decision and remand for further analysis and determination of the S&S issue without consideration of whether the hazard could be mitigated by the use of caution.

~1124

III.

Conclusion

We conclude that the "exercise of caution" is not an element in determining whether a violation rises to the level of S&S, and we direct the judge on remand to conform to the Mathies test to substantively analyze the evidence of record and to set forth his rationale in his reconsideration. Accordingly, we vacate the judge's conclusion that Eagle Nest's violation of section 75.305 was not S&S and remand for further proceedings

consistent with this decision.
Ford B. Ford, Chairman
Richard V. Backley, Commissioner
Joyce A. Doyle, Commissioner
Arlene Holen, Commissioner
L. Clair Nelson, Commissioner