

CCASE:

MSHA V. LJ'S COAL

DDATE:

19920804

TTEXT:

August 4, 1992

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

Docket Nos. KENT 90-356
KENT 90-399
KENT 90-400
KENT 90-401

v.

LJ'S COAL CORPORATION

BEFORE: Ford, Chairman; Backley, Doyle, Holen and Nelson, Commissioners
DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. • 801 et seq. (1988)(the "Mine Act" or "Act") and concerns whether two citations issued by the Secretary of Labor ("Secretary") to LJ's Coal Corporation ("LJ's") for violations of 30 C.F.R. 75.220 and 50.10 were properly characterized as being of a significant and substantial ("S&S") nature.(Footnote 1) Commission Administrative Law Judge Avram Weisberger concluded that the evidence was insufficient to establish that the violation of 30 C.F.R. • 75.220, a roof control standard, was S&S. 13 FMSHRC 1277, 1286 (August 1991)(ALJ). With respect to the violation of 30 C.F.R. • 50.10, an accident reporting standard, the judge made no findings as to whether the violation was of an S&S nature. 13 FMSHRC at 1280. The Commission granted the Secretary's petition for discretionary review challenging the judge's S&S determinations. For the following reasons, we reverse the judge's determination that the violation of 30 C.F.R. • 75.220 was

1 The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. • 814(d)(1), which, in pertinent part, 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...."

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not S&S and remand to the judge for a determination of whether the violation of 30 C.F.R. • 50.10 was S&S.

I.

Factual Background and Procedural History

A. Violation of section 75.220

The facts regarding the violation of the approved roof control plan are undisputed. LJ's was engaged in retreat mining and extracting a series of

four, forty foot square pillars of coal in the 001 Section of its No. 3 Mine. 13 FMSHRC 1284. In this section, five entries lead to the last open crosscut, where pillar extraction was being performed. LJ's used Entries 2 and 4 to gain access to the pillars on both sides of those entries at the intersection of the last open crosscut. Entries 1 and 5 were full of debris. 13 FMSHRC 1285-86.

The procedure for recovering coal from pillars, as detailed in LJ's approved roof control plan, is a sequential process integrating the installation of roof support with a series of cuts from the center of each pillar. Tr. 281, 300-312. The plan divides the center portion of each pillar into sections, each representing a ten foot by twenty foot cut made to extract coal. Tr. 301. The outside edges, or splits, measuring ten feet by forty feet, are left as support during the recovery process.

LJ's roof control plan provides that posts are to be installed on four foot centers and are to be in place before mining is started on any pillar. After each cut, posts must be installed before the mining of the next cut. The plan further provides that pillars may be mined from either side or from outby; however, all pillars must be mined from the same direction, limiting access through each entry to one pillar.(Footnote 2) Tr. 280, 300-312.

During an inspection of LJ's ongoing operations, MSHA Inspector Robert W. Rhea noticed that the pillar extraction under way departed from the roof control plan in that entries were being used to gain access to two pillars. Broad sections of the last open crosscut were left largely unsupported. Tr. 322-323. Specifically, Inspector Rhea testified that Entries 2 and 4 were being used to gain access to pillars III and IV, and I and II, respectively. Accordingly, he issued an order pursuant to section 104(d)(2) of the Mine Act,

2 This provision means that when making the cuts, all of the pillars must be approached either from the entries located to the right of the pillars or from entries located to the left of the pillars. The operator cannot approach two pillars from the same entry because the roof support posts must be evenly spaced across the last open crosscut in front of the pillars.

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30 U.S.C. • 104(d)(2) (1988), which he designated S&S, for violation of LJ's approved roof control plan. That order (Footnote 3) provided:

The Approved Roof Control plan (pillar plan) was not being followed in the 001 section in that the No. 1 & 2 pillar block and the No. 4 & 5 pillar blocks were being mined from one roadway.

The approved plan stipulates in sketch #8 page #13 that one pillar split shall be mined from one roadway only.

Following an evidentiary hearing, Judge Weisberger found that placement of the breaker timbers, or supports, did not provide maximum support at the intersections of the last open crosscut and Entries 2 and 4. The judge found

that the alternatively placed timbers provided support at the intersection of the last open crosscut and Entry 5 and additional support at the intersection of the last open crosscut and Entry 3. Based on these facts, the judge found "the evidence insufficient to establish that the violation was significant and substantial." 13 FMSHRC at 1286.

On review, the Secretary argues that the uncontroverted testimony amply demonstrates the dangers inherent in failing to place the timbers in the proper locations during pillar extraction. The Secretary argues further that the evidence shows serious roof control problems in that section of the mine because of hill seams and draw rock. Moreover, the Secretary contends, the evidence is uncontroverted that the cited practices would create severe stresses on the roof strata at the unsupported intersections exposing miners to the dangers of a roof fall. The Secretary notes that Inspector Rhea described the conditions as "deadly dangerous."

LJ's did not file a brief before the Commission. At trial, LJ's presented no witnesses and waived its right to file briefs with the judge.

B. Violation of section 50.10

During an earlier inspection of LJ's mining operations on March 8, 1990, an MSHA inspector noted a large cavity in a section of roof in the No. 3 entry. Mine personnel indicated that the cavity was the result of an unplanned roof fall that had trapped a roof bolting machine. A citation then was issued to LJ's for failing to report this accident as required by 30 C.F.R. • 50.10. The citation was designated as S&S. 13 FMSHRC at 1279. Judge Weisberger found that an unplanned roof fall had, in fact, occurred. Moreover, because the fall buried a roof-bolting machine, the judge concluded that it took place in an active work area and impeded passage of miners. Based on these facts, the judge affirmed the violation of 30 C.F.R.

³ The order mistakenly refers to the entry between pillars 4 and 5. There is no evidence that a pillar 5 exists. The testimony, however, makes clear that the intended reference is to pillars 3 and 4.

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□ 50.10 for failure to report the accident. Although the judge note testimony clearly indicating the hazardous conditions associated with retrieving the buried roof-bolter, the judge found no evidence with regard to the gravity of the cited violation, i.e., "failure to report" the roof fall. (Emphasis in the original.) The judge's decision did not address the Secretary's contention that the violation was of an S&S nature. 13 FMSHRC at 1280.

On review, the Secretary argues that the uncontroverted testimony amply demonstrates the dangers inherent in failing to report the unplanned roof fall. According to the Secretary, if the accident had been reported, the area would have been secured pursuant to section 103(k) and steps, such as installation of various support mechanisms, taken to insure the safe recovery of the buried machinery. The Secretary argues that the inspector's testimony

shows that serious injury was reasonably likely to occur because of the massive nature of the fall and the operator's failure to install additional support during the recovery phase. Finally, the Secretary notes that the judge's failure to consider this testimony does not satisfy Commission procedural requirements that the judge set forth findings of fact and conclusions of law.

II.

Disposition of Issues

A. Violation of section 75.220

The judge determined that the violation by the operator of its approved roof control plan was not S&S because there was no evidence that the timbers were improperly installed or that the alternative supports placed in the last open crosscut were of a lesser quantity or quality. 13 FMSHRC 1286. The judge found that those alternative supports provided some measure of support for Entries 3 and 5. *Id.* Based on these findings, the judge found that the violation was not properly characterized as S&S. We disagree.

A violation is properly designated as being of an S&S nature "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 (January 1984),

the Commission further 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.

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6 FMSHRC at 3-4. See also *Austin Power Co. v. Secretary*, 861 F.2d 99, 104-05 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria).

With respect to the first element, the judge found a violation of the approved roof control plan. 13 FMSHRC 1285. With respect to the second element, inasmuch as the judge accepted the inspector's conclusion that the failure to provide maximum roof support can lead to a roof fall, the record contains evidence that a measure of danger to safety resulted from the violation. 13 FMSHRC 1286. The fourth element is also satisfied: a reasonable likelihood exists that an injury resulting from a roof fall would

be of a reasonably serious nature. Tr. 336-337.

The judge's analysis of the third element of the Mathies test does not address the entries in question. His determination that the alternatively placed timbers provided additional support concerned the intersection of the last open crosscut and Entries 3 and 5. *Id.* The violation that was cited and was alleged to be S&S was the operator's failure to provide the required roof support in the intersection of the last open crosscut and Entries 2 and 4, not Entries 3 and 5. Consequently, the judge's determination that the violation was not of an S&S character fails to address the specific entries that were cited by the Secretary.

Moreover, the judge recounted the inspector's testimony that "lack of support in an intersection results in a weakened roof, and a greater danger of roof fall in the intersection," but, nonetheless, incorrectly concluded that the Secretary failed to present sufficient evidence to show that the violation was S&S. 13 FMSHRC 1286. This conclusion is not based on substantial evidence.

The record evidence demonstrates a reasonable likelihood that the hazard, lack of properly placed roof supports, would result in an injury. As noted by the judge, Inspector Rhea testified that the lack of support at the cited intersections increases the likelihood of roof failure. Tr. 326-327.

The Inspector also testified in detail to the unstable geological conditions in that area of the mine and that certain conditions known as hill seams and draw rock existed. Tr. 331-336. Finally, Inspector Rhea noted the history of roof falls and unstable roof in that section of the mine, further indicating the likelihood of a roof fall and concomitant injury without the proper support required by the approved roof control plan. Tr. 341-345.

According to Inspector Rhea, not only were the roof conditions themselves dangerous, but hazards due to those particular geological conditions were further aggravated by the failure to provide support at locations designated in the plan. Inspector Rhea testified further that the lack of support added significantly greater stress on the unsupported roof in locations where miners were actively engaged in pillar extraction. Tr. 336-338. The operator offered no evidence to rebut this testimony nor was contradictory testimony elicited on cross examination. Moreover, the judge did not suggest a lack of credibility on the inspector's part. While the judge apparently concluded that, because the misplaced timbers provided additional support in Entries 3 and 5, they were an acceptable substitute for the missing ~1230

supports, there is no evidence in the record to support this conclusion. We find no other evidence in the record to support the judge's conclusion that the violation was not S&S. Rather, the uncontroverted evidence establishes a reasonable likelihood that the failure to place roof support beams in their proper positions, according to the approved roof control plan, would result in an injury of a reasonably serious nature to miners conducting pillar recovery in Entries 2 and 4. Accordingly, we reverse the judge's conclusion that the

violation was not S&S.

B. Violation of section 50.10

The citation issued by the Secretary to LJ's for violation of section 50.10 was designated as being of an S&S nature. Although the judge affirmed the violation, he erred in failing to set forth findings of fact and conclusions of law, and supporting reasons or bases analyzing whether the violation was of an S&S nature under the four elements of the Mathies test. See 29 C.F.R. • 2700.65(a). See also Anaconda Co., 3 FMSHRC 299, 299-300 (February 1981) and Youghioghney & Ohio Coal Co., 7 FMSHRC 1335, 1336 (September 1985).

III.

Conclusion

For the reasons discussed above, we reverse the judge's finding and hold that the failure to follow the approved roof control plan in violation of 30 C.F.R. • 75.220 was S&S. We remand to the judge for the limited purpose of determining whether the failure to report an unplanned roof fall in violation of 30 C.F.R. • 50.10, was S&S. In this regard, the judge shall analyze each element of the Mathies test and set forth findings of fact and conclusions of law, and the reasons or bases supporting his determinations.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

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