CCASE:
MSHA V. SHAMROCK COAL
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August 28, 1992
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. KENT 90-60

SHAMROCK COAL COMPANY, INC.

BEFORE: Ford, Chairman; Backley, Doyle, Holen and Nelson, Commissioners
DECISION
BY THE COMMISSION:
This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. • 801 et seq. (1988)(the "Mine Act" or "Act"), involves a dispute between the Secretary of Labor and Shamrock Coal Company, Inc. ("Shamrock") regarding whether Shamrock's violation of 30 C.F.R. □ 75.1101-23 may properly be characterized as being of a significant an substantial ("S&S") nature.(Footnote 1) Commission Administrative Law Judge Avram Weisberger concluded that the violation was not S&S because he did not find that the hazard contributed to by the violation was reasonably likely to occur. 12 FMSHRC 1944 (October 1990)(ALJ). The Commission granted the Secretary's petition for discretionary review challenging the judge's S&S determinations. On review, the Secretary's challenge is based entirely on the theory that the S&S nature of the violation should be examined in the context of the presumed occurrence of an emergency. Because the Secretary failed to raise this theory before the judge, we are unable to consider it on review, given the review strictures of the Act. Under these circumstances, we affirm

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1 Section 75.1101-23 provides in pertinent part:
(a) Each operator of an underground coal mine shall adopt a program for the instruction of all miners in the location and use of fire fighting equipment....
Shamrock was cited for failure to comply with the terms of the program required by section 75.1101-23. S. Br. at 2-3 n.1; Sh. Br. at 1.
The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. • 814(d)(1), 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...."

the judge's decision.(Footnote 2)
I.

Factual Background and Procedural History

On September 20, 1989, John Linder, an inspector for the Department of Labor's Mine Safety and Health Administration ("MSHA"), issued Citation No. 3205519 to Shamrock pursuant to section 104(a) of the Mine Act, 30 U.S.C. 814(a), alleging an S&S violation of section 75.1101-23. The citation provides:

> The operators approved fire fighting and evacuation plan which requires that the self contained self rescuers (SCSR's) for non-section workers will be allowed 10 minutes away from the SCSRs ... [w]as not being complied with in that four persons was cleaning belt conveyor for 006 section and they were 3,600 feet inby the mine portal. The mining heigh[t] was 52 to 64 inches in this area and only one self contain[ed] self rescuer was provided within 600 feet of the four person's.

At the evidentiary hearing, Shamrock contested only whether the violation of section 75.1101-23 was S&S. Sh. Br. at 2. The judge found that Shamrock had violated section 75.1101-23 but that the violation was not S&S. The judge summarized Inspector Linder's testimony that the SCSRs provide oxygen for one hour and would enable a miner to breathe in the event of an explosion or liberation of methane. 12 FMSHRC at 1946. He noted that the miners observed by the inspector were wearing "filter type rescuers" that did not produce oxygen and could not be used for some poisonous gases. Id. After further review of the evidence, he found:

> Thus, although there was some hazard to the miners in the section in question, as a result of not having been provided with rescuers that could supply oxygen in the event of a fire or an explosion, the evidence fails to establish that there was any "reasonable likelihood" that the hazard contributed to would result in an injury-producing event. (U.S. Steel Mining Co., supra.) Accordingly, I conclude that it has not been established that the violation herein was significant and substantial.

12 FMSHRC at 1946-47.

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2 This decision is one of three issued on this date involving the Secretary's attempt to raise this new theory on review without having first presented it to the judges below. The two other decisions issued today are: Beech Fork Processing, Inc., 14 FMSHRC _____, Docket No. KENT 90-398 (August 1992); and

Shamrock Coal Co., 14 FMSHRC _____, Docket Nos. KENT 90-137 and KENT 90-142

(August 1992).

On review, the Secretary argues that the judge's finding that Shamrock's failure to provide SCSRs was not S&S is erroneous because the judge failed to analyze the S&S nature of the violation in the context of an emergency. S. Br. at 5. The Secretary maintains that, when considering the S&S nature of a violation involving a safety standard that is designed to take effect only in an emergency situation, the occurrence of such an emergency should be presumed. S. Br. at 6-7. The Secretary argues that the relevant question under the Commission's test in Mathies Coal Co., 6 FMSHRC 1 (January 1984), therefore, is not whether a fire is reasonably likely to occur but, instead, "given the presence of a fire or explosion, whether the failure to have a sufficient number of SCSRs within the specified distance from miners working underground is reasonably likely to result in serious injuries or deaths that would not otherwise occur if such SCSRs had been provided as required." S. Br. at 7.(Footnote 3) The Secretary does not argue in the alternative that the judge's determination that an ignition was not reasonably likely to occur is without substantial evidence. Thus, the Secretary's case on review hinges entirely on the proposition that an emergency event should be presumed for purposes of the S&S analysis.

II.

Disposition of Issues

As in our companion decisions issued this date in Beech Fork Processing, Inc., 14 FMSHRC _____, Docket No. KENT 90-398 ("Beech Fork") and Shamrock Coal Co., 14 FMSHRC _____, Docket Nos. KENT 90-137 and KENT 90-142, the Secretary

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3 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, 3 FMSHRC 822, 825 (April 1981). In Mathies, 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.

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). The Commission has held that 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., Inc., 6 FMSHRC 1834, 1836 (August 1984).
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presents a new theory in this case, i.e., that the S&S nature of violations involving safety standards that provide protection only in the event of an emergency should be examined in the context of the presumed occurrence of that emergency. The Secretary, however, failed to present this theory below for consideration by the judge and, therefore, has not preserved it for the Commission's review.

Explicit limits to Commission review are provided in section 113(d) of the Mine Act, 30 U.S.C. • 823(d). Section 113(d)(2)(A)(iii) of the Act, 30 U.S.C. • 823(d)(2)(A)(iii), provides, in pertinent part, that "[e]xcept for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass." See also Commission Procedural Rule 70(d), 29 C.F.R. • 2700.70(d). The key Senate Report on the bill that was enacted as the Mine Act explains this provision as follows:

> The Committee believes that the provision of section 114(d)(2) [section 113(d)(2)] that matters not raised before an Administrative Law Judge may not be raised before the Commission (except for good cause shown) and the provision of section 107(a) [section 106(a)] that objections not raised before the Commission cannot be raised before a reviewing court are consistent with sound procedure and do not deny essential due process. The Committee notes that fairness is also protected by provisions which would permit remanding of cases for further factfinding where warranted. It is the Committee's intention that the Commission and Administrative Law Judges permit parties every reasonable opportunity to adequately develop the record within these constraints and consistent with its duty to resolve matters under dispute in an expeditious manner.

S. Rep. No. 181, 95th Cong., 1st Sess. 38 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 637 (1978).

The explicit statutory limitation on the scope of Commission review set forth in section 113(d)(2) may be raised as an issue by an objecting party, or sua sponte, by the Commission itself, at any appropriate time during the Commission review process. See Midwest Minerals,Inc., 12 FMSHRC 1375,

(July 1990); Ozark-Mahoning Co., 12 FMSHRC 376, 379 (March 1992); Union Oil of
California, 11 FMSHRC 289, 301 (March 1989) ("Unocal"). This limitation on review is an important feature of the administrative trial and appeal structure established by the Act.

Here, the Secretary presented testimony at trial as to the existence of factors that would cause an ignition to be reasonably likely to occur, in an attempt to demonstrate that it was reasonably likely that injuries would occur as a result of the violation. See, e.g., Tr. 21-24. In other words, the

Secretary proceeded along established Mathies lines. N.3 supra. Neither party filed a post-hearing brief. The Secretary's theory on review that the occurrence of a fire or explosion should be presumed is a departure from her trial position. Thus, on review, the Secretary relies on a theory upon which the judge "had not been afforded an opportunity to pass." Nor has the Secretary demonstrated any cause for her failure to present her theory to the judge.

As we observed in Beech Fork, supra, the "Commission's practice has been to resolve these `opportunity to pass' questions on a case-by-case basis." 14 FMSHRC at , slip op. at 5 (citations omitted). We noted that "a matter must have been presented below in such a manner as to obtain a ruling in order to be considered on review." Id. (citation omitted). In addition, we stated that the "matter must be raised with `sufficient specificity and clarity [so] that the [judge] is aware that [he] must decide the issue.'" 14 FMSHRC at , slip op. at 5-6, quoting Wallace v. Dept. of the Air Force, 879 F.2d 829, 832 (Fed. Cir. 1989). We recognized that "a matter urged on review may have been implicitly raised below or is so intertwined with something tried before the judge that it may properly be considered on appeal." 14 FMSHRC at , slip op. at 6 (citation omitted). Here, however, none of the foregoing criteria is satisfied. The Secretary argued below only the theory that factors existed making a fire reasonably likely to occur. Thus, the judge was most likely unaware of the Secretary's theory that the S&S nature of the violation should be evaluated in the context of the presumed occurrence of an emergency.

In Beech Fork, we recognized that the Mine Act "establishes an orderly, two-tiered litigation system consisting of trial before a Commission judge and appellate review by the Commission." Id. We explained that the "rationale for requiring lower tribunals to first pass upon questions is that subsequent review is not hindered by the lack of necessary factual findings and the lack of application of the lower court's expertise or discretion." Id. (citations omitted). The Secretary's actions here conflict with this basic principle, that parties in Mine Act cases must first present their evidence and advance their legal theories before the judge, and not for the first time on appeal.

In addition, in Beech Fork we noted that the essence of Mathies analysis

is a careful examination surrounding a specific violation, and that use of the presumption advanced by the Secretary would represent a departure from that analysis. Id. As in Beech Fork, we conclude that it "is incumbent upon the Secretary to develop a trial record demonstrating why the presumption that she wishes the Commission to accept is legally supportable." Id.

In sum, in the instant proceeding, the Secretary has asserted on review a theory upon which the judge was not afforded an opportunity to pass. She also has asserted no reason for her failure to present this theory to the judge. The language of section 113 of the Mine Act and Commission precedent bar us from considering the Secretary's theory in this case. See, e.g., Ozark-Mahoning, 12 FMSHRC at 379; Unocal, 11 FMSHRC at 297-98, 300-301. Because the Secretary did not proceed on alternative grounds, no other basis for review is presented. Accordingly, we affirm the judge's decision.

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III.

Conclusion

For the reasons set forth above, we affirm the judge's decision that Shamrock's violation of section 75.1101-23 was not S&S.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner