CCASE:
MSHA V. SHAMROCK COAL
DDATE:
19920828
TTEXT:
August 28, 1992
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket Nos. KENT 90-137
KENT 90-142

SHAMROCK COAL COMPANY, INC.

BEFORE: Ford, Chairman; Backley, Doyle, Holen and Nelson, Commissioners
DECISION
BY THE COMMISSION:
These civil penalty proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. • 801 et seq. (1988)(the "Mine Act" or "Act"), involve a dispute between the Secretary of Labor and Shamrock Coal Company, Inc. ("Shamrock") regarding whether Shamrock's violations of 30 C.F.R. • 75.403, 75.1101-1(a), and 75.1101-10 may properly be characterized as being of a significant and substantial ("S&S") nature.(Footnote 1)

_____

1 30 C.F.R. • 75.403, entitled "Maintenance of incombustible content of rock dust," provides in pertinent part:

Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than 65 per centum, but the incombustible content in the return aircourses shall be no less than 80 per centum....

30 C.F.R. • 75.1101-1 is entitled "Deluge-type water spray systems," and section 75.1101-1(a) provides:

Deluge-type spray systems shall consist of open nozzles attached to branch lines. The branch lines

~1307

Commission Administrative Law Judge Avram Weisberger concluded that the violations were not S&S because he did not find that the hazards contributed to by the violations were reasonably likely to occur. 12 FMSHRC 2098 (October 1990)(ALJ). The Commission granted the Secretary's petition for discretionary review, in which she challenges the judge's findings by arguing, with respect to the violation of section 75.403, that the judge misapplied the Commission's

test formulated in Mathies Coal Co., 6 FMSHRC 1 (January 1984). With respect to Shamrock's violations of sections 75.1101-1(a) and 75.1101-10, the Secretary's challenge is based entirely on the theory that the S&S nature of the violations should be examined in the context of the presumed occurrence of an emergency. For the reasons discussed below, we affirm the judge's decision.(Footnote 2)

I.

Factual Background and Procedural History

Shamrock operates the Shamrock No. 18 Series Mine, an underground coal mine located in Leslie County, Kentucky. On January 10, 1990, MSHA Inspector James Delp issued three citations to Shamrock pursuant to section 104(a) of the Mine Act. Citation No. 3206452 alleges an S&S violation of section 75.403, and states, in pertinent part:

Rockdust applications in the outby area of 006 section are not adequate in that ... the results of a survey collected, during the period from 11-29 thru 11-30

ÄÄÄÄÄÄÄÄÄÄÄÄÄ

1 (...continued)

shall be connected to a waterline through a control valve operated by a fire sensor. Actuation of the control valve shall cause water to flow into the branch lines and discharge from the nozzles.

30 C.F.R. • 75.1101-10 is entitled "Water sprinkler systems; fire warning devices at belt drives," and provides:

Each water sprinkler system shall be equipped with a device designed to stop the belt drive in the event of a rise in temperature and each such warning device shall be capable of giving both an audible and visual warning when a fire occurs.

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...."

_____

2 This decision regarding the Secretary's new theory is one of three issued this date. The two other decisions issued today are: Beech Fork Processing, Inc., 14 FMSHRC , Docket No. KENT 90-398 (August 1992); and Shamrock Coal Co., Inc., 14 FMSHRC , Docket No. KENT 90-60 (August 1992).

~1308

-1989, in such area showed that 31 of 38 samples collected had an incombustible content of from 56 to 79.2 percent, in the return air courses (80% required)....

The citation was later modified to include the results of samples collected in intake air courses of the 006 section of the mine showing that one of the 54

samples had an incombustible content of 60.4%, while 65% was required. Citation No. 3206452-01.

Citation No. 3206323 alleges an S&S violation of section 75.1101-10 and states:

> The requirement that, each deluge water system shall be equipped with a device designed to stop the belt drive in the event of a rise in temperature and such warning device shall be capable of giving both a audible and visual warning when a fire occurs, is not being complied with at the No. 6 headdrive unit, serving the 005 working section, in that; when tested, the belt conveyor did not stop and no visual or audible warning was given.

Citation No. 3206454 alleges an S&S violation of section 75.1101-1(a) and states:

> The Deluge-type water spray system provided for the 009 section headdrive unit was inoperative in that; the waterline was not connected to the water supply.

At the evidentiary hearing, Shamrock did not contest the fact that it violated section 75.1101-1(a), but did contest the fact of violation of sections 75.403 and 75.1101-10. Tr. 50-51. The judge concluded that Shamrock had violated section 75.403 because Shamrock had not rebutted laboratory analyses indicating that required incombustible contents were not maintained in the return and intake air courses in the 006 section. 12 FMSHRC at 2099. The judge then determined Shamrock's violation of section 75.403 was not S&S because the evidence failed to show that an ignition was reasonably likely to occur. Id. The judge noted that the equipment in the area was not in a deficient condition, "which would have rendered it reasonably likely for a spark to have occurred," and that the mine does not liberate a large quantity of methane. Id. The judge concluded that, although the violation "could have contributed to the hazard of the propagation of an explosion ... the evidence fails to establish that there was any reasonable likelihood of an ignition." Id. The judge then found that the violation was of a moderately high degree of gravity but that the operator acted with a low degree of negligence, and assessed a civil penalty of $300, rather than the penalty of $434 proposed by the Secretary. 12 FMSHRC at 2100.

The judge found that Shamrock had violated section 75.1101-1(a) but that the violation was not S&S, because the evidence did not reveal that the hazard of an ignition was reasonably likely to occur. He stated:

~1309

> [Inspector Delp] indicated that there were various materials which could potentially burn, such as several gallons of oil in metal containers, and various timbers and wooden cribs. However, he did not indicate the distance of these materials to the head

drive, and it is noted that the oil was contained in metal containers. Also, although he indicated that the area is known as one that accumulates float coal dust, and that the belt was in operation and carrying coal, he was unable to say whether he observed coal dust on the belt, and did not specifically indicate that there was any coal dust around the head drive. Further, although he noted that there was a potential of fire due to friction of rollers and various components, as well as sparks from various electrical equipment at the head drive, there was no evidence adduced as to a specific condition of the various equipment which would make the hazard of an ignition reasonably likely to have occurred. I thus conclude that it has not been established that the violation herein was significant and substantial. (See, Mathies, supra).

Id.

The judge also found that Shamrock had violated section 75.1101-10 based on Inspector Delp's testimony concerning the inoperative condition of the sprinkler system on the belt drive, which was unrebutted. 12 FMSHRC at 2103. The judge determined that this violation also was not S&S:

Delp indicated that the hazards of a fire are the same as those he described in his testimony with regard to Citation No. 3206454, which involved the deluge system. Also, on the same date, concerning the same belt, he issued Citation No. 3206321 alleging that there were no fire hose outlets for a distance of approximately 900 feet along the belt. In addition, he issued Citation No. 3206322 alleging that there was coal dust a quarter inch to 20 inches in depth, along the side and under the belt conveyor for a distance of approximately 900 feet. However, Delp did not describe the presence of any specific condition which would make the event of ignition reasonably likely to occur. Accordingly, I find that it has not been established that the violation herein was significant and substantial.

Id.

With respect to the judge's finding that Shamrock's violation of section 75.403 was not S&S, the Secretary argues on review that the judge misapplied the Commission's S&S test formulated in Mathies, supra. She maintains that

the judge failed to apply the third element of the test, regarding the reasonable likelihood that the hazard contributed to would result in an

injury, in terms of normal mining practices. S. Br. at 7-8. The Secretary asserts that the judge essentially would require electrical equipment to actually be producing sparks before finding the violation to be S&S and that he improperly equated conditions that present an imminent danger with those that are S&S. S. Br. at 8-9. The Secretary emphasizes that an S&S violation is less than an imminent danger, and that the Commission "has consistently determined that S&S findings are not dependent on a high probability of occurrence or on the present existence of all factors necessary for an injury causing event." S. Br. at 9.

With respect to the violations of sections 75.1101-1(a) and 75.1101-10, the Secretary argues that the "judge's failure to analyze the significant and substantial nature of Shamrock's violations of ... sections 75.1101-1(a) and 75.1101-10 in the context of an emergency was erroneous." S. Br. at 12. 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, such an emergency should be presumed. S. Br. at 12-14. The Secretary argues that the relevant question regarding whether Shamrock's violation of section 75.1101-1(a) is S&S under the Commission's test in Mathies, therefore, is not whether a fire or explosion is reasonably likely to occur but, instead, is "given the presence of a fire at the belt head drive, whether the failure to have a deluge water spray system is reasonably likely to result in serious injuries or deaths that would not otherwise occur if such system was properly functioning as required by the standard." S. Br. at 14. Similarly, with respect to section 75.1101-10, the Secretary argues that the relevant question is "given the presence of a fire, whether the failure to stop the coal-conveying belt and the failure to visually and audibly warn miners of the fire, are reasonably likely to cause serious injuries or deaths that would not otherwise occur if such alarms had been given and the belt stopped as required." S. Br. at 15-16. The Secretary does not argue in the alternative that the judge's determinations that a fire or ignition was not reasonably likely to occur is without substantial evidence.

II.

Disposition of Issues

A. Violation of section 75.403

We conclude that substantial evidence supports the judge's finding that Shamrock's violation of section 75.403 was not S&S. A violation is properly designated as being 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 an 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). Here, there is no dispute as to the fact of violation or that the discrete safety hazard contributed to by the violation is the hazard of ignition or explosion. The issue on review is the third element, whether there was a "reasonable likelihood that the hazard contributed to will result in an injury."

We reject the Secretary's contention that the judge improperly equated the reasonable likelihood element with the presence of an "imminent danger." As in Eastern Associated Coal Corp., 13 FMSHRC 178 (February 1991), we do not find any indication in the judge's decision that he misapplied the Mathies test by requiring that the injurious event be imminent. The judge did not expressly require that the injurious event be imminent but, rather, properly stated that it must be reasonably likely to occur. 12 FMSHRC at 2099. Nor did the judge rely solely on the fact that the equipment was permissible at the time of the inspection. Rather, the judge found that an ignition was not reasonably likely to occur because the mine did not liberate a large quantity of methane. Id. The Commission has previously recognized that, when examining whether an explosion or ignition is reasonably likely to occur, it is appropriate to consider whether a "confluence of factors" exists that could result in an ignition or explosion. Texasgulf, Inc., 10 FMSHRC 498, 501 (April 1988). The judge properly followed Commission precedent by reviewing the evidence regarding such a confluence of factors.

Substantial evidence supports the judge's conclusion that the record lacks evidence establishing that an ignition was reasonably likely to occur. Inspector Delp testified that section 75.403 is directed at "hold[ing] down the combustible material" by requiring that limestone dust be applied to highly flammable and explosive coal dust. Tr. 22-23. He stated that if the incombustible content is not maintained at the appropriate level, a mine "could have the possibility of [a] dust ignition." Tr. 23. Inspector Delp explained that if "by chance methane or some other source of ignition were to

take place in the face area or anywhere in the return, if you had enough concussion or pressure to raise the float dust into suspension in the air, where the particles would ignite, then you would have what is known as a dust explosion." Tr. 24.

~1312

Inspector Delp also testified that when the samples were taken, 12 men working in the face of the section were operating a continuous mining machine, two shuttle cars, two roof bolting machines and a scoop, and that if such equipment malfunctioned, it could be a source of sparks. Tr. 24. Although Inspector Delp testified that there was electrical equipment in use at the face, and that such equipment could be a source of sparks if the equipment malfunctioned, the record does not reveal that such equipment was impermissible. Tr. 24, 29. In addition, the record does not reveal that the mine had experienced methane ignitions in the past, or that it liberated excessive quantities of methane. Inspector Delp testified that the mine liberated "some" methane, although "not a great amount," and that he had measured 16,000 cubic feet of methane in a 24-hour period. Tr. 26, 32. There is no evidence in the record of the amount or extent of coal dust or loose coal present, other than that there was "always the amount of coal dust, loose coal" at the face, that would be a by-product of mining. Tr. 25.

The judge's finding that Shamrock's violation was not S&S is also supported by the lack of specific evidence to establish the fourth Mathies factor, that is, that the injuries sustained would be of a reasonably serious nature. Inspector Delp testified that, if an ignition occurred, miners other than those at the face could possibly be affected, but he did not specify in what manner. Tr. 26.

This lack of specificity results in a vague and general record more suited to speculation than in clear evidence of the S&S nature of the violation sufficient to overturn the judge's finding that it was not. Cf. Utah Power & Light Co., 12 FMSHRC 965, 971 (May 1990). We do not suggest that

the Secretary could not have proven the S&S nature of the violation in this case. Rather, we conclude only that she did not do so here. Thus, we conclude that substantial evidence supports the judge's conclusion that Shamrock's violation of section 75.403 was not S&S.

B. Violations of sections 75.1101-1(a) and 75.1101-10

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 No. KENT 90-60, the Secretary 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:

~1313

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, 1378 (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 or fire 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 violations. See, e.g., Tr. 56, 58-59, 127-29. 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 ignition 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 ~1314
(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 violations 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 as to Shamrock's violations of sections 75.1101-1(a) and 75.1101-10, 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 with respect to Shamrock's violations of sections 75.1101-1(a) and 75.1101-10, no other basis for review is presented. Accordingly, we affirm the judge's decision that Shamrock's violations of sections 75.1101-1(a) and 75.1101-10 were not S&S.
~1315
III.
Conclusion
For the reasons set forth above, we affirm the judge's decision that Shamrock's violations of sections 75.403, 75.1101-1(a) and 75.1101-10 were not S&S.
Ford B. Ford, Chairman
Richard V. Backley, Commissioner
Joyce A. Doyle, Commissioner
Arlene Holen, Commissioner
L. Clair Nelson, Commissioner