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MSHA V. BEECH FORK PROCESSING
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August 28, 1992
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. KENT 90-398

BEECH FORK PROCESSING, 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 Beech Fork Processing, Inc. ("Beech Fork") regarding whether Beech Fork's two violations of 30 C.F.R. □ 75.1100-3 may properly be characterized as being of a significant an substantial ("S&S") nature.(Footnote 1) Commission Administrative Law Judge James A. Broderick 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. 13 FMSHRC 576 (April 1991)(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 violations 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,

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30 C.F.R. • 75.1100-3, entitled "Condition and examination of firefighting equipment," provides:
All firefighting equipment shall be maintained
in a usable and operative condition. Chemical
extinguishers shall be examined every 6 months and the
date of the examination shall be written on a
permanent tag attached to the extinguisher.
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...."

given the review strictures of the Act. Under these circumstances, we affirm the judge's decision.(Footnote 2)

I.

Factual Background and Procedural History

On April 12, 1990, Kellis Fields, an inspector for the Department of Labor's Mine Safety and Health Administration ("MSHA"), issued a citation to Shamrock pursuant to section 104(a) of the Act, 30 U.S.C. • 814(a), alleging an S&S violation of section 75.1100-3. The citation states:

The deluge type fire suppression system installed for fire fighting purposes was not being maintained in a usable or operative condition. When tested water would not flow through the branch lines. For the 1-A belt conveyor drive.

On April 16, 1990, Inspector Fields issued a second section 104(a) citation to Shamrock alleging another S&S violation of section 75.1100-3. The citation states:

The dry chemical type fire suppression system installed for fire fighting equipment on the No. 2 10 shuttle car on the 002-0 section was not being maintained in a useable and operative condition. The branch line going to the tank was broken off leaving the system open if either ... was activated.

Following an evidentiary hearing, Judge Broderick concluded that Shamrock had violated section 75.1100-3, as alleged in the first citation, because the deluge fire suppression system on the belt line was not maintained in a usable and operative condition as required by the standard. However, the judge rejected the Secretary's allegations that the violation was S&S. The judge found:

The hazard to which this violation contributes is fire and smoke which could travel inby from the belt conveyor to the section. A fire could result from stuck rollers, friction, or coal spillage including float coal dust. The inspector testified that these are common occurrences in coal mines. However, there is no evidence of any such conditions in the area of the cited violation. The evidence does not establish

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Our decision in this matter 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: Shamrock Coal Co., Inc., 14 FMSHRC , Docket No. KENT 90-60 (August 1992), and Shamrock Coal Co., Inc., 14 FMSHRC , Docket Nos. KENT 90-137 and KENT 90-142 (August 1992).

that the hazard contributed to is reasonably likely to result in serious injury. The citation was not properly designated as significant and substantial.
13 FMSHRC at 578.

The judge also concluded that Shamrock violated section 75.1100-3, as alleged in the second citation, because the dry chemical type fire suppression system on the cited shuttle car was inoperative. 13 FMSHRC at 579. He again rejected the Secretary's S&S allegations, finding:

> The traction motor on the shuttle car has electrical components and the cable going back to the power center carries 440 volt ac power. If the traction motor shorted out and ignited accumulations of oil, grease, or coal dust, or a cut in cable caused a spark, a fire could result, which could cause smoke inhalation injuries to miners on the section. However, there is no evidence of any oil, grease or coal dust, and no evidence of any electrical problems or defects in the motor or cable. Therefore, the evidence fails to show that the hazard contributed to was reasonably likely to result in injuries to miners. The citation was not properly designated as significant and substantial.

13 FMSHRC at 579.

Beech Fork did not seek review of the judge's determination that it violated the standard. The Secretary seeks review of the judge's S&S finding. She argues that the judge erred in finding that the violations were not S&S based on his determination that a fire was not reasonably likely to occur under the circumstances surrounding the violations. S. Br. at 5-6. 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 3-4. 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 is, instead, "given the presence of a fire at the belt head drive or on the shuttle car, whether the failure to have operative firefighting equipment is reasonably likely to result in serious injuries or deaths that would not otherwise occur if such equipment was properly functioning as required by the standard." S. Br. at 5-6.(Footnote 3) The Secretary does not argue in the alternative that the judge's

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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:

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determination that a fire 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.(Footnote 4)

II.

Disposition of Issues

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:

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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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Beech Fork did not file a response brief before the Commission, and

proceeded pro se at the evidentiary hearing.
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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 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. 26-27, 30-31, 49-52. 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 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. The Commission's practice has been to resolve these "opportunity to pass" questions on a case-by-case basis. See, e.g., Ozark-Mahoning, supra, 12

FMSHRC at 379; Unocal, supra, 11 FMSHRC at 297-98, 300-01; Richard Bjes v. Consolidation Coal Co., 6 FMSHRC 1411, 1417 (June 1984). The Commission has
not viewed this limitation as a procedural straitjacket. However, in general, a matter must have been presented below in such a manner as to obtain a ruling in order to be considered on review. See generally 4 C.J.S. Appeal & Error 243 (1957). The matter must be raised with "sufficient specificity an clarity [so] that the [judge] is aware that [he] must decide the issue."
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Wallace v. Dept. of the Air Force, 879 F.2d 829, 832 (Fed. Cir. 1989). The Commission also has 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. See, e.g., Freeman United Coal Mining Co., 6 FMSHRC 1577, 1580 (July 1984). 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.

The Mine Act establishes an orderly, two-tiered litigation system consisting of trial before a Commission judge and appellate review by the Commission. This system provides for the creation of the factual record before the trier of fact. 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. See, e.g., Railroad Yardmasters of America v. Horns, 721 F.2d 1332, 1338 (D.C. Cir. 1983); Terkildsen v. Waters, 481 F.2d 201, 204-05 (2d Cir. 1973). 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. Unocal, 11 FMSHRC at 301. The U.S. Court of Appeals for the D.C. Circuit has recognized the general rule that litigation theories not pursued in a lower court will not be heard on appeal. See, e.g., Short v. UMWA, 728 F.2d 528, 532 (D.C. Cir. 1984); Kassman v. American University, 546
F.2d 1029, 1032 (D.C. Cir. 1976).

The Commission's National Gypsum decision was issued in 1981. In its Mathies decision issued in 1984, the Commission set forth the requirements for establishing the S&S nature of a violation under National Gypsum. 6 FMSHRC at 3-4. The essence of Mathies analysis is a careful examination of the evidence surrounding a specific violation; use of the presumption advanced by the Secretary would represent a departure from that analysis. 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. Cf. Unocal, 11 FMSHRC at 297 & n.6.

In sum, 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 Beech Fork's violations of section 75.1101-3 were not S&S.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner