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SOL (MSHA) V. S & H MINING  
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June 22, 1993

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. SE 91-32
	:	
S & H MINING, INC.	:	

BEFORE: Holen, Chairman; Backley, Doyle 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)("Mine Act"). The issue before the Commission is whether a violation by S&H Mining, Inc. ("S&H") of 30 C.F.R. 75.902(Footnote 1) was "significant and substantial" in nature ("S&S") and was caused by S&H's unwarrantable failure to comply with the safety standard. Commission Administrative Law Judge William Fauver concluded that the violation was S&S and was caused by S&H's unwarrantable failure. 14 FMSHRC 887, 890 (May 1992)(ALJ). We granted S&H's petition for discretionary review of the judge's decision. For the reasons that follow, we affirm.

I.

Factual Background and Procedural History

On May 14, 1990, Inspector Don McDaniel of the Department of Labor's Mine Safety and Health Administration ("MSHA") inspected S&H's Mine No. 7, an underground coal mine in Campbell County, Tennessee. McDaniel unintentionally stepped on the cable supplying electricity to the power center of the coal

1 30 C.F.R. 75.902 provides in part:

[L]ow- and medium-voltage resistance grounded systems shall include a fail-safe ground check circuit to monitor continuously the grounding circuit to assure continuity which ground check circuit shall cause the circuit breaker to open when either the ground or pilot check wire is broken.... Cable couplers shall be constructed so that the ground check continuity conductor shall be broken first and the ground conductors shall be broken last when the coupler is being uncoupled.

feeder, pulling the cable coupler from the power center. McDaniel found that the locking device on the top of the cable coupler had been removed. Wedges had been placed under the coupler in an attempt to hold it in place. McDaniel concluded that, without the locking device, the ground conductor could disconnect prior to the ground check continuity conductor, in violation of section 75.902.

Inspector McDaniel discussed the violation with Dwight Lindsey, who had conducted S&H's preshift examination on the day of the inspection. According to McDaniel, Lindsey acknowledged that he knew, as a result of his preshift examination, that the locking device had been removed. Tr. 9-10, 17, 46. Lindsey also told McDaniel that he (Lindsey) had inserted the wedges under the cable coupler. Tr. 9-10, 17, 46. McDaniel issued a section 104(d)(1) order of withdrawal for S&H's alleged unwarrantable failure to comply with section 75.902 and designated the violation as S&S.

S&H contested the inspector's S&S designation and unwarrantable failure finding and a hearing was held before Judge Fauver. The judge concluded that the violation was S&S. He found that, but for McDaniel's inspection, the coupler would have remained in an unsafe condition for a substantial period. 14 FMSHRC at 890. The judge also found that it was reasonably likely that this condition would result in operation of the feeder without ground fault protection, and that, in wet mining conditions, a miner working in the area would suffer an electric shock. Id. In addition, the judge determined that "continued mining could well result in arcing between the two conductors and could cause a mine fire or burn out the circuit breaker." Id. The judge concluded that the violation was the result of S&H's unwarrantable failure to comply with the standard. He found that Lindsey, knowing that the locking device had been removed, failed to report that condition in his preshift report, and attempted to bypass the safety lock by using wedges. He determined that Lindsey, as S&H's certified examiner, was S&H's agent. Id. The judge concluded that Lindsey's actions demonstrated aggravated conduct beyond ordinary negligence and were imputable to S&H. Id.

## II.

### Disposition of Issues

#### A. Whether the violation was significant and substantial

S&H argues that the judge erred in finding that there was a reasonable likelihood of injury as a result of the violation. S&H contends that there was no danger associated with the violation at the time it was discovered because the circuit breaker tripped when the cable coupler was pulled from the power center. S&H argues that the alleged hazards created by the violation were hypothetical and speculative. S&H submits that the judge's finding is not supported by substantial evidence and is contrary to Commission precedent.

The Secretary argues that in determining whether a violation is S&S, the violation must be viewed not only as it was at the time of the citation, but also as it would be if it were to continue unabated. The Secretary argues that the violation would have continued unabated for at least several days

during which it was reasonably likely that an injury would occur. The Secretary contends that the judge's finding of S&S is supported by substantial evidence.

The Commission has determined that a violation is S&S if, based on the particular facts surrounding the 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, 825-26 (April 1981). (Footnote 2) 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; (footnote omitted) (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 first and second Mathies elements are established. S&H concedes that it violated section 75.902. The violation created electric shock and fire hazards. With respect to the fourth Mathies element, S&H did not challenge that an injury resulting from the violation would be of a reasonably serious nature.

The third element of the Mathies test, whether there was a reasonable likelihood that the hazard contributed to would result in an injury, is the issue in dispute. The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's decision. 30 U.S.C. 823(d)(2)(A)(ii)(I). The term "substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." See, e.g., Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (November 1989), quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

Inspector McDaniel testified that, because the top locking device was missing, the coupler would drop by its own weight and the ground wire would disengage. The power conductors, however, would not completely disengage because the locking device on the bottom of the coupler was still functioning. Tr. 13-15. He testified that, with the conductors engaged but the ground removed, there was "a high likelihood that someone could be electrocuted." Tr. 18. McDaniel also testified that the ground monitor was not a fail-safe

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2 The S&S terminology is taken from section 104(d)(1) of the Mine 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...."

system because a relay could malfunction, disabling the monitor without the operator's knowledge. Based on his experience, McDaniel believed that it was "highly likely" that a relay for the ground monitor would malfunction, if left for any length of time. Tr. 63-64. This position was confirmed by S&H's mine superintendent, Charles White, who testified that S&H has encountered situations where the ground monitor failed to break a circuit despite the fact that the ground wire was not functioning. Tr. 101, 104. McDaniel further testified and the judge found that, if the coupler were to partially detach from the power source while it was energized, arcing between the power conductors could cause a mine fire or burn out the circuit breaker. He characterized the cited condition as a "serious danger." Tr. 46.

S&H's argument that there was no danger associated with the violation because the ground monitor worked correctly during the inspection and the circuit breaker tripped, shutting off the power, does not lead to a contrary result. The Commission has held that an "evaluation of the reasonable likelihood of an injury should be made in terms of continued normal mining operations." U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985) (citation omitted). Inspector McDaniel testified that it was "highly likely" that the ground monitor would fail at some time. Tr. 63-64. He had 16 years experience inspecting ground monitors for electrical systems in mines and the judge credited his testimony. After considering the record, including evidence that detracts from the judge's findings, we conclude that substantial evidence supports the judge's S&S finding.

B. Whether the violation resulted from the operator's unwarrantable failure

S&H argues that the judge erred in crediting McDaniel's testimony concerning Lindsey's knowledge of the violation. S&H contends that Lindsey never told McDaniel that he knew about the cited condition. S&H also argues that the judge erred in imputing Lindsey's knowledge to S&H's management.

The Secretary argues that the judge found McDaniel's testimony credible, and that there is no compelling evidence to overturn the credibility determination. The Secretary further takes the position that knowledge of a preshift examiner can be imputed to the operator.

The Commission has determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. Emery Mining Corporation, 9 FMSHRC 1997, 2004 (December 1987); Youghioghney & Ohio Coal Company, 9 FMSHRC 2007, 2010 (December 1987). This determination was derived, in part, from the plain meaning of "unwarrantable" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" (the failure to use such care as a reasonably prudent and careful person would use, characterized by "inadvertence," "thoughtlessness," and "inattention"). Emery, 9 FMSHRC at 2001.

It is undisputed that Lindsey performed the preshift examination on the morning McDaniel found the violation. It is also undisputed that Lindsey did not report the hazardous condition in his preshift report.

Inspector McDaniel testified that Lindsey told him that he had found the locking device missing and had placed wedges under the coupler. Tr. 9-10, 17, 46. McDaniel also saw the wedges. Tr. 9-10, 45-46. Lindsey did not testify at the hearing but the record does contain contrary testimony on this point from S&H President Smith and from Tommy McCoo, Lindsey's supervisor.(Footnote 3) The judge credited McDaniel. Credibility determinations are within the discretion of the judge who heard the witnesses' testimony and observed their demeanor. BethEnergy Mines, Inc., 14 FMSHRC 1232, 1239 (August 1992) and cases cited. The Commission has held that a judge's credibility determinations cannot be overturned lightly. See, e.g., Ranger Fuel Corp., 12 FMSHRC 363, 374 (March 1990); Smith v. Kem Coal Company, 12 FMSHRC 67, 71-72 (January 1992) and cases cited. The record contains no compelling evidence to support a reversal of the judge's credibility determination.

We reject S&H's assertion that the judge erred in imputing Lindsey's knowledge to S&H. Under Commission case law, a lack of actual knowledge by management does not bar a finding of unwarrantable failure. Eastern Associated Coal Corp., 13 FMSHRC 178, 187 (February 1991). Smith conceded that Lindsey was designated by S&H to conduct the preshift examination and that Lindsey was S&H's agent. Lindsey's conduct was therefore properly imputed to S&H. See Rochester & Pittsburgh Coal Co., 13 FMSHRC 189, 194-98 (February 1991); Mettiki Coal Corporation, 13 FMSHRC 769, 772 (May 1991).

We conclude that substantial evidence supports the judge's conclusion that the actions and knowledge of Lindsey, S&H's preshift examiner, constituted aggravated conduct imputable to S&H. Thus, we affirm the judge's finding that the violation was caused by S&H's unwarrantable failure to comply with the safety standard.

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3 Smith testified that Lindsey denied telling McDaniel that he knew about the violation. Tr. 76. McCoo confirmed Lindsey's denial to Smith and testified that, although he (McCoo) was in the general area with McDaniel and Lindsey, he did not hear Lindsey make the disputed statement. Tr. 108-11, 114-15.

III.

Conclusion

For the foregoing reasons, we affirm the judge's finding that S&H's violation of 30 C.F.R. 75.902 was significant and substantial and was a result of S&H's unwarrantable failure.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner