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SOL (MSHA) V. ENERGY WEST MINING
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September 27, 1993

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| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | |
| | : | |
| v. | : | Docket No. WEST 91-251 |
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| ENERGY WEST MINING COMPANY | : | |

BEFORE: Holen, Chairman; Backley, Doyle, 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)("Mine Act" or "Act"), presents the issue of whether a violation by Energy West Mining Company ("Energy West") of 30 C.F.R. 75.503 (1992)(Footnote 1) was significant and substantial ("S&S") in nature.(Footnote 2) Administrative Law Judge Michael Lasher concluded that the violation was S&S and assessed a \$750 civil penalty. 14 FMSHRC 1595 (September 1992)(ALJ). For the reasons discussed below, we remand for further proceedings.

1 30 C.F.R. 75.503, entitled "Permissible electric face equipment; maintenance," provides in pertinent part:

The operator of each coal mine shall maintain in permissible condition all electric face equipment ... which is taken into or used inby the last open crosscut of any such mine.

2 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...."

I.

Factual and Procedural Background

Energy West operates the Cottonwood Mine, an underground coal mine in Huntington, Utah. On October 24, 1990, Donald Gibson, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted an examination of the electrical equipment at the longwall mining unit in the 16 West Section. At one longwall shield, the inspector discovered an impermissible opening between the ballast box(Footnote 3) and its cover. The inspector inserted a measuring gauge into the plane flange joint and determined that the opening was .005 of an inch, exceeding the permissibility standard set forth at 30 C.F.R. 18.31(a)(6).(Footnote 4) The inspector, together with Energy West's foreman, Tom Kerns, removed the box's cover and discovered that rust had caused the opening. He issued a citation to Energy West alleging an S&S violation of section 75.503.

MSHA subsequently proposed a civil penalty of \$350 for the alleged violation and Energy West contested it. At the hearing before Judge Lasher, Energy West conceded the violation but contested its S&S designation.

The judge concluded that the violation was S&S. 14 FMSHRC at 1623. Because of the gravity of the ignition hazard contributed to by the violation, the presence of miners, and Energy West's negligence, the judge assessed a civil penalty of \$750. Id.

We granted Energy West's petition for discretionary review, which challenges the judge's S&S determination and his civil penalty assessment.

II.

Disposition of Issues

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 Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

3 Steel ballast boxes, located on the longwall shields, provide power for auxiliary lighting. Each box is approximately 8«-by-11 inches in size and 2 inches thick. A 120-volt cable enters one side of the box, passes through a power supply module encased in rubber, and is connected to the next ballast box. An aluminum cover about 3/8 of an inch thick is bolted onto each box. The "plane flange joint," formed where the cover meets the box, prevents sparks or explosions from escaping the box. Tr. II 117, 143-44, 150; Exs. G-4, G-5.

4 The regulation requires that the opening for the cited ballast box not exceed .004 inch. 30 C.F.R. 18.31(a)(6).

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.

See also *Austin Power Co. v. Secretary*, 861 F.2d 99, 103-04 (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.*, 6 FMSHRC 1834, 1836 (August 1984)(emphasis in original). When examining whether an explosion or ignition is reasonably likely to occur, "it is appropriate to consider whether a 'confluence of factors' exists to create such a likelihood." *Zeigler Coal Co.*, 15 FMSHRC 949, 953 (June 1993) citing *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988).

The judge noted that the first element of the Mathies test, violation of a safety standard, was conceded. 14 FMSHRC at 1621. The judge determined that the second element, a discrete safety hazard contributed to by the violation, was present because the permissibility violation posed the danger of a methane or coal dust explosion. 14 FMSHRC at 1621-22.

With respect to the third element, which is the subject of dispute on review, the judge concluded that a reasonable likelihood of an injury was also present. 14 FMSHRC at 1622. The judge analyzed the evidence from the standpoint of a "substantial possibility" of injury standard. See 14 FMSHRC at 1607-1609, 1622. As to the fourth element, a reasonable likelihood that any injury would be of a reasonably serious nature, the judge found that, because miners worked near the area of the violation, serious injuries would result if an explosion occurred. 14 FMSHRC at 1622.

On review, Energy West challenges only the judge's findings as to the third element of Mathies. It contends that the judge's conclusion is not supported by substantial evidence(Footnote 5) in the record and that the judge relied on an improper legal standard. The judge found no "specific evidence" of prior high levels of methane in the mine, but he deemed "credible and convincing" the inspector's testimony that a methane explosion was always possible. 14 FMSHRC at 1622. He noted that the violation occurred within 150 feet of

5 The Commission is bound by the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] a conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989), quoting *Consolidation Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

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pillar extraction and that the longwall shearing machine generates and suspends coal dust. Id. The judge credited the inspector's testimony that the opening in the plane flange joint was large enough either to permit electrical sparking to the outside or to admit methane or coal dust into the opening to cause an explosion. 14 FMSHRC at 1619, 1622. The judge concluded "that there existed a substantial possibility that the hazard contributed to by the violation would have resulted in an injury or fatality occurring," and that, therefore, the third Mathies element was established. 14 FMSHRC at 1622.

The Commission has uniformly applied the Mathies test to analyze S&S violations since 1984. The judge expressed his view that his finding of a substantial possibility of a resulting injury satisfied the Mathies reasonable likelihood element. 14 FMSHRC at 1622. We disagree with the judge that a substantial possibility formulation is the equivalent of reasonable likelihood. Such a formulation is at variance with the Commission's criteria for determining S&S. We acknowledge the judge's effort to amplify the Mathies test, but we decline to alter that test. Accordingly, we conclude that the judge erred in applying a substantial possibility concept in place of reasonable likelihood.

The judge's substantial possibility analysis does not lend itself to review under the third Mathies standard. Therefore, we remand this case to the judge for application of the third Mathies element, i.e., whether there was a reasonable likelihood that the hazard contributed to would result in an injury.

We note two additional issues to be resolved. The judge made unclear findings as to ignitable levels of methane in the past and we request the judge to clarify his findings on that subject.(Footnote 6) The judge referred to the mine as "gassy" (14 FMSHRC at 1622) and, on review, the parties have disagreed as to whether the mine is subject to spot inspections under section 103(i) of the Act, 30 U.S.C. 813(i). The Mine Act does not explicitly employ "gassy" or "nongassy" classifications. We ask the judge on remand to clarify whether the Cottonwood Mine was subject to section 103(i) inspection.

6 The judge found that there was no evidence of prior detection of high levels of methane, although he noted testimony by Inspector Gibson that the mine had experienced ignitable levels of methane. 14 FMSHRC at 1620, 1622. The judge also found, in his analysis of another citation decided in this consolidated proceeding, that ignitable levels of methane have never been detected in this mine. 14 FMSHRC at 1606 n.9.III.

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Conclusion

For the foregoing reasons, we vacate the judge's S&S determinations and remand for analysis pursuant to the Mathies standard. We do not reach the civil penalty issues raised by Energy West.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle Commissioner

L. Clair Nelson, Commissioner