

CCASE:
SOL (MSHA) V. PITTSBURG & MIDWAY COAL MINING
DDATE:
19931117
TTEXT:

November 17, 1993

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. CENT 91-202
	:	
PITTSBURG & MIDWAY COAL MINING	:	
COMPANY	:	

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" or "Act"). The issue is whether a violation of 30 C.F.R. 77.400(a)(Footnote 1) by Pittsburg & Midway Coal Mining Company ("P&M") was of a significant and substantial ("S&S") nature.(Footnote 2) Administrative Law Judge John J. Morris concluded that the violation was not S&S. 14 FMSHRC 1941 (November 1992)(ALJ). The Commission granted the Secretary's petition for discretionary review of that finding.(Footnote 3)

1 Section 77.400(a) requires:

(a) Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.

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...."

3 In his decision, the judge ruled on two other citations issued to P&M. Because the citations were issued in different areas of the mine, involved different facts, and alleged dissimilar violations of the Secretary's safety standards, we have issued a separate decision for each citation.

~2244

For the reasons that follow, we vacate the judge's conclusion that the violation was not S&S and remand for further proceedings.

I.

Factual and Procedural Background

On March 27, 1991, Donald Jordan, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), inspected P&M's preparation plant at its York Canyon Mine in Colfax County, New Mexico. A 36-inch wide metal grating walkway was 12 to 18 inches from the feeder slide. The walkway handrail was approximately 40 inches high on the side closest to the feeder slide; a concrete wall was on the other side. Jordan determined that the feeder slide was not guarded in conformance with section 77.400(a) to prevent persons from contacting its moving parts. Jordan issued a section 104(a) citation to P&M for its failure to guard the feeder slide, and designated the violation S&S.

Before the judge, P&M conceded the violation but contested the S&S designation. In concluding that the violation was not S&S, the judge found that there was not a reasonable likelihood that the hazard contributed to would result in an injury. 14 FMSHRC at 1948. The judge reasoned that, if a person were to slip on the walkway, he would most likely steady himself on the adjacent handrail. Id.

II.

Disposition

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 (April 1981). In Mathies Coal Co., 6 FMSHRC 1 (January 1984), the Commission explained:

In order to establish that a violation of a mandatory safety standard is significant and substantial ..., 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, Inc. 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

~2245

original). In finding that the violation was not S&S, the judge concluded that the Secretary had failed to prove the third element of the Mathies test. 14 FMSHRC at 1948.

On review, the Secretary contends that the judge's conclusion is not supported by substantial evidence in the record.(Footnote 4) He argues that the judge failed to consider evidence that maintenance or repair workers, through inattention or carelessness, could contact the slide's moving parts while working on or near the unguarded machinery. According to the Secretary, the judge failed to consider that the walkway is only 36 inches wide,(Footnote 5) is often wet or dusty, and is flanked on the other side by a concrete wall.

P&M argues that the Secretary did not carry his burden of establishing the reasonable likelihood of an injury and submits that a generalized concern that maintenance workers may work around unguarded equipment does not by itself support an S&S designation.

We agree with the Secretary that the judge's decision did not address the hazards facing maintenance and repair workers. The judge focused solely on the hazard of miners slipping on the walkway and contacting the slide's moving parts. Inspector Jordan testified that the violation was S&S because someone reaching toward the unguarded feeder slide to grease or clean it could become entangled in the moving parts and be seriously injured. Tr. 32-33. P&M's safety manager, Michael Kotrick, acknowledged that a miner is assigned to clean around the feeder slide one to three times each shift and that a repairman may also work on the feeder slide as needed. Tr. 77.

The judge determined that the adjacent handrail would most likely provide support to a slipping miner. 14 FMSHRC at 1948. Kotrick conceded, however, that the handrail, consisting of a single metal pipe, did not provide much of a physical barrier. Tr. 79. In addition, the judge failed to consider the hazard to miners carrying objects, in which case the handrail might not provide protection.

Accordingly, we agree that the judge failed to address adequately the Secretary's evidence when he determined that it was not reasonably likely that the hazard contributed to by the violation would result in an injury. A judge must analyze and weigh the relevant testimony of record, make appropriate findings, and explain the reasons for his decision. Anaconda Co., 3 FMSHRC 299, 299-300 (February 1981). The substantial evidence standard of review requires the Commission to weigh all probative evidence and to examine the

4 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). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (November 1989), quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

5 The Secretary, in his brief, states that the walkway was only 30 inches wide. The evidence in the record establishes the width at 36 inches. Tr. 77.

~2246

fact finder's rationale in arriving at the decision. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951).

Because we are unable to evaluate the judge's rationale in light of the Secretary's evidence, we vacate his conclusion that the violation was not S&S and remand for further analysis of that issue. If the judge finds that the violation is S&S, he should reconsider the appropriate civil penalty.

III.

Conclusion

For the foregoing reasons, we vacate that part of the judge's decision in which he found that P&M's violation of section 77.400(a) was not S&S. We remand this case for further proceedings consistent with this decision.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner