

CCASE:  
SOL (MSHA) V. US STEEL MINING  
DDATE:  
19931216  
TTEXT:

December 16, 1993

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) :  
: :  
v. : Docket No. WEVA 92-783  
: :  
UNITED STATES STEEL MINING :  
COMPANY, INC. :

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 two issues: whether United States Steel Mining Company, Inc. ("U.S. Steel") violated a transportation safeguard issued under 30 C.F.R. 75.1403(Footnote 1) and whether that violation was of a significant and substantial ("S&S") nature.(Footnote 2) Commission Administrative Law Judge William Fauver concluded that U.S. Steel violated the safeguard and that the violation was S&S. 15 FMSHRC 452 (March 1993)(ALJ). U.S. Steel filed a petition for discretionary review with the Commission, challenging whether the safeguard was valid and whether the judge erred in determining that the alleged violation was S&S. For the reasons that follow, we affirm the judge's conclusion that U.S. Steel violated the safeguard and remand the S&S issue for further consideration.

I.

Factual Background and Procedural History

On May 23, 1989, James Bowman, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA") conducted a regular

---

1 Section 75.1403, entitled "Other safeguards," provides:

Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.

---

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."

~2446

inspection of U.S. Steel's Gary No. 50 Mine in West Virginia. Inspector Bowman observed that the trolley poles of two vehicles frequently disengaged from the trolley wire as they traveled along the track entry. 15 FMSHRC at 452; Tr. 12-13. The disconnection caused the vehicles to de-energize. The inspector determined that the problem was caused by "kinks, bends and twists in the wire and by an excessive distance between the track and the trolley wire." 15 FMSHRC at 452.

As a result, Bowman issued safeguard notice No. 3238838, which provided:

The trolley wire was inadequately installed in 6-B and 6-C sections in that the wire gauge(Footnote 3) was much wider than the track. Kinks, bends, and twists were present in the trolley wire, causing the trolley pole to de-energize on numerous occasions. The wire gauge is so wide that anti-pole swing devices can not be used at several locations along the 6-B and 6-C track entries by Jeep No. 97 and personnel carrier No. 33.

This is Notice to Provide Safeguard. All trolley wire shall be installed within a gauge where anti-swing(Footnote 4) devices can be used on all equipment and installed without excessive kinks, bends, and twists that de-energize track equipment while traveling along the track within reason.

15 FMSHRC at 454 (footnotes added); Ex. P-3.

On February 4, 1992, MSHA Inspector Earl Cook inspected the mine. The trolley pole of the track-mounted jeep in which he traveled disengaged and caused the jeep to lose power 15 times. Inspector Cook determined that the causes of the trolley pole disconnections were kinks in the wire and a wide gauge between the track and wire. He issued a citation to U.S. Steel for violation of the safeguard. U.S. Steel contested the violation and proposed penalty. A hearing was held on October 14, 1992.

The judge determined that the safeguard was valid because it was "based on an evaluation of the specific conditions at the mine and the determination that such conditions created a transportation hazard in need of correction." 15 FMSHRC at 455 citing Southern Ohio Coal Co., 14 FMSHRC 1, 13 (January 1992). The judge concluded that the safeguard provided U.S. Steel "with

---

3 Inspector Bowman testified that the gauge meant the horizontal distance between the trolley wire and the rail. Tr. 27.

---

4 Anti-swing devices restrict the movement of trolley poles to prevent injury to passengers. Tr. 26. Inspector Bowman testified that, when such a device is in place, "it allows the pole a certain range to work side-by-side to stay on the trolley wire. If the trolley wire is outside a certain gauge, then the anti-swinging device causes the trolley pole to come off the wire...." Tr. 13.

~2447

sufficient notice of the nature of the hazard": disconnection of trolley poles due to severe kinks in the wire and excessive distance between the wire and the track. 15 FMSHRC at 455-56. The judge also concluded that the safeguard specified "the conduct required of the operator to remedy such hazard": installation of the trolley wire a proper distance from the track and without kinks or twists. Id. The judge found that the cited conditions violated the safeguard because the trolley pole disconnected at five locations where the distance from the track to the trolley wire was too wide, and at ten other locations where there were kinks. Id.

The judge applied a "substantial possibility" test of injury in reaching his conclusion that the violation was S&S. He determined that an "[a]nalysis of the statutory language and the Commission's decisions indicates that the test of an S&S violation is a practical and realistic question whether the violation presents a substantial possibility of resulting in injury or disease..." Id. (emphasis in original). The judge assessed a \$690 penalty for the violation. Id. at 457.

## II.

### Disposition

#### A. Violation of the Safeguard

U.S. Steel argues that the safeguard was invalid because it failed to provide fair notice of what was required or prohibited. U.S. Steel asserts that the terms "excessive" and "within reason" were interpreted incorrectly by the judge, and that a finding of violation under the safeguard would require numerous occurrences of pole disconnection because of kinks and distance between the trolley wire and the track. The Secretary contends that the safeguard provided adequate notice to U.S. Steel to install trolley wire within a certain distance of the trolley track and to correct kinks, bends or twists that cause the pole to separate from the wire.

The Commission has held that "a safeguard notice must identify with specificity the nature of the hazard at which it is directed and the conduct required of the operator to remedy such hazard." Southern Ohio Coal Co., 7 FMSHRC 509, 512 (April 1985). The Commission has further stated that its approach toward interpretation of the safeguard provisions of the Act "strikes an appropriate balance between the Secretary's authority to require ... safeguards and the operator's right to notice of the conduct required of him" and that "the safety of miners is best advanced by an interpretative approach that ensures that the hazard of concern to the inspector is fully understood by the operator, thereby enabling the operator to secure prompt and complete abatement." Id.

The language of the safeguard provides that the hazard to be eliminated is too great a distance between the track and the wire and the presence of kinks, bends or twists that would cause the trolley pole to disengage. Thus, the safeguard notice addressed the very hazard that was the subject of the citation. It specifically identified trolley pole disengagement due to kinks in the wire or to horizontal distance between the track and the wire. Those

conditions served as the basis for the citation.

As the judge concluded, the language of the safeguard indicates that "excessive" kinks distort the wire to a degree that would cause the trolley pole to disengage during travel. The phrase "within reason" does not suggest, as U.S. Steel asserts, that the safeguard is violated only when there are an unreasonable number of disconnects of the trolley pole. We agree with the judge that the phrase "within reason" refers to "traveling" and references traveling at a reasonable speed. Moreover, the evidence establishes that the trolley pole disconnected at ten locations because of kinks in the wire and at five locations because of the distance between the track and the wire. Fifteen disconnections during one trip would constitute a violation of the safeguard, even under U.S. Steel's interpretation. Thus, we conclude that U.S. Steel was given fair notice of what was required by the safeguard and that the safeguard was violated by the cited conditions.

B. Whether the Violation Was S&S

A violation is properly designated S&S "if, based upon 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 Co., 3 FMSHRC 822, 825 (April 1981). 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; ... (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).

Contrary to Commission precedent, the judge applied a "substantial possibility" test to establish the third element of Mathies. 15 FMSHRC at 456. In Energy West Mining Co., 15 FMSHRC 1836, 1839 (September 1993), the Commission held that "the ... substantial possibility analysis does not lend itself to review under the third Mathies standard." Therefore, we conclude that the judge erred by applying a substantial possibility test, and we remand this case to the judge for proper application of the third Mathies element, i.e., whether there was a reasonable likelihood that the hazard contributed to would result in an injury.

III.

Conclusion

For the foregoing reasons, we affirm the judge's ruling that U.S. Steel violated the safeguard. We also vacate the judge's S&S determination and remand for further analysis pursuant to the Mathies standard.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner