

CCASE:
SOL (MSHA) V. WYOMING FUEL
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January 10, 1994

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. WEST 91-598-R
	:	WEST 92-335
WYOMING FUEL COMPANY	:	

BEFORE: Holen, Chairman; Backley, Doyle, and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This consolidated contest and 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"). Following an evidentiary hearing, Administrative Law Judge John J. Morris found that Wyoming Fuel Company ("Wyoming Fuel") violated its ventilation plan and that the violation was significant and substantial in nature ("S&S").(Footnote 1) 14 FMSHRC 1758 (October 1992)(ALJ). The Commission granted Wyoming Fuel's petition for discretionary review, which challenges these findings, and heard oral argument. For the reasons that follow, we affirm the judge's decision.

I.

Factual and Procedural Background

Wyoming Fuel owns and operates the Golden Eagle Mine, an underground coal mine, near Trinidad, Colorado. On July 28, 1991, Inspector Melvin Shiveley of the Department of Labor's Mine Safety and Health Administration ("MSHA"), accompanied by Wyoming Fuel fireboss(Footnote 2) Gene Castillo, inspected the northwest longwall of the mine.

1 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...."

2 A fireboss is "[a] person designated to examine the mine for gas and other dangers." Bureau of Mines, U.S. Dept. of Interior, Dictionary of Mining, Mineral and Related Terms at 429 (1968).

Inspector Shiveley observed water on the headgate side of the longwall between crosscuts 70 and 75 in the No. 3 entry, between crosscuts 73 and 74 in the No. 2 entry, and in various places in the No. 1 and No. 2 bleeder rooms. On the tailgate side, he found water "basically everywhere" in the No. 1 and No. 2 bleeder rooms. Tr. 21. Shiveley determined that the water was generally between 4 and 28 inches in depth. Castillo, wearing waders, walked in waist-deep water in the No. 2 bleeder room between crosscuts 68 and 69. On the basis of these observations, Shiveley concluded that Wyoming Fuel violated its approved ventilation plan, which requires that pumps be installed to remove water accumulations presenting a hazard. The inspector issued an order pursuant to section 104(d)(2), 30 U.S.C. 814(d)(2), alleging a violation of 30 C.F.R. 75.316, which requires the adoption of ventilation plans.(Footnote 3) The order stated that water conditions would prevent the fireboss from safely examining and evaluating the performance of the bleeder system. Shiveley designated the violation S&S and determined that it was the result of Wyoming Fuel's unwarrantable failure to comply with the cited ventilation plan provision.

The judge found that the water accumulations were hazardous and credited the testimony of Shiveley and other MSHA witnesses as to the nature of the hazards presented. 14 FMSHRC at 1761-63. The judge determined that the testimony of Wyoming Fuel's witnesses regarding the "water accumulations and related hazards" was "not persuasive." 14 FMSHRC at 1762. In addition, the judge noted that Wyoming Fuel's preshift examiners' reports listed the water in the bleeders as a "hazardous condition." Id. The judge also determined that the violation was S&S, but that it was not the result of Wyoming Fuel's unwarrantable failure. 14 FMSHRC at 1764-65.

3 Section 75.316 states:

A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form.... The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

The coal mine ventilation standards were significantly revised, effective August 16, 1992. See 57 Fed. Reg. 20868 (May 15, 1992). References in this decision are to the Secretary's former ventilation standards, found at 30 C.F.R. Part 75.300 et seq. (1991), which were in effect at the time of the alleged violation.

II.

Disposition of Issues

A. Whether Wyoming Fuel violated the ventilation plan provision

Wyoming Fuel submits that it did not violate its ventilation plan because: (1) pumps had been installed and operated; (2) the weekly examiner did not need to travel in areas of significant accumulations of water to check the integrity of the bleeder system;(Footnote 4) and (3) the water did not present a hazard in any event. The Secretary argues that the judge correctly determined that Wyoming Fuel violated its ventilation plan by permitting water to accumulate in sufficient quantity and depth to present a hazard.

Wyoming Fuel's ventilation plan requires that "[p]umps will be installed to remove water that accumulates in sufficient quantity or depth to present a hazard." Ex. S-2. It is undisputed that Wyoming Fuel had installed pumps and that they had been operating. It appears, however, that the pumps were inoperative at the time of Shiveley's inspection because of a problem with the compressor. Tr. 35-36, 49, 66. It is also undisputed that the presence of water in the bleeders does not, by itself, violate the plan. The plan is violated, however, when water accumulations that present a hazard are not removed. We reject Wyoming Fuel's argument that it complied with the plan by operating pumps in an attempt to remove water from the area. The Mine Act is a strict liability statute and an operator may be held liable for violations without regard to fault. *Asarco, Inc. - Northwestern Mining Dep't*, 8 FMSHRC 1632, 1634 (November 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989).(Footnote 5)

Wyoming Fuel also argues that the plan provision is satisfied because the weekly examiner was able to examine the bleeder system to ensure that it was functioning properly without walking through hazardous accumulations of water. Wyoming Fuel's interpretation of the provision limits its applicability to the weekly examiner. The provision, however, does not contain language limiting its application to certain miners. Ex. S-2. We agree with the Secretary that the plan is violated if water is allowed to accumulate in sufficient quantity or depth to present a hazard to those entering the bleeders. We conclude that the plan provision applied to

4 Wyoming Fuel was required to have the bleeder system examined at least once each week by a certified person. See 30 C.F.R. 75.316-2(f)(2). The latest weekly examination took place on July 26, 1991, two days before Shiveley's inspection.

5 Wyoming Fuel's efforts to remove the water are relevant, however, to the degree of negligence that should be attributed to a violation. We note that, while Inspector Shiveley had designated the degree of negligence as high, the judge found Wyoming Fuel's negligence to be moderate. 14 FMSHRC at 1766.

Castillo, whose assigned duties required him to travel through significant water accumulations.(Footnote 6)

Finally, we conclude that substantial evidence(Footnote 7) supports the judge's finding that water accumulations in the bleeder system on July 28 presented a hazard. 14 FMSHRC at 1761-63. As the judge noted, Castillo's use of waders in traversing the bleeder system is indicative that the excessive water presented a hazard, since waders are not standard issue clothing in a coal mine. 14 FMSHRC at 1761.

The judge's finding was also based on his explicit credibility determinations(Footnote 8) in favor of MSHA's witnesses, especially Inspector Shiveley. 14 FMSHRC at 1761-62. Shiveley testified that the mine floor was uneven and that pieces of loose coal and cribbing were submerged below the water on the mine floor. Tr. 38-39. See also Tr. 99 (MSHA Inspector Ned Zamarripa). These conditions presented a stumbling hazard. Tr. 39. He also testified that a miner attempting to walk the rib line to avoid water accumulations could pull down the rib if he were forced to grab it. Tr. 30-32, 37, 41. See also Tr. 104 (Zamarripa). Shiveley further testified that the coal in the mine is soft and tends to "sluff." Tr. 30, 41. In addition, water accumulations in bleeder systems can impede ventilation and increase the danger of hazardous methane accumulation. Tr. 37, 46, 98-99, 103, 213.

6 Castillo was in the bleeder system to inspect the pumps and perform preshift examinations. W.F. Br. at 7, 10; Ex. W.F.-2. Castillo described his duties as a fireboss as follows:

Checking the pumps, make sure the water is being pumped out of the mine, checking the lift stations, the bleeders, make sure those pumps are running, checking the -- checking the bleeders to make sure they're doing what they're suppose to do.

Tr. 193-94.

7 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." Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (November 1989), quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

8 The Commission has recognized that a "judge's credibility findings and resolutions of disputed testimony should not be overturned lightly." Robinette v. United Castle Coal Co., 3 FMSHRC 803, 813 (April 1981); Quinland Coals, Inc., 9 FMSHRC 1614, 1618 (September 1987).

B. Whether the violation was S&S.

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 (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.

6 FMSHRC at 3-4 (footnote omitted). 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 formula 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).

Wyoming Fuel argues that the S&S finding is erroneous because the third Mathies element was not established and that the judge erred in relying on the Commission's decision in *Eagle Nest, Inc.*, 14 FMSHRC 1119 (July 1992). Wyoming Fuel emphasizes that the maximum water depth in the mine, 28 inches, was limited to one discrete area and that the water was clear. The Secretary contends that the judge's S&S finding is supported by substantial evidence.

We agree with the Secretary that substantial evidence supports the judge's S&S finding. In finding the third Mathies element satisfied, the judge credited Shiveley's testimony. 14 FMSHRC at 1764, citing Tr. 40, 43. Shiveley testified that it was reasonably likely that an injury of a reasonably serious nature would result from the violation. Tr. 40-41. He testified that people have drowned by falling in water while walking in waders. Tr. 39-40. The inspector also indicated that a miner could stumble and hit his head or twist an ankle, or that a loose rib could strike someone, possibly causing drowning. Tr. 41. The judge also found that waders by themselves can cause the wearer to slip, particularly where the mine floor is not easily seen. 14 FMSHRC at 1764. Finally, Shiveley's testimony contradicts Wyoming Fuel's contention that the water was clear. Tr. 38-39. In any event, the Commission's decision in *Eagle Nest* did not suggest that accumulations less murky, deep or extensive than the accumulations in that

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case might not be S&S.(Footnote 9) We reject Wyoming Fuel's argument to that effect. Determination of whether a violation is S&S must be based on the particular facts surrounding the violation. Texasgulf, Inc., 10 FMSHRC 498, 501 (April 1988).

III.

Conclusion

For the foregoing reasons, we affirm the judge's decision that Wyoming Fuel violated its ventilation plan and that the violation was S&S.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

9 In Eagle Nest, water accumulations were murky, up to four feet deep, extensive, and had to be traversed to permit an examination. 14 FMSHRC at 1120-21. The judge, on remand, found the violation to be S&S. 14 FMSHRC 1800 (November 1992)(ALJ).