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SOL (MSHA) V. BUFFALO CRUSHED STONE
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET N.W., 6TH FLOOR
WASHINGTON, D.C. 20006

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket Nos. YORK 92-117-M
 : YORK 92-128-M
BUFFALO CRUSHED STONE, INC. :

BEFORE: Jordan, Chairman; Doyle and Holen, 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 five similar violations of 30 C.F.R. 56.9301 by Buffalo Crushed Stone, Inc. ("Buffalo") were significant and substantial ("S&S"). Administrative Law Judge Avram Weisburger determined that the violations were not S&S. 15 FMSHRC 1641 (August 1993)(ALJ). For the reasons that follow, we reverse and remand.

I.

Factual and Procedural Background

Buffalo operates the Wehrle Quarry, an open pit limestone quarry in New York State. On May 5, 1992, Joseph Denk, an inspector from the Department of Labor's Mine Safety and Health

1 Commissioner Marks assumed office after this case had been considered at a decisional meeting and a decision drafted. In light of these circumstances, Commissioner Marks elects not to participate in this case.

2 30 C.F.R. 56.9301, entitled "Dump site restraints," provides:

Berms, bumper blocks, safety hooks, or similar impeding devices shall be provided at dumping locations where there is a hazard of overtravel or overturning.

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Administration ("MSHA"), along with his supervisor, Richard Duncan, inspected five stockpiles of finished stone in the quarry. The stockpiles, which abutted a highwall, were approximately 25 feet high and 60 feet in diameter and were flattened to accommodate travel. Stone from the stockpiles was placed around the top perimeters of the stockpiles to create berms.

Inspector Denk observed that the berms were approximately one foot high and did not reach the three-foot, mid-axle height of the WA-500 front-end loader, the largest piece of equipment operated on the stockpiles, as required by 30 C.F.R. 56.9300(b). Tr. 59, 68. The inspector also observed a Mack M-30 haul truck dumping stone over a stockpile's edge and concluded that overtravel could occur because of the low berm. Tr. 65-68. Accordingly, the inspector issued citations, pursuant to section 104(a) of the Act, 30 U.S.C. 814(a), alleging S&S violations of section 56.9301 for each of the five stockpiles. Buffalo contested the citations.

Following an evidentiary hearing, Judge Weisberger concluded that Buffalo had violated section 56.9301 in all five instances, but that the violations were not S&S. 15 FMSHRC at 1645-46. The judge based his liability determination on his findings that a hazard of overtravel existed, that a vehicle had been observed dumping at the edge of a stockpile, and that the berms did not reach the height required by section 56.9300(b). *Id.* With respect to the S&S issues, the judge found that, although "an injury-producing event ... could have occurred" because of the height of the stockpiles and the low berms, the Secretary had not established a reasonable likelihood that such an event would occur. *Id.* at 1646 (emphasis in original). The judge assessed a civil penalty of \$50 for each violation. *Id.*

The Commission granted the Secretary's petition for discretionary review, which challenged the judge's determination that the violations were not S&S.

II.

Disposition

The Secretary argues that substantial evidence does not support the judge's finding that Buffalo's violations of section 56.9301 were not S&S. He asserts that the judge erred when he

3 30 C.F.R. 56.9300, entitled "Berms or guardrails," provides in part:

(b) Berms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway.

4 The Secretary designated his petition for discretionary review as his brief; Buffalo did not file a response brief.

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determined that the reasonable likelihood of an injury had not been established because there was no direct testimony based on personal knowledge as to how close trucks were driven to the cited berms. According to the Secretary, the judge failed to consider evidence that Buffalo's trucks routinely backed up to the edges of the berms, a practice that has caused accidents at other mines.

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. 814(d), and refers to a more serious type of violation. 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 Div., Nat'l Gypsum Co., 3 FMSHRC 822, 825-26 (April 1981). In Mathies Coal Co., 6 FMSHRC 1 (January 1984), the Commission further 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 injury in question will be of a reasonably serious nature.

Id. at 3-4. See also *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987)(approving Mathies criteria).

The first and second Mathies elements have been established. The issue on review is whether the judge erred in finding that there was not a reasonable likelihood that the hazard of overtravel contributed to by the low berms would result in an injury.

The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C.

823(d)(2)(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). While we do not lightly overturn a judge's factual findings and resolutions, neither are we bound to affirm such determinations if only slight or dubious evidence is present to support them. See, e.g., *Krispy Kreme Doughnut Corp. v. NLRB*, 732 F.2d 1288, 1293 (6th Cir. 1984); *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1263 (7th Cir. 1980). We are guided by the settled principle that, in reviewing the whole record, an appellate tribunal must also consider anything in the record that "fairly detracts" from the weight of the evidence that supports a

challenged finding. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951). We conclude that substantial evidence does not support the judge's determination.

In determining that the Secretary failed to establish the third Mathies element, the judge reasoned that the stockpiles were flat, there was no evidence of overtravel, the stockpile vehicles had no braking or steering problems and there was "no direct testimony in the record, from anyone having personal knowledge based on observation, as to how close the various vehicles in use actually, in the normal course of operation, travel to the edge of the berms." 15 FMSHRC at 1646 (emphasis in original).

The overwhelming weight of the evidence detracts from the judge's finding. Inspector Denk testified that a truck backing up or driving near the edge of a stockpile could travel through the berm, falling 25 feet. Tr. 65. Duncan testified that the low berms created a "significant hazard" because they were not high enough to prevent overtravel, which could result in serious accidents. Tr. 135-37. He testified that the drivers were "backing these trucks up using mirrors, and [were] not ... people [who] do this on a daily basis." Tr. 136. He further testified that "[i]t's very easy to misjudge in a rear view mirror backing [sic]." Id. Duncan also explained that, as a truck dumps its load, a "tremendous" amount of weight is shifted toward the rear of the truck and the outside edge of a stockpile. Id. In one fatal accident that Duncan investigated, a truck was backing up to a stockpile similar to those cited when a wheel of the truck "went in at an angle" and "caught the edge." Tr. 137. As the truck dumped its load, its weight shifted, a wheel dropped, and the truck flipped over, crushing the cab. Id. Duncan stated that, on account of their inadequate, the berms would not restrain overtravel but would function only as "speed bump[s]." Tr. 135.

Contrary to the judge's finding, there is evidence in the record as to how close vehicles travelled to the berms' edges during normal operations. Inspector Denk testified that, when he observed a Mack M-30 haul truck back up to the berm and dump a load of material, the truck's "wheels were actually touching the berm." Tr. 67. He also testified that he observed tire tracks on the stockpiles that were "[a]llmost actually on the berm." Tr. 66. Inspector Denk's testimony was based on his personal observations at the mine. Denk was not required to observe the mine's operations for an extended period of time for his observations to have probative value. Moreover, there is no requirement that the Secretary's case be based exclusively on testimony founded on personal knowledge. In making factual determinations, a judge may consider all "[r]elevant evidence, including hearsay evidence." 29 C.F.R. 2700.63(a)(1993). See Mid-Continent Resources, Inc., 6 FMSHRC 1132, 1135-37 (May 1984).

Furthermore, the judge focused on factors that, in this case, the Secretary need not prove to establish the third Mathies element. Under the circumstances, the fact that the stockpiles were flat and that there were no equipment problems at the time does not establish that an accident was not reasonably likely to occur. The hazard of overtravel presented here did not arise from the contour of the top of the stockpiles or the condition of

the vehicles, but from the fact that trucks backing up to the edge experienced great shifts in weight as they dumped their loads. Likewise, the absence of previous instances of overtravel does not establish that an accident would not be reasonably likely to occur, given the nature of the hazards presented. As noted, serious accidents resulting from overtravel had occurred at stockpiles similar to those cited. Tr.

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136-37. Accordingly, we reverse the judge's determination that the Secretary failed to establish the reasonable likelihood of an injury-producing event.

Although the judge did not expressly consider the fourth Mathies factor, he recognized in determining liability that "[b]oth Duncan and Denk testified regarding the hazards of a vehicle going over the edge of a stockpile and causing serious injuries to the driver of the vehicle." 15 FMSHRC at 1645; Tr. 65-66, 135-37. Given this uncontroverted evidence, the fourth Mathies element was established.

III.

Conclusion

For the reasons set forth above, we conclude that the judge's determination that the violations of section 56.9301 were not S&S is not supported by substantial evidence and we reverse the judge's conclusion. We remand for reassessment of civil penalties in light of our determination. See, e.g., Gatliff Coal Co., Inc., 14 FMSHRC 1982, 1989 (December 1992).

Mary Lu Jordan, Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner