

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20004

December 11, 2013

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2009-403
v.	:	A.C. No. 46-08808-169080-02
	:	
SPARTAN MINING COMPANY, INC.	:	

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, 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. (2006). At issue is whether the Administrative Law Judge correctly upheld the significant and substantial (“S&S”)¹ designations for two violations of emergency escapeway standards by Spartan Mining Company, Inc. Unpublished Decision Approving Partial Settlement and Decision on Stipulated Record (June 23, 2010) (ALJ). Spartan filed a petition for discretionary review challenging the Judge’s S&S determinations, and the Commission granted review.

We affirm the decision of the Judge and hold that, in determining whether escapeway standard violations are S&S, a Judge must consider the violations in the context of emergency conditions.

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 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

This case involves two citations issued to Spartan at its Ruby Energy Mine in Mingo County, West Virginia. On September 24, 2008, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Citation No. 8071651, alleging that Spartan violated the escapeway requirements contained in 30 C.F.R. § 75.380(b)(1).² That citation alleged that Spartan had failed to provide separate primary and secondary escapeways when removing equipment as required by the standard.³

On October 1, 2008, an MSHA inspector issued Citation No. 8065652 to Spartan, alleging a violation of the escapeway requirements contained in 30 C.F.R. § 75.380(d)(1).⁴ That citation alleged that a primary escapeway was not being maintained in a safe condition in violation of the standard.⁵

Spartan contested both citations.⁶ Before the Judge, the parties entered into a number of stipulations, including the following:

² Section 75.380(b)(1) states:

Escapeways shall be provided from each working section, and each area where mechanized mining equipment is being installed or removed, continuous to the surface escape drift opening or continuous to the escape shaft or slope facilities to the surface.

³ The citation alleged that ventilation controls separating the ventilation on the primary and secondary escapeway on the section were removed, making the primary and secondary escapeway common. It noted that during that time period, equipment was being removed from the section.

⁴ Section 75.380(d)(1) states:

Each escapeway shall be – maintained in a safe condition to always assure passage of anyone, including disabled persons.

⁵ The citation stated that the primary escapeway was not being maintained in a safe condition to always assure safe passage of anyone, including disabled persons, and that it had water measuring at least 17 inches deep. It also noted that there were tripping hazards in the form of loose rock, coal ribs, a pump and a discharge line located in the water.

⁶ Docket No. WEVA 2009-403 consisted of 19 separate citations and orders issued under the Mine Act. The parties agreed to settle all but the two citations at issue in this proceeding.

(1) the citations set forth above accurately describe the conditions that existed at the mine at the time the citations were issued. Dec. at 2-3; Stips. 13, 19;

(2) the conditions set forth in both citations constitute violations of the respective standards. Dec. at 3; Stips. 14, 20;

(3) the violations contributed to a discrete safety hazard, “because in the event that an emergency requiring the use of the escapeway[s] was to occur, the failure to provide the required escapeway[s] would have impeded the evacuation of miners trying to leave the mine.” Dec. at 3-4; Stips. 15, 21;

(4) at the times of the violations, an emergency requiring evacuation was not reasonably likely to occur. Dec. at 3, 4; Stips. 16, 22;

(5) in the event of an emergency requiring the use of the escapeways described in the two citations, it was reasonably likely that “injuries resulting in lost workdays or restricted duty” would occur. Dec. at 3, 4; Stips. 17, 23.

Based on the stipulations, the parties submitted the matter to the Judge for a decision on the issues of gravity and the S&S nature of the violations. The Judge found: “By its very nature, the mandatory standard found at 30 C.F.R. [§] 75.380, and at issue here, is designed to protect miners only in the event of a mine emergency. The only purpose of the escapeway is to quickly evacuate all persons, including disabled persons, in the case of a fire, explosion, smoke or other emergency.” Dec. at 5. Thus, the Judge concluded that “[s]tandards that are designed to protect miners in emergency situations must be analyzed in the context of an anticipated emergency.” *Id.* at 6. Accordingly, the Judge concluded that both violations were S&S and assessed a penalty of \$2,976 for each. *Id.* at 6-7.

In petitioning for review of the Judge’s S&S determinations, Spartan argued that the Judge erred by “[presuming] that a hazardous condition was reasonably likely to occur.” PDR at 1. We now address the issues raised by Spartan in this case.

II.

Disposition

Under Commission case law, 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. *See Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), the Commission set forth the following four-part test to evaluate whether a violation is properly designated as S&S:

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.

Id. at 3-4 (footnote omitted); accord *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec’y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). The analysis should be made assuming continued normal mining operations. See *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

The governing legal principles for applying the *Mathies* test in this case are controlled by our decision in *Cumberland Coal Resources, LP*, 33 FMSHRC 2357 (Oct. 2011), and by the D.C. Circuit’s decision affirming our ruling. *Cumberland Coal Res., LP v. FMSHRC*, 717 F.3d 1020 (D.C. Cir. 2013). The *Cumberland* case involved the similar issue of whether, in determining if violations of emergency lifeline standards are S&S, the violations should be considered in the context of a contemplated emergency.⁷ In *Cumberland*, we held that the “hazard contributed to by defectively placed lifelines necessarily involved consideration of an emergency situation.” 33 FMSHRC at 2364. This is because “[e]vacuation standards are different from other mine safety standards. They are intended to apply meaningfully only when an emergency actually occurs.” *Id.* at 2367.

Similarly, in affirming the Commission’s decision in *Cumberland*, the D.C. Circuit instructed that the S&S nature of a violation of a lifeline standard must be evaluated in the context of an emergency:

[A] violation of the lifeline standard could only contribute to the delayed evacuation from emergency hazard if there is an emergency, but the likelihood of an emergency will usually have nothing to do with the violation of the emergency safety standard. Thus, if the decisionmaker does not assume the existence of the emergency, then his focus must necessarily shift away from the nature of the violation to the likelihood of the emergency.

717 F.3d at 1027.

⁷ In the instant case, the parties moved to suspend briefing before the Commission pending our issuance of a decision in *Cumberland*. We stayed briefing until after our *Cumberland* decision was issued.

Just as the need for a lifeline in *Cumberland* would arise only in the event of an emergency, the need for adequate escapeways will only arise in the context of an emergency evacuation from the mine. Accordingly, we reject Spartan’s contention that the escapeway violations were not S&S because the parties stipulated that an emergency was not reasonably likely to occur.

We now examine each step of the *Mathies* test to determine whether the Judge correctly analyzed each element based on the record.

As the Judge noted, the first *Mathies* element is satisfied by the parties’ stipulations of violations. Dec. at 4-5.

With regard to the second *Mathies* element, the Judge determined in accordance with the parties’ stipulations, that “a discrete safety hazard . . . contributed to by the escapeway violations is that of impeding the evacuation of miners in the event of an emergency.” Dec. at 5; Stips. 15, 21. We conclude that this statement is an accurate description of the relevant hazard contributed to by the violations in this case. The judge’s finding of a discrete safety hazard is consistent with our holding in *Cumberland*. As the D.C. Circuit noted in *Cumberland*, “the hazard here is delayed escape from emergency, but there can be no delayed escape, unless there is an emergency in the first place.” 717 F. 3d at 1027.

In addressing the third *Mathies* element, the Judge determined that the escapeway standards are specifically designed to protect miners in the event of a mine emergency and therefore that the standard “must be analyzed in the context of an anticipated emergency.” Dec. at 5-6. The Judge’s conclusion that it is not necessary for the Secretary to prove the likelihood of an emergency is fully consistent with our analysis and that of the D.C. Circuit in *Cumberland*. Indeed, the text of the *Mathies* test specifically requires the Judge to consider if there is a “reasonable likelihood that the hazard contributed to” – i.e., the danger of impeded evacuation in the event of an emergency – will result in an injury. The parties stipulated with respect to both citations that “[i]n the event that an emergency requiring the use of the escapeways described in [the citations] was to occur, it was reasonably likely that injuries resulting in lost workdays or restricted duty to [11 and 16] miners, respectively, would occur.” Dec. 3-4, Stips. 17, 23. Thus, the third *Mathies* element of reasonable likelihood of a resultant injury is satisfied.

The fourth element of *Mathies* also is established by the parties’ stipulations of the reasonable likelihood of injuries resulting in lost workdays or restricted duties. Dec. 3-4, 6; Stips. 17, 23. We conclude that the record establishes that the hazard contributed to by the violations would be reasonably likely to result in an injury of a reasonably serious nature as required by our S&S analysis. Thus, the Judge correctly determined that all four elements of the *Mathies* test had been satisfied.

In rejecting Spartan’s arguments, we note that the Commission has never required the establishment of a reasonable likelihood of a fire, explosion, or other emergency event when considering whether violations of evacuation standards are S&S. *Cumberland*, 33 FMSHRC at 2366. See *Maple Creek Mining, Inc.*, 27 FMSHRC 555, 563-64 & n.5 (Aug. 2005) (where the

Commission found that the failure to maintain an escapeway in safe condition was an S&S violation, noting that “in those circumstances [when] miners would be seeking quick exit from the mine in an emergency[,] . . . the potential for slips and falls would therefore be even greater during a mine evacuation.”)

III.

Conclusion

For the foregoing reasons, we affirm the decision of the Judge in all respects.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura
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/s/ William I. Althen
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