FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

DEC 09 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINSTRATION (MSHA)	:	Docket Nos. SE 2009-261-R SE 2009-487
v.	:	
OAK GROVE RESOURCES, LLC	:	

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

DECISION

BY: Jordan, Chairman; Nakamura and Althen, Commissioners

These proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"), involve a citation issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Oak Grove Resources, LLC following a fatal accident at its mine. The Secretary alleges that Oak Grove violated a notice of safeguard ("safeguard") which had been previously issued to the mine pursuant to section 314(b) of the Mine Act, 30 U.S.C. § 874(b).

Oak Grove contested the citation and the associated civil penalty before a Commission Administrative Law Judge. Initially, the Judge vacated the citation; he concluded that the safeguard had not been validly issued and, therefore, a violation of the safeguard could not be sustained. 33 FMSHRC 846, 852-54 (Mar. 2011) (ALJ). The Secretary petitioned the Commission for review, which we granted.

The Commission reversed the Judge, concluded that the safeguard was valid, and remanded the citation to the Judge for further proceedings as appropriate. 35 FMSRHC 2009, 2015 (July 2013).

On remand, the Judge concluded that Oak Grove violated the safeguard and that the violation was significant and substantial ("S&S").[1] 35 FMSHRC 3422, 3431 (Nov. 2013) (ALJ). Oak Grove then filed a petition for discretionary review, which we granted.

For the reasons that follow, the Commission now affirms the Judge's conclusion that Oak Grove violated the safeguard, but reverses his decision that the violation was S&S. The proceedings are remanded to the Judge so that he may assess an appropriate civil penalty.

---

[1] The "significant and substantial" terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguished as more serious in nature any violation that "could significant and substantially contribute to the cause and effect of a . . . mine safety and health hazard."

I.

Legal Framework

Although an operator is usually cited for violations of mandatory safety and health standards developed through notice-and-comment rulemaking pursuant to Title I of the Mine Act, 30 U.S.C. § 811(a), Title III of the Mine Act also gives the Secretary the authority to issue safeguards in underground coal mines to reduce hazards associated with the transportation of miners and materials. 30 U.S.C. § 874(b).[2] The Secretary implements this provision by authorizing inspectors to issue safeguards on a mine-by-mine basis. A safeguard informs the mine operator about conduct that is mandated or prohibited in a given situation involving transportation in the mine. The inspector issues the safeguard in writing and indicates a time by which the operator must provide and subsequently maintain that safeguard. 30 C.F.R. § 75.1403-1(b). If the operator does not comply with the safeguard, the inspector issues a citation. *See Wolf Run Mining Co. v. FMSHRC*, 659 F.3d 1197, 1204 (D.C. Cir. 2011).

II.

Factual and Procedural Background

On May 28, 2008, a fatal accident occurred at an underground coal mine operated by Oak Grove in Jefferson County, Alabama. Stips. at 1-2; Gov't Ex. 4, at 2. Oak Grove was in the process of transporting the body of a shearing machine to the mine's longwall face. The 24-ton body was placed on a "shearer carrier," a haulage car specifically designed for the task. Tandem locomotives led the shearer carrier, while a second set of tandem locomotives pushed the shearer carrier down the main haulage road.

Motor No. 8 led the procession. Connected to its rear by a coupling device was Motor No. 3, establishing a rigid connection. Motor No. 3 was then connected to the shearer carrier by a one inch diameter, *flexible,* wire rope. The shearer carrier was in turn connected to Motor No. 4 by a solid drawbar. Finally, Motor No. 4 was connected to Motor No. 9 by a coupling device, establishing a rigid connection. The wire rope connection between Motor No. 3 and the shearer was the only connection that was not rigid.[3]

As the lead motors ascended an incline in the mine floor, the shearer carrier derailed. *Id.* It was the fifth time the carrier had derailed during that trip. The operator of Motor No. 3, miner Lee Graham, exited his motor and walked over to examine the derailed carrier. Graham was standing on

---

[2] Section 314(b) of the Act states that "[o]ther 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." 30 U.S.C. § 874(b).

[3] Motors No. 4 and No. 9, the pushing motors, generated most of the force to move the carrier. Tr. 99, 104. The wire rope connecting Motor No. 3 to the shearer carrier behind it "was [used to] help pull the equipment." Tr. 104. It was also used "to help guide the carrier, particularly around curves, and to prevent derailments by using tension." Gov't Ex. 4 at 4; *see also* Tr. 44. The rope was used to pull the carrier back into position on the rails following a derailment. Gov't Ex. 4, at 6; Tr. 106-07.

the tracks, downhill from Motors No. 3 and No. 8, when the motors rolled down the grade, pinning him against the carrier and inflicting the fatal injuries.[4]

David Allen, a mining engineer and a supervisor at MSHA, investigated the accident. Tr. 16-17, 19; Gov't Ex. 4, at 3. As a result of his investigation, he issued Oak Grove a citation for a violation of Safeguard No. 2604892. The citation states:

> A fatal accident occurred on May 22, 2008, when a motorman was crushed between a derailed haulage car and the locomotive he had been operating. The haulage car was being pushed on the main haulage road. The victim would not have been exposed to the pinch point between the locomotive and the haulage car if the car was being pulled instead of pushed on the main haul road.

Gov't Ex. 3 (Citation No. 7696616). Inspector Allen designated the citation as S&S. *Id.*

The safeguard had been issued to Oak Grove on March 3, 1986; it implements the criteria at 30 C.F.R. § 75.1403-10(b). The safeguard states:

> The No. 902 battery powered locomotive was being used to push two loaded supply cars consisting of a car of timber and a car of roof bolts down the graded haulage supply mine track entry of the main south area of the mine, near the intersection of the No. 7 and No. 14 section switch and the No. 10 and the No. 5 section switch. Such area is approximately 2100 feet from the main bottom area of the mine and approximately 3600 feet from the No. 7 section and the No. 10 sections, respectively.
>
> This notice to provide safeguard requires that cars on main haulage roads not be pushed except where necessary to push cars from the side tracks located near the working section to the producing entries and rooms.

Gov't Ex. 2 (Safeguard No. 2604892).

Oak Grove contested the citation, the S&S designation, and the Secretary's proposed $55,000 civil penalty. Oak Grove's contest of the citation included a challenge to the validity of the underlying safeguard.

On August 19, 2010, an Administrative Law Judge issued an order concluding that the safeguard was in effect at the time of the accident. 32 FMSHRC 1081 (Aug. 2010) (ALJ) (order

---

[4] The brakes had not been set on either of the lead motors. 33 FMSHRC at 850; Tr. 57-58; Gov't Ex. 8. According to MSHA's Report of Investigation, post-accident tests "revealed that the motors would not move if either the service brakes or the park brakes on either motor were engaged." Gov't Ex. 4, at 8.

denying Oak Grove's motion for summary judgment).[5] Thereafter, the parties proceeded to a hearing. On March 28, 2011, the Judge issued a decision determining that the safeguard was not validly issued. 33 FMSHRC at 852 (citing *Southern Ohio Coal Co.*, 7 FMSHRC 509, 512 (Apr. 1985) ("*SOCCO I*"). Therefore, the Judge vacated the citation at issue. *Id.*

On July 25, 2013, the Commission reversed the Judge and held that the safeguard is valid because it identifies a hazardous practice and specifies a remedy. 35 FMSHRC at 2014. We remanded the case to the Judge to determine if the Secretary proved that Oak Grove violated the safeguard as alleged and to conduct other appropriate proceedings.

On November 13, 2013, the Judge issued his decision upon remand. He ruled that Oak Grove had violated the safeguard, rejecting Oak Grove's argument that the safeguard did not apply when the mine was moving heavy equipment such as the shearer carrier. 35 FMSHRC at 3425-26. The Judge also concluded that the Secretary proved that hazards associated with pushing contributed to the fatal incident, rejecting the operator's claim that the accident had no relation to the safeguard. The Judge therefore affirmed the Secretary's S&S designation, and assessed a penalty of $55,000.

III.

Disposition

When considering citations issued for alleged violations of safeguards, the Commission interprets the language of the safeguard narrowly to ensure that the operator was provided sufficient notice. *SOCCO I,* 7 FMSHRC at 512; *see also Green River Coal Co.*, 14 FMSHRC 43 (Jan. 1992); *Bethenergy Mines, Inc.*, 15 FMSHRC 981 (June 1993). The D.C. Circuit has recognized that "the Commission has through adjudication interpreted the criteria so as to ensure that an operator has adequate notice of what safeguard is required." *Wolf Run,* 659 F.3d at 1202 & n.8. This approach balances the Secretary's broad grant of authority to issue what are in effect mine-specific mandatory standards against the absence of the traditional protections accorded by notice-and-comment rule making procedures. *SOCCO I,* 7 FMSHRC at 512. When issuing a safeguard, however, the Secretary is required to provide written notice of the hazardous condition identified by the inspector and a specific remedy. *The American Coal Co.*, 34 FMSHRC 1963, 1969 (Aug. 2012).

A. Oak Grove violated the safeguard.

On review, Oak Grove argues that the Judge erred by failing to narrowly construe the safeguard as required by *SOCCO I.* More specifically, Oak Grove contends that because the safeguard cites the practice of pushing loaded supply cars, it cannot be construed as applying to the practice of pushing heavy equipment on a haulage car.

---

[5] On August 31, 1987, MSHA issued a "waiver" to Oak Grove which 'permitted [Oak Grove] to push heavy mining equipment on track haulage roads" if six specified conditions were met. OG Ex. 1, at 2. By letter dated December 3, 2001, MSHA informed Oak Grove that the waiver was void. *Id.* at 1.

We disagree and affirm the Judge's finding of a violation. We conclude that the safeguard applies in this case.[6]

The safeguard "requires that cars on main haulage roads [are] not [to] be pushed." Gov't Ex. 2. Although the hazardous condition discussed in the safeguard happened to involve supply cars carrying timber and roof bolts, the remedy set forth prohibits the pushing of "cars" on the main haulage road. We conclude that the specific equipment carried by the car is immaterial. Oak Grove was on notice that it was prohibited from pushing all "cars" on "main haulage roads."

We are not persuaded by Oak Grove's arguments that slight differences between a supply car and shearer carrier, such as differences in the amount of ground clearance from the mine floor, exempt the carrier from the requirements of the safeguard. Nor are we persuaded that the speed at which the carrier was traveling or the number of motors used in the move are sufficiently meaningful distinctions to invalidate application of the safeguard.[7] Simply stated, the safeguard provided notice that the operator was prohibited from pushing cars with a limited exception, and it is undisputed that the exception was not met. *See* Gov't Ex. 2 ("cars on main haulage roads [shall] not be pushed except where necessary to push cars from the side tracks located near the working section to the producing entries and rooms").

Furthermore, we note that while the Secretary initially provided Oak Grove with a waiver of the requirements of the safeguard when it pushed heavy equipment, the waiver was revoked in 2001. Revocation of the waiver by MSHA provided additional notice to Oak Grove that the safeguard prohibited the practice of pushing heavy equipment.

Accordingly, the Secretary has provided sufficient notice to the operator that the safeguard governs pushing all cars on main haulage roads, including cars carrying heavy equipment. As a result, we uphold the citation in question.

B. The Judge erred by finding that the violation was significant and substantial.

A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to by the violation 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 further explained:

---

[6] Commissioner Althen did not participate in the Commission's initial *Oak Grove* decision. Although Oak Grove continues to contest the validity of the safeguard, Commissioner Althen finds that the validity of the safeguard for purposes of Commission review was established in the Commission's initial decision. Thus, he expresses no opinion on the validity of the underlying safeguard.

[7] Oak Grove argues that "the safeguard is only applicable to the transportation of specific supplies and materials, namely timbers and roofbolts." OG Br. at 19. We conclude that Oak Grove's interpretation of the safeguard would lead to absurd results. In order to issue enforceable safeguards, inspectors would need to separately cite each individual piece of equipment that should not be transported, potentially requiring dozens of safeguards to fully implement the criteria at 30 C.F.R. § 75.1403-10(b), an unnecessary burden for both the inspectors and mine management.

> 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.

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).

On remand, the Judge affirmed the S&S designation. 35 FMSHRC at 3430. The first element of the *Mathies* test was satisfied when the Judge affirmed the violation. The Judge concluded that the second element was satisfied because the Secretary established three discrete hazards "attendant to the practice of pushing cars." *Id.* Those hazards are "diminished visibility, the creation of a pinch point and the lack of positive control." *Id.* With respect to the third *Mathies* element, the Judge concluded that the evidence demonstrated that the hazards resulted in the derailment of the shearer carrier, and it was during the course of assessing the derailment that the accident occurred. Finally, the Judge found that it was reasonably likely that the injury would be of a reasonably serious nature.

For the reasons that follow, we conclude that the Judge's S&S determination was erroneous because substantial evidence does not support a finding that this violation (pushing the shearer carrier) contributed to diminished visibility, the creation of a pinch point, or lack of positive control.

We discuss each of these hazards in turn.

Decreased visibility

The record reflects that decreased visibility was not an issue in the circumstances presented by this case as a miner was operating a motor at the head of the convoy, and was therefore in front of the pushing motors. As described above, Lee Graham was operating the No. 3 Motor (the second car in the procession), and Oak Grove's assistant general mine foreman/day-shift foreman was riding on Motor No. 4 (the fourth car). Tr. 98-100. As counsel for the operator explained at oral argument before the Commission, "the whole theory that you are sitting behind the supply cars and not being able to see up ahead doesn't apply because you actually have somebody up ahead." Oral Arg. Tr. 11.[8]

In sum, substantial evidence does not support a finding that the pushing violation contributed to the hazard of decreased visibility.

Creation of a pinch point

There is also not substantial evidence in the record to support the finding that pushing the cars contributed to the hazard of a pinch point. Rather, the inspector testified that a pinch point

[8] At the hearing, counsel for the Secretary never asked any witness if visibility obstructions contributed to this derailment.

was created by the use of wire rope to connect Motor No. 3 and the shearer carrier. Tr. 44. When the inspector was asked on direct examination how the operator should remedy the hazard, the inspector testified that it should "use a drawbar or tongue [as] the rigid connection between the shearer carrier and the motor and pull it." Tr. 44. In fact, after the accident at the mine, a drawbar was attached in place of the wire rope, and Oak Grove then continued to move the shearer carrier to the longwall face. Tr. 73. Thus, the inspector clearly testified that the use of a wire rope contributed to the hazard of a pinch point. Significantly, the inspector did not articulate how *pushing* the shearer carrier contributed to this specific hazard, as required by element two of *Mathies.*

Loss of positive control

The evidence in this case demonstrates that pushing the shearer carrier did not contribute to the hazard of a loss of positive control of the car. Nor is there any evidence that pushing caused the derailment.

There is no testimony regarding the likelihood of derailment when pushing a carrier as opposed to pulling the carrier. Furthermore, the inspector never stated that the lack of control increased the probability of a derailment. Rather, he testified that the derailment occurred "because there was slack in the wire rope between the #3 motor and the shearer carrier." Tr. 60. Furthermore, at oral argument before the Commission, counsel for the Secretary conceded that material on the mine floor caused the shearer carrier to derail. Oral Arg. Tr. 33, 36; Gov't Ex. 4, at 7 ('[a] build-up of material consisting primarily of a muddy combination of rock dust and mine floor materials . . . most likely caused the carrier to derail as indicated during interviews").

In concluding that the safeguard violation contributed to the hazard of a loss of positive control, Commissioner Cohen relies solely on one page of transcript testimony wherein the inspector stated that by pushing the cars, a miner cannot maintain good positive control of the loads. Slip op. at 11 (citing Tr. 43). However, when the inspector made this statement in the context of his general explanation of the hazards addressed by the safeguard (Tr. 41), he intertwined the hazard of poor visibility (which, as we have explained, did not apply in this case) with the loss of positive control. The inspector testified that "if you're pushing a load and it derails, since your visibility is obstructed, a lot of times you don't know that it's derailed until you've pushed it on farther. You don't have as good control. . . . If you're pulling a load, you can see if it derails and you know to stop immediately. And the severity of the accident would be lessened." Tr. 43. At oral argument, Secretary's counsel contended that pushing the cars is more dangerous than pulling them, but he also based this on the need for visibility. Specifically, he argued that "because the load was being pushed, those who were propelling the load forward could not see the build-up." Oral Arg. Tr. 33.

For these reasons, we conclude that substantial evidence does not support a finding that the violation of the pushing safeguard contributed to the hazards identified by the Secretary. Thus, element two of the *Mathies* test has not been met.

In fact, the record evidence identifies an independent cause of the fatality: the park and service brakes were not set on Motors No. 3 or No. 8 at the time of the accident. Gov't Ex. 4, at 8-9. The Report of Investigation states that "if either the service brakes or the park brakes on either motor were engaged," Motors Nos. 3 and No. 8 would not have moved. *Id.* at 8. This evidence demonstrates that an independent act, i.e., the failure to set the brakes on either motor,

occurred after the violation of the safeguard. The motors rolled downhill and tragically crushed the miner. Indeed, the Judge recognized this independent cause in his initial decision, stating that "this accident occurred not because of any claimed failure to comply with [the] safeguard. In short the accident did not occur from pushing the shearer." 33 FMSHRC at 850.[9]

Because the Secretary confined his case to the circumstances of the accident and did not provide evidence of the likelihood of injuries from any of the alleged hazards created by pushing cars in the context of continued normal mining operations, he also failed to prove the third step of *Mathies*. The record is bereft of evidence regarding any likelihood of injuries from hazards contributed to by pushing cars during continued normal mining activity in the context of the particular facts in this case. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985); *National Gypsum*, 3 FMSHRC at 825. In presenting his case on the third element of the *Mathies* test, the Secretary relied entirely on the occurrence of the accident at issue, producing no testimony demonstrating that hazards he identified (poor visibility, creation of pinchpoints, and lack of positive control), would have been reasonably likely to cause injury if normal mining operations had continued.

The Secretary's decision to base his S&S argument on the evidence regarding this fatality limited both the evidence and the arguments he asserted to support a reasonable likelihood that hazards associated with pushing would result in serious injury. Perhaps the Secretary could have introduced evidence that the violation would reasonably have been likely to have resulted in a serious injury from continuation of the transportation of the equipment. However, in concentrating solely on the occurrence of the fatality, he failed to do so.[10] Because the Secretary's case was confined to the accident, the Secretary has failed to meet his burden in proving element three of *Mathies* in this case.[11]

---

[9] The Judge subsequently contradicted this finding in his decision on remand. 35 FMSHRC at 3430 (relying on "the closely-connected hazardous pushing practice which precipitated the derailment").

[10] At oral argument before the Commission, the Secretary's counsel was asked whether there was any record evidence in this case that derailments are reasonably likely to cause death or serious injury. He replied, "In the abstract? No. No. All of the evidence in this case is about this case." Oral Arg. Tr. 51.

[11] Although Commissioner Cohen states that substantial evidence supports his theory that there was a reasonable likelihood that the hazards will result in an injury, slip op. at 12-13, the only evidence he cites is the weight of the equipment transported. Essentially, therefore, his dissent simply assumes a reasonable likelihood that a serious injury would have occurred had the movement of the equipment not been interrupted.

IV.

Conclusion

For the stated reasons above, we affirm the Judge's conclusion that Oak Grove violated Safeguard No. 2604892. We reverse the Judge's conclusion that the violation is "significant and substantial" because that conclusion is not supported by substantial evidence in the record. This proceeding is remanded to the Judge for assessment of an appropriate penalty.

Mary Lu Jordan, Chairman

Patrick K. Nakamura, Commissioner

William I. Althen, Commissioner

Commissioner Cohen concurring, in part, and dissenting in part:

I concur with my colleagues' conclusion that Oak Grove violated Safeguard No. 2604892 when it pushed a shearer carrier on the main haulage road. I write separately because I believe that the Judge's determination that the violation was significant and substantial (S&S) is supported by substantial evidence in the record, and my colleagues are incorrect in concluding otherwise.

The Commission reviews a Judge's factual determinations under the *Mathies* test in accordance with the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I); *see also Black Beauty Coal Corp.*, 34 FMSHRC 1733, 1741 (Aug. 2012), *aff'd sub nom. Peabody Midwest Mining, LLC v. FMSHRC,* 762 F.3d 611 (7th Cir. 2014). "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 (Nov. 1989) (quoting *Consolidation Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

Under the substantial evidence standard, the Commission's task is a narrow one. "[E]ven if we would have weighed the evidence differently," our sole responsibility is to "determine whether a ... reasonable factfinder could have reached the conclusions actually reached by ... the ALJ." *Sec'y of Labor v. Keystone Coal Mining Corp.,* 151 F.3d 1096, 1104 (D.C. Cir. 1998) (internal quotations omitted).

For the reasons that follow, I would hold that the record contains substantial evidence to support the Judge's determinations as to each of the four *Mathies* elements.

***Mathies* Step Two**

The second element of *Mathies* requires the Secretary to demonstrate that the violation contributed to a safety hazard. The Secretary argued that the violation contributed to three distinct hazards. Sec'y Post-Hearing Br. at 8-9. The Judge concluded that the Secretary demonstrated that pushing the carrier contributed to these hazards. 35 FMSHRC at 3430. I conclude that the record contains substantial evidence to support the Judge's decision.

Decreased Visibility

Common sense dictates that a 24-ton shearer carrier would obstruct the vision of a motor operator who was pushing the load along a graded haul road. In fact, the inspector testified that when a miner uses a motor to push rather than to pull a load it is "harder to see the track and the traffic in front of you." Tr. 43. Notably, the inspector was testifying about the visibility of *the miner who was actively engaged in pushing* the shearer-carrier in violation of the safeguard.

The majority concludes that it was not reasonable for the Judge to rely on the inspector's testimony that pushing the carrier contributed to a visibility hazard. *See* slip op. at 6. Instead, the majority independently determines that complete visibility of the track and traffic was not necessary for the miners operating the motors pushing the load. Citing oral argument by Oak Grove's counsel, the majority concluded that the position of the two miners in front of the load rendered the visibility requirements of the pushing motor operators

superfluous. *See* slip op. at 6 ("decreased visibility was not an issue in the circumstances presented by this case as a miner was operating a motor at the head of the convoy").

However, the majority ignores the fact that when a load is being pushed, the power to move it comes from the pushing motors, while the two motors which Oak Grove placed in front of the load were used to guide the shearer carrier and to help prevent derailment of the carrier. Gov't Ex. 4, at 2; Tr. 35, 69. When a load is being pulled, the miner who operates the pulling motor can see what is in front of him and react immediately if there is a problem with the track or traffic in front of the motor. Tr. 43. However, with the configuration used by Oak Grove, the miner operating the front motor could *see* a problem ahead (just as he would if he were operating a pulling motor), but would have to also *communicate* with the miner operating the pushing motor so that the miner operating the pushing motor could take effective action to avoid the problem. The necessity of communicating as well as seeing thus contributes to a hazard.

Creation of a pinch point

Contrary to the majority opinion, the inspector did testify how pushing the load rather than pulling it contributed to the hazard of the creation of a pinch point. The inspector explained that when a load is pulled, there is a solid bar – a tongue or drawbar – between the motor and the car being pulled. Tr. 29. However, with the configuration used by Oak Grove, instead of a bar there was a wire rope connecting the car with the load and the motor in front of it. Tr. 29, 35, 37, 39. The wire rope was a component of the pushing configuration; it was connected to a forward motor to supply tension to the carrier which would help to prevent the shearer carrier from derailing while the carrier was being pushed, but in turn it created the hazard of a pinch point. Tr. 44, 50-51.

Loss of Positive Control

The Judge also concluded, based on the inspector's testimony, that pushing heavy equipment decreases the amount of control the operator has over the load. 35 FMSHRC at 3430.

My colleagues conclude that "[t]he evidence in this case demonstrates that pushing the shearer carrier did not contribute to the hazard of a loss of positive control of the car." Slip op. at 7. However, the inspector testified that pushing a car provides less control as compared to pulling the car. Tr. 43 (stating that pushing the carrier creates a hazard because "[y]ou don't have as good control. It's like pulling a boat, it's easier to pull a boat than it would be to push a boat."). An inspector's judgment is an important element in a S&S determination. *Mathies Coal Co.*, 6 FMSHRC 1, 5 (Jan. 1984) (citing *Cement Div., National Gypsum Co.*, 3 FMSHRC 822, 825-26 (Apr. 1981)); *see also Buck Creek Coal Inc., v. MSHA*, 52 F.3d at 133, 135-36 (7th Cir. 1995) (stating that the Judge did not abuse his discretion in crediting the opinion of an experienced inspector). [1]

[1] The majority implies that I have made the legal conclusion that the violation contributed to the hazard of loss of control. *See* slip op. at 7. This is incorrect. Instead, as previously stated, I conclude that substantial evidence supports *the Judge's* legal conclusion that the violation contributed to a loss of control. *See* 35 FMSHRC at 3430. It was reasonable for the Judge to rely on the inspector's opinion that pushing a carrier provides less control as

The Judge relied on the testimony of the MSHA inspector in finding that the violation of the safeguard contributed to three discrete safety hazards – decreased visibility, creation of a pinch point and loss of positive control. My colleagues assert that Step 2 of the *Mathies* test was not met here because "substantial evidence does not support a finding that the violation of the pushing safeguard contributed to the hazards identified by the Secretary." Slip op. at 7. However, as described herein, the inspector testified as to each of the three hazards. The question of whether a particular violation is S&S is based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988). Here the particular facts surrounding the violation include the configuration of the motors and shearer carrier which Oak Grove used to move the shearer. The inspector's testimony about how the pushing of the shearer carrier with that configuration contributed to discrete hazards provides substantial evidence in the record supporting the Judge's finding as to Step 2 of *Mathies.*

***Mathies* Steps 3 and 4**

My colleagues also state that the record does not support the Judge's decision that it was reasonably likely that the hazards contributed to would result in a reasonably serious injury. *See* slip op. at 8. In reaching this conclusion, the majority restricted their analysis to the evidence relating to the derailment and the fatal accident which followed.[2]

However, it is well established that a Judge's evaluation of the reasonable likelihood of injury should be made *assuming* continued normal mining operations. *See U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (emphasis added). The evaluation is made in consideration of the length of time that the violative condition existed prior to the condition and time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). More recently, the Commission has reaffirmed that the S&S analysis should not contain any assumption that the violative condition would be abated by the operator. *Paramont Coal Co. Virginia LLC,* 37 FMSHRC 981, 985 (May 2015).

Therefore, the majority's consideration of the fatal accident in isolation from continued normal mining operations is inconsistent with our case precedent.

In contrast, I believe that the record contains substantial evidence to support the conclusion that under continued normal mining operations it was reasonably likely that the hazards would contribute to a reasonably serious injury. It is undisputed that Oak Grove transports heavy equipment such as shearers, scoops, shields, and continuous miners on the haulage road a couple of times a year. Tr. 86-87, 108-09. This equipment is of tremendous weight. For example, the shearer weighs 24 tons and a shield weighs approximately 19 tons. Tr. 27, 46, 108-09. Since at least January 2002, the practice at Oak Grove was to push heavy

---

compared to pulling.

[2] Admittedly, the Secretary at trial (but not on appeal) and the Judge also confined their analysis to the facts of the accident rather than considering Steps 3 and 4 of *Mathies* in the context of continued normal mining operations.

equipment because the drawbar was oriented on the outby side of the carrier.[3] Tr. 85-86, 89, 99. The evidence supports the conclusion that a loss of visibility, or creation of a pinch point, or a loss of control that occurs during the move of a 24-ton piece of equipment (or equivalent) on a graded haulage road would be reasonably likely to result in a reasonably serious injury. *See Peabody Midwest*, 762 F.3d at 616 (the third step under *Mathies* only requires a Judge to determine whether, if a discrete hazard occurs (regardless of likelihood), it is reasonably likely that a reasonably serious injury would result). Indeed, it is hard to understand why the majority would conclude that any loss of control of such equipment on a graded road in a confined space would not reasonably be likely to result in an injury. According to *Peabody,* the Commission must determine whether, *if the hazard occurs* – e.g., a miner loses control of a 24-ton piece of equipment – there is evidence to support a conclusion that it is reasonably likely a miner will suffer an injury. I join the MSHA inspector and the Judge in concluding that the evidence supports such a conclusion. A derailment is just one of the events that may occur as a result of a loss of control, creation of a pinch point, or diminished visibility.[4]

The accident at issue in these proceedings may not have occurred in a foreseeable manner. A mine is a dynamic environment and hazardous practices may lead to injuries in unpredictable ways. The Commission should not conflate our S&S analysis with tort law and require the Secretary to demonstrate that the violative practice actually and proximately caused a specific injury. Instead, the Commission should continue to consider whether it was reasonably likely that the hazards would contribute to a reasonably serious injury if normal mining operations continued with the hazardous practice.

Therefore, I would affirm the Judge's conclusion that the violation was S&S, and dissent from the majority's reversal of that portion of the Judge's Decision.

Robert F. Cohen Jr., Commissioner

[3] After the accident Oak Grove acquired a new carrier which can be pulled. Tr. 114.

[4] The majority contends that I "simply assume" that there is a reasonable likelihood that serious injury would occur during the course of continuing mining operations. Slip op. at 8 n.11. I disagree. Instead, I conclude that the weight of the equipment, together with the frequency of the moves, the graded haul road used to transport the equipment, and the number of miners involved in each move are factors which, combined, provide substantial evidence to support the Judge's conclusion that the third *Mathies* element was satisfied. No "assumptions" are necessary.

Commissioner Young, dissenting:

In the Commission's initial decision, I dissented from the finding that the safeguard in this case was valid. 35 FMSHRC 2009, 2016-18 (July 2013). Because we remanded the case to the judge after the Commission majority upheld the facial validity of the safeguard, the operator has not had an immediate opportunity to appeal our holding on that issue; it is not final, nor is it binding on any subsequent appeal. *See Kyocera Corp. v. Prudential-Bache Trade Serv., Inc.*, 341 F.3d 987, 995 (9th Cir. 2003) (legal conclusions of three-judge panel binding on other three-judge panels reviewing case, but not on Court rehearing case en banc).

I continue to believe that the ALJ decided this issue correctly the first time, and I incorporate by reference my dissent in our previous decision. I would further note that the majority's own opinion would seem fatal to the theory under which the safeguard was affirmed – i.e., that the practice of pushing cars in this mine was so obviously hazardous that nothing more particular needed to be said in describing the hazard allegedly identified in the safeguard.

Indeed, in a case arising from a *fatal accident*, my colleagues have found that none of the supposed dangers MSHA has postulated significantly and substantially contributed to a mine safety and health hazard in this case. Slip op. at 5-8. This exposes the glaring inadequacy of the safeguard notice.

Safeguards were intended to provide immediate protection against particular, mine-specific transportation hazards in mines. *See Southern Ohio Coal Co.*, 14 FMSHRC 1, 8 (Jan. 1992) ("*SOCCO II*") ("A safeguard . . . must address a transportation hazard that is actually present in the mine in question."). In *SOCCO II*, the Commission identified the parameters of MSHA's authority to issue safeguards as follows:

> In order to issue a notice to provide safeguards, an inspector must determine that there exists at a mine an *actual* transportation hazard that is not covered by a mandatory standard; that a safeguard is *necessary* to correct the hazardous condition; and the corrective measures that the safeguard should require.

Id. (emphases added).[1]

While the Solicitor initially agreed with my suggestion that his agency believes pushing cars to be a *per se* hazardous practice, Oral Arg. Tr. at 43-45, he has disclaimed that position as a matter of agency policy. Ltr., Edward Waldman, Esq., to Lisa Boyd, May 22, 2015. I am somewhat relieved to learn that MSHA has not failed for decades to promulgate a formal rule protecting all miners from a known serious danger to miner health and safety. However, the

[1] Section 314(b) originates from the Federal Coal Mine Health and Safety Act of 1969. While the legislative history of this provision is limited, it is apparent that Congress recognized the need to grant the Secretary supplemental authority to address specific transportation hazards in a particular mine in addition to the general obligation to promulgate mandatory standards through notice and comment rulemaking. *See* 30 U.S.C. §§ 811, 861.

Secretary's concession on this point precludes the identification of the practice, alone, as a hazardous condition.

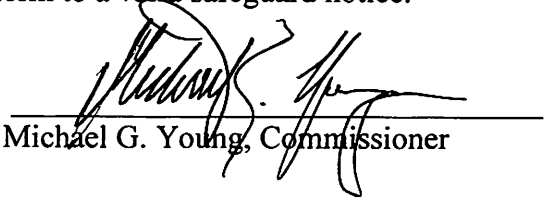
Because the practice itself is not characterized as inherently and obviously dangerous, the expression of the particular dangers supposedly inherent in the practice become more critical. The safeguard, however, is silent on the question of particular hazards. And among those identified by the Secretary, none was contributory to the fatal accident. Furthermore, the majority has found that the practice at issue here was not an S&S violation, reversing the ALJ's findings on all three of the Secretary's bases.

The Secretary asserted, and the Judge found, that pushing cars creates a visibility issue. 35 FMSHRC at 3425, 3430. While the visibility problem would have been a sufficient statement of a hazard, had it been expressed properly in the safeguard notice, it was not expressed in the notice. Even if it had been, in this case, miners were positioned on one of the motors which was in front of and helping to steer the car, so the visibility was the same as if the car had been pulled. Thus, the operator might not have been in violation of a safeguard notice that had properly stated poor visibility as the hazard. Slip op. at 6; Tr. 98-100.

The Secretary also claimed that pushing equipment creates a pinch-point hazard, and again the Judge agreed. 35 FMSHRC at 3425, 3430. Again, this hazard is not stated in the safeguard notice. Nor is it self-evident. Indeed, the majority holds that the Secretary has not provided a sufficient explanation under *Mathies* for the manifestation of this hazard. Slip op. at 6. Nothing in *American Coal* excuses the Secretary from describing with particularity a hazard that is not self-evident from the description of the practice or condition. And the majority has found the "hazard" here to be unsupported, even after trial and the opportunity to present evidence in support of the pinch-point hypothesis.

Finally, the Secretary argued that pushing cars gives rise to a lack of "positive control." 35 FMSHRC at 3425, 3430. The majority has concluded that "[t]he evidence in this case demonstrates that pushing the shearer carrier did not contribute to the hazard of a loss of positive control of the car. Nor is there any evidence that pushing caused the derailment." Slip op. at 7. It's not possible to limit that holding to the accident at issue, because, again, there's no description of the hazard itself in the safeguard. Thus, the majority must consider the application of the safeguard notice to the practice involved, and for the third and final time concludes that there's no evidence of the manifest danger suggested by the Secretary – a danger which, under *SOCCO II* and its progeny, including *American Coal,* must be obvious from the prohibited practice.

We have held today that the operator shall be punished because it engaged in conduct which is not formally and properly proscribed by the regulatory program, without any substantial evidentiary support for the required finding that it failed to protect its miners from a dangerous practice or condition. This is error. Once again, I urge the Secretary to at least look at this practice in light of his own concerns and take steps to protect all miners from the potential danger MSHA has found so troubling in this case. And once again, I dissent from the Commission's holding that the operator failed to conform to a valid safeguard notice.



Michael G. Young, Commissioner

Distribution:

R. Henry Moore, Esq.
Jackson Kelly, PLLC
Three Gateway Center, Suite 1500
401 Liberty Avenue
Pittsburgh, PA 15222

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Edward Waldman, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

William B. Moran
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
1331 Pennsylvania Avenue, N. W., Suite 520N
Washington, D.C. 20004