

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20004-1710

MAY 27 2015

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. VA 2010-458
	:	VA 2010-369-R
v.	:	VA 2010-370-R
	:	
PARAMONT COAL COMPANY	:	
VIRGINIA LLC	:	

BEFORE: Cohen, Nakamura, and Althen, Commissioners¹

DECISION

BY: Cohen, Nakamura and Althen, Commissioners

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). They involve Citation No. 8166774, which was issued to Paramount Coal Company Virginia LLC (“Paramont”) by the Department of Labor’s Mine Safety and Health Administration (“MSHA”), for a misaligned conveyor belt at Paramont’s Deep Mine No. 35. The citation alleged a “significant and substantial” (“S&S”)² violation of the safety standard in 30 C.F.R. § 75.1731(b), which requires conveyor belts to be properly aligned.³

The Administrative Law Judge found that the Secretary of Labor failed to prove that the violation of the cited standard was S&S. 35 FMSHRC 1118, 1158 (Apr. 2013) (ALJ). The

¹ Chairman Mary Lu Jordan and Commissioner Michael G. Young assumed office after this case had been considered at a Commission meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218 (June 1994). In the interest of efficient decision making, Chairman Jordan and Commissioner Young have elected not to participate in this matter.

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 any violation that “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.”

³ 30 C.F.R. § 75.1731(b) states that “[c]onveyor belts must be properly aligned to prevent the moving belt from rubbing against the structure or components.”

Judge found that the Secretary failed to establish a confluence of factors which would have resulted in the ignition of a belt fire. The Secretary filed a petition for discretionary review of the Judge's determination that the citation was not S&S, which we granted.

For the reasons that follow, we vacate and remand the Judge's decision that Citation No. 8166774 was not S&S.

I.

Factual and Procedural Background

A. Factual Background

On April 5, 2010, MSHA inspectors Bobby Hall and Lloyd Robinette arrived at Paramont's Deep Mine No. 35, an underground coal mine in Virginia, to conduct a ventilation inspection. During the inspection, the inspectors viewed the area along the No. 3 belt between crosscuts 81 and 84. As discussed below, three citations were issued on that day, and all concerned the same general area. Citation Nos. 8166774 (at issue here) and 8166775 both involved equipment that rubbed against the belt — bottom roller hangers and wooden baffles respectively. Citation No. 8166773 involved accumulations of float coal dust in the area.⁴ The main issue in the case is whether the wooden baffles that were the subject of Citation No. 8166775 should also have been considered as a potential cause of a belt fire when the Judge made his S&S determination regarding Citation No. 8166774.

At approximately 11:30 a.m., Inspector Hall issued Citation No. 8166774 for an S&S violation of section 75.1731(b). Hall alleged that the No. 3 belt was misaligned, resulting in the belt rubbing against 14 bottom roller hangers. He noted that the friction between the belt and the hangers resulted in at least two of the hangers being hot to the touch and that "the atmosphere in the area had a strong odor from rubbing belt." Gov't Ex. P-3. Hall added that "[f]loat dust was present in the area." *Id.*

On the same day, Hall issued two related citations concerning the same general area between crosscuts 81 and 84 alongside the No. 3 belt. The first was Citation No. 8166773, which was also issued at approximately 11:30 a.m. for a violation of 30 C.F.R. § 75.400.⁵ Hall alleged that float coal dust had accumulated along the No. 3 belt on the travelway and offside areas, and in the crosscuts. Hall added that "[f]loat coal dust and coal fines had accumulated

⁴ While both parties filed petitions for discretionary review, only the Secretary's petition, seeking review of the Judge's finding that Citation No. 8166774 was not S&S, was granted. In regard to the two related citations, Citation No. 8166773 was litigated before the Judge below while Citation No. 8166775 was settled. 35 FMSHRC at 1166; *see* Docket No. VA 2010-408.

⁵ 30 C.F.R. § 75.400 states that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein."

between the two new constructed [baffles, referred to in Citation No. 8166775] along the No. 3 belt conveyor near stopping No. 82. No methane was detected.” Gov’t Ex. P-2.

The second related citation was Citation No. 8166775, which was issued at approximately 3:00 p.m. for a violation of 30 C.F.R. § 75.1731(c).⁶ Hall alleged that the misaligned belt was rubbing against two wooden baffles between crosscuts 81 and 82.⁷ The baffles consisted of wooden boards placed on the sides and across the top of the belt as a ventilation control. As stated in Citation No. 8166773, Hall alleged that float coal dust had accumulated between the baffles. Hall specified that “[t]he conveyor belt was not aligned properly and was rubbing the wood material and the atmosphere smelled of an odor of smoldering wood.” Gov’t Ex. P-12.

B. The Judge’s Decision

In regard to whether Citation No. 8166774 was S&S, the Judge concluded that there was a violation — the misaligned belt rubbing against two hot hangers — that contributed to a discrete safety hazard of a belt ignition fire.⁸ 35 FMSHRC at 1154-55. However, the Judge found that the Secretary failed to carry his burden of proof that the hazard was reasonably likely to result in reasonably serious injury. Therefore, the Judge found that the violation was not S&S. *Id.* at 1158.

The Judge focused on the friction between the hangers and the belt, and ignored the friction between the wooden baffles and the belt. The Judge stated that “[t]he Secretary’s reliance on the wooden baffle materials as . . . contributing to the . . . S&S finding is not well taken. The evidence establishes that those materials were removed . . . and the Secretary’s counsel confirmed that the baffles were ‘taken down immediately . . . which just left the belt rubbing, and they did not feel that itself was an imminent danger.’” *Id.* at 1155. As to the friction between the hangers and the belt, the Judge found “no credible evidence of any confluence of factors [which] could have come together to produce any ignition, combustion, fire, or other injury producing hazards described by the inspector.”⁹ *Id.* at 1158. The Judge also

⁶ 30 C.F.R. § 75.1731(c) states that “[m]aterials shall not be allowed in the belt conveyor entry where the material may contribute to a frictional heating hazard.”

⁷ At trial, Paramount disputed the exact location of the wooden baffles on the No. 3 belt at the time in question. Tr. 133-34, 403-04. On remand, the Judge may wish to determine the exact location of these baffles when determining whether Citation No. 8166774 was S&S.

⁸ Based on his credibility determination, the Judge found that only two of the bottom roller hangers were rubbing against the belt at the time of the inspection, with the remaining 12 bottom roller hangers indicating past rubbing by the belt. 35 FMSHRC at 1157-58.

⁹ The Judge found that the following conditions existed:

- (1) the absence of any methane;
- (2) the absence of any float coal dust in suspension;
- (3) no exposed electrical wires;
- (4) no float coal dust turning or backed up in any of the belt rollers;
- (5) a fire

found that the hangers, at the time Hall observed them, were not sufficiently hot to start a belt ignition or fire and that Hall could not specify how hot the hangers must be in order to start a fire. *Id.* at 1157.

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.

(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). An 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).

The first *Mathies* element is satisfied by the Judge's determination of a violation, a finding which has not been appealed. Regarding the second *Mathies* element, we conclude that the Judge correctly determined that the violation contributed to the hazard of a belt ignition fire.

As to the third *Mathies* element, the Commission has recognized that "[i]n addressing [whether a hazard is reasonably likely to result in an injury] . . . in cases involving violations which may contribute to the hazard of . . . explosions or ignitions, the likelihood of an injury resulting from the hazard depends on whether a 'confluence of factors' exists that could trigger an explosion or ignition." *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1992 (Aug. 2014).

resistant and retardant belt line; and (6) the absence of any rock dust or foot prints on the float coal dust accumulations that would indicate the presence of anyone in the area.

Id. at 1157.

Such factors include any potential ignition sources, the presence of methane, float coal dust accumulations, loose coal or other ignitable substance, and the types of equipment operating in the area. See *Utah Power & Light Co., Mining Div.*, 12 FMSHRC 965, 970-71 (May 1990); *Texasgulf*, 10 FMSHRC 498, 501-03 (Apr. 1988).

In this case, the Judge erroneously failed to consider the frictional contact between the wooden baffles and the misaligned No. 3 belt as a factor that could contribute to a belt fire. 35 FMSHRC at 1155. He incorrectly reasoned that the Secretary could not rely on the smoldering baffles as an ignition source (as evidence establishing the third and fourth prongs of the *Mathies* test) because the mine foreman had removed them (which he did in order to abate Citation No. 8166775).

The Commission has long held that an S&S determination must be made at the time the citation is issued “without any assumptions as to abatement” and in the context of “continued normal mining operations.” *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984) (emphasis added). Accordingly, in *Gatliff Coal Co.*, 14 FMSHRC 1982, 1985-86 (Dec. 1992), the Commission determined that the Judge misapplied the *Mathies* test by inferring that the violative condition would cease. Further, the “operative time frame for determining if a reasonable likelihood of injury exists includes both the time that a violative condition existed prior to the citation and the time that it would have existed if normal mining operations had continued.” *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989).

We decline to assume that the operator would have noticed and removed the smoldering baffles in the absence of the inspector’s issuance of Citation No. 8166775. Accordingly, we conclude that there is no merit in the Judge’s reliance on the operator’s abatement of that baffles violation. The Judge should have considered the wooden baffles which were allegedly smoldering and near accumulations of coal dust (including float coal dust) in the confluence of factors analysis.¹⁰

On remand, the presiding Judge should consider whether a confluence of factors, including the wooden baffles, could have contributed to a fire. The Judge should also consider

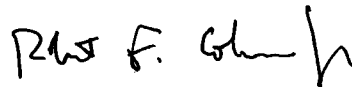
¹⁰ The fact that the smoldering baffles were also the subject of a separate citation, Citation No. 8166775, is irrelevant to consideration of the baffles in the S&S analysis of Citation No. 8166774. Citation No. 8166775 is not duplicative of Citation No. 8166774 because they allege violations of separate standards, involving separate duties. Citation No. 8166775 was issued at approximately 3:00 p.m., three-and-a-half hours after the issuance of Citation No. 8166774. Inspector Hall testified that after issuing Citation Nos. 8166773 and 8166774, he went to the face to determine whether air was getting to the face. Tr. 154-55. After returning to the No. 3 belt between crosscuts 81 and 84, where the belt was misaligned, Inspector Hall observed that the belt was rubbing against the wooden baffles, causing friction, smoldering, smoke and an odor. Tr. 83-84, 155-57. Inspector Hall had not observed this condition earlier. Tr. 157. The fact that the severity of conditions resulting from the misaligned belt had increased over three-and-a-half hours does not militate against an S&S finding for Citation No. 8166774. Rather, it shows the effect of normal mining conditions on the development and worsening of the hazard.

the Secretary's argument that the two hot hangers would eventually heat to a sufficient temperature to contribute as an ignition source.¹¹

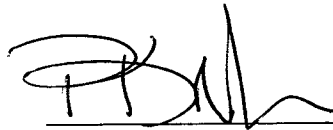
III.

Conclusion

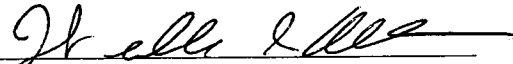
We vacate the Judge's finding that Citation No. 8166774 was not "significant and substantial" and remand the case to the Chief Administrative Law Judge¹² for further proceedings, including whether the violation was "significant and substantial" and what penalty assessment is appropriate.



Robert F. Cohen Jr., Commissioner



Patrick K. Nakamura, Commissioner



William I. Althen, Commissioner

¹¹ The Secretary also asserts that the Judge erred in his S&S finding for Citation No. 8166774 by improperly conflating the S&S and imminent danger analyses contrary to Commission precedent. *See Eastern Assoc. Coal Corp.*, 13 FMSHRC 178, 183 (Feb. 1991) ("the conditions created by [a S&S) violation need not necessarily be so impending as to constitute an imminent danger"). However, we find that the Judge included the phrase "imminent danger" as part of a quotation discussing the abatement of the baffles violation (Citation No. 8166775) and did not discuss any of the requirements for an "imminent danger." 35 FMSHRC at 1155. Therefore, we reject the Secretary's argument, which overlooks the context in which the Judge included the phrase "imminent danger."

¹² The Judge who originally decided this case has since retired.

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