

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20004-1710

August 19, 2014

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket Nos. WEVA 2006-853
 : WEVA 2006-854
v. : WEVA 2007-666
 :
WOLF RUN MINING COMPANY :

BEFORE: Jordan, Chairman; Young, Nakamura, and Althen, Commissioners¹

DECISION

BY: Jordan, Chairman; Young, Nakamura, and Althen, Commissioners

These consolidated civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act” or “Act”). The lone remaining issue is whether the Administrative Law Judge erred when he concluded on remand that Wolf Run Mining Company’s violation of the lightning arrester requirement of 30 C.F.R. § 75.521 was not significant and substantial (“S&S”).² 33 FMSHRC 1197-1202 (May 2011) (ALJ). For the reasons that follow, that determination is reversed, and the penalty the Judge assessed is affirmed.³

¹ Commissioner Robert F. Cohen, Jr., is recused in this case.

² Section 75.521 states in pertinent part that “[e]ach ungrounded, exposed power conductor and each ungrounded, exposed telephone wire that leads underground shall be equipped with suitable lightning arresters of approved type within 100 feet of the point where the circuit enters the mine.” 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 All four Commissioners agree in result, though they split two to two with regard to the rationale for reversing the non-S&S determination under “*Mathies* Element Three.”

I.

Factual and Procedural Background

As discussed in greater detail in the Commission's earlier decision in these proceedings, 32 FMSHRC 1669 (Dec. 2010), 12 miners died and one was seriously injured in January 2006 as a result of an explosion caused by lightning at Wolf Run's Sago Mine, an underground coal mine in Upshur County, West Virginia. Our earlier decision involved five citations for violations of the requirements of section 75.521 issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") following its investigation into the Sago accident. Four of those five citations contained the same type of allegation: a lightning arrester was required but not provided for a power conductor or communications wire that was located in whole or in part aboveground on the surface at the Sago Mine, and either ran to, or originated in, an underground portion of the mine. 32 FMSHRC at 1671.

It is the last of those citations that remains unresolved. Citation No. 7335233 initially charged Wolf Run with violating the lightning arrester requirement with respect to telephone paging and trolley phone system wires that ran from the dispatcher's office and entered the mine through the track entry. Gov't Ex. 5. In his original decision, the Judge found that the trolley wires were grounded, and therefore lightning arresters were not required for them. 31 FMSHRC 640, 664 (June 2009) (ALJ).

With respect to the cited telephone and paging line,⁴ the Judge found a violation of section 75.521, because neither of the two conductors within the wires was grounded. 31 FMSHRC at 664. Wolf Run had abated the telephone line violation by installing two lightning arresters, one for each of the conductors. Tr. 685; Gov't Ex. 5.

In his initial decision, the Judge declined to uphold the designation of the violation as S&S, based on his finding that any electrical surge from lightning would destroy the wires before it entered the mine portal. 31 FMSHRC at 664. In our initial decision, we agreed with the Secretary that the Judge's conclusion regarding the capacity of the telephone wire was not supported by substantial evidence,⁵ in that the record only reflected "the voltage *normally carried*

⁴ The telephone and paging line ran to approximately 20 phones underground (Tr. 601-02), as well as to a loudspeaker used for paging (Tr. 623).

⁵ When reviewing an Administrative Law Judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "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 *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that

by Wolf Run's telephone wires and did not discuss the *capacity* of such wires." 32 FMSHRC at 1687. We also held that it was error for the Judge to fail to address MSHA Engineer Kevin Hedrick's statement that a surge of electrical energy from lightning could enter a mine via the wire before that energy destroyed the wire. *Id.* Consequently, we vacated and remanded, among other issues, the Judge's non-S&S finding for his consideration of the overall record with regard to whether the violation of section 75.521 was S&S. *Id.*

In his remand decision, the Judge found that there was a potential for such a surge to enter the mine. However, he again concluded the violation of section 75.521 was not S&S, because of the low probability of lightning striking the telephone wires and the fact that the absence of arresters does not increase the likelihood of such a strike. 33 FMSHRC at 1201. Both parties petitioned for review of various aspects of the Judge's remand decision. We limited our grant of review to whether the Judge erred in concluding that the lack of lightning arresters with respect to the telephone wires was not an S&S violation.⁶

II.

Disposition

The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), and refers to more serious violations. 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 (Jan. 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 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*

supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

⁶ With its response brief, Wolf Run submitted a motion that the Commission hear oral argument in the case. Commissioners were polled and denied that request.

criteria). Under the Commission's *Mathies* test, it is the contribution of the violation at issue to the cause and effect of a hazard must be significant and substantial. *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984).

Here, the Judge concluded that the first, second, and fourth elements of *Mathies* had been satisfied, because "on balance, the Secretary has demonstrated the subject telephone wire has the capacity to transmit a lightning surge underground that poses a risk of serious injury" to miners working there. 33 FMSHRC at 1199. The Judge found that the *Mathies* test was not entirely satisfied, however, because "the failure to equip exposed conductors with arresters does not increase the likelihood of a lightning strike." *Id.* at 1201.

A. Mathies Element One

At this point there is no dispute that there was a violation of the lightning arrester requirement of section 75.521. In our initial decision, we affirmed the Judge's original decision that a violation had been established with respect to the subject telephone wire. 32 FMSHRC at 1679-82.

B. Mathies Element Two

With regard to the second *Mathies* element of a measure of danger to safety contributed to by the violation, Wolf Run agrees with the Judge that the proper inquiry is whether the absence of lightning arresters would result in electrical current being carried into the mine. The Judge stated that "[t]he hazard posed by the subject section 75.521 violation is the potential transmission of a lightning surge underground through telephone power conductors on the surface that are not equipped with arresters." 33 FMSHRC at 1201. Wolf Run argues, however, that substantial evidence does not support the Judge's determination that the telephone line in question had the capacity to transmit dangerous amounts of electrical energy underground.⁷

The general danger that lightning poses if provided a path to travel underground was addressed in our first decision in this case. Summarizing the evidence and findings below, we stated that

a lightning strike from as much as a mile away can cause a surge of energy on a power conductor. *Id.* at 645. Even when it does not hit the conductors directly, such a strike can induce thousands of volts and amps of electric current into a power conductor. Tr. 238-40. The purpose of a lightning arrester required by section 75.521

⁷ As the prevailing party below, Wolf Run may urge in support of the decision under review even those arguments that the Judge considered and rejected. *See, e.g., Sec'y on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1529 (Aug. 1990).

is to minimize the amount of such energy entering into the underground portions of the mine. 31 FMSHRC at 643.

Unless a power conductor entering a mine from the outside is protected by a lightning arrester, the excess energy from a lightning strike on the conductor would not be dissipated into the ground, but could instead travel into the mine via the conductor. *Id.* at 645. This could energize the frames of equipment, resulting in a shock or electrocution hazard, and the energy could cause an arcing that would pose a fire hazard and an ignition source for methane. *Id.*

32 FMSHRC at 1670-71 (footnote omitted).

The Judge based his determination that such a danger is posed by a telephone wire lacking a required lightning arrester on the testimony of MSHA Engineer Hedrick. Hedrick stated that lightning, either striking directly or even just nearby, has the potential to elevate the amount of electricity flowing through a telephone wire, and that therefore an arrester is needed to provide a path to ground for the excess electricity and reduce the amount of energy that can go underground via the telephone wire. 33 FMSHRC at 1198 (citing Tr. 631).⁸ The Judge also credited Hedrick's testimony that even if the power surge became so great that it eventually destroyed the wire and thus disconnected points further along the wire, the power that had already flowed to those points prior to the destruction would continue to pose a danger in the mine for a time afterwards. *Id.* at 1198-99 (citing Tr. 662). The Commission has recognized that a Judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981).

Here, Wolf Run argues that the Judge should not have credited Hedrick's testimony because neither he nor any other witness could establish how much current would flow via the telephone wire into the mine due to a lightning strike occurring in the absence of a lightning arrester. The operator maintains that such evidence is necessary to determine whether the lack of an arrester posed a hazard in this instance.

The record in this case clearly establishes that the amount of electrical energy produced by a lightning strike can vary greatly, depending on the strength of the strike and its proximity. Tr. 310-12, 649. Moreover, it is not possible to predict which path the energy from it will travel. Tr. 314-16, 379, 538. Consequently, the maximum amount of energy a lightning arrester will

⁸ Below, the Secretary submitted an exhibit consisting of the 35 section 75.521 citations or orders that had been issued to other mines over the previous five years alleging that required lightning arresters were absent with respect to communication wires, including a number of which that had been designated S&S. Gov't Ex. 26.

need to prevent from traveling through a specific wire is simply not predictable, and therefore the lack of a specific amount is not a basis for overturning the Judge's crediting of Hedrick's testimony.

Moreover, Wolf Run's argument is essentially a collateral attack on the terms of section 75.521. The regulation as it pertains to power conductors originated as section 305(p) of the Federal Coal Mine Health and Safety Act of 1969 ("Coal Act"), and was carried over as the same section of the Mine Act, 30 U.S.C. § 865(p). The statutory language was promulgated as section 75.521 by a predecessor to MSHA, the Department of Interior's Bureau of Mines, after the enactment of the Coal Act. 35 Fed. Reg. 17,890, 17,910 (Nov. 20, 1970). The mandatory standard was then expressly extended in 1973 to include ungrounded, exposed telephone wires. *See* 38 Fed. Reg. 4974, 4975 (Feb. 23, 1973).

In proposing to extend the reach of the mandatory standard, the Bureau of Mines cited "operating experience gained to date under the [Coal Act], particularly since promulgation [of the 1970 regulations], and "determined [it] to be desirable to propose . . . revisions of several mandatory standards for electric equipment." 37 Fed. Reg. 11,777 (June 14, 1972). The agency's proposal went on to state that with regard to the lightning arresters that are required to be used in connection with ungrounded, exposed power conductors leading underground, "it is desirable that suitable, approved lightning arresters also be required on ungrounded, exposed telephone wires which lead underground." *Id.* at 11,778.

The danger posed by lightning-induced power surges on telephone wires was clearly enough to persuade MSHA's predecessor to bring them within the coverage of section 75.521. Accordingly, we conclude that the absence of evidence on the amount of current that would flow through a specific wire in the event of a lightning strike does not prevent a finding that the wire in question had the potential to carry dangerous amounts of current underground.⁹

The record also contains evidence that the anyone using the phone system during the time that lightning-induced excess energy was coursing over the unprotected telephone wires would be subject to the risk of an electrical shock. Tr. 635-36, 682. Consequently, we find that substantial evidence supports the Judge's finding that the Secretary satisfied the second *Mathies* element in this instance.

⁹ Similarly, we reject Wolf Run's argument that the hazard posed by the lack of an arrester in this instance cannot be established because the amount of electricity that an arrester would divert into the ground is unknown. The Judge credited Hedrick's testimony regarding the efficacy of lightning arresters in reducing the amount of energy that went underground in the event of a lightning strike. 33 FMSHRC at 1198 (citing Tr. 631).

C. *Mathies* Element Three

It is with regard to the third *Mathies* element that the Judge found that the Secretary had failed to establish that the violation of section 75.521 was S&S in this instance. However, the Judge's framing of the issue was in error. He stated that:

The question is whether it is reasonably likely that the hazard created by this violation will result in a lightning strike event in which there is serious injury. Resolution of this question is dependent on the contribution of the absence of arresters to the likelihood of a lightning strike that results in electrocution.

. . . . [T]he failure to equip exposed conductors with arresters does not increase the likelihood of a lightning strike. Although the absence of arresters does affect the hazard associated with lightning, their absence does not contribute to the likelihood of the occurrence of lightning. Since a lightning strike in proximity to a particular location is a rare event, the Secretary has failed to demonstrate that it is *reasonably likely* that the failure to install lightning arresters will result in an injury or illness of reasonably serious nature.

33 FMSHRC at 1201 (citations omitted) (emphasis in original).

The issue is not whether the absence of arresters on the telephone wires will affect the frequency or severity of lightning strikes on or in proximity to the wires. Lightning strikes are the result of atmospheric conditions entirely outside of the control of the operator and, as the Sago accident demonstrated, can occur just about anywhere, in varying degrees of intensity, and at any time with little or no warning. Tr. 294, 649. Thus, the frequency, proximity, and magnitude of lightning strikes are wholly unrelated to an operator's compliance with section 75.521 to protect against their effects, and the Judge erred in weighing such a consideration in his S&S analysis.

In addressing the Judge's determination to give dispositive weight to his finding that a lightning strike in proximity to a particular location is a rare event, the Secretary requests that we assume the occurrence of a lightning strike in determining whether a violation of section 75.521 is S&S. However, adopting such an assumption is not necessary to resolve this case.¹⁰

¹⁰ The Chairman and Commissioner Nakamura have cast the occurrence of a lightning strike as something that must be expressly assumed for the purposes of our S&S analysis. We disagree with this approach.

First, it is not necessary to assume anything. Congress in the Mine Act and the Secretary

First of all, there is no record evidence that supports the Judge's finding with respect to the Sago mine, because neither party submitted evidence on the issue. This is entirely understandable, given the nature of the accident that precipitated this proceeding.

Secondly, Congress, in passing the Coal Act and then the Mine Act, clearly did not consider the danger posed by a lightning strike on mine property to be remote. As previously outlined herein, it included the forerunner to section 75.521 in both of those statutes in substantially similar form.

Lastly, the Judge, in essence, held that no violation of the lightning arrester requirement, as well as any other lightning protection standard, could be S&S, regardless of the circumstances surrounding the violation and the number of miners exposed to the dangers resulting from lightning-induced energy having an uninterrupted conduit into the underground mine atmosphere. There is no basis for such an interpretation of S&S under the Mine Act, nor is there Commission precedent for such an application of the *Mathies* test. However rare a condition may be, if a mandatory standard addresses it, the S&S provision of the Mine Act is potentially applicable and the danger posed by the violation of the standard must at least be considered.

Even if this were a case in which the infrequency of lightning at or in dangerous proximity to the location in question had been established below, in an attempt to demonstrate that there was a minimal risk of harm posed by the violation of section 75.521, other considerations go into determining whether a violation was S&S under the circumstances. In this instance, such considerations include the expanse of cable or wire left unprotected under the

in rulemaking have determined that lightning may strike in close proximity to underground mines thereby presenting a danger to underground miners. A lightning strike is part of the operative context for evaluating the effectiveness of devices intended to deal with lightning strikes. Furthermore, as a matter of definition, we have noted that it is not possible to address the performance of safety features designed to arise in emergencies or highly-unusual situations without including the context. *See Cumberland Coal Res., L.P.*, 33 FMSHRC 2357, 2366 (Oct. 2011) ("The Commission has never required the establishment of the reasonable likelihood of a fire, explosion, or other emergency event when considering whether violations of evacuation standards are S&S."), *aff'd on other grounds*, 717 F.3d 1020 (D.C. Cir. 2013); *see also Maple Creek Mining, Inc.*, 27 FMSHRC 555, 563-64 & n.5 (Aug. 2005).

Second, while there may be little apparent harm in assuming a lightning strike, which would have the same analytical utility in this case as our approach, expressing assumptions of certain facts or conditions when such assumptions are not necessary may embolden the Secretary to seek the assumption of other events, occurrences, or conditions. Without consideration of all possible permutations arising from this invitation to mischief, we cannot articulate a principled limit upon them. We therefore would hold that occurrence of a lightning strike is a necessary part of the context for evaluating measures that the Secretary has deemed prudent and necessary, whether or not it is likely to occur at a specific moment in time.

standard and the number of miners subject to exposure to the dangers of a lightning-induced power surge via the cable or wire. Evidence was presented below on these issues, but it was not considered by the Judge in determining that the violation was not S&S.

Here, the undisputed evidence is that no lightning arresters were provided for the approximately 400 feet of telephone wire than ran to the mine portal. Tr. 613, 625-26; Gov't Ex. 11, 24. Thus, the amount of exposed wire was several times that which was permissible under section 75.521, which provides that a lightning arrester may be no more than 100 feet from where the circuit enters the mine. This had the effect of greatly increasing the risk posed by the lack of required lightning arresters. Tr. 633-34.

Similarly left unaddressed by the Judge was the unrebutted evidence regarding the underground telephone system and the use of the system. MSHA Electrical Engineer Russell Dresch, in testifying why he designated the citation as S&S with respect to the telephone wires, explained that it was designated as such because there was a discrete safety hazard associated with the violation in this instance. Tr. 681. Dresch testified that the key factor was that the wires were for

the telephone system. The communication system is used often. There is a dispatcher on the surface. He has to be in communication with the underground . . . all through the day. There are numerous reasons to use that system. So it's reasonably likely that miners will be using that system.

Tr. 681-82. Throughout the hearing the Secretary's witnesses had stressed that the system was "hard-wired," and Dresch explained that meant that anyone using any of the approximately 20 phones would be in contact with the system's electrical circuit and thus would be at increased risk for shock due to the absence of the lightning arrester required by section 75.521. Tr. 601-04, 683.

We have noted that an inspector's judgment is an important element in an S&S determination. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278 (Dec. 1998); *Mathies*, 6 FMSHRC at 5 (citing *Nat'l Gypsum*, 3 FMSHRC at 825-26); see also *Buck Creek Coal*, 52 F.3d at 135-36 (stating that ALJ did not abuse his discretion in crediting opinion of experienced inspector). At a minimum, the judge should have addressed the explanation provided by Dresch.

While a remand to the Judge to consider the surrounding circumstances and, especially, the testimony of the MSHA witness who designated the citation as S&S is an option, the Secretary has requested that we reverse the Judge with respect to the third *Mathies* element. Given the record evidence in this case, we agree. See *American Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (remand not necessary when record supports no other conclusion).

D. Mathies Element Four

As for the fourth *Mathies* element, the judge found a reasonable likelihood that an injury resulting from a lightning-induced power surge over the wires and underground mine telephone system would be of a reasonably serious nature. 33 FMSHRC at 1199. Our review of the record evidence discloses substantial evidence in support of the Judge's conclusion.

MSHA Engineer Hedrick explained that anyone using a phone when lightning-induced energy coursed over the telephone wire would be subject to electrical shock. Tr. 635-36. Another member of the MSHA electrical investigation team at Sago, James Honaker, cited an instance in which a miner, while using a telephone two miles underground, suffered a shock. Tr. 836.

As for the seriousness of such shocks, MSHA Engineer Dresch testified that it could rise to electrocution levels. Tr. 682. MSHA Inspector Arthur Wooten described the factors that go into a person's susceptibility to electrocution and identified an instance in which electrical current as low as 32 volts had killed a miner. Tr. 310-11.

Because we have upheld the Judge on three of the *Mathies* elements and overturned his determination on the fourth, we reverse his conclusion that the Secretary failed to establish that Wolf Run's failure to equip the telephone wires with lightning arresters in violation of section 75.521 was S&S. The Judge, despite not agreeing with the Secretary that the violation was S&S, assessed the \$440 penalty the Secretary proposed. 33 FMSHRC at 1202. The Secretary has not requested a reassessment of the penalty and therefore we see no need to remand this case.



Michael G. Young, Commissioner



William I. Althen, Commissioner

Chairman Jordan and Commissioner Nakamura, concurring:

We agree with our colleagues that the Judge erred in finding that the lightning arrester violation at issue was not significant and substantial. However, we write separately because in analyzing the issue of whether a violation of the lightning arrester standard was S&S, we would assume the existence of a lightning strike.

Under the S&S test articulated by the Commission in *Mathies Coal Co.*, 6 FMSHRC 1, 3 (Jan. 1984), the Secretary must demonstrate, among other things, a “reasonable likelihood that the hazard contributed to will result in an injury.” Here, the hazard is shock or electrocution. 32 FMSHRC at 1670-71. As the Secretary correctly argues, however, the lightning arrester safety standard is designed to protect miners from these hazards only in the event of a lightning strike. PDR at 19. Because the standard serves no purpose in the absence of lightning, it makes sense to assume the existence of a lightning strike when determining whether the lack of a lightning arrester is a significant and substantial violation. The relevant question then becomes whether, given the occurrence of lightning, the failure to have lightning arresters is reasonably likely to result in a serious injury or death.

The Judge in this case, however, demanded that the Secretary produce evidence of the possibility of a lightning strike. Since this is an impossible task, we agree with our colleagues that the Judge erred in requiring the Secretary to establish the reasonable likelihood of a lightning strike. His approach makes it almost impossible for the Secretary to successfully charge a lightning arrester violation as S&S. We doubt that Congress, which thought to include lightning arrester requirements in the Coal Act and Mine Act, slip op. at 6, would have approved such an outcome.

The lightning arrester standard exists to protect miners only in situations in which there is a lightning strike, so it is appropriate to assume the existence of a lightning strike in this case. See *Manalapan Mining Co.*, 18 FMSHRC 1375, 1384 (Aug. 1996) (holding that “the assumption sought by the Secretary (the existence of a fire or explosion) is to evaluate the effect of the violation (an inadequate fire deluge system) under the circumstances and conditions in which the standard was intended to provide protection”) (separate opinion of Chairman Jordan and Commissioner Marks). Forcing the Secretary to rely on meteorological evidence to prove the likelihood of lightning, as the Judge here seemed to do, diverts us from the true inquiry in this case.

The D.C. Circuit decision in *Cumberland Coal Resources, LP v. FMSHRC*, 717 F.3d 1020 (D.C. Cir. 2013), which affirmed our ruling below, is persuasive precedent for assuming a lightning strike in lightning arrester cases where S&S is at issue. In *Cumberland*, the operator was charged with failure to maintain adequate lifelines in the mine’s escapeways. In upholding our S&S determination, the court assumed the existence of an emergency when evaluating the

significant and substantial nature of the violation.¹ In so doing, the court deferred to the Secretary's reasonable interpretation of the significant and substantial provision of the Mine Act (section 104(d)(1), 30 U.S.C. § 814(d)(1)). 717 F.3d at 1026.

We are mindful that the standard in *Cumberland* was an emergency safety standard, while the lightning arrester standard in this case is not. The reasoning of the court, however, is completely apposite in this situation as well. In *Cumberland*, the court observed that if decisionmakers were told not to assume an emergency when deciding whether a violation of an emergency safety standard was S&S:

It would appear unlikely that any violation of those standards would ever be "significant and substantial." That is, the violation of those standards apparently would never, or at least rarely, contribute to the existence of the emergency so that the scale would be loaded against the finding. Given that the violation of those standards could be expected to have serious, indeed tragic, consequences, it is reasonable for the Secretary to interpret the statute and his own regulations to avoid that odd result.

Id. at 1026-27.

The Judge's approach in this case leads to the result that the *Cumberland* court, in the quotation set forth above, was determined to avoid. And, just as the D.C. Circuit acknowledged that "the likelihood of an emergency will usually have nothing to do with the violation of the emergency safety standard," *id.* at 1027, the likelihood of a lightning strike will usually have nothing to do with the violation of a lightning arrester standard.²

Our colleagues state that adopting an assumption of a lightning strike is not needed to resolve this case. Slip op. at 7. They find that the third prong of the test is met because of evidence regarding: (1) the expanse of cable or wire left unprotected; (2) the number of miners subject to exposure; (3) the frequent use of the telephone system; and (4) that the system was "hard-wired." Indeed, these are relevant factors, but only in the presence of lightning.


¹ The Commission decision in *Cumberland* also assumed an emergency, but not as explicitly as in the court of appeals opinion. In our decision finding that the lifeline violation was S&S, we stated that "with regard to evacuation standards, the applicable analysis under *Mathies* involves consideration of an emergency." 33 FMSHRC 2357, 2366 (Oct. 2011).

² Indeed, lightning striking a particular location is considered both proverbially and statistically rare and unpredictable. Its occurrence is not only independent of the violation at issue, but independent of the operator's mining operations. In legal parlance, it is described as an "act of God." Given this nature, it is particularly appropriate and reasonable to assume the occurrence of a lightning strike in determining whether the violation is S&S.

In addition, more puzzling is our colleagues' assertion that "[e]ven if this were a case in which the infrequency of lightning at or in dangerous proximity to the location in question had been established below, in an attempt to demonstrate that there was a *minimal risk of harm posed by the violation* of section 75.521, other considerations go into determining whether a violation was S&S under the circumstances." Slip op. at 8 (emphasis added). We fail to understand how the violation could be sustained as S&S if it could pose only a "minimal risk of harm," as S&S violations are inherently more serious.

For the reasons set forth above, we would reverse the Judge's determination that the violation of section 75.521 was not S&S and affirm the penalty assessed by the Judge.


Mary Lu Jordan, Chairman


Patrick K. Nakamura, Commissioner

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