FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 02, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2009-427
v.	:	
MACH MINING, LLC	:	

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

DECISION

BY THE COMMISSION:

In this proceeding arising under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"), the Commission, by sua sponte review, directed the parties to address whether the Administrative Law Judge correctly determined that an escapeway violation[1] was not significant and substantial ("S&S").[2] 33 FMSHRC 2428, 2435-36 (Oct. 2011) (ALJ). Mach also filed a petition for discretionary review contesting the Judge's high negligence finding associated with the escapeway violation. The Commission granted the petition. For the reasons stated herein, we affirm in result the Judge's S&S determination, and we affirm the Judge's high negligence determination.

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[1] The standard at issue, 30 C.F.R. § 75.380(d)(4)(ii), requires that "[w]here the route of travel passes through doors or other permanent ventilation controls, the escapeway shall be at least 4 feet wide to enable miners to escape quickly in an emergency."

[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."

I.

Facts and Proceedings Below

During a February 12, 2009 inspection, an inspector with the U.S. Department of Labor's Mine Safety and Health Administration ("MSHA") observed that one of the primary escapeways of Mach #1 Mine had been narrowed to 26 inches in width. 33 FMSHRC at 2433. This had been done by closing the regulator on the entryway. A regulator is a concrete wall with a hole knocked out of it to control the amount and velocity of air going to the section. *Id.* at n.9. As a result, the inspector issued a citation for a violation of section 75.380(d)(4)(ii), alleging that the escapeway was not at least four-feet wide. *Id.* at 2433.

After a hearing on the merits, the Judge concluded that a violation of section 75.380(d)(4)(ii) had occurred. *Id.* The Judge found that the violation was not S&S. *Id.* at 2435-36. The Judge concluded that Mach's level of negligence was "relatively high" because Mach's president and mine superintendent, Anthony Webb, was aware of the violative condition for a number of weeks prior to the citation and was subject to a high standard of care as a supervisor. *Id.* at 2435 n.11, 2437-38.

II.

Disposition

A. S&S

On the S&S issue, both parties agree that the violation is not S&S. Based on the record, we affirm the Judge in result.

B. Negligence

The Commission reviews a Judge's negligence finding, which is a component of a penalty assessment, to determine whether the factual findings are supported by substantial evidence[3] and are consistent with the statutory penalty criteria set forth in section 110(i) of the Mine Act, 30 U.S.C. § 820(i). *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986).

We conclude that the Judge's finding of relatively high negligence is supported by substantial evidence. The record demonstrates that the mine president and superintendent,

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[3] 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 *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

Anthony Webb, had knowledge of the narrowed regulator, and that the condition had existed for approximately two months. 33 FMSHRC at 2437-38; Tr. 81, 86-88. Like the Judge, we reject Mach's contention that, because an MSHA inspector had previously traveled through the regulator at issue, Mach's negligence should be mitigated. 33 FMSHRC at 2437-38.

We are not persuaded by Mach's assertion that the negligence level should be reduced based on Webb's mistaken good faith belief that the regulator could be reduced to less than 48 inches in the primary escapeway, if the narrowed regulator passed a stretcher test.[4] As the Judge stated, Webb must exercise a high standard of care because of his supervisory role, and therefore Webb's testimony that he was not aware of the width requirements provided only "slight mitigation." *Id.* at 2438. The Commission has held that supervisors "[can]'not close their eyes to violations, and then assert lack of responsibility for those violations because of self-induced ignorance.'" *Douglas R. Rushford Trucking*, 23 FMSHRC 790, 793 (Aug. 2001) (citation omitted). Accordingly, in *Prabhu Deshetty*, 16 FMSHRC 1046, 1051, 1053 (May 1994), the Commission affirmed a high negligence determination despite the manager's claim that he was not aware of whether the cited conditions were prohibited under the law. *See also Rushford Trucking*, 23 FMSHRC at 793 (adhering to the general principle that "ignorance of the law is no defense.")

In sum, we affirm the Judge's relatively high negligence determination as supported by substantial evidence in the record.

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[4] 30 C.F.R. § 75.380(d)(4)(iii) provides that an *alternate* escapeway may be less than four feet wide if a "stretcher test" is met. The Judge noted that a successful stretcher test was held by MSHA in an alternate escapeway that had been narrowed to 24 inches. 33 FMSHRC at 2435 n.11. However, this stretcher test provision does not apply to the primary escapeway at issue here.

III.

Conclusion

For the foregoing reasons, we affirm in result the Judge's determination that the escapeway violation was not S&S and affirm the Judge's finding of relatively high negligence.

Mary Lu Jordan, Chairman

Michael G. Young, Commissioner

Patrick K. Nakamura, Commissioner

William I. Althen, Commissioner

Commissioner Cohen, concurring:

I join my colleagues in affirming the Judge's determination that Mach Mining's violation of the safety standard in 30 C.F.R. § 75.380(d)(4)(ii) was the result of relatively high negligence, and also the conclusion that the violation was not significant and substantial ("S&S"). I write separately to point out certain fundamental errors in the Judge's application of the *Mathies* criteria to his analysis of the S&S issues in this case.

The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1),[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 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 (Jan. 1984), the Commission set forth a four-step test for the analysis of whether a violation is S&S:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard — that is, a measure of danger to safety — contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Id. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir.

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[1] Section 104(d)(1) provides, in pertinent part,

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, *such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard*, . . . he shall include such finding in any citation given to the operator under this Act.

30 U.S.C. § 814(d)(1) (emphasis added).

1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

In the present case, the Judge concluded that the Secretary had proved the first two *Mathies* elements, but had failed to prove the third element. 33 FMSHRC 2428, 2435-36 (Oct. 2011) (ALJ). In this regard, the Judge stated that the evidence did not establish "the reasonable likelihood of an injury-producing event". *Id.* The Judge's analysis is erroneous under *Mathies* in two important respects.

First, the Judge failed to define or articulate the discrete safety hazard which is necessary for analysis under both steps two and three of *Mathies*.[2] The description of S&S in section 104(d)(1) of the Mine Act is centered on a "mine safety or health hazard". Our cases illustrate that a Judge is required to articulate a discrete safety hazard in order to determine whether the violation has contributed to it under step two and whether it is reasonably likely to result in an injury under step three.[3] *See, e.g., Black Beauty*, 34 FMSHRC at 1741; *Consolidation Coal Co.*, 35 FMSHRC 2326, 2328, 2333, 2335-36, 2338, 2345 (Aug. 2013) (noting, with respect to five separate violations, how the judge described the discrete safety hazard and approving the Judge's articulation of the hazard). The failure of a judge to clearly articulate the discrete safety hazard in an S&S case impedes the Commission's ability to perform its review function under section 113(d)(2)(C) of the Mine Act, 30 U.S.C. § 823(d)(2)(C).

Second, the Judge's analysis under step three of *Mathies* was flawed. In concluding that the evidence did not show a reasonable likelihood of an injury producing event, the Judge relied on two separate lines of testimony – (1) the absence of any obstacles to walking, the fact that the lifeline was in good shape, and the fact that it was not necessary to raise one's foot in order to go from the surface of the overcast through the regulator, and (2) the MSHA inspector's testimony that an emergency was not likely to occur as of the time of the inspection, and that "he did not indicate the specific events or conditions that would be reasonably likely to occur with the continuance of normal mining operations that would make an injury producing emergency evacuation reasonably likely to occur." 33 FMSHRC at 2435. The Judge's reliance on the absence of conditions likely to create an emergency was in error. The mandatory safety standard at issue, 30 C.F.R. § 75.380(d)(4)(ii), sets forth requirements for escapeways in bituminous and lignite coal mines. Because an evacuation standard was at issue, the *Mathies* test does not require

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[2] Regarding the first element of *Mathies*, the Judge correctly found that Mach Mining violated the safety standard when it narrowed the escapeway through the regulator from 48 inches to 26 inches. 33 FMSHRC at 2433.

[3] The Commission has described a safety hazard (i.e., the "measure of danger to safety", as stated in *Mathies*) as "the dangerous situation that the mandatory safety standard anticipates." *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1741 (Aug. 2012) (citing *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2366 (Oct. 2011), *aff'd* 717 F.3d 1020 (D.C. Cir. 2013); *Musser Engineering, Inc., and PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010).

consideration of whether an emergency was likely to occur. *See Cumberland Coal*, 33 FMSHRC at 2366-67 ("[t]he 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"). As succinctly stated by the Court of Appeals for the D.C. Circuit in affirming *Cumberland Coal*, "the likelihood of an emergency will usually have nothing to do with the violation of the emergency safety standard." 717 F.3d at 1027.

Although the Judge erred in his S&S analysis, I would affirm his ultimate conclusion that this violation was not S&S. The safety standard in 30 C.F.R. § 75.380(d)(4)(ii) states that "where the route of travel passes through doors or other permanent ventilation controls, the escapeway shall be at least 4 feet wide to enable miners to escape quickly in an emergency." The regulator involved in this case is a permanent ventilation control within the meaning of the regulation. As stated by MSHA inspector Bobby Jones, the discrete safety hazard under step two of *Mathies* was that "the narrow opening through the regulator would impede miners escaping rapidly." Tr. 28.

I conclude that the record does not contain substantial evidence to support a conclusion that the violation at issue would contribute to a failure of miners to escape quickly in an emergency. The inspector testified that he believed that in an emergency if an injured miner had to be transported out of the mine on a stretcher, miners carrying the stretcher would be delayed or injured trying to navigate the stretcher and the injured miner through the narrowed escapeway. Tr. 32, 35-36, 48. However, the inspector failed to describe with any detail how the narrowed escapeway would functionally impede the passage of miners with a stretcher. In particular, the inspector was unaware of the width of the stretchers used by Mach Mining, or how their width compared with the width of the escapeway as it passed through the regulator. Tr. 70-71. Furthermore, the inspector testified that he did not observe any obstructions in the walkways on either side of the overcast, on the stairs, or on the overcast itself, and that the lifeline was in good shape. Tr. 64-65.

Moreover, as the Judge noted, Anthony Webb, the president of Mach Mining, testified that the mine had previously conducted testing at the request of and in the presence of MSHA inspectors, and had determined that miners carrying a stretcher were able to navigate through a 24-inch escapeway without difficultly. 33 FMSHRC at 2435 n.11; Tr. 98-99. He explained that the stretchers used by the operator are constructed with handles or hand holds at either end of the stretcher. This enables the stretcher carriers to walk in front and behind the stretcher rather than beside it. 33 FMSHRC at 2435 n.11; Tr. 98-99. This testimony was uncontradicted.

Because the record lacks any evidence that the violation of regulator width would contribute to a hazard of miners being unable to escape quickly in an emergency, the Secretary failed to sustain her burden of proof under step two of *Mathies*. In *Cumberland Coal*, the Commission noted that not every violation of an evacuation standard would be S&S, even though such violations are viewed in the context of an emergency. 33 FMSHRC at 2369. We observed that if violations of an evacuation standard are "relatively minor in nature and scope, a fact-finder may well not [find] that the violations contributed to the hazard of miners being delayed in escaping from the mine in an emergency". *Id.* at 2368. This is such a case.

The Judge's conclusory statement that the second element of the *Mathies* test was satisfied lacks evidentiary support. Therefore, the violation was not significant and substantial.

Robert F. Cohen, Jr., Commissioner

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