

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 23, 2014

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket Nos. LAKE 2009-490
v.	:	LAKE 2009-491
	:	LAKE 2009-531
BIG RIDGE, INC.	:	LAKE 2009-532

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”), an Administrative Law Judge found a violation of the lifeline requirements contained in 30 C.F.R. § 75.380(d)(7)(i)¹ to be significant and substantial (“S&S”).² 33 FMSHRC 689, 693-99 (Mar. 2011) (ALJ). Big Ridge, Inc., subsequently petitioned for review of the Judge’s S&S finding, which the Commission granted. For the reasons stated herein, we affirm the Judge’s decision and conclude that Big Ridge’s violation of the lifeline requirements was S&S.³

¹ Section 75.380(d)(7)(i) provides as follows: “Each escapeway shall be provided with a continuous, durable directional lifeline or equivalent device that shall be installed and maintained throughout the entire length of each escapeway.”

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 We have determined that oral argument is not necessary and, therefore, Big Ridge’s motion for oral argument is denied.

I.

Facts and Proceedings Below

During a March 12, 2009 inspection, an inspector with the U.S. Department of Labor's Mine Safety and Health Administration ("MSHA") observed that 20 feet of a lifeline was missing on a secondary escapeway at Big Ridge's Willow Lake Mine. 33 FMSHRC at 694-95. The secondary escapeway was next to a belt entry at a heavily traveled crosscut intersection. *Id.* At least 40 miners in the working area would have used this escape route in the event of an emergency. *Id.* at 695. As a result, the inspector issued a citation alleging that the secondary escapeway was not being provided with a lifeline at a crosscut intersection for approximately 20 feet. *Id.* at 694.

There was no dispute that there was a 20-foot gap in the lifeline. *Id.* at 694-97. After a hearing on the merits, the Judge concluded that a violation of section 75.380(d)(7)(i) had occurred and found the violation to be S&S. *Id.* at 693-99.

The Judge applied the Commission's four-part S&S analysis established in *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984). The Judge found that a "discrete safety hazard existed as a result of the violations, i.e, the danger of being unable to quickly and safely escape the mine in the event of an emergency where smoke and/or fire are created by various scenarios." 33 FMSHRC at 697.

The Judge did not find it necessary to assume the existence of an emergency, as requested by the Secretary, because she determined that "an emergency [wa]s likely to occur" "in the continued course of mining operations." *Id.* at 698-99. She also concluded that the hazard described would result in an injury and that the injury would be "serious or fatal." *Id.* at 699. Additionally, the Judge found that this violation would affect 40 or more miners who used the travelway on a daily basis. *Id.* at 699.

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*, 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.

6 FMSHRC at 3-4 (footnote omitted); *accord* *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec’y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

Because this case involves a violation of an emergency lifeline standard, our application of the *Mathies* test is controlled by *Cumberland Coal Res., LP*, 33 FMSHRC 2357 (Oct. 2011), *aff’d* *Cumberland Coal Res., LP v. FMSHRC*, 717 F.3d 1020 (D.C. Cir. 2013). In *Cumberland*, the Commission held that “[t]he hazard contributed to by defectively placed lifelines necessarily involved consideration of an emergency situation.” 33 FMSHRC at 2364. This is because “[e]vacuation standards are different from other mine safety standards. They are intended to apply meaningfully only when an emergency actually occurs.” *Id.* at 2367.

When applying the *Mathies* analysis with respect to escapeway violations, a Judge is to consider the S&S nature of those violations within the context of an emergency. *Cumberland*, 717 F.3d at 1027-28 (providing that “assuming the existence of an emergency” when evaluating the S&S nature of emergency safety measures is consistent with *Mathies*). The D.C. Circuit made clear that the likelihood of an emergency actually occurring is irrelevant to the *Mathies* inquiry, which focuses on the nature of the violation itself. 717 F.3d at 1027 (citing *Sec’y of Labor v. FMSHRC*, 111 F.3d 913, 917 (D.C. Cir. 1997)). *Cf. Spartan Mining Co.*, 35 FMSHRC 3505, 3509 (Dec. 2013) (Secretary need not prove the likelihood of an emergency when evaluating whether escapeway violations were S&S).

Applying the *Mathies* test to the case at bar, we note that the first *Mathies* element is satisfied by the Judge’s finding of violation. 33 FMSHRC at 697.

With regard to the second *Mathies* element, the Judge determined that a discrete safety hazard existed as a result of the violation, i.e., “the danger of being unable to quickly and safely escape in the event of an emergency where smoke and/or fire are created by various scenarios.” *Id.* The Judge’s statement of hazard is consistent with the *Cumberland* decisions and is an accurate description of the relevant hazard contributed to by the violation. 33 FMSHRC at 2364.

Substantial evidence in the record supports the Judge’s finding that the gap in the lifeline would contribute to a hazard of miners being unable to quickly and safely escape in the presence of an emergency.⁴ As the Judge found, the area where the lifeline was missing for 20 feet is a

⁴ 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.

heavily-traveled area at a crosscut. 33 FMSHRC at 695; Tr. II at 122-24. In such an intersection, there is no rib line to help miners find their way, and other wires and cables may confuse miners looking for a missing lifeline. 33 FMSHRC at 695; Tr. II at 127-28, 131. In addition, the presence of the conveyor belt would contribute to the thickness of the smoke in the cited area. 33 FMSHRC at 695; Tr. II at 129. The inspector testified that the air in the escapeway was common to the air in the next entry, which contained the conveyor belt. Tr. II at 121. In a fire near a belt, the smoke would be so thick from the rollers on the belt that a miner would be unable to see his hand in front of his face. Tr. II at 129. The Judge also found that at least 40 miners in the working area would use this escape route in the event of an emergency. 33 FMSHRC at 695; Tr. II at 122-23.

We reject Big Ridge's argument that miners would find their way out because they knew which way the air was ventilated and would have the air at their backs. As the Judge noted, even experienced miners panic and become disoriented in an emergency. 33 FMSHRC at 695. In addition, ventilation may be interrupted in an emergency. Tr. II at 123, 141-42, 164, 197. Moreover, this violation involved a secondary escapeway, where the air flows outby or away from the working face. Tr. II at 121. This increases the possibility that a fire inby, close to the face, would contaminate the entry with smoke, making a usable and accessible lifeline critically important.

Big Ridge argues that 20 feet of inaccessible lifeline is not sufficient to support an S&S finding as shown by the longer distances of the deficient lifelines in *Cumberland*. *Cumberland* involved four violations with inaccessible lifelines that spanned the distances of 6,650 feet, 450 feet, 120 feet and 300 feet, respectively. 33 FMSHRC at 2358-60. Although a gap of 20 feet is smaller than the distances involved in *Cumberland*, the Judge could reasonably find on this record that the deficient lifeline posed a hazard when considered in the context of an emergency situation. In particular, the gap occurred at a critical intersection, where miners could get disoriented and lost; there were many cables and wires to further confuse escaping miners; and the intersection was near a belt line with common air, which would make any smoke very thick, greatly diminishing visibility. 33 FMSHRC at 694-95.

Substantial evidence also supports the Judge's determination that the third and fourth *Mathies* elements were satisfied. In addressing the third and fourth *Mathies* elements, the Judge determined: "It has been demonstrated that if a large gap remained in the lifeline, it would hinder the evacuation of the mine, thereby causing serious injury." *Id.* at 699. Although Big Ridge calls the 20-foot gap small, we note that Inspector Morris testified that "[i]n smoky conditions, 20 feet is a long way." Tr. II at 129. As in *Cumberland*, the Judge relied on the inspector's testimony that in an emergency, miners become disoriented or panic and cannot see in dense smoke, such


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 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)).

that a directional lifeline is essential to help them find their way and avert disaster. *Compare Cumberland*, 33 FMSHRC at 2365, *with* 33 FMSHRC at 695. The hazard of a delayed escape or no escape at all due to a missing lifeline in an emergency is reasonably likely to result in serious or fatal injuries. Accordingly, the Judge's application of the *Mathies* test to conclude that the lifeline violation was S&S is fully supported by substantial evidence on the record.

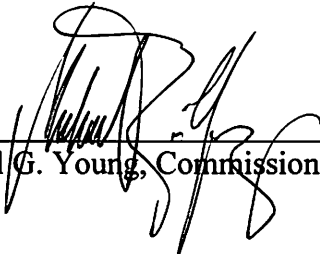
III.

Conclusion

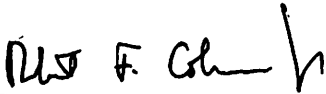
For the foregoing reasons, we affirm the Judge's determination that the lifeline violation was S&S.



Mary Lu Jordan, Chairman



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner



Patrick K. Nakamura, Commissioner



William I. Althen, Commissioner

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