

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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WASHINGTON, DC 20004

May 23, 2014

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2009-565
v.	:	A.C. No. 12-02295-188278
	:	
	:	
BLACK BEAUTY COAL COMPANY	:	

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)(iv)<sup>1</sup> to be significant and substantial (“S&S”).<sup>2</sup> 33 FMSHRC 1174, 1176 (May 2011) (ALJ). Black Beauty Coal Company 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 Black Beauty’s violation of the lifeline requirements was S&S.<sup>3</sup>

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<sup>1</sup> Section 75.380(d)(7)(iv) provides as follows: “Each escapeway shall be provided with a continuous, durable directional lifeline or equivalent device that shall be located in such a manner for miners to use effectively to escape.”

<sup>2</sup> 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.”

<sup>3</sup> We have determined that oral argument is not necessary and, therefore, Black Beauty’s motion for oral argument is denied.

## I.

### Facts and Proceedings Below

During an April 21, 2009 inspection, an inspector with the U.S. Department of Labor's Mine Safety and Health Administration ("MSHA") observed that a lifeline at Black Beauty's Francisco Mine was at a height of seven to twelve feet above the mine floor for a distance of 100 to 110 feet. 33 FMSHRC at 1174-75. Both the inspector and the Black Beauty representative who accompanied him were unable to pull the lifeline down to an accessible height. *Id.* at 1175-76. As a result, the inspector issued a citation, alleging that "in the event of a disaster the miners trying to use the lifeline to escape would not have been able to keep hold of the lifeline and safely exit the mine." *Id.* at 1175.

After a hearing on the merits, the Judge concluded that a violation of section 75.380(d)(7)(iv) had occurred. *Id.* at 1176. There was no dispute that the lifeline was at a height of seven to twelve feet above the mine floor and was not located such that a miner could effectively use it. *Id.*

In finding the violation to be S&S, 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 not being able to access or use the lifeline in the event of an emergency where visibility is reduced and miners must rely on the tangible nature of the lifeline to quickly escape the mine." 33 FMSHRC at 1177-78. 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 reasonably likely to occur in the course of continued mining operations." *Id.* at 1178. She also concluded that the hazard described would result in an injury and that the injury would be "serious or fatal." *Id.* at 1179. Additionally, the Judge found that this violation would affect 14 miners who were on the section at the time the citation was issued and noted that 28 miners would have been affected if a fire or explosion were to occur during a shift change. *Id.*

## II.

### Disposition

#### A. Jurisdictional Issue

At the outset, we turn to the Secretary's argument that the Commission lacks jurisdiction to consider certain arguments in Black Beauty's brief because they were not raised in its initial petition for discretionary review ("PDR").

Mine Act section 113(d)(2)(iii) provides that review by the Commission "shall be limited to the questions raised by the petition." 30 U.S.C. § 823(d)(2)(iii). In its brief, Black Beauty argues that the violation is not S&S because the violation would not have significantly delayed

miners in exiting the mine. However, Black Beauty's PDR identified the issue as whether the judge erred when she found a reasonable likelihood of an emergency requiring the use of a lifeline.

The Commission has held that section 113(d)(2)(iii) does not preclude review if the issue was implicitly raised in the PDR or is sufficiently related. *Fort Scott Fertilizer-Cullor, Inc.*, 19 FMSHRC 1511, 1514 (Sept. 1997) (broadly construing PDR to encompass party's argument). Although Black Beauty did argue in its PDR that the Judge erred in finding an emergency reasonably likely, it framed the issue broadly as: "Whether the ALJ erred in finding that the condition was properly designated S&S." PDR at 4. Since this broad issue was raised in the PDR, it encompasses the arguments that Black Beauty later raised in its brief. Thus, we will address Black Beauty's S&S arguments on their merits.

## **B. S&S Issue**

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 1177.

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 not being able to access or use the lifeline in the event of an emergency where visibility is reduced and miners must rely upon the tangible nature of the lifeline to quickly and safely escape the mine.” 33 FMSHRC at 1177-78. 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. She reasoned that if an escaping miner cannot reach the lifeline for 110 feet, the miner will become disoriented in a matter of seconds and could stumble and fall and not know which way to travel to exit the mine. 33 FMSHRC at 1179.

Substantial evidence in the record supports the Judge’s opinion that the gap in the lifeline would contribute to a hazard of miners being unable to quickly and safely escape, in an emergency.<sup>4</sup> As the Judge found, the lifeline was unreachable for 110 feet. 33 FMSHRC at 1179. Because the area was on a grade, a tripping or stumbling hazard was even more likely. Tr. 31. Although Black Beauty argues that the lifeline was only temporarily inaccessible due to construction, the inspector testified that during the five-day period that the lifeline was unreachable, miners traveled in the area. Tr. 28-29. We also reject Black Beauty’s argument that miners would find their way out because they knew the way the air was ventilated. As the Judge noted, even experienced miners panic and become disoriented in an emergency. 33 FMSHRC at 1179. Ventilation may also be interrupted in an emergency. Tr. 24, 42. Moreover, this violation involved a secondary escapeway where the air flows outby or away from the working face. Tr. 40-42. 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.

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<sup>4</sup> 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)). 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)).

Black Beauty argues that 110 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 110 feet is slightly smaller than the distances involved in *Cumberland*, a Judge could certainly find on this record that the deficient lifeline posed a hazard when considered in the context of an emergency situation. As she held, an escaping miner who cannot reach the lifeline “will become disoriented in a matter of seconds.” 33 FMSHRC at 1179.

In addressing the third and fourth *Mathies* elements, the Judge determined that “the unreachable, and thus unusable, lifeline created a hazard” and that the “likelihood of injuries or death increases as the distance of the unavailability of the lifeline increases.” 33 FMSHRC at 1179. As in *Cumberland*, the Judge relied on inspector testimony that in an emergency, miners become disoriented or panic and cannot see in dense smoke, such 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 1179. Thus, substantial evidence supports the Judge’s determination that the third and fourth *Mathies* elements were satisfied. The hazard of delayed or no escape at all due to an inaccessible 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 the record.<sup>5</sup>

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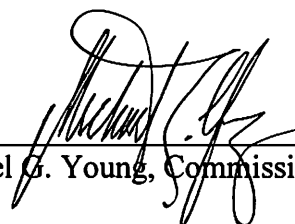
<sup>5</sup> In challenging the S&S determination, Black Beauty raises the presence of other safety measures, such as a viable primary escapeway, tethers, and reflective material, as mitigating the S&S determination. The Commission and courts have soundly rejected this line of argument. As stated in *Cumberland*, additional safety measures do not prevent a finding of S&S. 33 FMSHRC at 2369 (citing *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995)).

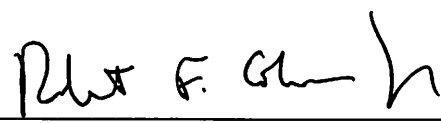
III.


Conclusion

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

  
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May Lu Jordan, Chairman

  
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Michael G. Young, Commissioner

  
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Robert F. Cohen, Jr., Commissioner

  
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Patrick K. Nakamura, Commissioner

  
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