

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR  
WASHINGTON, D.C. 20006

June 19, 1996

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) :  
 :  
v. : Docket No. CENT 93-238-M  
 :  
BLUE BAYOU SAND AND GRAVEL, INC. :

BEFORE: Jordan, Chairman; Holen, Marks and Riley, Commissioners<sup>1</sup>

DECISION

BY THE COMMISSION:

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”), involves a citation alleging a significant and substantial (“S&S”) violation of 30 C.F.R. § 56.14101(a) (1995)<sup>2</sup> and a withdrawal order, issued under section 107(a)<sup>3</sup> of the Mine Act, 30 U.S.C. 817(a), alleging that

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<sup>1</sup> Commissioner Doyle participated in the consideration of this matter but resigned from the Commission before its final disposition.

<sup>2</sup> Section 56.14101(a) provides in part:

*Minimum requirements.* (1) Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels. . . .

(3) All braking systems installed on the equipment shall be maintained in functional condition.

<sup>3</sup> Section 107(a) of the Mine Act provides in part:

If, upon any inspection or investigation of a coal or other mine which is subject to this [Act], an authorized representative of the Secretary finds that an

defective brakes on a haulage truck created an imminent danger. Administrative Law Judge Avram Weisberger concluded that the operator violated the standard but that the violation was not S&S and did not present an imminent danger. 16 FMSHRC 1059, 1064-67 (May 1994) (ALJ). For the reasons that follow, we reverse and remand.

## I.

### Factual and Procedural Background

Blue Bayou Sand and Gravel, Inc. (“Blue Bayou”) operates an open-pit sand and gravel mine in Arkansas. 16 FMSHRC at 1059; Tr. 12. On April 28, 1993, Larry Slycord, an inspector from the Department of Labor’s Mine Safety and Health Administration (“MSHA”), and his supervisor, Billy Ritchey, conducted a regular inspection of the mine. 16 FMSHRC at 1060; Tr. 10. Inspector Slycord observed a loaded 22-ton Euclid haulage truck traveling out of the pit and motioned to the driver, William Jewell, to stop the truck. 16 FMSHRC at 1062-63; Tr. 135. Slycord informed Jewell that he wanted to test the service and parking brakes. 16 FMSHRC at 1063. Jewell replied that the brakes did not work and that he used the transmission to hold the truck. *Id.*

Inspector Slycord directed Jewell to drive to a nearly level area and motioned to him to stop the truck. *Id.* Slycord and Ritchey heard an exhaust of air as if brakes had been applied but observed that the truck continued to roll without hesitation, eventually coming to a stop. *Id.* at 1063, 1066. The truck was tested again with the same result. *Id.* at 1063. Inspector Slycord issued Citation/Order No. 4116491 alleging an imminent danger and an S&S violation of section 56.14101(a). *Id.* at 1064, 1066; Tr. 181. Slycord and Ritchey directed Jewell to park the truck, permitting him first to unload it into a nearby hopper in preparation for the brake repair. 16 FMSHRC at 1065; Tr. 181-82. Subsequently, Inspector Slycord modified the citation by changing the likelihood of injury designation from “reasonably likely” to “highly likely.” Tr. 143-44; Gov’t Ex. 1 at 2, 3. Blue Bayou contested the citation and order.

Following an evidentiary hearing, the judge concluded that Blue Bayou had violated section 56.14101(a) but that the violation was not S&S. 16 FMSHRC at 1066-67. The judge explained that, although the violation contributed to the hazard of the truck hitting and injuring a person, the reasonable likelihood of injury had not been established. *Id.* at 1066. The judge also determined that the record failed to establish such an event was imminent. *Id.* at 1064-65. He

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imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section [104(c)], to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist.

emphasized that the inspector, after becoming aware of the defective brakes, permitted the truck to be driven down a grade to unload. *Id.* at 1065. Accordingly, the judge dismissed the withdrawal order, modified the citation, and assessed a civil penalty of \$50, based in part on his findings of low gravity and low negligence. *Id.* at 1067, 1069.

The Commission granted the Secretary's petition for discretionary review, which challenged the judge's S&S and imminent danger determinations.

## II.

### Disposition<sup>4</sup>

#### A. Significant and Substantial

The Secretary claims substantial evidence does not support the judge's determination that the violation was not S&S. PDR at 1. He asserts the judge erred in finding that a reasonable likelihood of injury had not been established because there was evidence the truck could roll into the hopper and fall down a 20- to 30-foot-high bank; truck drivers have been killed at other mines because trucks without brakes have gone over bump blocks and into hoppers; people working along the road would be endangered by the truck; and mobile equipment accidents cause more fatalities than any other hazard in the mining industry. *Id.* at 11-14. Blue Bayou contends the judge correctly determined the violation was not S&S because the truck had operated in the cited condition for many months; bump blocks and mounds of dirt added a degree of safety to operation of the truck; the truck normally operated at speeds of only 3 or 4 miles per hour; and it had no history of accidents. Blue Bayou Br. at 18-19.

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. *Cement Div., Nat'l Gypsum Co.*,

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<sup>4</sup> Blue Bayou requests that the Commission review the judge's finding of violation for the instant citation as well as for two other citations involving the defective brakes. Blue Bayou Br. at 2, 15-17, 19-20. The Mine Act and the Commission's procedural rules provide that the Commission's scope of review is limited to issues raised in the petition for discretionary review. 30 U.S.C. § 823(d)(2)(A)(iii); 29 C.F.R. § 2700.70(f) (1995); *see, e.g., Chaney Creek Coal Corp. v. FMSHRC*, 866 F.2d 1424, 1429 & n.7 (D.C. Cir. 1989). Blue Bayou raised its challenge to the judge's decision in its response brief, filed after the deadline for filing a petition had passed. *See* 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). Accordingly, we address only the S&S and imminent danger issues raised by the Secretary.

3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 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). See also *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary 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. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (August 1985).

The first and second elements of the *Mathies* criteria have been established. 16 FMSHRC at 1066. The issue on review is whether the judge erred in concluding the Secretary failed to establish the reasonable likelihood of an injury-producing event.

The Commission is bound by the substantial evidence test when reviewing an administrative law judge's factual determinations. 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 (November 1989) ("*R&P*"), quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). While we do not lightly overturn a judge's factual findings and credibility resolutions, neither are we bound to affirm such determinations if only slight or dubious evidence is present to support them. See, e.g., *Krispy Kreme Doughnut Corp. v. NLRB*, 732 F.2d 1288, 1293 (6th Cir. 1984); *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1263 (7th Cir. 1980). We are guided by the settled principle that, in reviewing the whole record, an appellate tribunal must also consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

In concluding the Secretary failed to establish the third *Mathies* element, the judge determined there was a mound of dirt at the track hoe<sup>5</sup> and a bump block at the hopper, the truck normally traveled at a speed of under 10 m.p.h., and there were no steep grades or significant traffic on the road. 16 FMSHRC at 1066-67.

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<sup>5</sup> A track hoe loads dirt from the pit into the truck. Tr. 15.

The overwhelming weight of the evidence, however, detracts from the judge's conclusion. Inspector Slycord observed the loaded truck operating without brakes at a pit work site with grades as high as 10%. Tr. 16, 110, 117. To dump its load into the hopper, the truck was driven in reverse down a 40-foot-long road with a 3- to 4-foot decline to the hopper area. Tr. 110, 117. Both Slycord and Ritchey testified that, if the transmission had failed, the driver would have no means of stopping the truck. Tr. 121, 184. Slycord testified that, if the driver had to swerve to avoid a person or obstruction, the truck could have plunged into the hopper and down a 20- to 30-foot-high bank into the plant area, fatally or seriously injuring the driver. Tr. 118-21, 127. Slycord testified that the plant operator who stands in the area beside the hopper, construction workers working beside the road, and other drivers would also have been endangered. Tr. 22, 111-12, 114-16, 118, 127-28. On the day of the inspection, another haulage truck was using the road and there were three other vehicles that could use or cross the road. Tr. 111, 127. We consider these particular facts surrounding the violation against the backdrop of Inspector Ritchey's testimony that mobile equipment accidents are the leading cause of fatalities in the mining industry.<sup>6</sup> Tr. 186.

The evidence relied upon by the judge is insubstantial compared to the body of record evidence and does not establish that an accident would not be reasonably likely to occur. Although there was a bump block at the hopper, it may not have been sufficient to stop the truck from falling into the hopper. Ritchey testified that fatalities have occurred at other mines when trucks with malfunctioning brakes have rolled over bump blocks and into hoppers. Tr. 185-86. Ritchey also testified that, even if the 22-ton truck was going slowly, it could "drive right over" a pickup truck, crushing its driver. *Id.* Blue Bayou's assertions, that the company had no history of accidents and that the truck had been operated in the cited condition for many months without incident, are not dispositive of a finding that the third *Mathies* element has not been established. *See Buffalo Crushed Stone, Inc.*, 16 FMSHRC 2043, 2046 (October 1994). Accordingly, we reverse the judge's determination that the Secretary failed to establish the third *Mathies* element. *See id.* at 2045-47.

Although the judge did not expressly consider the fourth *Mathies* element, the evidence is undisputed that an injury resulting from the truck's involvement in an accident would be serious in nature. Inspector Slycord testified that, in the event of an accident, the truck driver could have experienced

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<sup>6</sup> Commissioner Holen notes that, under the Commission's precedent, Inspector Ritchey's testimony to the effect that mobile equipment accidents are the leading cause of fatalities in the mining industry is irrelevant. The Commission has long held that an S&S determination is based on the particular facts surrounding the violation. *E.g., Peabody Coal Co.*, 17 FMSHRC 508, 511-12 (April 1995); *Eagle Nest, Inc.*, 14 FMSHRC 1119, 1122 (July 1992). In *Lion Mining Co.*, the Secretary argued that the judge erred, when determining whether a roof control violation was S&S, in failing to consider that roof falls are the leading cause of fatalities in mines. 18 FMSHRC \_\_\_, slip op. at 3, No. PENN 94-71-R (May 23, 1996). The Commission unanimously rejected the Secretary's argument and explained, "The Commission has held that an S&S determination must be based on the particular facts surrounding the violation, including the nature of the mine." *Id.* at 5, *citing Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988).

broken bones, head injury, or death, the plant operator could have been crushed to death, and another driver using the haul road could have been killed. Tr. 126-28.

Viewing the record as a whole, we find that substantial evidence does not support the judge's conclusion that Blue Bayou's violation of section 56.14101(a) was not reasonably likely to result in an injury. Accordingly, we reverse the judge's determination that the violation was not S&S.

#### B. Imminent Danger

The Secretary argues that the judge erred in vacating the imminent danger order and in failing to address evidence establishing an imminent danger. PDR at 6-10. He also claims the judge committed legal error when, relying on the inspector's permitting the truck to be unloaded, he found that danger was not imminent. *Id.* at 10-11. Blue Bayou responds, in essence, that the judge correctly determined the record does not support a finding of imminent danger. Blue Bayou Br. at 17-19. It also emphasizes that Inspector Slycord initially designated the likelihood of injury on the order as "reasonably likely" and only changed it to "highly likely" to justify the withdrawal order. *Id.* at 18.

Section 3(j) of the Mine Act defines an imminent danger as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. § 802(j). Adopting the reasoning of the U.S. Courts of Appeals, the Commission has "refused to limit the concept of imminent danger to hazards that pose an immediate danger." *R&P*, 11 FMSHRC at 2163, *citing Freeman Coal Mining Co. v. Interior Bd. of Mine Op. App.*, 504 F.2d 741 (7th Cir. 1974). *See also VP-5 Mining Co.*, 15 FMSHRC 1531, 1535 (August 1993); *Island Creek Coal Co.*, 15 FMSHRC 339, 345 (March 1993). Rather, the Commission has stated that "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." *R&P*, 11 FMSHRC at 2163, *quoting Eastern Associated Coal Corp. v. Interior Bd. of Mine Op. App.*, 491 F.2d 277, 278 (4th Cir. 1974) (emphasis omitted). The Commission has explained that "[t]o support a finding of imminent danger, the inspector must find that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time." *Utah Power & Light Co.*, 13 FMSHRC 1617, 1622 (October 1991) ("*UP&L*").

In reviewing an inspector's finding of an imminent danger, the Commission must support the inspector's finding "unless there is evidence that he has abused his discretion or authority." *R&P*, 11 FMSHRC at 2164, *quoting Old Ben Coal Corp. v. Interior Bd. of Mine Op. App.*, 523 F.2d 25, 31 (7th Cir. 1975) (emphasis omitted). An inspector abuses his discretion, making a

decision that is not in accordance with law, if he orders the immediate withdrawal of miners in circumstances where there is not an imminent threat to safety. *UP&L*, 13 FMSHRC at 1622-23. An inspector is granted wide discretion because he must act quickly to remove miners from a situation he believes is hazardous. *Island Creek*, 15 FMSHRC at 346-47.

We conclude that the judge erred in determining that an imminent danger did not exist because the inspector allowed the truck to be unloaded before the brakes were repaired. The judge found the inspector's action inconsistent with enforcement of an imminent danger order. Record evidence indicates the truck was unloaded with caution to facilitate repair of the brakes. Tr. 181-82. As the Commission stated in *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1292 (August 1992), although some "imminently dangerous conditions may require abatement that poses a degree of unavoidable risk to miners[, t]he fact that such actions are necessary to abate a condition . . . does not mean that the condition does not pose an imminent danger."

Further, although the judge articulated the proper standard for imminent danger, he failed to apply it. The judge did not examine whether the inspector abused his discretion by issuing the withdrawal order. The inspector made a reasonable investigation of the surrounding facts. *See Island Creek*, 15 FMSHRC at 346. The record reveals that Inspector Slycord observed the 22-ton truck operating without brakes at a pit work site with grades up to 10%, being driven in reverse on a decline to the hopper. Tr. 16, 110, 117. The inspector also testified there was a 20- to 30-foot drop from the bank where the hopper is located to the plant area below. Tr. 120-22. Slycord noted that, in addition to the truck driver, people in other vehicles were using or could use the road, a plant operator was working at the hopper, and construction workers were beside the road. Tr. 22, 111-12, 114-16, 118, 127-28. The inspector articulated his concern that these people would have been endangered in the event the driver could not control the truck, e.g., if the driver had to swerve suddenly, or if the transmission had failed, leaving no way to stop the truck. Tr. 118-23, 127. The bump block at the hopper may not have prevented the cited truck from rolling into the hopper. Tr. 121-23, 184-85. In addition, the truck was dangerous even at slow speed and could cause a fatality in the event of collision. Tr. 185-86.

The subsequent modification of the citation from "reasonably likely" to cause injury to "highly likely" does not diminish evidence that it was the inspector's belief at the time he issued the order that an imminent danger existed. Inspector Slycord explained that he modified the citation to correct a mistake. Tr. 144.

It was reasonable for the inspector, in evaluating the particular circumstances at issue in this case, to conclude that an imminent danger existed. The evidence does not allow any other conclusion than that the inspector did not abuse his discretion in issuing the imminent danger order. Accordingly, we reverse the judge's determination.

III.

Conclusion

For the foregoing reasons, we reverse the judge's S &S and imminent danger determinations. We remand for reassessment of the civil penalty consistent with this decision.<sup>7</sup> *See, e.g., Gatliff Coal Co., Inc.*, 14 FMSHRC 1982, 1989 (December 1992).

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Mary Lu Jordan, Chairman

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Arlene Holen, Commissioner

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Marc Lincoln Marks, Commissioner

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James C. Riley, Commissioner

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<sup>7</sup> We note that, in his penalty assessment, the judge found low gravity and low negligence based on evidence that work necessary to repair to the brakes was minor. 16 FMSHRC 1067. We caution the judge against relying upon such evidence on remand. *Cf. Southern Ohio Coal Company*, 13 FMSHRC 912, 919 (June 1991) (operator's failure to make minor repairs was aggravated conduct).