FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 25, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. KENT 93-295
PEABODY COAL COMPANY	:	

BEFORE: Jordan, Chairman; Doyle and Holen, Commissioners

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. (1988), presents the issue of whether a violation by Peabody Coal Company ("Peabody") of its ventilation plan was significant and substantial ("S&S"). Administrative Law Judge Arthur Amchan concluded that the violation was not S&S. 15 FMSHRC 1887 (September 1993) (ALJ). For the reasons that follow, we affirm the result reached by the judge.

I.

Factual and Procedural Background

Peabody owns and operates the Martwick mine, an underground coal mine in Muhlenberg County, Kentucky. On November 19, 1992, Darold Gamblin, an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA"), observed a continuous mining machine operating 60 feet inby the last open crosscut in the No. 1 entry. Gamblin instructed the operator of the continuous miner to shut it down and he then measured the air flow 25 feet behind its cutting edge at the end of the line brattice. He found the air flow to be 2,340 cubic feet per minute ("cfm"), less than the 5,000 cfm required by Peabody's ventilation plan. The inspector

issued a section 104(a), 30 U.S.C. ' 814(a), citation to Peabody, alleging an S&S violation of 30 C.F.R. ' 75.316 (1991) based on the air flow deficiency.[1] Gov't Ex. 3.

At the hearing, the citation was amended to allege a violation of 30 C.F.R. ' 75.370(a)(1), which superseded section 75.316 three days before the inspection.[2] 15 FMSHRC at 1891. Peabody conceded the violation. *Id.* The judge determined, however, that the Secretary had

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[1] Section 75.316, which restated 30 U.S.C. ' 863(o), provided as follows:

> A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form . . . .

30 C.F.R. ' 75.316 (1991).

[2] Section 75.370(a)(1) states in pertinent part:

> The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine. . . .

30 C.F.R. ' 75.370(a)(1). This section became effective November 16, 1992. 57 Fed. Reg. 34683 (August 6, 1992).

failed to prove that the violation was S&S. *Id.* at 1894. The Commission granted the Secretary's petition for discretionary review, which challenged this determination.

II.

Disposition

Peabody's approved ventilation plan required that "[a] minimum of 5000 cfm of air shall be delivered to the inby end of the line brattice before the scrubber[3] [on the continuous miner] is started and shall be maintained until the cut has been completed." Gov't Ex. 4, at 4, & 2. The Secretary submits that the judge, in making his S&S determination, improperly focused on the fact that the continuous mining machine was not running at the time the inspector took his air flow reading. The Secretary contends that the judge erred in distinguishing *U.S. Steel Mining Co.*, 7 FMSHRC 1125 (August 1985), in which the Commission found that a violation of a ventilation plan provision was S&S. The Secretary also argues that the judge erred in rejecting the inspector's testimony that injury or illness was reasonably likely to result if the violation continued.

Peabody responds that the judge's S&S determination is supported by substantial evidence and is not in conflict with *U.S. Steel*.

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. ' 814(d), and refers to a more serious type of violation. 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.*, 3 FMSHRC 822, 825-26 (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.

[3] The scrubber, a fanlike device, vacuums coal dust from the atmosphere by suctioning in air from behind the continuous miner's cutting head and spraying it with water. The water-laden dust is collected on a screen; the air is dried and discharged dust-free. *See* Tr. 88-90, 106-07, 109, 141-42.

Id. at 3-4. *See also Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

The issue in question is the third element of the *Mathies* test. Peabody conceded the violation, establishing the first element. 15 FMSHRC at 1891. As to the second element, a discrete safety hazard, the judge found that "the lack of 5,000 cfm of air prior to operation of the scrubber increased the likelihood of serious injury or illness." *Id.* at 1893. The judge also found that the fourth element was proven. He concluded that resulting injuries -- from inhalation of excessive amounts of respirable coal dust as well as from explosions -- would be serious. *Id.* at 1891. The judge concluded, however, that the Secretary had failed to prove the third element of *Mathies*, a reasonable likelihood that the 2,340 cfm air flow prior to the machine being placed in operation would result in injury or illness. *Id.* at 1892-93.

The Secretary bears the burden of proving that a violation is S&S. *See, e.g., Union Oil Co. of Cal.*, 11 FMSHRC 289, 298-99 (March 1989). We agree with the judge that the Secretary failed to establish the reasonable likelihood of injury or illness and, thus, failed to meet his burden of proof.

The inspector measured the air quantity while both the scrubber and the continuous miner were off and cited Peabody for its failure to deliver 5,000 cfm before the scrubber was started. At hearing, the Secretary's case essentially relied upon the testimony of Inspector Gamblin, who testified that, without 5,000 cfm air flow, a person "could" be exposed to respirable dust and that pneumoconiosis "can" result. Tr. 93, 97. He also stated that methane ignitions "can" result. Tr. 93. He said that ignition sources "could" still be present when the continuous miner is not operational. Tr. 120. The inspector was also concerned with the danger of methane and dust recirculation due to inadequate air flow, but he indicated only that recirculation "can" or "could" occur. Tr. 122. Gamblin's testimony, as found by the judge, does not establish that delivery of 2,340 cfm of air before the scrubber is started, when no mining is occurring, would be reasonably likely to result in injury or illness. *See Union Oil*, 11 FMSHRC at 298-99.

The judge rejected the Secretary's argument that *U.S. Steel* is controlling here. In *U.S. Steel*, the operator was cited for running its continuous miner while its air quantity was below the required level of 5,000 cfm and, based on the evidence presented in that case, the Commission determined that U.S. Steel's failure to provide the required level of air during mining was S&S. 7 FMSHRC at 1126-31. Under Commission precedent, however, determination of whether a violation is S&S must be based on the facts surrounding the violation as evidenced in the record. *See, e.g., Texasgulf, Inc.*, 10 FMSHRC 498, 501-03 (April 1988). The facts giving rise to this violation differ significantly from those in *U.S. Steel*: here, the violation rested on the operator's failure to provide a specific quantity of air before either the scrubber or continuous miner was started. Thus, we conclude that the judge was correct in distinguishing the Commission's holding in *U.S. Steel* from the issue in this case.

The Secretary also argues that Peabody was grossly out of compliance with its ventilation plan and that there is no evidence that, during production mining, operation of the scrubber would

have increased the air flow to 5,000 cfm or more.[4] Inspector Gamblin conceded that the scrubber was in operation until he requested that it be shut down. Tr. 108-09. The Secretary presented no evidence as to the air quantity being delivered prior to the shutdown and the record contains no evidence that the inspector measured the air prior to the shutdown. Thus, the Secretary did not provide support for his theory that the air flow during production would also be inadequate. In fact, Gamblin testified that, with the scrubber running, an air flow of approximately 5,000 to 6,700 cfm could be generated. Tr. 110. In reaching our conclusion that the Secretary failed to prove that the cited violation was S&S, we do not suggest that there is a threshold of diminished air flow required for a ventilation plan violation to be considered S&S.

[4] The judge found and the Secretary has conceded on review that, had the air quantity been measured with the scrubber in operation, the air flow would have been greater than that measured by the inspector. 15 FMSHRC at 1892-93; PDR at 7 n.5.

III.

Conclusion

For the foregoing reasons, the decision of the Administrative Law Judge is affirmed.

Mary Lu Jordan, Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Commissioner Marks, not participating:

I assumed office after this case had been briefed, considered at a Commission decisional meeting, and a decision had been drafted. As a new Commissioner, I possess legal authority to participate in pending cases and such participation is discretionary. In light of these circumstances, I elect not to participate in this case.

Marc Lincoln Marks, Commissioner