

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

August 18, 1997

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

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v.

Docket No. KENT 93-369

PEABODY COAL COMPANY

BEFORE: Jordan, Chairman; Marks, Riley and Verheggen, Commissioners

DECISION

BY: Jordan, Chairman; Riley and Verheggen, Commissioners

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), involves a dispute between the Secretary of Labor and Peabody Coal Company (Peabody) regarding whether Peabody's violation of 30 C.F.R. § 75.601¹ was significant and substantial (S&S).² In an earlier decision, Administrative Law Judge Arthur Amchan determined that the violation was S&S. 15 FMSHRC 2578, 2584-86 (December 1993) (ALJ). The Commission subsequently vacated that decision and remanded for further analysis, concluding that the judge failed to apply the Commission's S&S test in *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984) consistent with Commission precedent. 17 FMSHRC 508, 510-12 (April 1995) (*Peabody I*). On remand, the judge determined that the violation was not S&S.³ 17 FMSHRC 811, 813-15 (May 1995) (ALJ). For the reasons that follow, we reverse and remand.

¹ Section 75.601 provides in part:

Disconnecting devices used to disconnect power from trailing cables shall be plainly marked and identified and such devices shall be equipped or designed in such a manner that it can be determined by visual observation that the power is disconnected.

² The S&S terminology is taken from section 104(d)(1) of the Mine 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 The judge also found that a violation of 30 C.F.R. § 75.701 by Peabody was not S&S. 17 FMSHRC at 813. The Secretary did not seek review of that determination. PDR at 2 n.1.

I.

Factual and Procedural Background

The background facts in this proceeding are fully set forth in *Peabody I*, 17 FMSHRC at 509, and are summarized here. On December 14, 1992, Darold Gamblin, an inspector from the Department of Labor's Mine Safety and Health Administration (MSHA), inspected Peabody's Martwick Mine, an underground coal mine in Muhlenberg, Kentucky. 17 FMSHRC at 811. At the 3 South Panel entries, the inspector observed two disconnecting devices, or catheads, which were plugged into a transformer. *Id.* at 813. Both catheads were attached to trailing cables leading to continuous miners located at the face, a distance of approximately 250 to 300 feet. Tr. 38. One of the continuous miners, which had been rebuilt and returned to service, was being exchanged for the other miner. Tr. 89. Only one of the catheads was labeled to indicate the equipment to which its cable was attached. Tr. 42. The inspector believed that, if the wrong cathead were plugged into the transformer, a miner could get electrocuted or crushed if he were working on or near the mistakenly energized continuous miner. Tr. 40-41. Accordingly, Inspector Gamblin issued a citation to Peabody alleging an S&S violation of section 75.601.

Peabody conceded the violation but disputed the inspector's characterization of the violation as S&S. Tr. 7. The matter proceeded to hearing before Judge Amchan.

In his initial decision, the judge found that the violation was S&S. 15 FMSHRC at 2584-86. In reaching his determination, the judge attempted to harmonize the test for a serious violation under the Occupational Safety and Health Act, 29 U.S.C. § 651 et seq. (1994) (OSHAct) with the Commission's S&S test under *Mathies*, 6 FMSHRC at 3-4. *Id.* at 2581-84. In addition, the judge found Peabody's violation to be indistinguishable in any significant respect from the operator's S&S violation of section 75.601 in *U.S. Steel Mining Co.*, 6 FMSHRC 1834 (August 1984) (*U.S. Steel II*). *Id.* at 2586.

The Commission granted Peabody's petition for discretionary review of the judge's determination. A majority of the Commission concluded that the judge departed from applicable Commission precedent in attempting to harmonize the Commission's S&S test with the test for a serious violation under the OSHAct. 17 FMSHRC at 510-11. The Commission also determined that the judge erred in concluding that the violation was S&S because he could not distinguish the facts of this case from those in *U.S. Steel II*. *Id.* at 511. It explained that S&S determinations have been based upon the particular facts surrounding the violation in issue. *Id.* Accordingly, the Commission vacated the judge's decision and remanded for further analysis. *Id.* at 512. Chairman Jordan, dissenting in part, voted to affirm the judge's S&S determination. *Id.* at 514-15. She concluded that the judge's decision was supported by substantial evidence. *Id.* at 514. In addition, the Chairman found the judge's conclusion consistent with the Commission's resolution of the S&S question in *U.S. Steel II*. *Id.* at 514-15.

In his decision on remand, the judge determined that Peabody's violation of section 75.601

was not S&S. 17 FMSHRC at 813-15. He reasoned that there was not a reasonable likelihood of injury resulting from the violation because the older continuous miner would only be in the same location as the rebuilt miner for 2 or 3 days, and a person could tell by process of elimination which cathead belonged to the rebuilt miner. *Id.* at 814-15. The judge also relied upon evidence that it was company practice for employees, prior to disconnecting a cathead, to trace its trailing cable to the transformer and for an employee performing work on a miner to lock out power to the machine himself. *Id.* Accordingly, the judge assessed a penalty of \$50 rather than the proposed penalty of \$189 that he had assessed in his initial decision. *Id.* at 815.

The Commission granted the Secretary's subsequent petition for discretionary review, challenging the judge's determination.

II.

Disposition

The Secretary argues that the judge's determination that Peabody's violation of section 75.601 was not S&S is inconsistent with the purpose of the standard and is not supported by substantial evidence. PDR at 4-5.⁴ She maintains that the purpose of section 75.601 is to prevent miners from being forced to use a process of elimination to identify the correct cathead to connect or disconnect. *Id.* at 6. The Secretary contends that, without proper labeling, the wrong cathead could be plugged into the transformer, resulting in a reasonable likelihood of injury to miners working on or near mistakenly energized equipment. *Id.* at 7-8. Finally, she argues that the Commission found a similar violation to be S&S in *U.S. Steel II*. *Id.* at 9-10. Accordingly, the Secretary requests that the Commission reverse the judge's determination and remand for the reassessment of a civil penalty. *Id.* at 10-11.

Peabody responds that the judge correctly determined that the violation was not S&S. P. Br. at 7. It argues that injury was not reasonably likely to result from its failure to label one of the catheads because the continuous miners would be in the same site for a brief period of time, the catheads were distinguishable in that one was cleaner and one was labeled, and activation of the lights on the continuous miners would reveal whether the correct cathead had been connected. *Id.* at 3-5. Peabody also asserts that the likelihood of injury was eliminated by its lock-out policy and the practice at the mine to trace trailing cables to the transformer before connecting or disconnecting catheads. *Id.* at 5-6.

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

⁴ Pursuant to Commission Procedural Rule 75(a), 29 C.F.R. ' 2700.75(a), the Secretary designated his petition for discretionary review as his brief.

reasonably serious nature. *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies*, 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 **C** that is, a measure of danger to safety **C** 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).

At issue is the third *Mathies* element. We conclude that substantial evidence does not support the judge's determination that injury was not reasonably like to result from Peabody's violation.⁵

First, contrary to the judge's finding, evidence that both continuous miners would be in the same site for 2 to 3 days increased, rather than decreased, the likelihood that injury would result from Peabody's failure to label one of the miners' catheads. Under normal conditions, only one continuous miner is usually used in a section of the mine. Tr. 89. At the time of the inspection, circumstances were unusual in that there were two continuous miners in one section. Tr. 42. The

⁵ 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 (November 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

catheads of the trailing cables of both continuous miners were plugged into the same transformer and energized.⁶ Tr. 42, 46-47. Inspector Gamblin testified that, under such circumstances, a miner instructed to turn the power off of the equipment would not know which cathead to disconnect. Tr. 61. He stated that a person working on the equipment might assume that the correct miner had been turned off when it had not. Tr. 62. The inspector explained that a person working on the mistakenly energized equipment's electrical components or cable could be electrocuted, and a miner working on the cutting head could be crushed. Tr. 40-41.

In addition, the return to service of a rebuilt continuous miner is the type of work that would likely require miners to connect or disconnect the equipment's cathead. Inspector Gamblin testified that miners would handle catheads if they had problems with the equipment or if they needed to disconnect power in order to do mechanical or electrical work. Tr. 45. He stated that installation of a continuous miner involves primarily electrical work and that they w[ere] having trouble with the miners electrically and they had been back and forth to the power station. Tr. 34, 45. Bob Epley, the chief engineer at the mine, testified that when a rebuilt miner is exchanged for an older miner, the older miner is not removed until it is determined that all [of] the bugs have been worked out of the rebuilt miner. Tr. 103.

Furthermore, although Peabody had a policy requiring a person performing work on equipment to lock out power to the equipment himself, that policy did not apply to troubleshooting. Tr. 110-11. Even if a lock were placed in the receptacle, however, the cathead connected to the equipment requiring work could still be plugged into the other receptacle at the transformer. Tr. 62-63, 75-77. Both catheads for the continuous miners were interchangeable and could be plugged into either receptacle. Tr. 46. Thus, even if the lock-out policy were followed, a continuous miner could still be mistakenly energized.

Moreover, the judge erred in finding that there was not a reasonable likelihood of injury because miners could use a process of elimination to distinguish between the catheads. In *U.S. Steel II*, the Commission, concluding that injury was reasonably likely to result from an operator's violation of section 75.601, rejected the operator's argument that because only one of two catheads was unmarked, a person would know the identity of the cables through a process of elimination. 6 FMSHRC at 1838. The Commission explained that Relying on [the] skill and attentiveness of miners to prevent injury ignores the inherent vagaries of human behavior. 6 FMSHRC at 1838 n.4 (quoting *Great W. Elec. Co.*, 5 FMSHRC 840, 842 (May 1983)). See also *Eagle Nest, Inc.*, 14 FMSHRC 1119, 1123 (July 1992) (a miner's exercise of caution is not a factor in considering whether violation is S&S). Here, although the cathead for the rebuilt miner was cleaner than the other cathead, the area around the transformer was pitch dark and the only light provided was by cap lamps. Tr. 43. In addition, although one cathead was marked, there is

⁶ In order to energize equipment, the cathead must be plugged into the receptacle at the transformer, and the breaker for that receptacle must be turned on. Tr. 66.

no evidence as to what the label actually read and whether it distinguished between the two continuous miners. Epley testified that the practice at the mine was to use reflective tape with the name of the piece of machinery on it. Like a miner, it would be marked with a white reflector tape and [>]miner[=] wrote on it.@ Tr. 111-12. Thus, a person at the transformer might not know that the labeled cathead was connected to the older miner rather than the rebuilt miner.

Similarly, injury was not sufficiently reduced by Peabody's practice requiring miners to trace a trailing cable from the equipment to the transformer before disconnecting it. As the inspector testified, miners handle catheads when there are problems with the equipment. Tr. 44-45; PDR at 6. Here, if such problems arose, a miner would have to trace approximately 250 to 300 feet of trailing cable to the transformer before he could verify that he was disconnecting the correct continuous miner. Tr. 38.

Finally, we find unpersuasive Peabody's argument that injury was not reasonably likely because the continuous miners were equipped with lights that are activated only when the miner was plugged into the transformer, making it apparent whether the correct machine had been energized. P. Br. at 4-5. As the Commission has previously recognized, the purpose of the standard's labeling requirement is to prevent accidental energization of equipment in the first instance.@ *U.S. Steel Mining Co.*, 10 FMSHRC 1138, 1143 (September 1988). In any event, Inspector Gamblin testified that the lights on the continuous miner would not burn, even though the miner was energized at the transformer, if a breaker on the continuous miner had been turned off or if the equipment's methane monitor had deactivated the lights. Tr. 63-64.

III.

Conclusion

For the foregoing reasons, we reverse the judge's determination that Peabody's violation of section 75.601 was not S&S. We remand to the Chief Administrative Law Judge for reassignment and the reassessment of a civil penalty consistent with this opinion.⁷

Mary Lu Jordan, Chairman

⁷ Judge Amchan has transferred to another agency.

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Commissioner Marks, concurring:

For the same reasons expressed in my concurring opinion in *U.S. Steel Mining Co.*, 18 FMSHRC 862, 868-75 (June 1996), wherein I suggested that the *Mathies* test be eliminated, I concur, in result, with my colleagues' conclusion that the violation is S&S. I further note that, since the issuance of *U.S. Steel*, I have repeatedly extended, to operators and the government, the opportunity to challenge the flawed *Mathies* test (particularly the third element) in cases pending before the Commission. However, to date, there has been no response.

Marc Lincoln Marks, Commissioner