FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 26, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. KENT 93-369
PEABODY COAL COMPANY	:	

BEFORE: Jordan, Chairman; Doyle, Holen and Marks, Commissioners

DECISION

BY: Doyle, Holen and Marks, Commissioners

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1988) ("Mine Act" or "Act"), presents the issue of whether violations of 30 C.F.R. '' 75.701 and 75.601 by Peabody Coal Company ("Peabody") were significant and substantial ("S&S").[1] Administrative Law Judge Arthur Amchan determined that the violations were S&S. 15 FMSHRC 2578 (December 1993) (ALJ). For the reasons that follow, we vacate the judge's decision and remand.

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[1] 30 C.F.R. ' 75.701 provides:

> Metallic frames, casings, and other enclosures of electric equipment that can become "alive" through failure of insulation or by contact with energized parts shall be grounded by methods approved by an authorized representative of the Secretary.

30 C.F.R. ' 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.

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 in nature any violation that could "significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard . . . ."

I.

Factual and Procedural Background

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. At the 3 South Panel entries, the inspector observed that the external grounding device to a cathead was not properly connected. 15 FMSHRC at 2578-79. The inspector issued a citation alleging an S&S violation of section 75.701 because he was concerned that, if the insulation of the trailing cable were torn allowing internal parts to contact the casing, the cathead casing could become energized. *Id.* at 2579-80; Tr. 17; Jt. Ex. 1.

Inspector Gamblin also observed two catheads that were attached to cables from continuous miners and connected to a transformer; one was not labeled to identify the equipment whose trailing cable was attached. 15 FMSHRC at 2584. The inspector issued a citation alleging an S&S violation of section 75.601, based on his belief that there was a reasonable likelihood that, if the wrong cathead were connected to the transformer, an injury would result. *Id.* at 2584-85; Jt. Ex. 2.

Peabody conceded both violations but contested the inspector's determination that the violations were S&S. The matter was heard by Judge Amchan.

The judge determined that the only question at issue in evaluating the S&S nature of the violations was whether the Secretary had established a reasonable likelihood of injury resulting from the violations. 15 FMSHRC at 2579, 2585. Attempting to harmonize the test for a "serious" violation under the Occupational Safety and Health Act, 29 U.S.C. ' 651 et seq. (1988) ("OSHAct"), with the Commission's S&S test, the judge construed *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984) ("*U.S. Steel I*"), as inconsistent with *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825-26 (April 1981) and *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984). *Id.* at 2581-84.

With respect to the violation of section 75.701, the judge determined that, "unless the record indicate[d] that the conditions cited do not pose the hazard to which the standard is directed," injury is reasonably likely in the context of "normal mining conditions" because "sooner or later, at this mine or at another, noncompliance with the standard will result in injury." 15 FMSHRC at 2583. The judge concluded that, because there was no evidence in the record indicating that the cited conditions did not pose the hazards to which the standard was directed, Peabody's violation of section 75.701 was S&S. *Id.*

Applying the same analysis to the violation of section 75.601, the judge found that the violation was S&S "[e]ven if injury [were] likely to occur only once every ten or twenty years." 15 FMSHRC at 2585. The judge also relied on his finding that this violation was factually similar

to an S&S violation of section 75.601 in *U.S. Steel Mining Co.*, 6 FMSHRC 1834 (August 1984) ("*U.S. Steel II*"). 15 FMSHRC at 2586.

The Commission directed review sua sponte of the judge's S&S determinations, granted Peabody's petition for review, and allowed amicus curiae participation by twelve organizations.

II.

Disposition

Peabody argues that the judge applied an incorrect standard in determining whether its violations of sections 75.701 and 75.601 were S&S and that, in fact, the *Mathies* test had not been modified by *U.S. Steel I*. It states that, in order to prove a violation S&S, the Secretary must prove the existence of a "confluence of factors" necessary for injury to result and that the Secretary failed to do so with respect to its violations. P. Br. at 11-14. Peabody asks the Commission to reverse the judge's S&S determinations or, in the alternative, to remand for application of *Mathies*.[2] The Secretary agrees that the judge's analysis is inconsistent with Commission precedent. He asserts, however, that he met his burden of proving the violations S&S under *Mathies* and that application of *Mathies* by the Commission is appropriate. The Secretary alternatively requests remand for a *Mathies* analysis by the judge. Sec. Br. at 16-17.

The Mine Act sets forth a graduated enforcement scheme, including the designation of violations as S&S (*National Gypsum*, 3 FMSHRC at 828); there is no comparable provision in the less stringent OSHAct. *See Allied Prod. Co. v. FMSHRC*, 666 F.2d 890, 894 (5th Cir. 1982). The Commission has determined that 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. *National Gypsum*, 3 FMSHRC at 825-26. 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 -- 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. *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).

[2] The amici filed a joint brief generally supporting Peabody's position.

We agree with the parties and the amici that the judge's analysis of whether the violations were S&S was inconsistent with longstanding Commission precedent. The judge erred in looking to the test for a serious violation developed under the OSHAct; that law, unlike the Commission's S&S test, does not require consideration of the likelihood of injury. Under the OSHAct, the Secretary need only prove that an accident could result from a violation and that, if an accident does occur, there would be a substantial probability of serious physical harm; the Secretary need not prove the likelihood of an accident occurring. *East Tex. Motor Freight, Inc. v. OSHRC*, 671 F.2d 845, 849 (5th Cir. 1982).

Moreover, the judge misconstrued *U.S. Steel I*. In that case, the Commission, in response to an operator's argument that the seriousness of the violation should be evaluated on the basis of conditions existing at the precise moment of an inspection, recognized that S&S determinations were not limited to conditions existing at the time of citation. 6 FMSHRC at 1574. Rather, the Commission held that evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *Id.* The Commission did not suggest, however, that the conditions in other mines or over extended periods were relevant. The judge also erred in concluding that Peabody's violation of section 75.601 was S&S because he could not distinguish the facts of this case from those in *U.S. Steel II*, in which the Commission found a violation of section 75.601 to be S&S.[3] In cases decided under *National Gypsum* and *Mathies*, including *U.S. Steel I*, S&S determinations have been based upon the particular facts surrounding the violation in issue. *E.g., Texasgulf, Inc.*, 10 FMSHRC 498, 500-01 (April 1988).

[3] The facts of the two cases are not identical. *U.S. Steel II* involved a "keying system," which was deemed unreliable and which was frequently modified by miners. 6 FMSHRC at 1838.

Our dissenting colleague would affirm the judge's determination that Peabody's violation of section 75.601 was S&S because she finds that substantial evidence supports his decision and because, like the judge, she finds the facts in this case to be similar to those in *U.S. Steel II*. To the extent that she relies on a factual similarity between this case and *U.S. Steel II*, she errs. The Commission's S&S determinations are properly based upon the particular facts of record underlying the violation in issue, not upon facts in other cases.[4]

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[4] Commissioners Doyle and Holen believe that their dissenting colleague also errs in citing *Texasgulf, Inc.*, 10 FMSHRC at 503-04, and *Michigan Wis. Pipe Line Co. v. F.P.C.*, 520 F.2d 84, 89 (D.C. Cir. 1975), to support her proposition that an S&S determination can rest on the facts of other cases. Slip op. at 8 n.1. The Commission's disposition in *Texasgulf* expressly rested upon the particular facts of record considered under the *Mathies* test. In order to emphasize the factual basis for its determination that the violation at issue *was not* S&S, the Commission compared that result with other cases where it found that violations under factually similar, but not identical, circumstances *were* S&S: *U.S. Steel Mining Co.*, 6 FMSHRC 1866, 1867-69 (August 1984); *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1128-31 (August 1985); and *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 677-78 (April 1987). 10 FMSHRC at 503. The Commission's statement in *Texasgulf* that its conclusion was consistent with applicable precedent referred to legal precedent. 10 FMSHRC at 500, 504.

The judge did not properly apply the Commission's S&S test. Accordingly, we vacate his determinations with respect to the two violations at issue, and remand for application of *Mathies* consistent with Commission precedent. *E.g.*, *Energy West Mining Co.*, 15 FMSHRC 1836, 1839-40 (September 1993).

In *Michigan Wis. Pipe Line Co.*, the issue involved application of a pricing "principle" developed in an earlier case. 520 F.2d at 89. The court found that the principle could be applied in subsequent proceedings, *id.*, just as the Commission has applied *Mathies*. Contrary to our dissenting colleague's assertion, the court did not conclude that the agency's decision could be based upon the facts of the earlier case if the cases bore "something more than a modicum of similarity." Slip op. at 8 n.1. Rather, the court found that a prerequisite to the application of the principle was that the case "bear something more than a modicum of similarity to the case from which the principle derives." 520 F.2d at 89. Further, the court criticized the agency for its inappropriate reliance on the earlier case and remanded the matter for analysis of the evidence of record. *Id.* at 90.

III.

Conclusion

For the foregoing reasons, we vacate the judge's decision and remand for further analysis consistent with this opinion.

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Marc Lincoln Marks, Commissioner

Jordan, Chairman, concurring in part and dissenting in part:

I agree with my colleagues that the judge's S&S finding with regard to Peabody's violation of section 75.701 should be vacated and the matter remanded for application of *Mathies.* With regard to Peabody's violation of section 76.601, however, I would affirm the judge's S&S finding.

The judge found that there were two catheads attached to trailing cables from two continuous miners. 15 FMSHRC at 2584. One of the continuous miners had been in the section for "quite a while;" the other machine had been recently rebuilt and was to replace the older equipment. *Id.* at 2585. The catheads plugged the trailing cables into a transformer. *Id.* at 2584. The judge further found that one of the catheads was not marked to indicate the equipment to which its trailing cable was attached. *Id.* The judge accepted that the cathead attached to the trailing cable from the older continuous miner was dirtier than the cathead attached to the rebuilt machine's trailing cable. *Id.* at 2585.

As noted by the judge, the parties' dispute centered around the reasonable likelihood of injury, the third element of the S&S test set forth in *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984). 15 FMSHRC at 2585. The MSHA inspector thought that there was a reasonable likelihood that miners would confuse the catheads and energize the wrong piece of equipment, thereby subjecting employees to electric shock or injury from a continuous miner's cutting head. *Id.* In analyzing whether the Secretary had established the third *Mathies* criterion, the judge rejected Peabody's argument that, since one cathead was labeled, miners could rely on a "process of elimination" and therefore would be unlikely to confuse the catheads. *Id.* at 2586. Citing *U.S. Steel Mining Co.*, 6 FMSHRC 1838 n.4 ("*U.S. Steel II*"), the judge concluded that speculation about the future behavior of miners did not negate the Secretary's proof of reasonable likelihood of injury. 15 FMSHRC at 2586.

The judge acknowledged that in *U.S. Steel II*, unlike the present case, the catheads could not be differentiated on the basis of cleanliness. 15 FMSHRC at 2586. However, he declined to distinguish *U.S. Steel II* on that basis, concluding that to do so would require him to "speculate that an employee would in every situation make the logical connection between the appearance of the cathead and its connection to the new or old mining machine." *Id.*

Based on the facts of record, I believe substantial evidence supports the judge's conclusion that the Secretary established that the violation of section 75.601 was reasonably likely to result in injury, and hence that the violation was S&S. I find the judge's conclusion

consistent with the Commission's resolution of the S&S question, based on similar facts, in *U.S. Steel II*.[1] Accordingly, I would affirm rather than remand this issue to the judge.

Mary Lu Jordan, Chairman

[1] Commissioners Doyle and Holen erroneously assert that my views "rest on the facts of other cases." Slip op. at 5 n.4. Like the judge, I rely on the facts of *this* case, and on *precedent* from a prior Commission decision. While S&S determinations should be based on record facts, the Commission also relies on "applicable precedent" in making S&S determinations. *Texasgulf, Inc.*, 10 FMSHRC 498, 503-04 (April 1988); *see also, e.g., Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 678 (April 1987) (citing as precedent *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (August 1985)). That the facts of *U.S. Steel II* are not "identical" with those in the present case, slip op. at 4 n.3, is no impediment to reliance on *U.S. Steel II* as precedent here; it is sufficient that the cases bear "something more than a modicum of similarity" to each other. *Michigan Wisconsin Pipe Line Co. v. F.P.C.*, 520 F.2d 84, 89 (D.C. Cir. 1975). I agree with the judge's conclusion that they do.