FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

March 18, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. PENN 93-51
POWER OPERATING COMPANY, INC.	:	

BEFORE: Jordan, Chairman; Doyle, Holen, and Marks, Commissioners[1]

DECISION

BY: Jordan, Chairman; Holen and Marks, Commissioners

This civil penalty proceeding involves a violation of 30 C.F.R. § 77.1710(a), which requires the wearing of face-shields or goggles when hazards to the eyes exist.[2] Administrative Law Judge Avram Weisberger concluded that Power Operating Company, Inc. ("Power") violated the standard but that the violation was not significant and substantial ("S&S"). 16 FMSHRC 591 (March 1994) (ALJ). The Commission granted the Secretary of Labor's petition for discretionary review, which challenges the judge's S&S determination. For the reasons that follow, we reverse and remand for reassessment of the civil penalty.

I.

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[1] Commissioner Riley assumed office after this case had been considered and decided at a Commission decisional meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, n.2 (June 1994). In the interest of efficient decision making, Commissioner Riley has elected not to participate in this matter.

[2] Section 77.1710(a) states:

> Protective clothing or equipment and face-shields or goggles shall be worn when welding, cutting, or working with molten metal or when other hazards to the eyes exist.

Factual and Procedural Background

During an inspection of Power's Frenchtown mine in Clearfield County, Pennsylvania, on September 16, 1992, Inspector Charles Lauver of the Department of Labor's Mine Safety and Health Administration ("MSHA") noticed a miner steam cleaning the side of a rock truck with a "steam jenny,"[3] which applies "high pressure steam and liquid" through a hose. 16 FMSHRC at 606; Tr. 212-13.[4] According to Lauver, such steam cleaning causes "dirt, grease, [and] all manner of material to become dislodged and . . . splatter in all directions." *Id.* at 606-07; Tr. 213. Lauver observed that the miner was not wearing goggles or a face shield and that his face was "splattered with black spots from the material that had been sprayed up." *Id.* at 606; Tr. 213. He thereupon issued a citation to Power alleging an S&S violation of section 77.1710(a).

Power conceded the violation but contested the S&S designation. 16 FMSHRC at 606. The judge concluded that the violation was not S&S and assessed a $100 civil penalty. *Id.* at 607.

II.

Disposition

In analyzing the S&S issue, the judge found that an injury-causing event involving the miner's eyes was reasonably likely to occur as a result of the violation. 16 FMSHRC at 607. He opined, however, that the record contained no evidence regarding the seriousness of such an injury. *Id.* at 607.

The Secretary argues that the judge's finding that there was no evidence regarding the severity of an eye injury erroneously overlooks the inspector's contemporaneous notes, which were entered into evidence and state that a "serious eye injury could result." PDR at 4 (*citing* Gov't Ex. 21.)[5] The Secretary further contends that "the splattering of foreign material into the eye under high pressure, is recognized by most people, in light of common life experiences, to be very likely . . . of a serious nature." PDR at 4; *see also id.* at 5 n.2.

Power responds that the judge properly concluded that the Secretary failed to establish the likelihood of a reasonably serious injury. P. Br. at 2-3. It asserts that the testimony of its witness, Peter Baughman, an experienced jenny operator, who perceived no serious hazard in using it without protective equipment, constitutes substantial evidence in support of the judge's

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[3] A "jenny" is "a machine for cleaning . . . surfaces by means of a jet of steam." *Webster's Third New International Dictionary (Unabridged)* 1213 (1986).

[4] Transcript references are to the volume of testimony taken on December 8, 1993.

[5] The Secretary designated his PDR as his brief.

determination. *Id.* at 3. In its view, the Secretary's argument based upon "common life experiences" lacks common sense and impermissibly attempts to shift the burden of proof. *Id.* at 3-5.

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), 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.*, 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.

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, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (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 *Mathies* elements are established. Power concedes the violation (Tr. 210) and the record shows that the violation contributed to the hazard of exposing the jenny operator's unprotected eyes to flying debris from the high pressure jet of steam and water. 16 FMSHRC at 606; Tr. 212-13; *see also* Tr. 222-23. Concerning the third *Mathies* element, substantial evidence supports the judge's finding that there was a reasonable likelihood of injury resulting from that hazard.[6] Usually, the nozzle of the jenny's hose is held only about three feet away from the truck being cleaned. It was undisputed that the steam cleaning causes dirt, grease, and other material to dislodge and splatter loose and that, in fact, the jenny operator's face was spattered with spots of "sprayed up" material when the inspector observed the violative situation.

[6] 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) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). 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).

16 FMSHRC at 606; Tr. 212-13, 222. Thus, on this record, it is clear that an injury-producing event of materials dislodged from the truck during steam cleaning being propelled into the equipment operator's unprotected eyes was reasonably likely to occur.

We conclude, however, that the judge's ultimate S&S determination is erroneous. With respect to the fourth *Mathies* element, he failed to consider all the relevant evidence and his finding is not supported by substantial evidence.

In *Mathies*, the Commission recognized that "[a]s a practical matter, the last two [*Mathies*] elements will often be combined in a single showing." 6 FMSHRC at 4. Much of the evidence on this record that establishes the reasonable likelihood of an eye injury also demonstrates that the injury would be reasonably serious. Steam cleaning the rock truck required the jenny operator to shoot a pressurized jet of hot water and steam at close range (approximately three feet), forcibly dispersing whatever debris had accumulated on the truck. Hot water and dislodged materials splattered on the operator's unprotected face. These facts support only one conclusion: forcibly propelled debris such as dirt, grease, or hot water striking the eye is reasonably likely to cause reasonably serious trauma.[7]

Moreover, in *Ozark-Mahoning Co.*, 8 FMSHRC 190 (February 1986), the Commission observed in general terms that, for S&S purposes, "it is obvious that whenever foreign objects are propelled into the eye there is a reasonable likelihood of loss or impairment of vision as well as injury." 8 FMSHRC at 192. Although that case involved different facts, the hazard of rock fragments propelled through the air as a result of percussion drilling, the Commission did not confine its observation to that context.

Contrary to the judge's view, the record also contains evidence of the inspector's opinion regarding the severity of such injury. The citation issued by the inspector (Gov't Ex. 29) and his contemporaneous notes (Gov't Ex. 21), both introduced into the record without objection (Tr. 212, 214-15), state that the eye injury likely to result from the violation would be serious. On cross-examination, the operator's counsel asked the inspector about the somewhat different wording of his injury characterizations on these two documents, and the inspector replied, in clarification, that a serious eye injury was "highly likely," not just "reasonably likely." Tr. 216. The judge overlooked this relevant documentary and testimonial evidence and, hence, failed to address the record adequately. *See, e.g., Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994), and authorities cited. In concluding that the fourth *Mathies* element has been established, the Commission has relied on the opinions of a mine inspector concerning the

[7] Chairman Jordan and Commissioner Marks decline to accord any weight to Baughman's assertion that he had so far avoided eye injury while steam cleaning without goggles (Tr. 220-22). It would be inconsistent with the safety promoting goals of the Mine Act to permit an operator to defend itself against an S&S designation in a citation by presenting evidence of its previous failures to comply with the standard in question.

seriousness of potential injury, including opinions set forth in the inspector's citation. *E.g.*, *Zeigler Coal Co.*, 15 FMSHRC 949, 954 (June 1993). *Accord Buck Creek*, 52 F.3d at 135-36.

The evidence of record supports no other conclusion than the reasonably serious nature of the eye injury likely to occur as a result of the violation. *See generally Donovan v. Stafford Constr. Co.*, 732 F.2d 954, 961 (D.C. Cir. 1984). We therefore conclude that the judge's contrary finding with regard to the fourth *Mathies* element is not supported by substantial evidence. Accordingly, we reverse.[8]

III.

Conclusion

For the foregoing reasons, we reverse the judge's determination that the violation was not S&S and remand for reconsideration of the civil penalty.

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Mary Lu Jordan, Chairman

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Arlene Holen, Commissioner

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Marc Lincoln Marks, Commissioner

[8] Given our conclusion, we need not address the Secretary's "common life experience" presumption (S. Br. at 4).