

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 6, 1984

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. PENN 82-3-R
	:	PENN 82-15
v.	:	
	:	
MATHIES COAL COMPANY	:	

DECISION

This consolidated proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981), and presents the question of whether a violation of 30 C.F.R. § 75.1403 was "significant and substantial" within the meaning of Cement Division, National Gypsum Company., 3 FMSHRC 822 (April 1981). The Commission's administrative law judge concluded that Mathies Coal Company ("Mathies") violated the standard, that the violation was significant and substantial, and assessed a penalty. 4 FMSHRC 1111 (June 1982)(ALJ). We granted Mathies' petition for discretionary review, which challenges only the judge's significant and substantial findings. For the reasons that follow, we affirm.

On September 22, 1981, during a spot inspection of Mathies' underground coal mine, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a citation to Mathies under section 104(a) of the Mine Act, 30 U.S.C. § 814(a)(Supp. V 1981). The citation alleged a violation of 30 C.F.R. § 75.1403, 1/ and stated:

1/ The portions of the standard involved in this citation are:

Section 75.1403, a statutory provision, which requires that

[o]ther safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided;

Section 75.1403-1, which permits the Secretary's authorized representative to require on a mine-by-mine basis, safeguards in addition to those required in §§ 75.1403-2 through 75.1403-11; and

Section 75.1403-6(b)(3), which requires in part that each track-mounted, self-propelled personnel carrier be equipped with "properly installed and well-maintained sanding devices...."

One of the four sanding devices provided for the No. 4 self-propelled personnel carrier (mantrip) was inoperative which was going to transfer personnel from Gamble No. 1 to 4 face 24 Butt Parallel Section. The sander was empty due to a valve that was stuck open. Foreman in charge Ron Pietroboni. Notice to provide safeguard LJWC 12-01-72. [2/]

The citation also alleged that the violation was significant and substantial. The inspector issued the citation at the start of the day shift, immediately following the mantrip operator's regular check of the mantrip. The inspector terminated the citation five minutes later after Mathies adjusted the valve and refilled the defective sander with sand. Thereafter, Mathies filed with this independent Commission a notice of contest of the citation. The contest proceeding subsequently was consolidated with the Secretary of Labor's proposal for a civil penalty.

The mantrip was used by Mathies to transport its production crews of 8-10 miners to and from working areas in the mine. The mantrip traveled along the haulage track from an area near the mine portal called the "bottom" to the working sections, at the beginning of each of three shifts and back again at the conclusion of the shifts. In addition to primary and secondary braking systems, the mantrip was equipped with a sander above each of its four wheels. Each sander contained a half-gallon of sand. The sanders supplemented the mantrip's brakes by dispensing sand in order to increase the friction between the haulage track and the wheels. The mantrip used only the two sanders at the front end, as determined by the direction of travel. One hand lever activated the two sanders at the front end of the mantrip, so that one inoperable sander would reduce sanding capacity by one-half.

The record evidence indicates that sanders were most likely to be needed to supplement a mantrip's brakes in wet conditions, on curves, or on grades. The Mathies mine was considered to be a "wet" mine. Some areas along the haulage track were always damp or wet. In a few locations, Mathies used sump pumps to reduce excess moisture. On September 22, 1981, the haulage track was wet at least in part because it was a high humidity time of year. The mantrip's route to the working section on the September 22d day shift passed curves, including blind curves and an S-curve, and hills, the steepest having a 3.4% grade.

At the time the inspector issued the citation, the mantrip was fully loaded and ready to go. The inoperable sander was on the rear end of the mantrip. Because the mantrip changed directions five minutes into the 20-minute trip, however, what was the rear end of the mantrip at the start of the trip would become the front end. Thus, the majority of the mantrip's 6,500-foot trip into the mine and a portion of the return trip could have required the use of the inoperable sander to supplement the brakes.

2/ A general notice of safeguard, issued December 1, 1972, requiring sanding devices on all self-propelled mantrips, was modified on August 12, 1980. The modification required that "all mantrips at this mine will be provided with properly maintained sanding devices sufficient to sand all wheels in both directions of travel." 4 FMSHRC at 1112.

The Commission's administrative law judge concluded that the defective sander constituted a violation of the cited standard, and that the violation was significant and substantial. He assessed a \$130 penalty. Applying the National Gypsum test for determining when a violation is significant and substantial, the judge concluded that the hazard associated with the violation was a sliding derailment or collision with an object on the tracks, and that the hazard was reasonably likely to result in an injury of a reasonably serious nature. 4 FMSHRC at 1115, 1117-19. He attributed the likelihood of such injury to such factors as the "wetness, albeit occasional, of the haulageway, the curves, and downgrades in the mine and the intrinsic danger of haulage travel itself." 4 FMSHRC at 1118.

The issue on review is whether substantial evidence supports the judge's conclusion that the violation was "of such a nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1)(Supp. V 1981). 3/ We have previously interpreted this statutory language as follows:

[A] violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based upon the particular facts surrounding that 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. Noting that the Mine Act does not define "hazard," we construed the term to "denote a measure of danger to safety or health." 3 FMSHRC at 827. We stated further that a violation "'significantly and substantially' contributes to the cause and effect of a hazard if the violation could be a major cause of a danger to safety or health. In other words, the contribution to cause and effect must be significant and substantial." Id. (footnote omitted).

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; 4/ (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

3/ The Mine Act's references to significant and substantial violations are contained in sections 104(d) and (e), 30 U.S.C. §§ 814(d) & (e). The MSHA inspector's significant and substantial findings in this case were made in connection with a citation issued under section 104(a) of the Mine Act, 30 U.S.C. § 814(a), which does not expressly refer to this statutory phrase. Mathies has not challenged the propriety of including such findings in a section 104(a) citation, and we accordingly express no view on the issue in this decision. We note, however, that the question is pending before us in Consolidation Coal Co., FMSHRC Docket No. PENN 82-203-R, etc.

4/ We emphasize that this case involves the violation of a mandatory safety standard. We have pending before us a case raising a challenge to the application of National Gypsum to a violation of a mandatory health standard. Consolidation Coal Co., FMSHRC Docket No. WEVA 82-209-R, etc. We intimate no views at this time as to the merits of that question.

result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. As a practical matter, the last two elements will often be combined in a single showing.

Here, only two of the four elements necessary to establish a significant and substantial violation are at issue. Mathies does not contest the judge's finding of a violation or, assuming the existence of a hazard posing a reasonable likelihood of injury, that the injury would be reasonably serious. Mathies argues only that the evidence does not support a finding either that one defective sander could contribute to a hazard or that any such hazard would involve a reasonable likelihood of injury.

The judge found that the violative condition, the defective sander, contributed to a hazard of a sliding derailment or collision with some object on the tracks. 4 FMSHRC at 1115. The record amply supports this finding. Section 75.1403-6(b)(3) (n. 1 supra), which requires sanders on mantrips, reflects a broad determination by the Secretary of Labor that a mantrip's brakes by themselves do not always provide sufficient traction to prevent derailment or collision and that sanders are necessary to provide added stopping power. MSHA's modification of the 1972 notice of safeguard to Mathies (n. 2 supra) reflects a specific determination that conditions at the Mathies mine required that mantrips be equipped with properly maintained sanding devices "sufficient to sand all wheels in both directions of travel." 4 FMSHRC at 1112. These determinations support the conclusion that because brakes alone may not suffice to stop the mantrip at Mathies' mine, sanders are necessary to supplement the brakes and that a defective sander can contribute to a derailment or collision hazard.

Moreover, the record also establishes the existence of a hazard on the day of the citation. The damp conditions in the mine, the wet track, and the fact that the mantrip's route traversed curves and grades, created travel risks on September 22, 1981, that could have required the extra traction that sanders are intended to provide. The foregoing considerations establish the existence of a hazard. We need not pass on the validity of the additional consideration, relied on by the judge, of the "intrinsic danger" of haulage travel.

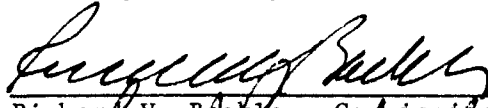
The remaining issue is whether the judge properly concluded that there was a reasonable likelihood that the hazard contributed to could result in injury. As we have noted in our discussion of the hazard, the mantrip's route encompassed curves and grades. In addition to the chronically wet conditions at the mine, conditions were exceptionally wet on the day the citation was issued. If the dampness, curves, or grades had necessitated use of the defective sander, the absence of sanding capacity could have been a major cause of a derailment or a collision. We must be mindful of the fact that the mantrip carried miners, and we agree with the judge that it is reasonably likely that such a loss of control would have exposed the 8-10 miners riding in the mantrip to the reasonably serious injury that any derailment or collision could entail. Thus, we concur with the judge that the hazard contributed to by the violation created a reasonable likelihood of injury, and that the violation was therefore a major cause of a danger to safety.

In reaching this conclusion, we note that the judge's decision was based in large part on his credibility findings and his resolution of disputed testimony in the Secretary's favor. Such determinations by a judge should not be overturned lightly, and in any event, we need not take that exceptional step here. Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 813 (April 1981). First, in light of our admonition that an inspector's judgment is an important element in making significant and substantial findings, (National Gypsum, 3 FMSHRC at 825-26), the judge gave appropriate weight to the inspector's judgment. Second, as the judge concluded, the inspector's testimony was "reasonable, logical and credible." 4 FMSHRC at 1115. The inspector observed conditions first-hand, in contrast to Mathies' sole witness, its foreman, who conceded he was present only part of the time. Moreover, the inspector's testimony was more specific than that of the foreman who could not remember the exact conditions that day. Thus, we conclude that the judge did not err in crediting the inspector's testimony as to the wet rail, the hazards created by the loss of sanding capacity, and the likelihood of injury.

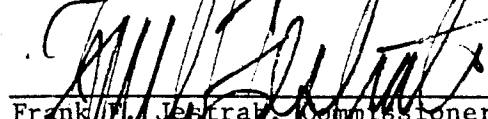
For the foregoing reasons, we affirm the judge's holding that the violation was significant and substantial.



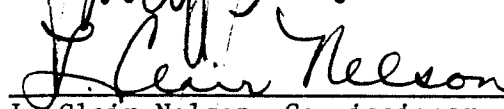
Rosemary M. Collyer, Chairman



Richard V. Beckley, Commissioner



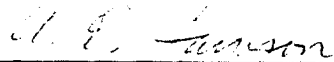
Frank D. Jeitray, Commissioner



L. Clair Nelson, Commissioner

Commissioner Lawson concurring:

I agree with the majority as to the result reached and in their affirmance of the decision of the judge below. However, for the reasons expressed in my dissent in National Gypsum, supra, I disagree with their analytical approach as set forth here and in that decision.



A. E. Lawson, Commissioner

Distribution

H. Juanita M. Littlejohn, Esq.
Mathies Coal Company
1800 Washington Road
Pittsburgh, PA 15241

Michael McCord, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

Harrison Combs, Esq.,
UMWA
900 15th St., N.W.
Washington, D.C. 20005

Administrative Law Judge Michael Lasher
Fed. Mine Safety & Health Rev. Commission
5203 Leesburg Pike, 10th Floor
Falls Church, Virginia 22041