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SOL (MSHA) v. ANDALEX RESOURCES
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
The Federal Building
Room 280, 1244 Speer Boulevard
Denver, CO 80204

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

v.

ANDALEX RESOURCES, INC.,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. WEST 90-213
A.C. No. 42-01474-03549

Docket No. WEST 90-214
A.C. No. 42-01474-03550

Docket No. WEST 90-256
A.C. No. 42-01474-03551

Pinnacle Mine

Docket No. WEST 91-126
A.C. No. 42-01750-03513

Apex Mine

DECISION

Appearances: Robert J. Murphy, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Thomas R. May, Safety Director, Andalex Resources,
Inc., Price, Utah,
pro se.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration ("MSHA"), alleges Respondent Andalex Resources, Inc. ("Andalex"), violated safety regulations promulgated under the authority of the Federal Mine Safety and Health Act, 30 U.S.C. 801, et seq. (the "Act").

A hearing on the merits was held on April 16, 1991, in Salt Lake City, Utah. The parties filed post-trial briefs.

STIPULATION

At the hearing, the parties stipulated as follows:

1. Andalex is engaged in mining and selling bituminous coal in the United States, and its mining operations affect interstate commerce.

2. Andalex is the owner and operator of Pinnacle Mine, MSHA I.D. No. 42-01474.

3. Andalex is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

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4. The Administrative Law Judge has jurisdiction in this matter.

5. The subject citations were properly served by a duly authorized representative of the Secretary upon an agent of Andalex on the dates stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

6. The exhibits to be offered by Andalex and the Secretary are stipulated to be authentic, but no stipulation is made as to their relevance or the truth of the matters asserted therein.

7. The proposed penalties will not affect Andalex's ability to continue in business.

8. The operator demonstrated good faith in abating the violation.

9. Andalex is a large mine operator with 4,037,818 tons of production in 1989.

10. The certified copy of the MSHA Assessed Violations History accurately reflects the history of this mine for the two years prior to the date of the citation.

Docket No. WEST 90-213

In Citation No. 3414458, the Secretary originally cited Andalex for a violation of 30 C.F.R. 75.1100-3. However, prior to the hearing, the Secretary alleged a violation of 30 C.F.R. 77.1110.(Footnote 1)

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MSHA Inspector William Taylor, a person experienced in mining, found that the actuator for the chemical fire suppression system was inoperative because of a lack of batteries. The defective suppression system was located above ground at the No. 1 belt line, which was also a secondary designated escapeway.

Andalex admits the fire suppression system was inoperative but denies the "significant and substantial" (S&S) designation.

Inspector Taylor believed the inoperative system was S&S as it affected any miner who might be required to put out a fire above ground in the area of the discharge roller. In his opinion, the S&S designation did not extend underground into the nearby belt line. This was because any smoke from a fire entering the portal would be removed by the ventilation system at the first crosscut.

The Commission has set the parameters of an S&S 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 Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

In order to establish that a violation of a mandatory standard is significant and substantial under National Gypsum the Secretary 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.

See also *Austin Power Co. v. Secretary*, 861 F.2d 99, 103-104 (5th Cir. 1988), *aff'g*, 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria). The question of whether any specific violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498, 500-01 (April 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011-2012 (December 1987).

In the instant case, a violation of 30 C.F.R. 77.1110 exists. A measure of danger exists as the discharge belt could overheat. If so, a fire could result and the fire suppression device would not function. A miner is not ordinarily stationed at this location. Injuries can and do occur when miners are

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fighting fires. Finally, it is reasonable to expect that the injury would be reasonably serious. While this fire suppression device is not underground, photographs R-1 through R-6 show that some of the areas in the immediately vicinity are not reasonably accessible.

The testimony of Inspector Taylor is clear as to the likelihood a miner would be in danger of suffering a serious injury. He stated:

But I do believe, that the person who had to try and go up and fight this fire after it had been allowed to exist without being suppressed by the automatic fire suppression system, that his life would be in danger. (Tr. 23).

Further,

The hazard here would be to the man who had to extinguish this fire. It's not reasonable to believe that any mine operator would allow a fire to exist that was in close proximity to a very large coal stock pile without attempting to extinguish that. And it's reasonable to believe that the first person who was made aware that there was a fire would attempt to extinguish that fire rather than to continue to allow other men who are on the property to be endangered. (Tr. 23, 24).

It is true that MSHA does not require an automatic fire suppression device at this location. However, once installed, 77.1110 requires that it "shall be continuously maintained in a usable and operative condition."

Andalex, in its post-trial brief, raises various issues. Initially, the operator asserts its mine has no history of fires or explosions.

The lack of fires or explosions at the mine is fortunate, but not necessarily indicative of whether a fire might occur.

Andalex further argues that no ignition sources were present at the #1 drive.

I disagree. Inspector Taylor was questioned on this issue. The transcript at pages 21-22 reflects the following testimony:

- Q. Were there any--were there any sources of ignition near this belt drive of extraneous materials that may contribute to a fire?
- A. Well, this particular belt drive dumps where it dumps its stock pile of coal where you have thousands of tons of coal that are stockpiled until the coal trucks can remove the coal from the area.
- Q. Now, how close would these stock piles of coal be to the belt drive itself?
- A. If the trucks have been down, for one reason or another, the stockpile could build up to just below the roller of the belt. In most cases, the level is probably lower than that because the coal trucks run on a continuing basis.
- Q. Let's assume that the pile is at its maximum, how close would it be to the belt drive itself, the one we're talking about?
- A. It would be in close proximity to the belt drive roller.

Further, Andalex argues that the fire suppression system stopped the belt as required by 30 C.F.R. 75.1102. Thus, no coals or belt material would be carried into the mine.

This may be true, but the fire suppression system was nevertheless inoperative at the No. 1 belt line.

Andalex further contends that an employee is not regularly at the No. 1 belt drive. Therefore, miners responding could fight any fire from a safe location or such fire-fighting miners could escape by walking out in either direction.

I reject Andalex's arguments. First of all, a fire should not occur if the suppression device is operative. Without the suppression device, the fire would have a "head start." Andalex's brief rebuts its own argument by stating (Brief pg. 5, ¶576) that "[s]pontaneous combustion fires . . . are commonplace in the surface coal stockpile." The lack of a fire suppression device could easily result in an injury of a serious nature.

Citation No. 3414458 should be affirmed.

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Docket Nos. WEST 90-214 and WEST 90-256

These cases involve violations of 30 C.F.R. 75.1704.
(Footnote 2) Since they are related, they will be considered together.

On March 5, 1990, in Docket No. 90-214, MSHA Inspector Taylor issued Citation No. 3414454.

On that occasion, in the area of the double doors, it was readily apparent that something was wrong as Inspector Taylor could feel air flowing towards the belt. He took readings at the top, bottom, and middle of the homemade doors. The doors meet in the middle and each side of the door measured six feet by five feet.

At the hearing, the Inspector reaffirmed his citation which read as follows:

Two separate and distinct travelable passageways, designated as escapeways, were not maintained for the 1st left active working section in that 625

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fpm of air flowed from the designated intake escapeway into the No. 7 belt entry through holes around and in the drive-through doors at crosscut 22. The No. 7 belt entry is the designated secondary escapeway for the 1st left active working section.

Subsequently, on March 28, 1990, the inspector issued Citation No. 3415061. The citation, restated at the hearing, reads as follows:

Two separate and distinct travelable passageways, designated as escapeways, were not maintained for the 1st left, 2nd East and 1st North active working sections in that a man was observed driving an Isuzu pickup into the No. 1 belt entry through the metal drive-thru doors at crosscut No. 1. As measured with an anemometer, 15,000 cfm of air flowed from the intake entry to the belt entry with the metal doors open. When the doors were closed, 550 fpm of air flowed from the intake entry to the belt entry. Also, holes around the bottom of the metal drivethru doors at the No. 4 belt drive permitted 850 fpm of air to flow from the intake escapeway to the secondary escapeway. Also, the metal drive-thru doors along the No. 4 belt line at crosscuts 78 and 82 permitted 760 fpm and 610 fpm of air to flow from the designated primary intake escapeway to the designated No. 5 belt secondary escapeway.

Inspector Taylor issued the later citation as an S&S violation because three working sections were affected. Further, it had been 23 days since the initial related citation had been issued. Accordingly, he felt the operator should have corrected the later condition.

In the inspector's opinion, the hazard directly affected the integrity of the escapeways. There were sources of ignition in the mine including power lines, rollers, and belt drives.

JACK MATEKOVIC, an MSHA supervisor, had discussed leaky ventilation with Andalex management before these citations were issued.

Andalex's defense focuses on the argument that the drive-through doors were reasonably airtight.

Andalex's evidence shows that Mine Manager KENT PILLING took readings six hours after the inspector on the March 1990

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citation. Mr. Pilling also had an engineering drawing prepared. The drawing showed only minimal defects in the equipment doors. (See Ex. R-9).

Further, on April 15, 1991, Andalex Safety Representative JED GIACOLETTO took an air reading at the last open cross-cut right after the second citation was written. His typed notes read as follows:

On April 15, 1991, at 4 pm, an air reading was taken in the last open crosscut of the Main North Section. The reading was taken by Jed Giacoletto. The results of the reading were:

Area: $7.5 \times 20 = 150$ square feet
Velocity: $113 + \text{correction factor of } 7 = 120$

$150 \text{ square feet} \times 120 \text{ feet per minute} =$

18000 cubic feet per minute.

After the reading was taken, three man-doors and a material door were opened along the section intake which divides the intake entry from the belt line entry.

Another air reading was taken in the Main North section last open crosscut after the doors were opened. The results of the reading were:

Area: $7.5 \times 20 = 150$ square feet
Velocity: $103 + \text{correction factor of } 7 = 110$ feet
per minute

$150 \text{ square feet} \times 110 \text{ feet per minute} =$

16500 cubic feet per minute.

The issue presented is whether Andalex maintained at least two distinct travelways. If the separation at the metal drive-through doors was reasonably airtight, then no violation existed, since two distinct travelways were maintained.

In connection with these citations, I credit Inspector Taylor's expertise and testimony that he could feel the flow of air when opposite the double doors. He further described his findings as to the doors and the related leakage. In addition, at the time of Mr. Taylor's inspections, Andalex representatives

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did not in any manner dispute the Inspector's findings. Andalex's evidence is not persuasive. At best, it shows some leakage existed.

Andalex also disputes the S&S designations as to Citation No. 3415061. The applicable law as to S&S has been discussed above. In this factual scenario, which deals with one of the most important underground regulations for coal mines, there was a violation of 30 C.F.R. 75.1704, a measure of danger--somewhat substantial--contributed to by the violation. There was a reasonable likelihood that the hazard would result in an injury. Specifically, smoke in either escapeway would cause both escapeways to be contaminated. In short, there would not be two separate and distinct travelable passageways. The likelihood of injury in a smoke-filled environment is well documented.

Andalex's extensive post-trial brief raises several issues: The operator contends the doors were reasonably airtight and, accordingly, no violation existed. This is a credibility issue previously discussed. As indicated, I have credited the inspector's views. He further explained the separate and distinct requirement of the regulation:

Q. (Mr. May): Okay. What is separate and distinct?

A. Separate and distinct means that if I have an entry that starts on the surface, that you have to maintain that through ventilation devices from the surface portal all the way to the working section separate from another entry.

Q. How is that separation accomplished?

A. In other words, those two entries cannot be common, they cannot be common at any port.

Q. Common, you mean air mixing?

A. That's right. (Tr. 71).

The amount of air, recorded and manually observed, was excessive. This was due to a lack of proper maintenance of the doors. 625 feet of leakage per minute was not "reasonably airtight."

Andalex asserts the citations were not issued because of hazardous conditions but because the operator resisted MSHA's verbal policy to install double airlock material doors.

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The testimony of witness MATKOVIC is conflicting as to whether MSHA, as a policy, required double airlock doors at the time of this inspection. (Tr. 96, 98). But even such a policy would not excuse the operator if the facts otherwise establish a violation of the escapeway regulations.

Andalex asserts the theory of separate and distinct escapeways exists only in the regulations since all doors leak air. The extent of the leak is the critical matter and the facts establish the leak was excessive. Andalex says MSHA's non S&S Citation No. 3414454 is inconsistent with the subsequent citation (designated as S&S) relating to the same subject. On this issue, I credit Inspector Taylor's explanation.

Q. (Mr. Murphy): . . . can you justify the issuance of an S&S citation just on the facts of the last citation?

A. Yes . . . even though no citation had been previously issued, the conditions in the second Citation, 3415062, are definitely significant and substantial because of the number of people affected and because of the repeated violations of separate different belt lines because there are three belt lines involved on this violation. And, in my opinion, it is reasonably likely that if these conditions were not corrected, they would result in a reasonably serious injury at this mine. (Tr. 91).

The operator argues that if the belt entry had not been designated as the secondary escapeway, then the citations would be invalid since the doors are shown on the approved map and are therefore part of the approved ventilation plan.

It is the operator who designates the escapeways. MSHA's function is to approve them. The operator's position is rejected.

Andalex further argues that previous MSHA inspectors had not issued similar citations. The Commission and the appellate courts have rejected the doctrine. King Knob Coal Company, Inc., 3 FMSHRC 1417 (1981); the Supreme Court of the United States has ruled that the doctrine does not apply against the federal government. Federal Crop Insurance Corporation v. Merrill, 332 U.S. 380, 383-386 (1947); Utah Power and Light co. v. United States, 243 U.S. 389, 408-411 (1927).

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I have reviewed the briefs filed by the parties. To the extent they are inconsistent with this decision, they are rejected.

Citation Nos. 3414454 and 3415061 should be affirmed.

Docket No. WEST 91-126

In this case, Petitioner filed a written settlement motion. In the motion, Petitioner moved to vacate Citation No. 3409636. For good cause shown, the motion should be granted.

Andalex further agreed to withdraw its contest as to Citation Nos. 3415076 and 3415077 and to pay the related penalties of \$20 for each such violation.

The settlement motion contains information relating to the assessment of civil penalties as required by Section 110(i) of the Act.

The settlement agreement is approved and disposition is incorporated in the order herein.

CIVIL PENALTIES

The statutory criteria for assessing civil penalties is contained in 30 U.S.C. 820(i).

Joint Exhibit 2 shows Andalex has an average adverse history. Andalex paid 91 violations in the two years prior to March 27, 1990. Before March 28, 1988, the operator paid 78 violations.

Andalex is a large operator and the proposed penalties will not affect the company's ability to continue in business (Stipulation).

The operator was negligent in that a company representative could have detected the flow of air through and around the doors.

The gravity has been discussed; further, the operator demonstrated good faith in abating the violations.

Considering the statutory criteria, I believe the penalties assessed in the order of this decision are appropriate.

Based on the foregoing findings of fact and conclusions of law, I enter the following:

ORDER

Docket No. WEST 90-213

1. Citation No. 3414458 is AFFIRMED and a penalty of \$100 is ASSESSED.

Docket No. WEST 90-214

2. Citation No. 3414454 is AFFIRMED and a penalty of \$20 is ASSESSED.

3. Citation No. 3415061 is AFFIRMED and a penalty of \$200 is ASSESSED.

Docket No. WEST 91-126

4. Citation No. 3409636 and all penalties are VACATED.

5. Citation No. 3415076 and the proposed penalty of \$20 are AFFIRMED.

6. Citation No. 3415077 and the proposed penalty of \$20 are AFFIRMED.

John J. Morris
Administrative Law Judge

Footnotes start here:-

1. The regulation allegedly violated reads as follows:
77.1110 Examination and maintenance of fire-fighting equipment.

Firefighting equipment shall be continuously maintained in a usable and operative condition. Fire extinguishers shall be examined at least once every 6 months and the date of such examination shall be recorded on a permanent tag attached to the extinguisher.

2 . 75.1704 Escapeways.

[Statutory Provisions]

Except as provided in 75.1705 and 75.1706, at least two separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section continuous to the surface escape drift opening, or continuous to the escape shaft or slope facilities to the surface, as appropriate, shall be maintained in a safe condition and properly marked. Mine openings shall be adequately protected to prevent the entrance into the underground area of the

mine of surface fires, fumes, smoke, and floodwater. Escape facilities approved by the Secretary or his authorized representative, properly maintained and frequently tested, shall be present at or in each escape shaft or slope to allow all persons, including disabled persons, to escape quickly to the surface in the event of an emergency.