

CCASE:

SOL (MSHA) V. PITTSBURG & MIDWAY COAL

DDATE:

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TTEXT:

Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

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

v.

THE PITTSBURG AND MIDWAY COAL  
MINING COMPANY,

RESPONDENT

CIVIL PENALTY PROCEEDING

DOCKET NO. WEST 79-127  
MSHA CASE NO. 05-00303-03003

DOCKET NO. WEST 79-211  
MSHA CASE NO. 05-00303-03004

MINE: EDNA STRIP

Appearances:

James Abrams, Esq., Office of Henry C. Mahlman, Regional  
Solicitor, United States Department of Labor, Denver, Colorado  
for the Petitioner

George M. Paulson, Jr., Esq., and Terrance Cullen, Esq. Denver,  
Colorado  
for the Respondent

Before: Judge John J. Morris

DECISION

In these civil penalty proceedings Petitioner, the Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges that four Pittsburgh and Midway Coal Mining Company (P & M) trucks were in violation of 30 C.F.R. 77.1104(FOOTNOTE 1), a regulation issued under the authority of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

Pursuant to notices, a hearing on the merits was held in Denver, Colorado, on January 11, 1980 and in Littleton, Colorado, on February 6, 1980.

The parties filed post trial briefs.

## ISSUE

The issue is whether the facts establish a violation of the standard.

## FINDINGS OF FACT

The evidence is essentially uncontroverted. I find the following facts to be credible.

1. A mixture of motor oil, grease, diesel fuel, dirt, and water was present on the upper portion of the engines of PITTSBURG trucks #656, #657, #658 and #27 (Tr. 24-26, 49, 58, 59, 72, 73, 88)

2. Motor oil, grease, and diesel fuel are combustible materials (Tr. 7, 55, 75, 88, 174, 176).

3. The mixture on the engines of trucks #656, #657, and #658 was one sixteenth to one-eighth of an inch thick. The substance covered most of the engine in truck #27 (Tr. 22, 26).

4. If there was a sufficient concentration of the combustible materials a fire could be started by a statically caused spark, by friction brakes, by mechanical sparking, or by arcing (Tr. 218, 219).

5. The mere presence of combustible oil or grease similar to lubricating oil and #2 diesel fuel does not create a fire hazard (Tr. 199, 222).

6. Road dirt would significantly suppress the flash point of the combustible materials on the engines. It would also make the ignition point of the materials higher, thereby substantially reducing the chance of a fire (Tr. 199, 223).

## DISCUSSION

The above findings of fact do not support a conclusion that P & M violated the standard. The evidence fails to show the quantitative composition of the material on the engines (Tr. 24, 49, 72, 73). The inspector indicated the upper portion of the engine was covered with oil, grease and dirt but the inspector could not say how much dirt or "lacquered type thing" was present. (Tr. 73, Exhibit R-1(a)). In view of the lack of evidence on this pivotal issue, I consider that MSHA failed to prove that there was a sufficient accumulation of combustible materials where they can create a fire hazard within the terms of 30 C.F.R. 77. 1104.

MSHA's post trial reply brief asserts three basic contentions. First, MSHA argues it need only establish the presence of one of the substances mentioned in the standard. Second, that the inspector's expertise establishes the violation. Third, that the possibility of ignition was clearly established.

Concerning the initial argument: I agree with MSHA that there were on these engines accumulations of combustible materials and that, by themselves, such materials are combustible. The inspector, during portions of his testimony, established the foregoing facts. However, a careful evaluation of the evidence establishes that the accumulations were in

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combination with dirt. (See transcript pages 22, 24 - 26, 49, 58, 59, 72, 73, 88). A finding that dirt was combined with the combustible substances leaves the Commission in the quandary of trying to evaluate the combustibility of the dirt component and its effect on the possible ignition of the other materials. The lack of a clear articulation of these facts lends considerable strength to the testimony of P & M's expert witness (see findings of fact 5 and 6).

In short, MSHA understates its burden of proof under 30 C.F.R. 77. 1104. The evidence must show the presence of a sufficient accumulation of combustible materials in an area where there is an ignition source for these materials.

I am not persuaded by the admissions of the P & M safety director who at the inspection characterized the inspector's finding as "right" and the cited conditions "bad". The admissions are conclusory in form. But more to the issue, in my view, a mine operator's representative during an inspection would be more inclined to agree rather than disagree with an inspector. The comments of the safety director do not prove that there was a sufficient accumulation of combustible materials to create a fire hazard.

Concerning MSHA's second argument: The expertise of the inspection is not persuasive since the factual basis for his opinion, as stated above, is fatally flawed. While expert testimony is commonly given greater weight than lay testimony, expert testimony need not be accepted even if uncontradicted, *U. S. Steel v. O.S.H.R.C.*, 537 F. 2d 780, 783, (3rd Cir., 1976). Indeed, expert testimony is not conclusive. It is up to the trier of the fact to determine what, if any, weight will be given to that testimony, *Sartor v. Arkansas Natural Gas Corporation*, 321 U.S. 620, 627 (1944).

Further diminishing MSHA's expert testimony argument is that prior incidents of fires in trucks involved broken fuel lines (Tr. 36, 39). The inspector had never experienced a situation where a vehicle caught fire except where there was a leaking fuel or oil line (Tr. 56). The parties stipulated to the fact that no leaking fuel or oil lines near the engines were observed or repaired after the engines were steam cleaned to abate the citation. (Tr. 176, 177).

Contrary to P & M's views, it was not necessary to conduct a test on the accumulations before issuing the citations. However, there must be some persuasive evidence that there was a sufficient accumulation of the combustible materials to create a fire hazard. *American Coal Corp.* 3 IBMA 93 (1974).

MSHA's final argument concerning the possible ignition of the materials involves an evaluation of the evidence.

MSHA points to the heat of the turbocharger (1000 - 1250 degrees F) and the Hauser report (Exhibit 3) to conclusively establish combustibility and the presence of an ignition source.

I disagree. The turbocharger is

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at the top of this diesel engine and the accumulations were beneath it at best within an inch or two of the heating source (Tr. 46 - 47, Exhibit R-1(a)). Mere close proximity to the heat source does not, on this record, prove the existence of a fire hazard. These vehicles had been running and hauling material at the jobsite when the inspection occurred. When running his finger in the area of the accumulations the inspector described the area as "warm" (Tr. 50). If the heat at that point will ignite these materials, one would anticipate it would have a degree of heat greater than "warm".

P & M's expert admitted to the existence of other ignition sources. However, without proof of a sufficient accumulation of combustible materials, MSHA has failed to prove a violation.

#### CONCLUSIONS OF LAW

Petitioner did not prove a violation of 30 C.F.R.77. 1104.

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

#### ORDER

1. Case number WEST 79-127:

Citations 791120, 791121, and 791122 and all proposed penalties therefor are VACATED.

2. Case number WEST 79-211:

Citation number 791124 and all proposed penalties therefor are VACATED.

John J. Morris  
Administrative Law Judge

#### ~FOOTNOTE\_ONE

1 The cited standard provides as follows:

77.1104 Accumulations of Combustible Materials.  
Combustible materials, grease, lubricants, paints, or flammable liquids shall not be allowed to accumulate where they can create a fire hazard.