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MATHIES COAL V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

MATHIES COAL COMPANY, CONTESTANT-RESPONDENT	Contest of Citation
v.	Docket No. PENN 82-9-R Citation No. 1142337 9/22/81
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER-RESPONDENT	Docket No. PENN 82-10-R Citation No. 1142336 9/22/81 Civil Penalty Proceeding Docket No. PENN 82-35 A.O. No. 36-00963-03182 Mathies Mine

DECISION

Appearances: Janine C. Gismondi, Attorney, U.S. Department of Labor, Philadelphia, Pennsylvania, for MSHA ; Jerry Palmer, Attorney, Pittsburgh, Pennsylvania, for Mathies Coal Company

Before: Judge Koutras

Statement of the Proceedings

These consolidated cases were heard on the merits in Pittsburgh, Pennsylvania on September 14, 1982. Docket No. PENN 82-35, concerns a proposal for assessment of civil penalties filed by the Secretary pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalties for two alleged violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations. Docket PENN 82-9-R is the contest filed by Mathies Coal Company challenging one of the citations issued in the civil penalty case, and Docket PENN 82-10-R is the contest challenging the second citation.

Issues

The principal issues presented in the civil penalty proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulation as alleged in the proposal for assessment of civil penalty

filed in this proceeding, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation based upon the criteria set forth in section 110(i) of the Act.

In determining the amount of civil penalty assessments, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violations, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violations.

The issues presented in the Contests are whether the conditions or practices cited by the inspector as the basis for the citations constituted significant and substantial violations of the cited mandatory safety standards.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).

3. Commission Rules, 29 C.F.R. 2700.1 et seq.

Stipulations

The parties stipulated that Mathies Coal Company and the subject mine are subject to the Act, and that the presiding Judge has jurisdiction to hear and decide these cases. The parties also stipulated that the payment of the civil penalties proposed by MSHA will not adversely affect the operator's ability to continue in business, and that mine production for the period January 1, 1982 to May 21, 1982, was 73,000 tons, and that the mine ceased production on May 31, 1982.

Discussion

Section 104(a) citation No. 1142336, September 22, 1981, cites a violation of mandatory safety standard 30 CFR 75.1105, and the condition or practice is described on the face of the citation as follows:

> The air current used to ventilate the battery charging station located in the No. 7 entry at surveyor station 3á46 in the 4 face 24 butt parallel section MMU054 was not coursed directly into the return. The air was going to the working face. The charge unit was setting in the middle of the entry. (The charge unit has been dangered out until a proper station can be constructed.)

The inspector indicated that the alleged violation was "significant and substantial", and he fixed the abatement time as 4:00 p.m., September 22, 1981.

Section 104(a) Citation No. 1142337, September 22, 1981, cites a violation of mandatory safety standard 30 CFR 75.1722(a), and the condition or practice is described on the face of the citation as follows:

> Adequate guarding was not provided for the cross-over belt conveyor at the drive head in the 4 Face 24 Butt Section MMU034. The head drive was not guarded so to protect person from coming in contact with moving parts.

The inspector indicated that the alleged violation was "significant and substantial" and he fixed the abatement time as 12:00 p.m., September 23, 1981.

MSHA's Testimony and Evidence in Support of Citation No. 1142337

MSHA Inspector Francis E. Wehr, Sr., testified as to his background and experience, and he confirmed that he inspected the mine on September 22, 1981, and he confirmed that he issued a citation (exhibit G-1) for a violation of section 75.1722(a), for failure by the operator to properly guard the drive motor or drive head of one of its conveyor belts. He described the "drive head" as consisting of two rollers, gear sprockets and a chain, and he explained that the belt is laced through the two rollers and it drives the belt by pulling it through the rollers as it is laced. The drive head is powered by a 460 AC horsepower motor, and the drive head roller is approximately 15 to 20 feet in length, and the moving parts include the rollers, belts, gears, and chain drive. The belt was operating when he cited it and the moving parts of the drive head were in motion (Tr. 8-17).

Mr. Wehr confirmed that the drive head did have a guard around it, and he identified exhibit G-2 as a simulated "drawing of a cutout" indicating the type of guard being used (Tr. 17). He described the guarding as one-by-six boards nailed across the length of the conveyor belt to several posts which were anchored to the mine floor and wedged solidly into the roof. The posts were approximately on five-foot centers, and the posts were about 8 1/2 to 9 feet high. The posts were of wood, approximately 6 to 10 inches in diameter, and the horizontal boards extended along a 15 to 20 foot distance for the full distance of the drive head, and they were nailed to the posts. The openings in the wooden guarding were approximately 2 feet in height and 4 feet wide (Tr. 17-22).

Mr. Wehr stated that he measured the distance between the existing guarding and the drive head itself by a folding rule which he inserted through the guard opening, and found that it was approximately two feet.

These were the narrowest location between the guard and the belt, but the separation between the guard and belt became wider as it went by the belt (Tr. 23).

Mr. Wehr identified exhibit G-3 as a copy of the guarding regulation found in MSHA's "manual", and in his opinion the existing guarding which he observed on September 22, would not prevent an employee from possibly coming into contact with the moving parts of the drive head. He believed that the guarding openings were large enough to allow a person's hand to pass through, and the openings did not comport with the policy guidelines which state that they be small enough to prevent this from happening (Tr. 25).

Mr. Wehr testified that one person is normally assigned to the belt conveyor system to shovel or clean up spillage, conduct hand dusting, or to check out the belt, and this is usually during one shift. If problems are encountered, extra people may be assigned to the belt (Tr. 26). In addition, the fire boss or foreman would have occasion to travel the belt area for the purpose of conducting his belt line examination, and this is required to be done once during each production shift (Tr. 27). He also indicated that the floor bottom in the section is wet and damp, and the location of the belt was at the top of a small grade starting in on the section, and these factors would present a slip or fall hazard and someone could actually fall through the guard openings and suffer possible fatal injuries (Tr. 28).

Mr. Wehr stated that he has observed at least ten other similar belt heads in the same mine and that they are all guarded by wire mesh nailed to boards and posts, or the wire mesh is hung up, and the opening in the mesh is approximately one inch square (Tr. 29). He also identified exhibit G-6 as a head roller design similar to the one he cited (Tr. 37).

Mr. Wehr identified exhibit G-1(a), as a copy of his "inspector's statement" which he filled out at the time the guarding citation was issued, and he indicated that with respect to the likelihood of any accident occurring he marked "probable" (Tr. 60), and the statement was admitted without objection (Tr. 61).

In response to bench questions, Inspector Wehr conceded that the existing guarding did guard part of the head roller, and he indicated that the roller changes position with respect to the drive mechanism. He also indicated that the distance from the guarding to the particular roller in question was four feet, and the distance from the guard to the drive head was two feet. The unguarded moving parts were approximately two feet from the floor (Tr. 62-63).

Mr. Wehr could not state why the openings around the guarding framework were left as they were, but he did indicate that similar wooden guarding framework was used around the other belt locations previously referred to, but that wire mesh was installed over it to provide a sturdy construction. He conceded

that the operator made an attempt to guard

the area in question, and he confirmed that the belt was newly installed and had been in operation for three to four weeks. He also conceded that it was possible that the operator intended to cover the framework with meshing but had no opportunity to do so (Tr. 64). Although he discussed the matter with the operator's escort, Mr. Dunbar, his notes do not reflect any specific comments in this regard (Tr. 65). The citation was abated by the installation of wire mesh over the guarding framework, and he abated the citation on September 29th (Tr. 65).

Mr. Wehr stated that the bottom horizontal one-by-six board which was nailed across the posts was approximately one foot off the ground, that the second board was approximately four feet off the ground, and that the third board which was located at the top running horizonatlly to the roof was "fairly close to the top" (Tr. 65-67). In response to a question concerning someone reaching the moving belt parts while walking adjacent to the framework and slipping, he replied (Tr. 67):

> THE WITNESS: At the distance where the four foot mark is, that area, he would probably not come in contact with the head roller itself, but the area where the two foot is, he would be right into the general area of the roller and the drive unit itself.

Mr. Wehr stated that he observed no one performing any work in the belt area at the time the citation issued, but there is a supply storage place in the area and an individual was there (Tr. 67). The preshift examination was made on the prior shift, and the belt was a working belt which was connected to a feeder and the belt portion which had been installed was about 250 feet long (Tr. 68).

Mr. Wehr indicated that the manufacturer of the belt drive did provide "a metal guard, two halves that bolt around the gear sprocket, gears and the chain on the drive head itself" (Tr. 72). He conceded that this guard did decrease the severity where there are two or three extra guarded parts, but indicated that his principal concern was the two rollers which drove the belt and the belt lacing (Tr. 73-74). In reply to further questions from the bench, Mr. Wehr responded as follows (Tr. 74-79):

> Q. All right. Looking at that picture, if someone were walking adjacent to this, the post they had, which is two feet out from the edge of this machinery, someone who accidentally slipped on that adjacent walkway or whatever, it would take a little bit for him to get into those rollers, wouldn't it? The fellow just could not walk back there and slip through this opening over all this steel construction and fall into those rollers?

THE WITNESS: I'd say it's possible.

Q. Well, anything is possible, but let us look at the real world. How could someone accidentally slip through one of these openings and fall over that?

THE WITNESS: The openings itself? I would say the possibility is there, plus the guard and type of board that you have is one inch and say a fellow that is your size is walking along the side and would trip and fall, he'd more than likely burst through that board or he could slip underneath, strike his head against the metal part of that frame. The wetness of the bottom and the grade was another factor into it.

Q. Was this a regular travel way?
THE WITNESS: That would have been their walkway side, as they call it. They call one side their clearance side.

Q. What I mean is this an area where the miners would go through or is it an area where it is visited by the examiner or if they had some work to do there?

THE WITNESS: The examiner and the guy assigned to go through that area.

Q. They do not have anybody permanently stationed at this location?

THE WITNESS: To the best of my knowledge, they don't.

Q. Would a miner walk back and forth through this area where they were working and that sort of thing?

THE WITNESS: No, sir.

Q. How do they perform maintenance on this equipment assuming if the mesh were up? Is this mesh permanently installed to these wooden frameworks?

THE WITNESS: Generally it's set up so it could be taken down and put right back up. Generally, the rule is that before you take any guards down, they have what they call japko switches along the beltline and locked. The guards are removed and the cleaning process is supposedly done there and the guard put back on and then you lock it and put the power back on.

Q. You were the resident inspector at this point for approximately five or six months?

THE WITNESS: Yes, sir.

Q. Did you have occasion to look at the other ten similar belt mechanisms that were guarded?

THE WITNESS: Yes, sir.

Q. Are you familiar with the cleanup process and everything?

THE WITNESS: Yes, I would say so.

Q. Did you have occasion to cite them for cleaning without locking out the equipment? What has been the general practice of the mine, for example, when they perform maintenance on these moving parts?

THE WITNESS: The maintenance that was observed over that period was fine. They did lock it out. They took on the precautionary work when they was in there doing work. The actual cleaning around the belt drive itself, I could not see that. I seen them cleaning around the belt but not along the drive.

Q. What cleaning would be done around the particular drive that was not guarded, in your opinion?

THE WITNESS: A lot of times you have spillage coming back from the bottom belt, particularly where you would have a scraper in between those two drive rollers. It does collect a lot of dirt at times.

Q. What is the procedure there for cleaning that particular location? What do they do with that material? Would you say the fellow who is cleaning would be in close proximity?

THE WITNESS: If he has it shut off, he has to move the guard and put the guard back up and shovel it out the belt. That is the practice I would observe.

And, at (Tr. 94-96):

Q. If a fellow slipped and the outer guarding, the posts, the boards are four feet from the edge of the equipment and then there is another two feet, how could he possibly fall there? It would have to be a conscious act, wouldn't it?

THE WITNESS: I have problems with what you are saying. You are using the four feet. The two foot was right close to the rollers. I'm saying the two foot. The four feet is the widest part. The two feet is the closest to the roller.

Q. My question is addressed to the four feet. Is it possible for someone to get into that unguarded equipment if the guard is four feet away from it?

THE WITNESS: I believe the four foot where it was, not really. The two foot area, yes, and there is a picture showing where the two foot and the four feet are.

Q. The existing posts were up to cover that entire 15 to 20 or 30 feet distance, weren't they?

THE WITNESS: Yes.

Q. It included the wheel area?

THE WITNESS: Right.

Q. If it is not likely that anybody would fall in there, I just wonder why management decided to extend it for 30 feet, why they put that framing up to begin with.

THE WITNESS: It is a general practice. This is how they guard. They extend it more distance than they need to, but that's the way to guard.

Mathies Coal Company's Testimony and Evidence Concerning Citation No. 1142336

Mathies Coal Company opted not to present any testimony in defense of this citation, and counsel indicated during the course of the hearing that he stood by his motion to dismiss this citation and he relied on his arguments presented during the course of the hearing.

MSHA's Testimony and Evidence in Support of Citation No. 1142336

Inspector Wehr identified exhibit G-7 as a copy of the citation he issued for an alleged violation of section 75.1105 for failure to properly locate a battery charger away from air being coursed directly into the return. The scoop in question was used to charge a scoop tractor which was being used on the section. The scoop is usually charged for a couple of hours each shift to keep it running, and the scoop is normally used two shifts a day, although at times it is used on three shifts. The scoop cannot be used while it is being charged, and the purpose of the section 75.1105 requirement that the air current used to ventilate the battery charger be coursed directly into the return is to carry away smoke in the event of a fire, or to carry off explosive hydrogen which may be released during the battery

charging process (Tr. 99-105).

Inspector Wehr identified exhibits G-8 as a sketch he drew depicting where the battery charger was located when he observed it, and he stated that it was located in the neutral intake entry next to the right return. His attention was drawn to the charger when he came from the face area and noticed a cable going through a wall over the track entry. He followed the cable through two stopping man doors, and he found the cable plugged in but with no power on it and the "breaker wasn't set up". He identified the cable as the "dotted line" on exhibit G-8. The cable was hung up on well insulated roof and rib insulators from the charger to the belt starter box or transformer (Tr. 106). The battery charger was some 300 feet from the belt transformer, and the transformer is not normally used as the source of power for the cable. The battery charger was not operating at the time he observed it and there was no tag on the power plug. In order to energize the battery charger it would have first been necessary to energize the transformer belt starter box and a scoop tractor timing switch would have had to be turned on. The power cable was hooked up to the battery charger and it did pass through a proper fitting (Tr. 107-111).

Mr. Wehr described the air flow over the battery charger as it existed at the time he cited the condition, and he indicated that in the event of smoke coming from the battery charger, it would have been directed to the working face or place, or both. He identified the return entry on exhibit G-8, and he stated that the air could have been directed to the return by means of cracking a stopping door in conjunction with the use of a check curtain, or the use of a deflector, which is normal at the mine in question (Tr. 112-113). He also indicated that the chargers are normally ventilated by means of a deflector check (Tr. 116). He stated that the hazard created by failing to route the ventilating air current directly to the return, would result in eight people in the section possibly being affected by smoke or hydrogen. They could be asphyxiated in the event of a short circuit in the battery charger, and the mine moisture or humidity would contribute to the possibility of short circuiting (Tr. 119-120). He confirmed that he indicated on his "inspector's statement", exhibit G-9, that the likelihood of the battery charger sitting in the middle of the entry where the air was not being coursed to the return giving off hydrogen and causing it to be directed to the face to be "probable" (Tr. 123). He also indicated that the charger plugs that go to the scoops looked like they had recently been used (Tr. 124).

On cross-examination, Mr. Wehr confirmed that section 75.1105 requires an operator to vent the air current into the return when it passes over a battery charger station, and he confirmed that a battery charger is a moveable piece of equipment which may be moved during the course of a mining operation. While it is being moved, he stated that it was not possible to ventilate the air current into the return and the power cable would have to be disconnected when the unit is moved to a new location. Mr. Wehr stated that when he looked at the battery charger in question it did not appear to him that it was in the process of being moved, and he saw no physical sign of it being

moved at that time (Tr. 128-129). He also indicated that when he asked the inspector

escort Dunbar what the charger was doing in the middle of the entry, Mr. Dunbar replied that he did not know but would talk to the section foreman about it. Mr. Wehr also confirmed that his usual practice is to look for an "out of service" tag on the cable, but saw no such tag in this instance, and relied on Mr. Dunbar in determining whether the charger was being moved (Tr. 130). He also indicated that while he could have spoken with the section foreman or other crew members he did not do so and relied on Mr. Dunbar. He denied that Mr. Dunbar told him that the charger was in the process of being moved, and confirmed that Mr. Dunbar only told him that he would find out (Tr. 132).

Mr. Wehr confirmed that the citation was issued 9:30 a.m., and the miners on the section would have been there an hour or so before that time. He stated that if there were evidence that the battery charger was in the process of being moved up or dragged up, the violation would not have been issued (Tr. 133). He confirmed that the normal procedure in the mine is to locate the charger in the crosscut, but that in this case it was located approximately in the middle of the entry (Tr. 133). He assumed that the charger had been used on the immediate preceding shift, but he spoke with no one on that shift or to the section foreman and he explained his reason for not doing so by stating that he deals directly with the inspector escort for information unless he has to go to others for problems which may have occurred before, and he conceded that he was not prevented from speaking to the miners (Tr. 135). He conceded that he was not absolutely certain that the charger was used on the previous shift, and he based his conclusion that it was not being moved on the fact that he saw no physical evidence of any such move (Tr. 136).

Mr. Wehr stated that he has previously observed hydrogen being emitted during a battery charging process, stated the explosive range of hydrogen, and indicated that he was present in another mine when another MSHA inspector tested for explosive hydrogen. He conceded that before anyone could say that the presence of hydrogen is hazardous in such a situation, one must know the amount that is present. He did not observe any charging process in the instant case, and he conceded that he has no evidence to substantiate any conclusion as to any hydrogen emission hazard in this case or that an accident was "reasonably probable" or that it would "probably occur" (Tr. 142). He also indicated that the battery charger was provided with short circuit protection, but he did not know whether it was operational because "you would have to tear it apart" to determine this. However, even though the charger is not permissible, as far as he knew there was nothing wrong with the unit (Tr. 144). He also confirmed that the miners have preventive action available which they can take in the event of smoke, and these included use of their self-rescuer units and the intake escapeway, and he had no reason to believe that the miners would not have used these measures in the event of an accident (Tr. 145).

In response to bench questions, Mr. Wehr conceded that he made no detailed examination of the battery charger and took no

smoke tube readings (Tr. 149-150). He also conceded that the operator was in compliance with

the amount of air required to be on the section (Tr. 151). He assumed that the charger would be used to charge the battery scoop, and he could not recall what Mr. Dunbar told him when he came back after seeing the section foreman (Tr. 153). Mr. Wehr was not sure whether he was present when the condition was abated, and while his notes are silent on the abatement, he believed the citation was abated by moving the charger into the crosscut and putting a deflector on it (Tr. 154). He stated that the charger is on skids, and that the usual method for moving it is by use of the scoop bucket (Tr. 156).

Mathies Coal Company's Testimony and Evidence

Malcolm Dunbar, safety supervisor, Mathies Mine, testified that he accompanied the inspector during his inspection and he confirmed that the battery charger was located at the place indicated by Mr. Wehr. Mr. Dunbar testified that when Mr. Wehr asked for an explanation as to the location of the charger, he (Dunbar) told the inspector that he did not know but would ask the section foreman. The section foreman advised Mr. Dunbar that the charger was not being used because a new power station was under construction and that the charger would be relocated and would not be used until this was done. Mr. Dunbar stated that when he advised Mr. Wehr of this fact, Mr. Wehr told him that "the citation stands". He confirmed that Mr. Wehr told him that the battery charger plug was not deenergized and that it had the tag on it (Tr. 163-166).

Mr. Dunbar stated that even assuming that the charger were to be used without the air being vented into the return, he still did not believe that the citation was significant and substantial because the chargers are inspected weekly, and any defective ones are removed from service. He indicated that the charger in question was in good condition, and he also confirmed that in the event of an emergency, the men in the section could use their self-rescuers as well as the designated escapeqay (Tr. 166-168).

On cross-examination, Mr. Dunbar testified that battery charging stations have had no problems in the mine and stated that it was his understanding that the previous shift had begun the erection of a new charging station, and that this is the first step in the process of moving the station. He confirmed that the charger in question was not enclosed in a metal housing "station" when it was cited because it is a self-enclosed unit with no need for an additional enclosure. He confirmed that the metal housing could be begun without the necessity of moving the battery charger (Tr. 171). He admitted that the charger was moved to the new station immediately after the citation was issued (Tr. 176). The section foreman in question was not available for testimony because he has been laid off.

Findings and Conclusions

Fact of violation - Citation No. 1142336

The citation charges that the air current used to ventilate

a battery charger which the inspector found in the middle of an entry

was not coursed directly into the return. Mandatory safety standard 30 CFR 75.1105, states as follows:

> Underground transformer stations, battery-charging stations, substations, compressor stations, shops, and permanent pumps shall be housed in fireproof structures or areas. Air current used to ventilate structures or areas enclosing electrical installations shall be coursed directly into the return. Other underground structures installed in a coal mine as the Secretary may prescribe shall be of fireproof construction.

Mathies Coal Company's counsel argued that MSHA did not prove that the battery charger cited by Inspector Wehr had been used to charge any equipment during the time it was located in the middle of the entry (Tr. 172-173). Counsel also asserted that the evidence establishes that the battery charger was in the process of being moved at the time the inspector observed it, and that no violation has therefore been established (Tr. 173).

Upon consideration of all of the testimony and evidence adduced with regard to this citation, I conclude and find that MSHA has established a violation of section 75.1105 by a preponderance of the evidence. Mathies Coal has not rebutted the fact that at the time the inspector observed the charging unit in question it was located in the middle of the neutral intake entry, and the inspector's testimony establishes that the ventilation system in place at the time was such as to cause the air currents passing over the charging unit to be coursed back to the face area and not to the return as required.

With regard to the assertion by Mathies Coal that the charger was in the process of being moved, the fact is that at the time the unit was observed by the inspector the unit had not been moved to its newly located charging station. That was done after the citation was issued. The inspector's attention was called to the charger after he followed the course of a power cable which had been hooked into a belt transformer to the charger for a distance of some 300 feet and found it in the middle of the entry. Although the charger was not in operation charging any equipment at the time Mr. Wehr first observed it, the power cable was hooked up, it was not tagged out as was the usual practice, and the condition of the charger plugs which are normally hooked into the scoop while it is being charged led the inspector to believe that the charger had recently been used. In addition, the inspector observed no evidence that the unit was being moved, and it was not equipped with a deflector which is normally used to course the air into the return. Under all of these circumstances, the inspector's belief that the charger had recently been used was reasonable. Further, since the power cable was hooked up to a power source and was not tagged out, and since there were no other indications that the charging unit was actually moved at the time

Mr. Wehr observed it, the assertion by Mathies Coal that the unit "was in the process of being moved" is rejected. Although it may be true that the intent was to move the charging unit once the new charging station was completed, the fact is that the inspector saw no evidence of any such move, and his conclusions to the contrary are supported by the record evidence and testimony in this case. The citation IS AFFIRMED.

Significant and substantial

In addition to citing a violation of section 75.1105, the inspector also concluded that the violation was "significant and substantial", and he marked the appropriate block on the citation form accordingly. Mathies Coal challenges that finding.

In Secretary of Labor v. Cement Division, National Gypsum Company, 3 FMSHRC 822, issued on April 7, 1981, the Commission interpreted section 104(d) and set forth the test for determining whether a condition created by a particular violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine hazard. The National Gypsum case was a civil penalty proceeding concerning eleven section 104(a) citations in which the inspectors marked the "S & S" block on the face of each citation. In that case the Commission held that a violation is "significant and substantial" 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.

On the facts of this case, I cannot conclude that the conditions cited by Inspector Wehr constituted a significant and substantial violation of section 75.1105. Although Mr. Wehr alluded to certain general hazards connected with the failure to vent air coursed over a battery charger unit into the return, in the case at hand the evidence is clear that no such hazards existed. Mr. Wehr made no tests to detect the presence of any noxious gasses, he confirmed that the proper amount of air was present on the section, the power cable leading to the charger was hung on well insulated roof and rib insulators, no charging was taking place at the time he observed the unit, the unit was provided with short circuit protection, and Mr. Wehr detected nothing wrong with the unit itself. He also candidly conceded that before anyone can speculate as to whether or not the presence of hydrogen, which is sometimes given off when battery chargers are used, can cause an accident, there must be some indications as to the amounts given off, and he conceded that in this case there is no evidence that hazardous hydrogen was present or that an accident was reasonably probable.

Mine safety supervisor Dunbar testified that all battery chargers are inspected weekly and that any which are found defective are removed from service. He indicated that the unit in question was in good condition, and he confirmed that miners could use their self-rescuers and the designated escapeway in the

event of any emergencies.

Given all of the prevailing circumstances, I conclude and find that MSHA has not established that the conditions at the time the citation issued were significant and substantial, and the inspector's finding in this regard IS VACATED.

Gravity

Although I have found that the battery charger violation was not significant and substantial, I nonetheless conclude and find that it was serious. While the prevailing conditions at the time of the citation may not have presented a significantly hazardous situation, leaving the battery charger in the middle of the entry hooked into a power source without the air deflectors presented a potential temptation for someone to engage the equipment and attempt to charge a scoop before the battery charger was actually placed into the completed charging station.

Fact of violation - Citation No. 1142337

This citation charges Mathies Coal with a failure to adequately guard the drive head on a conveyor belt. The cited mandatory safety standard, section 75.1722(a), provides as follows:

> (a) Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings, shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.

At the conclusion of the inspector's testimony concerning the citation, Mathies Coal moved to dismiss his finding that the citation was "significant and substantial". In support of this motion, counsel asserted that Inspector Wehr only testified that an injury could be fatal, but did not testify that an injury was "reasonably likely to occur" as required by the decision in the National Gypsum case (Tr. 39). When asked whether his motion to dismiss also included an assertion that MSHA had filed to establish a prima facie case concerning the fact of violation, counsel stated in pertinent part as follows (Tr. 40):

> I am not going to argue that. Draw whatever inference you wish about that. I am arguing specifically S & S.

During further colloquy counsel conceded that the issues of "significant and substantial" and whether or not a violation of the cited mandatory standard has been proved are separate issues for which separate findings may be made, and counsel indicated that his motion to dismiss the "S & S" finding is based on a lack of evidence to support the inspector's conclusion in this regard (Tr. 43-44).

In further argument in support of his motion, Mathies' counsel stated that there is no testimony from the inspector as to whether how likely it would be for an injury to occur, but that if the question were put to him, he might testify that it is highly unlikely that an injury would occur under the factors that he did testify to (Tr. 48). When invited by the Court to put that question to the inspector during his cross-examination, counsel stated that he would not cross-examine the inspector (Tr. 48).

In response to the motion to dismiss the "S & S" finding, MSHA's counsel asserted that it is not necessary to elicit specific testimony from the inspector that the "reasonable likelihood of injury" test has been met. Counsel argued that the inspector made that finding when he issued the citation and marked the citation form "S & S". Further, counsel asserted that it is for the Judge to determine from the facts presented in this case whether or not the National Gypsum test has been met. Counsel asserted further that the inspector testified as to the frequency of employee exposure to the hazard, the likelihood of the injury, and the fact that he believed that the incline and wet floor increased the possibility of someone slipping or falling into the guard openings and making contact with the moving parts of the drive head. As for the "could be fatal" testimony by the inspector, MSHA's counsel stated that this has nothing to do with the "likelihood of an accident", but rather, goes to the seriousness of any injury. Given the facts of this case, counsel concludes that if an accident were to occur, it would be reasonably serious (Tr. 44-47). Concluding her arguments, counsel asserted as follows (Tr. 51):

> MISS GISMONDI: Apparently what Mr. Palmer is saying, because in spite of the fact that the witness testified to the underlying facts, because it did not come out of his mouth, the ultimate legal conclusion is that it is not sufficient. It is my position that it is the witness's role to testify to the facts and the Court's role to determine the legal conclusion of whether or not those facts support a finding of a reasonable likelihood of that of an accident occurring.

After due consideration of the argument presented by counsel, the motion to dismiss the "S & S" finding, as well as the citation, was denied from the bench (Tr. 55-56).

Mathies Coal declined to put on any evidence in defense of the inspector's assertion that the belt drive head was not adequately guarded. In support of the citation, MSHA's counsel asserted that the guard which was in place "allows pretty easy access to the moving parts of the drive head by virtue of the size of the openings, as well as the relatively flimsy construction of the posts and boards that were used

as part of the guarding structure" (Tr. 83). In further support of the inspector's "S & S" findings, MSHA's counsel argued that two employees are in the general area in close proximity to the belt drive head on a daily basis, that the mine floor was wet and muddy, and that the belt was at the top of an incline, and that it was foreseeable that someone in the course of his normal job duties would make contact with the moving parts in question (Tr. 83).

In commenting on MSHA's position, Mathies Coal's counsel pointed out that Mr. Wehr's "inspector's statement" contains no information concerning the inclined roadway or wet conditions, and that MSHA's testimony does not elaborate on the fact that the drive head in question was protected by a guard provided by the manufacturer (Tr. 86-87).

It seems obvious to me from the facts of this case that at the time the citation was issued Mathies Coal was in the process of erecting wire mesh guarding for the cited piece of equipment. The conveyor belt had recently been installed and at the time the inspector was on the scene a framework of posts and wooden planks were in place and provided some means of protection for the belt drive head in question. Similar equipment at other locations in the mine were already guarded by practically identical systems of posts, wooden frames, and wires mesh. Therefore, the question presented is whether the posts and planks which were in place at the time the citation issued provided adequate guarding as required by section 75.1722(a).

Inspector Wehr testified that at the time the citation was issued the belt was in operation and the moving parts of the drive head in question were in motion. Although the drive head was partially protected by the existing guarding system framework, the inspector's concern was over the fact that the large openings in the framework provided ready access to the exposed moving parts of the belt head drive. Although Mr. Wehr conceded that a built-in guard was installed on the conveyor to protect the gear sprocket and drive head chain, he indicated that his principal concern was with the belt lacing and two drive rollers which he believed were totally unprotected. Although he conceded that one of the unguarded rollers was at a distance of four feet or more from the machine frame and existing guarding, and that it was unlikely that anyone would contact that point, he also indicated that at a second unguarded location the distance from the existing guarding to the unprotected roller was only two feet, and that if anyone happened to fall at that area they could easily reach the unguarded belt drive rollers and lacing.

I conclude and find that MSHA has established a violation of section 75.1722(a), by a preponderance of the evidence. Although the conditions cited are mitigated by the fact that an existing semblence of a guarding system was in place at the time the inspector viewed the conditions, the fact is that in at least one location where the distance from the unguarded pinch point to the existing guarding framework was two feet, the opening which was unguarded was sufficiently large enough to permit someone to fall

in and reach the pinch point. While I reject MSHA's notion

that the existing guarding framework was "flimsy", it seems clear to me that the wire meshing which is obviously nailed over the framework was not yet in place, and the existing openings were large enough to permit contact with the belt rollers. To that extent, MSHA has established a violation, and the citation is therefore AFFIRMED.

Significant and substantial

On the facts of this case, I conclude and find that MSHA has established that the conditions cited by the inspector constituted a significant and substantial violation of section 75.1722(a). MSHA established by credible evidence that the belt was in operation at the time the inspector viewed the conditions, and that at least two people were normally in the area during the course of any work shift. Although it is true that most of the belt drive location was guarded by posts and wooden planks, the actual wire mesh which the operator normally used to guard such belt drive locations had not as yet been installed at the time of the inspection, and at least one of the unguarded locations was two feet from the belt rollers and lacing. I conclude that this location was not adequately guarded to prevent anyone from coming into contact with the moving parts, and to that extent the violation is significant and substantial. Accordingly, the inspector's finding in this regard IS AFFIRMED.

Gravity

I conclude and find that the failure to completely guard the cited conveyor belt drive head constitutesd a serious violation, particularly at the one location where the pinch point was some two feet from the edge of the open guarding framework.

Negligence

I conclude and find that both citations which have been affirmed resulted from Mathies Coal Company's failure to take reasonable care to prevent the conditions cited by the inspector in these proceedings. With regard to the guarding citation, since the operator here went to the trouble of erecting a guarding system framework, it seems obvious to me that it was aware that the belt head drive location required guarding. As for the battery charger, I believe that a closer attention or examination to the area where the charger was found by the inspector would have alerted the operator to the existence of the cited conditions, thus enabling the operator to at least tag out the charger until such time as the asserted move was completed. I find that both citations resulted from ordinary negligence.

Good Faith Compliance

With regard to the guarding citation, the inspector testified that abatement was achieved within the time allowed, and that he considered this to be ordinary good faith abatament (Tr. 85-86).

With regard to the battery charger violation, the evidence establishes that the charger was moved into the charging station and that a deflector was installed on the unit to course the air into the return. It would appear that all of this was done in good faith and there is no evidence to the contrary. Accordingly, I conclude that good faith abatement was timely achieved by the operator in this case.

Size of Business and Effect of Civil Penalty on the Respondent's Ability to Continue Business

The parties stipulated that the payment of the proposed civil penalties will not adversely affect the company's ability to remain in business, and I adopt this as my finding on this issue. Further, the stipulated mine production of 73,000 tons for the period January 1, 1982 to May 21, 1982, leads me to conclude that the mine in question is a medium-to-large sized operation, and I take note of the fact that mine production apparently ceased on May 31, 1982.

History of Prior Violations

MSHA's Exhibit G-10, purports to be a computer print-out submitted by its counsel by letter dated September 21, 1982. The letter states that for the 24 month period preceding the issuance of the citations in issue in this case the Mathies Mine had 890 paid violations, 17 of which are for prior violations of section 75.1722(a), and 13 of which are for violations of section 1105.

At the time of hearing, MSHA's counsel did not have the computer print-out, and she was permitted to file it post-hearing. However, I note that the print-out submitted by counsel appears to be a partial listing, since the itemized citations contained on the three pages reflect a total of 141 violations, some of which are for violations subsequent to the dates of the citations in issue here. In addition, while the print-out contains a "certification" by someone from MSHA's Office of Assessments attesting to the authenticity of the print-out, the print-out itself contains no mine identification data to support the claim that it is in fact the data from the subject mine.

Since the information submitted by MSHA purporting to show the history of prior violations is confusing and incomprehensible, IT IS REJECTED. Insofar as this item is concerned, since I cannot understand it, I will not consider it.

Penalty Assessments

In view of the foregoing findings and conclusions, respondent is assessed civil penalties for the two violations which have been affirmed as follows:

Citation No.	Date	30 CFR Section	Assessment
142336	9/22/81	75.1105	$300
1142337	0/22/81	75.1722(a)	225
			$525

ORDER

Respondent IS ORDERED to pay the civil penalties assessed in this matter, in the amounts shown above, within thirty (30) days of the date of these decisions, and upon receipt of payment by MSHA these proceedings are dismissed.

George A. Koutras
Administrative Law Judge