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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. WEST 81-163 A.C. No. 48-00900-03018
v.	
MEDICINE BOW COAL COMPANY, RESPONDENT	Medicine Bow Mine

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Brent L. Motchan, Esq., Medicine Bow Coal Company, St. Louis, Missouri, for Respondent.

Before: Judge Carlson

This proceeding arose out of an inspection of respondent's surface coal mine on August 12, 1980. The case was transferred to the undersigned judge on June 8, 1983, and was heard in Denver, Colorado on February 15, 1984 under provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (the "Act"). The parties asked for leave to file post-hearing briefs, but ultimately agreed to waive such submissions. At issue here is whether the respondent, Medicine Bow Coal Company (Medicine Bow), committed three violations of the mandatory safety standard published at 30 C.F.R. 77.1104. The standard relates to accumulations of combustible materials. (FOOTNOTE 1) The Secretary contends that two of the three alleged

violations were "significant and substantial" under the Act. He seeks civil penalties of $150.00 for one violation, and $160.00 each for the remaining two. (FOOTNOTE 2)

REVIEW AND DISCUSSION OF THE EVIDENCE

The evidence shows that Mine Safety and Health Inspector John E. Thompson visited Medicine Bow's surface coal mine at Hanna, Wyoming on August 12, 1980. In the course of this inspection he examined three pieces of heavy mobile equipment which are the subject of the three citations at issue in this case.

According to the inspector, the government's sole witness, a Caterpillar off-highway dump truck, a Clark front-end loader, and a skidder, had "excessive accumulations" of "combustible materials" on and around the engines, belly pans, transmissions, and rear-end housings. The materials, he testified, were composed chiefly of oil, grease, and related lubricants, along with coal dust and some dirt or soil. His testimony indicated that the composition of the accumulations varied from place to place (e.g. engine oils on engine parts, transmission lubricants on transmissions) but all were mixed with coal dusts. The depths of the deposits, he said, varied from 1/2 to 3 inches. These figures were the product of visual estimates only; he took no measurements. He did not touch or handle the accumulations, nor did he obtain a laboratory analysis. His determination, he acknowledged, was based upon the appearance of the accumulations and their locations.

The inspector maintained that the accumulations constituted a fire hazard because they would burn if ignited. In his belief, ignition could be furnished by exhaust heat, friction heat (brakes for example), malfunctioning electrical components, or engine heat. He further believed that if a fire did occur, from whatever source, the accumulations would serve to fuel and intensify it.

Inspector Thompson was of the further view that heavy equipment fires expose operators and fire fighters to possible injuries in the form of burns, fractures, and smoke inhalation.

Through the inspector the Secretary introduced computer print-outs summarizing all reported machine or equipment fires in surface coal mines for the years 1978 through 1983. Prepared by the Mine Safety and Health Administration's Health and Safety Analysis Center, these listings show that such fires ranged in number from a high of 20 in 1981, to a low of 13 in 1978 and 1983. The reports contain a brief description of the cause of each fire. The most frequent single cause was ruptured hydraulic lines. The print-outs (petitioner's exhibit 1) were admitted as demonstrating that fires in surface mining equipment are not uncommon.

Donald E. Burkhart, Jr., Medicine Bow's safety director at the time of inspection, testified for the respondent. Burkhart, who accompanied Inspector Thompson on the inspection, acknowledged that he saw accumulations of lubricating oils and fluids, but insisted that they were only 1/4 to 1/2 inches in depth.

Mr. Burkhart denied that the accumulations constituted a fire hazard. Essentially, his opinion was that fire hazards do not exist without the presence of an ignition source. Measurements of the heat generated by the three pieces of equipment in question, he testified, showed that none generated temperatures sufficient to cause autoignition of the accumulations. The Caterpillar truck, for example, showed temperatures ranging from 35 Farenheit on the belly pan to 327 on the turbocharger (the hottest engine component on most diesels). On the Clark front-end loader, the turbocharger gave a reading on an optical thermometer of 430. The hottest point on the skidder was the exhaust manifold at 318.

Mr. Burkhart conceded that equipment fires do occur on mining equipment, but that they nearly always result from broken hydraulic or fuel lines where the fuel or hydraulic fluid is ignited by the heat of the exhaust system. Such a fire, the witness admitted, could then ignite oil or grease accumulations which would intensify the fire hazard "to a minor degree."

Mr. Carl J. Dahn, a consulting engineer, also testified for Medicine Bow. This witness heads a research firm which, he testified, had done extensive studies in engineering hazard analysis with respect to mechanical, chemical, electrical, hydraulic, and pneumatic systems. His work included analysis dealing with equipment fire and explosion hazards, including those involving diesel engines.

According to Mr. Dahn, the autoignition temperature for the oil and grease found around diesel engines ranges from 800 to 1200 Fahrenheit. (FOOTNOTE 3) Coal in grease tends to increase autoignition temperatures. The witness indicated that the turbocharger is ordinarily the hottest engine part with temperatures ranging 300 and 400. Mr. Dahn agreed that the accumulations in this case could ignite if exposed to high enough temperatures, but insisted that the facts in the present case showed no likely sources for such ignition. He acknowledged that the most common source of fires in heavy equipment are ruptured fuel or hydraulic lines. While not ignition sources themselves, sprayed fuel or hydraulic fluids may be ignited by exhaust stacks. Electrical shorts, frictional heating, or outside sources such as cigarettes are possible but less likely sources, according to Mr. Dahn.

Repeatedly throughout his testimony Mr. Dahn expressed the opinion that the grease and coal accumulations in this case--including the 1/2 to 3 inch deposits described by the inspector--could not constitute a fire hazard. Behind this reasoning was his conviction that the extent to which the accumulations would intensify or fuel a fire would be so insignificant as to make no real difference. At various times he described the potential intensification as "slight," as "small," and as "secondary." He also stressed that since the Caterpillar and Clark vehicles carried coal, the residues of coal dust in their beds would be significantly more dangerous than the comparative small amount of grease, oil and coal dust on the locations pinpointed by the inspector. In essence, according to Mr. Dahn, even though the accumulations could burn under certain circumstances their hazard potential, compared to primary fire dangers such as ignited fuel or hydraulic fluids, was de minimis.

In deciding whether violation occurred, we should first examine the words of the standard. The inspector, in his testimony, repeatedly referred to "excessive" accumulations of combustible materials, although the standard uses no such term. The inspector was doubtless correct, however, in implying that violations cannot occur with only trivial (as opposed to excessive) accumulations. Even with the best cleaning program, traces of lubricants will likely be present on heavy equipment.

I find that the accumulations on each piece of equipment were essentially as the inspector described them: from 1/2 inch to 3 inches in depth. Accumulations of that magnitude are large enough to have significance under the standard. I also find that the various areas of excessive accumulations described by the inspector were potential targets for either fuel or hydraulic fluids, or both, sprayed from ruptured, pressurized lines.

Respondent suggests that the Secretary's evidence was insufficient to establish violation because the mixed components of the accumulations were not determined with precision through a laboratory analysis. In support of this claim, counsel cited a case decided by a judge of this Commission where charges were dismissed, in part at least, because of the failure to obtain a laboratory analysis of an allegedly "combustible" solvent. Magma Copper Company, 1 FMSHRC 837 (1979). A question in the case, however, was the propriety of relying on three-year-old label information from a source other than the containers at the worksite.

The evidence in the present case convinces me that the substances in question were of the sort proscribed by the standard. Greases and lubricants are named specifically in the standard, and no one doubts that coal dust qualifies as a "combustible material." I cannot conclude that the admitted fact that some dirt or soil was contained in the mix requires the Secretary to obtain a laboratory analysis when significant amounts of proscribed substances are clearly present. Both witnesses for Medicine Bow conceded that the accumulations would burn if subjected to a fire involving motor fuel or hydraulic fluid.

Medicine Bow also relies upon another judge's decision, Pittsburg and Midway Coal Mining Company, 2 FMSHRC 3049 (1980), in which a lubricant accumulation charge, under the same standard as that cited in the present case, was dismissed. The case is inapposite. There the maximum accumulation was a mere 1/8 of an inch thick, and the chief issue was the "sufficiency" of the accumulation. Moreover, unlike the present case, there were no credible proofs that fuel or hydraulic line breaks are a major cause of equipment fires.

Mr. Dahn suggests that neither a "bad safety practice" nor a "significant fire hazard" results from the presence of up to three inches of grease and coal dust accumulation. This is so, he claims, because the extent to which such accumulations would add to the severity a fuel or hydraulic fluid fire would be "very small" (Tr. 230-239).

On this issue I must agree with the Secretary. Mr. Dahn's argument goes to the gravity of the violation, not its existence. Because the Act is remedial, the mandatory standards promulgated thereunder must be construed in consonance with their underlying purpose--the protection of miners from injury and illness. Nothing in the Act suggests that only major hazards must be suppressed. The evidence here indicates that the accumulations present could sustain or intensify fuel or hydraulic liquid fires. Any fire on a piece of heavy equipment poses some degree of danger to the equipment operator or persons performing rescue or firefighting operations. Additional fuel sources that enhance the intensity or duration of a fire, even marginally, therefore fall within the ambit of the standard. In this connection the word "create," as used in the phrase "create a fire hazard" in the standard, cannot be construed in the narrow or hypertechnical sense of a first cause. Any substance which may reasonably be expected to enlarge, propagate or intensify a fire, "creates" a greater fire hazard. (FOOTNOTE 4) I therefore conclude that Medicine Bow violated the standard as to all three machines.

Although the evidence supports a finding of violations, it does not sustain a finding that the violations were "significant and substantial" under section 104(d)(1) of the Act. Citations 828442 (the Clark loader) and 828443 (the skidder) were alleged by the Secretary to be "significant and substantial" while 828440 (the Caterpillar truck) was not. At the hearing, counsel for the Secretary explained that all three should have been given that classification but, through oversight, were not. (The inspector simply failed to place an "X" in the box on the citation form designated "S and S.") This judge then stated that no motion for amendment would be entertained since any such oversight should have come to the attention of the Secretary during the extensive pre-hearing procedures in this case.

The Commission in Cement Division, National Gypsum Co., 3 FMSHRC 822 (1981), articulated the test to be used in determining whether a violation, in the words of the statute "* * * could significantly and substantially contribute to the cause and effect of * * * a mine safety or health hazard." The violation must be one where there exists "a reasonable liklihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." In the present case, essentially for the reasons urged by Medicine Bow, I must conclude that the violations do not rise to the "significant and substantial" level. Much of the government's case was premised on the notion, rejected in this decision, that the accumulations could be ignited directly by such heat sources as the vehicle engines, turbochargers, or exhaust systems. The evidence demonstrates that the accumulations would burn only if ignited by a fire originating from broken fuel or hydraulic lines. Such fires would likely be quite serious in their own right, made only somewhat more so by the presence of lubricant and coal dust deposits. I agree with Medicine Bow that the additional hazard presented by the burning of such deposits would add in a minor way to a serious fire originating from unrelated causes. Thus, the violations established here cannot be classified as serious and substantial.

We now turn to the matter of penalty. Section 110(i) of the Act requires the Commission, in penalty assessments, to consider the size of the operator's business, its negligence, its ability to continue in business, the gravity of the violation, and the operator's good faith in seeking rapid compliance. Most of the evidence concerning these penalty factors in this case came into the record through stipulations in the settlement agreement entered into with respect to citations 828415 and 828439. The stipulations show that Medicine Bow is a large operator and that in the two years prior to the inspections here it was cited 79 times in 33 days of inspection. The record shows that imposition

of civil penalties of the magnitude proposed by the Secretary would not impair its ability to continue in business, and that it abated the present violations expeditiously.

Upon the evidence, I find that the gravity of the violations was low and that the operator's negligence was moderate. The Secretary seeks a civil penalty of $150.00 for the violation involving the Caterpillar truck and $160.00 each for the violations involving the Clark loader and the skidder. Because of the low gravity of the violations, I find these proposals excessive. On balance, I conclude that $35.00 is an appropriate penalty for each violation.

CONCLUSIONS OF LAW

Based upon the entire record herein, and in accordance with the findings of fact embodied in the narrative portions of this decision, the following conclusions of law are made:

(1) This Commission has the jurisdiction necessary to decide this case.

(2) The respondent, Medicine Bow, violated the mandatory safety standard published at 30 C.F.R. 77.1104 as alleged in citations 828440, 828442, and 828443.

(3) The violations were not "significant and substantial" within the meaning of section 104(d)(1) of the Act.

(4) The appropriate civil penalty for each of the three violations is $35.00.

ORDER

Accordingly, all citations are ORDERED affirmed, and the respondent Medicine Bow shall pay to the Secretary of Labor civil penalties totaling $105.00 within 40 days of the date of this decision.

John A. Carlson
Administrative Law Judge

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~FOOTNOTE_ONE

1 30 C.F.R. 77.1104 provides:

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

~FOOTNOTE_TWO

2 The case originally included five citations. At the outset of the hearing the parties announced that two of these, numbers 828415 and 828439, had been settled and would be disposed of by separate written agreement. The citations tried were numbers 828440, 828442, and 828443. The settlement agreement was not received until June 4, 1984. The separate approval of the settlement agreement is issued contemporaneously with this

decision.

~FOOTNOTE_THREE
3 The autoignition point is the lowest temperature at which a material will burn in a closed vessel. Under other than laboratory conditions, the temperature for ignitions would likely be higher.

~FOOTNOTE_FOUR
4 In furtherance of the de minimis argument, Mr. Dahn also pointed out that the truck involved in one citation carried loads of coal and that even when empty the bed inevitably contained coal dust residues. The coal in a full load, or the dust in an empty bed, he contended, so dwarfed the potential of grease and coal dust accumulations on engines or undercarriages as secondary fuel sources as to render the latter inconsequential. I reject this reasoning. The purpose of the standard is to minimize fire hazards to the maximum practical extent. The hazard from flammables or combustibles carried as a part of the normal load of a vehicle is essentially unavoidable. Such hazards merely underscore the obvious proposition that some enterprises are inherently more dangerous than others. The standard with which we deal in this present case is aimed at the type of fire hazard which is avoidable. Lubricant accumulations, as the evidence shows, may be removed by routine equipment cleaning procedures. They pose an unnecessary risk. The attempt to introduce a comparative hazard principle, carried to its logical extreme, would produce unacceptably awkward distinctions. It would mean, for example, that water trucks whose loads would rather clearly not burn, would require an engine cleaning program. Fuel trucks, on the other hand, could presumably accumulate grease and oil deposits on the engine and elsewhere indefinitely because of the volatile character of their loads. The standard does not contemplate such an anomalous result. Only if we accept the premise (which this decision does not) that lubricant accumulations are permissible without limit, could respondent's reasoning be accepted.