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SOL (MSHA) V. UNITED MINING  
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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.

UNITED STATES STEEL MINING  
COMPANY, INCORPORATED,  
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. WEVA 86-231  
A.C. No. 46-01329-03637

Morton Mine

DECISION

Appearance: Mark R. Malecki, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;  
Billy M. Tennant, Esq., Pittsburgh, Pennsylvania and Carl Peters, Senior Mine Inspector, Chesapeake, West Virginia, for Respondent.

Before: Judge Weisberger

Statement of the Case

The Secretary (Petitioner) seeks a Civil Penalty for an alleged violation by Respondent of 30 C.F.R. 75.1106. Pursuant to notice, the case was heard in Charleston, West Virginia on December 9, 1986. Charles Knotts and Carl E. Jenkins testified for Petitioner, and Theodore Cobb and Thomas Cummings testified for the Respondent. The Parties filed Proposed Findings of Fact and Briefs on February 17, 1986. No reply briefs were filed.

Findings of Fact

1. On October 29, 1985, at 10:00 a.m., at Respondent's Morton Mine, Charles Knotts (in his capacity as a Federal Coal Mine Inspector for the Mine Safety and Health Administration) arrived at the 047-0 section, and proceeded to a scoop to determine whether a citation written concerning that scoop had been abated. He then proceeded to an area marked "B" on Petitioner's Exhibit 3. He paused for approximately 5 minutes at this spot and noticed sparks from welding operations, which were going on in

~620

the second crosscut outby the face area, some 140 feet away from him. Knotts approached the area where the welder was working on a continuous mining machine. Knotts testified that he observed the welder, Theodore Cobb, from a distance of 5 or 6 feet welding on the continuous miner for a period of 5 to 6 minutes. During this time Cobb did not take a reading for methane with a methanometer. No other individual was observed making a methane test either. (Cobb testified that he had taken a methane test that morning before he started welding, and this was corroborated by the testimony of Thomas Cummings, Respondent's electrical foreman. Cobb also testified that he made frequent and regular tests during the welding operation. His testimony also differed from Knotts' version concerning what occurred after Knotts approached the area in which Cobb was working. I adopted Knotts' testimony that when he observed Cobb for 5 to 6 minutes, from a distance of 5 to 6 feet there was no testing of methane. My conclusion, in this regard, is based on observations of the witnesses' demeanor while testifying about this issue.)

2. The Morton Mine liberated 700,000 cubic feet of methane per day in the first quarter of the inspection year 1986, and 1,000,000 cubic feet per day in the last quarter of the inspection year 1985.

3. If the methane level accumulates to 5 percent of total air or more and no methane checks are being made, the gas could be ignited by welding and cause an explosion. Coal dust increases the likelihood of explosion and would cause the ensuing explosion to travel beyond the section in question.

4. The ventilation system at the Respondent's Morton Mine circulates over 1,000,000 cubic feet of air per minute. On the date of the citation there was sufficient air in the area to keep it clear of methane.

5. In the 047-0 section there are fans located on both sides to keep the air free of methane gas.

6. Methane could accumulate in the mine in the event of a failure in the ventilation control system if the lime stone blocks get "out of kilter" (Tr. 53.), or if a fan stops working. A failure of one fan would have only a "miniscule" effect on the ventilation in the section. (Tr. 146.)

7. The ventilation system could also fail if there is a roof fall on an overcast, or there is a curtain interruption which could occur if it is knocked down with a piece of mobile machinery. There was no testimony presented as to whether these occur in normal mining operations. A block stoppage, causing a failure of a ventilation system, could be crushed in a "moving action," from the mine roof or bottom. (Tr. 186.) There is no evidence that this is a common occurrence in the subject mine.

8. Knotts was asked whether it is possible that there can be interruptions in the Respondent's ventilation system and he stated "all things are possible, but it is not probable that there is going to be any major ventilation change." (Tr. 135.)

9. There was no evidence of any interruptions in the ventilation system on the date the citation was issued.

10. On October 29, 1985, when Cobb first began to weld, prior to the issuance of the citation, he made a gas test with a methanometer and no methane was detected. Immediately after Knotts determined that a violation had occurred in the welding area, no methane was detected in a check for methane.

11. Cobb was asked in direct examination whether he conducted a search for fire during the period in question and he answered in the affirmative " . . . but it was too wet to worry about fire." (Tr. 241.) In essence, he further testified that he always looks for fire and that whenever he puts a rod in and takes his hood up he will look at the immediate area and see if there is a fire. (In contrast, it was the testimony of Knotts that when he stood for 5 or 6 minutes near Cobb, who was welding, the floor of the mine was not felt by the latter to see if there were burning pieces of slag. I adopted Knotts' testimony due to my observations of the witnesses' demeanor, and also because this testimony is directed specifically to what occurred while Knotts observed Cobb welding.)

12. Sparks falling on coal and coal dust could present a fire hazard.

13. Knotts testified that on the day in question the mine floor was damp to dry, but not wet. On the other hand, Cobb testified that the area beneath where he had worked on the miner was wet. I adopted this testimony as it was corroborated by Cummings, and also in light of the fact that both Cobb and Cummings testified that before Cobb started to weld on the mining machine it was washed off with a water hose.

14. Cobb was asked whether he saw any float coal dust and he answered in the negative. Knotts on the other hand testified that he saw float coal dust on the machine and that there were "combustibles" on the floor. (Tr. 105.) I have adopted the testimony of Knotts with regard to "combustibles" on the floor, as it was not contradicted. Also, Cobb and Cummings testified that before the machine was washed off it was scraped. It is thus conceivable that some coal dust might have been formed in the scraping process.

15. The welding, performed by Cobb on October 29, was to the head (front) of the mining machine which was located at a crosscut between two entries. I accepted Knotts' version placing the head of the miner almost flush with the entry. Knotts testified that, in essence, after he stopped Cobb from welding, rock dust was brought from a distance of approximately 140 feet, and that the fire extinguisher was 4 or 5 breaks away. On the other hand, Cobb testified that the fire extinguisher was on a header adjacent to the power center in the next entry to the right of the tail end of the mining machine, and outby the break (crosscut) in which the miner was located. His testimony placed the rock dust in that same entry along the welding machine to the right of the power center. I accepted Cobb's testimony, in this regard, as it was corroborated by Cummings. Also, it is noted, that Knotts testified that he was not in that specific area, and did not recall where the power center was located, and even said that it was possible that there was a fire extinguisher and rock dust in the area as indicated by Cobb and Cummings.

16. The blocks or pillars between entries are approximately 60 to 70 feet in length, and the entries are approximately 20 feet in length.

17. The failure to have a fire extinguisher or rock dust immediately available during welding could reasonably have led to an increased fire or explosion hazard since a fire would not have been immediately put out.

18. An ignition, due to an accumulation of methane at the site of welding, without the presence of coal dust would cause severe burns to persons in the immediate area. If coal dust is present, and an explosion results, it would cause serious injury or fatalities.

19. There are generally 10 miners in a section crew, and approximately 200 miners were at the Morton Mine the day the citation was issued.

20. On the date the citation was issued, Cummings, the electrical foreman, was present in the area the entire time that Cobb was welding and was supervising him.

The Parties stipulated that:

1. The Morton Mine had an annual hours worked or tonnage of 11,130,942 in 1985 and the Respondent had an annual hours worked or tonnage of 814,854 in 1985.

~623

2. The Respondent had 783 inspection days in the period November 1, 1983 through October 31, 1985, and was assessed 536 violations other than single penalty assessments timely paid.

3. The fine proposed by Petitioner will not adversely effect the Respondent's ability to continue in business.

4. The violation was timely abated.  
Regulatory Provisions

30 C.F.R. 75.1106 provided as follows:

. . . Welding, cutting or soldering with arc or flame in other than a fireproof enclosure shall be done under the supervision of a qualified person who shall make a diligent search for fire during and after such operation and shall, immediately before and during such operations, continuously test for methane with means approved by the Secretary for detecting methane. Welding, cutting, or soldering shall not be conducted in air that contains 1.0 volume per centum or more of methane. Rock dust or suitable fire extinguishers shall be immediately available during such welding, cutting or soldering.

#### Issues

1. Whether Respondent made a diligent search for fire during welding on October 29, 1985.

2. Whether Respondent continuously tested for methane during welding on October 29, 1985.

3. Whether rock dust was immediately available during welding on October 29, 1985.

4. Whether a fire extinguisher was immediately available during welding on October 29, 1985.

5. If a violation of 75.1106, supra, occurred, was it of such a nature as could have significantly and substantially contributed to the cause and effect of a safety hazard.

6. If a violation of 75.1106, supra, occurred, whether such violation was caused by Respondent's unwarrantable failure to comply with 75.1106, supra.

Jurisdiction

Respondent, as owner and operator of the Morton Mine, is subject to the provisions of the Federal Mine Safety and Health Act of 1977, and I have jurisdiction over the Parties and subject matter in this proceeding.

Violation of Section 75.1106

Based on my observations of the demeanor of Knotts and Cobb, I found Knotts' testimony credible that during the 5 or 6 minutes that he watched Cobb welding, the latter did not test for methane. Section 75.1106, supra, provides that during welding methane should be tested for "continuously." Webster's New Collegiate Dictionary (1979 edition), defines continuous as "marked by uninterrupted extension in space, time, or sequence." Inasmuch as neither Cobb or anyone else tested for methane during the 5 minutes of welding, observed by Knotts, I conclude that the testing was not done "continuously," and as such 75.1106, supra, was violated.

I found Knotts' testimony credible that during the 5 or 6 minutes that he observed Cobb welding, the latter did not feel the floor of the mine to see if there were burning pieces of slag. Cobb testified that, in essence, whenever he changed the rod he had his hood up, and he would notice whether there was a fire in the area under him. He indicated that he always looks for fire "but it was too wet to worry about a fire." (Tr. 241.) Section 75.1106, supra, requires that during welding the search for fire be "diligent." Webster's New Collegiate Dictionary, (1979 edition), defines "search" as ". . . to look into or over carefully or thoroughly in an effort to find or discover something . . . ." [Emphasis added.] This same source defines "diligent" as "characterized by steady, earnest, and energetic application and effort." Based on these definitions, I conclude that although Cobb would have noticed a fire when he removed his hood, he did not make a diligent search for fire during the time that he was observed by Knotts. As such, a violation of 75.1106, supra, has occurred.

I found credible the testimony of Cobb and Cummings that a fire extinguisher and rock dust, on October 29, 1985, were located at the next entry and outby the areas by which Cobb was welding. Specifically, I adopted Knotts' testimony which placed the area in which Cobb was working, one entry removed from the areas Cummings and Cobb testified to be the location of the fire extinguisher and rock dust. Accordingly, one would have to traverse the length of a pillar, approximately 50 feet, and then travel some distance outby to reach the fire extinguisher and rock dust.

Webster's New Collegiate Dictionary (1979 edition), defines "immediately" as, "(1) in direct connection or relation . . . .; (2) without interval of time . . . ." Due to the distance involved between the welding site where Cobb was welding, and the fire extinguisher and rock dust on October 29, 1985, I find that the latter two items were not "immediately available," as required in 75.1106, supra, and as such that section was violated

#### Significant and Substantial

The Petitioner has, in essence, alleged that the nature of Respondent's violations of 75.1106, supra, fall within the purview of 104(d)(1) of the Act, as they " . . . could significantly and substantially contribute to the cause and effect of a coal . . . mine safety or health hazard . . . ." ( 104(d), supra) In Mathies Coal Co., 6 FMSHRC 1 (January 1984), the Commission set forth the elements of a "significant and substantial" violation as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (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. (6 FMSHRC, supra, at 3-4.)

As discussed above, infra, I have already found that a mandatory safety standard, i.e., 30 C.F.R. 75.1106, has been violated. Accordingly, the first element of Mathies, supra, has been satisfied.

Knotts' testimony was not contradicted that, in essence, if as a result of not testing for methane, undetected methane increases to five percent of total air, a fire or explosion could occur in the event the ventilation system fails. Thus, it is concluded that not testing for methane contributed to some extent to the hazard of a fire or explosion. It has already been found, infra, that neither a fire extinguisher nor rock dust were "immediately available," at the site of Cobb's welding. Accordingly, in the event of a fire or explosion, caused by excess methane being ignited, the hazard would be increased because, due to the placement of the fire extinguisher and rock dust, the fire would not be immediately put out.

Cobb testified that while welding, upon lifting up his hood he would be able to check the exact area in which he was working. However, that there was no evidence that specifically there was any search for fire, or welding sparks, on or about the miner. Although Cobb and Cummings testified, in essence, that there was not coal dust on the miner, I adopted Knotts' testimony as to the presence of coal dust on the miner. Inasmuch as Cobb had testified that prior to the welding he and another miner had scraped the mining machine of coal, it is likely that coal dust, to some extent, had remained, even after it was washed down. I concluded that Cobb did not make a diligent search for fire. Thus, there is a likelihood that some sparks might have remained undetected on the floor or on the miner. I accepted Knotts' testimony that there were combustible items on the floor, and that there was coal dust on the miner. Thus, I conclude that the failure to make a diligent search for sparks did, in combination with the evidence of coal dust and combustible items, contribute to a fire hazard.

Accordingly, I conclude that the second element of Mathies, supra, has been established in that the violation did contribute to a discrete safety hazard.

As interpreted by the Commission in *Secretary of Labor v. Consolidation Coal Company*, 6 FMSHRC 189, at 193 (February 1984), the third element articulated by the Commission in the Mathies, supra, "embraces a showing of a reasonable likelihood that the hazard will occur, because, of course, there can be no injury if it does not."

According to the testimony of Carl E. Jenkins, Federal Coal Mine Supervisor, the Morton Mine is considered to liberate more methane than many other mines in the area, and, indeed, in the last quarter of the inspection year 1985, it was found to liberate 1,000,000 cubic feet per day. Knotts has indicated that an accumulation of methane in concentrations of more than 5 percent of total air, could lead to an ignition or explosion. Jenkins testified that, in essence, although the area in which Cobb was welding is not considered to be a high liberator of methane, there was a "possibility," that methane could accumulate between 5 and 15 percent. However, Jenkins indicated that, at the location where Cobb was working, a couple of breaks out by the face, normally he would not expect to find methane. Furthermore, Knotts indicated that Respondent's ventilation system, which has the purpose of keeping the air free of methane gas, is very effective, and that on the day that he issued the citation there

was sufficient air in the area to keep it free of methane. It appears further, from Knotts' testimony, that the only way in which methane would increase to the point to where it would constitute a fire or explosion hazard, would be in the event of a failure of the ventilation system. In essence, it was the testimony of Knotts and Jenkins that a failure of the ventilation system could occur: if a fan would stop working, if the check curtains would become interrupted, if the lime stone blocks would get "out of kilter," (Tr. 53.) if the block stoppings would get crushed, or if there would be a roof fall on an overcast. However, Knotts indicated that "it's not probable that there is going to be any major ventilation change." (Tr. 135.) He further stated that the failure of one fan would have only a "miniscule" effect on the ventilation in the section. (Tr. 135-136.) Jenkins said that usually interruptions of a block curtain could occur if it is knocked down with a piece of mobile machinery, but he did not offer any opinion on the likelihood of this event occurring. Also, there was no evidence presented as to the likelihood of the lime stone block getting "out of kilter," (Tr. 53.) the roof falling on an overcast, or the crushing of block stoppings. In this connection, Knotts testified that the latter condition occurs from a "moving action" from the mine roof or bottom, (Tr. 186.) but there was no evidence presented that this is a common occurrence in the Respondent's mine.

There was evidence presented that there have been at least 12 cited violations of the Respondent's ventilation plan in the last 2 years. However, Jenkins, in essence, testified that there was no way that he could ascertain whether any of these violations were specifically for any failure of the ventilation system.

Accordingly, it must be concluded that Petitioner has failed to establish that there was any reasonable likelihood of a failure of Respondent's ventilation system to the extent that it would cause methane to accumulate in a high enough concentration as to constitute a hazard. Therefore, it must be concluded that it has not been established that there was a reasonable likelihood that a fire or explosion will occur as a result of Cobb's failure to continuously test for methane.

I have adopted the testimony of Cobb and Cummings that on the morning of October 25, 1985, prior to welding, the miner was washed down. It is likely that the washing would have caused the miner and the area around it on the floor, to be somewhat wet. Taking this factor into account, I find that the Petitioner has not met its burden in establishing that there was any reasonable likelihood of combustible materials or coal dust on the floor or on the miner, being in a dry enough state to have been ignited by sparks caused by the welding operation. It thus is not established that as a result of the failure of Cobbs to make a diligent search for fire, there was a reasonable likelihood of a fire.

Therefore, based upon on all of the above, I conclude that it has not been established that the violations herein were "significant and substantial."

(I conclude, based upon the testimony of Jenkins, that in the unlikely event of a fire or explosion either could have reasonably been expected to result in fatalities or serious injuries to miners in the blast or fire area.)

#### Unwarrantable Failure

At the date the citation was issued, Cummings, the electrical foreman, was supervising Cobb directly and was in the area the entire time that Cobb was welding. As such, he was in the position to observe Cobb, and thus should have known of his failure to continuously test for methane during the welding. He also should have known that no one else was testing for methane. In the same fashion, he should have known that Cobb was not making a diligent search for fire during the welding. Further, inasmuch as he knew the location of the fire extinguisher and rock dust, he thus should have known that it was not "immediately available," during the welding. As such, I conclude that the violation of 75.1106, supra, was due to Respondent's "unwarrantable failure."

#### Civil Penalty

I have considered all of the criteria in 110(i) of the Act. All criteria have been stipulated to except the Respondent's negligence and the gravity of the violation. I conclude that Respondent, in violating 75.1107, supra, acted with a high degree of negligence. Further, since I found that the violation was not "significant and substantial," I conclude that its gravity was only moderately serious. I conclude that a fine of \$400 is appropriate.

#### ORDER

It is ORDERED that Order Number 2717216, is modified to a 104(a) Citation. It is further ORDERED that Respondent pay the sum of \$400 within 30 days of the date of this decision as a civil penalty for the violation found herein.

Avram Weisberger  
Administrative Law Judge