

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 11 1992

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 91-251
Petitioner : A.C. No. 42-01944-03586
 :
 : Docket No. WEST 91-256
v. : A.C. No. 42-01944-03585
 :
ENERGY WEST MINING COMPANY, : Cottonwood Mine
Respondent :

DECISION

Appearances: Robert J. Murphy, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Thomas C. Means, Esq., Claire Brier, Esq.,
CROWELL & MORING, Washington, D.C.,
for Respondent.

Before: Judge Lasher

In these two proceedings, the Secretary of Labor (MSHA) originally sought penalties for a total of eight alleged violations described in eight enforcement documents (Citations and Withdrawal Orders) pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) 1977.

Prior to hearing, Citations numbered 3413895 (in Docket West 91-251) and 3413829 (in Docket WEST 91-256) were severed (T. 6-7) from the subject dockets, processing thereof was stayed, and these two Citations were placed in ancillary "A" dockets for separate processing (T. 7-8) since they involved so-called "excessive history" questions. After this administrative action, two Citations remained in Docket WEST 91-251 and four remained in Docket WEST 91-256. Of the four in this last docket, two were settled when the parties, prior to hearing, filed their written motion for approval of an amicable resolution concerning such.¹

¹ This motion, which was approved on the record of hearing (T.5-6), indicated that the violative conditions described in the two Citations (3414063 and 3415064) were not "reasonably likely to cause serious injury or illness" that the "significant and substantial" designations thereon should be

Four enforcement documents remained and were litigated, numbers 3413898 and 3414071 in Docket No. 91-251, and numbers 3414062 and 3413883 in Docket No. 91-256.

Stipulation

At the commencement of the proceedings, the parties stipulated to the following:

1. Energy West is engaged in mining and selling of bituminous coal in the United States, -and its mining operations affect interstate commerce.

2. Energy West is the owner and operator of the Cottonwood Mine, MSHA I.D. No. 42-01944.

3. Energy West is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. (the "Act").

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

5. The subject Citations were properly served by duly authorized representatives of the Secretary upon agents of Energy West on the dates and places stated therein; and may be admitted into evidence for the purposes of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

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

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

8. Energy West demonstrated good faith in abating the violations.

removed, that the "gravity" designation of such should be modified to "unlikely," and that the proposed penalties therefor should in such circumstances be reduced to \$20 each. My bench order approving this disposition is here **AFFIRMED** and appropriate execution of such appears in the "Order" at the end of this decision.

9. Energy West is a large mine operator with 3,317,397 tons of production in 1989.

10. The certified copy of the MSHA Assessed Violations History (Ex. G-1) accurately reflect⁶ the history of this mine for the two years prior to the dates of the citations.²

pocket No. WEST 91-256

Citation No. 3414062 (T. 12-90).

This Citation was issued by Inspector Marietti on October 16, 1990, and described the alleged violation as follows:

The fire-fighting equipment at the No. 20 Crosscut in the 16 West Section belt return entry was not being maintained in a usable and operable condition. The fire hose nozzle for the two length⁶ of fire hose, located at this location, was missing and could not be located in the area.

MSHA seeks a \$20 penalty for this alleged infraction of 30 C.F.R. § 75.1100-3 which provides:

All fire-fighting equipment shall be maintained in a usable and operative condition. Chemical extinguishers shall be examined every six months and the date of the examination shall be written on a permanent tag attached to the extinguisher.

Although it concedes that there was no nozzle present with the cited fire equipment, Respondent questions the occurrence of

² The computerized history show⁶ 277 "Paid" violation⁶ during the two-year period from 10-18-88 to 10-17-90. The four citation⁶ were issued at different times during the period 10-3-90 through 11-8-90. I thus find and infer from this evidence and the stipulation that Energy West had a previous history of approximately 277 violations.

a violation with respect to this Citation, which was not characterized as "Significant and Substantial" by the Inspector. (T. 13-14).³ Respondent contends that it has installed "two to three times" the amount of fire hose that MSHA required, that nozzles were available in other locations, that a nozzle is not required for every hose at a mine, and that a nozzle is not necessary for a hose to be "usable and operative." (T. 14-15).

Findings

Inspector Marietti spotted the alleged violation (hose without a nozzle) while on inspection accompanied by Energy West's safety representative Dixon Peacock. He was in the 2 Entry section and was walking the belt return when he examined a 30-gallon garbage can (where Energy West stores the fire hoses) and could not find the nozzle "in the storage area." (T. 24, 25). The nearest nozzle was 1000 feet away. (T. 25, 61).

The Inspector did not assert that the hose itself was faulty or damaged. It would have operated properly when attached to a hydrant or to another hose. (T. 38, 47, 58).

The regulations do not mention or specifically require fire hose nozzles. (T. 25, 36, 68).

The regulations require at least 500 feet of fire hose to be "stored at strategic locations along the belt conveyor." 30 C.F.R. § 75.1100-2(b) (T. 66). The regulations also specify that enough fire hose to reach the working face must be provided at each section loading point and 500 feet of fire hose must be stored within 300 feet of the belt drive. According to MSHA's interpretation of the regulations, this means that, altogether, Energy West was required to have a total of 600 feet of fire hose along the belt line and at the belt drive in the section in question. (T. 34, 66, 67). Since Energy West stored 500 feet of hose at the tailpiece and 500 at the belt drive, in addition to the 200 feet every tenth crosscut, Energy West actually had 2000 feet of hose (more than three times the amount required by the regulations) along the 16 WEST belt line on the date the citation was issued. (T. 53, 54, 69).⁴

³ Hearing was held on two days, March 5 and 6, 1992, and the two sections-of transcript (one for each day) begin with-page 1. Accordingly, the transcript references will be shown as "T. " and II-T. ", respectively.

⁴ Further, although the two lengths of hose at crosscut No. 20 did not have a nozzle stored with them there were eight nozzles stored along the belt line. (T. 51, 69).

Although Inspector Marietti conceded that there is no requirement in the regulations that a hose be at the location in question with the nozzle (T. 25), he explained that he issued the citation:

Because 1100-3 says that all fire-fighting equipment at the mine will be maintained usable and operable. And it's just prudent that if it's not going to be maintained as such for people to rely on it in the event they need to use it would create a problem for the users and possibly a serious fire for the mine. (T. 26-27).

Although a fire hose could be used without a nozzle to fight a fire, it would generally be more effective if the hose had a nozzle. (T. 26, 27, 35-38, 46, 47). Without a nozzle, as much water would be supplied, but the water would shoot out from the hose 20-25 feet; with a nozzle, water would propel from the hose approximately 60-70 feet. (T. 45, 46). However, a hose without a nozzle could be used to fight a fire by flooding the area. (T. 35-36, 38).

While Inspector Marietti testified that he interprets 30 C.F.R. § 75.1100-3 as requiring each hose to have a nozzle stored with it (T. 51), the alleged violation was considered abated by providing a single nozzle in the can, even though two hose lengths were stored there. (T. 55-56). Moreover, in his view, if only one long hose were stored along the belt line or if several pieces of hose were connected together to form one long hose, then MSHA's regulations would be satisfied by only a single nozzle for all of the hoses along the entire belt line (T. 51, 56); and even though the fire hydrants, located at 300-foot intervals along the belt line, did not have fire hose stored with them, Inspector Marietti considered the hydrants to be fully usable and operative within the meaning of § 75.1100-3. (T. 54, 57).

Randy Tatton, Chief Safety Engineer for the Cottonwood Mine, testified that since the hose at crosscut 20 was extra hose that was intended to be used as a part of one long hose, he did not believe that nozzles were required by regulation to be stored with the hoses at all. (T. 69-70, 71, 87). Mr. Tatton testified that if a piece of hose from crosscut 20 had to be used alone to fight a fire, not only could the hose be used to fight a fire without a nozzle, but a nozzle could also be obtained from another nearby location along the belt line. (T. 70, 71, 73, 87).

The hose could be kinked to simulate the spray a nozzle would produce, or a miner could place his fingers or part of his hand over the mouth of a hose. (T. 70, 78, 87). Mr. Tatton conceded that the hose is usually more effective with a nozzle, but in some circumstances, such as if a small smoldering fire occurred, the hose would be more effective without a nozzle. (T. 70). Mr. Marietti agreed with this assessment. (T. 47).

Energy West's practice at the Cottonwood Mine was to store two 100-foot lengths of fire hose at every tenth crosscut along each of its belt lines. (T. 24, 25, 34, 68, 72).

Conclusion

Although not required by law to provide this hose or store it in these locations, Energy West adopted this practice so that miners would have extra lengths of hose available and readily accessible if needed and know where to find it, as part of a policy of supplying fire protection in excess of MSHA's requirements. (T. 25, 27, 38, 50, 51, 52, 53, 66-70, 80, 88). MSHA concedes that, by providing these hoses at every tenth crosscut, Energy West went "way beyond the requirements of the law." (T. 53).

When Energy West instituted this practice, it anticipated that these extra pieces of hose would be used as segments of a longer hose. (T. 70, 71, 80, 87). However, it is also possible that a piece of this hose could be used alone to fight a fire if the fire happened to break out near a cache of extra fire hose, although this was not Energy West's intention in storing the hose in these locations. (T. 70, 71, 87). Energy West also has adopted the practice of storing one fire hose nozzle with each of the caches of hoses. (T. 50, 52, 68). Cottonwood has never experienced a belt fire and thus has never had reason to use the hose or nozzles stored in these caches. (T. 48-50, 52, 68-72, 87).

The fire hose at issue here was extra fire hose, not required by the regulations, which Energy West stored in this location in order to provide additional firefighting equipment in readily accessible locations. The extra hose, because it was in good working order, was usable and operative even though a fire hose nozzle was not stored with it.

Because the hose itself was maintained in good working order, it was usable and operative. Energy West stored this extra hose at crosscut 20 so that it would be readily available to a miner if it were needed. (T. 50, 52, 53, 70, 80, 87, 88). It was intended for the extra pieces of hose to be attached to other pieces of hose to form one hose to fight a fire in the area or in another part of the mine. (T. 69-70, 80, 81, 88). The hose, being vastly in excess of what was required, was thus fully usable and operative even though a nozzle was not stored with it.

The regulations required Energy West to store 600 feet of hose along the belt line in 16 West. (T. 51, 54, 66, 67). In an exercise of caution and as a matter of safety policy, Energy West stored 2000 feet of fire hose along this belt line - 1400 feet more than required. (T. 53, 54, 69). As Energy West argues, it could have stored this extra 1400 feet of hose anywhere (for example, in a storage room or in one central location in the mine). (T. 86-87). Instead, it chose to spread out the 1400 feet of hose along the belt line in specific, evenly spaced locations so that a piece of hose could be located and obtained quickly if it were needed. (T. 50, 52, 53, 70, 80, 87, 88).

In this matter, Energy West, for the purpose of enhancing safety, stored extra hose (in good usable and operative condition) without nozzles in amounts beyond that required by the regulations. In such pursuit of safety, Energy West should not be penalized because it stored such extra hose along the belt line rather than in some remote area, such as (as Energy West points out) in a storage area. This is particularly true, where the regulations do not speak of any requirement for hose nozzles, where the extra hose potentially had beneficial purposes in the event of a fire, and where this hose was in excess of the regulation's requirements.

Accordingly, it is concluded that no violation occurred. It is noted in reaching this determination that no intimation was made or intended that as to required hose, i.e., that which is not in excess of the regulations' requirements, hose nozzles are not required. It may well be that in a given situation "required" hose, to be in "usable and operative condition," must be stored with a nozzle.

Docket No. West 91-251

Citation No. 3414071 (T. 95-196).

This Citation, issued by MSHA Inspector Fred L. Marietti on November 8, 1990, charges an infraction of 30 C.F.R. § 75.316, and describes the violative condition as follows:

The approved ventilation and methane and dust control plan was not being complied with in the 2 North double-split miner sections. The belt was moved up to 42 crosscut on graveyard 11-8-90. The brattice installed between the belt and the 2 N.E. and the 2 N.W. designated intake escapeways was not installed in a workmanlike manner and maintained in the condition to serve the purpose for which they

were intended. The 41 crosscut, west side next to the roadway was open on the outby side six feet at the top and tapered down to one foot at the bottom for a distance of six-foot high. The 40 crosscut, west side, the brattice was gapped down from the roof four inches for 15 feet. The inby side was open at the top one foot and tapered out for three feet at the bottom for a distance of 6.5 foot high. The outby side was open 30 inches by 6 feet high. The 40 crosscut, east side, was gapped open at the top from 4 inches to 5 inches for 12 feet. The inby side was open 3 feet by 8 feet high. The outby side was open 4 feet by 8 feet high. There was coal running out on the belt and the section was mining. Refer to Citation Nos. 3414072 and 3414073.

The standard infracted, 30 C.F.R. § 75.316, provides:

A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plans shall be reviewed by the operator and the Secretary at least every 6 months.

The pertinent provisions (Par. E, Subparagraphs 1(a) and (b) of Respondent's plan (Ex. G-2) provide:

1. Ventilation Controls
 - a. All ventilation controls such as stoppings, overcasts, undercasts, doors, regulators, shaft partitions, etc., shall be of substantial and incombustible construction; installed in a workmanlike manner and maintained in the condi-

tion to serve the purpose for which they were intended.

- b. Permanent stoppings shall be erected between the intake and return air courses, a minimum of 8" thick, and shall be maintained to and including the third connecting cross-outby the faces of the entries. Whenever the third connecting crosscut is broken through, work shall be started on building the stopping as soon as possible and shall be continued in a reasonable and diligent manner until completed. Similarly, whenever a belt move is completed, curtains shall be installed immediately and work shall be started on building the permanent stoppings as soon as possible and shall be continued in a reasonable and diligent manner until completed.

Energy West concedes the occurrence of this violation but contends that it was not "Significant and Substantial." (T. 10). Violation of an approved ventilation plan is the same as a violation of a mandatory safety standard. Ziegler v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976); Jim Walter Resources, Inc., 9 FMSHRC 903 (1987).

On November 8, 1990, a belt move was conducted in the 2d North Section at the end of the graveyard shift which ended at 8 a.m. The temporary curtains in question were installed in crosscuts 40 and 41 east and west either at the end of the shift or between the graveyard and day shifts. Materials for the construction of permanent stoppings had been brought to each crosscut by the beginning of the day shift and a miner had begun work on the permanent stopping at crosscut 40 east. Miners were also working on constructing a permanent stopping across crosscut 41 east. All permanent stoppings would have been completed and in place by the end of the day shift. At this time, the faces were approximately 200 to 300 feet inby crosscut 41 and 40. (T. 141). Air was flowing north (inby) up the intakes, across the faces and then south (outby) down the returns and the belt entry. (Ex. R-4; T. 142). The ventilation at the faces was 25,967 cubic feet per minute ("cfm") and 13,000 cfm of air was entering the belt entry at the feeder breaker. (T. 143, 178). Because the volume and pressure of air traveling up the intakes was greater than that traveling outby in the belt, any air that escaped through the temporary curtains flowed from the intakes into the

belt entry. (Tr. 118-119, 120, 142, 146, 177-178). That air was then forced to flow south down the belt entry, outby the cited curtains, and away from the faces. (T. 142-143).

At approximately 9 a.m. on November 8, 1990, while coal was being produced, Inspector Marietti entered the 2d North section and found that the temporary brattices installed at crosscut 41 west, crosscut 40 west, and crosscut 40 east were not drawn up tight against the crosscut ribs, allowing some air to leak from the intake entries into the belt entry through the curtains. (T. 108-110). The Inspector did not measure the amount of air escaping through the curtains, but did a smoke test which showed some leakage from the intakes into the belt entry. (T. 118, 119, 177-178). He then issued § 104(a) Citation 3414071 which, as noted, alleges a significant and substantial ("S&S") violation of the ventilation plan under 30 C.F.R. § 75.316. The violation was promptly abated when the gaps in the curtains were closed.

Inspector Marietti felt there were two hazards posed by this violation: (1) contaminated air entering the intakes through the gaps in the temporary curtains (brattices) should a fire have occurred in the belt entry,⁵ and (2) "short-circuiting*" of air, i.e., air escaping, which was intended for the face. (T. 119, 120).⁶

It appears that his primary concern was of a fire occurring in the belt entry (T. 120-121, 126) since the direction of the air coming through the curtains was away from the face and toward the belt entry (T. 119, 120):

At the belt drive, if you had a fire there, for one thing, the air would be coming through those stoppings to feed the fire. And in all of the experiences that I've seen, which I've seen many mine fires and more than I want to see and have been at some of the investigations, and the fire has a tendency to follow the oxygen so it gravitates towards

⁵ This hazard was dependent on the happening of a separate hazard, a belt entry fire, to which it would have contributed and worsened. This is -why the question narrows on whether there was sufficient proof that a belt entry fire was reasonably likely.

⁶ The viability of this contemplated hazard was not dependent on the occurrence of some other separate hazard, and determination of the reasonable likelihood of its occurrence can be made without reference to some other independent hazard.

the direction that the oxygen is--or the air is coming in. It'd have a very good tendency to pull right through there and burn right out into the intake escapeway. (T. 121) (Emphasis added).

As to the first hazard mentioned, the Inspector's basis for considering that there was a reasonable likelihood that the hazard contributed to would occur and result in an injury was general:

- a. Belt entries are the number one cause of fires.
- b. "Fires are expected in mines."
- c. Potential ignition sources were present in the form of "friction," coal on the belt, a feeder breaker (electrical source), a pick breaker, and a conveyor.
- d. The mine has had fires in the past. (T. 122-123).⁷

He said it was "possible" for the hazard to occur but he did not find specific conditions present which would raise the degree of likelihood, such as: "hot rollers" or accumulations. (T. 124). He thought that if there had been hot rollers present, the situation might have constituted an imminent danger. (T. 124). Although there were fire-detecting devices in the area and also fire-fighting equipment (T. 127), he did not consider the presence of these devices and equipment in determining whether the violation was **Significant and Substantial." (T. 127-128).

As to the Inspector's belief that air intended for the face could have been short-circuited, his testimony was speculative. He admitted that a door would have had to be opened outby for short-circuiting to occur. (T. 128-131).

Energy West's witnesses, Chief Safety Engineer Tatton and Mr. Steve Radmall, the Safety Engineer who accompanied Mr. Marietti on his inspection, both gave their general opinion that it was not reasonably likely that a serious injury or illness would have resulted from the violation. (T. 154, 180). As the

⁷ He testified that if a fire did occur, a serious injury would result, which would result in lost workdays or restricted duty for the injured miner(s) (T. 123) due to smoke inhalation.

smoke test by Mr. Marietti demonstrated and as Mr. Marietti admitted, the direction of the flow of air in the section was such that air flowed from the intakes into the belt entry through the curtains. (T. 118-119, 120, 142, 146, 177, 178; see Ex. R-4. Thus, it was unlikely that contaminated air from the belt entry would have entered the intakes through the curtains. Had the contaminated air somehow flowed in the opposite direction, it was not likely that a fire would have broken out on the belt line at the location of the curtains before the permanent stoppings were erected. (T. 145, 179).⁸ The mine has never had a belt fire (T. 146) and it was not likely that one would have occurred here and certainly not before the permanent stoppings were completed. (T. 145-146).

Because the ventilation at the face was 25,967 cfm (T. 178), such indicates that adequate air was reaching the face and that intake air was not being short-circuited in any meaningful amount--in other words, the ventilation system was operating properly despite the air leaking through the curtains. Finally, it appears that the regulator in the section would not have allowed short-circuiting since it assured that a constant level of air circulated through the area. (T. 150).⁹

Significant and Substantial

The Commission's formula, as set forth below, is employed here to determine this question.

A violation is properly designated "significant and substantial" if, based on 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. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

⁸ The temporary curtains would have been replaced with permanent stopping by the end of the day shift. (T. 138).

⁹ Nor was it reasonably likely that inadequate ventilation would have caused a methane ignition since no methane had been detected in the area. (T. 179). Ignitable levels of methane have never been detected in the mine. (T. 145, 163, 172). This finding is based on the record relating to this Citation.

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.

Accord, Austin Power v. Secretary of Labor, 861 F.2d 99, 103 (5th Cir. 1988).

The third element of the Mathies formula requires **"that** the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury, and that the likelihood of injury must be evaluated in terms of continued normal mining operations. U.S. Steel Minina Co., 6 FMSHRC 1572, 1574 (July 1984). See also Monterey Coal Co., 7 FMSHRC 996, 1001-1002, July 1985). The operative time frame for determining if a reasonable likelihood of injury exists includes both the time that a violative condition existed prior to the citation and the time that it would have existed if normal mining operations had continued. Halfway, Inc., 8 FMSHRC 8, 12 (January 1986); U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985). The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved. Texasgulf, Inc., 10 FMSHRC 498, 500-501 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007, 2011-2012 (December 1987). It is the **contribution** of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984).

This analytical process for determining the "reasonable **likelihood**" question is a general, broad system of setting forth the conditions or practices which might lead to the occurrence of the contemplated hazard and then proceeding to the conclusion whether or not the hazard is reasonably likely to come about and cause injury. A useful companion method is one which was utilized in Secretary v. Texasgulf, Inc., 9 FMSHRC 748 (April 1987), where the concept of "**substantial possibility**" (9 FMSHRC at page 764) was mentioned. This was used as an enhancement of "reasonable likelihood" for the reasons stated in the decision, including avoidance of confusion with the "imminent danger" concept, and also because it appeared as a practical matter to be the thinking actually being used by both tribunals, judges, and **laymen** involved at the various levels of mining safety **enforce-**

ment and administrative and judicial review. Its value is in its being less ambiguous and at least somewhat more comprehensible. Since understanding what a law means also is consistent with an increased faith in American justice and fairplay, I adopt here, as an aid to the general formula, the "substantial possibility" test. The end result would be the same whichever method of analysis were used.

Judge William Fauver, in his Decision in Secretary v. Coal Mac Inc., 13 FMSHRC 1600 (Sept. 25, 1991) succinctly states the "substantial possibility" concept as follows:

Analysis of the statutory language and the Commission's decisions indicates that the test of an S&S violation is a practical and realistic question whether, assuming continued mining operations, the violation presents a substantial possibility of resulting in injury or disease, not a requirement that the Secretary of Labor prove that it is more probable than not that injury or disease will result. See my decision in Consolidation Coal Company, 4 FMSHRC 748-752 (1991). The statute, which does not use the phrase "reasonably likely to occur" or "reasonable likelihood" in defining an S&S violation, states that an S&S violation exists if "the violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or 'other mine safety or health hazard" (§ 104(d)(1) of the Act; emphasis added). Also, the statute defines and "imminent danger" as "any condition or practice . . . which could reasonably be expected to cause death or serious physical harm before [it] can be abated," and expressly places S&S violations below imminent dangers. It follows that the Commission's use of the phrase "reasonably likely to occur" or "reasonable likelihood" does not preclude an S&S finding where a substantial possibility of injury or disease is shown by the evidence, even though the proof may not show that injury or disease was more probable than not.¹⁰

¹⁰ The observation is made that the phrase "more probable than not" has origins from the beginning attempts of the development of construction principles for the Act's "S&S" terminology. It would seem that substitution of the single word "probable" for the entire phrase "more probable than not" is a simpler, less

Utilizing the phrase "substantial possibility" for purposes of analysis seems consistent with the Commission's "reasonable likelihood" phraseology in Cement Division, supra, and Mathies, supra, and permits comparing and contrasting such with the commonly understood ideas (T. 97, 101-106) of "remote" possibility, "strong" possibility, and "probability." See Texassulf, supra.

Turning to the first alleged hazard, that if a fire developed in the belt entry contaminated air could have entered the intakes through the curtains (T. 116, 126), the Inspector himself testified that the air was flowing in the direction from the intakes (the area of high pressure) to the belt entry (the area of low pressure) through the curtains. (T. 118, 119, 120). Energy West's witnesses agreed that this was the direction in which the air flowed through the curtains. (T. 142, 146, 177-178). There was no explanation how contaminated air would have been able to flow in the opposite direction--from the belt entry into the intakes.

The Inspector conceded that if a fire had occurred inby the curtains, the curtains would not have posed a contamination hazard at all since the contaminated air could not have entered the intakes through the curtains. (T. 120). And if a fire had occurred outby the curtains, he admitted that the curtains would not have caused a contamination hazard because the direction of the flow of air in the belt entry would have sent the air down the belt entry and "out" of the mine (away from the curtains and the faces). (T. 121). Nevertheless, he concluded that if a fire occurred at the belt drive (1700 to 1800 feet outby the curtains (T. 149), then the curtains would pose a hazard. He believed that the air coming through the curtains could feed a fire at the belt drive. He also said - without explanation - that if a fire had occurred at the belt drive, the fire itself would have entered the intakes through the curtains because fire has a tendency to follow oxygen. Even under Inspector Marietti's own theory, the only fire that could have affected the intakes would have been a fire at the belt drive.

However, there is no evidence to support a finding that there was a substantial possibility or reasonable likelihood that a fire would have broken out at the belt drive at any time, whether or not before the permanent stoppings were completed. Beyond the broad allegations that a belt entry is "the number one major cause of fires in mines," that "fires are expected to be in coal mines," and that there is "friction" and "coal on the belt, etc.," there is no basis to conclude that it was reasonably

confusing way to express the same thought.

likely that a fire would occur. See Eastern Association Coal Corporation, 13 FMSHRC 178 (February 1991). No specific conditions were present to indicate that there was increased likelihood of a fire or that such was a substantial possibility. (T. 124).

To conclude otherwise would require a finding that normal mining in and of itself involved a substantial possibility of a fire occurring. It is found only a remote possibility existed that a fire could have occurred. Thus the mine has not previously experienced belt fires. Where it is merely "possible" that a fire hazard "could" occur, a violation is not S&S. Beaver Creek Coal Co., 12 FMSHRC 153, 157 (Jan. 1990) (ALJ Cetti) (violation of § 75.316 improperly designated S&S where fire was merely possible); Beth Energy Miners, 11 FMSHRC 1999, 2001 (Oct. 1989) (ALJ Weisberger). See Union Oil Co. of California, 11 FMSHRC 289, 298-299 (March 1989).

The second theoretical hazard was that the air leaking through the leaky curtains might have prevented an adequate level of air from reaching the face. The Inspector did not measure the amount of air that was leaking through the curtains, but he thought that it was enough to deprive the face area of ventilation. However, ventilation at the face measured 25,967 cfm. (T. 150-151, 178). This indicates that the air leaking through the curtains was not adversely affecting the ventilation at the face. Therefore, there is no basis to conclude it was likely that ventilation at the face would have become inadequate before the permanent stoppings were completed.¹¹ Unless the Secretary can prove that ventilation at the face has been affected or was likely to have been affected by a violation of 30 C.F.R. § 75.316, the violation is not S&S. See Cyprus Emerald Resources Corp., 12 FMSHRC 2107, 2110-2111 (Oct. 1990) (ALJ Weisberger); Cyprus Emerald Resources, Corp., 10 FMSHRC 1417, 1421 (Oct. 1988) (ALJ Melick); Jim Walters Resources, Inc., 7 FMSHRC 2187, 2216 (Dec. 1985) (ALJ Koutras).

Conclusion

It is concluded, in the terminology of the 3d prerequisite of Mathies, supra,¹² that there was not a "reasonable likelihood"

¹¹ Inspector Marietti did state that if a door had been left open outby the curtains, that could have triggered short-circuiting. (T.-130). However, this was not shown-to be likely.

¹² The first and second evidentiary prerequisites of Mathies, supra, are clear, the violation having been conceded and the violation's contributing a measure of danger to safety. These points are not in issue.

that the hazards contributed to (contaminated air from fire in the belt entry and short circuiting of air from the face) would result in injury to miners. ¹³ It was not established that it was certain, probable in some degree--or, minimally, that there was a substantial possibility--that the hazards envisioned and contributed to by the violation would have occurred. The "Significant and Substantial" designation on this citation will be stricken and the penalty adjusted to reflect such.

In connection with the two remaining penalty assessment criteria, it is determined that Energy West was negligent in the commission of the violation since it was obvious and flagrant, the gaps in the brattice were visible from 25 to 30 feet away and existed at least 1 hour and 15 minutes (T. 112, 125-126), and Inspector Marietti considered it "one of the worst cases" he had ever seen "of anyone installing brattices." (T. 111-115). (See also T. 123-124).

Although the violation did not meet the special "Significant and Substantial" prerequisites, it nevertheless is found to be serious since had the unlikely event of a fire in the belt entry actually occurred, the hazard of contaminated air entering the intakes could have occurred, and as Inspector Marietti indicated, the fire in the belt drive might have had the "tendency to pull" through the area "and burn right out into the intake escapeway." (T. 121). It is therefore found to be a moderately serious violation.

In consideration of these findings and the other four mandatory penalty assessment criteria set forth in the "stipulation" section, a penalty of \$400 for this violation is found appropriate.

Docket No. WEST 91-256

Citation No. 3413003 (T. 196 - II-T. 112).

Inspector Donald E. Gibson issued this "Significant and Substantial" Citation on October 3, 1990, alleging an infraction of 30 C.F.R. § 75.1725(a), to wit:

¹³ There is insufficient evidence to determine that had an injury occurred that such would be of a reasonably serious nature. Thus, as to both hazards, I also conclude that as to the fourth prerequisite of Mathies, the burden of proof was not met.

The speed reducer being used on the stage loader on the 11th East longwall working section was not maintained in safe operating condition. A seal in the speed reducer was damaged/burst allowing gear oil to leak from the reducer on to the surface of the tailpiece, the fluid coupling housing and the electric motor driving the speed reducer. The motor is supplied 950 VAC.

Oil was observed dripping out of the fluid coupling housing onto the belt tailpiece. This oil was cleaned periodically but the leak persisted from the reducer.

In this condition, the hazard of a fire is present due to the consistent leak and the power source (motor) in the area. The stage loader was removed from service immediately by management after being notified of the violation.

30 C.F.R. § 75.1725(a), pertaining to "Machinery and equipment; operation and maintenance," provides:

Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

Respondent Energy West, while acknowledging that there was a leak in the speed reducer, denies that such leak made it unsafe (T. 198) and further contends that this condition was not reasonably likely to result in serious injury or death and thus, assuming arguendo, there was a violation, the violation was not "Significant and Substantial."

A speed reducer is a device consisting of gears of different sizes and configurations that is used to slow down or speed up a given apparatus. In this case it was used to reduce the speed of the stage loader motor. Such equipment is used in long-wall mining. (T. 206-207).

Inspector Gibson said oil, which he believed was gear oil, was running down the shaft of the speed reducer into the coupling housing guard. He observed oil on the face of the electric motor of the stage loader. He indicated he was able, from experience,

to identify "gear" oil. (T. 208-209). ¹⁴ The Inspector also observed oil "that dripped down on the tail piece out of the fluid coupling housing" which he identified as gear oil. (T. 215-216, 249). ¹⁵

As Inspector Gibson stated in the Citation, the leak was caused by a burst seal in the speed reducer of the stage loader. Energy West contends the leak could not have been fixed at the mine and that the entire loader would have had to have been taken to a fabrication shop to replace the seal. (T. 211; II-T. 80-81).

At the time of his inspection, Inspector Gibson was advised by the section foreman, Leonard Reid, that he (Reid) was aware of the leak and that it had been leaking for three days. (T. 210). Later on, Chief Safety Engineer Randy Tatton told the Inspector that he (Tatton) did not believe the condition was a violation and that it was not "Significant and Substantial." (T. 211). According to Inspector Gibson, Mr. Tatton made the following explanation to him:

And he made me aware at that time that' the mine superintendent and longwall coordinator, Mine Superintendent, Garth Neilson, and Longwall Coordinator, Bud Warrington, had approached him a week and a half to two weeks earlier about this condition - that they had an oil leak, in fact, on the stage loader and wanted to know if they should change the oil - change the speed reducer out or repair it or could they continue mining and wash the oil away until they finished or completed that panel, which was at that time 2- to 300-foot left in the panel then the long wall would have been removed off that particular face recovered this, we determined. And this stage loader or speed reducer would have been sent off for repair at that time. (T. 211-212).

¹⁴ Energy West contends that it was not gear oil, but hydraulic fluid mixed with coal dust, which was on the fluid coupling housing and the inside face plate of the motor. (II-T. 22-25).

¹⁵ Energy West concedes that the oil on the tail piece was gear oil. (II-T. 24-25).

The leak was thus allowed to continue for approximately two weeks. (T. 212).

The vital question to be determined is whether the combustible gear oil leak from the burst seal constituted an unsafe operating condition mandating that the equipment be removed from service immediately,

A preliminary question is whether the oil observed by Inspector Gibson was indeed gear oil from the leak or hydraulic fluid mixed with coal dust.

Inspector Gibson was quite certain it was gear oil and Energy West did not question this determination on the day of inspection or at any time in proximity thereto. (T. 210, 222; II-T. 47, 104-105).

Frank Zmerzlikar, general maintenance foreman, nevertheless testified at the hearing that the oil on the fluid coupling housing and the face plate of the motor was hydraulic fluid and not gear oil. (II-T. 21-27; but see II-T. 46-47). Mr. Tatton first mentioned that the oil was hydraulic fluid some 6-7 weeks before the hearing in this matter. (II-T. 104). Thus, as MSHA contends in its brief (p. 12, fn 7):

In August 1991, Energy West in responses to interrogatories failed to mention its belief that the oil was fluid coupling oil, however, in supplemental answers filed in January 1992, seven weeks prior to the hearing and 29 months after the citation was issued, it first offered its theory that the oil was fluid coupling and not gear oil. (II-T. 100-104).

I find the Inspector's determination that the oil was gear oil reliable and consistent,¹⁶ with what he observed on the inspection day (T. 219) and it is credited.

Energy West established that, after learning of the leak, Garth Nielson, then the Longwall Superintendent, and Randy Tatton conferred and decided that it would be safer to finish the panel as long as the leaking oil was not allowed to accumulate. (II-T. 27, 64, 67, 84, 87-90).

¹⁶ Energy West's version is not so found. (II-T. 46-47, 48).

To prevent the leaking oil from accumulating, Energy West employed a program of adding gear oil and washing oil which had leaked on the tailpiece away with a hose at every pass of the longwall shear (approximately every 35 minutes) and appropriate personnel, foremen, and miners were instructed in this task. (II-T. 63-71).

It is noted that this program, however well-intended, did not alleviate the problem of the oil leak so as to keep oil from accumulating at the three places observed by Inspector Gibson on the day of inspection.

Inspector Gibson described several hazards from the condition he observed as a fire hazard, stating: "The motor itself is a source of fire; the speed reducer itself is a source of fire; and the motor is subject to fail at any time" He also said that, while the amount of the oil did not constitute an "accumulation," it could "create the fire" if there was a motor or cable failure and there was some "type of arc to ignite the oil." (T. 216-217, 234). Such an arc could be created by electrical component or failure of the motor or trailing cable. Such fires are not uncommon. (T. 217, 234).

The Inspector, in emphatic and convincing contradiction to Energy West's contention to the contrary, said the motor and the speed reducer were at the same level and were joined together by the fluid coupling, thus making it possible for the gear oil to leak from the speed reducer onto the electric motor. (T. 218, 269). Since Energy West's witness Mr. Tatton was not particularly clear with respect to the juxtaposition of the motor and the speed reducer (II-T. 100-104), and Inspector Gibson's testimony on this point and throughout was certain and reliable in tenor, the Inspector's testimony is credited.¹⁷

The Inspector pointed out that if the gear oil (a combustible material; T. 272) continued to leak from the speed reducer, the speed reducer itself was subject to having a bearing go out, creating another source of fire. (T. 220; see also II-T. 54). The tailpiece was another source of fire (T. 226) and two 950-volt longwall power cables from the section transformer to the master controller went through the area (T. 227) which could fail (T. 242-244, 272; 11-t. 58-59) or be cut (T. 245) or damaged (II-T. 58-59).

¹⁷ As I have noted elsewhere in this decision, Energy West's position that the dripping fluid was not gear oil also seems to have dawned many months after the Citation was issued. (II-T. 100-104).

Inspector Gibson also pointed out that there was a smoke inhalation hazard because the air was traveling over the equipment (stage loader) in question headed inby to the face about 100 feet away. He testified:

... So the entire mining crew, consisting of 13 people this particular day, were inby that location as I observed them. So if you had a fire to occur the smoke would go long--or go inby or move inby across the people, which could lead to smoke inhalation of CO (Carbon Monoxide). (T. 226).

MSHA's evidence that the condition cited was unsafe is reliable and persuasive. Various hazards to the safety of miners were created by the oil dripping from the leak. Inspector Gibson measured the puddle of oil which had dripped down on the tail-piece out of the fluid coupling housing and it was 1/16th of an inch deep x 6- to 8-inches wide by 15- to 16-inches long. Oil was found in two other places. Various potential ignition sources were present. While the "washing and refilling" program employed by Energy West may have reduced the likelihood of a fire occurring, it didn't eliminate the hazard. It is concluded that the machinery in question had not been maintained in safe operating condition and that Energy West, by allowing such to remain in service, violated the safety standard as charged.

The analytical formula for determining "Significant and Substantial" issues has been set forth previously. I have found that a violation was established and that such created safety hazards in the foregoing analysis. The decisive issue, in terms of the four criteria set forth in Mathies, supra is whether a reasonable likelihood existed that the hazard contributed to by the violation would result in an injury.

Although the Inspector considered it "more than likely" that the possibility of the motor or trailing cable failure could happen (T. 242) he conceded that the shielding of the cables to prevent arcing or sparking did lessen the possibility of cable failure. At the same time he pointed out such would not prevent cable failure from happening. (T. 243-245).¹⁸ Should the motor or cable fail, the voltage was high enough to "likely" ignite the oil. (T. 222-223, 243-244).

¹⁸ This distinction is one example of the line to be drawn between the condition being "unsafe" and its being "Significant and Substantial."

The question of likelihood thus turns on the initial link in the chain, i.e., whether the motor or cables would fail in the first place. As to this issue, the net effect of the Inspector's testimony is that the occurrence of such failure was merely possible, not that there was a substantial possibility, even though he summed up his opinion as being that the occurrence of motor or cable failure was "likely". [Compare T. 224, 242 with T. 228 (possibility) 229 and 234 (motor failure "could" happen); 243-245 (likelihood reduced by protective measures); 247-248, 262, 264, 270].

Energy West established, in diminution of the likelihood of the occurrence of the hazard that:

1. The speed reducer was regularly refilled on the graveyard shift (II-T. 29-30);

2. If the speed reducer started to heat up, a smell and a noise would be created which would alert miners working in the area (T. 241; II-T. 29-30);

3. The warmth of the speed reducer which was noticed by the Inspector was "normal" (II-T. 34);

4. The motor is checked a minimum of once a week for permissibility (II-T. 43);

5. It was not a common occurrence for electrical cables to be cut or damaged (II-T. 42, 73).

6. Had a fire occurred, it was likely that such would have been detected in its early stages and there were various types of fire-fighting equipment in the area, i.e., the washdown hose, fire hose, a fire hydrant, a foam eductor, and fire extinguishers. (II-T. 94-96).

In conclusion, the overall evidence of record indicates that the occurrence of the fire hazard created by the violation (and contributed to by it) was a possibility but that it was not reasonably likely (there was not a substantial possibility) that the hazard would come to fruition and result in an injury to miners. Accordingly, it is found that the third prerequisite of Mathies has not been established and that the "Significant and Substantial" designation on this Citation should be stricken.

The violative condition was known to Energy West's management personnel and was allowed to continue for a considerable period of time (II-T. 50) until the same was detected by Inspector Gibson and abated. As MSHA points out in its brief, Energy West's general maintenance foreman made a significant concession in his testimony:

Q. . . . and if this--if this seal had started leaking, say, when you just began work on the panel which--would you, as the maintenance foreman, wait until you completed the entire panel removal before you stopped production and fixed the seal or would you just keep adding oil?

A. I would have fixed the seal or changed the reducer. (II-T. 56).

It is concluded that Energy West was negligent in the commission of this violation.¹⁹

Even though it has been found that this violation was not "Significant and Substantial," it did create the various hazards described by the Inspector and indicated heretofore in this decision. Since the hazards were not "reasonably likely" to occur, that is, there was only a remote possibility of the occurrence of the hazards, the violation is found to be only moderately serious. A penalty of \$300 is assessed therefore.

Docket No. WEST 91-251

Citation No. 3413898 (II-T. 112-166).

This "Significant and Substantial" Citation was issued by MSHA Inspector Donald E. Gibson on October 24, 1990, charging an infraction of 30 C.F.R. § 75.503, and describing the following violation:

The Joy Shear mining machine 2G-3675A-0, being used on the 16th West working section was not maintained in permissible condition. An opening in excess of .005 inch was observed between the cover lid and the plane flange joint on a light ballast box located at face shield #77. The ballast box is supplied 120 VAC. In this condition, poses the hazard of an ignition source.

30 C.F.R. § 75.503, pertaining to "Permissible electric face equipment; Maintenance," provides:

¹⁹ See also II-T. 48-50.

The operator of each coal mine shall maintain in permissible condition all electric face equipment required by Sections 75.500, 75.501, 75.504 to be permissible which is taken into or used in by the last open cross-cut of any such mine.

Respondent concedes the occurrence of this violation (II-T. 115) but challenges that the violation was "Significant and Substantial" (T. 10) and the propriety of MSHA's proposal of a \$350 penalty.

The ballast box in question is approximately the size of an 8.5 by 11-inch sheet of paper, is 2 inches thick, and is used to provide power for the lighting system for the long-wall section (II-T. 117, 143).

Inspector Gibson testified that the hazard posed by the opening was that it could "emit" ²⁰ gases or coal dust inside the box or permit arcs to the outside atmosphere (II-T. 125). He pointed out that since the opening of the flange joint was in excess of .004 inches (the *maximum* clearance permitted by 30 C.F.R. § 18.31 for this plane flange joint), and since it was in by the last open crosscut and within 150 feet of pillar extraction, such created the "potential for an ignition source of either methane or (float) coal dust" (II-T. 125). He said the longwall shearing machine generates and puts into suspension coal dust and that permissibility requirements are the first line of defense in preventing ignitions of methane and/or coal dust. (II-T. 125-126, 138).

In support of his conclusion that it was reasonably likely that the violation could cause a serious injury if the ballast box were left in the condition he found it, the Inspector testified:

During the normal mining operation methane is released from the coal. That's the process of coal mining. Methane is there and certain amounts are emitted as the coal is being extracted. A lot of dust is put in suspension sometimes on those long walls. So this poses the hazards of an ignition to either the methane and/or the coal dust that could be in suspension.

²⁰ I interpret this to mean "admit."

Q. In other words, what you're saying is that this opening is large enough that either escaping methane from the coal being cut off or coal dust in the air could enter this opening and combine with the flame path to cause an explosion?

A. Yes. Sir.

Q. And that's why you labeled it S&S violation?

A. Yes, Sir.

Q. Are there any other factors that you considered?

A. Well, there have been instances-where lighting packages or lighting systems and components of lighting systems have been involved with or have been determined by MSHA through investigations to be the causes of ignitions. One was in 1981 at Mid-Continent Resources in which 15 miners were killed. There was another one--I-was-trying--to think where the other one is but it slips my mind right now where that one is. (XI-T. 129-130).

This is a gassy mine and even though the mine had never experienced ignitable levels of methane (II-T. 133, 139, 140) **methane is always present and the** Inspector testified that (1) the "potential for ignitions is always there in coal mining." (II-T. 139) and since methane is always present, there could be an occurrence of an "ignitable amount at any time which the mine has had" even though the Inspector personally had never detected such (II-T. 139-140). (Emphasis added).

Energy West presented two witnesses, Maintenance Foreman **Thomas Kerns** and Chief Safety-Engineer-Tatton..-<Mr. Kerns indicated that for an ignition to occur inside the ballast box **combustible mixture, being 5 percent at** least and that is 5 to 15 percent air and methane mixture, would have had to enter into the box and then an incendiary spark--that is a spark with enough energy to ignite the

mixture--would have had to occur within this box. (II-T. 144). ²¹

Energy West established that the ballast box was "electrically sound" before and after the inspection (II-T. 145); that the methane level is checked frequently, i.e. at least twice each production shift by the foreman, and by the Joy Shear mining machine operators every 20 minutes while in operation. (II-T. 162-163).

Mr. Kerns who said that it was "highly unlikely" that the ballast box would have sparked or arced, also indicated that he carries a methane detector on his shift and he has never detected an ignitable level of methane (II-T. 145) and that he was not aware of there ever having been detected an ignitable level of methane at the Cottonwood Mine (II-T. 146). There is also a methane sensor detector system in the longwall itself. (II-T. 146-147).

Mr. Kerns also felt that the approximately 45,000 cfm of air on the face would have "diluted any methane below explosive levels" and carried it away. (II-T. 148). See also II-T. 163.

He also pointed out that there were permissibility checks on the ballast box - once every weekend - and that there was fire-fighting equipment in the area involved. (II-T. 149-152).

Mr. Tatton felt it unlikely that coal dust would get ignited unless in the presence of methane. (II-T. 163-164).

The Commission's analytical formula for determining whether the violation was "Significant and Substantial" has been previously set forth. The application of this formula must be made in the perspective of continued mining operations, not as Energy West seems at times to argue, at or in proximity to the time of inspection only. U.S. Steel Minina Co., 6 FMSHRC 1573, 1574 (July 1984).

In terms of the Mathies prerequisites, the violation is conceded. Since the unargued hazard, however likely one party or the other views its occurrence, is of a methane and or coal dust explosion, it is concluded that a measure of danger to safety was

²¹ Mr. Tatton's version of what it would take for an ignition to occur inside the ballast box is, upon analysis, basically the same as Mr. Kerns'. See II-T. 161-162. On cross-examination Mr. Kerns retreated somewhat from his 5 percent methane level assertion and conceded that a 2 percent level of methane could ignite although this was "very marginal" or "very slightly." (II-T. 157-158).

contributed to by the violation. The record reveals that there would have been miners who worked nearby the area of the violation with some frequency (II-T. 125, 162-163) so, although the Petitioner's evidence did not directly address the fourth Mathies element, I infer and find that if an explosion of methane and/or coal dust had occurred there would have been serious injuries or fatalities ensuing from such event (II-T. 128-130, 139-140, 162-163).

In concluding that there was a reasonable likelihood that the ignition hazard contributed to would result in an injury, it is first noted that this is a gassy mine. While there was no specific evidence of prior high levels of methane having been detected, nevertheless the essence of the Inspector's testimony, which was credible and convincing, was that such could occur at any time. This must be considered in connection with the fact that the permissibility violation occurred within 150 feet of pillar extraction and the fact that the longwall shearing machine also generates and puts into suspension coal dust. The Inspector testified that the opening in the plane flange joint was large enough that either methane e escaping from the coal being cut or coal dust in the air could enter the opening and combine with the flame path to cause an explosion. (II-T. 129).

Summing up, there were two kinds of ignitable substances involved in this situation which could have been ignited. The Commission has previously recognized that one factor which increases the likelihood of the occurrence of an ignition hazard is the presence of a "more flammable substance," i.e., methane, and a mine's classification as "gassy." See Secretary v. Eastern Associated Coal Corporation, 13 FMSHRC 178, fn. 4 (Feb. 1992). In this case, where the combustible substance was hydraulic oil, the Commission contrasted the difference of such with methane:

Methane is ignitable by a spark and is much more flammable and explosive than hydraulic oil. Further, the mines in both those proceedings (cited by the Secretary in urging an S&S finding) were gassy mines as defined by the Mine Act."

Inspector Gibsontestified that the subject mine "has had" ignitable levels of methane in the past.

It is therefore determined that there existed a substantial possibility that the hazard contributed to by the violation would have resulted in an injury or fatality occurring, and that therefore the "reasonable likelihood" requirement of the third element of Mathies, supra, has been satisfied.

The Inspector testified that the gap in the plane flange joint occurred because of rust, which process would have taken a considerable length of time to develop. I therefore conclude, in the absence of rebuttal testimony, that Energy West was negligent in allowing such condition to develop. (II-T. 123-124). Because of the seriousness of the ignition hazard which was contributed to by the violation (II-T. 128-130) and the presence of miners inby the place of violation (II-T. 162-163), I find this to be a serious violation.

Considering various stipulations in connection with mandatory penalty assessment criteria and the above findings as to negligence and gravity, it is concluded that a penalty of \$750 is appropriate and such is here ASSESSED.

ORDER

1. Citations numbered 3414063 and 3414064 (in Docket WEST 91-256) are MODIFIED to change the "Likelihood" characterization in the "Gravity" section (para. 10 A) from "Reasonably Likely" to "Unlikely" and to delete the "Significant and Substantial" designation thereon.

2. Citation No. 3413898 (Docket No. WEST 91-251), including the "Significant and Substantial" designation thereon is AFFIRMED.

3. Citation No. 3414071 (Docket WEST 91-251) is MODIFIED to delete the "Significant and Substantial" designation and is otherwise AFFIRMED.

4. Citation No. 3413883 (Docket No. WEST 91-256) is MODIFIED to delete the "significant and Substantial" designation and is otherwise AFFIRMED.

5. Citation No. 3414062 (Docket WEST 91-256) is VACATED.

6. Respondent, within 40 days from the date of issuance of this decision, **SHALL** PAY to the Secretary of Labor the total sum of \$1490 as and for the civil penalties agreed to and/or assessed (\$20 each for Citations numbered 3414063 and 3414064; \$400 for Citation No. 3414071; \$300 for Citation No. 3413883; and \$750 for Citation No. 3413898).

Michael A. Lasher, Jr.
Michael A. Lasher, Jr.
Administrative Law Judge

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