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MSHA V. ENERGY FUELS
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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November 6, 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 91-432
	:	A.C. No. 05-03455-03592
v.	:	Southfield
ENERGY FUELS COAL INCORPORATED Respondent	:	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Phillip D. Barber, Esq., Denver, Colorado, for Respondent.

Before: Judge Cetti

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 C.F.R. 801 et seq., the "Act," charging Energy Fuels Coal Incorporated (Energy Fuels) with five "significant and substantial" (S&S) violations of mandatory safety standards in 30 C.F.R. Part 75 entitled "Mandatory Safety Standards - Underground Coal Mines."

Energy Fuel filed a timely answer contesting the alleged violations, the significant and substantial designation of the alleged violations and the appropriateness of the proposed penalties.

The only witnesses called to testify for the Petitioner were federal mine inspectors Donald Jordan and Melvin H. Shiveley. The only witnesses called by Energy Fuels were Messrs. Gary Carroll, the mine's Safety Supervisor, James W. Pushchak, the mine's Maintenance Superintendent and Randy Acre, Manager of the Southfield Mine. I

I have considered the evidence presented and the record as a whole, and find that a preponderance of the substantial, reliable, and probative evidence along with the applicable law establishes the following Findings of Fact and Conclusions.

Findings and Conclusions

1. Respondent is the operator of the Southfield Mine located at Fremont County, Colorado. The mine is an underground coal mine.

2. The operations and products of the Southfield Mine affect commerce or the products of such mine enter commerce. Accordingly, the mine and its operators are subject to the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (the Act).

3. As a result of an inspection by an authorized representative of the Secretary, Respondent was issued five citations, pursuant to 104 of the Act (30 U.S.C. 814) and penalties were proposed pursuant to 105 and 110 of the Act (30 U.S.C. 815 and 820). Each alleged violation was alleged to be a significant and substantial (S&S) violation.

4. Each citation number, date issued, provision or standard allegedly violated, MSHA's proposed penalty and the penalty assessed herein is as follows:

Citation No.	Date	30 C.F.R.	Proposed Penalty	Penalty Assessed
3242478	1/8/91	75.512	119	Vacated
3243302	1/9/91	75.1105	192	$100
3243303	1/9/91	75.512	119	80
3243304	1/15/91	75.400	168	20
3242437	1/2/91	75.202(a)	119	20
			TOTAL	$220

5. With respect to Citation No. 3242478, the evidence is insufficient to establish a violation of 30 C.F.R. 75.512. There was no persuasive evidence that the 480 volt belt control and starter box in question was not frequently examined, tested and properly maintained to assure safe operating conditions. The citation should be vacated and the proposed penalty set aside.

6. With respect to Citation No. 3243302, the air compressor was housed in an expanded metal housing with no fireproofing material. It was not housed in a fireproof structure. There was a 104(a) non S&S violation of 30 C.F.R. 75.1105. The violation

was not significant and substantial as there was no reasonable likelihood that the hazard contributed to would result in an injury or illness of a reasonable serious nature. The operator was negligent. A civil penalty of $100 is appropriate.

7. With respect to Citation No. 3243303, the Pinco 150 KVA Power Center, that provided power to the belt drive that hauls coal out of the mine, was not maintained in safe condition. This was a 104(a) non S&S violation of 30 C.F.R. 75.512. The violation was not significant and substantial as there was no reasonable likelihood that the hazard contributed to would result in an injury or illness of a reasonably serious nature. An appropriate penalty for this violation is $80.

8. With respect to Citation No. 3243304, the preponderance of the evidence established the existence of an accumulation of combustible material within the meaning of the cited safety standard (30 C.F.R. 75.400) as interpreted by the Commission in Old Ben Coal Co., 1 FMSHRC 1954 (December 1979) and Old Ben Coal Co., 2 FMSHRC 2806. The violation was not significant and substantial as there was no reasonable likelihood that the hazard contributed to would result in an injury of a reasonable serious nature. A civil penalty of $20 is appropriate.

9. With respect to Citation No. 3242237, there was a non S&S 104(a) violation of 30 C.F.R. 75.202(a). There was a hazard related to a potential fall of a rib. There was no negligence on the part of the operator. The likelihood that the hazard contributed to would result in injury was remote. An appropriate penalty under the facts and circumstances established at the hearing is $20.

II

DISCUSSION AND FURTHER FINDINGS

Citation No. 3242478

Citation No. 3242437 alleges a "significant and substantial" violation of the standard at 30 C.F.R. 75.512 and charges as follows:

> The 480 volt belt control and starter box located at crosscut #56 of the west submains was not maintained in safe condition, in that the doors provided were not locked and could be opened by unauthorized personnel and expose themself [sic] to 480 volts.

The cited safety standard 30 C.F.R. 75.512 provides as follows:

> 75.512 Electric equipment; examination, testing and maintenance.
>
> All electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such examinations shall be kept and made available to an authorized representative of the Secretary and to the miners in such mine.

This belt control and starter box supplies power to the belt motor. It sits on the mine floor on a set of metal skid bars and consists of a box shaped cabinet, 36" by 60" and approximately 36 to 48 inches high. It has two metal doors on the front. On the outside of the metal box is an "on-off" switch to stop and start the belt. Inside the metal box is a breaker panel and wiring for the power center. To access the breaker or the wiring, the doors of the box have to be opened. There are no electrical parts outside of the box and the only hazard which Inspector Shiveley described was the possibility that an unauthorized person might open the cabinet doors and inadvertently contact an energized part.

The only thing Inspector Shiveley observed that he felt was unsafe was that the doors to the metal cabinet were ajar and not locked so as to prevent an unauthorized person from touching anything inside the cabinet. The only thing the inspector required for abatement of the citation was to put a lock on the cabinet so as to keep "unauthorized people" from getting inside the cabinet. The inspector on cross examination admitted that the cited safety standard does not restrict access to "authorized personnel" and does not have any "locking out" requirement.

Jim Pushchak, the Southfield Mine Maintenance Superintendent and a certified electrician, testified on behalf of Energy Fuels. Mr. Pushchak testified the control box was in safe operating condition. It had no electrical problems and was maintained, serviced and tested by qualified electricians pursuant to 30 C.F.R. 75.512.

Only belt men and electricians have any reason to access this power center. All of these miners are either certified electricians or have been task trained, and know how to operate the equipment and are aware of any hazards related to it. There were no exposed electrical equipment on the exterior of the box, and the only reason that a belt man opens the doors to this box is to reset the breaker for the belt control. Mr. Pushchak testified that if a person went inside the box to reset the

breaker, the power inside the box would have been deenergized except for the leads coming in on the line side into the top of the main breaker. Therefore, exposure to electrical hazard was negligible.

Mr. Pushchak described the metal cabinet box as having metal doors on the front that latch shut. He testified that since 1979 every belt drive in the mine has had this type of box. These boxes are inspected frequently by personnel from the Southfield Mine, and by the MSHA inspectors. Mr. Pushchak stated that in the 12 years that these boxes were in use at the mine they have never before had any complaint from any inspector that these boxes constituted an unsafe condition. Energy Fuels had never received any indication before this citation was written that it was going to be required to lock this box.

Inspector Shiveley`s application of the cited safety standard to the facts of this case constitutes an impermissible expansion of the plain meaning of the standard and thus constitutes an im-permissible avoidance of the rulemaking requirements of Section 101 of the Mine Act.

In relation to the deference to be accorded an agency's interpretation of a mandatory safety standard, the court is required to give effect to the actual words and the plain objective meaning of the regulations and is not bound by the agency's "hidden intentions and idiosyncratic interpretations." Western Fuels - Utah, Inc., March 1989, 11 FMSHRC 278, 284.

It is a basic tenant of administrative law that "a regulation cannot be applied in a manner that fails to inform a reasonably prudent person of the conduct required." Secretary v. Garden Creek Pocahontas Company, 11 FMSHRC 2148, 2152, (1989) (citing Mathies Coal Company, 5 FMSHRC 300, 303 (1983). An agency's failure to provide adequate and fair notice constitutes a denial of due process and renders any attempted enforcement action invalid. Gates and Fox Company, Inc. v. Occupational Safety and Health Review Commission, 790 F.2d 154, 156 (D.C. Cir. 1986). The rulemaking provisions of the Mine Act were intended to ensure sound standards and regulations and fair and adequate notice to regulated parties. Regulatory interpretations that extend beyond the clear language of the regulation and change the rights or duties of the parties constitute unenforceable amendments that are in avoidance of required rulemaking procedures. Garden Creek Pocahontas Company, supra.

If the Secretary truly desires to require a cabinet housing a power center such as the one in question to be equipped with a lock and use it to lock out access by "unauthorized persons", then the Secretary must pursue this goal through notice-and-comment rulemaking. The Secretary should promulgate a standard to clearly and directly address not only the perceived hazard but

also clearly inform the mine operator what he must do for compliance.

I credit the testimony of Mr. Pushchak. Based upon the plain meaning of the cited section quoted above, the testimony of Mr. Pushchak and the admissions made by Inspector Shiveley on cross examination (all summarized above) I find that a preponderance of the evidence presented at the hearing failed to establish a violation of 30 C.F.R. 75.512. Citation No. 3242478 and its related proposed penalty are vacated.

Significant and Substantial Violations

MSHA designated the four remaining citations significant and substantial (S&S) violations. The term significant and substantial is taken from Section 104(d)(1) of the Act, 30 U.S.C. 814(d)(1), which distinguishes as more serious in nature an violation that "could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard ..." It is well established that a violation is properly designated as S&S "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." National Gypsum, 3 FMSHRC at 825. In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission further explained:

> 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 at 3-4. See also Austin Power Co. v. Secretary, 861 F2d 99, 104-05 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (December 1987)(approving 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." U.S. Steel Mining Co., Inc., 6 FMSHRC 1834, 1836 (August 1984).

It is this third element of the Mathies formula that the preponderance of the evidence presented fails to establish in each of the four remaining citations discussed below.

Citation No. 3243302

Citation No. 3243302 alleges a "significant and substantial" violation of the standard at 30 C.F.R. 75.1105 and charges as follows:

> The 480 volt Sullair air compressor Serial No. 003-55609 located in crosscut #24 of the west submains, was not installed or maintained in a fireproof structure, in that the area surrounding the air compressor was designed of expanded metal, no fireproofing material was provided for roof or ribs in area. The air currents, when tested, were being coursed to the return.

The safety standard 30 C.F.R. 75.1105 provides as follows:

> 75.1105 Housing of underground transformer stations, battery-charging stations, substations, compressor stations, shops, and permanent pumps.
>
> Underground transformer stations, battery-charging stations, substations, compressor stations, shops and permanent pumps shall be housed in fireproof structures or areas. Air currents used to ventilate structures or areas enclosing electrical installations shall be coursed directly into the return. Other underground structures installed in a coal mine as the Secretary may prescribe shall be of fireproof construction.

It is undisputed that the 480 volt air compressor was not housed in a fireproof structure or area, and for this reason the violation of 30 C.F.R. 75.1105 was conceded. The primary issues remaining were whether the violation was S&S and the appropriate penalty.

The air compressor was a screw type compressor enclosed in an expanded metal housing. There were electrical leads and oils "involved in the unit." The potential hazard was that a fire under some circumstances could occur within the compressor and possibly ignite combustible material.

The air compressor was located in a crosscut between a return airway and an intake airway. Respondent asserts the open ends of the crosscut were sealed off from the air courses. There was undisputed evidence that air coming into the crosscut from the intake side was restricted and minimized by a flame resistant curtain. The return side of the crosscut was blocked off by a

fireproof Kennedy stopping. A tube ran from a hole in the Kennedy stopping to a place directly above the air compreessor. All air from the crosscut, and any fumes or smoke, would be coursed through the tube into the return airway and away from any miners. There was no active mining at the time the violation was observed and the citation written, and no one was outby the place where the crosscut air was vented into the return. A smoke-test performed by the inspector demonstrated that the air was being properly vented into the return.

The air compressor was located four to five feet from one wall of the crosscut, eight to ten feet from another wall of the crosscut and approximately one foot from the top of the crosscut. The crosscut had been rock dusted as required by law. The air compressor was resting on a rock floor, a naturally incombustible surface.

The inspector testified that the compressor was operating and there was a "probability or possibility" that the conditions observed could cause a fire. He put his hand on the coal 12 inches above the top of the compressor and found the coal was warm. The inspector testified that he probably "could have left it (his hand) there" without burning his hand. He did not take a temperature reading of any thermostats installed on the compressor.

Mr. Jim Pushchak, the Maintenance Superintendent at the Southfield Mine, accompanied Inspector Shiveley when this citation was written. He observed the compressor and determined that it was working properly and running as normal. The equipment was in safe operating condition, was not emitting any smoke, was not unduly hot and did not have any accumulation of combustible material on it.

This particular compressor had been operating at this location for over seven months with no problems. The mine has never had any problems with the air compressor and it was still working properly and safely on the date of the hearing, some 16 months after the citation was written.

One factor of considerable importance on the S&S issue was that the compressor was equipped with an automatic fire extinguisher that was activated by heat. Once activated, it would have completely extinguished any fire hazard in the crosscut by covering the entire area with a fire dampening chemical. Mr. Pushchak concluded his testimony with his opinion that under all the facts surrounding the violation there was no reasonable likelihood of a fire resulting from the violation.

Upon careful evaluation of all the probative evidence I find that the preponderance of the evidence presented did not

establish a reasonable likelihood that the hazard contributed to by the violation would result in an injury. There was no persuasive evidence of a confluence of factors that such an event was reasonably likely. There existed a mere possibility that was less than the reasonable likelihood required in Mathies for an S&S finding.

I find the operator was negligent to a moderate degree in using over a long period of time an air compressor subject to weekly examination, that did not comply with the fire proof housing requirement of the cited standard. The violation was serious. On consideration of all the statutory criteria in 110(i) of the Act I find that a civil penalty of $100 i appropriate.

Citation No. 3243303

Citation No. 3243303 alleges a "significant and substantial" violation of the standard at 30 C.F.R. 75.512 and charges as follows:

> The Pinco 150 KVA Power Center 4160/480 volt, located in crosscut #2 of the 2 left 2 west, was not maintained in safe condition, in that the 480 volt line side power lugs were exposed on the upper part of the 400 amp rating circuit breaker supplying power to the 2 west beltdrive. Persons that are required to test and operate the circuit breaker would be exposed to the energized 480 volt lugs.
>
> 75.512 Electric equipment; examination, testing and maintenance.
>
> All electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such examinations shall be kept and made available to an authorized representative of the Secretary and to the miners in such mine.

The power center in question provides power to a belt drive that hauls coal out of the mine. It was located two or three crosscuts from where the coal was being mined. It was housed in a large box-shaped metal cabinet that sat on the mine floor. It was 5 feet wide, 8 feet long and 3 feet high. In front, the cabinet had a closed metal door. On the side it had a sign warning that the power center had "dangerous, high voltage."

Inside the metal cabinet is a circuit-breaker unit. This unit is a small plastic box with a handle on the front. Inspector Shiveley testified the breaker box poses no hazard if you operate it properly but could be dangerous if the miner "shoved" the handle of the breaker up with the palm of his hand in such a way that his fingers went up and over the top of the insulating barrier (insulated backboard) rather than lifting up the handle to deenergize it.

The hazard according to the inspector were two uninsulated exposed lugs located behind the insulated barrier inside the circuit breaker unit. These lugs were attached to the bussing on the primary 480 volt feed and were not insulated. A person operating the handle located in front of the breaker by pushing the breaker handle with the palm of his hand could get his fingers over the top of the insulated barrier back board in such a manner that his fingers could come in contact with the uninsulated lugs. If this were to happen, the person would probably be electrocuted.

The Respondent presented evidence that there is no electrical equipment exposed either on the outside of the power center box, or on the outside of the inner breaker box. In order to contact the metal lugs, a person would have to get down on his knees, open the outer metal doors, and reach the inner breaker box and push his fingers over the top of the insulating barrier. The citation was abated by placing a few pieces of insulating tape over the top on the insulated backboard so that the lugs were no longer exposed to an inadvertent potential contact.

I credit the testimony presented by Respondent which established that it was not reasonably likely that the hazard contributed to would result in an injury. The power center box sat on the mine floor and was only 3 feet high so that a person opening the cabinet door to reset the breakers would most likely pull up on the breaker handle and rather than getting down close to the floor level to push the handle with the palm of his hand in such a manner as to push his fingers over the top of the insulated barrier and contact the uninsulated lugs. Although the hazard contributed to was not reasonably likely to result in injury, there was a remote possibility that the hazard contributed to could result in a serious injury. Since the injury could be fatal, the violation was serious.

Based upon the evidence presented, I find that there was a violation of 30 C.F.R. 75.512. I further find, based upon the particular facts surrounding the violation, that the preponderance of the evidence does not establish a reasonable likelihood that the hazard contributed to, would result in an injury. Thus the evidence did not establish the third element required by the Mathies criteria for an S&S finding.

On careful consideration of all of the statutory criteria in Section 110(i) of the Act, I find a civil penalty of $80 is an appropriate civil penalty for this non S&S violation.

Citation No. 3243304

Citation No. 3243304 alleges a "significant and substantial" violation of the standard at 30 C.F.R. 75.400 and charges as follows:

> Accumulation of combustible material, float coal dust was deposited along the rockdusted ribs and mine floor, in the last open crosscut #16+65 for a distance of 180' feet, the area in MMU0060, 2 west was dark gray to black.

The cited safety standard 30 C.F.R. 75.400 provides as follows:

> 75.400 Accumulation of combustible materials.
>
> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

Float coal dust is defined in 30 C.F.R. 75.400-1(b) as follows:

> (b) The term "float coal dust" means the coal dust consisting of particles of coal that can pass a No. 200 sieve.

Inspector Melvin Shiveley was the Secretary's only witness. On January 15, 1991 when he inspected the Second West section of the Southfield Mine he found that miners were actively mining coal in the area. They were cutting coal with a continuous miner. Inspector Shiveley observed that there was "float coal dust" laying on the curtain and mine floor for a distance of approximately 180 feet outby from the face. It was such a fine layer of "float coal dust" that its depth was not measurable. He observed white rock dust under the coal dust. The "float coal dust" was black in color near the face to dark gray further away from the face.

On cross examination, Inspector Shiveley testified he did not observe any coal dust in suspension and took no test to determine whether the particles of dust could pass through a No.

200 sieve. See 30 C.F.R. 75.400-1. The inspector agreed that you need to stir up coal dust by another explosion to make coal dust self explosive.

On redirect examination, the inspector agreed with his counsel that walking or moving equipment in the area where float coal dust had settled would have stirred it up and put it in suspension.

The inspector testified that he took air readings and found the volume of air was permissible and in compliance with the Southfield Mine Ventilation Plan; that methane was not excessive and that he found no electric equipment in the area that was not in permissible condition.

Coal is mined at the Southfield Mine in the conventional way with a continuous miner and shuttle cars. There is no longwall mining. The mining cycle begins with a continuous miner making a cut of coal. The coal is then loaded and the continuous miner is moved out of the section and a roof bolting machine is moved in. The roof bolter installs roof bolts for permanent roof support. The roof bolter is equipped with a rock dusting machine. After bolting the roof, the roof bolter blows rock dust into the air so that it will be carried by the mine's ventilation and deposited outby the working face on top of any coal dust. This citation was abated by having the roof bolting machine rock dust the area. Respondent contends it would have done this as part of the normal mining cycle had it been allowed to continue. Inspector Shiveley visited the adjacent entry that was part of this same mining cycle, where the roof bolting machine had just completed its work. He found that this entry had been properly rock dusted as part of the normal mining cycle.

Inspector Shiveley acknowledged that it was not practical to clean up or scrape up fine float coal dust; that the alternative is to apply rock dust; and stated "once that rock dust is applied, then you no longer consider that can be accumulation" because the float coal dust is covered up with an uncombustible material. (Tr. 96 line 8-25, Tr. 97 line 1-2).

Inspector Shiveley conceded that the liberation of coal dust is a "natural feature" and "an unavoidable consequence of mining." He acknowledged that it is not possible to mine coal without generating coal dust as part of the mining cycle. Coal dust is liberated, suspended in the air, carried away as part of the ventilation of the section and deposited outby the working face during a normal mining cycle. Because the coal dust is moist, most of the coal dust falls from the air near the working face. Inspector Shiveley conceded that float coal dust is combustible only if (1) the float coal dust is in suspension, (2) there is an ignition source, and (3) there is an actual ignition or an explosion.

As pointed out in Respondent's brief, Inspector Shiveley testified that the length of time that coal particles had been present in the area was irrelevant and that, in his opinion, time was not a factor in determining whether there was an accumulation under 75.400.

Q: So in your opinion, it makes no difference how long the accumulation is there; isn't that correct?

A: Yes.

Q: Time is not a factor?

A: No, it isn't.

Q: Mr. Shiveley, you don't know how long this coal dust had been present on top of the rock dust, do you?

A: No, I don't.

(Tr. 105, line 24-25, Tr. 106 line 1-6).

Energy Fuels presented the testimony of two witnesses, Jim Pushchak and Randy Acre. It also introduced Respondent's Exhibit R-2, a diagram that was helpful in describing the mining cycle, the cited area and the surrounding entries, returns and crosscuts.

Mr. Pushchak testified substantially as follows: He has worked at the Southfield Mine for twelve years and is familiar with the mining cycle at the mine. He accompanied Inspector Shiveley on this inspection and walked through the area that was cited by Inspector Shiveley. Mr. Pushchak explained that the dust in the area in the return that was closest to the working face was black because that was where most of the coal dust tended to settle after being blown away from the face. The continuous mining machines were equipped with water sprays which dampened the liberated coal dust. As a result, this dust is heavier and is deposited near the working face. As one proceeded further away from the face, there was less coal dust on the rock dust because most of the coal dust had dropped closer to the face.

Mr. Pushchak described what was occurring in the mining cycle when the citation was written. Using the diagram, Ex. R-2, he explained the continuous miner had just finished cutting Cut No. 3 in the main entry and had moved to the adjacent left entry to begin Cut No. 4. As the continuous miner moved out of Cut No. 3, the roof bolting machine moved into Cut No. 3 to install permanent roof support and then apply rock dust. The coal dust

which lay on top of the rock dust outby the working face had been generated as a result of Cut No. 3. The average amount of time from the end of the cutting of coal to the application of rock dust (with roof bolting having occurred in the interim) is 30 minutes. Cut No. 3, however, was a longer cut than the average cut made on that shift. (Tr. 147 lines 12-16).

It is generally conceded that it would not be possible to mine coal without generating float coal dust. Energy Fuel contends it would be hazardous to the health and safety of miners to apply rock dust while mining was occurring. This could only be done manually by miners standing just outby the working face. Float coal dust would be generated by the mining, and some of it would be deposited on the miners or it would be inhaled by them. Therefore, Energy Fuel contends it is necessary to wait until after the mining and the roof bolting have been completed before rock dusting. Furthermore, it contends that until the mining is actually completed and the coal dust settles, rock dusting would not cover all of the coal dust in suspension.

Randy Acre, the Mine Manager at the Southfield Mine, testified substantially as follows: He has been in the coal mining business for 20 years. He is well acquainted with mining cycle at the Southfield Mine. Coal dust is rendered harmless by allowing it to settle on top of rock dust, and then applying an alternate layer of rock dust on top of the coal dust which renders the coal dust incombustible.

Mr. Acre testified that the continuous miner in this area was equipped with special water sprays that force the wet coal dust to settle in the return entries. The continuous miner is equipped with a methane detection system that first provides a warning, and then automatically shuts down the machine if the amount of methane exceeds 2% per cubic meter.

Mr. Acre confirmed that the mining cycle in this area provided for immediate application of rock dust after the roof bolter completes bolting the roof of the cut.

The regulations assume that coal dust will be liberated as part of the mining process, and requires the mine to "clean it up" and not allow it to "accumulate." Inspector Shiveley testified that time was "irrelevant" in determining whether an accumulation existed. Based on his observation, he was of the opinion that an accumulation existed and that he was justified in issuing the citation.

In Utah Power & Light v. Secretary of Labor, 951 F.2d 292, 295 (10th Cir. 1991)(n. 11), the Tenth Circuit stated that 75.400 "prohibits permitting [coal dust] to accumulate; hence it must be cleaned up with reasonable promptness, with all convenient

speed." (Emphasis added). Thus, the length of time that combustible material is present is relevant.

As Energy Fuels points out in its post-hearing brief, the logic of the Tenth Circuit ruling in apparent. If an operator is not given a reasonable amount of time to clean up a by-product of the mining cycle, then an operator could be cited as soon as any coal dust is generated. This, however, is not what has happened in this case. The cut in question was longer than the usual cut being made on this shift and the mine manager conceded that one hour may have elapsed after the roof bolter moved in and began bolting the roof and the rock dusting of the cut began. (Tr. 157 line 20-25, Tr. 158 line 1-2).

It is undisputed that Federal Coal Mine Inspector Shiveley observed a fine layer of combustible coal dust deposited along the ribs and mine floor in the last open crosscut for a distance of 180 feet. Based upon his observations, Inspector Shiveley was of the opinion that the coal dust he observed for a distance of 180 feet was an impermissible accumulation and cited it as such. Based upon Inspector Shiveley`s observation, opinion and testimony, I find that this rather extensive fine layer of coal dust was an accumulation in violation of 30 C.F.R. 75.400. I also credit the testimony of Messrs. Pushchak and Randy Acre that established there was no reasonable likelihood that the hazard contributed to would result in an event that would cause injury. Since the preponderance of the evidence did not establish this essential factor needed to support an S&S finding, I find that the violation was a non S&S 104(a) violation.

Considering all the statutory criteria in Section 110(i) of the Act and the fact that the accumulation consisted of only a fine layer of coal dust of rather recent origin, I find a penalty of $20 is an appropriate penalty for this 104(a) non S&S violation.

Citation No. 3242437

Citation No. 3242437 alleges a "significant and substantial" violation of the standard at 30 C.F.R. 75.202(a) and charges as follows:

> A loose coal rib measuring about 6' x 10' x about one ft. in thickness, with at least a four inch space behind it, just inby crosscut #24 in the first right entry of the south mains (intake haulage) was leaning out in a hazardous position. This is the main travelway in and out of the working section.

The cited safety standard 30 C.F.R. 75.202(a) provides as follows:

> 75.202 Protection from falls of roof, face and ribs.
>
> (a) The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.

The primary issues presented are as follows:

1. Did the Secretary sustain her burden of proving that Energy Fuels violated 30 C.F.R. 75.202(a) as alleged in the citation?

2. If there was a violation, was the violation significant and substantial?

3. If there was a violation, what is the appropriate penalty?

Donald Jordan, Federal Mine Inspector, testified that on the date of inspection, October 9, 1991, he was conducting a 103(i) inspection which is required every five years. [30 U.S.C. 813(i)]. Inspector Jordan cited Energy Fuels for a violatio of 30 C.F.R. 75.202(a) because he observed a rib just inby crosscut 24 that "appeared to be a hazard." He stated that the rib was "loose." Inspector Jordan looks for loose ribs whenever he inspects a mine.

Inspector Jordan was looking for loose ribs when he entered the Southfield Mine on the morning that the citation was written, but he did not observe that the rib he cited was "loose" or that any rib was "leaning" when he entered the mine, even though he traveled past the area that he later cited on his way back from the working face.

Inspector Jordan on his way out of the mine traveled the same route he used to travel into the mine. As he traveled out through the main travelway of the mine, he observed a rib that had a crack on one side that "would possibly extend to the point that it could hit someone." (Emphasis added). Inspector Jordan had no idea how long the rib was in the condition that was noted in his citation. He did not know whether any miner had passed by this rib when it was loose, or whether any miner had observed the rib and failed to scale it down. The pre-shift report did not indicate that this rib had any crack in it. Inspector Jordan testified on cross examination that he could not definitely say whether the rib would have fallen naturally or whether it would have remained indefinitely in the position that it was in when the citation was written. However, when asked by his counsel on

redirect examination if it is "likely" the rib would have fallen on its own, he replied "Yes ma'am, I think it would have."

Inspector Jordan stated that cracks in ribs are common in coal mines and that rib hazards are controlled by scaling--or prying--the rib down. Inspector Jordan inspected four to six thousand feet of the mine on the day the citation was written and did not observe any other cracked or loose ribs. The miners were working approximately 1,500 to 2,000 feet away from the cited area and Inspector Jordan did not observe any person standing, or walking by this rib. Evidence was presented that a person who was traveling in the area cited by Inspector Jordan would have probably driven by this rib in one or two seconds.

Gary Carroll, the Safety Supervisor at the Southfield Mine, has worked in underground mines since 1974 and worked at the Southfield Mine for over 10 years. He testified substantially as follows:

The roof at the Southfield Mine is controlled by permanent and supplemental roof support. The ribs at the Southfield Mine are controlled by maintaining a permissible width (18 to 20 feet) in the entries and by scaling and barring down ribs that are loose.

On the day that the citation was written, Mr. Carroll rode into the mine with Inspector Jordan on the mancar tractor, driving down the center of the entry, as was normally the case. Both he and Inspector Jordan were "looking around" as they went into the mine to check for cracks and loose ribs. No cracks or loose ribs were noticed as they entered the mine and none were noticed during the inspection of the working face.

When miners enter and leave the mine, they ride either in a tractor, or in a trailer pulled by the tractor, that has metal supports on the sides. On the date of the citation, the miners were working approximately 1,500 to 2,000 feet from the cracked rib.

Cracks in ribs are common at the Southfield Mine. However, a crack does not mean that a rib is loose. It is not possible to tell simply by visual observation whether a rib is loose. The Southfield Mine Roof Support Plan requires that loose ribs be scaled down. Mr. Carroll routinely scales down ribs whenever he observes a loose rib. The hazard of a loose rib is that a person standing close to the rib could be injured if the rib fell naturally.

Mr. Carroll did not observe any crack in the rib as he entered the mine. Like Inspector Jordan, he observed the crack in the rib when he was leaving the mine. The crack was on one side of the rib only, Mr. Carroll did not observe that the rib

was leaning precariously. Mr. Carroll testified that the crack was no more than four feet in height. He stated the entire coal seam at this point in the mine has a maximum height of 5 to 5 1/2 feet.

Mr. Carroll had difficulty prying loose the cracked portion of the rib. It took three separate attempts to pry the piece of coal away from the rib. On a scale of one to ten, with ten being the most difficult rib to pry down, this rib was "between a six and a seven" in difficulty. To Mr. Carroll, this meant that it was "difficult to pry down." Mr. Carroll testified that the rib was approximately four feet in height, six feet across at the bottom and two feet across at the top after it was pried down. After it was forcibly pried down, most of the coal fell within two to three feet of the rib.

Mr. Carroll testified that this crack in the rib posed no hazard to any miner. The crack was approximately one-half mile from the working face. It had been several years since there had been any work in this area. In the twelve years that Mr. Carroll had been at the mine, he has had to walk by this area only once. On every other occasion, he drove or rode in a tractor by this portion of the main travelway and would pass by the area within a second or so. Energy Fuels has never had a rib fall in the travelway that caused any injury in the twelve years that the mine has been in existence.

Respondent contends the Secretary failed to prove that Energy Fuels had violated 30 C.F.R. 75.202(a) because she produced no evidence to show that Energy Fuels was not supporting or otherwise controlling the ribs to protect persons from hazards related to rib falls. The undisputed testimony was that Energy Fuels regularly inspects for loose ribs and when they are noticed, bars them down.

The standard states that ribs shall be supported or controlled to protect people from hazards. Even though Inspector Jordan viewed almost 5,000 feet of entryway during this inspection, he saw only one place where there was even a crack in a rib. Inspector Jordan did not observe this rib which he said was "obviously leaning" when he passed by it on his way into the mine. Respondent contends that the only conclusion that can be drawn is that the rib cracked after Inspector Jordan and Mr. Carroll drove by it on their way into the mine. The Secretary presented no evidence that the condition was known to Energy Fuels and that Energy Fuels failed to take steps to control it. I find that the evidence fails to establish that Energy Fuels was negligent.

With respect to the special significant and substantial finding, the evidence fails to establish that, if the rib in question were to fall, a chain of events would occur that would

be reasonably likely to result in injury. Exposure to the hazard of a falling rib would occur only when a miner is very close to or in the immediate area of the falling rib.

Furthermore, it took a considerable effort to pry down this rib and the testimony of Inspector Jordan regarding this rib posing a hazard was only that when it fell, it "might possibly extend to the point where it could hit someone." It appears from the evidence that such a possibility was remote.

The evidence failed to establish a reasonable likelihood that the hazard contributed to would result in injury.

Based upon the evidence presented, I find that there was a 104(a) non S&S violation of 30 C.F.R. 75.202(a). However, based upon the particular facts surrounding that violation, I find that the preponderance of the evidence does not establish a reasonable likelihood that the hazard contributed to, would result in an injury.

On careful consideration of all of the statutory criteria in Section 110(i) of the Act, including the operators lack of negligence, I assess a civil penalty of $20 for this non S&S violation.

ORDER

Based upon the above finding of fact and conclusions of law, IT IS ORDERED that

1. Citation No. 3242478 is VACATED.

2. Citation Nos. 3243302, 3243303, 3243304 and 3242436 ARE MODIFIED to delete the significant and substantial finding and, as modified, ARE AFFIRMED.

3. Respondent Energy Fuels Coal Incorporated shall PAY to the Secretary of Labor a penalty in the sum of $220 within 30 days of the date of this decision.

August F. Cetti
Administrative Law Judge

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