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MSHA V.PITTSBURGE AND MIDWAY
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 91-196
Petitioner :	:	A.C. No. 29-00224-03563
	:	
	:	Cimarron Mine
v.	:	
	:	Docket No. CENT 91-197
	:	A.C. No. 29-00845-03540
PITTSBURG AND MIDWAY COAL :	:	
MINING COMPANY,	:	Docket No. CENT 91-202
Respondent	:	A.C. No. 29-00095-03561
	:	
	:	York Canyon-Underground Mine

DECISION

Appearances: William E. Everheart, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
John W. Paul, Esq., THE PITTSBURG & MIDWAY COAL MINING COMPANY, Englewood, Colorado, for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration ("MSHA") charges Respondent Pittsburg and Midway Coal company ("P&M") with violating safety regulations promulgated under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (the "Act").

A hearing on the merits was held in Alamosa, Colorado, on April 7, 1992.

At the commencement of the hearing the parties stipulated as follows:

1. The York Canyon Surface Mine, mine I.D. No. 29-00845; the Cimmaron Mine, mine I.D. No. 29-00224; and York Canyon Underground Mine, mine I.D. No. 29-00095, are subject to the jurisdiction of the Federal Mine safety and Health Act of 1977, and the Federal Mine Safety and Health Review Commission.

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2. The Citations in CENT 91-197 numbered 3243235, 3243236, and 324327 and Citation No. 3243346 in CENT 91-196 were all properly served by a duly authorized representative of the Secretary of Labor upon an agent of the Pittsburgh and Midway Coal Mining Company and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of the statements asserted therein.

3. The assessment of civil penalties in CENT 91-197, CENT 91-196, and CENT 91-202 will not affect Respondent's ability to continue in business.

4. The alleged violations contained in the Citations in CENT 91-197, CENT 91-196, and CENT 91-202, were abated in a timely fashion and Respondent demonstrated good faith in obtaining abatement.

5. The sizes of the three mines of the Pittsburgh and Midway Coal Company are as follows:

a. York Canyon Surface Mine, I.D. No. 29-00845 - company size 13,587,727 production tons; mine size 482,069 in produced tons;

b. Cimmaron Mine, I.D. No. 29-00224 - mine size 73,843 produced tons;

c. York Canyon underground Mine, I.D. No. 29-0095 - mine size is listed, the company size 13,587,727 produced tons.

CENT 91-196

Citation No. 3243318 alleges P&M violated 30 C.F.R.

75.316. At the commencement of the hearing, the Secretary withdrew the "Significant and Substantial" classification and reduced the proposed penalty from \$157 to \$20.

Respondent admitted the violation of the Citation as amended.

The Citation and proposed amended penalty should be affirmed.

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Citation No. 3243346 was modified to allege P&M violated 30 C.F.R. 75.1722(a). (Footnote 1)

Federal coal mine inspector ANTHONY DURAN, during an AAA inspection, observed an auxiliary floor fan was inadequately guarded. The pulley was exposed and a person could contact moving parts. The fan withdraws float coal dust from the face and blows it into the return. the blower fan is chest high. The inspector would be an arm's reach from the pulley if he was dumping rock dust into the hopper. (P-17, P-18).

P&M admitted it violated 75.17223(a). At issue is whether the violation should be classified as significant and substantial. (Tr. 8).

A violation is properly designated as being S&S "if, based on the particular facts surrounding the 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, 6 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

In order to establish that a violation of a mandatory standard is significant and substantial under National Gypsum the Secretary 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.

See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-104 (5th Cir. 1988), aff'g, 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria). The question of whether any specific violation is S&S must be based on the particular facts surrounding the violation. Texasgulf, Inc., 10 FMSHRC 498, 500-501

1 75.1722 Mechanical equipment guards.

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

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(April 1988); Youghiogheny and Ohio Coal Co. 9 FMSHRC 2007, 2011-2012
(December 1987).

In connection with Citation No. 3243346, the evidence shows a violation of the underlying guarding regulation. There was a measure of danger contributed to by the violation. Unguarded equipment is reasonably likely to result in an injury. Becoming entangled with unguarded parts such as shown in P-18 will cause a reasonably serious injury. In sum, I agree with Inspector Duran when he classified this as an S & S violation. (Tr. 51-52).

Citation No. 3243347 alleges P&M violated 30 C.F.R.
75.503

P&M withdrew its contest to this Citation and accepted the proposed penalty of \$20. (Tr. 8). Accordingly, the Citation and proposed penalty should be affirmed.

CENT 91-197

Citation No. 3243235 alleges P&M violated 30 C.F.R.
77.1605(k)

MSHA Inspector Donald L. Jordan testified as to the alleged berm violation. At the conclusion of the hearing, P&M withdrew its contest to the Citation. (Tr. 88).

P&M's motion was granted. The Citation and the proposed penalty should be affirmed.

Citation No. 3243236 alleges P&M violated 30 C.F.R.
77.410. (Footnote 2)

MSHA Inspector DONALD JORDAN issued this Citation for an explosive truck that had a non-functioning backup alarm. The truck is designed with large boxes on each side. (P-9).

Inspector Jordan opined that pickup trucks are required to have a backup alarm if vision is not clear to the rear. He con-

2 77.410 Mobile equipment; automatic warning devices.

Mobile equipment, such as trucks, forklifts, front-end loaders, tractors and graders, shall be equipped with an adequate automatic warning device which shall give an audible alarm when such equipment is put in reverse.

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sidered the violation to be S&S. Workers were always around the truck putting priming explosives in holes.

MICHAEL KOTRICK, P&M safety manager, produced photographs that show a relatively clear view from front to rear of the explosives truck. (R-1, R-2, R-3). In Mr. Kotrick's opinion, the wire mesh on the truck permits a greater "see through" than does a standard pickup with an ordinary tailgate.

In P&M's business, miners take detonators and primer cord and drop them in holes. However, kneeling by the truck is not part of the procedure.

The parties in this case injected an issue of "see through" visibility, that is, if the driver of the truck could see workers to the rear no backup alarm is required. However, the regulation does not recognize this exception as it simply requires an audible alarm on mobile equipment when the equipment is put in reverse.

Since P&M's truck had no alarm, the Citation should be affirmed.

I agree with Inspector Jordan's evaluation that this violation was S&S. The S&S criteria, set forth above, is established by the evidence. Specifically, there was a violation of the mandatory safety standard and a measure of danger to safety was contributed to by the violation. Further, it is uncontroverted that miners work in close proximity to the truck. The final criteria is established: a truck backing into a miner would cause reasonably serious injuries or a fatality.

P&M was negligent since it should have known the backup alarm was inoperative. Gravity has been discussed in connection with the S&S criteria.

Citation No. 3243236 should be affirmed.

Citation No. 3243237 alleges P&M violated 30 C.F.R. 77.1104. (Footnote 3

Federal Coal Mine Inspector Donald Jordan issued this Citation in the PEPCO Buildings, a Class 2, Division 2 building. In such a building, since there are no explosion-proof motors,

3 77.1104 Accumulations of combustibile materials.

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

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the operator agrees to keep the area free of combustibles such as flammable liquids, oil, grease, coal dust, etc. (Tr. 23).

Mr. Jordan saw an oil and float coal dust accumulation averaging 1/16th of an inch thick. (Tr. 24). The accumulation was on a flat metal surface surrounding a 460-volt A.C. motor. (P-11 shows the accumulation; P-14 shows tracks on the floor from Mr. Jordan's shoes.)

Mr. Jordan believed the float coal dust in the presence of oil created an insulating effect that prevented the motor from adequately cooling. Under normal circumstances, Mr. Jordan agreed that the probability of ignition or fire was highly unlikely. However, tests reveal that 64/100 of an inch accumulation on a flat surface would propagate ignition if given the proper heat. (Tr. 27).

In Mr. Jordan's opinion, heat would come from the motor if overheated because of excessive coal dust in the cooling fans. In Mr. Jordan's opinion there was a strong probability that an accident or serious injury could occur. An explosion would be remote but he considered a fire to be a strong possibility.

Mr. Jordan concluded the violation was S&S.

Under 77.1104, the Secretary must prove there were (1) combustible materials, (2) such combustibles were allowed to accumulate and (3) they created a fire hazard.

In Texasgulf, Inc., 10 FMSHRC 498 (April 1988), the Commission developed an analytical approach useful for determining the reasonable likelihood of a combustion hazard resulting in an ignition or explosion. The Commission established that there must be a "confluence of factors" to create a likelihood of ignition, cf. Compare: Eastern Associated Coal Corporation, 13 FMSHRC 178 (February 1991) involving Section 75.400.

In the instant case, I credit the testimony of P&M's safety manager Michael Katrick who testified as to a fire triangle and described the three legs as: oxygen, ignition source, and fuel in vaporized form. (Tr. 64, 65).

Further, a flash point is a point where sufficient vapors are given off a substance for it to be ignited. (Tr. 66). The lowest flash point at P&M's site was the transmission fluid. Its flashpoint was 160 degrees Centigrade. P&M's lab tested coal dust and the flash point was found to be in excess of 500 degrees Fahrenheit. (Tr. 69, 70).

Mr. Kotrick concluded the minimum flash point would be 160 degrees. (Tr. 71). The motors were tested and their highest

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temperature was 55 degrees Fahrenheit. The motors are specifically designed to be used in a Class 2 Division 2 area.

Based on his research, Mr. Kotrick concluded the accumulations were a combustible mixture. (Tr. 74-75). While the materials are classified as combustible in a definitional sense, there were not present in a combustible state. (Tr. 74). There were no open flames nor electrical sparks in the area. (Tr. 75). The motor was not malfunctioning. In addition, there were fire extinguishers 10 to 20 feet away.

The Secretary's post-trial brief relies on Inspector Jordan's opinion. (Tr. 28, 29). However, I am not persuaded. Mr. Jordan agreed he did not know the flash point of the materials he observed in accumulation nor did he have any information regarding the heat given off the surface of the apparatus where the dust and oil accumulated. (Tr. 34). Further, there was no short circuit or evidence of malfunction. Mr. Jordan further agreed he had no way of knowing if the accumulation caused excessive heat. (Tr. 35).

The Secretary failed to establish an ignition source and fuel to support a fire. Accordingly, Citation No. 3243237 should be vacated.

Citation No. 3243342 alleges P&M violated 30 C.F.R.

77.1303(ii). P&M has admitted the occurrence of the violation. The Secretary, upon the evaluation of new evidence provided by P&M agreed to withdraw the classification from "Significant and Substantial" and proposed a single assessment of \$20. (Tr. 7).

The motions were granted. The Citation and amended civil penalty should be affirmed.

CENT 91-202

Citation No. 3243321 alleges P&M violated 30 C.F.R.

77.400(a) (Footnote 4) P&M admits the violation. At issue are the S& allegations and the penalty. (Tr. 8).

Inspector DONALD JORDAN issued this Citation. He found the west end of the feeder slide on the walkway side and the draw-off

4 77.400 Mechanical equipment guards.

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

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tunnel at the prep land where a person could be injured was not guarded. The feeder slide is a moving machine part. (Tr. 31).

This is an area that must be examined several times a shift. The area must be checked for methane, coal spillage and accumulations.

There was a handrail parallel to the feeder slide. However, the handrail does not prevent a person from reaching into the slide.

Inspector Jordan considered the violation to be S&S because a person could become entangled and incur serious injuries. An injury could include the loss of a hand or arm. (Tr. 32, 33).

MICHAEL KOTRICK, testifying for P&M, did not contradict Mr. Jordan. He indicated the area is isolated. The 36-inch walkway is made of a heavy metal grating. (Tr. 77).

The railing, approximately 40 inches high, is between a feeder and the walkway. The hazard is 12 to 18 inches beyond the railing. (Tr. 78). The railing could be contacted by anyone who might slip. (Tr. 79).

In order to establish an S&S violation, the Secretary must establish evidence to comply with the Commission mandate set forth, supra.

Of the four elements required, I do not find there was a reasonable likelihood that the hazard contributed to will result in an injury. If a person were to slip on the walkway, he would most likely steady himself on the adjacent guardrail. Further, the unguarded feeder slide was 12 to 18 inches beyond the rail. The S&S violations should be stricken.

P&M was negligent in failing to guard the feeder slide. This was an open and obvious condition.

The gravity of this violation should be considered as low since the unguarded equipment was 12 to 18 inches beyond the railing.

CIVIL PENALTIES

P&M's negligence and the gravity of the violations have been previously discussed. The remaining statutory criteria to assess civil penalties is contained in Section 110(i) of the Act.

The stipulation (5) indicates P&M is a large operator. Further, the penalties are appropriate and will not affect the company's ability to continue in business.

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P&M's previous adverse history, as evidenced by Exhibits P-1, P-2, and P-3, is average.

The stipulation further indicated P&M promptly abated the violative condition. The operator is entitled to statutory good faith.

For the foregoing reasons, I enter the following:

ORDER

CENT 91-196

1. Citation No. 3243318 and the penalty of \$20, as amended, are AFFIRMED.
2. Citation No. 3243346 is AFFIRMED and a civil penalty of \$100 is ASSESSED.
3. Citation No. 3243347 is AFFIRMED and a civil penalty of \$20 is ASSESSED.

CENT 91-197

4. Citation No. 3243235 is AFFIRMED and the proposed penalty of \$227 is ASSESSED.
5. Citation No. 3243236 is AFFIRMED and penalty of \$200 is ASSESSED.
6. Citation No. 3243237 is VACATED.
7. Citation No. 3243342 is AFFIRMED and a civil penalty of \$20 is ASSESSED..

CENT 91-202

8. The S&S allegations are STRICKEN from Citation No. 3243321.
9. Citation No. 3243321, as amended, is AFFIRMED and a civil penalty of \$50 is ASSESSED.

John J. Morris
Administrative Law Judge

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