

CCASE:
SOL (MSHA) V. AMAX COAL
DDATE:
19940819
TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 94-55
Petitioner : A. C. No. 11-00877-04031
v. :
 : Docket No. LAKE 94-79
AMAX COAL COMPANY, : A. C. No. 11-00877-04034
Respondent :
 : Mine: Wabash Mine

DECISION

Appearances: Christine M. Kassak, Esq., Office of the Solicitor
U.S. Department of Labor, Chicago, Illinois, for
the Petitioner;
R. Henry Moore, Esq., Buchanan Ingersoll,
Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Feldman

These civil penalty proceedings concern petitions for civil penalties filed by Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C.

801 et seq., (the 1977 Mine Act). These matters were heard on June 14, 1994, in Evansville, Indiana. The parties' post-hearing proposed findings and conclusions are of record.

At the hearing, the parties stipulated to facts that are common to both docket proceedings and to facts that are unique to each proceeding. The stipulated facts common to both proceedings are as follows:

1. The Federal Mine Safety and Health Review Commission has jurisdiction over these proceedings.
2. At all times relevant to these proceedings, Respondent, Amax Coal Company (hereinafter, "Respondent") and its mines are subject to the provisions of the Federal Mine Safety and Health Act of 1977 (hereinafter, the "Act").
3. At all times relevant to these proceedings, Respondent owned and operated the Wabash Mine, a bituminous coal mine located in Wabash County, Illinois.

4. Respondent's operations affect interstate commerce.
5. The Wabash Mine produced 1,838,272 tons of bituminous coal from January 1, 1992 through December 31, 1992.
6. Respondent, Amax Coal Company, produced 38,939,422 tons of bituminous coal at all of its mines from January 1, 1992 through December 31, 1992.
7. The subject citations were properly served by a duly authorized representative of the Secretary of Labor upon an agent of the Respondent on the date indicated therein.

LAKE 94-79

The Respondent stipulated to the fact of occurrence of prohibited coal dust accumulations on its continuous miner in violation of the mandatory safety standard in Section 75.400, 30 C.F.R. 75.400. The language in Section 75.400 is identical to the provisions of Section 304(a) of the 1977 Mine Act, 30 U.S.C. 864(a). Section 75.400 provides:

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.

Citation No. 4054831 described the subject accumulations as:

Accumulation of loose coal and oil soaked loose coal was allowed to accumulate in and upon the JOY continuous miner. Accumulation in the operator's compartment measured 7 inches deep, 2 feet in width, and 4 feet in length, also the loose coal was allowed to accumulate upon conduits, lights, panels and motors up to 6 inches in depth.

The only issue for determination is whether the violation of Section 75.400 was properly designated as significant and substantial. The parties stipulated to the following facts that are specific to Docket No. LAKE 94-79:

1. On October 7, 1993, Michael Dean Rennie (the "inspector") issued Citation No. 4054831 at Respondent's Wabash Mine, Wabash County, Illinois (hereinafter the "Wabash Mine"), alleging a violation of 30 C.F.R. 75.400 because Inspector Rennie had determined that the Respondent allowed loose coal and oil soaked loose coal to accumulate in and upon the JOY continuous miner (serial number J.M. 3870), which was

located on the 3W/MWS unit, 010 M.M.U., at Survey Station 39857.

2. At the time Citation No. 4054831 was issued, the JOY continuous miner was located on the 3W/MWS unit, 010 M.M.U., at Survey Station 39857, an area of the Wabash Mine where miners normally work or travel.
3. Loose coal and oil soaked coal are combustible materials.
4. There are three (3) necessary factors which must be present simultaneously for a fire to begin: fuel, heat and oxygen. If any factor is absent, fire becomes impossible.
5. The heat necessary to ignite a fire varies with the particle size of the fuel. The larger the particles, the higher the temperature necessary to ignite the fire.
6. The JOY continuous miner at issue here comes within the definition of "electric equipment" referred to in 30 C.F.R. 75.400.
7. Amax agrees that the conditions cited constitute a violation of Section 75.400. The issue before the Administrative Law Judge is whether the condition was significant and substantial. Also at issue would be the appropriate size of the penalty.
8. At this time, the parties have identified from the available MSHA data that, for the period 1978 to 1992, there were five (5) fires reportable under 30 C.F.R. Part 50 on the continuous miner in an underground coal mine. In two (2) such fires, a person was injured as a result of such fire. Such injuries involved burns and lost workdays. One such fire occurred as a result of cutting and welding on a continuous miner.

Findings of Fact

A continuous miner ("miner") is a mining machine designed to remove coal from the face and to load that coal into cars or on conveyors. A continuous miner is required to be maintained in permissible condition to ensure that all enclosures for motors, controllers, junction boxes and headlights are designed to prevent sparks from exiting the enclosure in order to contain an internal explosion. (Tr. 69-70, 85-87, 155). A permissible enclosure will prevent any flame or arc from propagating outside the enclosure and igniting material deposited on the enclosure. (TR. 86-87, 156). The trailing cable of the miner is a shielded

~1840

cable. (Tr. 70, 90, 139). The remote control box is equipped with a "kill" or panic bar switch which deenergizes the miner (Tr. 80).

At the time Citation No. 4054831 was issued the continuous miner was in a permissible condition. (Tr. 69, 114). The miner was equipped with a fire suppression system that includes nozzles located in the area of the electrical and hydraulic components. (Tr. 107, 140, 153). The fire suppression system can be activated in three independent ways: by a switch in the operating compartment of the miner; by a switch on the control box used to operate the miner remotely; and by means of a valve within a hose running from the remote control box to the miner. (Tr. 141). This last method of activation of the fire suppression system permits activation even if power to the continuous miner is lost or if the continuous miner is under unsupported roof. (Tr. 141). Once activated, the fire suppression system covers the entire machine. (Tr. 153-154). The continuous miner is also equipped with a water hose near the operator's compartment which can be used to extinguish a fire. (Tr. 87-88, 142).

The electrical cables in the continuous miner are located within a 3/16 inch conduit. (Tr. 136). The electrical cable and conduits that cover the cables do not generate any heat. (Tr. 138). Even if the conduit was damaged, the interior cable has additional protection around the conductors. (Tr. 70, 90, 139).

The shielding of each conductor protects the cable from damage or sparking. If the cable itself were damaged, short circuit protection would deenergize the continuous miner. (Tr. 107, 114-115, 139). The continuous miner's extensive system of electrical protection includes short circuit, overcurrent, undervoltage and ground fault protection, which would remove power from the miner in the event of damage to an electrical conductor located within a protective conduit, or, if there was a problem with an electrical motor or component. (Tr. 83-85, 114-115, 134-136). Short circuit protection for the continuous miner is instantaneous in that a short circuit would immediately deenergize the miner. (Tr. 83, 134). Overload protection prevents the cables from becoming hot and ground monitoring protection prevents energization of the machine unless the ground fault system is functioning properly. (Tr. 134-135).

There are eight motors on the continuous miner: two tram motors; two motors to operate the conveyor; two cutting motors; the hydraulic pump motor; and the scrubber motor. (Tr. 143-145). Each motor has short circuit and overload protection (Tr. 85, 136). The motors on the continuous miner are water cooled except for the scrubber motor. (Tr. 69, 138-145).

The continuous miner is equipped with several dust control/suppression systems. A scrubber device takes in air near the

~1841

head of the miner and subjects it to a water scrubber system as well as filtration. (Tr. 138, 144-147). There are also water sprays near the head of the miner as well along the conveyor in the center of the miner. (Tr. 90-91, 120). The use of these sprays result in the wetting of any coal accumulations on the miner, thus making the accumulations harder to ignite. (Tr. 92-93, 120).

Two miners, an operator and a helper, are assigned to operate the continuous miner. (Tr. 63). Although the subject JOY continuous miner had an operator's compartment, it was being operated by remote control on the day the citation was issued. (Tr. 61-63). There were no ignition sources on the floor of the operator's compartment (Tr. 95). All gauges and other electrical components which are located in the operator's compartment are permissible. (Tr. 95, 140).

Rennie conceded that coal dust accumulations can reasonably be expected to accumulate on the continuous miner during its operations. (Tr. 107-108, 126). However, Rennie stated that coal dust deposited on a permissible light or motor of an operational continuous miner during the course of mining does not pose a hazard. (Tr. 123-124).

In describing the nature and extent of the cited accumulations, inspector Rennie testified the accumulations were not "mere spillage" from the shift. (Tr. 49-51). Rather, Rennie testified the color and compaction of the accumulations gave him reason to believe that the accumulations "had been there for sometime." (Tr. 51, 94). Consequently, Rennie thought too much coal had accumulated and opined that the accumulations had existed approximately two weeks. Therefore, Rennie concluded nothing had been done to clean the machine during that time. (Tr. 107-108, 122-124).

Significant and Substantial Issue

A violation is properly designated as being significant and substantial (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 an illness of a reasonably serious nature." Cement Division, National Gypsum, 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1 (January 1984) the Commission explained:

In order to establish that a violation of a mandatory safety standards 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

~1842

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 F.2d 99, 104-05 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria). The Commission has held that 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." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984).

Applying the Mathies test, the Respondent has stipulated to the fact of the violation satisfying the first element. With respect to the second element, it is clear that the cited combustible accumulations contributed to the discrete safety hazard of ignition or explosion.

However, resolution of the third and fourth elements of Mathies is more contentious. Addressing the third element, the Respondent argues that, given the continuous miner's permissibility, short circuit protection and fire suppression system, there was no reasonable likelihood that the combustion hazard contributed to by the violation of Section 75.400 would result in an event, i.e., a fire, which would cause serious injury. In response, the Secretary asserts that heat from the continuous miner's lights and water cooled motors could lead to spontaneous combustion; (2) the conveyor chain rubbing metal against metal could cause a spark; and (3) in the event of a roof collapse, power cables and conduits could rupture causing a spark and fire. (Tr. 48, 68, 94, 96-97, 107, 109).

Analysis of element three in Mathies as it pertains to this proceeding must be made in the context of the likelihood of fire given "continued normal mining operations." *U.S. Steel Mining Company, Inc.*, 6 FMSHRC 1573, 1574 (July 1984). In this regard, the Respondent contends that for the Secretary to prevail, I must conclude that a continuous mining machine operated in a normal mining environment is inherently hazardous. I am sensitive to the Respondent's argument in that I cannot conceive of an operable continuous mining machine without accumulations of coal dust which are a normal byproduct of the extraction process. I am also reluctant to assume the "confluence of factors", such as a roof collapse, resulting cable rupture, spark and ignition, that must result a fire or explosion. See *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988).

However, in this instance, the evidence does not reflect that the continuous miner was being operated under normal circumstances in that it is uncontroverted that its coal dust

~1843

accumulations were as much as 7 inches in depth and that these accumulations had existed for approximately two weeks. While I am not inclined to conclude that coal dust accumulations on a continuous miner constitute a per se significant and substantial violation, I am likewise not persuaded that such accumulations are per se not significant and substantial. Rather, this issue must be resolved on a case by case basis.

There is a positive correlation between the duration of a hazardous condition and the likelihood of an event precipitated by that hazard. In this case, the two week duration of extensive accumulations provides an adequate basis for determining it was reasonably likely that an intervening result (a permissibility defect or a cable rupture) could occur which would create an ignition source and cause combustion. The duration of the accumulations also reflects that this condition would have remained unabated for a significant period of time without the intervention of Inspector Rennie. My determination may have been different had the accumulations existed for only one or two shifts. Thus, the Secretary has met his burden of proof with respect to the third element of Mathies.

However, the Secretary does not prevail on the issue of significant and substantial unless all four elements of Mathies are satisfied. Element four requires a reasonable likelihood the event, in this case a fire or explosion, will result in injuries of a reasonably serious nature. The respondent argues that the fire suppression system on the continuous miner would quickly extinguish a fire thus removing the likelihood of serious injury.

At the outset, I note that a fire suppression system would not prevent the serious injury or death of the continuous miner operator or helper in the event of an explosion. Moreover, the presence of a hose in a working place is not an appropriate mitigating factor when considering the significant and substantial nature of violations contributing to the likelihood of a fire. Likewise, a fire suppression system on a continuous miner is not a mitigating factor. Rather, it is a system of last resort. Accordingly, I conclude that the Secretary has established the violation in Citation No. 4054831 was properly designated as significant and substantial.

In considering the appropriate civil penalty to be imposed for this citation, I note the serious gravity of the violative condition as it exposes personnel to the danger of combustion. However, this gravity is mitigated by the propensity for dust accumulation on a continuous miner. Therefore, I find the operator's negligence to be no more than moderate in degree. Accordingly, the \$309 civil penalty assessment proposed by the Secretary will be affirmed.

LAKE 94-55

Docket No. Lake 94-55 concerns Citation Nos. 4054082, 4054083, and 4054084 which were issued on September 22, 1993, by Mine Safety and Health Administration (MSHA) Inspector Steven Miller. These citations allege violations of Section 75.400 for coal dust accumulations found on diesel equipment operating in the Respondent's active workings. The parties agreed that my decision in Citation No. 4054082 would govern the other two citations in this docket proceeding. (Tr. 220-221).

The Respondent does not contest the cited coal dust accumulations described in the stipulations below. Rather, the contestant disputes the fact of occurrence of a Section 75.400 violation contending that the cited mandatory safety standard applies to electric rather than diesel equipment. The parties have stipulated to the following facts in Docket No. LAKE 94-55:

1. On September 22, 1993, Steve Miller (the "inspector") issued Citation No. 4054082 at Respondent's Wabash Mine, Wabash County, Illinois, alleging a violation of 30 C.F.R. 75.400 because he determined that Respondent permitted loose coal saturated with oil, coal float dust, oil, and grease to accumulate on the WAGNER diesel scoop, company number 48 (serial number 3A11P0305), which was being operated on the 4 East Right Travelway. A complete and accurate copy of the citation will be offered into evidence at the hearing.
2. At the time Citation No. 4054082 was issued, the WAGNER diesel scoop was operating in the 4 East Right Travelway, an area of the Wabash Mine where miners are normally required to work or travel.
3. On September 22, 1993, the inspector issued Citation No. 4054083 at Respondent's Wabash Mine, alleging a violation of 30 C.F.R. 75.400 because he determined that Respondent permitted loose coal saturated with oil, coal float dust, oil, and grease to accumulate on the JEFFREY diesel ram car, company number 106 (Serial number 38979), which was located on the 3 South East (MMU-004). A complete and accurate copy of the citation will be offered into evidence at the hearing.
4. At the time Citation No. 4054083 was issued, the JEFFREY diesel ram car was located on the 3 South 4 East (MMU-004), an area of the Wabash Mine where miners are normally required to work or travel.
5. On September 22, 1993, the inspector issued Citation No. 4054084 at Respondent's Wabash Mine, alleging a violation of 30 C.F.R. 75.400 because he determined

that Respondent permitted loose coal saturated with oil, coal float dust, oil, grease and paper to accumulate on the WAGNER diesel scoop, company number 63 (serial number SA11P0299), which was being operated on the 4 East Right construction area. A complete and accurate copy of the citation will be offered into evidence at the hearing.

6. At the time Citation No. 4054084 was issued, the WAGNER diesel scoop was being operated on the 4 East Right construction area, an area of the Wabash Mine where miners are normally required to work or travel.
7. The materials referenced in the subject citations (i.e., loose coal saturated with oil, coal float dust, oil, grease and paper) are combustible materials.
8. The first use of diesel-powered equipment in an underground coal mine in the United States was in 1946.
9. Diesel equipment did not achieve significant usage in underground coal mines until the 1970's.
10. In 1974, there were 150 units of diesel equipment operating in underground coal mines in the United States.
11. In 1987, there were over 1300 units of diesel equipment operating in 107 underground coal mines in the United States.
12. Historically, the type of mining equipment most suited to diesel applications has been production haulage equipment such as load haul dump units (LHD's) and shuttle cars, personnel carriers, and diesel-powered auxiliary vehicles.
13. The WAGNER diesel scoops and the JEFFREY ram car at issue here are diesel-powered equipment.
14. Stipulation numbers 8 through 12 above are derived from the July 1988 Report of the Mine Safety and Health Administration Advisory Committee on Standards and Regulations for Diesel-Powered Equipment in Underground Coal Mines.
15. The Secretary hereby agrees to drop his determination that the conditions cited were of a significant and substantial nature.

~1846

16. The parties agree that, should the violations be found, an appropriate penalty for each violation would be \$100.
17. The parties stipulated to the locations of the three (3) subject pieces of diesel equipment in the Wabash Mine, on or around the time that the citations were issued and agreed that the map prepared by the Secretary be admitted as Joint Stipulation.

As indicated above, the issue in this docket proceeding is whether the prohibition against coal dust accumulations in Section 75.400, which is identical to the statutory language in Section 304(a) of the 1977 Act, applies to diesel equipment in active workings. Statutory and regulatory provisions must always be viewed in the context of their intended purpose. In this regard, I am reminded of an incident that occurred in the early 1970's in Long Island, New York, for which I cannot provide documentation or further citation, where the town counsel passed a local ordinance. The ordinance provided that as of midnight on a specified date ". . . the owner of any dog who permits the dog to wander the streets without a leash will be put to sleep (emphasis added)." Thankfully, case precedent has provided a solution for such problems.

Although the ordinary meaning of words is important, such meaning ". . . must [not] prevail where that meaning . . . thwart[s] the purpose of the statute or lead[s] to an absurd result." Utah Power & Light Company, 11 FMSHRC 1926, 1930 (October 1989), citing Emery Mining Corp., 9 FMSHRC 1997, 2001 (December 1987) and In re Trans Alaska Pipeline Rate Case, 436 U.S. 631 (1978). Thus, regulations and statutes should be interpreted to harmonize rather than conflict with their intended objective. See Emery Mining Corp. v. Secretary of Labor, 744 F.2d 1411, 1414 (10th Cir. 1984).

The applicability of Section 75.400 to diesel equipment is not a matter of first impression. Judge Fauver recently denied the Respondent's Motion for Summary Decision on this issue in a recent proceeding. See Decision Denying Motion for Summary Decision in Docket No. Lake 94-74 (July 15, 1994). Judge Fauver, citing Black Diamond Coal Mining Company, 7 FMSHRC 1117, 1120 (August 1985) and cases cited therein, noted the Commission has repeatedly recognized the "strong Congressional intention to prohibit combustible accumulations anywhere in active workings."

Thus, the Respondent's reliance on Jones & Laughlin Steel Corp., 5 FMSHRC 1209 (July 1983), rev'd on other grounds, sub nom., International Union, UMWA v. FMSHRC and Vesta Mining Co., 731 F.2d 995 (D.C. Circuit 1984), aff'd on remand, 8 FMSHRC 1058 (July 1986) wherein the Commission stated "active workings

~1847

generally are areas or places in a mine, not equipment (emphasis added)" is not dispositive. In Jones & Laughlin, the Commission held that coal conveyor belts are not in and of themselves "active workings" and thus subject to preshift examinations.

While equipment may not constitute an active working area or place, the legislative history, when viewed in the context of the parties' stipulations, clearly reflects that "electric equipment" should be interpreted to include all permissible equipment including diesel-powered equipment. The predecessor to Section 304(a) of the 1977 Mine Act was Section 304(a) of the 1969 Coal Mine Health and Safety Act (the 1969 Mine Act), 30 U.S.C. 864(a). The provisions of Section 304(a) of the 1969 Mine Act are the same as the provisions in Section 304(a) of the 1977 Mine Act and the language in the regulatory standard in Section 75.400.

The parties' stipulations reflect virtually no use of diesel equipment in underground mines when the 1969 Act was promulgated. Diesel equipment satisfying MSHA's permissibility specifications as required by Section 36.2(b), 30 C.F.R. 32(b), particularly with respect to hydraulic rather than electric starters to suppress a potential ignition source, has only recently been approved for underground use. (Tr. 244). Consequently, underground diesel equipment has only recently become commonplace. Therefore, the failure to include diesel equipment in Section 304(a) of the 1969 or 1977 Mine Acts does not evidence a Congressional intent to distinguish diesel from electric equipment.

Significantly, the Respondent has failed to provide any rational basis for viewing electric equipment and diesel equipment differently. Both types of equipment require permissibility approval by MSHA as defined by Section 75.2 of the regulations, 30 C.F.R. 75.2. See also 30 C.F.R. 36.2(b). Rather, it is clear that the Congressional concern about electric equipment as a potential ignition source is equally applicable to diesel equipment. In fact, Respondent witness Robert Kudlawiec, Project Engineer at the Respondent's Wabash Mine, testified that any powered equipment creates a safety issue concerning a potential ignition source. (Tr. 300). Kudlawiec further stated that the considerations regarding prevention of an ignition source are the same for diesel and electric equipment. Consistent with Kudlawiec's opinion, at the hearing counsel for the Respondent conceded that combustible accumulations on diesel equipment is a serious concern. (Tr. 339, 349-350).

Finally, I recognize that mandatory safety standards must provide reasonable and adequate notice of prohibited mine practices and conditions. Ideal Cement Company, 12 FMSHRC 2409, 2416 (November 1990); Alabama By-Products, 4 FMSHRC 2128, 2129 (December 1982). However, I cannot imagine a mine operator

~1848

disregarding combustible accumulations on diesel equipment while conscientiously removing such accumulations on electric equipment under a good faith alleged color of authority of Section 75.400. Obviously, any such claim must be rejected.

Consequently, I conclude common sense and established case law dictate that "electric equipment therein" must be interpreted to include all permissible equipment, including diesel equipment. It follows that the subject accumulations constitute violations of the mandatory safety standard in Section 75.400 as well as violations of the provisions of Section 304(a) of the 1977 Mine Act.

The parties have stipulated that the three violations in Docket No. LAKE 94-55 are nonsignificant and substantial. Accordingly, Citation Nos. 4054082, 4054083 and 4054084 are modified to delete the significant and substantial designation and are affirmed as modified. While I retain jurisdiction to assess the appropriate civil penalties in this matter, I will defer to the parties' stipulation of a \$100 civil penalty assessment for each citation.

ORDER

In view of the above, IT IS ORDERED that Citation No. 4054831 in Docket No. LAKE 94-79 IS AFFIRMED. IT IS FURTHER ORDERED that the significant and substantial designations in Citation Nos. 4054082, 4054083 and 4054084 in Docket No. LAKE 94-55 are deleted and that these citations ARE AFFIRMED as modified. The Respondent SHALL PAY a total civil penalty of \$609 within 30 days of the date of this decision in satisfaction of the four citations in issue. Upon timely receipt of payment, these cases ARE DISMISSED.

Jerold Feldman
Administrative Law Judge

Distribution:

Christine M. Kassak, Esq., Office of the Solicitor,
U.S. Department of Labor, 230 South Dearborn Street,
Chicago, IL 60604 (Certified Mail)

R. Henry Moore, Esq., Buchanan Ingersoll, 58th Floor,
600 Grant Street, Pittsburgh, PA 15219-2887 (Certified Mail)

/efw