

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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July 13, 2015

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Petitioner,

v.

PARAMONT COAL COMPANY  
VIRGINIA LLC,  
Respondent.

PARAMONT COAL COMPANY  
VIRGINIA LLC,  
Contestant,

v.

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. VA 2010-458  
A.C. No. 44-07123-223318

Mine: Deep Mine No. 35

CONTEST PROCEEDINGS

Docket No. VA 2010-369-R  
Citation No. 8166777; 04/07/2010

Docket No. VA 2010-370-R  
Citation No. 8166778; 04/07/2010

**DECISION AND ORDER ON REMAND**

Before: Judge Paez

This matter is before me on remand from the Commission. 37 FMSHRC \_\_\_, slip op. at 1, No. VA 2010-458 (May 27, 2015) (citing 35 FMSHRC at 1155). On April 30, 2013, Administrative Law Judge George Koutras issued a decision after hearing that involved two section 104(a) citations and two section 104(b) withdrawal orders. 35 FMSHRC 1118, 1158 (Apr. 2013) (ALJ). The Commission's decision vacated and remanded one aspect of Judge Koutras's decision regarding one of the section 104(a) citations. 37 FMSHRC \_\_\_, slip op. at 6, No. VA 2010-458 (May 27, 2015). Judge Koutras has since retired, so Chief Administrative Law Judge Robert J. Lesnick reassigned this matter to me on June 9, 2015.

The matter on remand involves Citation No. 8166774, which was issued to Paramont Coal Company Virginia LLC ("Paramont") by the Department of Labor's Mine Safety and Health Administration ("MSHA"), for a misaligned conveyor belt at Paramont's Deep Mine

No. 35. The citation alleged a significant and substantial (“S&S”)<sup>1</sup> violation of the safety standard in 30 C.F.R. § 75.1731(b), which requires conveyor belts to be properly aligned.<sup>2</sup> The Commission determined that Judge Koutras erred by failing to consider the frictional contact between the wooden baffles and the misaligned No. 3 belt as a factor that could contribute to a belt fire. *See* 37 FMSHRC \_\_\_, slip op. at 5 (citing 35 FMSHRC at 1155).

## I. PROCEDURAL BACKGROUND AND ISSUES ON REMAND

Judge Koutras’s decision in this matter discussed three citations issued by Inspectors Bobby Hall and Lloyd Robinette in connection with their inspection on April 5, 2010, as well as two orders issued on April 7, 2010. First, the Secretary alleged in Citation No. 8166773 that Paramont violated 30 C.F.R. § 75.400 for allowing coal dust to accumulate along the belt line in Deep Mine No. 35. Second, in Citation No. 8166774 the Secretary alleged that the alignment on Paramont’s belt conveyor violated 30 C.F.R. § 75.1731(b). The Secretary designated both citations as S&S and included both citations in Docket No. VA 2010-458.

A few hours later, Inspectors Hall and Robinette returned to the same area of the mine and issued Citation No. 8166775, charging Paramont with a violation of 30 C.F.R. § 75.1731(c). 35 FMSHRC at 1127, 1129. Citation No. 8166775 involved wooden boards—which Judge Koutras refers to as “wooden baffles”—that had been constructed across the belt conveyor and which contributed to a frictional heating hazard. *Id.* at 1124–25. The body of Citation No. 8166775 indicates that the conveyor belt was rubbing against those wooden baffles and the atmosphere smelled like smoldering wood. *Id.* at 1125. Float coal dust and coal fines were also present. *Id.* To abate Citation No. 8166775, Paramont’s foreman “immediately destroyed the wooden baffle materials by knocking them out with a sledge hammer.”<sup>3</sup> *Id.* at 1129. Two days later, the Secretary issued section 104(b) Order Nos. 8166777 and 8166778 for failing to abate the conditions cited in Citation Nos. 8166773 and 8166774.<sup>4</sup> *See* 35 FMSHRC at 1120–21.

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<sup>1</sup> The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.”

<sup>2</sup> 30 C.F.R. § 75.1731(b) states that “[c]onveyor belts must be properly aligned to prevent the moving belt from rubbing against the structure or components.”

<sup>3</sup> Citation No. 8166775 was included in a separate docket, Docket No. VA 2010-408, and the parties agreed to settle that civil penalty proceeding. 37 FMSHRC \_\_\_, slip op. at 2 n.4. Judge Koutras issued a Decision Approving Settlement for Docket No. VA 2010-408 in 2010. That matter is not before me.

<sup>4</sup> Paramont contested these section 104(b) orders in Docket Nos. VA 2010-369-R and VA 2010-370-R. Judge Koutras affirmed Order No. 8166778 and vacated Order No. 8166777. 35 FMSHRC at 1166. Although both dockets are before me on remand, the Commission’s decision did not disturb Judge Koutras’s decision regarding either order.

Judge Koutras determined that Citation No. 8166774 was not appropriately designated as S&S. *Id.* at 1158. He declined to consider the frictional contact between the smoldering wooden baffles identified in Citation No. 8166775 and the belt in question as a possible ignition source that should be considered in determining whether a confluence of factors existed that could trigger an explosion or ignition. *Id.* at 1155–58.

In remanding the matter, the Commission states: “only the Secretary’s petition, seeking review of the Judge’s finding that Citation No. 8166774 was not S&S, was granted.” 37 FMSHRC \_\_\_, slip op. at 2 n.4. As the Commission stated:

Citation Nos. 8166774 (at issue here) and 8166775 both involved equipment that rubbed against the belt — bottom roller hangers and wooden baffles respectively. Citation No. 8166773 involved accumulations of float coal dust in the area. The main issue in the case is whether the wooden baffles that were the subject of Citation No. 8166775 should also have been considered as a potential cause of a belt fire when the Judge made his S&S determination regarding Citation No. 8166774.

37 FMSHRC \_\_\_, slip op. at 2 (footnote omitted). The Commission directs me to “consider whether a confluence of factors, including the wooden baffles, could have contributed to a fire. . . . [and] also consider the Secretary’s argument that the two hot hangers would eventually heat to a sufficient temperature to contribute as an ignition source.” *Id.* at 5–6.

Consequently, the sole issues before me on remand are (1) whether the Secretary established a confluence of factors which would have resulted in the ignition of a belt fire, thus establishing that Citation No. 8166774 was significant and substantial (“S&S”), and (2) the appropriate penalty assessment for Citation No. 8166774.

## II. PRINCIPLES OF LAW AND ANALYSIS

### A. Significant and Substantial – Principles of Law

A violation is 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.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). To establish an S&S violation, 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.” *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (footnote omitted); *see also Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135–36 (7th Cir. 1995) (affirming ALJ’s application of the *Mathies* criteria); *Austin Power, Inc. v. Sec’y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving the *Mathies* criteria).

The Commission has provided guidance to Administrative Law Judges in applying the *Mathies* test. As to the third *Mathies* element, the Commission specifically noted on remand:

[T]he Commission has recognized that “[i]n addressing [whether a hazard is reasonably likely to result in an injury] . . . in cases involving violations which may contribute to the hazard of . . . explosions or ignitions, the likelihood of an injury resulting from the hazard depends on whether a ‘confluence of factors’ exists that could trigger an explosion or ignition.” *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1992 (Aug. 2014). Such factors include any potential ignition sources, the presence of methane, float coal dust accumulations, loose coal or other ignitable substance, and the types of equipment operating in the area. See *Utah Power & Light Co., Mining Div.*, 12 FMSHRC 965, 970-71 (May 1990); *Texasgulf*, 10 FMSHRC 498, 501-03 (Apr. 1988).

37 FMSHRC \_\_\_, slip op. at 4–5.

The Commission’s remand decision also noted that “an S&S determination must be made at the time the citation is issued ‘*without any assumptions as to abatement*’ and in the context of ‘continued normal mining operations.’” 37 FMSHRC \_\_\_, slip op. at 5 (citing *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)). In addition, the Commission previously indicated that “an inspector’s judgment is an important element” in an S&S determination. *Mathies*, 6 FMSHRC at 5 (citing *Nat’l Gypsum*, 3 FMSHRC at 825–26); see also *Buck Creek Coal*, 52 F.3d at 135 (stating that ALJ did not abuse discretion in crediting opinion of experienced inspector).

**B. S&S Analysis of Citation No. 8166774**

The first *Mathies* element is satisfied by Judge Koutras’s determination of a violation, a finding which was not appealed. 37 FMSHRC \_\_\_, slip op. at 4. Regarding the second *Mathies* element, the Commission concluded that Judge Koutras correctly determined that the violation contributed to the hazard of a belt ignition fire. *Id.*

Turning to elements three and four of the *Mathies* test, I note Judge Koutras’s factual findings that: (1) no methane was present in this area of the mine; (2) no float coal dust was in suspension; (3) no electrical wires were exposed; (4) no float coal dust was turning or backed up in any of the belt rollers; (5) Paramount’s belt was fire resistant or retardant; and (6) no rock dust or footprints were present on the float coal dust to suggest anyone had been in the area. 35 FMSHRC at 1157. Because the Commission’s decision did not disturb these findings, they remain applicable to my S&S analysis on remand.

Judge Koutras also found and concluded that “it [was] unlikely and improbable that the two belt hangers observed by the inspector, as well as the remaining hangers that evidenced past rubbing by the belt[,] were viable heat sources that would contribute to, or result in a belt fire, or an injury of reasonably serious nature.” 35 FMSHRC at 1158. Yet, the Commission has specifically directed me to evaluate whether the friction between the belt and belt hangers would heat to a sufficient temperature in the course of continued mining operations to provide an

ignition source. I note Inspector Hall's testimony that a temperature in excess of 140 degrees was necessary to ignite a belt fire. (Tr. 140:18–141:5.) Likewise, I note Judge Koutras's finding that the misaligned belt had damaged twelve *other* belt hangers at some point. 35 FMSHRC at 1157.

In the course of continued normal mining operations, the repeatedly misaligned belt would continue to rub the belt hangers. *Cf.* 37 FMSHRC \_\_\_, slip op. at 5 n.10 (indicating the increase in severity of conditions associated with the wooden baffles over three-and-a-half hours “shows the effect of normal mining conditions on the development and worsening of the hazard.”) Although the temperature of the belt hangers was *presently* insufficient to cause a fire, the record also demonstrates the belt hangers heated up in response to friction. Indeed, the temperature of the two belt hangers in question was already 74 and 75 degrees, respectively, at the time of the citation.<sup>5</sup> (Tr. 332:19–334:1.) I therefore find that the frictional contact would continue to build heat on the belt hangers and eventually reach a temperature that would provide an ignition source for the float coal dust accumulations located just a few feet away.

The smoldering wooden baffles constituted *another* ignition source for the nearby float coal dust accumulations. *See* 35 FMSHRC at 1133, 1157. Additionally, Judge Koutras found that no rock dust was present at the time the inspector issued the citation, and he inferred that its absence implied that no miners had been present in the area. 35 FMSHRC at 1157. But I recognize that the *absence* of rock dust actually increases the danger that the *presence* of float coal dust raised in this case.<sup>6</sup> According to Paramont's rock dusting schedule, the area should have been rock dusted the previous day. *See* 35 FMSRHC at 1141–47 (indicating that Paramont applied rock dust to the belts once per week and as needed on other days). Paramont's failure to follow its rock dusting schedule suggests to me that in continued mining operations float coal dust would have been present without any rock dust. Notwithstanding Judge Koutras' finding that no float coal dust was in suspension at the moment, these untreated float coal accumulations would have provided a dangerous fuel source for any suspension or ignition event that occurred.

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<sup>5</sup> The record in this case does not make clear what the ignition temperature for a belt fire would be. On cross-examination, Inspector Hall admitted that it would be higher than 140 degrees. (Tr. 140:25–141:5.) However, it is unclear how high the ignition temperature would be for the fire resistant/retardant belt in question. Given their experience as coal miners and MSHA inspectors (Tr. 57:23–58:25, 191:6–193:11), I credit the testimony from Inspectors Robinette and Hall that friction between the belt and the belt hangers and the wood baffles in question presented an ignition source. (Tr. 87:24–88:4, 89:2–16, 144:14–145:6, 148:5–18, 210:13–22.) *See also Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278–79 (Dec. 1998) (relying on the opinion of an experienced inspector to conclude that substantial evidence supported an ALJ's S&S determination).

<sup>6</sup> Rock dust is applied to help reduce the dangers of float coal dust. *See, e.g., American Geological Institute, Dictionary of Mining, Mineral, and Related Terms* 465 (2d ed. 1997) (defining rock dust as “[t]he general name for any kind of inert dust used in rendering coal dust inert . . .” and rock dusting as “[t]he dusting of underground areas with powdered limestone to dilute the coal dust in the mine atmosphere and on mine surfaces, thereby reducing explosion hazards.”).

Methane presented a similar problem. Although Inspector Hall did not detect any methane at the time, I recognize that MSHA was required to provide spot inspections of Deep Mine #35 every 10 or 15 working days because it liberated approximately 100,000 cubic feet of methane every twenty-four hours. (See Tr. 130:19–25, 212:11–13; 30 U.S.C. § 813(i).) In the course of continued mining operations, methane could accumulate quickly on the belt line and provide fuel for the belt hanger and wooden baffle ignition sources. Cf. *Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1132 (May 2014) (indicating that the ALJ erred when he took a “snapshot” approach” to the S&S analysis), *appeal pending*, 4th Cir. 14-2313. Given the above evidence of record, I determine that a float coal dust or methane ignition was reasonably likely to occur. I therefore conclude that a belt ignition hazard was reasonably likely to result in injuries, satisfying *Mathies*’ third element.

If a belt did catch fire, I have no doubt that burns and smoke inhalation injuries would be serious. The Commission has routinely considered smoke inhalation and burns to constitute reasonably serious injuries for the purpose of a *Mathies* analysis. See, e.g., *Big Ridge, Inc.*, 35 FMSHRC 1525, 1528–29 (June 2013) (affirming ALJ’s S&S determination where smoke inhalation and burn injuries were reasonably likely). Here, I credit the testimony of Inspectors Hall and Robinette that they would expect smoke inhalation injuries. (Tr. 89:2–10, 96:16–98:2, 217:5–8.) Thus, I determine that the Secretary has satisfied the fourth element of *Mathies*.

In view of the above, the Secretary has met his burden of proof on all four elements of *Mathies*. Accordingly, I conclude that MSHA appropriately designated Citation No. 8166774 as S&S.

### III. PENALTY

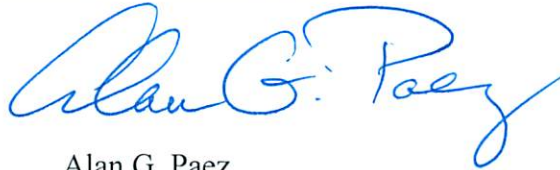
Although the Secretary proposes penalties, the Commission assesses penalties for violations of the Mine Act *de novo*. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000). When assessing a civil penalty, section 110(i) of the Mine Act requires that I consider six criteria, including: the operator’s history of previous violations, the appropriateness of the penalty relative to the size of the operator’s business, the operator’s negligence, the penalty’s effect on the operator’s ability to continue business, the gravity of the violation, and the demonstrated good faith of the operator in attempting to achieve rapid compliance. 30 U.S.C. § 820(i). The criteria are not required to be given equal weight. *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1979 (Aug. 2014).

In his decision, Judge Koutras found that Paramount’s history of previous violations was “not egregious.” 35 FMSHRC at 1165. He also noted the parties’ stipulation that Paramount was a large mine operator and that the proposed penalties would not adversely affect its ability to remain in business. *Id.* Further, he observed that Paramount’s abatement efforts to achieve compliance were on-going but not completed at the time the section 104(b) orders were issued on April 7, 2010. *Id.* Judge Koutras also agreed with the Secretary that Paramount acted with a moderate level of negligence. *Id.* Finally, he ordered Paramount to pay a civil penalty of \$1,400.00 in connection with Citation No. 8166773, affirmed Withdrawal Order No. 8166778, and vacated Order No. 8166777. *Id.* at 1166.

Because the Commission has not disturbed the above determinations, the only factor that I must revisit under section 110(i) is the gravity of Citation No. 8166774. Based on the evidence before me and in the context of continued mining operations, I have determined that Citation No. 8166774 was sufficiently dangerous to constitute an S&S violation. I therefore conclude that the Secretary's proposed penalty of \$1,569.00 is appropriate for Citation No. 8166774.

#### IV. ORDER

In light of the foregoing, it is hereby **ORDERED** that Citation No. 8166774 be **AFFIRMED** as written. Furthermore, Paramont is **ORDERED** to **PAY** a total civil penalty of \$1,569.00 within forty (40) days of the date of this decision on remand.



Alan G. Paez  
Administrative Law Judge

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