

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

721 19<sup>th</sup> STREET, SUITE 443  
DENVER, CO 80202-2500  
303-844-3577/FAX 303-844-5268

March 18, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2009-030
Petitioner	:	A.C. No. 11-03141-161545-01
	:	
v.	:	Docket No. LAKE 2009-193
	:	A.C. No. 11-03141-170102-01
	:	
	:	Docket No. LAKE 2009-405
MACH MINING, LLC,	:	A.C. No. 11-03141-178166-02
Respondent	:	
	:	Mach #1 Mine

**DECISION**

Appearances: Sarah T. White, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;  
Christopher D. Pence, Esq., Allen Guthrie & Thomas, PLLC, Charleston, West Virginia, for Respondent.

Before: Judge Manning

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Mach Mining, LLC (“Mach”) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The parties introduced testimony and documentary evidence at a hearing held in St. Louis, Missouri.

Mach operates an underground coal mine in Williamson County, Illinois. This mine employed an average 165 people in 2008 and 173 people in 2009. These cases involve 13 citations issued under section 104(a) of the Mine Act, but the parties settled 7 of the citations prior to the hearing.

**I. DISCUSSION WITH FINDINGS OF FACT  
CONCLUSIONS OF LAW**

**A. Citation Nos. 6674679 and 6674680**

On January 20, 2009, Inspector Bobby Jones issued Citation Nos. 6674679 and 6674680 under section 104(a) of the Mine Act, alleging violations of 30 C.F.R. § 75.400 as follows:

Accumulations of loose coal saturated with oil, coal float dust, oil, and grease were allowed to accumulate, in active workings, on the

Fletcher Roofbolting Machine Co. No. 1, located on the HG#3 (MMU-002) Active Section. The accumulations were found in the motor compartment, operator's controls compartment, on the frame and ranged in depth from a thin film to 2 inches in depth.

(Ex. 8). Citation No. 6674680 was identical to the previous citation except that it applied to the Fletcher Roofbolting Machine Co. No. 4. (Ex. 9). For both citations, the inspector determined that an injury was reasonably likely and that any injury could reasonably be expected to result in lost workdays or restricted duty. He determined the violations were significant and substantial ("S&S") and that the company's negligence was moderate. Section 75.400 provides that "[c]oal 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 diesel-powered and electric equipment therein." The Secretary proposes a penalty of \$1,530.00 for each citation.

Inspector Jones testified that accumulations of hydraulic oil and oil-soaked coal were on the No. 1 roofbolting machine, located in the working section area of Headgate 3. (Tr. 19, 20). The inspector determined that the violation was S&S because, if the condition were left uncorrected it would be reasonably likely it could lead to an accident or injury. (Tr. 25). Inspector Jones testified that the conditions surrounding Citation No. 6674680 were comparable to the conditions surrounding Citation No. 6674679. (Tr. 45-46, 47-48). He estimated that the machines were 300 to 400 feet apart at the time the citations were issued. (Tr. 46). When making his S&S determination, the inspector considered a multitude of factors including the location of the equipment and how it would affect the machine's operators. (Tr. 25-26). He testified that oxygen, fuel, and an ignition source ("triangle of fire") were all present, and that "moving parts, motors, [and] shafts" generate heat and can act as ignition sources. (Tr. 26). The inspector determined that the company's negligence was moderate because the section foreman, who is responsible for finding and abating such conditions, should have found the accumulations during an on-shift examination. (Tr. 27). The inspector was uncertain how long the condition had existed before the citation was issued, but estimated it had been there for a few days. (Tr. 28-29, 38). He testified that the accumulation could not have occurred over the course of only one shift. (Tr. 38).

During cross-examination, the inspector testified that the machine was not running at the time the citation was issued, but he believed it had previously been running with the accumulations present. (Tr. 33). Inspector Jones did not determine either the flashpoint of the accumulated material or the operating temperature of the equipment during the inspection. (Tr. 34-35). The machine is equipped with a fire suppression system, which provides coverage for the entire machine and must be manually activated by a miner in case of fire. (Tr. 35-36). Mach's roofbolters are also equipped with methane monitors that read 0.2 percent or less at the time of inspection. (Tr. 37).

Jim Henderson, the third-shift mine manager at the mine, testified on behalf of Mach. Henderson was present when Inspector Jones issued both citations. (Tr. 54). According to Henderson, the methane monitors on the roofbolters sound an alarm at 1 percent and shut down the machine at 2 percent. (Tr. 60). His testimony supported Inspector Jones's testimony regarding the methane levels in the cited area at the time of inspection, as well as the existence and function of the fire suppression systems. *Id.* Henderson stated that he did not see any evidence on any part of the

machine indicating an ignition was reasonably likely to occur. (Tr. 61, 62, 63). Henderson contradicted the inspector, testifying that the accumulations could have accrued over only one shift. (Tr. 64).

On cross-examination, Henderson testified that his interpretation of reasonably likely is “a much higher percentage of happening.” (Tr. 68). He also testified that the fire actuators, which activate the fire suppression system, are strategically located around the machines, making them easy for the operators to access in case of a fire. (Tr. 69).

Anthony Webb, the general manager at the mine, testified on behalf of Mach. When questioned about moving parts in the motor compartment that could potentially ignite accumulated material, Webb stated that:

There’s one coupling between the motor and the pump, and it is a plastic coupling, and it’s internal with a guard. . . . [T]he only other moving part is one pulley with a belt, and it is high enough up off the floor to where two inches of material would not contact that pulley or belt.

(Tr. 76). In preparation for the hearing, Webb measured the operating temperature of the pump compartment and operator’s compartment, two places where accumulations of hydraulic fluid are common, at about 140 to 145 degrees Fahrenheit. (Tr. 77). It is his understanding that this is consistent with the temperature at which most electric hydraulic equipment operates. *Id.* Webb also measured the operating temperature of the frame between 72 degrees and 76 degrees Fahrenheit. (Tr. 78). In comparison, the material safety data sheet (“MSDS”) for the hydraulic oil being used in the machines indicates a flashpoint of 450 degrees Fahrenheit and the MSDS for the grease referred to in the citations indicates a flashpoint of 480 degrees Fahrenheit. (Tr. 79, 80). The Mach #1 Mine is in the Herrin No. 6 seam where an accumulation of coal has a flashpoint of 380 degrees. (Tr. 81). Webb testified that it is the production shift’s responsibility to clean, grease, and service any equipment that needs to be taken care of. (Tr. 84). Webb’s testimony also supported Henderson’s description of the roofbolter’s fire suppression system. (Tr. 82-84). Webb agreed with Henderson’s opinion that an accident was not reasonably likely because there was no ignition source present. (Tr. 84). On cross-examination, Webb testified that the two inches of accumulation was not a large amount for one shift. (Tr. 92).

With respect to both citations, Mach stipulated that the accumulated materials existed in violation of § 75.400. Further, it agrees with the inspector’s determination that, if an ignition were to occur, any injury could reasonably be expected to result in lost workdays or restricted duty. (Tr. 49). However, Mach argues that the Secretary failed to establish the violations were S&S because she did not prove that an ignition was reasonably likely to occur. *Id.* Mach maintains that there was no evidence as to either the flashpoint of the cited material or the operating temperature of the machines. *Id.* Mach argues that the evidence it presented with regard to the material’s flashpoint and the equipment’s operating temperature leads to the conclusion that an accident or injury was unlikely to occur. (Tr. 310). Mach relies on *Highland Mining Co.*, 30 FMSHRC 1097 (Nov. 2008) (ALJ) and *AMAX Coal Co.*, 18 FMSHRC 1355 (Aug. 1996) to support the conclusion that

when the evidence demonstrates that there is no ignition source present for the accumulation, the citation should be non-S&S. (Tr. 310).

Mach also argues that the company's negligence should be reduced to low for Citation Nos. 6674679 and 6674680. (Tr. 311). This argument is based on the fact that the section foreman and the machine operators have to rely on their personal experience and judgment when determining if the machines need to be cleaned. *Id.*

A violation is properly designated S&S "if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (Apr. 1981). The Commission has elaborated on this standard, adding elements that the Secretary has the burden of proving. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984). The elements are:

- (1) [T]he 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.

*Id.* An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (August 1985). Finally, the Commission has held that, in determining if an ignition or explosion is reasonably likely, a judge must analyze a "confluence of factors," "including the nature of the mine involved." *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988).

There are several factors in this case that indicate it was not reasonably likely that the hazard contributed to by the violation would lead to an injury. Although there is conflicting testimony as to how long the accumulations existed before the citation was issued, I credit the testimony of Henderson and Webb that the accumulations could have developed during a single shift. Because the machines were not operating at the time the citation was issued, there is no indication the machines had been in operation with the accumulations present. Furthermore, there was no ignition source present. I credit Webb's testimony that he measured the operating temperature on various parts of the machines and found these numbers to be substantially lower than the flashpoints of the combustible accumulations. The machines were also in a safe operating condition, eliminating the possibility of ignition caused by hazardous wiring or other problems. According to Webb, assuming normal mining operations, the machines would have been cleaned by the time of the next production shift. Finally, the methane monitors used on the machines significantly decrease the likelihood of an accident and established that, at the time of inspection, methane levels in the area were low.

I have previously held that an operator's admitted violation of § 75.400 based on accumulations of loose coal, coal fines and float coal dust was not S&S because MSHA failed to prove it was reasonably likely that a fire would occur. *C.W. Mining Co.*, 17 FMSHRC 937, 943

(June 1995) (ALJ Manning). In *C.W. Mining*, material had accumulated in an area where a roof bolter was operating, and the Secretary argued the machine was a potential ignition source. *Id.* at 941. The Secretary did not explain how the machine could have ignited the combustible material and the evidence did not establish it was reasonably likely an injury causing accident would occur. *Id.* at 942-43. In *C.W. Mining*, it was also important that the accumulations would have been removed before mining resumed, thereby exposing miners to the hazard for only a short period of time. *Id.* at 943. Because of these factors, the citation was modified to delete the S&S designation.

In another case, the operator appealed a judge's decision that accumulations on the continuous miner were S&S. *AMAX*, at 1356. The operator argued that the judge failed to apply the proper test to determine if the violation was S&S. *Id.* at 1357. The operator's main contention was the judge applied the wrong legal standard under part three of the *Mathies* test, focusing on if an injury "could occur," rather than if it "will result." *Id.* The Commission agreed with the operator in this case and vacated the S&S determination. *Id.* at 1359. The Commission held that a judge should focus on if it is reasonably likely that the hazard contributed to *will* result in an injury or illness of a reasonably serious nature. *Id.* at 1358.

Based on these factors and Commission precedent discussed above, I find that, due to the lack of an ignition source, the Secretary did not establish that an ignition was reasonably likely to occur. The Secretary established that an injury was possible but not that an injury was reasonably likely. My findings in this regard are, of course, limited to the specific facts presented in this case. Therefore, the S&S determinations for Citation Nos. 6674679 and 6674680 are vacated. I find that the gravity of the violations was serious because, if an injury were to occur, it would likely result in lost workdays or restricted duty.

I find that the violations were the result of Mach's moderate negligence. Even though the roof bolting machines were not in use, the condition should have been detected during the on-shift examination. A penalty of \$1,000.00 is appropriate for each citation.

**B. Citation Nos. 6674879, 6674883, and 6674688**

On July 29, 2008, Inspector Edward Law issued Citation No. 6674879 under section 104(a) of the Mine Act, alleging a violation of 30 C.F.R. § 75.400 as follows:

Accumulations of combustible materials in the form of coal fines and loose coal are present at the slope belt tripper drive. The accumulations are in contact with the operating bottom slope belt. The accumulations are on the tripper drive framing and structure to the angle of repose for a distance of approximately 7 feet and underneath the tripper drive framing on both sides the same distance. The accumulations are approximately 7 to 18 inches in depth, 2 to 4 feet wide and 3 ½ to 4 [½] feet in length at the wiper contact area. The slope belt was removed from service by management until the contact areas were cleared.

(Ex. 4). The inspector determined that an injury was reasonably likely and that any injury could reasonably be expected to result in lost workdays or restricted duty. He determined the violation was S&S and that the company's negligence was moderate. The Secretary proposes a penalty of \$634.00 for this citation.

Inspector Law testified that he issued the citation because there were extensive accumulations of combustible materials on the upslope side of the tripper drive. (Tr. 203, 204). The inspector stated that the belt was running in coal and accumulations, creating a frictional heat source. (Tr. 207). The cited condition was adjacent to a frequently used travelway. (Tr. 208). The inspector testified that he believed the condition had existed for two to three shifts. (Tr. 210). The inspector also believed that under normal mining conditions, if this condition were allowed to continue, it would be reasonably likely a fire would occur. (Tr. 220).

On cross-examination, Inspector Law testified about factors that limited exposure to the hazard. There are carbon monoxide ("CO") monitors that detect carbon monoxide and, in the event of an increase in the CO level, the control center on the surface is alerted. (Tr. 222). There was also a fire suppression system and hose outlets at the drive, about ten feet away from the wiper. (Tr. 223). The inspector testified that the air at the cited location was flowing outby, so in the event of a fire smoke would flow directly to the surface. (Tr. 224). In this event, miners would be blocked from their normal exit thereby requiring them to use an escape capsule in a distinct air course. (Tr. 241, 243). The inspector agreed that accumulations on a mine floor, such as the one cited, can occur quickly under the right circumstances. (Tr. 228). However, he testified that the coal fines on the railing and the packed coal could not have accumulated between the preshift examination and the time he issued the citation. (Tr. 231). He stated that it is impossible for the belt to rub the coal fines that were located on the railing. *Id.* However, the inspector testified that, at the time of inspection, the belt running on a roller above the tripper drive frame was in contact with coal accumulations. (Tr. 232; Ex. M-13). According to the inspector, the coal was dry where it was rubbing against the belt but he was unsure if other parts of the accumulation were wet or dry. (Tr. 226).

Chris England, a shift manager at the mine, testified on behalf of Mach. He testified that the slope where the belt is located is ventilated with neutral air that travels outby. (Tr. 246). England accompanied Inspector Law when the citation was issued. During this time he observed wet coal piled up to the bottom of the belt. (Tr. 248, 250). Because of the coal's wet condition, it was England's belief that the accumulations were the result of a washback. (Tr. 251). Washback happens when water-saturated coal slides down the slope belt to the area just outby the tripper drive. All the coal extracted at the mine exits the mine on this slope belt, which is at an angle. Because the slope belt exits the mine, rainwater can also run down the belt. The saturated material typically spills off just above the tripper drive, carrying coal fines and loose coal along with it. *Id.* England testified this accumulation looked "exactly" the same as washback accumulations he has seen in the past. (Tr. 252). Furthermore, England believes this condition could have occurred in a "split second," and it is his opinion this accumulation had not been there long. (Tr. 256, 260). England contradicted the inspector's testimony with regard to the roller. (Tr. 253). According to England, the roller in question no longer supported the belt after a new scraper was installed prior to the time this inspection took place. *Id.* England also testified that the fire suppression system would provide sufficient coverage to the cited area. (Tr. 257-59; Ex. M-10).

Dave Adams, an examiner at the mine, testified on behalf of Mach. Adams was responsible for examining the cited area on July 29. (Tr. 269; Ex. M-14). Adams testified that the cited accumulation was not present at the time of his preshift examination around 6:00 a.m. (Tr. 273). Adams also testified that accumulations such as this one can occur in a short amount of time. (Tr. 272). On cross-examination, Adams stated the tripper drive is well lit with the result that accumulations are easy to identify. (Tr. 276). He further testified that he would not overlook an accumulation as extensive as the one described in Inspector Law's citation. (Tr. 274-75).

On July 29, 2008, Inspector Law issued Citation No. 6674883 under section 104(a) of the Mine Act, alleging a violation of 30 C.F.R. § 75.360(a)(1) as follows:

A[n] inadequate preshift exam of the slope belt was made on the midnight (11 PM to 7 AM) shift, 7/29/2008. A hazardous condition existed on the slope belt at the tripper drive where an accumulation of combustible materials (coal fines and loose coal) were in contact with the operating belt. This area was on the travelway side of the belt. There was no record of this condition in the examiner books.

(Ex. 6). The inspector determined that an injury was reasonably likely and that any injury could reasonably be expected to result in lost workdays or restricted duty. He determined the violation was S&S and that the company's negligence was moderate. Section 75.360(a)(1) provides that "[e]xcept as provided in paragraph (a)(2) of this section, a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground." The Secretary proposes a penalty of \$634.00 for this citation.

Inspector Law testified that there was an inadequate preshift examination because the preshift examiner did not identify the accumulated combustible material that is the subject of Citation No. 6674879. (Tr. 215; Ex. M-14). Although an examination was performed, the cited hazard was not listed and the records indicated the mine was safe. (Tr. 217; Ex. M-14). The inspector designated the citation S&S because it was written in conjunction with Citation No. 6674879. (Tr. 219). The inspector testified that this citation also should have been marked high negligence, instead of moderate. *Id.* On cross-examination, Inspector Law testified that he did not consult with the preshift examiner to discuss the condition of the mine. (Tr. 236). However, inspectors are not required to consult with examiners before issuing a citation under this section. (Tr. 238).

On January 26, 2009, Inspector Jones issued Citation No. 6674688 under section 104(a) of the Mine Act, alleging a violation of 30 C.F.R. § 75.400 as follows:

Accumulations of rock, loose coal and coal float dust were allowed to accumulate under the HG#3 tripper drive and on both sides of the belt for a distance of 30 feet inby the drive. The accumulations measured approximately 2 inches to 7 inches deep, 2 feet to 6 feet wide, and 50 feet long. This condition existed from the outby end of the drive located at 80 cross cut in the #2 entry (alternate escapeway). Accumulations were also observed from 16 to 18 cross cut on the back side of the belt. These accumulations ranged from 2 inches to 6 inches in depth and 2 feet to 3 feet wide.

(Ex. 11). The inspector determined that an injury was reasonably likely and that any injury could be reasonably expected to result in lost workdays or restricted duty. He determined the violation was S&S and that the company's negligence was moderate. The Secretary proposes a penalty of \$5,503.00 for this citation.

Inspector Jones testified that he issued this citation because accumulations between two and seven inches deep of rock, loose coal, and coal float dust were under the tripper drive extending outby for some distance. (Tr. 280, 281). He further testified that the belt was making contact with the accumulations. (Tr. 282). The inspector stated that he was unsure how long the condition had existed prior to issuing the citation. (Tr. 283). The inspector determined that the company's negligence was moderate because the condition should have been observed during a preshift examination. *Id.*

On cross-examination, the inspector testified that at the time of inspection, he mistakenly believed the air was traveling inby. (Tr. 285-86). In the inspector's opinion, the fact that the air was actually traveling outby would reduce the number of miners affected from ten to one. (Tr. 286). The inspector testified that the area was well rock-dusted and equipped with atmospheric monitoring devices, a fire suppression system, and firefighting equipment. (Tr. 286-87). Although it is the inspector's opinion that the accumulation existed during the preshift examination, he could not be certain. (Tr. 302).



England testified that he accompanied Inspector Jones at the time this citation was issued. (Tr. 292). He confirmed the inspector's testimony that the area was well rock-dusted. (Tr. 293). England also testified that the recovery rate in this area of the mine is a maximum of 50 percent. (Tr. 294).<sup>1</sup> Adams testified that he inspected the area around 4:15 a.m., at which time the Headgate 3 tripper drive area was idle, and he did not observe any hazards in the area. (Tr. 297, 298-99; Ex. M-12e).

The Secretary emphasizes that Mach has a history of § 75.400 violations. (Tr. 306). Furthermore, the Secretary argues it was reasonably likely that the accumulations could have caused fires leading to serious injuries because the triangle of fire was present in all cases. *Id.* The Secretary argues that because inspectors have discussed accumulation issues with Mach many times, Mach had notice of the problem. (Tr. 308). The Secretary stipulated that the number of miners affected by Citation No. 6674688 should be reduced from ten to one. (Tr. 307). The Secretary also points out that § 75.360 does not require the inspector to consult with the preshift examiner before issuing a citation for an inadequate preshift examination. (Tr. 308).

Mach emphasizes the fact that the cited areas are protected by atmospheric monitoring, fire suppression, and firefighting equipment. (Tr. 313). Furthermore, neutral air was traveling outby in both areas. *Id.* Mach argues that the credible testimony of Adams, who said that the accumulations were not present during his preshift examination, should be highly probative. (Tr. 315, 316). Mach also argues that, because the material was wet, it was likely fresh. (Tr. 315). Although the inspectors testified that they believed the accumulations must have been present during the preshift examination based on their experience, Mach believes that the evidence it presented established this type of accumulation can occur quickly. (Tr. 314).

With specific regard to the accumulation citation at the Headgate 3 tripper drive, Mach argues that the 50 percent recovery rate and Jones's testimony that the area was well rock-dusted should convince the Commission to reduce the citation to non-S&S. (Tr. 313-14). Regarding the slope belt tripper drive, the air only had to travel 1800 feet to the surface. (Tr. 313). Mach maintains it did not violate § 75.400 because this type of spillage can occur quickly and is routine under normal mining conditions. (Tr. 314, 315). Alternatively, if a violation of § 75.400 is found, Mach argues that it was non-S&S based on its location near the surface, the manner in which it was ventilated, and the presence of atmospheric monitoring, fire suppression, and firefighting equipment. *Id.*

Finally, Mach argues that the negligence determination for both of the accumulation citations should be none because there was no evidence presented to indicate the accumulations were present at the time of the preshift examination. (Tr. 315-16). Furthermore, Adams testified the material was not present during his examination of the area. (Tr. 273, 297). Mach relies on *Enlow Fork Mining Co.*, 19 FMSHRC 5 (Jan. 1997) to support the conclusion that if a judge finds an

---

<sup>1</sup> In this context, a recovery rate of 50% means that half of the material mined and transported on conveyor belts at the mine is non-combustible rock.

examiner credibly testified that the cited condition was not present at the time of examination, the accompanying examination citation should be vacated. (Tr. 316).

In *Enlow Fork*, the Commission upheld a judge's dismissal of a citation for an inadequate preshift examination based on accumulations of loose coal and float coal dust in a longwall section. *Enlow Fork*, at 15. The judge made a credibility determination in favor of the operator's preshift examiner who testified that the accumulations were not present during his preshift examination. *Id.* at 14-15. However, in the same case, the Commission affirmed the judge's finding that the operator conducted an inadequate preshift examination based on coal dust and loose coal at a belt feeder. *Id.* at 18. For this citation, the judge made a credibility determination in favor of the MSHA inspector who testified the accumulations must have been present during the preshift examination based on the accumulation's heavy concentration. *Id.* at 17, 18.

In a case with similar factual circumstances to the case at bar, the Commission upheld an S&S designation for a citation for a violation of § 75.400. *AMAX Coal Co.*, 19 FMSHRC 846, 850 (May 1997). The Commission was not persuaded by the operator's argument that the presence of fire detection systems, self-contained rescuers, and firefighting equipment in the cited area minimized the risk of injury to miners from a fire. *Id.* Furthermore, the operator in *AMAX* had an extensive history of accumulation violations and had been counseled by MSHA numerous times regarding this problem. *Id.* at 847. However, *AMAX* is distinguishable in several key aspects. First, the cited accumulations were caused by spillage at the intersection of two major belts and were more extensive than the accumulations at issue here. *Id.* at 849. In fact, they were characterized as a "major spill" by the company's own shift manager. *Id.* Second, the judge found that the accumulations had built up over several days. *Id.* at 847. Third, it was undisputed that a 15 foot section of the main belt was running in contact with packed, dry coal and loose coal. *Id.* at 849. Finally, it was not disputed that the surface area of the accumulation was dry. *Id.*

In another case upholding an S&S designation for a § 75.400 violation, the Seventh Circuit Court of Appeals stated that the presence of fire safety measures "does not mean that fires do not pose a serious safety risk to miners. Indeed, the precautions are presumably in place (as MSHA regulations require them to be) precisely because of the significant dangers associated with coal mine fires." *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995). However, *Buck Creek* is also distinguishable from the case at bar. In *Buck Creek*, the inspector issued a citation because a tail roller was turning in black coal fines, the color indicating to him "that the accumulation was not mixed with rock dust and therefore not of the proper incombustible content." *Id.* at 135. In the MSHA inspector's opinion, the cited accumulations had been present for at least three shifts, and the judge found they had been present for at least one prior shift. *Id.* at 136. Furthermore, the judge made a credibility determination in favor of the inspector who testified "that in the event of a fire, smoke and gas inhalation by miners in the area would cause a reasonably serious injury requiring medical attention." *Id.* After stating that "credibility determinations reside in the province of the ALJ," the court held the judge did not abuse his discretion in crediting the testimony of the MSHA inspector. *Id.*

I credit the testimony of Adams who stated that accumulations described by the inspector were not present during his preshift examinations. I also credit the testimony of England, supported by Adams, who stated that these types of accumulations can occur over a short period of time. Together, the testimony of Adams and England sustain a reasonable probability that the accumulations were not present during the preshift examination. For these reasons, Citation No. 6674883 alleging a violation of section 75.360 is vacated.

With regard to Citation Nos. 6674879 and 6674688, I find that the Secretary has established the violations of § 75.400. However, I also find that the violations were not S&S. The Secretary did not establish that, assuming continuing normal mining operations, the hazard contributed to by the violations would have been reasonably likely to result in an injury to a miner. I find, for several reasons, that miners were not exposed to the hazard that existed on the slope belt. I credit the testimony of Mach's witnesses that the material was wet and that the roller of concern was no longer in use. If the accumulations did begin to smolder, the CO monitoring system and the sprinkler system would have doused the area before a significant hazard was created. The cited area was near the surface and any smoke would have traveled away from the mine workings. I also credit the testimony of the company's witnesses that the material was wet and could have accumulated over a short period of time. I reach the same conclusion with respect to the accumulation at the HG #3 tripper drive for similar reasons. As stated by England, the recovery rate at the mine is no more than 50 percent, which means that at least half of the accumulated material was non-combustible rock. The area was well rock-dusted, CO monitors were in the area, and water sprays were also present. The only potential ignition source was the belt itself and I find that it was unlikely that the belt would generate enough heat to ignite the accumulation. Finally, the material could have accumulated in a relatively short period of time. I find that the gravity of both violations was serious because, if an injury were to occur, it would likely result in lost workdays or restricted duty.

I find that Mach's negligence was moderate. The mine has a history of accumulation violations and it had been put on notice that greater efforts must be made to eliminate accumulations. A penalty of \$500.00 is appropriate for Citation No. 6674879 and a penalty of \$1,000 is appropriate for Citation No. 6674688.

### **C. Citation No. 6674860**

On July 17, 2008, Inspector Edward Law issued Citation No. 6674860 under section 104(a) of the Mine Act, alleging a violation of 30 C.F.R. § 75.1722(a) as follows:

The DBT company #2 ratio feeder located in the #2 Headgate, 003-MMU working section cross cut #112 has the top cover over the chunk breaker missing exposing miners to moving machine parts. The missing cover is approximately 3 feet wide by 4 feet long, 24 inches in from the walkway and 4 and ½ feet up from the mine floor. There is also a side cover plate that is out of position exposing a miner to moving machine parts approximately 7 inches by 7 inches.

The exposed revolving chunk breaker pick points are within easy reach of a working miner. The area was flagged off to prevent travel.

(Ex. 2). The inspector determined that an injury was reasonably likely and that any injury could reasonably be expected to be permanently disabling. He determined the violation was S&S and that the company's negligence was moderate. Section 75.1722(a) provides that "[g]ears; 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." The Secretary proposes a penalty of \$946.00 for this citation.

Inspector Law testified that the offset side cover was four and a half feet up from the mine floor. (Tr. 101). The opening exposed miners on the rib side of the feeder to moving parts 24 inches away. *Id.* The inspector testified that there was enough room for a miner to travel between the exposed area and the rib. (Tr. 102). Although he did not observe any miners working in the area, he testified that the presence of shovels and grease guns were obvious signs people had been working in the area. (Tr. 104, 124). During the inspection, Mach management flagged the area and blocked the entrance and exit. (Tr. 105).

On cross-examination, Inspector Law testified that in order for an area to be citable under § 75.1722(a) it must satisfy a two-part test. (Tr. 109). Moving parts must be guarded if they might be contacted by persons *and* might cause injury to those persons. *Id.* The feeder that was cited has three different locations where shuttle cars can dump coal onto a moving conveyor chain. (Tr. 110). MSHA regulations do not require these areas to be guarded because in normal mining operations a miner would not work in this area. (Tr. 111-12). This particular feeder is also mounted on cats, allowing it to be moved every third shift as mining advances inby. (Tr. 115). Furthermore, the chunk breaker on this feeder is offset to the rib side of the machine. (Tr. 119, 121-22; Ex. M-7). The inspector's testimony is unclear regarding the distance from the uncovered chunk breaker to the rib. He first testified that the distance "was well more than two feet." He later stated that there were areas that were less than two feet but he could walk through the area. (Tr. 123, 124). The inspector further testified that it is possible that the evidence he observed of workers in the area could have been there before the feeder was moved inby. (Tr. 125). Finally, the inspector testified that he does not believe the cited opening would expose a miner on the walkway side of the machine to moving parts. (Tr. 127; Ex. M-5, M-7).

Webb testified that the feeder is moved on the third shift a maximum of once a day. (Tr. 136). The tram is energized during the move but the conveyor chain and chunk breaker do not run. *Id.* Webb also testified that the cited feeder was purchased without a top guard over the chunk breaker and MSHA approved of the machine in that condition. (Tr. 138, 150). The cover was added only to control dust generated from the chunk breaker, not to protect miners from moving machine parts. (Tr. 138-39). To prepare for the hearing, Webb measured a distance of four feet from the walkway side of the machine to the missing cover. (Tr. 141; Ex. M-2, M-4). It is Mach's policy that miners may not access the rib side of the machine while the machine is operating. Webb testified that he has never seen a miner in violation of this policy under normal mining conditions. (Tr. 140). Webb's testimony also helped clarify the distance between the cited area of the machine

and the rib. He testified that the cat track on the machine is adjacent to the chunk breaker and juts out toward the rib, so anyone walking in this area would be forced to walk sideways. (*See* Tr. 144-45). Past the cat track and chunk breaker the space opens up to about two feet allowing a person to walk normally. *Id.*

England testified that typically ten or eleven men work on one section at a time at the mine. (Tr. 173). Of these men, nine are operating equipment in by the feeder. *Id.* England testified that, during normal mining operations, there would be no reason for the other two miners to work in between the rib and the feeder. (Tr. 174). This particular feeder is different than most feeders in the mining industry. (Tr. 175). First, the chunk breaker on this feeder is offset from the center away from the walkway side so that the feeder can fit tighter against the rib. *Id.* Second, all the feeder's controls are on the walkway side of the machine. *Id.* Finally, the tailpiece is mounted directly on the feeder. (Tr. 179). England stated that, during mining operations, miners would only be on the walkway side of the feeder and it is against company policy to work on the rib side. (Tr. 178). England's testimony supported Webb's testimony regarding when the feeder is moved. (Tr. 180). He added that it is impossible to operate the caterpillars to move the feeder forward while operating the chunk breaker at the same time. (Tr. 181). Based on his measurements, the cited opening is approximately four feet from the walkway. (Tr. 195; Ex. M- 2). England also testified that he would expect spillage around the dumping point and tailpiece of the feeder, but there has never been spillage on the off side of this feeder at the chunk breaker. (Tr. 199-200).

Mach requests that Citation No. 6674860 be vacated because it does not believe it violated § 75.1722(a). (Tr. 311). Mach notes that the missing cover's function was to control dust, not to prevent miners from contacting moving parts. (Tr. 312). Mach argues that the unique nature of the modified feeder prevents miners from contacting moving parts. *Id.* Furthermore, it is Mach's policy that miners do not work on the rib side of the cited feeder when the chunk breaker is operating, and no evidence was presented to permit the conclusion that this policy had been violated or that it would ever be violated. *Id.* Mach also argues that because the unguarded chain conveyor was not cited, the coal breaker in the feeder should also not have been cited. (Tr. 311-12). Mach relies on *Kingwood Mining*, 30 FMSHRC 943, 948 (Sept. 2008) to support the conclusion that a missing cover plate only marginally increases a feeder's inherent danger. (Tr. 312).

I credit the testimony of Webb and England that, under continued normal mining conditions, a miner would not be on the rib side of the feeder while the chunk breaker was operating. Therefore, the missing top cover and the cover on the rib side of the machine did not expose miners to the hazard of moving machine parts. Furthermore, because the chunk breaker is offset from the center of the machine, a miner could get no closer than four feet from the missing cover on the walkway side. It would be completely impossible for a miner to come into contact with moving machine parts from the walkway side. As a consequence, the Secretary did not establish a violation of section 75.1722(a). Accordingly, the citation is vacated.

## **II. APPROPRIATE CIVIL PENALTIES**

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. Mach had 122 paid violations at the Mach #1 Mine during the 15 months

preceding July 16, 2008. Mach is a large operator. The mine employed about 170 people at the time of the subject inspections. The violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect on Mach's ability to continue in business. The gravity and negligence findings are set forth above.

### III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
LAKE 2009-030		
6674860	75.1722(a)	Vacated
6674879	75.400	\$500.00
LAKE 2009-193		
6674883	75.360	Vacated
LAKE 2009-405		
6674680	75.400	1,000.00
6674679	75.400	1,000.00
6674688	75.400	1,000.00
TOTAL PENALTY		\$3,500.00 <sup>2</sup>

For the reasons set forth above, the citations are **MODIFIED** and **VACATED** as set forth above. Mach Mining, LLC is **ORDERED TO PAY** the Secretary of Labor the sum of \$3,500.00

---

<sup>2</sup> On February 24, 2011, I granted the Secretary's motion for partial settlement and Mach Mining was ordered to pay penalties totaling \$6,409.00 for the seven settled citations in these dockets.

within 30 days of the date of this decision.<sup>3</sup> Upon payment of the penalty, these proceedings are **DISMISSED**.

Richard W. Manning  
Administrative Law Judge

Distribution:

Sarah T. White, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 800, Denver, CO 80202-5708 (Certified Mail)

Christopher D. Pence, Esq., Allen, Guthrie & Thomas PLLC, P.O. Box 3394, Charleston, WV 25333-3394 (Certified Mail)

RWM

---

<sup>3</sup> Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.