

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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April 8, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 98-153
Petitioner	:	A.C. No. 41-03164-03542
v.	:	
	:	Jewett Mine
NORTHWESTERN RESOURCES,	:	
Respondent	:	

DECISION

Appearances: Ned Zamarripa, Conference and Litigation Representative, Mine Safety and Health Administration, U.S. Department of Labor, Denver, Colorado, for the Petitioner;
Charles C. High, Jr., Esq., Kemp, Smith, Duncan & Hammond, P.C., El Paso, Texas, for the Respondent.

Before: Judge Feldman

This proceeding concerns a petition for assessment of civil penalty filed by the Secretary of Labor against Northwestern Resources (the respondent) pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 820(a). The petition seeks to impose a total civil penalty of \$734.00 for seven alleged violations of the mandatory safety standards in 30 C.F.R. Part 77 of the Secretary's regulations governing surface coal mines. Three of the seven cited conditions were designated as significant and substantial (S&S).¹ These matters were heard on January 20 and January 21, 1999, in Huntsville, Texas.

At the hearing, the parties agreed to settle one of the citations and they waived the filing of post-hearing briefs with respect to three of the citations so that a bench decision could be entered with respect to those citations. The settled citation and bench decisions, with non-substantive edits, will be addressed in the initial portion of this decision.

¹ A violation of a mandatory safety standard is properly characterized as S&S if it is reasonably likely that the hazard contributed to by the violation will result in an event, *i.e.*, an accident, resulting in serious injury. *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984).

The parties have filed post-hearing proposed findings and replies with respect to the remaining citations that are contested by the respondent. These citations involve the issue of the circumstances under which deposits of hydraulic or lubricating oils on engines, transmissions and frames of equipment operating at a surface mine constitute a prohibited accumulation of combustible materials under section 77.1104, 30 C.F.R. § 77.1104, of the Secretary's mandatory safety standards.²

I. Pertinent Case Law and Penalty Criteria

This decision applies the Commission's standards with respect to what constitutes an S&S violation. A violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation 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 standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to [by the violation] 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).

In *United States Steel Mining, Inc.*, 7 FMSHRC 1125, 1129, (August 1985), the Commission explained its *Mathies* criteria as follows:

We have explained further 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.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the

² As discussed *infra*, the Secretary concedes that petroleum deposits in engine compartments and on transmissions are unavoidable consequences of operating internal combustion equipment, and, that not all such deposits constitute violations of section 77.1104.

cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Company, Inc.*, 6 FMSHRC 1866, 1868 (August 1984).

The Commission subsequently reasserted its prior determinations that as part of any “S&S” finding, the Secretary must prove the reasonable likelihood of an injury occurring as a result of the hazard contributed to by the cited violative condition or practice. *Peabody Coal Company*, 17 FMSHRC 508 (April 1995); *Jim Walter Resources, Inc.*, 18 FMSHRC 508 (April 1996).

This decision also applies the statutory civil penalty criteria in section 110(i) of the Act, 30 U.S.C. § 820(i), to determine the appropriate civil penalty to be assessed. Section 110(i) provides, in pertinent part, in assessing civil penalties:

. . . the Commission shall consider the operator’s history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator’s ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

The parties stipulated that the respondent is a large operator that is subject to the jurisdiction of the Mine Act and that the small civil penalty sought to be imposed by the Secretary will not affect the respondent’s ability to continue its business. The evidence further reflects that Northwestern abated the cited conditions in a timely manner. (Joint Ex. 1). Northwestern does not have a significant history of previous violations in that, during the two years preceding the issuance of the citations in issue, Northwestern was cited for only 14 violations, ten of which were designated as non S&S. (Ex G-8).

II. Findings of Fact and Bench Decisions

This matter concerns seven citations that were issued as a result of a regular Triple A inspection that was conducted during January and February 1998 by Mine Safety and Health Administration (MSHA) Inspector Alfonso Castaneda, Jr., at Northwestern’s Jewett Mine, a surface coal facility located in Leon County, Texas. Although all of the citations were initially characterized as S&S, three of the citations were subsequently modified to delete the S&S designation following MSHA Health and Safety Conferences conducted on March 31 and April 28, 1998.

a. Citation No. 7599225

Citation No. 7599225 was issued by Inspector Castaneda on February 12, 1998, for accumulations of loose coal and fine coal dust, prohibited by section 77.1104, that were located

under the No. 1 Belt that transports coal from the coal hopper to the coal transfer tower. The cited condition was designated as S&S and the Secretary proposed a civil penalty of \$178.00. At the hearing, Northwestern agreed to accept the citation as issued, and it agreed to pay the \$178.00 proposed civil penalty. (Tr. 340). Accordingly, the parties' settlement of Citation No. 7599225 was approved on the record and **Citation No. 7599225 shall be affirmed.**

b. Citation No. 7599226

Castaneda testified that, during the course of his inspection, he asked miners if they had any safety concerns. A miner expressed concern about the adequacy of the lights around the No. 28 dragline shoes. Consequently, Castaneda performed an evening shift light check at the No. 28 dragline. Each dragline has two sets of "star wars" type shoes that move approximately eight feet per step when it is necessary to maneuver the dragline. Castaneda observed a shadow area adjacent to the dragline shoes that he concluded was not adequately illuminated by the dragline lights. However, Castaneda did not take any objective measurements of the illumination in the area. (Tr. 39). Castaneda stated the shoe area is the location where the dragline oiler mounts and dismounts the dragline. Castaneda testified the oiler would have to step down a distance of approximately six inches to two feet depending on the terrain. Castaneda concluded it was reasonably likely that the oiler would sustain a serious slip and fall injury. Consequently, he issued Citation No. 7599226 alleging an S&S violation of the mandatory safety standard in section 77.207, 30 C.F.R. § 77.207. This mandatory standard requires, in pertinent part, "illumination sufficient to provide safe working conditions."

In defense of the citation, Northwestern elicited contradictory testimony from Castaneda with regard to whether Castaneda believed the illumination was inadequate or whether he was relying on the miner's complaint as the basis for issuing the citation. Moreover, Castaneda conceded that Northwestern had increased the wattage of the dragline lights from 400 watts each to 1,000 watts, and that Northwestern had added additional lights to the dragline to increase the number of lights from those that were initially installed.

The Secretary did not call any miners to testify that the illumination was inadequate. However, Northwestern called employee Terry Mosely, a dragline oiler, who opined that the light around the No. 28 dragline shoes was adequate. (Tr. 74). Mosely testified the lighting problem at the No. 28 dragline primarily was caused by lights on the adjacent No. 27 dragline that was operating in the same pit. Mosely testified the lights from the No. 27 dragline were "blinding" personnel at the No. 28 dragline.

At the hearing, the following bench decision was entered with respect to Citation No. 7599226:

Citation No. 7599226, which cites a violation of section 77.207, states:

The dragline 28, Marion 8750, outside illumination was not sufficient to provide safe working conditions. The shadow cast alongside the propel, shoe walkway, and on the ground adjacent to the propel shoes made it difficult for a person to safely walk and mount the machine. The machine was in use at the D pit.

Section 77.207 provides:

Illumination sufficient to provide safe working conditions shall be provided in surface structures, paths, walkways, stairways, switch panels, loading and dumping sites and working areas.

Thus, the operative phrase is “illumination sufficient to provide safe working conditions.” Whether the illumination required by the mandatory standard is adequate to provide safe working conditions must be viewed in the context of the circumstances upon which personnel will be working in the area being illuminated. Here, the concern is for the oiler who is called upon to mount and dismount the dragline via a ladder of several steps that is installed adjacent to the shoes of the dragline. The uncontroverted testimony is the distance of descent from the bottom of the ladder to the surface varies between six inches and two feet depending on the terrain.

The dragline’s initial 400 watt lights installed on the dragline were replaced with 1,000 watt lights. In addition, additional lights were installed. Although there was reference made to Terry Mason, a dragline oiler who reportedly complained to Castaneda about the lights, Mason was not called by the Secretary as a witness in support of the citation. On the other hand, the respondent presented testimony from Terry Mosely, another oiler employed by Northwestern, who opined the lighting was adequate.

The adequacy of lighting, in the absence of objective lumen measurements, is subjective. Although reasonable people may differ with regard to what constitutes adequate lighting conditions, Castaneda’s opinion is unsupported by, and outweighed by Moseley’s testimony. Given the Secretary’s burden of proving the fact of a violation, the evidence is inadequate to support Citation No. 7599226. **Accordingly, Citation No. 7599226 shall be vacated.** (Tr. 342-45).

c. Citation No. 7599212

During the course of his inspection, Castaneda observed Northwestern’s D106 Komatsu bulldozer in the D pit area. The bulldozer had a fire suppression system with discharge hoses and nozzles on the right and left sides of the dozer. The discharge hoses were connected to metal canisters containing fire suppression chemicals that were located on the right and left sides of the dozer. Castaneda noted the actuating line was disconnected from the right canister, thus disabling the right side discharge hoses and nozzles. Castaneda recalled the threads on the disengaged connection fitting were rusted which gave him reason to believe this condition had existed for a considerable period of time.

Consequently, Castaneda issued Citation No. 7599212 citing an alleged violation of section 77.1110, 30 C.F.R. § 77.1110. This mandatory standard requires firefighting equipment to be continuously maintained in a usable and operative condition. Although the cited condition was initially designated as S&S, it was subsequently modified to a non S&S citation.

The respondent does not dispute that the right actuator was disconnected and that the system was not fully functional. However, the respondent asserts that the right side canister system was redundant in that the left side canister and hoses, alone, constituted an effective fire suppression system. In addition, the respondent argues that the actuator connection had not been repaired because it recently had become disconnected as evidenced by the fact that the malfunction had not been noted in the preshift book. Thus, the respondent asserts, somewhat inconsistently, that although it believed the right side discharge hoses to be superfluous, it would have repaired the condition immediately had it been aware of the situation. Finally, the respondent argues that fire extinguishers, which were available to the dozer operator, are sufficient to satisfy the cited mandatory standard.

The following bench decision was issued for Citation No. 7599212:

Citation No. 7599212, citing a violation of section 77.1110, states:

The fire suppression system provided on the Komatsu bulldozer, Model D375A, Company No. 106, was not maintained in an operative condition. The actuator line had come loose from the actuating cartridge. The bulldozer was in use at the D Pit.

Section 77.1110 requires that “firefighting equipment shall be continuously maintained in usable and operative condition.” I am sensitive to the respondent’s argument that the cited fire suppression system was not mandatory and that, ordinarily, fire extinguishers are adequate. However, once the respondent took it upon itself to install this fire suppression system, it had a continuing duty to maintain it. It is undisputed that, while the system was operative on the left side, it was inoperative on the right side. Whether or not the left side alone was sufficient to extinguish a fire, the malfunction on the right side undoubtedly would cause a diminution in effectiveness.

Turning to the respondent’s assertion that the condition had just occurred, notwithstanding Castaneda’s testimony concerning the corrosion on the actuator connection, the Commission has noted the failure to note a condition in a preshift book does not establish the condition occurred after the shift began. *See Peabody Coal Company* 14 FMSHRC 1258, 1262 (August 1992) *citing Eastern Associated Coal Company*, 13 FMSHRC 178, 187 (February 1991). To the contrary, the condition may have been overlooked, or, it may not have been considered

hazardous in which case it would continue to be excluded from the preshift notations.

In any event, the evidence supports the cited violation. **Accordingly, Citation No. 7599212 is affirmed, and the \$50.00 civil penalty proposed by the Secretary for this non S&S condition shall be assessed for this citation.** (Tr. 345-47).

d. Citation No. 7599214

On January 28, 1998, Castaneda inspected the auxiliary room of the Caterpillar backhoe, Model LS01. Although this area is referred to as “a room” it is more accurate to describe it as a very small tool shed that is located under the operator’s compartment. (See photographs admitted as Exs. R-9A-9F). The area is accessed from a door that is located to the left of a ladder that is affixed to the side of the backhoe. The ladder is used to climb from the surface onto the backhoe catwalk structure. The dimensions of the subject “room” are 49 inches wide by 50 inches long. Upon opening the door to this area, Castaneda observed tool boxes, wrenches, sledge hammers and various machine parts lying on the floor.

Based on his observations, Castaneda issued Citation No. 7599214 citing the respondent for an alleged violation of section 77.208(a), 30 C.F.R. § 77.208(a), that provides, “materials shall be stored and stacked in a manner which minimizes stumbling or fall of material hazards.” Although the citation was issued as S&S, it was subsequently modified to delete the S&S designation as a result of a Health and Safety Conference after MSHA conceded the cited area “was not a high traffic area” where exposure to serious injury was likely. Indeed.

At the hearing, the following bench decision was issued with respect to Citation No. 7599214:

The subject area is approximately 4 feet by 4 feet. The cited standard requires that materials be stored and stacked in a manner so as to minimize stumbling and falling. The standard must be reasonably interpreted to require that tools and other materials be kept in a corner or along a wall so that mine personnel can traverse an area without tripping and falling. However, this area, which is analogous to a truck bed where tools are stored, is not a walk through area as the entire area can be reached by standing in place. Thus, MSHA’s characterization of this space as “not a high traffic area” is disingenuous in that it is not a traffic area at all.

To determine if a broadly worded mandatory standard applies to a given factual situation the Commission applies the reasonably prudent person test. *Ideal Cement Company*, 12 FMSHRC 2409, 2416 (November 1990). A reasonably prudent person familiar with the purposes of the cited mandatory standard would

not think the standard was applicable to this situation. MSHA's attempt in this instance to micro manage the placement of tools in this closeted area trivializes the Mine Act, and, in so doing, undermines its purpose. **Accordingly, Citation No. 7599214 shall be vacated.**

III. Further Findings and Conclusions

The remaining three citations concern alleged violations of section 77.1104 as a result of Castaneda's observations of fuels, oils, or lubricants on internal combustion engines, frames and transmissions of equipment used in the mining process. Section 77.1104 provides:

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

Thus, in considering whether violations of section 77.1104 have occurred the Secretary must demonstrate: (1) the presence of combustible material; (2) that the combustible material was "allowed" to accumulate; and (3) that the accumulations are located in an area "where they can create a fire hazard."

In evaluating the merits of the citations discussed below, the first element of a section 77.1104 violation is present in that it is undisputed that deposits of hydraulic and lubricating oils and diesel fuel are combustible. The third element requires an analysis of potential ignition sources and their proximity to the combustible material.

However, the second element of section 77.1104, namely whether the cited deposits are "accumulations," and, if so, whether they were "allowed" to accumulate, raise difficult issues that must be resolved on a case by case basis. For example, the Secretary's characterization of areas of oil deposits on engines, hoses and frames of heavy duty mining equipment as "accumulations" begs the question. In this regard, Inspector Castaneda conceded not all oil deposits on engines constitute violations of section 77.1104, stating that the issue is one of degree. (Tr. 208-09, 231-33). Moreover, Castaneda admitted internal combustion engines are designed to operate safely despite seepage from gaskets and hoses, and, that engine deposits are commonplace and not ignitable from engine heat. (Tr. 212). Specifically, Castaneda testified:

COURT: The issue of oil, lubricants, hydraulic oil, in an engine compartment, in your experience, I assume you've frequently come into contact with oil on trucks; right?

A. Yes.

COURT: If you looked at the engine[s] of . . . heavy duty truck[s], what percentage of them would be clean as opposed to engines

with residue or oil deposits on them? Isn't it a common occurrence to have oil deposits on an engine particularly engines, backhoes, this type of equipment? Isn't it hard to keep it free of residue?

A. On all engines, yes.

COURT: So there was something about this condition that distinguishes normal residue; is that --

A. About the amount that I would normally expect to see.

COURT: Would the heat from the engine be a source of ignition?

A. Just the ambient heat?

COURT: Yes, from the engine itself.

A. No.

COURT: So the materials on the engine itself, the engine running, the engine wouldn't be an ignition source?

A. No. (Tr. 211-12).

Although the subject citations primarily concern "accumulations" of oil deposits, the citations dealing with the backhoe and coal hauler also concern deposits of fine coal dust. These pieces of equipment operate "knee deep" in outdoor, open coal pits. In this regard, a video was admitted depicting Jewett Mine heavy duty equipment operating in coal beds. *See* Ex. R-26. Castaneda repeatedly admitted it is impossible to prevent fine coal dust deposits on the frames and in the compartments of such equipment. (*See, e.g.*, Tr. 193-94, 236, 283-86). For example, Castaneda testified:

COURT: When we saw the video [Ex. R-26] on the general operations of the Jewett Mine, am I correct that these haulers sometimes actually ride in these coal pits; is that correct?

A. They always go to the coal pits.

COURT: That's what I'm saying. They're in the coal pit?

A. Yes, sir.

COURT: So they're basically riding through extensive areas of coal?

A. Yes, sir, they are.

COURT: How do you keep any degree of coal particles from “accumulating” underneath the underbelly of a hauler if it's riding through piles of coal?

A. You're not.

COURT: How do you determine when you're doing an inspection what is and what isn't a violation with regard to the coal that's on the equipment itself?

A. I have to make a decision on whether it is or [is] not when I'm looking.

COURT: Whether it's normal accumulations or over and above?

A. Whether it's normal accumulations or it's above and beyond. All these haulers, they haul coal. You're going to get some coal dust on them, but if you don't have the oil and something to make it stick to the frames or the equipment, then coal dust, whenever it's dry, it can blow off as soon as it gets on the road.

COURT: I see. Again these haulers, I think of a hauler as a dump truck that's loaded, but these particular haulers actually drive through mounds of coal in the pit; is that right?

A. Not in the pit.

COURT: I remember in the video that I saw areas where they seemed to be riding over --

A. They're riding on top of the solid coal, and then the backhoe or the . . . will rake the coal out and swing over and dump it into the bed of the truck.

COURT: Okay. So what I recall now was that it was riding on the areas of solid coal.

A. And then it goes on a dirt road to the coal stop light where, depending upon what the plant wants, they'll either go over to [inaudible] or they'll go over to the coal stock pile.

COURT: Let me ask you this question. This issue of transmission[s], I'm thinking in terms of [a] transmission mechanism, the rear end of a vehicle. In your opinion, is it common to have residue of let's say seepage of transmission fluids, oil, in and around the transmission boxes and the rear end of these vehicles, you know, the underbelly of the vehicle?

A. Yes.

COURT: If you look at the underbelly of such a vehicle, and you saw, as I said, that it was coated, not with measurable amounts, but just coated in the sense that there was a deposit of transmission fluid and hydraulic oils, again on the transmission and the rear end of a vehicle like this, do you consider that to be a violation of 77.1104?

A. This is a combination of coal dust and oil or coal dust without oil?

COURT: If you have any degree of residue, I would assume . . . in fact, that's the quandary that I have; if you have any degree of residue and you're riding through areas of coal, how do you prevent some dust from adhering to the coating that's not uncommon that forms on transmissions and rear ends of vehicles:

A. You will not prevent it. You're going to --

COURT: Is that a violation then, do you think?

A. It would depend upon the degree; I mean, the amount of accumulation; just merely having dry coal dust on a metal frame in its normal operations, I would not think that I would issue a citation on that.

COURT: What about the coating of coal dust and hydraulic fluids on the transmission and rear end, again the underbelly of the vehicle?

A. It would depend upon the degree.

COURT: But these are not easy decisions, are they?

A. Not to me they're not.

COURT: I appreciate that these are difficult calls, and that's what we're grappling with here today. (Tr. 283-86).

In the context of the above analysis and testimony, we now consider the subject section 77.1104 citations.

a. Citation No. 7599213 - Hitachi Backhoe B008

During the course of his inspection, Castaneda opened the door to the engine compartment of the Hitachi backhoe. Castaneda observed an area of hydraulic oil and lube oil about 3 feet by 3 feet in size "mostly on the surfaces of the hose and frame" along with some fine coal dust. The backhoe was in operation and had fine coal dust on it because it was loading haulers. (Tr. 193-4).

Castaneda considered the oil deposits in the engine compartment, and on and around the hydraulic pump motors that were located outside the engine compartment at the front of the backhoe, to be excessive and more than a "normal accumulation." (Tr. 232). Although Castaneda did not identify a specific leak in the engine compartment, Castaneda determined, based on information provided by Northwestern's maintenance supervisor, Ronald Carmichael, that the hydraulic pump at the front of the backhoe was leaking because an O-ring had been left off after the pump had been overhauled. (Tr. 194, 214-15).

Consequently, Castaneda issued Citation No. 7599213, alleging a violation of section 77.1104, because:

Combustible materials were allowed to accumulate on the Hitachi Backhoe, B008, where they created a fire hazard. Hydraulic oil, lube oil and fine coal dust had accumulated on the engine, pumps, hoses, and frame of the backhoe. The backhoe was in use at the D Pit loading coal haulers.

Castaneda concluded the violation was S&S although he was unable to provide convincing testimony concerning any potential ignition sources in the vicinity of the cited accumulations. Flammable liquids have a flash point of less than 100 degrees Fahrenheit. Combustible materials, such as the cited oil lubricants, have flash points above 100 degrees Fahrenheit. As previously noted, Castaneda conceded the ambient heat from the engine was an insufficient ignition source. (Tr. 212). Although he relied on the exhaust manifold as a potential

source of ignition he did not explain why the exhaust heat source is more dangerous than the heat generated by the engine that is in direct contact with the cited deposits. Castaneda also stated that insulation on electrical wiring that could become damaged and create an ignition spark could be another ignition source although he admitted a defective spark plug wire was not a significant source of ignition. (Tr. 214).

i. Discussion and Evaluation

As a general proposition, not all combustible accumulations are prohibited accumulations, particularly at a surface mine where underground considerations of permissible equipment, coal dust suspension and propagation, are not safety concerns. (See 30 U.S.C. § 878(i) pertaining to permissible equipment in underground mines; see also Tr. 210, 301-02). For example, a coal stockpile or a wet oil spot on the ground are not prohibited accumulations.

Moreover, oil deposits on engines, hydraulic motors and transmissions on surface mine equipment must be viewed in context because they are not “accumulations” as that term is normally applied to coal dust accumulations. Unlike coal dust that can accumulate in depth over a period of time, oil “accumulations” drip off on the ground, or are vaporized from the heat of the engine. (Tr. 234-36).

The Commission has held that a violative “accumulation” exists “where the quantity of combustible materials is such that, in the judgement of the authorized representative of the Secretary, it likely could cause a fire or explosion if an ignition source were present.” *Old Ben Coal Co.*, 2 FMSHRC 2806, 2808 (October 1980). The mine inspector’s judgement is subject to a challenge before the administrative law judge. *Id.* at 2808 n.7. The inspector’s judgement must be reviewed judicially by applying an objective test of whether a reasonably prudent person, familiar with the surface mining industry and the protective purpose of the cited mandatory safety standard, would have recognized the hazardous condition that the regulation seeks to prevent. *Utah Power & Light Company, Mining Division*, 12 FMSHRC 965, 968 (May 1990).

Having said that not all combustible accumulations are prohibited, we turn to the provisions of the cited mandatory standard in section 77.1104. As an initial matter, it is important to recognize the distinction between establishing the fact of occurrence of a section 77.1104 violation, and establishing that such a violation is S&S. To establish the fact of occurrence, the Secretary must show that an operator “allowed” combustible materials to accumulate at a location and in a manner that are ill advised. In other words, routine engine oil deposits, or other lubricating oil deposits and residues, that are a consequence of normal operations do not constitute a violation of section 77.1104. However, a discrete operational defect, manifest by excessive accumulations of leaking hydraulic oils and lubricants, constitutes a violation of section 77. 1104. Here, the evidence reflects combustible material was permitted to

accumulate on the subject backhoe by virtue of a defective or missing O-ring on the hydraulic pump. Consequently, the Secretary has demonstrated a violation of section 77.1104.

Turning to the S&S issue, the Secretary bears the burden of proving the S&S nature of a violation. *Union Oil Co. Of Cal.*, 11 FMSHRC 289, 298 (March 1989); *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984). An S&S violation of section 77.1104 requires a demonstration of a “confluence of factors,” such as presence of a fuel source in proximity to a potential ignition source, to establish a reasonable likelihood that ignitions or explosions will occur. See *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988). As discussed above, Castaneda’s testimony with regard to the likelihood of ignition sources was inconsistent and unconvincing. Given Castaneda’s concession that not all oil deposits on engines and transmissions are violations, it is clear that such deposits are not significant risks of fire.³ **Accordingly, Citation No. 7599213 shall be modified to delete the S&S designation.**⁴

The Secretary initially proposed a civil penalty of \$178.00 for Citation No. 7599213. Although the S&S designation has been deleted, the degree of Northwestern’s negligence was relatively high in view of its failure to replace the missing O-ring. Accordingly, consistent with the penalty provisions of section 110(i) of the Mine Act, **a civil penalty of \$100.00 shall be imposed for this violation.**

³ As discussed *infra*, the conclusion that Castaneda failed to provide persuasive testimony that an explosion or fire was reasonably likely to occur is consistent with MSHA’s non S&S determination in Citation No. 7599216 that there were no “obvious ignition sources” near “hydraulic oil and coal dust . . . on the transmission, hoses and frame of [a Euclid] coal hauler.” (Ex. G-5, p.3).

⁴ In her post-hearing Proposed Findings, the Secretary refers to a Mine Safety and Health Administration Technical Support report that noted there were 106 mobile diesel equipment fires during the years between 1978 and 1983. (Sec.’s Br. at p.9-10). This information has not been considered because it was not presented at the hearing. Moreover, the circumstances behind these reported fires are unknown and they are, therefore, of little evidentiary value in determining whether the cited condition was likely to contribute to a fire and resulting injury.

b. Citation No. 7599215 - Light Plant No. 15

Northwestern uses light plants at various locations at the mine to provide additional lighting at night. A light plant consists of lights mounted on a small trailer-like device that can be moved from location to location as needed. (Exs. R-11A-E; Tr. 251). The lights are powered by a diesel engine which starts and stops automatically by a photocell. In the morning, when sufficient light appears, the photocell will cause the engine to stop and the lights to go out. As dusk appears and it becomes dark, the photocell causes the engine to start and the lights to come on. In addition, the light plant is equipped with two warning lights. An amber light comes on when the light plant is ready and could start at any time. When fuel becomes low, a blue light begins flashing to indicate that additional fuel is needed.

Castaneda examined the light plant located on the highwall of the D Pit that was used at night to provide additional lighting to the pit floor below. The light plant was not operating at the time. No employee worked near the light plant. The nearest employee working was approximately 150 to 200 yards away. (Tr. 270).

Castaneda testified that he opened the engine door and saw evidence of diesel fuel running down the side of the engine. (Tr. 253). Castaneda determined there was a leak in a return line that recirculates excess diesel fuel that is not sprayed into the engine by the injectors. The respondent's safety coordinator, David Evans, admits there was a leak in the diesel fuel line that caused some diesel fuel to leak onto the side of the engine.

As a result of his observations, Castaneda issued Citation No. 7599215 citing a violation of section 77.1104 for allowing combustible material, including diesel fuel, to accumulate where it could cause a fire hazard on the Light Plant No. 15. In view of the fact that employees did not work in proximity to the light plant, Castaneda designated the violation as non S&S in nature. The Secretary proposes a civil penalty of \$50.00 for this violation.

As discussed above, a violation of the mandatory safety standard in section 77.1104 occurs if the respondent allowed, by virtue of a discrete operational defect, combustible materials to accumulate. Here the respondent permitted diesel fuel leakage, albeit in small amounts, to run down the side of the engine. Operating the light plant in a state of disrepair, given the resultant diesel fuel accumulation, constitutes a violation of section 77.1104. **Accordingly, Citation No. 7599215 shall be affirmed and the \$50.00 civil penalty proposed by the Secretary shall be assessed.**

c. Citation No. 7599216 - Coal Hauler

Castaneda and David Evans, Northwestern's safety coordinator, inspected coal hauler No. 001 at the D Pit and observed some oil dripping down the side of the transmission. Evans testified that occasional transmission oil discharge through the transmission's oil breather was a

normal occurrence. Northwestern's maintenance supervisor, Ronald Carmichael opined it is impossible to operate Euclid coal haulers, because of their design, without getting some transmission oil through the breather onto the outside of the transmission. Tr. 333, 338. The Euclid transmission is designed to operate as a brake when going down a slope. Downshifting, as well as operating under a heavy load, causes heat buildup in the transmission. The heat causes the transmission fluid to expand which results in the release of "little burps" from the breather. Tr. 333-334.

As a result of his observations, Castaneda issued Citation No. 7599216 alleging a violation of section 77.1104 because:

Combustible materials were allowed to accumulate on the Euclid coal hauler, Company No. 001, where they could create a fire hazard. Hydraulic oil and coal dust was present on the transmission, hoses and frame of the coal hauler. The coal hauler was in use at D Pit.

Although the citation was initially issued as S&S, it was modified to delete the S&S designation on May 4, 1998, as a result of a Health and Safety Conference. In modifying the citation, it was noted that, "the accumulation on this unit was not excessive nor was it in an area where there were obvious ignition sources." (Ex. G-5, p.3).

At the hearing Castaneda stated he inspected two Euclid haulers at the Jewett Mine. One Euclid was observed at the fuel station with hydraulic oil leaking out of a rear oil tank onto the ground in the nature of an overflow. Another Euclid was inspected at the D Pit located six miles from the fuel station. The Euclid at the D Pit had the transmission leak. The respondent contends Castaneda has confused the extensive oil leaking to the ground from the Euclid at the fuel station with the normal small amount of transmission fluid discharged from the breather on the cited Euclid at the D Pit. Although Castaneda insists the cited Euclid had an extensive transmission leak, Castaneda's recollection of his inspection that occurred approximately one year earlier is undermined by the results of the Health and Safety Conference that was conducted shortly after the subject inspection. Consequently, the evidence supports the testimony of Evans and Carmichael that the cited transmission discharge was "not excessive" or otherwise extraordinary.

As previously discussed, normal petroleum discharges and deposits through breathers, or seepage through hoses and gaskets, do not constitute violations of section 77.1104 because the operator has not "allowed" combustible accumulations to occur. It is also significant that MSHA concedes "there were no obvious ignition sources" in the vicinity of the cited "leak." The absence of a showing of a potential ignition source also precludes a finding of a section 77.1104 violation because the plain language of this standard requires a showing that the cited accumulations "can create a fire hazard." **Accordingly, Citation No. 7599216 shall be vacated.**

ORDER

In view of the above, **IT IS ORDERED** that Citation Nos. 7599226, 7599214 and 7599216 **ARE VACATED**.

IT IS FURTHER ORDERED that, pursuant to the parties' settlement agreement, Citation No. 7599225 **IS AFFIRMED**.

IT IS FURTHER ORDERED that Citation Nos. 7599212 and 7599215

ARE AFFIRMED.

IT IS FURTHER ORDERED that Citation No. 7599213 **IS MODIFIED** to delete the significant and substantial designation.

ACCORDINGLY, IT IS ORDERED that Northwestern Resources pay a total civil penalty of \$378.00 within 45 days of the date of this Decision. Upon timely receipt of payment, Docket No. CENT 98-153 **IS DISMISSED**.

Jerold Feldman
Administrative Law Judge

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