FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 12, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 94-74 A.C. No. 11-00877-04033
v.	:	
	:	Wabash Mine
AMAX COAL COMPANY, Respondent	:	

DECISION

Appearances: Miguel J. Carmona, Esq., and Ruben Chapa, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;
R. Henry Moore, Esq., Buchanan Ingersoll Corp., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Fauver

This is a civil penalty action under ' 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 **et seq.**

The case involves three ' 104(d)(2) orders, each alleging a violation of 30 C.F.R. ' 75.400. A settlement of Order No. 4054145 was approved at the hearing. The proceeding as to Order No. 4054043 was stayed pending a decision as to Order No. 4054148, which went to hearing.

Respondent acknowledges the violation alleged in Order No. 4054148, but contests the inspector's findings that the violation was "significant and substantial" and was due to an "unwarrantable" failure to comply within the meaning of ' 104(d) of the Act. Respondent seeks to have those findings deleted from the order and to have the proposed civil penalty reduced accordingly.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, probative, and reliable evidence establishes the Findings of Fact and further findings in the Discussion below:

FINDINGS OF FACT

1. Respondent owns and operates the Wabash Mine, which produces coal for sale or use in or substantially affecting interstate commerce.

2. Respondent is a large coal operator, producing about 39 million tons of bituminous coal a year. The Wabash Mine produces about 1.8 million tons annually.

3. On September 1, 1993, MSHA Mine Inspector Steve Miller issued Order No. 4054148 at the Wabash Mine, alleging the following conditions:

> Accumulations of dry loose coal and coal float dust were allowed to accumulate at the junction of the Main South No. 1 head roller and the Mother belt. Accumulations were packed solid under the Mother belt in this area. The accumulations measured approximately 3 feet (east side Main South No. 1) to 6 inches in depth, 4 feet to 8 feet in width, and 85 feet in length along Main South No. 1 and 200 feet in length along the Mother belt. The bottom of the Mother belt was observed running on packed dry coal, and in loose dry coal for a distance of approximately 15 feet.

4. The evidence sustains the inspector's findings as to the above conditions. The inspector observed the conditions and made reasonable measurements and estimates of the accumulations.

5. The accumulations of loose coal and float coal dust had accumulated over a period of several days. They were wet in places, mainly beneath the surface layers. The layers that came into contact with or were closest to the conveyor belts were generally dry.

6. There were ignition sources in the areas of the accumulations. For about 15 feet, one of the accumulations was in contact with a running conveyor belt and the friction of the belt running against the combustible materials was reasonably likely to result in a mine fire.

7. The Wabash Mine is a large mine, with about 26 miles of conveyor belts. The mine has two portals, a North and South portal. The area at issue was the intersection of the Main South No. 1 Belt and the Mother Belt.

DISCUSSION WITH FURTHER FINDINGS

The inspector cited a violation of 30 C.F.R. ' 75.400, which is a reprint of a statutory safety standard. The standard provides:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

Respondent acknowledges a violation of ' 75.400 but contests the inspector's findings that it was "significant and substantial" and "unwarrantable."

Significant and Substantial Violation

The inspector found that the violation was "significant and substantial" under ' 104(d)(1) of the Act, which provides:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

The Commission has held that a violation is "significant and substantial" if there is "a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981); Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984). This evaluation is made in terms of "continued normal mining operations" without abatement of the violation (U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (1984)), based on the particular facts surrounding the violation (Texasgulf, Inc., 10 FMSHRC 498, (1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 1007, (1987)). In Mathies the Commission further stated:

> 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 will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

The Commission's definition does not state whether the likelihood of injury or illness must be "more probable than not" to establish a significant and substantial violation. For a better understanding of the Commission's test, I believe this issue should be resolved.

As I interpret the Commission's decisions, the third Mathies element -- "a reasonable likelihood that the hazard contributed to will result in an injury or illness" -- does not mean "more probable that not."

I begin by noting the Commission's discussion of a "significant and substantial" violation as falling "between two extremes" (in National Gypsum):

> Section 104(d) says that to be of a significant and substantial nature, the conditions created by the violation need not be so grave as to constitute an imminent danger. (An "imminent danger" is a condition "which could reasonably be expected to cause death or serious physical harm" before the condition can be abated. Section 3(j).) At the other extreme, there must be more than just a violation, which itself presupposes at least a remote possibility of an injury, because the inspector is to make significant and substantial findings in addition to a finding of violation. Our interpretation of the significant and substantial language as applying to violations where there exists a reasonable likelihood of an injury or illness of a reasonably serious nature occurring, falls between these two extremes -- mere existence of a violation, and existence of an imminent danger . . . . [3 FMSHRC at 828.]

The legislative history of the Act makes clear that an "imminent danger" is not to be defined in terms of "a percentage of probability":

> The Committee disavows any notion that imminent danger can be defined in terms of a percentage of probability that an accident will happen; rather the concept of imminent danger requires an examination of the potential of the risk

> to cause serious physical harm at any time. It is the Committee's view that the authority under this section is essential to the protection of miners and should be construed expansively by inspectors and the Commission. * * * [1]

It follows that a significant and substantial violation, which by statute is less than an imminent danger,[2] is determined in terms of "the potential of the risk" of injury or illness, not a "percentage of probability." Tests such as "more probable than not" or some other percentage of probability are inconsistent with ' 104(d) and the Act's legislative history.

This interpretation is also indicated by Commission decisions affirming a significant and substantial violation where the facts do not show injury or illness was "more probable than not." For example, in U.S. Steel Mining co., 7 FMSHRC 327 (1985), the issue was whether the failure to install a bushing for a cable entering a water pump was a significant and substantial violation. The judge found that the pump vibrated, that vibrations could eventually cause a worn spot in the insulation, and that if the circuit protection systems also failed, a worn spot in the cable could energize the pump frame and cause an electrical shock. The judge found that injury was "reasonably likely" to occur. 5 FMSHRC 1788 (1983). In affirming, the Commission stated, inter alia:

> On review, U.S. Steel argues that the facts indicated that the occurrence of the events necessary to create the hazard, the cutting of the wires' insulation and failure of the electrical safety systems, are too remote and speculative for the hazard to be reasonably likely to happen and, consequently, that the judge erred in concluding that the violation was significant and substantial. * * *

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[1] S. Rep. No. 95-181, 95th Cong. 1st Sess. (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 626 (1978).

[2] Section 104(d) excludes imminent dangers from its definition of a significant and substantial violation.

> * * * The fact that the insulation was not cut at the time the violation was cited does not negate the possibility that the violation could result in the feared accident. As we have concluded previously, a determination of the significant and substantial nature of a violation must be made in the context of continued normal mining operations. U.S. Steel Mining Co., 5 FMSHRC 1673, 1574 (July 1984). The administrative law judge correctly considered such continued normal mining operations. He noted that the pump vibrated when in operation and that the vibration could cause a cut in the power wires' insulation in the absence of a protective bushing. In view of the fact that the vibration was constant and in view of the testimony of the inspector that the insulation of the power wires could be cut and that the cut could result in the pump becoming the ground, we agree that in the context of normal mining operations, an electrical accident was reasonably likely to occur.

In the above decision, the finding that injury was "reasonably likely" was based upon a reasonable potential for injury, not a finding that it was more probable than not that injury would result. Indeed, based upon the facts found by the trial judge, one could not find that it was "more probable than not" that the circuit protection systems would also fail in the event a bare spot developed in the cable.

Applying the Mathies test to this case, I find that the evidence amply supports the inspector's finding that the violation was "reasonably likely" to result in serious injury. In the event of fire, the accumulations presented a high risk of propagating a fire and causing serious injuries by burns or smoke inhalation. The accumulations not only provided a large amount of fuel to propagate a mine fire, but they were in contact with a running conveyor belt. The friction of the belt running in loose coal and coal dust could start a fire.

To hold that the extensive accumulations of loose coal and float coal dust in this case were not a significant and substantial violation would run counter to a fundamental purpose of the statute. The primary concern in passing the Mine Act was to prevent mine fires and explosions. The Congressional standard that is reprinted as ' 75.400 is central to that purpose (Black Diamond Coal Company, 7 FMSHRC 1117 (1985); and see: Buck Creek Coal, Inc., v. FMSHRC, 52 F. 3d 133 (7th Cir. 1995)) and is "directed at preventing accumulations in the first place, not at cleaning up the materials within a reasonable period of time after they have accumulated." Old Ben Coal Company, 1 FMSHRC 1954 (1979).

In Black Diamond Coal Mining Company, supra, the

Commission discussed the clear Congressional intent to eliminate fuel sources of explosions and fires in active workings of underground coal mines:

> * * * We have previously noted Congress' recognition that ignitions and explosions are major causes of death and injury to miners: "Congress included in the Act mandatory standards aimed at eliminating ignition and fuel sources for explosions and fires. [Section 75.400] is one of those standards." Old Ben Coal Co., 1 FMSHRC 1954, 1957 (December 1979). We have further stated "(i)t is clear that those masses of combustible materials which could cause or propagate a fire or explosion are what Congress intended to proscribe." Old Ben Coal Co., 2 FMSHRC 2806, 2808 (October 1980). The goal of reducing the hazard of fire or explosions in a mine by eliminating fuel sources is effected by prohibiting the accumulation of materials that could be the originating sources of explosions or fires and by also prohibiting the accumulation of those materials that could feed explosions or fires originating elsewhere in a mine.

Respondent's contention that wet accumulations of loose coal and coal dust should not be considered a fire hazard lacks merit. As I found in Green River Coal Co., Inc., 13 FMSHRC 1247, 1254-53 (1991):

> Loose coal is not "mud" and can propagate a mine fire. Once a fire spreads, the heat can rapidly dry loose coal or coal dust and further propagate a fire. A mine fire is one of the principal dangers in underground coal mining. Permitting substantial accumulations of fuel for a fire underground is a "significant and substantial" violation.

Respondent's contention that its fire-detection and fire-fighting systems render the violation non-significant and substantial also lacks merit. The "likelihood of a fire has no bearing on the separate question of whether such a fire would be likely to result in injury." Buck Creek, Coal, supra. As the Seventh Circuit stated further:

> The fact that Buck Creek has safety measures in place to deal with a fire 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.

Also, in assessing the gravity of a safety violation it is not reasonable to presume that all other safety standards will be complied with in the event of an emergency. Moreover, the friction points between the moving belt and the accumulations

support the inspector's finding that a fire was reasonably likely.

The Commission has also held that "the inspector's independent judgment is an important element in making significant and substantial findings, which should not be circumvented." Cement National Gypsum Company, 3 FMSHRC at 825-826. In Mathies, the Commission concluded that the judge gave appropriate weight to the inspector's judgment and concluded that the inspector's testimony was "reasonable, logical, and credible" based upon his first-hand observations. I find that Inspector Miller credibly testified regarding the accumulations of combustible materials and the bases of his finding that the violation was significant and substantial.

Unwarrantable Violation

The Commission has held that an "unwarrantable" violation within the meaning of ' 104(d) means "aggravated conduct constituting more than ordinary negligence." Emery Mining Corp., 9 FMSHRC 1997, 2001 (1987). This may be shown by evidence that "a violative condition or practice was not corrected prior to issuance of a citation or order because of 'indifference, willful intent or serious lack of reasonable care.'" Id. at 2003.

Respondent has a poor history of compliance with ' 75.400. In a short period of one year and two months before the instant violation, Respondent was issued 63 citations and orders for accumulations in violation of ' 75.400, three of which were on the same belt at issue. In numerous contacts with MSHA inspectors, Respondent had been cited for ' 75.400 violations and notified of the dangers presented by its recurring accumulations of combustible materials.

Despite this knowledge, Respondent allowed the accumulations at issue to develop over several days. The combustible materials were extensive and put Respondent on notice that prompt action was necessary to clean up the area. Due to the massive size of the accumulations, after the inspection it took 16 miners 4**2** hours to remove the accumulations to abate the violation, working while the belt was stopped. Before the inspection, Respondent kept the belt running and assigned only one miner to clean up the accumulations. Respondent's conduct in allowing the accumulations to develop and assigning only one miner to attempt to clean up tons of loose coal and float coal dust was "aggravated conduct constituting more than ordinary negligence." Its plainly inadequate effort to clean up the extensive accumulations is consistent with the testimony of Cecile Scott and Leonard Gallagher that there was no regular maintenance on the belts and Scott's testimony that it was more common to clear

combustible material so that the belt would not be running in loose coal, rather than cleaning up the accumulations.

Respondent has made some important improvements since Inspector Miller's order on September 1, 1993. However, the post-inspection changes do not alter the reasonable grounds for the inspector's findings that the extensive accumulations on September 1 were "significant and substantial" and due to an "unwarrantable" failure to comply with the safety standard.

Civil Penalty

Section 110(i) of the Act provides six criteria for assessing a civil penalty: history of violations, size of the mining business, effect of penalty on the operator's ability to remain in business, negligence, gravity, and abatement efforts after notice of the violation.

Respondent is a large operator. The proposed penalty will not affect its ability to continue in business. The gravity of the violation was high -- a "significant and substantial" violation. Negligence was high -- an "unwarrantable" violation. After notice of the violation, Respondent made a good faith effort to abate the violation. Respondent has a poor history of compliance with ' 75.400.

Considering all of the criteria in ' 110(i), I find that a civil penalty of $9,600 is appropriate for the violation cited in Order No. 4054148.

CONCLUSIONS OF LAW

1. The judge has jurisdiction.

2. Respondent violated 30 C.F.R. ' 75.400 as alleged in Order No. 4054148.

ORDER

1. The proposed settlement of Order No. 4054145 is APPROVED. Respondent shall pay the approved civil penalty of $8,000 for the violation in that order within 30 days from the date of this Decision.

2. Order No. 4054148 is AFFIRMED.

3. Respondent shall pay a civil penalty of $9,600 for the violation in Order No. 4054148 within 30 days from the date of this Decision.

4. The STAY in Order No. 4054043 is LIFTED. The parties shall have 15 days from the date of this Decision to file their joint or separate proposed findings, conclusions and civil penalty as to Order No. 4054043.

5. This Decision constitutes the judge's final disposition of all issues as to Order No. 4054148 and therefore constitutes a final decision for purposes of any petition to review the Decision as to that order. However, the case remains open before the judge as to Order No. 4054043 until a final decision is entered as to that order.

William Fauver
Administrative Law Judge

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