FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 23, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. PENN 94-247
	:	A.C. No. 36-04999-03549
v.	:	
	:	Mine: Leslie Tipple
POWER OPERATING COMPANY, Respondent	:	
	:	Docket No. PENN 94-201
	:	A.C. No. 36-02713-03599
	:	
	:	Docket No. PENN 94-210
	:	A.C. No. 36-02713-03598
	:	
	:	Docket No. PENN 94-271
	:	A.C. No. 36-02713-03602
	:	
	:	Mine: Frenchtown

DECISION

Appearances: Theresa C. Timlin, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; James J. Sullivan, Jr., Esq., Kathryn A. Kelly, Esq., Pepper, Hamilton & Scheetz, Wilmington, Delaware, and Michael T. Farrell, Esq., Stradley, Ronon, Stevens & Young, Philadelphia, Pennsylvania, for Respondent.

Before: Judge Amchan

The seven citations/orders and proposed penalties in these cases arise from MSHA inspections of Respondent's mining facilities in central Pennsylvania in the fall of 1993. The Frenchtown surface coal mine, where the violation alleged in Docket No. PENN 94-201 occurred and the Leslie Tipple, where the violations alleged in Docket Nos. PENN 94-210, PENN 94-247 and PENN 94-271 occurred, are five to ten miles apart (Tr. II: 21-23). The Leslie Tipple includes the preparation plant and refuse area for the Frenchtown Mine (Tr. II: 22)[1].

[1]The assessment control numbers assigned the proposed penalties in these cases are not consistent with the mine identification numbers for the locations at which the alleged

violations occurred.

Order No. 3710524: Cut in dump truck tire

On September 30, 1993, MSHA Inspector Lester Poorman began inspecting the Frenchtown surface coal mine at 8:30 a.m. (Tr. I: 50). Immediately upon his arrival at the pit, at which mining was in progress, Poorman noticed Caterpillar dump truck No. 130 suddenly leave the pit area and drive to the mine's tire storage area (Tr. I: 54). The inspector believed he saw a large cut on the truck's right front tire (Tr. I: 55,57).

At the storage area, Poorman measured the cut and found it to be 38 inches long, 20 inches wide, and two to three inches deep (Tr. I: 55-56). It extended from the inside sidewall in a half-moonlike pattern to the portion of the tire touching the roadway (Tr. I: 55-57).

The inspector determined that the day-shift driver of truck No. 130 had completed an equipment report at the end of his shift the previous evening (6:00 p.m., September 29, 1993), which noted a bad cut in the right front tire (Tr. I: 58-59, 63)[2]. However, the equipment report of the night-shift driver did not mention the cut in the tire (Tr. I: 63, 80-81, 111-112).

As a result of his observations and an interview with the day-shift driver, Poorman issued Order No. 3710524, alleging

[2]Poorman also testified that the driver told him that when he advised his foreman Robert Greenawalt of the cut, Greenawalt told him that if he was not satisfied with the condition of the truck, he could go home (Tr. I: 64-65). The import of this testimony is that the driver was forced to use the truck in its defective condition. I decline to find, solely on the inspector's hearsay testimony, that any such conversation occurred. Moreover, even if such conversation did occur, it is unclear when it took place (Tr. I: 67, 101-02). This leaves open the possibility that the condition of the tire was much less dangerous than when observed by Inspector Poorman.

a violation of section 104(d)(2) of the Act and 30 C.F.R. '77.404(a). The regulation requires that mobile and stationary equipment be maintained in safe operating condition and that unsafe equipment be removed from service immediately. MSHA subsequently proposed a $5,000 civil penalty for this order.

Respondent's defense to the order

Truck No. 130 was sent to the tire storage area by Foreman Robert Greenawalt (Tr. I: 57, 94, 97) and the damaged tire was replaced prior to 11:30 a.m. (Order No. 3710524, block 18, Tr. 94-97). I credit Greenawalt's testimony that he sent the truck to tire storage area as soon as he was aware of the large cut on the right front tire (Tr. I: 97, 101-02).[3]

This, however, does not end the inquiry into the question of whether Respondent violated the cited regulation or whether it was negligent in doing so. The fact that Greenawalt was unaware of the defect in the tire until sometime on the morning of September 30 is the result, in part, of the procedures set up by Respondent for handling reports of defective equipment. I conclude, on the basis of the operator's report and Inspector Poorman's testimony, that the vehicle had not been in safe operating condition at least since the end of the day shift at

[3]I allowed Greenawalt to testify over Petitioner's objection that Greenawalt was not listed in Respondent's pre-trial exchange. Since my notice of hearing required the parties to exchange witness lists only one week before hearing, I fail to see how Greenawalt's "surprise" appearance prejudiced Petitioner's trial preparation. Moreover, Inspector Poorman had been told by the driver during the inspection that Greenawalt had sent him to the tire storage area (Tr. I: 57). In the absence of any prejudice, I see no basis for excluding Greenawalt's testimony for Respondent's noncompliance with the directions in the Notice of Hearing, DeMarines v. KLM Royal Dutch Airlines, 580 F. 2d 1193, 1201-02 (3d Cir., 1978).

6:00 p.m. on September 29 (Tr. I: 109).

I conclude further that this vehicle had been used and had been available for use in an unsafe condition for a period of 14 hours due to Respondent's procedures for handling defective equipment reports. Respondent contracted with Gem Industries for maintenance of its equipment (Tr. I: 105-06). Drivers' vehicle reports went to Gem Industries, not to Power Operating or its foremen (Tr. I: 100, 105-06).

Gem Industries reviewed the equipment reports and informed Respondent if any corrective action was warranted (Tr. I: 105-07). I conclude that Respondent cannot contract away its responsibility to immediately remove unsafe equipment from service. If the contract with Gem Industries failed to provide a mechanism for prompt corrective action with regard to the driver's September 29, 1993 report, Power Operating bares responsibility for this failure under the Federal Mine Safety and Health Act.

I credit the opinion of Inspector Poorman that continued use of the truck in the condition in which it was reported on September 29, and observed on September 30, was reasonably likely in the normal course of mining operations to result in a blow-out of the tire. Its condition made it reasonably likely that miners would be seriously injured by flying objects (Tr. I: 66-67), Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984); U.S. Steel Mining Co., 6 FMSHRC 1573, 1574 (July 1984).

On the other hand, I do not believe that the record supports a conclusion that Respondent's negligence was sufficiently "aggravated" to constitute an "unwarrantable failure" to comply with the regulation. I deem Respondent's negligence to be ordinary and affirm this violation as a "significant and substantial" violation of section 104(a) of the Act.

Considering the six penalty criteria in section 110(i) of the Act, particularly the gravity of the violation, the degree of negligence, and Respondent's immediate abatement of the violation, I assess a $1,500 civil penalty. I believe a penalty of this magnitude is warranted by the fact that this truck was available for use in an unsafe condition for at least 14 hours after the defect was reported by the driver (Tr I: 69, 109-110).

Respondent's handling of refuse at the preparation plant: Order No. 3710451 (Docket No. PENN 94-210); Order Nos. 3710505 and 3710506 (Docket No. PENN 94-271); Order No. 3710674 and Citation No. 3710675 (Docket No. PENN 94-247)

Four of the violations in these dockets concern whether Respondent's procedures for handing refuse at its coal preparation plant comport with MSHA's regulations at 30 C.F.R. '77.215. More specifically, the issues are whether refuse was deposited and spread so as to minimize the flow of air through a refuse pile in conformance with '77.215(a), and whether the piles were compacted in two-foot layers as required by '77.215(h).

Order No. 3710451 (Docket No. PENN 94-210)

On October 13, 1993, MSHA Inspector Charles Lauver inspected the 005 refuse pit at Respondent's preparation plant (the Leslie Tipple). Lauver observed a large number of piles of refuse from the preparation plant that were between four to eight feet high. They were peaked in shape and overlapped at the base (Tr. I: 124, 173). These piles had not been spread or compacted. A bulldozer was pushing dirt on top of the piles of coal refuse[4].

[4]This refuse is a mixture of rock, shale, dirt, clay and fine coal that is cleaned from the raw coal by washing at the preparation plant (Tr. I: 129, 157). It must be deposited in piles regulated by MSHA pursuant to ''77.214-77.215-4.

A major issue between MSHA and Respondent was the company's practice of stacking large amounts of refuse adjacent to the preparation plant prior to moving it to the refuse pile.

Because he determined that no effort was being made to spread and compact the refuse in two-foot layers, Lauver issued Order No. 3710451, alleging a violation of '77.215(h). That regulation states that, "After October 31, 1975 new refuse piles and additions to existing refuse piles, shall be constructed in compacted layers not exceeding two feet in thickness... ."

Power Operating's procedure for compacting refuse was to let it sit for a few days after being dumped at the refuse pile. Then it covered the refuse with soil, spread and compacted it (Tr. I: 152, 171). Respondent's witnesses testified that the refuse is up to 30 percent water when dumped and is too loose to support the weight of the machines that compact and spread it (Tr. I: 151-52, 171-72, 174). Not only is this testimony not controverted, it is essentially corroborated by Inspector Lauver and the Secretary's expert, John Fredland. Lauver testified:

> Q. .... this material is generally so soft that a vehicle could sink into it if it were to drive on top of it?
>
> A. Yes, sir. (Tr. I: 146-47).
>
> Q. You said that this is a thick mud material that is soft enough for a vehicle to sink into it. Does it make a difference in your mind whether the vehicle is riding over a two or three-foot layer of material as opposed to a six-foot pile

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Although there was considerable testimony regarding this practice, it appears to have little relevance to the violations alleged (Tr. I: 219-224). MSHA apparently believed that the alleged failure to compact the refuse in accordance with its interpretation of '77.215(h) was due to the large amount of refuse being hauled from the preparation plant to the refuse pile in October and November, 1993.

of material in terms of the likelihood of the vehicle to sink into it?

A .... In this case a bulldozer riding over a two or three-foot layer of material, the tracks are able to get purchase [traction] even if it begins to spin. ... When it gets thicker than that the machine will, what we call, belly out on the track. It will rest on the belly pan on the underpart of the machine and the tracks will be unable to get purchase and they'll sit there and spin. (Tr. I: 147-48).

Mr. Fredland agreed that a bulldozer would sink into a refuse pile with moisture content of 30 percent or even 25 percent (Tr. I: 200, 207).

Respondent argues that nothing in the cited regulation specifies a time period in which the refuse must be spread and compacted in two-foot layers. It contends further that by compacting the material in two-foot layers after letting it dry for two to three days it complies with the terms of '77.215(h). I reach the same conclusion.

Respondent also suggests that its procedures are consistent with the underlying rationale of the regulation which is to minimize air flowing through the refuse pile so as to prevent fire through spontaneous combustion (see Tr. I: 135-37, 194-95, 276-78). There is nothing in this record that persuades me that waiting several days before spreading and compacting the refuse created a possibility of spontaneous combustion in the newly deposited refuse (see Tr. I: 156).

There remains the issue of whether the Secretary proved its case through an expert witness, John Fredland. Mr. Fredland opined, based on testimony of Inspector Lauver and Respondent's witnesses, that it would not be possible for Respondent to achieve a two-foot layer, and that the refuse would end up in layers as thick as four feet (Tr. I: 187-89, 192-94, 202-03)[5].

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[5]I allowed Mr. Fredland to testify at the hearing despite Respondent's objections that his testimony should be excluded because the Secretary did not timely identify him as a witness by October 11, 1994, as required in the notice of hearing. Pursuant to my pretrial orders in this case, the parties were not required to exchange the names of witnesses until a week before the October 18, 1994 hearing. The Secretary did not identify Mr. Fredland as a witness until October 14.

There are four factors that should be considered in deciding whether to exclude testimony for failure to timely comply with pre-trial notice requirements: (1) the prejudice or surprise to the other party, (2) the ability of the other party to cure the prejudice or surprise, (3) the extent to which allowing the witness to testify would disrupt the orderly and efficient trial of the case, and (4) the bad faith or willfulness in failing to
(Footnote. 5, continued)
comply with the pre-trial disclosure requirements, DeMarines v. KLM Royal Dutch Airlines, 580 F.2d 1193, 1201-02 (3d Cir. 1978)). Considering the above factors, I conclude that excluding Mr. Fredland's testimony would have been unwarranted.

I note that on June 9, 1994, Respondent served interrogatories on the Secretary requesting him, among other things to, "Identify all persons who possess knowledge or information relevant to the above-captioned matter." I do not interpret this interrogatory as asking for the identification of any expert witness that may be called to testify at trial. If I did interpret the interrogatory as covering the identity of potential expert witnesses, I may well have excluded Mr. Fredland's testimony. In part as the result of the instant proceeding, I have changed my prehearing orders to require the exchange of the names of potential witnesses, including experts, at an earlier stage in the pre-trial process.

Larry Kanour, Respondent's safety director, who saw the piles in question on October 13, 1993, testified that they "probably" were four to six feet in height (Tr. I: 173) and that from previous drilling in the refuse pile he knew that the company was able to compact the material into two-foot layers (Tr. I: 173). Given the state of the record I am not sufficiently persuaded by Fredland's testimony to conclude that the Secretary has met his burden of proving that Respondent did not compact the refuse material into two foot layers. I therefore vacate Order No. 3710451 and the corresponding $1,800 proposed penalty.

Order Nos. 3710505 and 3710506 (Docket No. PENN 94-271)

On November 3, 1993, Inspector Lauver returned to the 005 Pit (Tr. I: 216). He observed two areas in which refuse had been dumped several days earlier without being spread and compacted (Tr. I: 217, 240, 246).

As the result of his observations, Lauver issued Order No. 3710505 alleging another "unwarrantable failure" to comply with '77.215(h) and Order No. 3710506, which alleged an "unwarrantable failure" to comply with 30 C.F.R. '77.1713(a). The latter regulation requires a examination of each surface installation of a coal mine at least once each shift. All hazardous conditions must be recorded and corrected. The gravamen of Order No. 3710506 was that a hazardous condition had existed for several days at the 005 Pit due to Respondent's failure to spread and compact the refuse cited in Order No. 3710505 and no record had been made of it.

Respondent readily admits that the procedures it followed at its 005 refuse pit were the same as when inspector Lauver visited it on October 13 (Tr I: 254-55). Power Operating dumped refuse in the left side of the pit at the beginning of each week, dumped in the center of the pit during the middle of the week, and in the right side of the pit at the end of the week (Tr. I: 256). The company has been following this procedure for at least 33 years (Tr. I: 268, 272-73).

In the middle of each week Respondent began to spread and compact refuse dumped at the beginning of the week, which by that time had dried significantly (Tr I: 256-257). Indeed, Inspector Lauver observed a bulldozer spreading and compacting material in an area of the pit separate from those covered by the order (Tr. I: 226, 252)[6].

[6]Although Lauver's testimony suggests that the bulldozer was spreading and compacting refuse as it was dumped, Respondent's

I vacate Order No. 3710505 for the same reason that I vacated Order No. 3710451. MSHA's regulations do not require that coal refuse be spread and compacted immediately upon being dumped at a refuse pile. Moreover, there is nothing in this record that would lead me to conclude that a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would recognize that Respondent's procedure for spreading and compacting refuse violated '77.215, Ideal Cement Co., 12 FMSHRC 2409 (November 1990). Although fire from spontaneous combustion is a hazard at refuse sites, I am not persuaded that such a hazard exists as a result of an operator waiting several days for refuse to dry out before spreading and compacting it.

Order No. 3710506 is vacated because its validity rests on Inspector Lauver's assumption that the failure to spread refuse as soon as it is dumped is a hazardous condition. Since I am not persuaded that Respondent's procedure for spreading and compacting refuse was hazardous, the company's failure to take "corrective" action or record the existence of the condition did not violate '77.1713(a).

Order No. 3710674/Citation No. 3710675 (Docket PENN 94-247)

On October 20, 1993, MSHA Inspector Joseph Colton was inspecting the areas leading to and surrounding Respondent's preparation plant (Exh. G6-A). At about mid-day he observed an area in which the +5 refuse material was deposited and saw what he believed was smoke coming from the refuse (Tr. II: 202-03, Exhs. G11-15, Order No. 3710674, block 8). The area from which the white substance was rising had a pungent odor similar to sulfur (Tr. II: 206-07).

The +5 refuse is material that is too large to go through the preparation plant and is separated from the coal and smaller refuse by a rotary breaker (Tr II: 203, 299). It consists of shale, siltstone, sandstone and some impure coal (Tr. II: 299-300). It felt hot to the touch of Colton's gloved hand (Tr. II: 204-06).

Colton issued imminent danger Order No. 3710674, pursuant

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evidence indicates that it never spread and compacted refuse that had been through the wash plant until it had several days to dry out (Tr. I: 265-66).

to section 107(a) of the Act. Shortly thereafter he issued section 104(a) Citation No. 3710675 for the same condition, alleging that Respondent violated '77.215(a), which requires that refuse deposited on a pile be spread in layers and be compacted in a manner so as to minimize the flow of air through the pile. MSHA proposed a $3,000 civil penalty for this citation/order.

At Inspector Colton's suggestion, the +5 material was moved to an empty area near the preparation plant where it was spread and compacted (Tr. II: 210, 272-73). Respondent's normal procedure for handling +5 refuse is to deposit it on the ground by the preparation plant for three to four days and then process it a second time in order to recover residual coal (Tr. II: 290-92). It is then hauled to the 005 refuse pit where it is spread and compacted (Tr. II: 317-18).

I vacate Citation No. 3710675 and the penalty proposed therefor because '77.215(a) does not specify a time period in which such refuse must be spread in layers and compacted. I also conclude that a reasonably prudent person familiar with the mining industry and the purposes of the standard would not necessarily conclude, on the basis on the instant record, that Respondent's normal procedures for handling +5 refuse violated the regulation.

In so finding, I credit the testimony of Respondent's witness, John Foreman, over that of Inspector Colton in concluding that the white gaseous substance observed by Colton was water vapor, rather than smoke, and the +5 refuse was not on fire (Tr. II: 295-303).[7] Inspector Colton believed that

[7]I allowed Mr. Foreman and several other witnesses to testify over the objections of the Secretary's counsel. These witnesses were not identified by Respondent in the prehearing exchange. I reiterate my conclusion that exclusion of such witnesses was not warranted, see discussion at pages 6-7, n.5, herein. This is particularly true in view of the fact that I offered both sides the opportunity to reconvene the hearing at a site agreeable to the parties to take additional testimony in order to cure whatever prejudice either of them may have suffered from "surprise" witnesses or exhibits (Tr. II: 308-311). Neither party has availed themselves of this offer.

I acknowledge that, while the Secretary's "surprise" witness and exhibits have little bearing on the outcome of this case, Mr. Foreman's expert testimony is an important factor in my resolution of Citation No. 3710675. It is his testimony that persuades me that no hazard was presented to miners by Respondent's procedures for handling +5 refuse.

miners were reasonably likely to incur permanently disabling injuries due to exposure to noxious gases emitted from the smoking +5 refuse pile (Tr. II: 221-22, Citation No. 3710674, block 10).

Inspector Colton is a high school graduate and has been trained as an electrical specialist by MSHA (Tr. II: 32-36). Mr. Foreman has a college degree in geological science and is a consultant who permits, constructs and manages refuse piles (Tr. II: 295-299). I conclude that Mr. Foreman is better qualified to render an opinion of the nature of the emissions from the +5 refuse pile than is Inspector Colton. Therefore, I find that this record fails to establish that exposure to the vapor from the +5 refuse exposed miners to a hazard.

Order No. 3710673: Unsafe haulage roads

Upon his arrival at the Leslie Tipple on October 20, 1993, Inspector Colton started to drive up a hill on the road leading to the raw coal storage area (Tr. II: 40-43, Exh. G6-A, road "A"). At the base he noticed that the truck in front of him was having difficulty negotiating the hill. It was moving very slowly and its wheels were spinning (Tr. II: 42).

October 20 was the fifth straight day that it had rained at the Tipple and the mud on the road was approximately 18 inches deep (Tr. II: 46, 143-44, Exh. 21). Colton saw another truck coming down the hill which was travelling in short jerky movements, which indicated to the inspector that the driver was trying to avoid a skid to the center of the road (Tr. II: 43). One of the drivers told Colton that he had observed another truck slide sideways on the hill earlier that morning (Tr. II: 49-50).

Colton drove to the scale house at the preparation plant to inform plant manager John Soltis that he was issuing a withdrawal order pursuant to section 104(d)(1) of the Act so as to require Respondent to remove the accumulated mud from the roadway (Tr II: 51). As he was talking to Soltis, a front-end loader drove by the scale house and entered an area where it travelled through five feet of water (Tr. II: 51-52, Exh. G-6A, area "E").

The inspector issued 104(d)(1) Order No. 3710673 for both these conditions. The order alleges a failure to comply with 30 C.F.R. '77.1608(a). The standard requires that dumping

locations and haulage roads be reasonably free of water, debris and spillage.

Colton was particularly concerned about the possibility of a collision between two trucks on the haulage road, at a point where it intersected with another road (Tr. II: 90-91). At the other cited location he was concerned that a vehicle driver using

a fueling station adjacent to the scale house could drown in the water impounded by +5 refuse (Tr. II: 70, 91-92, 116-17, 147, 151-54, Exhs. G7-9).

Respondent concedes that it was having trouble keeping the haulage road free of mud, but suggests it was doing the best it could. It had scraped the mud from the road with a front-end loader earlier that morning (Tr. II: 160). Power Operating claims that the area in which water was allowed to accumulate south of the scalehouse was not accessible to its vehicles. It contends that all drivers had been told not to enter the area (Tr. II: 163, 166-67, 177-78, 192-93).

I affirm this alleged violation as a "significant and substantial" violation of '77.1608(a) with regard to both areas and assess a $1,250 civil penalty. The Secretary has not established that the violations in either area were the result of Respondent's "unwarrantable failure" to comply with the regulation.

I credit Inspector's Colton's testimony and find the haulage road was not "reasonably free" of water and debris and was in extremely dangerous condition. Respondent recognized that the wet conditions of the preceding days had made the road dangerous and took some steps to eliminate the hazard by pushing the mud to the bottom of the road (Tr. II: 190). However, given the conditions observed by Colton, the company obviously did not scrape the road often enough.

Respondent had knowledge of the propensity for this road to become dangerously muddy. Thus, it was incumbent upon Respondent to assure that hazardous conditions did not recur before letting vehicles use the road. Since it failed to do this, I find its conduct negligent, although not sufficiently aggravated to sustain a characterization of "unwarrantable failure."

Given the conditions observed by Inspector Colton, I find, however, that an accident resulting in serious injury was reasonably likely and that these conditions were due to some considerable degree of negligence on the part of Respondent. I conclude that the gravity of the violation and Power Operating's negligence in allowing it to occur warrant a $1,250 penalty.

I also credit Inspector Colton's testimony that he observed a front-end loader travelling through the impounded water in the +5 refuse area. Further, I credit his testimony that vehicle drivers using the fueling pump near the scalehouse were endangered by this accumulation of water.

While I credit Respondent's testimony that it took steps to prevent access to the accumulated water, I conclude that these steps were insufficient, as evidenced by the direct observations of Inspector Colton. Since Power Operating management realized the potential hazard posed by the impounded water, I conclude that it was obligated to take more concerted measures to preclude miners from entering this area. The record does not establish that Power Operating took measures that would have assured that all miners would stay out of impounded water.

Given the action taken by Respondent to warn its employees, I conclude that its conduct does not rise to the level of aggravated conduct, but was sufficiently negligent to warrant the imposition of the $1,250 penalty assessed for the violations in both areas. The precautions taken by Power Operating to prevent access to this area indicate its awareness that entry into the impounded water area was reasonably likely to result in serious injury.

Order No. 3710704: Accumulation of combustible material in the old bucket shop

On October 26, 1993, Mr. Colton inspected the old bucket shop at Respondent's preparation plant (Tr. II: 224). At the north end of the shop is a door used by Respondent to bring a front-end loader partially inside the building for lubrication. Three 275-gallon drums of lubricant and several smaller drums were positioned by the door. There were oil soaked rags, wooden containers, wooden pallets, grease and other combustible materials around these drums of lubricant (Tr. II: 225-228).

Fluorescent lights, electrical sockets and an air compressor were also in this area. Inspector Colton believed the conditions posed a fire hazard and therefore issued Order No. 3710704, pursuant to section 104(d)(1) of the Act, alleging a violation of 30 C.F.R. '77.1104. That standard prohibits the accumulation of combustible materials, lubricants and grease where such substances can create a fire hazard.

While I credit Inspector Colton's opinion that these conditions at the north end of the bucket shop created a fire hazard, I conclude that the Secretary has not proven that a fire resulting in serious injury was reasonably likely. The record also does not establish that Respondent was highly negligent

in allowing this condition to exist. I therefore affirm this violation as a "non-significant and substantial" violation of section 104(a) of the Act. Applying the six criteria in section 110(i) of the Act, I assess a $400 civil penalty.

Respondent had applied some oil-dry, a substance which soaks up grease and oil, in front of the tanks and drums. While it should have cleaned up the area better, I deem its failure to do so constitutes a moderate degree of negligence.

I also conclude that the violation was not nearly as serious as assumed by the inspector. Mr. Colton was concerned that a spark caused by a fault in an electrical circuit could cause a fire (Tr. II: 234). The record, however, does not establish that such a spark was reasonably likely to occur, or that it was reasonably likely to cause a fire (Tr. II: 262-70, 287-93).

The inspector also based his opinion of the likelihood of fire on an assumption that hot vehicle exhausts would enter the bucket shop (Tr. II: 234). However, I credit the testimony of Assistant Plant Manager Gary Crago that the only vehicle entering the north end of the bucket shop is a front-end loader (Tr. II: 292). I further credit his testimony that this vehicle enters the shop only half-way with the exhaust (the hottest surface on the vehicle) outside of the building (Tr. II: 289).

ORDER

Citation No. 3710524 is affirmed as a significant and substantial violation of section 104(a) of the Act and a $1,500 civil penalty is assessed.

Citation No. 3710673 is affirmed as a significant and substantial violation of section 104(a) of the Act and a $1,250 civil penalty is assessed.

Citation No. 3710704 is affirmed as a non-significant and substantial violation of section 104(a) and a $400 civil penalty is assessed.

Order Nos. 3710451, 3710505, 3710506 and Citation No. 3710675 and the corresponding proposed penalties are vacated.

The assessed civil penalties in this matter shall be paid within 30 days of this order.

Arthur J. Amchan
Administrative Law Judge

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