

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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February 11, 1998

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. PENN 97-128  
Petitioner : A.C. No. 36-06475-03553  
v. :  
: Homer City Coal Processing Plant  
HOMER CITY COAL PROCESSING CORP., :  
Respondent :

## DECISION

Appearances: Ronald M. Miller, Conference and Litigation Representative,  
U.S. Department of Labor, MSHA, Hunker, Pennsylvania for Petitioner;  
R. Henry Moore, Esq., Buchanan Ingersoll Professional Corporation,  
Pittsburgh, Pennsylvania for Respondent.

Before: Judge Weisberger:

This case is before me based upon a petition for assessment of penalty filed by the Secretary of Labor ("Secretary") alleging a violation by Homer City Coal Processing Corp., ("Homer City") of 30 C.F.R. Section 77.404(a). Pursuant to notice, a hearing was held in Johnstown, Pa., on November 13, 1997. Each party filed a brief on January 21, 1998.

### I.

Homer City operates the Homer City Coal Processing plant located in Indiana County, Pa. The plant processes coal for a generating station. Within the plant, coal is conveyed to various points by conveyor belts. A series V-shaped structures ("chairs") containing two-wing rollers, one located on the walkway side of the belt and the other on the far side, and a bottom roller, to support and guide the belt.

### II.

On November 13, 1996, John H. Kopsic, an MSHA coal mine safety and health specialist, inspected the No. 5 conveyor belt at the subject site. He indicated that starting at the belt tail, 16 of the first 23 chairs contained rollers that were frozen or stuck. He said that he

observed a lot of material, most of it coal<sup>1</sup>, on the rollers, belt structures, frame, and under the belt. He indicated that the material was caked on some of the rollers. According to Kopsic, he observed flat spots on those rollers that were not turning. He indicated that the flat spots were created by the belt rubbing on the rollers that did not turn. According to Kopsic, two rollers were warm to the touch. One was under the decant chute, and the other was approximately eight feet away toward the head. The belt was in contact with these warm rollers, material was caked around them, and they were not turning. Kopsic indicated that he tested approximately a half dozen wing-rollers on the walkway side and they would not turn. According to Kopsic because rollers were not turning, when the belt would slide over these rollers, it would create friction which could lead to smoke. He opined that employees working in the upper floors of the plant could be overcome by the smoke.

Kopsic issued a § 104(a) citation alleging a violation of 30 C.F.R. § 77.404(a) which provides as follows: “[m]obile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.”

### III.

David William Anderson, Homer City’s health & safety director and equipment supervisor, testified that he was with Kopsic at the tail of the belt at approximately 7:50 a.m. on November 13, and that the belt was in operation at that time. He said that he checked every wing-roller that was not turning, and with the exception of two near the top, he was able to get the rest to pivot with only “minimal force” (Tr. 138). He indicated that because the belt was not touching the rollers that did not turn with the belt running, no friction was created. He also opined that the accumulations that were present were typical of that belt, and did not present any hazards. He indicated that he did not see any flat spots on the rollers.

A video of the cited area, was taken a few weeks after November 13, 1996. According to Anderson, the condition of the cited area in the video is the same as seen by him on November 13 with the exception of two chairs that had been replaced the Saturday after November 13. The video indicates some rollers that were not turning. However, the moving belt was not in contact with these, or other rollers. He opined that there was no danger of fire or smoke inasmuch as the belt was not in contact with any of the rollers that were not turning on November 13. Anderson also indicated that under normal operations the belt does not touch the rollers. He also noted the presence of a fire hydrant and fire extinguishers in the areas.

In the same fashion, Donald J. Farabaugh, the midnight shift maintenance foreman who was present with Kopsic on November 13, indicated that the belt was not running on the rollers. He said that he did not see any condition that led him to an opinion that the belt was unsafe.

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<sup>1</sup> He indicated that there could be other material mixed in with it.

Frank LoPresti, the shift foreman, indicated that on November 13, Kopsic pointed out to him the rollers that were not turning, and a “couple of little” flat spots (Tr. 224). He indicated that there was not anything that he thought was significant. LoPresti opined that in normal operation the belt does not come in contact with the rollers due its curvature and that it is normally approximately 18 inches above the rollers. He indicated that based on his experience, the belt that he saw on November 13 did not present a hazard.

#### IV.

I accept the testimony of Homer City’s witnesses that in normal operations the belt does not touch the rollers and runs above the rollers. Also, I note Anderson’s specific testimony that, the morning the belt was cited, when he was not in the presence of Kopsic, he noted rollers that were not turning with the belt running, as they were located in areas where the belt ran above the rollers. Homer City refers to Anderson’s testimony that two of these rollers would not turn by hand, and argues that since they were not in contact with the belt, no violation existed. I reject Homer City’s argument and testimony for the reasons that follow.

I observed Kopsic’s demeanor and found his testimony credible that, as observed by him, on November 13 the belt was riding on the flat spots of rollers, and was in contact with two rollers. Robert G. Nelson, a supervisor inspector who accompanied Kopsic in his inspection of the belt at issue, corroborated that “the belt was touching the rollers” (Tr. 120). John Bencic, the union representative who accompanied Kopsic indicated in response to a leading question that he observed “rollers that were not turning that had the belt running over top of the rollers that’s in contact with these rollers that were not running (sic)” (Tr. 92). None of Homer City’s witnesses were with Kopsic at the time he made his observations, and thus could not contradict his eyewitness testimony as to what he observed at the time that he made his inspection. Also, since Kopsic did not point out the warm rollers to Homer City’s agents, they could not contradict his testimony that two rollers that he touched were warm. Further, although Anderson indicated that he did not see any flat spots, LoPresti noted a couple of little spots. Moreover, since Anderson conceded that Kopsic did not point out flat spots to him, it was not possible for him to contradict Kopsic’s testimony regarding the specific flat spots that he had observed. Based on these reasons, and my observations of the inspectors’ demeanor, I accept their testimony regarding their observations. Based on the inspectors’ testimony, I find that, when cited, there was coal material on some rollers, that the belt was in contact with rollers that were not turning, that some rollers had flat spots, and two rollers were warm to the touch. It now must be resolved whether these conditions constituted a violation of Section 77.404(a) on the ground that the belt was not longer “in safe operating condition”<sup>2</sup>.

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<sup>2</sup> Homer City argues that Section 77.404(e), *supra*, is violated only if it is established that an operator does not maintain the equipment in a safe operating condition and fails to remove it from service. Based on Ambrosia Coal & Construction Co., 18 FMSHRC 1552, 1556 (1996), I reject this argument and find that, to prevail herein, the Secretary need establish only the equipment was not maintained in safe operating condition.

V.

In Alabama By-Products Corporation, 4 FMHSRC 2128, 2129 (December 9, 1982), the Commission held that the following standard is to be used in deciding whether equipment is in safe or unsafe operating conditions<sup>3</sup>, “. . . the alleged violative condition is appropriately measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation.” Essentially, according to Kopsic, approximately 16 chairs contained rollers that were not turning, and the belt was riding on rollers that had flat spots. He opined, that due to the presence of coal material, this condition presented a friction source as further indicated by the presence of two warm rollers. I conclude that a reasonably prudent person, familiar with the violative conditions that I have found, would recognize that the belt was in an unsafe condition (See, Alabama By-Products, 4 FMSHRC *supra*). As stated by the Commission in Alabama By-Products, 4 FMSHRC *supra*, at 2131, as follows:

The danger posed in underground coal mining by a friction source that will lead to a heat buildup in an area where coal accumulations could occur is obvious. Where such dangers are present due to defects in the operating condition of equipment, that equipment cannot be considered in safe operating condition.

I take cognizance of Anderson’s testimony regarding the presence of extinguishers and fire hydrants in the area. I also note Kopsic’s testimony that the area was very wet, and that he did not observe any smoke, fire, or hot rollers, and that any smoke produced by friction of the rollers of the belt can be seen or smelled by miners who would then extinguish the fire with the fire extinguishers and hoses in the area. In this connection, I note the Commission’s discussion in Alabama By-Products, 4 FMSHRC *supra*, at 2131, as follows:

In light of the nature of the danger, the evidence relied upon by the operator concerning other conditions in the area, *i.e.*, that the belt was wet and fire-resistant, the area was adequately rock-dusted and ventilated, and coal accumulations were not then present, is not controlling as to whether an unsafe condition existed.

In the same fashion, I find that the lack of presence of smoke, fire, or hot rollers, to be not controlling as to whether an unsafe condition existed.

For all the above reasons, I find that it has been established that Homer City did violate Section 77.404(a), *supra*.

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<sup>3</sup> Alabama By-Products *supra* involves 30 C.F.R § 75.1725(a) whose wording is the same as that set forth in Section 77.404(a) *supra*.

## VI.

According to Kopsic the violation was significant and substantial due to the presence of stuck rollers and flat spots, and the amount of material on the stuck rollers, and on the belt structures.

A “significant and substantial” violation is described in section 104(d)(1) of the Mine Act as a violation “of such nature as could significant and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial, “if, based upon the particular facts surrounding the violation there exists 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 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term “significant and substantial” as follows:

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 be 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.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

We have explained further that the third element of the Mathies formula required that the Secretary establish 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 continuation of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1754-75 (July 1984).

I note the presence of stuck rollers, flat spots, and two warm rollers. However, aside from Kopsic’s conclusion that there was “a lot of material” on the rollers, belt structures, frames, and under the belt, there is no evidence in the record to make a specific finding of the amount of coal material present. Also, it would appear that in normal operations the belt is not in contact with the rollers. I thus find that the third element in Mathies has not been established and that the violation is not significant and substantial.

## VII.

Taking into account the presence of extinguishers and hydrants in the area, as well as the fact that the area was wet, and considering the fact that in normal operations the belt does not come in contact with the rollers, I find that the gravity of the violation herein was low. It has been stipulated that the level of Homer City's negligence was low. Considering also the history of violations as well as the good faith efforts expended to abate the violation, I find that a penalty of \$20 is appropriate.

### **ORDER**

It is ordered that, within 30 days of this decision, Homer City pay a civil penalty of \$20.

Avram Weisberger  
Administrative Law Judge

Distribution:

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