

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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July 24, 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 91-421
Petitioner : A.C. No. 05-00301-03765
 :
v. :
 : Dutch Creek Mine
MID-CONTINENT RESOURCES, INC., :
Respondent :

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Edward Mulhall, Jr., Esq., Delaney & Balcomb,
Glenwood Springs, Colorado, for Respondent.

Before: Judge Manning

This case is before me pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1988)("Mine Act" or "Act") following a remand from the Commission. 16 FMSHRC 1218 (June 1994). The Commission vacated the conclusion of Administrative Law Judge John J. Morris that a violation of 30 C.F.R. ' 75.400 was not of a significant and substantial nature ("S&S") and remanded this issue to the judge. For the reasons the follow, I conclude that the violation was S&S.

I. BACKGROUND

On May 1, 1990, Inspector James Kirk of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Order of Withdrawal No. 3412700 (the "Order") to Mid-Continent Resources, Inc. ("Mid-Continent") at its Dutch Creek Mine¹, pursuant to section 104(d)(2) of the Mine Act, 30 U.S.C. ' 814(d) (2). The Order alleged that loose coal had accumulated along the

¹ The Dutch Creek Mine is now closed and sealed.

103 strike belt (the "belt") between the belt drive and the tail-piece at the stage loader. This belt transported coal from the longwall section to another belt, which transported the coal out of the mine. The belt was about 3,000 feet long. In his decision, Judge Morris affirmed the violation, determined that it was caused by Mid-Continent's unwarrantable failure to comply with the safety standard, but found that the violation was not S&S. 15 FMSHRC 149, 152-60 (January 1993). The Secretary filed a petition for discretionary review of his S&S finding, which was granted by the Commission.

As stated above, the Commission vacated Judge Morris's conclusion that the violation was not S&S and remanded that issue for further analysis consistent with the its decision. 16 FMSHRC at 1224. On March 13, 1995, this case was reassigned to me for an appropriate resolution. I have reviewed the hearing transcript and exhibits and make the following findings of fact based on the evidence.

II. THE COMMISSION'S DECISION

In its decision, the Commission agreed with the Secretary that "the judge failed to address adequately the evidentiary record in determining that it was not reasonably likely that the hazard contributed to by the violation would result in an injury." 16 FMSHRC at 1222. The Commission stated that the judge's factual determinations concerning the violation "appear to be consistent with a finding of S&S, and he failed to reconcile those findings with his determination that the violation was not S&S." Id. The Commission's decision lists a number of instances where it believes the judge's decision is inconsistent.

The Commission also determined that "the judge failed to reconcile his finding that Dutch Creek is a gassy mine subject to five-day spot inspections with his determination that the violation was not S&S." 16 FMSHRC at 1222. The Commission noted that accumulations, in conjunction with a methane ignition in the face area, "could propagate and increase the severity of a fire or explosion." Id.

Further, the Commission concluded that the judge failed to take into account continued normal mining operations when he "discounted" Inspector Kirk's testimony that accumulations were in contact with rollers supporting the belt. Id. Finally, the Commission held that the judge erred "to the extent [he] suggested that spontaneous combustibility of coal is required for an S&S finding...." Id.

III. THE JUDGE'S DECISION

Judge Morris made a number of finding in concluding that Mid-Continent violated 30 C.F.R. ' 75.400. As relevant here, the judge entered the following findings in his discussion of the violation:

7. [Inspector] Kirk saw accumulations of coal at the belt tailpiece, the stage loader area and up to the end of the conveyor belt. Outby coal was compacted underneath the belt. The belt rollers and belt were in contact with the coal.

* * * * *

19. The accumulations were mostly dry from the number 6 door inby to the tailpiece of the conveyor. Outby from the number 6 door towards the belt drive area the accumulations were moist or wet.

* * * * *

23. Fire is one of the hazards of coal accumulations.

24. The Dutch Creek Mine is a gassy mine subject to five-day spot inspections.

25. Potential ignition sources included the area where the rollers rubbed the coal as well as where the conveyor belt rubbed the framework of the conveyor. MSHA also found one area in the longwall that was not maintained. That area could also be considered as an ignition source.

26. Accumulations could be ignited by frictional contact. The amount of coal along the conveyor could be introduced into an ignition causing a more severe ignition.

27. Injuries from the described hazard could be serious and possibly fatal.

* * * * *

32. There were electrical cables for the shark pump and the normal electrical devices for the longwall. In addition, on May 1st there was a permissibility violation.

33. Mr. Kirk identified the pre-shift, on shift daily examination referring to the 103 longwall. The examinations, as reported, listed accumulations on the 103 longwall from April 25, 1990 to May 1, 1990. The conditions were reported and on one occasion the report noted that shoveling was undertaken.

34. In Mr. Kirk's opinion, the fire boss and the pre-shift inspection noticed that there were accumulations on the 103 longwall belt at the drive and inby. This was the area that Mr. Kirk cited.

15 FMSHRC at 152-54 (citations to transcript omitted).

In his discussion of the violation, Judge Morris credited Inspector Kirk's description of the location of the accumulations. 15 FMSHRC at 155. He also found that due to its low oxygen content and high-ash content, the coal "burns only with great difficulty." Id. He determined that the record established several ignition sources. In this regard, the judge stated:

One location was where the conveyor rollers rubbed against the coal and also where the conveyor belt rubbed on the framework of the conveyor. Additional ignition sources could also include the electrical cables required to run the conveyor, the impermissible condition he cited as well as the electrical cables for the shark pump.

15 FMSHRC at 155. Finally, Judge Morris credited the testimony of Mid-Continent's witnesses that the belt had broken on the previous shift and that this break dumped about 50 tons of coal into the belt entry. 15 FMSHRC at 156-57. He rejected the testimony of Inspector Kirk that the belt was not broken but was spilling coal at the time of the inspection. 15 FMSHRC at 157.

In discussing whether the violation was S&S, Judge Morris determined that Mid-Continent's coal burns with great difficulty and will not spontaneously combust due to its low oxygen and high

ash content. 15 FMSHRC at 159. He found that Mid-Continent must add fuel oil to its coal when it uses the coal in its coal-fired thermal dryers. Id. He further held that a major methane fire at the mine in the summer of 1990 failed to ignite adjacent coal pillars. Id. In a key paragraph, the judge made the following determinations:

Mr. Kirk confirms [Mid-Continent's] evidence as to the ignitability of the ... coal. He testified that while the coal was in contact with the conveyor belt at four places, he didn't recall any hot areas. He also tested the friction points for heat. Mr. Kirk testified that the usual scenario is that the more friction the greater the heat. Thus, a smoldering fire then goes to full fire. However, Mr. Kirk agreed that if contact fails to heat the coals and the contact remains minimal, there would probably be no injury to an individual miner. Mr. Kirk describes the friction in four places as "light to heavy."

15 FMSHRC at 159 (citations to transcript omitted).

Judge Morris determined that the violation was not S&S because the Secretary failed to prove the third element of the Mathies test. He stated: "Due to the lack of ignitability of the loose coal I conclude there was not a reasonable likelihood that a fire would occur." Id.

IV. DISCUSSION WITH FINDINGS AND CONCLUSIONS

The Commission has established a four part S&S test, as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial ..., the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete 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.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). An evaluation of the reasonable likelihood of an injury should be made assuming continued normal mining operations. U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985). In establishing the third element of the Mathies test, the Secretary is not required to prove that the injury or illness contributed to by the violation is more probable than not. Rather, the issue is whether there was a reasonable likelihood that the hazard contributed to would result in an injury.

Judge Morris determined that the first two steps of the Mathies S&S test were present. He found, however, that an injury was unlikely because the coal would not readily burn. In its brief on remand, Mid-Continent contends that the violation was not S&S because: (1) the coal is inherently incombustible and difficult to ignite; (2) there were no potential ignition sources in the area; and (3) the section was not in production and would not have produced coal until the accumulations were cleaned up.

The coal mined at the Dutch Creek Mine is coking coal, which is a type of bituminous coal. In the coal seam where the accumulations were found, the coal contains about 23 percent volatile matter. (Tr. 336-37). The coal is not used as fuel for power-plants or industrial boilers, but is used in making steel.

In 1990, a methane fire occurred in a different coal seam at the mine. The fire consisted of a large flame about 30 to 40 inches in diameter up to twenty feet in length. (Tr. 357-59). It was a "roaring jet of flame" that took about six weeks to put out. Id. The rock around the flame was red hot. The coal at the mine is under about 3,000 feet of overburden and the coal is soft. The coal pillars regularly slough loose coal. Indeed, the coal in the pillars is frequently crushed as a result of the weight of the overburden. (Tr. 359). Although the area around the methane fire became quite hot, the coal pillars and coal sloughage did not ignite. Id. Judge Morris determined, based on this and other evidence in the record, that the coal is difficult to ignite.

I agree with his finding that the coal does not easily ignite. Nevertheless, the coal is bituminous coal that will burn and when it does it is capable of producing intense heat. I

² See, generally, definition of "coking coal" in Bureau of Mines, U.S. Department of the Interior, Dictionary of Mining, Mineral and Related Terms, at 233 (1968).

believe that the fact that the coal does not easily ignite should be considered, but that the S&S determination must be based on analysis of all of the particular facts present at the mine, including, but not limited to, the ignition sources and the length of time that the accumulations existed.

There is no question that the belt break that occurred on the previous shift spilled up to 50 tons of loose coal into the entry. I find, however, that not all of the accumulations were caused by the belt break. Inspector Kirk determined that accumulations existed at a number of locations along the belt. As stated above, Judge Morris credited the inspector's description of the accumulations. 15 FMSHRC at 152-53. There were accumulations at the belt tailpiece near the stage loader. (Tr. 18). Approximately 100 feet outby the tail piece, coal was "compacted underneath the belt" and belt rollers were in contact with the coal. (Tr. 18-19). The accumulations were dry, ranged up to 12 inches deep, and were centered underneath the conveyor. (Tr. 19).

Additional accumulations were at the shark pump. (Tr. 19-20). Inspector Kirk was not sure of the depth, but the accumulations were about 50 feet long. (Tr. 20). The accumulations were black and dry. There were accumulations at the Nos. 10 and 11 doors. (Tr. 21). Belt rollers were in contact with the coal. (Tr. 21-22). At No. 9 door there was "a windrow approximately 260-foot long of coal, up to 18-inches deep." (Tr. 22). At the No. 6 door, coal accumulations were underneath the belt and the belt's rollers were turning in the coal. (Tr. 23). The coal was mostly dry at that location, but became very wet outby the No. 6 door towards the belt drive. (Tr. 24).

In a number of these locations, Inspector Kirk observed coal that was "compacted" under the belt and in contact with the belt's rollers. It is unlikely that such accumulations were solely the result of a belt break. When a belt breaks, coal will be dumped onto the lower belt and along the sides of the belt at the breaking point. (Tr. 544-45). In addition, coal will be thrown off the belt at other locations as a result of the sudden release of tension on the belt. Id. MSHA Inspector William Denning observed the belt on May 2, a day after the order was

Judge Morris determined that the accumulated material at the belt drive was "at best incombustible rock and some coal." 15 FMSHRC at 159. Accordingly, he vacated the part of the order that cited the drive area. Id. I have not considered any accumulations outby the No. 6 door, including the drive area, in reaching my conclusion that the violation was S&S.

issued. He testified that there was a windrow of coal along the side of the belt at one location that could have been dumped off the belt when it broke. (Tr. 687-88). He further testified that, in his opinion, not all of the accumulations were due to the belt spill. (Tr. 688). I do not believe that a belt break that causes coal to be dumped and scattered will create areas of compacted coal under the belt's rollers.

Preshift and onshift reports for the period between April 28 and May 1 indicate the presence of coal accumulations along the belt. (Ex. M-11). Some of these reports indicate that shoveling was occurring and others indicate that the condition was reported. Id. Anyone shoveling would have been close to the stage loader where coal is dumped onto the belt or at the drive where the coal is dumped onto the next belt. (Tr. 111, 117). Accumulations at those locations can create operational problems. Inspector Kirk reviewed these reports when he came out of the mine on May 1. (Tr. 43). I conclude that some of the accumulations observed by Inspector Kirk along the 3,000 foot long belt had existed for several days prior to May 1, the date the Order was issued. I base this conclusion on the fact that coal was compacted under the belt at some locations and preshift and

onshift reports indicate that accumulations had been present along the belt since at least April 28.

Although the belt was not operating continuously at the time the order was issued because it had broken, it had operated on the previous production shift and on production shifts during the days just prior to May 1. As stated above, some of the accumulations between the belt drive and the stage loader were in contact with the belt and rollers supporting the belt. Coal dust may be created when a belt and belt rollers turn in accumulations of coal. (Tr. 105). Judge Morris determined that conveyor rollers rubbing against the coal constituted an ignition source. 15 FMSHRC at 155. He stated that "[a]ccumulations could be ignited by frictional contact." 15 FMSHRC at 154. He found that additional potential ignition sources included "electrical cables required to run the conveyor, the impermissible condition [Inspector Kirk] cited, as well as electrical cables for the shark pump." 15 FMSHRC at 155.

The 103 longwall section produced coal on the graveyard shift (C-shift) only.

Judge Morris did not consider the longwall equipment at the face to be potential ignition sources because the longwall section was not producing coal at the time of Kirk's inspection. 15 FMSHRC at 155. Although I believe that such ignition sources

The Dutch Creek mine is a gassy subject to five-day spot inspections. 15 FMSHRC at 154. If there were a methane ignition at the face during coal production, a fire could spread into the belt entry as a result of the accumulations. Loose coal and coal dust can cause a methane ignition to propagate and increase the force of an explosion. (Tr. 483). Mid-Continent argues that methane ignitions at the face should not be considered because the longwall section was not producing coal at the time of the inspection. The evidence reveals, as discussed above, that some of the accumulations had existed for several days. Consequently, the record supports the Commission's determination that "[a]ccumulations, in conjunction with a methane ignition in the face area, could propagate and increase the severity of a fire or explosion." 16 FMSHRC at 1222.

Finally, the Commission asked the judge, on remand, to take into account continued normal mining operations when considering Inspector Kirk's testimony that the belt rollers he saw turning in the accumulations had not produced any hot areas. I cannot assume, as does Mid-Continent, that all of the accumulations would have been cleaned up as soon as the belt was spliced, before production resumed. I credit Mid-Continent's evidence that the accumulations at the location of the belt break and at the tailpiece would have been cleaned up. But the accumulations that were compacted under the rollers at other locations along the 3,000 foot long belt had existed for some time and, consequently, I cannot credit the testimony of Mid-Continent's witnesses that the belt would not have been operated until these accumulations were removed. Accordingly, taking into consideration continued normal mining operations, the fact that the inspector did not find any hot areas is not significant because such areas could have begun to smolder on subsequent production shifts. Inspector Kirk testified that these "friction points" could become hot once production resumed. (Tr. 104).

could have been considered because accumulations had existed for several production days, I have not included these potential ignition sources in my analysis.

In 1981, fire caused by a methane ignition in a working face was carried down a belt entry by the coal and coal dust on the belt. (Tr. 486-87). Although that belt was ventilated by return air and the 103 strike belt was ventilated by intake air, the accumulations along the belt could be introduced into a methane ignition or explosion at the face.

Because the inspection occurred on a nonproduction shift and

Mid-Continent contends that any smoldering or smoking coal would have been detected by its carbon monoxide monitoring system and that no injuries would have occurred as a result. Mid-Continent offered evidence about its fire protection systems, which I credit. As the Seventh Circuit has stated, in considering a similar argument, "[t]he fact that [a mine operator] has safety measures in place to deal with a fire does not mean that fires do not pose a serious safety risk to miners." Buck Creek Coal, Inc. v. Secretary, 52 F.3d 133, 136 (1995). The fact that Mid-Continent installed these systems confirms "the significant dangers associated with coal mine fires." Id.

Although the coal produced at the Dutch Creek Mine will not ignite as readily as steam coal, it will burn. The accumulations will not ignite unless there is a "confluence of factors" to produce such an ignition. Texas Gulf, Inc., 10 FMSHRC 498, 501 (April 1988). Taking into consideration the ignition sources, the length of time that accumulations existed, the high levels of methane produced at the working face, and continuing normal mining operations, I find that the Secretary established the third element of the Mathies S&S test. Judge's Morris's findings with respect to the fact of violation support an S&S finding. Because the coal does not easily ignite, I cannot say that it was more probable than not that the violation would have resulted in an injury producing ignition or explosion. Nevertheless, there was a reasonable likelihood that the hazard contributed to would result in an injury.

V. CIVIL PENALTY

Judge Morris analyzed the civil penalty criteria in section 110(i) of the Mine Act, 30 U.S.C. ' 820(i), and determined that a civil penalty of \$400.00 was appropriate for this violation. 15 FMSHRC at 160-61. He determined that Mid-Continent is in Chapter 11 bankruptcy, is only a debtor-in-possession, and is no longer mining coal. He determined that it had a history of 604 paid violations from May 1, 1988 to April 30, 1990. He found that Mid-Continent was negligent but that the violation was not seri-

the belt was broken, it is not surprising that Inspector Kirk did not observe any hot areas.

The fourth element of the Mathies S&S test has been met because it is reasonably likely that if an injury occurred, it would be of a serious nature.

ous. Finally, he found that Mid-Continent rapidly abated the violation. I adopt his analysis of the penalty criteria except that I find that the violation was serious, for the reasons set forth in my S&S analysis. The Secretary proposed a penalty of \$1,000 for the violation. I find that a penalty of \$500 is appropriate, taking into consideration the penalty criteria.

IV. ORDER

Accordingly, I find that the violation described in Order No. 3412700 significantly and substantially contributed to the cause and effect of a coal mine safety hazard. Mid-Continent Resources, Inc. is **ORDERED TO PAY** the Secretary of Labor the sum of \$500.00.

Richard W. Manning
Administrative Law Judge

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RWM

As stated above, Mid-Continent filed for bankruptcy under Chapter 11 of the Bankruptcy Act in 1992 (Case No. 91-11658 PAC, District of Colorado). Payment of the assessed penalty may be subject to the approval of the United States Bankruptcy Court. The Secretary is authorized to present the assessment as a claim in the bankruptcy proceeding.