

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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June 5, 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 93-298
Petitioner : A.C. No. 05-03505-03619
 :
v. : Deserado Mine
 :
WESTERN FUELS-UTAH, INC., :
Respondent :

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Karl F. Anuta, Esq., Boulder, Colorado,
for Respondent.

Before: Judge Cetti

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq., the "Act". The Secretary of Labor on behalf of the Mine Safety and Health Administration (MSHA), seeks civil penalties from Respondent Western Fuels-Utah, Inc., for the alleged violation of four mine safety standards contained in 30 C.F.R. Part 75, subpart L involving fire protection.

Facts Not In Dispute

1. Western Fuels-Utah, Inc., is engaged in mining and selling of bituminous coal in the United States, and its mining operations affect interstate commerce.

2. Western Fuels-Utah, Inc., is the owner and operator of Deserado Mine, MSHA I.D. No. 05-03505.

3. Western Fuels-Utah, Inc., is a medium-size mine operator with 2,606,398 tons of production in 1991.

4. Western Fuels-Utah, Inc., is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. ("the Act").

5. The presiding Administrative Law Judge has jurisdiction in this matter.

6. The subject citations and failure to abate orders were properly served by a duly authorized representative of the Secretary upon an agent of Respondent on the dates and places stated therein, and may be admitted into evidence for the purpose of establishing issuance and not for the truthfulness or relevancy of any statements asserted therein.

7. The exhibits offered by Respondent and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.

8. The proposed penalties will not affect Respondent's ability to continue in business.

II

The Deserado Mine is a medium-size underground coal mine located near Rangely, Rio Blanco County, Colorado. The mine operates on three shifts, five days a week.

On August 10, 1992, at about 7:10 p.m. during the mine's evening shift, a fire occurred in the drive unit of the conveyor belt located in the Number 3 East Mains (EM3) of the Deserado Mine. The fire was detected when the Conspec computer system noted a CO (carbon monoxide) alarm. Alarms were set off by the rise in carbon monoxide and the discharge of the dry chemical fire suppression system at the EM3 conveyor system.

It is undisputed that there were no injuries and that the fire was immediately reported to MSHA as soon as it was controlled, even though it was not a reportable fire in the opinion of the MSHA inspectors.

On August 11, 1992, the morning right after the swing shift fire, MSHA personnel went to the mine and inspected the area of the fire and the equipment at the EM3 belt drive. No violations were found at the time of this first inspection and no citations were issued. A week later MSHA personnel returned to the area of the fire at the mine and issued four citations. Two of the citations involved electrical safety switches and the other two the dry chemical powder fire suppression system.

III

There was considerable speculation and different theories advanced by the parties at the hearing as to what caused the fire but very little direct or persuasive evidence. The operator's theory as to what caused the fire as set forth in the first two pages of Respondent's post-hearing brief is as follows:

Logs, trash or coal jammed into the drive of the belt. Friction created by the belt drive rollers against the logs ignited the wood within perhaps one to two minutes after the jam. The ensuing fire rapidly burned through the jammed belt. The dry chemical powder fire suppression system discharged and the nozzles which were directed at the top and bottom of the top belt and the top of the bottom belt, extinguished the fire on the belt. However, the fire between the drive rollers was not extinguished. Warned by the alarms which were set off by the raise in carbon monoxide and the discharge of the fire suppression system, miners from the Deserado Mine, using backup fire hoses, extinguished the fire in the belt drive and in the cribbing above the belt drive. The fire which began at about 7:10 p.m. was controlled at about 7:34 p.m. and extinguished by 8:00 p.m.

It was the Secretary's position that the cause of the fire was either a jumper at the control center that resulted in the bypass of the sequence and slippage switches for the EM3 conveyor belt flight or the failure of those switches to function as intended. The Secretary in post-hearing brief at page 7 states:

... Inspector Gore issued [two citations] ... for an inoperable sequence switch and ... an inoperable switch on the fire suppression system. The inoperable switches were determined to be the cause of the accident, since the only other possible cause presented was a jumper at the control center. The mine insists there were no jumpers, leaving us to conclude that the switches must have been ineffective.

This was the basis for the issuance of Citation No. 3587226.

Turning now from the speculation and the various theories advanced by the parties during the hearing and in their post-hearing briefs as to what caused the fire, we now take a close look at each specific citation issued and determine if the pre-

ponderance of the evidence presented established the violations alleged in each citation.

Citation No. 3587226

This citation charges the operator with an S&S violation of 30 C.F.R. ' 75.1102. That safety standard in its entirety reads as follows:

Underground belt conveyors shall be equipped with slippage and sequence switches.

The citation issued by Inspector Gary K. Frey, one week after the fire at the time of the second inspection reads as follows:

The sequence and slippage switches installed for the East Mains No. 3 conveyor belt flight failed to function as intended, in that the belt drive continued to operate when the East Mains No. 2 belt was deenergized causing a coal spillage at the head roller of the No. 3 belt. This condition stalled the belt causing the drive rollers to slip on the belt, the resulting friction caused a belt fire to occur on 08-10-92.

Inspector Gary K. Frey who signed the citation was not available at the hearing. Although signed by Mr. Frey, the citation was written by Inspector Art Gore who was present and testified at the hearing. Mr. Gore was not present, however, at the time of the initial MSHA inspection of August 11, 1992, the morning immediately following the swing shift fire. Mr. Gore was at the mine on August 18th when the four citations were issued.

It is undisputed that sequence and slippage switches in question were installed for the East Main No. 3 conveyor belt flight. Both switches were "designed" to perform their proper function. Both of the switches were properly working before and after the August 10, 1992, fire and continued in use to the present (time of hearing) without any repair or alteration. During his inspection of August 18th Inspector Gore did not look at the switches to find out whether they were functioning or not. His conclusions were based upon his examination of the electrical wiring diagrams and the Conspec computer printout. Inspector Gore testified:

Q. ... So looking at the Conspec and the electrical wiring diagram, you concluded that the switch must not have been functioning?
A. That's true.

Q. Did you look at the switch to find out if it was functioning or not?

A. No, I did not.

In item 17 of the citation Inspector Gore states, "The system was examined and no malfunctions were found or occurred at the time of examination."

Evidence was presented by Respondent showing that the reliability of the Conspec printout is questionable. Errors were shown to exist in the Conspec printout. Credible evidence was also presented to show the switches in question had been inspected three days before the fire and were functional prior to the fire, that the switches had not been changed or modified in any way after the incident, and that the same switches were still in place and functional two years later at the time of the hearing.

In another vein, looking at the plain wording of the regulation in question, it clearly states that the conveyor shall be "equipped" with specified equipment. What is the ordinary plain meaning of the word "equipped?" If the transmission of your car were to suddenly not function properly for a short period of time, you would not say your car was not "equipped" with a transmission, particularly where the transmission for some unknown reason without any modification or repair appeared to be functioning in a very proper manner within a few minutes or hours thereafter. Using ordinary plain english you wouldn't say your car was not "equipped" with a transmission. I also believe that if the promulgators of the regulation intended to make the sudden unexpected malfunction of required equipment a citable offense, they would have worded the regulation differently so that a person of ordinary prudence on reading the regulation would have known of that intent.

Upon evaluation of all the evidence presented, I find that the preponderance of the probative evidence fails to establish that the EM3 belt conveyor was not "equipped with slippage and sequence switches" as required by 30 C.F.R. ' 75.1102. The citation is vacated.

Citation No. 3587227

This citation alleges a violation of 30 C.F.R. ' 75.1101-16(a). The safety standard in relevant part reads as follows:

30 CFR ' 75.1101-16(a)

(a) Each self-contained dry powder chemical system shall be equipped with sensing devices which shall be designed to activate the fire

control system, sound and alarm and stop the conveyor drive motor in the event of a rise in temperature, (Emphasis added).

Petitioner charges the operator with a 104(a) S&S violation of the above-quoted safety standard. The citation reads as follows:

Citation No. 3587227

The self-contained dry powder chemical system installed on the East Mains No. 3 belt flight failed to stop the conveyor drive motors after the fire suppression system for the No. 3 belt flight was activated. This condition is believed to have contributed to a belt fire which occurred on 08-10-92 at this belt drive.

The record shows the citation was issued on August 18, 1992, at 9:45 a.m. The citation was terminated five minutes later, at 9:50 a.m. without any change in the self-contained dry powder chemical system's sensing devices. Inspector Gore who wrote the citation wrote in item 17 of the citation:

The system was examined and no malfunctions were found or occurred at the time of examination.

The evidence clearly shows that the dry powder chemical fire suppression system was equipped with a sensing device that did, in fact, activate (discharge) the fire control system and sounded the alarm. There is disagreement as to whether or not the fire suppression system stopped the conveyor drive motor. Assuming arguendo that it did not stop the conveyor drive motor no persuasive evidence was presented that (in the words of the regulation) it was not "equipped" with a sensing device that was "designed" among other things, to stop the conveyor drive motor. The undisputed fact that the citation was abated without any repair, service or modification of this sensing device and continued to function properly after the August 10th fire is very strong, if not conclusive evidence that the fire suppression system was equipped with sensing devices "designed" to stop the conveyor drive motor in the event of a rise in temperature.

The Secretary, the charging party, has the burden of proof. On careful evaluation of all the evidence, I find that within the meaning of the safety standard in question, that the preponder-

ance of the evidence presented fails to establish that the self-contained dry powder chemical system was not "equipped" with sensing devices "designed" to activate the fire control, sound the alarm and stop the conveyor drive motor in the event of a rise in temperature. The citation is vacated.

Citation Nos. 3587228 and 3587229

Citation No. 3587228, as amended at the hearing, alleges a violation of 30 C.F.R. ' 75.1101-14(a). The citation reads as follows:

The dry chemical fire extinguishing system installed at the East Mains No. 3 belt drive was not installed as required in that it was measured with a standard rule to contain over 81 feet of piping and hose between the chemical container and the furthest nozzle which was located at the belt take-up unit.

Up to the time Petitioner modified the citation at the hearing, this citation alleged a violation of 30 C.F.R. ' 75.1107-9(a)(3) which, with respect to dry chemical fire-extinguishing systems, requires that the "hose and pipe shall be as short as possible; the distance between the chemical container and the furthest nozzle shall not exceed 50 feet."

At the commencement of the hearing, without objection, the Petitioner amended Citation No. 3587228 to allege a violation of 30 C.F.R. ' 75.1101-14(a) which provides as follows:

(a) Self-contained dry powder chemical systems shall be installed to protect each belt-drive, belt take-up, electrical-controls, gear-reducing units and 50 feet of fire-resistant belt or 150 feet of non-fire-resistant belt adjacent to the belt drive.

Turning now to the other fire suppression citation, Citation No. 3587229 alleges a violation of 30 C.F.R. ' 75.1101-15(d) which reads as follows:

Nozzles and reservoirs shall be sufficient in number to provide maximum protection to each belt, belt take-up, electrical controls and gear reducing unit.

The citation alleging a violation of the above-quoted safety standard reads as follows:

The reservoirs containing the dry chemical powder used for fire suppression at the East Mains No. 3 belt drive was not sufficient in number to provide maximum protection for this belt in that on 08-10-92 a fire occurred, the fire suppression system was activated, the dry powder chemical was expelled and failed to extinguish the fire.

Inspector Vetter inspected the area of the fire at the 3 East Mains section of the mine on August 11, 1992, the morning after the swing-shift fire. Vetter testified that the fire suppression system was inadequate. Although the system sensed the fire and automatically discharged, it was inadequate because it failed to completely put out the fire. The miners had to bring in and use auxiliary water hoses to put out the fire.

There was only one dry chemical powder reservoir and 81 feet of pipe from the reservoir to the discharge nozzles. This length of pipe made it very difficult on discharge for the system to adequately carry the dry powder chemical through this length of pipe to the nozzles and expel the chemical so as to provide maximum protection particularly to the "belt take-up".

Inspector Vetter testified:

A. The pipe is to carry this dry powder to the nozzles. If there's an unlimited amount of piping in the system, then it stands to reason that it will just, more or less, stay in the system. The chemical won't be expelled. The energy that's forcing this chemical through the system is dissipated throughout the system and it's ineffective when it reaches its final destination.

It might have expelled some, but the majority of it, I believe, was still left in the piping that transfers this chemical from the reservoir to the nozzles.

Q. Okay. The belt -- and just so we're clear, on this belt take-up unit, did the fire spread that far?

A. No, it didn't.

Q. Was this an area that was washed down by the hoses, do you know?

A. The takeup unit?

Q. Yea.

A. No. No, it didn't show a sign of being washed down.

Q. Okay. So that was a place that was easier to observe how much, if any, chemical was expelled; is that correct?

A. Yes.

With respect to the amount of the dry chemical expelled in the area of the take-up unit, Vetter testified:

A. What I saw was just a sprinkling of dry powder chemical. Normally, it's a blanket of yellow substance and this was just a dribbling or a sprinkle of dry powder chemical.

Vetter, based upon his observations of the amount of dry chemical he found at the belt take-up unit, testified that if the belt take-up unit had been on fire there wasn't enough chemical expelled out of that nozzle to adequately cover the take-up unit and put out the fire.

I credit Inspector Vetter's testimony and find the preponderance of the evidence established a violation of 30 C.F.R. ' 75.1101.

The violation was abated by installing a second dry chemical reservoir which considerably shortened the length of the needed piping to less than 50 feet from each reservoir to the nozzles through which the chemical is expelled.

This is the same abatement action that terminated the violation of Citation No. 3587228 and the corresponding 104(b) order. Considering this fact, along with the evidence presented with respect to these two fire suppression citations, leads me to the conclusion that Citation No. 3587228 is duplicative and, along with its corresponding 104(b) order, should be vacated and Citation No. 3587229 and its corresponding 104(b) order should be affirmed.

Inspector Vetter found the violation in Citation No. 3243029 significant and substantial (S&S). It is well established that a violation is S&S if, based on 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 rea-

sonably serious nature. Cement Division, National Gypsum Co. 3 FMSHRC 822, 825-26 (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 ..., 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.

6 FMSHRC at 3-4. See also Austin Power, Inc. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria).

The Commission has held 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) (emphasis in original).

The Commission has consistently held that evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations and must be based upon the particular facts surrounding the violation in issue. Texasgulf, Inc. 10 FMSHRC 498, 500-01 (April 1988).

This is not a case where the Judge is asked to assume an emergency situation in determining whether the violation is significant and substantial (S&S). In this case there was no need to make such an assumption as there definitely was an emergency. The belt foreman Nepp reported that it was an "uncontrolled fire" and the mine rescue team was notified that the mine had an emergency. (Tr. 54-55). The fire-suppression system at EM3 conveyor was clearly inadequate. It failed to extinguish the belt fire. The conveyor belt burned in two and the fire spread to the cribbing above the belt drive. It generated a lot of smoke. Miners were evacuated from the mine except for the few miners that remained to fight the fire with auxiliary water hoses.

Fortunately no miner was injured. Nevertheless there was a serious emergency with reasonable likelihood of serious injury from the fire, from smoke inhalation, and from the hazard of fighting an underground coal mine fire with auxiliary hoses. I

agree with Inspector Vetter that this violation of the fire suppression standard was a significant and substantial violation. The evidence presented established a violation of a mandatory safety standard, a significant measure of danger to safety that was significantly contributed to by the violation and a reasonable likelihood that the hazard contributed to would result in injury of a reasonable serious nature. The preponderance of the evidence established a significant and substantial violation.

PENALTY

The Deserado Mine is a medium-size underground coal mine. The mine failed to abate the serious violation charged in the fire suppression citations within the one week set for abatement by the mine inspector. There was no reasonable excuse for this failure to timely abate. The violation was very promptly abated only after MSHA issued the 104(b) order.

The gravity of the violation charged in Citation No. 3587229 is high. A fire in an underground coal mine is a serious hazard. A belt fire must be extinguished immediately because of the serious potential for harm that can result from the fire and smoke, particularly if the fire spreads. A fire in an underground coal mine such as we have in this case is reasonably likely to result in a serious injury and can result in tragic loss of life.

Considering the statutory criteria enumerated in section 110(i) of the Act, particularly the high gravity of this S&S violation of the fire suppression standard, I assess a civil penalty of \$4,000.00.

ORDER

In view of the foregoing findings and conclusion, it is **ORDERED** that:

1. Citation Nos. 3587226 and 3587227 are **VACATED**.
2. Citation No. 3587228 along with its corresponding 104(b) order is **VACATED**.
2. Citation No. 3587229 including its S&S designation and its corresponding 104(b) order are **AFFIRMED** and a penalty of \$4,000.00 is **ASSESSED** for the violation of 30 C.F.R. ' 75.1101-15(d).

3. **RESPONDENT SHALL PAY** a civil penalty of \$4,000.00 to MSHA within 40 days of this decision. Upon receipt of payment, this case is dismissed.

August F. Cetti
Administrative Law Judge

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