

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
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June 13, 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEST 94-380  
Petitioner : A.C. No. 42-01697-03668  
: :  
v. :  
: Bear Canyon #1 Mine  
C.W. MINING COMPANY, :  
Respondent :

**DECISION**

Appearances: Ned Z. Zamarripa, Conference and Litigation  
Representative, Mine Safety and Health  
Administration, Denver, Colorado, for Petitioner;<sup>1</sup>  
Carl E. Kingston, Esq., Salt Lake City, Utah, for  
Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of a civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against C.W. Mining Company ("C.W. Mining"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. " 815 and 820 ("Mine Act"). The petition alleges two violations of the Secretary's safety standards. At the start of the hearing, the Secretary agreed to vacate Citation No. 3588362.<sup>2</sup> With respect to the remaining citation, C.W. Mining does not contest the fact of violation, but contends that the violation was not of a significant and substantial nature ("S&S"). For the reasons set forth below, I find that the violation was not S&S and I assess a civil penalty in the amount of \$225.00.

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<sup>1</sup> Mr. Zamarripa was permitted to represent the Secretary in this proceeding and was under the supervision of counsel for the Secretary, Kristi Floyd, Esq.

<sup>2</sup> This stipulation is at Tr. 4-5 in WEST 93-375, February 7, 1995.

A hearing was held in this case on February 8, 1995, in Salt Lake City, Utah. The parties presented testimony and documentary evidence but waived post-hearing briefs.

### I. FINDINGS OF FACT

The Bear Canyon No. 1 Mine is an underground coal mine in Sevier County, Utah. On January 11, 1994, MSHA Inspector Robert Baker issued to C.W. Mining Citation No. 3588361, under section 104(a) of the Mine Act, which stated:

Loose coal and coal fines was accumulated in the roadway of the 2nd East pillar section from the pillar split off of 2nd Left entry across #27 crosscut to the pillar split in 20 feet inby #28 crosscut off of 2nd Right up to 12 inches deep and up to 12 feet wide, in 1st and 2nd Left it was dry in 1st and 2nd Right it was wet, the roof bolter was bolting in the split in 2nd right entry, also float coal dust was accumulated on the rock dusted surfaces around the feeder on the off walkway side and outby 20 feet in to the stopping in #26 crosscut.

He alleged a violation of 30 C.F.R. ' 75.400. In the citation, Inspector Baker stated that an injury was reasonably likely, that if an injury occurred it would result in lost workdays or restricted duty, and that the violation was S&S. He determined that C.W. Mining's negligence was moderate. The violation was abated by cleaning up the loose coal, coal fines, and float coal dust, and rock dusting the area.

Section 75.400 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.

On January 11, 1994, while inspecting the second east pillar section, Inspector Baker observed loose coal and coal fines in Crosscut No. 27 (the "crosscut"). (Tr. 9). He also observed loose coal and coal fines in the intake entry inby the crosscut where a miner was installing roof bolts with a roof bolting machine. Id. These accumulations were wet and up to 12 inches

in depth. Id. Inspector Baker then returned to the crosscut and walked its length. He determined that the accumulations became dryer as he walked through the crosscut towards the left side of the pillar section. A generalized representation of the accumulations is set forth in Ex. G-2.

Accumulations existed throughout the crosscut and they varied in depth between one and twelve inches. Large areas of the accumulations were between one and two inches in depth. (Tr. 14-15, 46). They were generally about four to five feet wide. (Tr. 14-15). Inspector Baker could not estimate the amount of coal and coal fines that had accumulated, but he believed the total length to be about 700 feet. Id. Accumulations were also present in the belt entry between the crosscut and the feeder breaker at the No. 26 crosscut. Inspector Baker took a methane reading in the crosscut and determined that there was no methane in the area. (Tr. 24).

A continuous mining machine was parked in the crosscut on the left side of the pillar section. The continuous miner was not energized. When Inspector Baker reached the continuous miner, he spoke to Mine Superintendent Randy Defa. The inspector asked Mr. Defa if he had noticed the accumulations. Mr. Defa stated that he knew about them, that he was not mining in the section because of them, and that a scoop was on the way to clean them up. (Tr. 10, 19, 24). Inspector Baker told Mr. Defa that he was going to issue a citation for the accumulations and, while they were discussing abatement time, the scoop arrived. (Tr. 11). The crew immediately started cleaning up the accumulations. Id. Mr. Defa told the inspector that he did not believe that the accumulations were S&S.

The cited area was a pillar section, which means that C.W. Mining was engaged in retreat mining in that section. The continuous miner was used to cut the pillars in a pre-established pattern. Considerable pressure was placed on the roof, ribs and floor as the pillars were cut and the roof fell in the gob. (Tr. 27-28). As a consequence, significant amounts of coal sloughed from the ribs and the floor heaved in the center of the crosscut. (Tr. 52). Inspector Baker was not able to determine how much of the accumulations he observed were coal sloughage from the ribs and how much was coal that had fallen from shuttle cars during mining. (Tr. 11, 31). He believed, however, that C.W. Mining had overloaded its shuttle cars on the previous shift and that a significant amount of the accumulations were coal that had fallen off these cars. (Tr. 15-16). He based his conclusion, in part, on tracks he observed in the area. (Tr. 16, 25).

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Apparently, the scoop on the pillar section would not start. (Tr. 10, 19).

Inspector Baker testified that, even though the superintendent knew of the accumulations and was taking steps to clean them up at the time of the MSHA inspection, the accumulations should have been removed before the end of the previous shift or the area should have been dangered off at the start of the day shift.

(Tr. 20). He estimated that the accumulations had been created on the previous shift and had existed for at least four hours. (Tr. 20, 36-37). There is no dispute that no mining had occurred on the day shift and that the day shift crew was going to clean up the accumulations before mining began. (Tr. 21, 24, 38).

**II. DISCUSSION WITH FURTHER FINDINGS**  
**AND**  
**CONCLUSIONS OF LAW**

The only issue in this case is whether the accumulations were of a significant and substantial nature.

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. ' 814(d), and refers to more serious violations. A violation is S&S if, based on the facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or illness of a reasonably serious nature.

Wyoming Fuel Co., 16 FMSHRC 1618, 1625 (August 1994)(citation omitted). 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).

There is no dispute that the first element of the Mathies test has been met, an underlying violation of a safety standard.

I also find that the Secretary has established that a discrete safety hazard existed, the second step. It is well known that accumulations of coal and coal fines present a danger of a mine fire and explosion. C.W. Mining contends that the Secretary failed to establish the third step of the Mathies S&S test. The Secretary maintains that because the accumulations were highly combustible and potential ignition sources were present, it was reasonably likely that the hazard presented would result in an injury of a reasonably serious nature.

Inspector Baker testified that portions of the accumulations were extremely dry and combustible and that any nicks in the trailing cables of the equipment in the section would have provided an ignition source. (Tr. 16-17, 34). He further stated that there was a reasonable likelihood that the crew would suffer serious burns and smoke inhalation if the condition was allowed to continue. (Tr. 17-18). He testified that all that was necessary to ignite the accumulations was an ignition source. (Tr. 18).

Inspector Baker testified that there were a number of ignition sources in the area. First, he observed two nicks in the trailing cable for the continuous miner that exposed the insulated inner conductors. (Tr. 18). Second, he stated that the feeder breaker in the belt entry was no longer maintained in permissible condition. Id. Finally, he testified that the roof bolting machine was being used in the far right entry. Although he did not find any problems with it or with its trailing cable, he stated that it was a potential ignition source. Id.

C.W. Mining contends that the accumulations were not S&S. It maintains that most of the accumulations were sloughage from the ribs and mine floor. (Tr. 42). It argues that this sloughage occurred either at the end of the previous shift or just prior to the start of the day shift and that the day shift crew was getting set to clean it up, prior to the start of mining, when the MSHA inspector arrived. Nathan Atwood, who was in charge of production on the day shift of January 11, 1994, testified that due to the tremendous amount of weight on the pillar

section, the mine floor crumbled and coal was forced up in the center of the crosscut. (Tr. 43). He observed the subject accumulations and testified that they were ordinary rib sloughage and floor heave. (Tr. 45, 48). While he testified that some of the accumulations could have fallen off a shuttle car, he believed that very little, if any, of the accumulations fell from shuttle cars. (Tr. 49). Mr. Defa also testified that the accumulations were mostly rib sloughage and floor heave. (Tr. 56-58, 60). He stated that rib sloughage and floor heave can accumulate very quickly, in a matter of minutes. (Tr. 59).

I find that the Secretary did not establish the third element of the Mathies S&S test. The Secretary contends that these accumulations had existed for a considerable length of time and that mining had occurred while the accumulations were present. Inspector Baker relied heavily on his analysis of tire tracks he observed in the crosscut. He testified that he saw cat tracks from the continuous miner in the crosscut and "shuttle car haulage track indentations in the accumulation ... down to the feeder." (Tr. 25). He stated that the shuttle cars have an eight inch clearance. (Tr. 26). When questioned how a shuttle car with low clearance could run over accumulations that were up to twelve inches deep, he testified that the tires of the shuttle car pushed the accumulations aside, to the outside of the roadway. Id. Yet, he also testified that the accumulations were in the center of the crosscut. (Tr. 12, 14-15). Mr. Defa testified that the continuous miner had been moved into the crosscut at the beginning of the day shift but that shuttle cars has not been in the area. (Tr. 52-53). In addition, he stated that mining had not been conducted on the left side of the pillar entry for three or four shifts, so there would not have been any reason for shuttle cars to be in that area. (Tr. 53, 60-61).

I credit the testimony of Mr. Defa in this regard and find that the Secretary did not establish that the accumulations had existed for a long time. I find that the preponderance of the evidence establishes that the majority of the accumulations were the result of rib sloughage and floor heave and that, due to the heavy pressure, these conditions could have been created in a short period of time. The citation was issued at 9:45 a.m., the day shift started at about 6:30 a.m., and the preshift examination was conducted at about 4:30 a.m. (Tr. 29-30). The preshift books did not indicate the presence of coal accumulations. (Tr. 11-12). While that fact does not prove that the accumulations

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The parties do not dispute that the area had been rock dusted. The rock dust did not cover the accumulations. (Tr. 36). Mr. Defa testified that the area was rock dusted on the previous shift. (Tr. 59).

did not exist at 4:30 a.m., when considered along with the other evidence, it casts doubts on the inspector's estimation of the length of time the accumulations had existed.

The Secretary contends that three ignition sources could have ignited the accumulations. Although the roof bolting machine was operating, the inspector testified that his inspection of it and the trailing cable did not reveal any problems. He did not explain how this machine could have ignited the coal accumulations. As stated above, there was no methane present in the area. Inspector Baker also stated that the feeder breaker was not in permissible condition, it was not in by the last open crosscut. There was no evidence, however, that it was energized or that it would have been energized before the area was cleaned up. Finally, he stated that there were two nicks in the trailing cable of the continuous miner. It is not disputed that this equipment had been moved while the accumulations were present. While this fact helps support the Secretary's argument, I find that it does not, by itself, establish that the violation was S&S. The evidence does not establish that it was reasonably likely that these nicks would propagate an injury-producing fire under the particular circumstances of this case.

There is no dispute that C.W. Mining was aware of the accumulations and was taking affirmative steps to clean them up before the inspector arrived on the pillar section. Inspector Baker believes that the accumulations should have been cleaned up at the end of the prior shift or the area dangered off at the beginning of the day shift. While it might have been prudent to danger off the area, the fact that C.W. Mining failed to do so does not establish the S&S nature of the violation.

The Commission has held that an evaluation of the reasonable likelihood of an injury should be made assuming continued normal mining operations. U.S. Steel Mining Co., 7 FMSHRC at 1130. In this instance, assuming continued normal mining operations, the accumulations would have been removed before mining was resumed.

Thus, miners were exposed to accumulation hazards for a short period of time.

### **III. CIVIL PENALTY ASSESSMENT**

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The forth element of the Mathies S&S test is whether it is reasonably likely that an injury would be of a reasonably serious nature. I find that if the accumulations did ignite and injure a miner, it is reasonably likely that such an injury would be of a reasonably serious nature.

Section 110(i) of the Mine Act, 30 U.S.C. ' 820(i), sets out six criteria to be considered in determining the appropriate civil penalty. Based on this criteria, I assess a penalty of \$225 for the violation. I find that C.W. Mining was issued 158 citations and orders in the 24 months preceding the inspection in this case. (Ex. G-1). I also find that C.W. Mining is a medium-sized operator that produced between 300,000 and 400,000 tons of coal in 1992. I find that the civil penalty assessed in this decision would not affect C.W. Mining's ability to continue in business. The violation was timely abated by C.W. Mining.



I further find that the violation was serious, but that C.W. Mining's negligence was low. The negligence was low because the operator had already taken steps to clean up the accumulations before the inspector arrived.

#### IV. ORDER

Accordingly, Citation No. 3588362 is **VACATED**. Citation No. 3588361 is **MODIFIED** to delete the significant and substantial designation. As modified, the citation is **AFFIRMED** and C.W. Mining Company is **ORDERED TO PAY** Secretary of Labor the sum of \$225.00 within 40 days of the date of this decision.

Richard W. Manning  
Administrative Law Judge

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