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SOL (MSHA) V. THOMPSON BROTHERS COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
September 24, 1984
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. PENN 81-171

THOMPSON BROTHERS
COAL COMPANY, INC.

DECISION
This civil penalty case arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1982), involves the interpretation and application of 30 C.F.R. $ 77.400(a), a mandatory safety standard dealing with the guarding of machine parts. 1/ A Commission administrative law judge concluded that Thompson Brothers Coal Company, Inc. ("Thompson"), violated section 77.400(a) by failing to guard the cooling fan blades and air compressor belts and pulleys on two dump trucks. 4 FMSHRC 1763 (September 1982)(ALJ). On the bases explained below, we affirm the judge's decision.
Thompson operates a surface coal mine located in Clearfield County, Pennsylvania. On January 12, 1981, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued citations to Thompson stating that guards were not provided for the cooling fan blades and air compressor belts and pulleys in the engine compartments of two Euclid R-50 dump trucks. 2/ These large trucks are used to haul earth and rock ("spoil") at the mine. Each truck is 14 feet wide, 30 feet long, and 13 feet high. Each is capable of hauling up to 50 tons of spoil. The tires on the trucks are 6 feet in diameter, and the engine compartment areas are approximately 5 feet wide.

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1/ 30 C.F.R. $ 77.400(a) provides:
Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.
2/ The citations originally stated that the alternator belts and pulleys were not guarded. The citations were modified subsequently to

refer to the air compressor belts and pulleys.
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The cooling fan and the air compressor belts and pulleys at issue are part of each truck's engine assembly, and are located in the center of the engine compartment in front of the engine. The engine compartment is accessible from either side of the truck. To gain access to the engine, a miner walks through a 2B-foot space between a front tire and the front end of the truck. To contact the fan blades or the air compressor belts and pulleys, a miner must reach over the truck frame, which is approximately 2-l/2 feet high, and extend his arm a distance of approximately 2-l/2 to 3 feet. The fan and the air compressor belts and pulleys turn only when the engine is running. It is undisputed that there were no guards on the fan blades or air compressor belts and pulleys at the time of the citations. At the hearing before the Commission's administrative law judge, the inspector who issued the citations testified that a miner checking or repairing the engine, while the truck was stationary and the engine was idling, could contact these unguarded moving parts and sustain an injury.
In his decision, the judge found that the cited fan blades and air compressor belts and pulleys were exposed moving machine parts similar to those listed in section 77.400(a). He further found that the fan blades and belts and pulleys were accessible and unguarded. With regard to the possibility of contact, the judge credited the testimony of the inspector over the contrary testimony of Thompson's witnesses. The judge found:
[Thompson] attempted to show that it was virtually impossible for a person not suicidally inclined to contact the parts in question while moving. On this issue, I accept the testimony of the inspector, and conclude that a person working around the engine or inspecting it while the engine was running, could inadvertently come in contact with one of the moving parts.
4 FMSHRC at 1764. Finally, the judge found that such contact with one of these unguarded moving parts could cause an injury. The judge accordingly concluded that Thompson violated the standard, and assessed a civil penalty of $35 for each violation. We granted Thompson's petition for discretionary review. 3/
On review Thompson's major contentions center around the question of whether the cited machine parts "may be contacted by persons" and "may cause injury." Thompson argues that the proper test for determining the possibility of contact and injury is whether an unguarded machine part subject to the

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3/ Before the judge, the Secretary of Labor contended that the

violations were significant and substantial within the meaning of the section 104(d) of the Mine Act. 30 U.S.C. $ 814(d). The judge found that the violations were not significant and substantial and the Secretary has not sought review of this aspect of the judge's decision.

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standard is reasonably likely to cause harm to the average man." Petition for Discretionary Review 1. Attacking the judge's evidentiary findings in light of this test, Thompson contends that contact with the cited fan blades, pulleys, and belts was extremely unlikely. In its petition for discretionary review Thompson also asserts that the machine parts in question were not the kind to which the standard applies, but Thompson does not further develop this issue in its supporting brief. We conclude that section 77.400(a) contemplates guarding of machine parts subject to the standard where there is a reasonable possibility of contact and injury. We also conclude, however, that the judge's findings are not inconsistent with this test and are supported by substantial evidence. We therefore affirm.

In order to establish a prima facie case of a violation under this standard, the Secretary of Labor must prove: (1) that the cited machine part is one specifically listed in the standard or is "similar" to those listed; (2) that the part was not guarded; and (3) that the unguarded part "may be contacted by persons" and "may cause injury to persons." 30 C.F.R. $ 77.400(a). As explained below, we construe this latter requirement to contemplate a showing of a reasonable possibility of contact and injury.

There is no question that the cooling fan blades and air compressor belts and pulleys were not guarded when the citations were issued. We also find that these machine parts were the types of machine parts to which the standard applies.

In Mathies Coal Co., 5 FMSHRC 300 (March 1983), aff'd sub nom. United Mine Workers of America v. FMSHRC, 725 F.2d 126 (D.C. Cir. 1984) (table), we held that 30 C.F.R. $ 75.1722(a), the identical standard applicable to underground coal mines, "applies to the specific machine parts listed plus other exposed moving machine parts similar to those listed." 5 FMSHRC at 302. Although cooling fan blades and air compressor belts and pulleys are not specifically listed in section 77.400(a), they are sufficiently "similar" to the parts that are listed to come within the scope of the standard. As in Mathies (see 5 FMSHRC at 302), we apply the ordinary dictionary definition of "similar":

1: having characteristics in common: very much alike ... 2: alike in substance or essentials ... 3a: having the same shape: differing only

in size and position ....
Webster's Third New International Dictionary (Unabridged) 2120 (1971) ("Webster's"). "Fan inlets" are mentioned in the standard and refer to the openings across the front of fans. ("Inlet" is broadly defined as "a place of entrance." Webster's 1165.) The citations in this case were directed to the outlet side of the cooling fans. However, the fan outlet is in this case similar to the fan inlet in that it provides an accessible "place of entrance" to the fan blades. The compressor pulleys and belts are also similar in shape and function to certain specified equipment parts. "Drive, head, or takeup pulleys" are cylinders or
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wheels which "change the direction ... of belt travel." U.S. Department of the Interior, Bureau of Mines, A Dictionary of Mining, Mineral, and Related Terms 875 (1968). The air compressor pulleys, on which the compressor belts move, perform the same function. Thus, we affirm the judge's conclusion that section 77.400(a) applies to the cited machine parts. The pivotal inquiry is the possibility of contact with these parts and resultant injury.
The standard requires the guarding of machine parts only when they "may be contacted" and "may cause injury." Use of the word "may" in these key phrases introduces considerations of the likelihood of the contact and injury, and requires us to give meaning to the nature of the possibility intended. We find that the most logical construction of the standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. In related contexts, we have emphasized that the constructions of mandatory safety standards involving miners' behavior cannot ignore the vagaries of human conduct. See e.g., Great Western Electric, 5 FMSHRC 840, 842 (May 1983); Lone Star Industries, Inc., 3 FMSHRC 2526, 2531 (November 1981). Applying this test requires taking into consideration all relevant exposure and injury variables, e.g., accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct. Under this approach, citations for inadequate guarding will be resolved on a case-by-basis.
In analyzing the evidence, the judge did not expressly apply a "reasonable possibility" test, but his findings are not inconsistent with that test. There is no dispute that the engines on these trucks were physically accessible and that on occasion mechanics could be called on to examine or work on the engines while the engines were idling. The judge specifically credited the testimony of the inspector that a miner checking or working on the engine while the engine was running could come into contact with any of the cited

machine parts. Thompson's witnesses all agreed that contact was possible even though they regarded it as unlikely. At a minimum, contact could result from such causes as a sudden movement, stumbling, or momentary distraction or inattention. We find no basis for overturning the judge's resolution of conflicting testimony regarding the possibility of contact. The judge also found that the possibility of such contact was "minimal." 4 FMSHRC at 1765. On the facts of this case, we construe a "minimal" possibility of contact to be within the realm of reasonable possibility. Given the physical accessibility of the engine compartment, the fact that mechanics could check and work on running engines, and that contact with the cited machine parts could occur, we conclude that a reasonable possibility of contact existed.

The judge also credited the inspector's testimony that contact with the fan blades or the air compressor belts and pulleys could result in injury, although such an injury would probably not be serious. We see no reason to overturn this finding.

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For the foregoing reasons, and on the foregoing bases, we affirm the judge's decision. 4/

Richard V. Backley Commissioner

L. Clair Nelson, Commissioner

4/ The terms of office of our former colleagues, Commissioners Frank F. Jestrab and A. E. Lawson, expired at the end of day on August 30, 1984. Pursuant to section 113(c) of the Mine Act, 30 U.S.C. $ 823(c), we have designated ourselves as a panel of three members to exercise "all of the powers of the Commission," including the issuance of orders and decisions in proceedings before this Commission.

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