

CCASE:
SOL (MSHA) V. PITTSBURG & MIDWAY COAL MINING
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November 17, 1993

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. CENT 91-197-B
	:	
PITTSBURG & MIDWAY COAL MINING	:	
COMPANY	:	

BEFORE: Holen, Chairman; Backley, Doyle, and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)("Mine Act" or "Act"). The issue is whether Pittsburg & Midway Coal Mining Company ("P&M") violated 30 C.F.R. 77.1104,(Footnote 1) and, if so, whether the violation was significant and substantial in nature ("S&S").(Footnote 2) Administrative Law Judge John J. Morris concluded that P&M had not violated section 77.1104. 14 FMSHRC 1941 (November 1992)(ALJ). The Commission granted the Secretary's petition for discretionary review of that finding.(Footnote 3) For the reasons that follow, we vacate the judge's decision and remand for further proceedings.

1 Section 77.1104 requires:

Combustible materials, grease, lubricants, paints, or flammable liquids shall not be allowed to accumulate where they can create a fire hazard.

2 The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. 814(d)(1), which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard...."

3 In his decision, the judge ruled on two other citations issued to P&M. Because the citations were issued in different areas of the mine, involved different facts, and alleged dissimilar violations of the Secretary's safety standards, we have issued a separate decision for each citation.

I.

Factual and Procedural Background

On February 25, 1991, Donald Jordan, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), inspected a building housing a coal transfer point at P&M's York Canyon surface mine in Colfax County, New Mexico. Jordan observed accumulations of float coal dust mixed with oil on the flat metal surfaces of two 460-volt A.C. energized motors. Float coal dust and oil had also accumulated on the floor surrounding the motors.

Jordan determined that the accumulations violated section 77.1104 and issued a citation under section 104(a) of the Mine Act, 30 U.S.C. 814(a). Jordan designated the violation S&S.

The judge held that, in order to prove a violation, the Secretary was required to show that a fire hazard had been created by the accumulations of combustible materials. 14 FMSHRC at 1946. The judge concluded that the Secretary did not prove a violation because he failed to establish the presence of an ignition source and fuel to support a fire. 14 FMSHRC at 1947. Accordingly, the judge vacated the citation. *Id.*

II.

Disposition

The Secretary argues that the judge applied an erroneous legal analysis in determining whether a violation had occurred. The Secretary asserts that, under section 77.1104, he need only prove that a hazard could arise, not that the hazard probably would arise and result in an injury. The Secretary asks the Commission to remand the case to the judge to apply the proper standard of proof in determining whether a violation occurred and to determine whether the violation, if found, was S&S. (Footnote 4) In response, P&M argues that the Secretary did not carry his burden of proving that the materials observed by the inspector violated the safety standard.

The judge relied upon the Commission's decision in *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988), in which the Commission analyzed whether a "confluence of factors" created a fire hazard that was S&S. 14 FMSHRC at 1946. The judge stated that he relied upon *Texasgulf* because it contained "an analytical approach useful for determining the reasonable likelihood of a combustion hazard resulting in an ignition or explosion." *Id.* The judge credited the testimony of P&M's safety manager, Michael Kotrick, who testified

4 A violation is properly designated as S&S "if, based on the particular facts surrounding that 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).

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as to the conditions necessary for a fire and the flammability of the accumulations. Id.

Section 77.1104 prohibits accumulations that "can create a fire hazard." The Secretary states that he is required "to prove that a hazard could arise" and that the "cited conditions created a possibility of fire." S. Br. at 5, 6 (emphasis in original). In considering whether P&M violated the regulation, the judge essentially required the Secretary to prove that an ignition or explosion was reasonably likely to occur. Thus, we agree with the Secretary that the judge erred in his analysis in imposing on the Secretary a greater burden of proof than is required by the standard. However, the Secretary has failed to set forth what he believes is necessary to establish a violation.

Because the Secretary provides little additional guidance beyond repeating the language of the standard, we are unable to evaluate the merits of his position. Accordingly, we remand this proceeding to the judge to allow the parties to supplement their briefs concerning the meaning and scope of section 77.1104. The judge should then determine whether P&M violated that section; if so, he should consider whether the violation was S&S and assess an appropriate civil penalty.

III.

Conclusion

For the foregoing reasons, we vacate that part of the judge's decision in which he found that P&M did not violate section 77.1104. We remand this case for further proceedings consistent with this decision.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner