FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

May 23, 1997

SECRETARY OF LABOR,:
MINE SAFETY AND HEALTH:
ADMINISTRATION (MSHA):
:
v.: Docket No. LAKE 94-74
:
AMAX COAL COMPANY:

BEFORE: Jordan, Chairman; Marks, Riley, and Verheggen, 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. (1994) (AMine Act@ or AAct@). At issue is the decision of Commission Administrative Law Judge William Fauver finding that a violation of 30 C.F.R. ' 75.400, involving an accumulation of combustible materials in two intersecting belt entries conceded by AMAX Coal Company (AAMAX@), was significant and substantial (AS&S@) and due to the operator=s unwarrantable failure. 17 FMSHRC 1127, 1129-36 (July 1995) (ALJ). The Commission granted AMAX=s petition for discretionary review. For the reasons that follow, we affirm.

I.

Factual and Procedural Background

AMAX operates the Wabash Mine, a bituminous coal mine located in Wabash County, Illinois. Tr. 18. The mine has two portals and approximately 26 miles of conveyor belts. 17

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[1] 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.

FMSHRC at 1129. On September 1, 1993, while inspecting belts and transfer points at the mine, Steve Miller, an inspector with the Department of Labor=s Mine Safety and Health Administration (AMSHA@), found an accumulation of dry, loose coal and float coal dust where the Main South No. 1 belt intersected the mother belt. *Id*. at 1128; Tr. 19. The accumulation stretched 85 feet along the Main South belt and 200 feet along the mother belt, and varied in depth from 6 inches to 3 feet and in width from 4 to 8 feet. 17 FMSHRC at 1128. The mother belt was running in the packed and loose dry coal for a distance of approximately 15 feet. *Id*. The accumulation was wet in places, generally beneath the surface layer. *Id*.

Accumulations were reported in the cited area in the mine preshift report for the morning of September 1. Tr. 122-23; Ex. R-3. The preshift examiner told Ricky Walker, the day shift manager, that one person could clean up the accumulation. Tr. 122-23. Walker sent Rick Snow to clean the area. Tr. 123. Snow was working in the cited area when Inspector Miller arrived. 17 FMSHRC at 1135; Tr. 28. Miller issued a section 104(d)(2) order alleging an S&S and unwarrantable violation of section 75.400. The Secretary proposed a penalty of $9,600 against AMAX. The company challenged the Secretary=s penalty proposal, and the matter proceeded to a hearing before Judge Fauver.

At the hearing, AMAX conceded that it violated section 75.400 in connection with the cited accumulation. 17 FMSHRC at 1127. With respect to the S&S allegation, the judge rejected AMAX=s contention that the phrase Areasonable likelihood,@ as used in determining whether a violation is S&S, means Amore probable than not.@ *Id*. at 1130. He concluded that an S&S violation Ais determined in terms of >the potential of the risk= of injury or illness, not a >percentage of probability.=@ *Id*. at 1131. The judge concluded that the violation was S&S, finding that a fire could have been started by the belt running in coal, that the accumulation provided a large amount of fuel to propagate a fire, and that such a fire could cause serious injuries such as burns or smoke inhalation. *Id*. at 1133.

The judge also concluded that the violation was the result of AMAX=s unwarrantable failure to comply with section 75.400 based on his findings that the mine had a poor history of compliance with the standard, that MSHA had repeatedly counseled mine management regarding accumulation problems, that the cited accumulation was extensive and had built up over several days, and that before the order was issued, mine management kept the belt running in coal and assigned only one person to clean the area. *Id*. at 1135. The judge found AMAX=s conduct Aaggravated@ and to constitute Amore than ordinary negligence.@ *Id*. He also noted that efforts made by mine management to improve compliance with section 75.400 after the order was issued were irrelevant as to the question of unwarrantability. *Id*. at 1135-36. The judge assessed a penalty of $9,600 against AMAX. *Id*. at 1136.

II.

Disposition

A. Significant and Substantial

AMAX argues that the proper S&S test is whether it is Amore probable than not@ that a cited hazard will result in an injury. AMAX Br. at 9-13. AMAX contends that, contrary to Commission precedent, the judge adopted what amounts to a per se S&S standard for section 75.400 violations when he focused on the potential for, rather than the probability of, serious injury. *Id*. at 13-18. AMAX also argues that the judge=s S&S determination was not supported by substantial evidence. *Id*. at 19-23. The Secretary argues that the judge was correct in declining to use a Amore probable than not@ standard in determining whether AMAX=s violation was S&S. S. Br. at 12-19. The Secretary maintains that the judge did not in effect hold that section 75.400 violations are per se S&S. *Id*. at 20-26. Highlighting Inspector Miller=s testimony, the Secretary argues that the judge=s S&S determination is supported by substantial evidence. *Id*. at 26-29.

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 reasonably serious nature. *Cement Div., Nat=l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), we further explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard **B** that is, a measure of danger to safety **B** 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.

Id. at 3-4 (footnote omitted). *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135-36 (7th Cir. 1995) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *United States Steel Mining Co.*, 7 FMSHRC 1125, 1130 (August 1985). When evaluating the reasonable likelihood of a fire, ignition, or explosion, we have examined whether a Aconfluence of factors@ was present based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988). These factors include the extent of accumulations and the presence of possible ignition sources. *Id*. at 500-03.

At issue here is the third element of the *Mathies* test. As to the legal issue, we are unpersuaded by AMAX=s argument that the judge erred by failing to apply a Amore probable than not@ standard in assessing the reasonable likelihood of injury. AMAX Br. at 9-13. We rejected an identical argument in *United States Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

In addition, the judge=s determination that there was a reasonable likelihood of an injury-producing event is supported by substantial evidence. There is no dispute that the cited accumulation of loose, dry coal and float coal dust was extensive. Inspector Miller testified that it varied in depth from 6 inches to 3 feet, and measured 85 feet along the Main South No. 1 belt line and approximately 200 feet along the mother belt. Tr. 19-20. One of AMAX=s shift managers, Gary Bennett, characterized the cited accumulation as Aa major spill.@ Tr. 171. Bennett testified that accumulations occurred frequently in the cited area, which was at the intersection of two major belts, and that Aany time you do have a spill you can figure that it=s a fairly major spill.@ Tr. 177; *see also* AMAX Br. at 21 (characterizing accumulation as Asignificant@). The cited area was also Acovered with accumulations of float coal dust.@ Tr. 21, 53. A 15-foot section of the mother belt running on packed dry coal and in loose coal was a potential source of an ignition. Tr. 20, 22.

Ricky Walker, an AMAX shift manager, admitted that a belt running in coal is a Adangerous condition@ and poses the threat of a fire. Tr. 121. Walker also admitted that although much of the coal was wet in the area, which AMAX argues would have delayed combustion (Br. at 14-16), the surface layer of the cited coal accumulation was dry. Tr. 145. In addition, we have held that accumulations of damp or wet coal can dry out and ignite. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1226, 1230 (June 1994). The presence here of an ignition source and large amounts of coal and coal dust that could propagate a fire or fuel an explosion satisfies the third *Mathies* element. As we have recognized, Aignitions and explosions are major causes of death and injury to miners.@ *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1120 (August 1985).

AMAX=s additional arguments are unpersuasive. We reject AMAX=s contention that the violation was not S&S because very few belt fires have resulted in injuries. AMAX Br. at 22-23. That injuries have been avoided in the past in connection with a particular type of violation may be fortunate, but is not determinative of an S&S finding. *New Warwick Mining Co.*, 18 FMSHRC 1568, 1576 (September 1996); *United States Steel*, 18 FMSHRC at 867. Also unavailing are AMAX=s arguments that a miner working in the area at the time the order was issued Awould have detected the smell of any combustion@ and taken appropriate measures to alert the mine=s communication center, and that the presence of fire detection systems, self-contained self rescuers, and fire fighting equipment in the cited area minimized the risk of injuries from a fire. AMAX Br. at 16, 18. While we believe that these measures could be

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[2] The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge=s factual determinations. 30 U.S.C. ' 823(d)(2)(A)(ii)(I). ASubstantial evidence@ means Asuch relevant evidence as a reasonable mind might accept as adequate to support [the judge=s] conclusion.@ *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that Afairly detracts@ from the weight of the evidence that supports a challenged finding. *Midwest Material* Co., 19 FMSHRC 30, 34 n.5 (January 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

effective in minimizing the consequences of a fire, in the event of an explosion they would make no difference. Even in the event of a fire, the mere presence of a miner and fire detection and fighting equipment Adoes not mean that fires do not pose a serious safety risk to miners.@ *Buck Creek*, 52 F.3d at 136. As we have noted, for purposes of analyzing whether a violation is S&S, a Ahazard continues to exist regardless of whether caution is exercised.@ *Eagle Nest, Inc.*, 14 FMSHRC 1119, 1123 (July 1992). Accordingly, we affirm the judge=s S&S determination.

B. Unwarrantable Failure

With respect to the judge=s finding that the violation was due to AMAX=s unwarrantable failure, AMAX faults the judge for ignoring evidence that it was addressing the accumulation and for holding the company to a Ashould have known@ standard. AMAX Br. at 25-28. AMAX argues that the mine=s history of compliance with section 75.400 does not demonstrate Aa significant incidence rate.@ *Id*. at 29. AMAX also contends that the judge ignored its efforts to improve its compliance with section 75.400 before the order was issued. *Id*. at 29-30.

In support of her argument that substantial evidence supports the judge=s unwarrantable failure determination, the Secretary contends that the cited accumulation was extensive and present for several days, that the mine had a poor history of compliance with section 75.400, that mine management was on ample notice that it needed to improve its compliance with the standard, and that inadequate efforts were made to remove the accumulation before the order was issued. S. Br. at 31-39. The Secretary asserts that, even if AMAX had taken some steps to improve its compliance with section 75.400, any such efforts Awere plainly unsuccessful in avoiding the massive and dangerous accumulation in this case.@ *Id*. at 37-38.

In *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (December 1987), we determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. Unwarrantable failure is characterized by such conduct as Areckless disregard,@ Aintentional misconduct,@ Aindifference,@ or a Aserious lack of reasonable care.@ *Id*. at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991); *see also Buck Creek*, 52 F.3d at 136 (approving the Commission=s unwarrantable failure test). We examine various factors in determining whether a violation is unwarrantable, including the extent of a violative condition, the length of time that it has existed, whether the violation is obvious or poses a high degree of

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[3] The very report on which AMAX relies to demonstrate the minimal chance of a miner being injured in a belt-entry fire reports two injuries that occurred during the *fighting* of such fires after they had been detected. AMAX Br. at 22; Ex. R-4 at 8-9.

[4] Commissioner Marks agrees that the violation was S&S. However, for the reasons set forth in his concurring opinions in *United States Steel*, 18 FMSHRC at 868, and *Buffalo Crushed Stone, Inc.*, 19 FMSHRC 231, 240 (February 1997), he continues to urge that the ambiguous language of the Commission=s *Mathies* test, 6 FMSHRC at 3-4, be replaced with a clear test that is consistent with Congressional intent.

danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator=s compliance efforts made prior to the issuance of the citation or order. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 11-12, 17 (January 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (February 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (August 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984). Repeated similar violations may be relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Peabody*, 14 FMSHRC at 1263-64.

Here, the cited accumulation was very extensive, stretching 200 feet in one direction and 85 feet in another direction. Tr. 19-20. The accumulation was so large that it took approximately 16 miners 4**2** hours to clean it up. Tr. 29. Despite ongoing efforts to keep the cited area clean, at no time during the several shifts preceding the issuance of the order was the area free of accumulations. Exs. R-3, R-5, R-6, R-9 (noting accumulations that were Acleaned on,@ a notation that was used when clean-up efforts were not finished, Tr. 185-86). The cited accumulation was obvious by virtue of its enormous size, and also because it was in an area where mine management knew major spills were the rule rather than the exception. Tr. 177; *see also* AMAX Br. at 21. Mine management=s effort to clean up the accumulation before the order was issued by sending one miner to the area (Tr. 122-23) was inadequate, a fact mine management knew or should have known, particularly in light of its knowledge that spills in the cited area were almost always large. Finally, AMAX was on more than ample notice that greater efforts were necessary for compliance with section 75.400. From October 1992 through August 1993, MSHA cited the Wabash Mine 98 times for violations of section 75.400. Tr. 35-36. Moreover, in the eight months of 1993 before the order was issued, MSHA had repeatedly met with mine management to discuss section 75.400 compliance problems. Tr. 31-32 (AThis has been an on-going problem . . .@), 85-86, 107. As Inspector Miller testified, A[s]eldom do[es MSHA] have a meeting with [mine management] that you don=t talk about 75.400 violations.@ Tr. 32.

We find unconvincing AMAX=s argument that its conduct did not result from unwarrantable failure because Walker=s decision to send only one miner to clean up the accumulation was based on the good faith, albeit mistaken, belief of the preshift examiner that one miner could clean up the spill. AMAX Br. at 26-27. We have held that unwarrantable failure does not result from an operator=s good faith, but mistaken, belief that its conduct was the safest method of complying with the Mine Act and MSHA=s regulations. *Wyoming Fuel Co. n/k/a Basin Resources, Inc.*, 16 FMSHRC 1618, 1628-29 (August 1994). But we have also held that the operator=s good faith belief must be reasonable under the circumstances. *Id*. at 1628. Here, the preshift examiner=s mistaken assessment of the spill was not reasonable in light of the size of the spill.

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[5] At oral argument, counsel for AMAX emphasized the rank-and-file status of the miner who conducted the preshift examination in question. Regardless of the miner=s status, however, he was AMAX=s agent for the purpose of conducting a preshift examination, and his actions **B** and mistakes **B** are fully imputable to AMAX. *Rochester & Pittsburgh*, 13 FMSHRC at 194-96.

AMAX also argues that its various efforts to control accumulation problems at the Wabash Mine should exonerate it from a finding of unwarrantability. However, most of the improvements advanced by AMAX occurred after the order was issued, and are therefore irrelevant in determining the level of negligence associated with the violation. *Enlow Fork*, 19 FMSHRC at 17. Nor did AMAX demonstrate that any of the improvements in place at the time of the violation had been implemented in the cited area, which AMAX concedes was an area in which large spills occurred. Tr. 177; *see also* AMAX Br. at 21.

In sum, we find that substantial evidence supports the judge=s conclusion that AMAX=s conduct was aggravated and constituted more than ordinary negligence. Accordingly, we affirm the judge=s unwarrantable failure determination.

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[6] These improvements included installation of automatic rock dusting devices (Tr. 231), the use of portable concrete mixers to Apour more extensive [belt support] pads or do more concrete work around drives and belts@ (Tr. 206, 232), elimination of short drive assemblies called pony drives (Tr. 212, 234-35), and renovation of belt lines (Tr. 236-37).

III.

Conclusion

For the foregoing reasons, we affirm the judge=s conclusion that AMAX=s violation of section 75.400 was significant and substantial and caused by an unwarrantable failure to comply with the standard.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner