FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 28, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. LAKE 94-55
	:	LAKE 94-79
AMAX COAL COMPANY	:	

BEFORE: Jordan, Chairman; Holen, Marks and Riley, Commissioners[1]

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) ("Mine Act" or "Act"), and involves four citations issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Amax Coal Company ("Amax"), alleging violations of 30 C.F.R. § 75.400.[2] Amax contested the citations and the matter went to hearing before Administrative Law Judge Jerold Feldman. Judge Feldman sustained the citations and determined that one violation was significant and substantial ("S&S"). 16 FMSHRC 1837, 1848 (August 1994) (ALJ). For the reasons set forth below, we affirm in

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[1] Commissioner Doyle participated in the consideration of this matter but resigned from the Commission before its final disposition.

[2] Section 75.400 states:

> 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.

"Active workings" is defined in 30 C.F.R. § 75.2 as "[a]ny place in a coal mine where miners are normally required to work or travel."

result the judge's determination that Amax violated section 75.400, and we vacate the judge's S&S determination and remand for further proceedings.

I.

On September 22, 1993, Inspector Steven Miller issued Citation Nos. 4054082, 4054083, and 4054084 to Amax, alleging violations of section 75.400 for accumulation of combustible materials. The citations alleged that Amax allowed loose coal saturated with oil, float coal dust and grease to accumulate on three pieces of diesel-powered equipment: two diesel scoops and a diesel ram car.

On October 7, 1993, Inspector Michael Dean Rennie issued Citation No. 4054831 to Amax, alleging a violation of section 75.400 for accumulation of combustible materials. The citation alleged that Amax allowed loose coal and oil soaked loose coal to accumulate on its continuous miner and that the alleged violation was S&S. At the time the citation was issued the continuous miner was in permissible condition and was equipped with a fire suppression system. 16 FMSHRC at 1840.

At the hearing, Amax conceded that it violated section 75.400 in connection with the continuous miner; however, it contended that the violation was not S&S. *Id*. at 1838. Noting that the cited accumulations had existed for approximately two weeks, the judge found a "positive correlation between the duration of a hazardous condition and the likelihood of an event precipitated by that hazard." *Id*. at 1843. The judge held that an intervening incident, such as a permissibility defect or a cable rupture, "could occur which would create an ignition source and cause combustion." *Id.* at 1843.[3] The judge further concluded that the fire suppression system on the continuous miner would not prevent a serious injury or death in the event of an explosion. *Id*. The judge determined that the violation was S&S and assessed a penalty of $309. *Id*.

In connection with accumulations on diesel-powered equipment, the judge found that section 75.400 prohibits accumulations on diesel-powered equipment, affirmed the citations, as modified by the parties' stipulation,[4] and assessed a $100 civil penalty for each citation. *Id.* at 1848.

The Commission granted Amax's petition for discretionary review, which challenged the judge's holding that the accumulation on the continuous miner was an S&S violation and that Amax violated section 75.400 in connection with the accumulations of combustible materials on three pieces of diesel-powered equipment.

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[3] The judge noted that his determination would have been different if the accumulation had existed for only one or two shifts. 16 FMSHRC at 1843.

[4] The parties stipulated that the accumulations on the diesel-powered equipment were not S&S. 16 FMSHRC at 1848.

II.

Citation No. 4054831

Amax contends on review that the judge failed to apply the proper test for determining whether a violation is S&S. Specifically, citing *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984), Amax argues that the judge improperly couched his discussion of S&S in the context of possibility, "could occur," rather than in the definitive, "will result," as required under the third element of the formula set forth in *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984).[5] A. Br. at 24. Amax also argues that the judge's S&S determination is not supported by substantial evidence. *Id.*

The Secretary argues that the judge applied the correct legal standard in concluding that Amax's violation was S&S. S. Br. at 13. Conceding that the judge used the word "could" instead of "will" in his recitation of the third element of the *Mathies* test, the Secretary asserts that there is not a qualitative difference between these two words. *Id.* at 15. In support of this contention, the Secretary cites section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1).[6] In the

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[5] In *Mathies*, 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 (footnote omitted).

[6] Section 104(d)(1) of the Mine Act provides in part:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard and if he also finds that, while the conditions created by such a violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this

Secretary's view, this section's use of the word "could" and the Commission's use of this word in *Mathies* -- in which "the Commission used both 'could' and 'will' interchangeably" -- demonstrates this point. *Id*. (citing *Mathies*, 6 FMSHRC at 3-4). The Secretary also asserts that the judge's S&S determination is supported by substantial evidence because he reasonably concluded that Amax allowed the extensive accumulations to remain unabated for two weeks and there was no indication that, absent the inspector's intervention, it would have abated the accumulation in the near future. *Id.* at 16-18. The Secretary argues that, based on the above finding, the judge's conclusion that a permissibility defect or cable rupture was reasonably likely to occur over time and under normal mining operations is supported by substantial evidence. *Id.* at 18-19.

We agree with Amax that the judge erred in analyzing the third element of the *Mathies* test based on whether an injury-causing event "*could* occur." "The third prong of the test for S&S is whether there exists a reasonable likelihood that the hazard contributed to *will* (not *could*) result in an injury or illness of a reasonably serious nature." *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1118 (July 1995) (citations omitted).

We also conclude that the judge erred in failing to consider relevant record evidence in reaching his S&S determination.[7] In determining that the Secretary satisfied the third *Mathies* element, the judge discussed only the effect of the passage of time. He failed to discuss the impact of other relevant evidence that: (1) the continuous miner was in permissible condition (Tr. 69, 114); (2) the electric cables on the continuous miner were insulated and did not produce any heat (Tr. 136, 138); (3) the continuous miner's various motors and lights operated under the maximum permitted temperature of 302 degrees Fahrenheit (Tr. 137-38, 145-46, 189-92); (4) Amax's coal has an ignition temperature of over 470 degrees Centigrade (Tr. 188); (5) Amax's hydraulic oil has a flash point of 356 degrees Fahrenheit (Tr. 177); and (6) the continuous miner is

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Act.

[7] 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); *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994). That standard of review requires that a fact finder weigh all probative record evidence and that a reviewing body examine the fact finder's rationale in arriving at his decision. *Wyoming Fuel*, 16 FMSHRC at 1627; *see also, Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-89 (1951)). A judge must analyze and weigh the relevant testimony, make appropriate findings, and explain the reasons for his decision. *Wyoming Fuel*, 16 FMSHRC at 1627; *Mid-Continent*, 16 FMSHRC at 1222 (citing *Anaconda Co.*, 3 FMSHRC 299, 299-300 (February 1981)).

equipped with several dust control/suppression systems which keeps coal on the continuous miner wet (Tr. 90-91, 119-20, 138, 144-147).[8]

A finding that the passage of time increases the likelihood of an injury-producing event cannot, standing alone, satisfy the requirements of either the substantial evidence test or the third element of *Mathies*. Inasmuch as the judge based his determination solely on the passage of time and failed to analyze other record evidence, we conclude that his determination is not supported by substantial evidence.

For the foregoing reasons, we vacate the judge's S&S determination in Citation No. 4054831 and remand for an analysis of that issue consistent with this opinion.[9]

III.

Citation Nos. 4054082, 4054083, and 4054084

Amax asserts that the judge erred in determining that section 75.400's prohibition against accumulations "in active workings, or on electric equipment therein" also prohibits accumulations on diesel-powered equipment. A. Br. at 4. Amax argues that section 75.400 does not cover diesel-powered equipment and contends that the Secretary's efforts to enforce this standard against diesel-powered equipment deprives it of due process. *Id*. at 9-10, 12.

The Secretary argues that the judge's finding that section 75.400 prohibits accumulations on diesel-powered equipment is consistent with the Secretary's interpretation. S. Br. at 24-28. He states that the term "in active workings" is broad enough to prohibit accumulations on diesel-powered equipment when such equipment is situated in active workings. *Id.* at 28. The Secretary asserts that his interpretation is reasonable and, thus, entitled to deference. *Id.* at 25.

The Commissioners agree, in result, to affirm the judge's conclusion that the accumulations on diesel-powered equipment located in active workings violated section 75.400, but differ as to the rationale for that determination. The opinion of Chairman Jordan and Commissioner Marks and that of Commissioner Holen and Commissioner Riley, setting forth their separate views, follow.

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[8] We reject Amax's contention that the judge erred in assigning no weight to evidence that its redundant fire suppression system reduced the likelihood of serious injury. In *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995), the court held that "safety measures in place to deal with a fire does not mean that fires do not pose a serious safety risk to miners."

[9] Commissioner Marks agrees that the judge failed to consider relevant evidence and that therefore remand is necessary. However, for reasons set forth in his concurring opinion in *United States Steel Mining Co.*, 18 FMSHRC 862, 868 (June 1996), he finds that remand for the judge's consideration and application of the third *Mathies* prong is unnecessary.

Chairman Jordan and Commissioner Marks:

The legislative history of the Mine Act provides that "the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts." S. Rep. No. 181, 95th Cong., 1st Sess. 49 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 637 (1978). The Supreme Court has stated that the promulgating agency's interpretation of its own regulation is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). The Court has emphasized that an agency is emphatically due this respect when it interprets its own regulations. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965); *See also Secretary of Labor ex rel. Bushnell v. Cannelton Industries, Inc.*, 867 F.2d 1432, 1433, 1435 (D.C. Cir. 1989).

Both the Secretary and Amax agree that the resolution of these citations hinge on the interpretation of section 75.400. S. Br. at 25; A. Br. at 4. Specifically, the interpretive issue is whether section 75.400's prohibition against accumulations "in active workings, or on electric equipment therein" is broad enough to include diesel-powered equipment found in active workings. The competing interpretation asserts that the term "or" restricts that prohibition to places and electric-powered equipment only, excluding all other types of equipment from the standard. Thus, the inquiry here is not whether the diesel-powered equipment itself *is* an active working, but rather whether accumulations on diesel-powered equipment *located in* an active working are prohibited under section 75.400.[1]

Under the Secretary's interpretation of section 75.400, the phrase "in active workings" is broad enough to prohibit accumulations on diesel-powered equipment when such equipment is in active workings, i.e., where miners are normally required to "travel or work." S. Br. at 28 (quoting section 304(a) of the Mine Act). The Secretary reasonably reads the standard prohibiting accumulations in active workings to include both the relevant physical area of the mine itself *and* all equipment located within it. As the Secretary points out, under a contrary reading of the statute, an operator could comply by sweeping up accumulations on the floor of a mine (located in active workings) and putting them on ignition sources on the diesel equipment located there. Such a reading of the standard can hardly be viewed as a reasonable one.

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[1] *Jones & Laughlin Steel Corp.*, 5 FMSHRC 1209 (July 1983), *rev'd on other grounds sub nom. UMWA v. FMSHRC and Vista Mining Co.*, 731 F.2d 995 (D.C. Cir. 1984) (table), cited by Amax, is inapposite. In *Jones & Laughlin*, the Commission held only that an unmanned conveyor belt was not *itself* an active working under 30 C.F.R. § 75.303(a) (1991) (redesignated as 30 C.F.R. § 75.360 in 1992).

The Secretary interprets the phrase "or on electric equipment therein" as nondisjunctive. According to the Secretary, it is intended to emphasize the standard's prohibition against accumulations on electric-powered equipment but should not be read so narrowly that it allows accumulations on any other type of "equipment." S. Br. at 29-30. Rather, according to the Secretary, it was used to make clear that the term preceding it ("in active workings") explicitly included "electric equipment therein." *Id.* (quoting *McNally v. United States*, 483 U.S. 350, 358-59 (1987) (Congress used the word "or" to make it clear that the statute reached the particular circumstance described in the phrase following the term)).

If a statute is ambiguous or silent on a point in question, an inquiry is required to determine whether an agency interpretation of the statute is a reasonable one. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984); *Donald Guess, employed by Pyro Mining Co.*, 15 FMSHRC 2440, 2442 n.2 (December 1993); *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 13 (January 1994).[2] Here, the Secretary's interpretation of the standard is reasonable and entitled to deference. It furthers safety objectives of the Mine Act by prohibiting accumulations in active workings, regardless of whether such accumulations exist on the mine floor, on pallet loads of supplies such as rock dust bags, on stacks of material such as concrete blocks, or on powered equipment working or stored in active workings. Accumulations on diesel-powered equipment are equally or more dangerous than accumulations on the mine floor. According deference to the Secretary's interpretation of the standard, which is a statutory provision, is appropriate because it is not plainly erroneous or inconsistent with the regulation and it is a reasonable interpretation which furthers the prime objective of the Mine Act, protecting the health and safety of miners. *Dolese Brothers Co.*, 16 FMSHRC 689, 693 (April 1994) (quoting *Emery Mining Co. v. Secretary of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984)).

Amax's assertion that the term "or" is disjunctive and thus restricts section 75.400's prohibition to places and electric-powered equipment would thwart the objectives of the Mine Act by prohibiting accumulations on the floor of active workings but not those accumulations on diesel-powered equipment in those workings. Inasmuch as the Secretary's interpretation is reasonable and furthers the purposes of the Mine Act, we give it weight and conclude, as did the judge, that section 75.400 prohibits the accumulation of combustible materials on diesel-powered equipment in active workings.

We reject Amax's assertion that the Secretary's interpretation deprives it of due process. In ascertaining whether an operator has received fair warning of a standard, the Commission has applied an objective standard of notice, the "reasonably prudent person" test. *BHP Mining Co.*, 18 FMSHRC ___, slip op. at 4, Docket Nos. CENT 92-329, CENT 93-272 (August 19, 1996). The Commission has summarized this test as "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990). We conclude that an operator familiar with the purpose of prohibiting coal

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[2] This is commonly referred to as a "*Chevron II*" analysis. *See, e.g., Keystone*, 16 FMSHRC at 13.

accumulations in active workings would have fair warning that the regulation applies to accumulations of coal dust on diesel equipment.

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Mary Lu Jordan, Chairman

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Marc Lincoln Marks, Commissioner

Commissioners Holen and Riley:

We agree with Chairman Jordan and Commissioner Marks' opinion in result but disagree with their rationale as it applies to the issue of deference.

We would affirm the judge's conclusion that Amax violated section 75.400 because we believe the Secretary's interpretation of the standard is reasonable and furthers the safety objectives of the Mine Act. *See Dolese Brothers Co.*, 16 FMSHRC 689, 693 (April 1994) (quoting *Emery Mining Co. v. Secretary of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984)). Chairman Jordan and Commissioner Marks, in our view, have articulated an overly broad concept of deference to which they say the Secretary is entitled for his interpretations of the statute as well as the regulations. Slip op. at 6-7. Our colleagues would have deference to the Secretary become a vow of obedience that obliges the Commission to acquiesce to virtually any interpretation of law advanced by the Secretary. Such a sweeping concept of deference cannot be reconciled with the Supreme Court's statement in *Thunder Basin Coal Co. v. Reich* that this Commission "was established as an independent-review body to 'develop a uniform and comprehensive interpretation' of the Mine Act." 510 U.S. __, 114 S. Ct. 771, 127 L. Ed. 2d 29, 42 (1994) (quoting *Hearing on the Nomination of Members of the Federal Mine Safety and Health Review Commission before the Senate Committee on Human Resources*, 95th Cong., 2d Sess., 1 (1978)).

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Arlene Holen, Commissioner

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James C. Riley, Commissioner