FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 20, 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 91-421
MID-CONTINENT RESOURCES, INC.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 91-627
WILLIAM PORTER	:	

BEFORE: Backley, Doyle and Holen, Commissioners[1,2]

DECISION

BY THE COMMISSION:

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"). The

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[1] Commissioner Nelson participated in the consideration of this case but he passed away before the decision was issued. Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves a panel of three members to exercise the powers of the Commission.

[2] Chairman Jordan assumed office after this case had been considered and decided at a Commission decisional meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. In the interest of efficient decision making, Chairman Jordan has elected not to participate in this matter.

issues are whether a violation by Mid-Continent Resources, Inc. ("Mid-Continent") of 30 C.F.R. § 75.400 for accumulations of combustible materials was significant and substantial ("S&S") (Docket No. WEST 91-421),[3] and whether Mine Superintendent William Porter "knowingly authorized, ordered, or carried out" the alleged violation within the meaning of section 110(c) of the Mine Act (Docket No. WEST 91-627).[4]

Administrative Law Judge John J. Morris concluded that Mid-Continent violated the standard, that the violation resulted from Mid-Continent's unwarrantable failure, that the violation was not S&S, and that Porter was not individually liable for a civil penalty under section 110(c). 15 FMSHRC 149 (January 1993)(ALJ). The Secretary filed a petition for discretionary review challenging the judge's S&S and section 110(c) determinations.[5] For the reasons that follow, we vacate the judge's conclusion that the violation was not S&S and remand for further analysis; we affirm the judge's determination that Porter was not liable under section 110(c).

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[3] 30 C.F.R. § 75.400 provides:

> Accumulation of combustible materials.
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> 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.

[4] Section 110(c) provides:

> Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order ..., any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) [of this section].

30 U.S.C. § 820(c).

[5] In his decision, the judge also ruled on an order issued to Mid-Continent alleging a violation of section 75.400 on May 29, 1990, and on penalties proposed under section 110(c) against two other Mid-Continent employees in connection with that violation. Docket Nos. WEST 91-168, -594, and -626. Petitions for discretionary review with respect to those aspects of the judge's decision were filed by Mid-Continent and those employees found individually liable. We are issuing a separate decision on that petition. Mid-Continent Resources, Inc., 16 FMSHRC 1231 (June 20, 1994).

I.

Whether the Violation Was S&S

A. Factual Background and Procedural History

Mid-Continent operates the Dutch Creek Mine, an underground bituminous coal mine in Pitkin County, Colorado. On May 1, 1990, James Kirk, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), inspected the 103 longwall section. He found accumulations of loose coal at various locations along the 103 strike conveyor belt, which was approximately 3,000 feet long, beginning with the area around the stage loader and belt tailpiece near the face. The belt had broken on the previous shift and, during Kirk's inspection, it was operating only intermittently. 15 FMSHRC at 155-57, 162; Tr. 66, 508, 578. Approximately 100 feet from the tailpiece, Kirk found accumulations up to 12 inches in height that were in contact with the belt and belt rollers. Proceeding outby along the belt near the shark pump, Kirk noticed additional accumulations extending about 50 feet. The belt rubbed against the conveyor framework as well as against the accumulations. Kirk also found accumulations between crosscuts 11 and 10 and at the 11 and 10 doors. These accumulations were also in contact with the belt and belt rollers. Near the 9 door, there was a windrow of coal approximately 260 feet long and up to 18 inches high. Kirk found further accumulations at the 8, 7 and 6 doors, which were 20 to 40 feet long and mostly dry. At the 6 door, the belt and rollers were in contact with the accumulations. Kirk also observed wet accumulations around the drive area of the 103 belt and the tailpiece of the B-2 belt.

Kirk determined that the accumulations violated section 75.400. He issued a withdrawal order to Mid-Continent pursuant to section 104(d)(2) of the Mine Act, 30 U.S.C. § 814(d)(2), alleging that the violation was S&S and had resulted from the operator's unwarrantable failure to comply with the standard.

In concluding that the violation was not S&S, the judge determined that there was not a reasonable likelihood that the accumulations would result in a fire because the loose coal was of low combustibility. 15 FMSHRC at 159.

B. Disposition

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to a more serious type of violation. 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 Division, National Gypsum Co., 3 FMSHRC 822, 825-26 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission 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 -- 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.

See also Austin Power, Inc. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g, 9 FMSHRC 2015, 2021 (December 1987)(approving Mathies criteria). The Commission has held that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., Inc., 6 FMSHRC 1834, 1836 (August 1984)(emphasis in original). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. U.S. Steel Mining Co. Inc., 7 FMSHRC 1125, 1130 (August 1985).

The judge found that Mid-Continent had violated section 75.400, that ignition or propagation of a fire is a hazard associated with coal accumulations, and that injuries resulting from the hazard could be serious and possibly fatal. 15 FMSHRC at 154, 156. He found, however, that there was not a reasonable likelihood that a fire would occur. Id. at 159-60. It is this finding that the Secretary challenges on review.

In concluding that the Secretary's evidence failed to satisfy the third element of the Mathies test, the judge found that Mid-Continent's coal has low oxygen and high ash content, burns with great difficulty, and will not spontaneously combust. 15 FMSHRC at 155, 159. The judge pointed out that Mid-Continent must add diesel oil to its coal to keep its coal-fired thermal dryers burning. Id. at 159. He noted that a major methane fire in a longwall section during the summer of 1990 failed to ignite adjacent coal pillars. Id. Accordingly, he concluded that, "[d]ue to the lack of ignitability of the loose coal," there was not a reasonable likelihood that a fire would result. Id.

On review, the Secretary contends that the judge's conclusion is not supported by substantial evidence in the record.[6] He argues that the judge failed to address adequately all the important evidence relevant to the likelihood of a mine fire occurring. The Secretary asserts that the accumulations could be ignited by frictional contact with the belt or belt rollers or by an ignition elsewhere in the mine. The Secretary also maintains that the judge failed to give due consideration to continued normal mining

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[6] 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). "Substantial evidence" means "such 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).

operations. In response, Mid-Continent submits that substantial evidence supports the judge's determination that there was only a remote possibility, if any, that either an ignition or an injury would occur as a result of the violation. Mid-Continent asserts that, at the time of citation, the belt had broken and thus all potential sources of friction were eliminated. It also contends that the Secretary failed to show a viable ignition source for any of the accumulations and that they were virtually incombustible.

The substantial evidence 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. See Universal Camera Corp. v. NLRB, 340 U.S. 474, 487-89 (1951). A judge must analyze and weigh the relevant testimony of record, make appropriate findings, and explain the reasons for his decision. Anaconda Co., 3 FMSHRC 299, 299-300 (February 1981). We agree with the Secretary that the judge failed to address adequately the evidentiary record in determining that it was not reasonably likely that the hazard contributed to by the violation would result in an injury. See Eagle Nest, Inc., 14 FMSHRC 1119, 1123 (July 1992).

The judge's factual determinations with regard to the violation appear to be consistent with a finding of S&S, and he failed to reconcile those findings with his determination that the violation was not S&S. The judge recognized potential ignition sources such as frictional contact between the belt rollers and the accumulations, the belt rubbing against the frame, electrical cables for the shark pump, the electrical devices for the longwall and one area in the longwall that was not being maintained. 15 FMSHRC at 154-55. As specifically noted by the judge, Kirk had cited a permissibility violation on a power cable connected to a longwall control box. Id. at 155; Tr. 12-13, 29, 42. The judge also found that the accumulations could be introduced into an ignition causing a more serious ignition. 15 FMSHRC at 154.

Further, the judge failed to reconcile his finding that Dutch Creek is a gassy mine subject to five-day spot inspections with his determination that the violation was not S&S. Id. at 154, 158-60. The mine emits over one million cubic feet of methane in a 24-hour period. Tr. 28; see also Tr. 29-30. The 103 longwall is a gassy area. Tr. 297. Accumulations, in conjunction with a methane ignition in the face area, could propagate and increase the severity of a fire or explosion. 15 FMSHRC at 154; Tr. 30, 741-42.

We also conclude that the judge failed to take into account continued normal mining operations when he discounted Kirk's testimony as to the belt and belt rollers being in contact with the accumulations because the inspector did not recall any hot areas. 15 FMSHRC at 159; see Tr. 104. As the judge found, the conveyor belt had broken during the preceding shift and was under repair when Kirk entered the section. 15 FMSHRC at 156-57, 161-62.

Finally, to the extent the judge suggested that spontaneous combustibility of coal is required for an S&S finding, he erred. See 15 FMSHRC at 159. The evidence shows that loose coal in the Dutch Creek Mine is low in combustibility, but coal is, by its nature, combustible.

Accordingly, we vacate his conclusion that the violation was not S&S. We remand for further analysis consistent with this decision. If the judge finds that the violation is S&S, he shall assess the appropriate civil penalty.

II.

William Porter's Liability Under Section 110(c)

A. Factual Background and Procedural History

On May 1, 1990, William Porter, the mine superintendent responsible for the 103 longwall, came to work at 6:20 a.m. for the A shift (7:00 a.m. to 3:00 p.m.). He was told by a subordinate that the 103 belt had broken and had been down during the last hour and a half to two hours on the C shift (11:00 p.m. to 7:00 a.m.). Porter was unable to reach those currently working underground on the belt; he immediately instructed his foreman to see that the belt was repaired and the spillage cleaned up. Tr. 578-79. The accumulations along the 103 belt were the subject of Kirk's section 104(d)(2) order discussed above.

Following further investigation of the violation, the Secretary alleged, in a petition for assessment of civil penalty pursuant to section 110(c) of the Mine Act, that Porter had knowingly authorized, ordered, or carried out the violation of section 75.400 cited in Kirk's order.

The judge concluded that there was no evidence that Porter knowingly authorized, ordered, or carried out the violation. 15 FMSHRC at 162. The judge emphasized that the coal accumulations along the 103 belt were caused by the belt break that had occurred on the shift before Porter's. Id.

B. Disposition

The Secretary contends that the judge failed to consider evidence that there were coal accumulations along the 103 belt reported in the days before the belt break. The Secretary argues that Porter knowingly authorized a violation of section 75.400 when he countersigned the earlier preshift and onshift examination reports and, according to the Secretary, took no meaningful steps to clean up the accumulations. Mid-Continent replies that the cited accumulations resulted from the belt break and that the earlier examination reports show that the previous accumulations around the belt had been abated by shoveling.

Section 110(c) of the Mine Act provides that, whenever a corporate operator violates a mandatory safety or health standard, any agent of the corporate operator who "knowingly authorized, ordered, or carried out such violation" shall be subject to civil penalty. 30 U.S.C. § 820(c).

The Secretary failed to establish that any of the cited accumulations existed before the belt break. The judge found that the belt broke on the May 1 C shift, causing coal spillage. 15 FMSHRC at 156. The record indicates that breakage of a belt carrying coal could result in the significant

accumulations later found by Inspector Kirk. See Tr. 134, 544, 548, 557. The inspector himself acknowledged that a great deal of coal could accumulate at the point of a belt break. Tr. 31, 67, 85. Accumulations would also result from removing coal from the belt in order to splice it. Tr. 83, 383-84, 493, 496-97.

Porter reported to work on the shift following the belt break. When he learned that the belt had broken, he assigned a foreman to repair it and clean up the area. Tr. 578-79.

The judge found that the entire production crew had spent one and a half to two hours repairing the belt (which took four hours), even before Kirk arrived at the mine. 15 FMSHRC at 156. Therefore, the record shows that Porter actively sought to address the belt and accumulation problem as soon as he became aware of it.

We conclude that substantial evidence supports the judge's determination that Porter did not knowingly authorize, order, or carry out the violation of section 75.400. Compare Prabhu Deshetty, 16 FMSHRC ____, No. KENT 92-549 (May 26, 1994)(affirming a finding of section 110(c) liability in connection with an accumulation violation). Accordingly, we affirm the judge's section 110(c) determination.

III.

Conclusion

For the reasons set forth above, we vacate the judge's conclusion that Mid-Continent's violation of section 75.400 was not S&S and remand for further analysis. We affirm the judge's determination that Porter is not liable under section 110(c) of the Mine Act for knowingly authorizing, ordering, or carrying out Mid-Continent's violation of section 75.400.

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

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