

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1048

September Term, 2018

FILED ON: JANUARY 11, 2019

MACH MINING, LLC,

PETITIONER

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION AND SECRETARY OF LABOR, MINE
SAFETY AND HEALTH ADMINISTRATION,
RESPONDENTS

On Petition for Review of a Decision of the
Federal Mine Safety and Health Review Commission

Before: TATEL, WILKINS and KATSAS, *Circuit Judges*.

J U D G M E N T

The Court considered this petition for review on the record and on the briefs and oral arguments of the parties. The Court has given the issues full consideration and determined that they do not warrant a published opinion. *See* Fed. R. App. P. 36; D.C. Cir. R. 36(d). For the reasons stated below, it is

ORDERED and **ADJUDGED** that the petition for review be denied.

Petitioner Mach Mining, LLC, operates a coal mine in Williamson County, Illinois. The mine contains a 3,500-foot tunnel that houses a slope belt and adjoining pathways. The belt, which is powered by rollers, transports mined material to the surface.

Around 6:15 AM on July 14, 2014, a Mach Mining examiner inspected the slope belt. He observed accumulations of coal and debris beneath the belt and wrote in the mine's examination record book: "slope ... needs cleaned work in progress." J.A. 529. Roughly two hours later, an inspector with the Mine Safety and Health Administration (MSHA) observed a more troubling scene. At six locations along the slope belt, he noted severe accumulations touching the belt and rollers. Such accumulations generate friction that can cause coal to explode.

As relevant here, the inspector cited Mach Mining for violating MSHA's "recordkeeping rule," which provides:

A record shall be made of any hazardous condition and any violation of the nine mandatory health or safety standards found by the mine examiner. This record shall be kept in a book maintained for this purpose on the surface at the mine. The record shall be made by the completion of the shift on which the hazardous condition or violation of the nine mandatory health or safety standards is found and shall include the nature and location of the hazardous condition or violation and the corrective action taken. This record shall not be required for shifts when no hazardous conditions or violations of the nine mandatory health or safety standards are found.

30 C.F.R. § 75.363(b). The inspector concluded that each of the six accumulations was a “hazardous condition” and that the generic notation by Mach Mining’s examiner did not adequately convey their “nature and location.”

An administrative law judge upheld the citation, *Sec’y of Labor v. Mach Mining, LLC*, 38 FMSHRC 2229, 2230 (2016) (*Mach Mining I*), and the Federal Mine Safety and Health Review Commission affirmed, *Sec’y of Labor v. Mach Mining, LLC*, 40 FMSHRC 1, 13 (2018) (*Mach Mining II*). Mach Mining now seeks review in this Court, which has jurisdiction under 30 U.S.C. § 816(a)(1).

Mach Mining first contends that the severe accumulations did not exist when its examiner checked the belt, but instead must have built up during the next two hours. Substantial evidence supports the Commission’s contrary conclusion. Before the ALJ, the MSHA inspector testified that the accumulations he observed—up to thirty inches in places—must have existed for several shifts. Additionally, the inspector noted that one accumulation had dislodged part of the belt, causing it to bore a groove in a support beam. He testified that the belt must have abraded the beam for at least twenty-four hours to create the groove, and a Mach Mining supervisor agreed that this cutting would have taken a “long time.” *Mach Mining I*, 38 FMSHRC at 2234 n.10 (quotation marks omitted).

Mach Mining next contends that because the recordkeeping rule applies only to hazardous conditions “found by the mine examiner,” 30 C.F.R. § 75.363(b), the citation could not rest on conditions that its examiner had never found. This argument, which Mach Mining raised for the first time in its reply brief, is forfeited. *See, e.g., Abdullah v. Obama*, 753 F.3d 193, 199 (D.C. Cir. 2014). One footnote in Mach Mining’s opening brief arguably hints at this point, but “cursory arguments made only in footnotes” do not preserve an issue. *Abdelfattah v. DHS*, 787 F.3d 524, 532 (D.C. Cir. 2015) (alterations adopted) (quotation marks omitted).

Mach Mining further contends that the “slope needs cleaned” notation satisfies the recordkeeping rule, which requires a record of “the nature and location of the hazardous condition.” 30 C.F.R. § 75.363(b). Mach Mining argues that “needs cleaned” adequately described the nature of the hazardous condition, and “slope” adequately described its location. But as the Commission reasonably concluded, “the ‘nature’ of the hazardous condition and the ‘location’ must be recorded in such a way that those who read the examination record will know how and where to address the problem.” *Mach Mining II*, 40 FMSHRC at 11–12. That standard was not met, for the record book conveyed neither the critical fact that the accumulations had reached the slope belt nor where along the 3,500-foot belt those accumulations were present.

Finally, Mach Mining argues that it did not have fair notice of MSHA's interpretation of the recordkeeping rule. We agree with the Commission that "any reasonably prudent miner would understand that the notation in question does not adequately identify the 'nature and location of the hazardous conditions.'" *Mach Mining II*, 40 FMSHRC at 13. Moreover, Mach Mining itself had made significantly more detailed examination entries in the past, and, even before this Court, it argues that its examiner would have noted accumulations this severe if he had actually observed them.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing *en banc*. See Fed. R. App. P. 41(b); D.C. Cir. R. 41(a)(1).

PER CURIAM

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk