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SECRETARY OF LABOR : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. PENN 92-445
Petitioner : A.C. No. 36-04175-03560
: :
v. : Robena Prep Plant
: :
CONSOLIDATION COAL COMPANY, :
Respondent :

DECISION

Appearances: John M. Strawn, Esq., U.S. Department of Labor,
Office of the Solicitor, Arlington, Virginia
for Petitioner;
Daniel E. Rogers, Esq., Consolidation
Coal Company, Pittsburgh, Pennsylvania,
for Respondent.

Before: Judge Feldman

This case is before me based upon a petition for assessment of civil penalty filed by the Secretary (petitioner) alleging a violation by the operator (respondent) of the surface mine mandatory safety standard that prohibits dangerous accumulation of coal dust. This matter was heard in Washington, Pennsylvania, at which time Robert G. Santee and Robert L. Campbell testified on behalf of the petitioner and William Geary testified for the respondent.

The issues for resolution are whether the respondent permitted a dangerous accumulation of coal dust at its Robena Preparation Plant and, if so, whether this accumulation was a "significant and substantial" violation and/or the result of the respondent's "unwarrantable failure". Also for consideration is the amount of civil penalty, if any, that should be assessed. The parties have stipulated to my jurisdiction in this matter and to the pertinent civil penalty criteria found in Section 110(i) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (The Act). The parties' post-hearing briefs are of record.

FINDINGS OF FACT AND DISCUSSION

At approximately 6:50 a.m., on August 22, 1991, Mine Safety and Health Administration Inspector, Robert G. Santee arrived at the respondent's Robena Preparation Plant facility for the purpose of conducting an inspection. This facility consists of several buildings, that receive, transport and process coal from the respondent's Dilworth Mine. The coal is transported up the Monongahela River by barge to the preparation plant where it is processed and stored by means of a series of conveyor belts.

Upon his arrival at the facility, Santee spoke to Mine Superintendent, Pat Zungri who informed Santee that Company Representative, Joe Bailey and Miner Representative, Harry Churby would accompany him on his inspection. Santee proceeded to the foreman's office where he inspected the foreman's log. Santee observed that the last entry in the log occurred on the afternoon shift of August 21, 1991, by Mine Examiner, Ed Bodkin. Bodkin's log entry made no reference to any accumulations of coal dust in the transfer house.

Sometime between 7:00 a.m. and 7:35 a.m., Santee, accompanied by Bailey and Churby, proceeded to the transfer house to conduct an inspection. The transfer house is a building used to transport coal by conveyor belt to and from the river from the preparation plant. Upon arriving on the first floor of the transfer building, Santee observed several areas of accumulation of float dust and loose coal. He noted that the more he looked around the transfer building, the more extensive the accumulations appeared to be. Therefore, Santee issued 104(d)(1) Order No. 3691990 to Joe Bailey for an alleged violation of Section 77.202 which Santee concluded had occurred as a result of the respondent's unwarrantable failure.(Footnote 1) The order was based on Santee's observations of dangerous amounts of coal dust accumulations at the following locations:

- 1) Coal dust accumulations ranging from 0 to 1/2 inch deep on top of the electrical motors for the No. 1 conveyor belt.
- 2) Coal dust accumulations ranging from 0 to 1/2 inch deep on the electrical motors and structures for the river tipple conveyor belt.
- 3) Coal dust accumulations ranging from 0 to 1/16 inch deep inside of the electrical control panel boxes on

1 30 C.F.R. 77.202 provides: "Coal dust in the air of, or in, or on the surfaces of, structures, enclosures, or other facilities shall not be allowed to exist or accumulate in dangerous amounts." (Emphasis added).

the bottom floor of the transfer building where electrical motors for the No. 1 conveyor belt and river tipple conveyor belt are located.

- 4) Coal dust accumulations ranging from 0 to 1/2 inch deep on the steel beam structures on the bottom floor of the transfer building and continuing up to the first landing, including the first landing platform.
- 5) Loose coal and wet coal and mud ranging from 2 to 24 inches in depth at three different locations on the bottom floor of the transfer building including underneath the tail rollers for the No. 1 and river tipple conveyor belts.
- 6) Coal dust accumulations from 0 to 1/2 inch deep on top of the drive units and structures for the No. 1 and river tipple conveyor belts and on the floor of the platform for the secondary drive for the river tipple conveyor belt.

Santee's citation noted that the No. 1 and river tipple conveyor belts were running at the time the citation was issued at 8:25 a.m. In addition, Santee testified that the electrical boxes were energized at the time he observed these accumulations. (Tr.21,25-26). Santee noted that the accumulations observed were black in color and were not combined with any non-combustible materials. (Tr.44,56,108). Finally, Santee stated that there were footprints in the accumulations which led him to believe that these accumulations should have been observed and were not of recent origin. (Tr.28). Santee estimated these accumulations existed for a period of several shifts to approximately one week. (Tr. 52).

Upon issuing the 104(d)(1) order, Santee informed Bailey to de-energize all power from the electrical motors and boxes so as to avoid any potential for ignition. After the top surfaces of the drive units and structures for the No. 1 and river tipple conveyor belts were washed off, Santee modified Order No. 3691990 to include additional coal dust accumulations he observed ranging from 0 to 1/2 inch deep which were saturated with grease and oil at several locations near the conveyor belt drive units. (Gov. Ex.1). Santee attempted to continue his inspection but realized that plant personnel were assigned to clean other areas of the transfer building before he could inspect them. Therefore, Santee discontinued his inspection at approximately 9:30 a.m. Santee returned to the field office and was contacted at approximately 4:00 p.m., by Zungri who advised Santee that the condition had been abated. Santee returned to the preparation facility at approximately 5:15 p.m., and reinspected the transfer house in the presence of Zungri and Robert L. Campbell, Chairman of the Union Safety Committee.

Robert Campbell testified on behalf of the Secretary. He stated that he also observed extensive amounts of float coal dust on top of the electrical panels, inside of the panels and on the floor. Campbell, who is employed at this facility, estimated that the dust accumulations existing in and around these panels were present for at least 3 weeks. (Tr. 110-111). Campbell corroborated Santee's observations regarding an oil and grease leak near the No. 1 conveyor belt. Campbell estimated that this condition existed for more than one month. (Tr. 108).

Campbell further testified that the transfer house is considered to be a problem area in terms of coal dust accumulations. He stated that the safety committee had raised the issue with the respondent's management on several occasions. (Tr.112-113). Campbell related that regular maintenance of the transfer house is done on weekends. Consequently, he opined that dust conditions deteriorate as the week progresses. (Tr. 110, 122-123). Thus, the nature and extent of the coal dust accumulations observed by Santee and Campbell were consistent with this weekend cleaning policy in that the inspection occurred on a Thursday. (Tr.117). Campbell testified that the weekend cleaning did not include cleaning of the electrical boxes or motors. (Tr. 122-123). Campbell expressed concern about the accumulations and their explosive potential as welding is performed in the transfer house approximately two times per month. (Tr. 120-121).

The respondent called Plant Foreman, William Geary as its only witness. Geary worked the midnight shift on August 22, 1991. This shift began on August 21, at 11:00 p.m., and ended at approximately 7:15 a.m., on August 22. Geary testified that he inspected the transfer house at approximately 6:00 a.m., on August 22, 1991. At that time, he reportedly noted coal dust that needed to be removed on the walkways around the No. 1 conveyor belt. (Tr. 161). Geary testified that he went to the foreman's office at approximately 6:30 a.m. Geary stated that he made a notation in the inspection log at approximately 6:35 a.m., to 6:40 a.m. (Tr.176). The subject notation states, "Transfer house area on both sides of river tipple belt need cleaned-up (sic)." (Footnote 2) Geary testified that he did not know how this coal accumulation occurred. (Tr.173). Geary stated that he observed Santee on the preparation facility premises on August 22, 1991, prior to his departure at the end of his shift. (Tr.203).

2 The respondent did not introduce a certified copy of this log entry at trial. The record was kept open and it was received in evidence as Respondent's Ex. 1 on November 16, 1992.

FURTHER FINDINGS OF FACT AND CONCLUSIONS

Occurrence of Violation

The respondent is cited for violation of the mandatory safety standard in section 77.202 which specifies that coal dust shall not be "allowed" to accumulate in "dangerous amounts" in the air or on the surfaces of structures, enclosures, or other facilities. As coal dust is a natural consequence of the coal preparation process, the issue for determination is whether the respondent "allowed" the accumulations to occur and whether such accumulations constituted "dangerous amounts."

Turning to the question of whether the respondent allowed these conditions to occur, the determining factor is the period of time in which the respondent permitted the coal dust to accumulate. In *Utah Power and Light v. Secretary of Labor*, 951 F.2d 292, 295 (10th Cir. 1991), the Tenth Circuit, in applying a similar mandatory safety standard for underground mining contained in Section 75.400, stated that coal dust accumulations must be ". . . cleaned with reasonable promptness, with all convenient speed." Obviously, section 77.202 does not contemplate citations for coal dust as it is generated as a by-product of coal preparation. It is only the accumulation of such coal dust, which requires a period of time to occur, which is prohibited. (Tr.84-85). Thus, the operator must be afforded a reasonable period of time to remove coal dust accumulations before a citation can be properly issued.

In its brief, referring to the testimony of Geary, the respondent alleges, without foundation, that "[t]he major accumulation, amounting to an estimated 50 tons of coal, and the dust associated with the spill of that coal, occurred sometime during the afternoon shift of August 21 or the midnight shift of August 22. (Tr. pp. 173 and 174)." (Emphasis added). (Respondent's Br. 1-2). However, the respondent has misquoted Geary's testimony. There is no evidence of record of any recent coal spill that could account for the accumulations observed by Santee and Campbell. In fact, Geary, speaking hypothetically, testified that, given the volume of coal on the conveyor belts it would only take ". . . a few minutes for 50 ton[s] to get there (spill)." (Tr.170-171). Although Geary referred to "a spill there sometime during the night" he also testified that he did not know how these accumulations (referred to by counsel for the respondent as a "spill") occurred or when they occurred. (Tr.168,173). Geary's lack of knowledge about a recent coal spill is consistent with the testimony of Santee and Campbell which makes no reference to any statement by Bailey, Churby or Zungri, mine personnel who accompanied Santee on his inspection,

that a relevant coal spill had occurred. Significantly, Geary testified that he only saw 2 to 24 inches of coal dust accumulations around the No. 1 conveyor belt rather than a catastrophic coal spill. (Tr.172- 173). Thus, the testimony, when viewed in its entirety, supports the conclusion that the subject accumulations developed over a period of time and were not the result of a recent spill.(Footnote 3) In reaching this conclusion, I note the testimony of Campbell concerning the respondent's policy of cleaning the transfer house on a weekly basis with resultant coal dust accumulations as the week progresses. Moreover, the physical evidence consisting of coal dust layers saturated with oil and grease, coal dust filtering through cracks in electrical boxes, and widespread coal dust accumulations on electrical motors, beams and around the rollers of the conveyor belts, supports the opinions of Santee and Campbell that these accumulations existed for a prolonged period of time.(Footnote 4)

I also reject the respondent's assertion that the subject accumulation was noted in the foreman's log book by Geary prior to Santee's inspection. Santee's contemporaneous notes reflect that upon arrival at the preparation plant the last entry in the inspection log was by Bodkin on the afternoon shift of August 21, 1991. (Gov. Ex. 2, p.1). Significantly, Superintendent Zungri, Plant Foreman Brian Mahalovich and Plant Engineer Bailey never informed Santee at the beginning of his inspection of the occurrence of a recent spill that required cleanup or of a pertinent entry in the inspection log. The first time Santee was shown Geary's log entry was sometime after 10:15 a.m. (Tr.35). Moreover, Geary testified that he was aware of Santee's presence on the premises prior to ending his shift on August 22, 1991. Thus, Geary had the opportunity to enter the cleanup notation concerning both sides of the river tipple belt after he was aware that Santee had begun his inspection. I conclude, therefore, that the evidence fails to establish the existence of a log entry concerning a cleanup of any of the subject coal dust accumulations until after Santee's inspection and after the 7:15 a.m., day shift on August 22, 1991, had begun. (See Tr. 35-36).

3 Respondent's Counsel and Geary have used the word spill and accumulation interchangeably throughout this proceeding. However, I find Geary's description of his observations of accumulations ranging from 2 to 24 inches consistent with an accumulation rather than a significant spill.

4 As previously noted, Santee estimated that the accumulation existed over a period of several shifts to one week. Campbell testified that these accumulations were present from 3 weeks to more than one month. I give greater weight to Campbell's testimony as he is employed at and familiar with the preparation facility.

Finally, assuming arguendo that Geary's log entry was timely, it did not adequately address the widespread accumulations on such locations as in the electrical boxes, on the electrical motors and on the beams. It is noteworthy that it took the respondent an entire day to clean the transfer house. There is no evidence that Geary's entry in the log book was intended as an acknowledgement of the necessity for such an extensive cleanup. Thus, the Secretary has established that the respondent "allowed" this coal dust to accumulate in contravention of Section 77.202 in that it failed to take remedial action until Santee issued the subject 104(d)(1) order.

The remaining issue is whether these accumulations ranging from 1/16 inch inside the electrical boxes, 1/2 inch on the electrical motors and conveyor belt structures and 2 to 24 inches around the conveyor belt rollers, constitute "dangerous amounts". The Commission, in Pittsburgh & Midway Coal Mining Company, 8 FMSHRC 4 (January 1986), has concluded that coal dust accumulations 1/8 inch in depth inside electrical boxes, where there is a potential ignition source, are "dangerous amounts" within the meaning of Section 77.202. Consistent with this Commission decision, I construe the extensive accumulations observed by Santee in close proximity to electrical boxes, motors and moving belts to be "dangerous" accumulations. Accordingly, the Secretary has established a violation of Section 77.202.

SIGNIFICANT AND SUBSTANTIAL

The Secretary asserts that the nature and extent of the coal dust accumulations cited by Santee warrant the finding that this was a significant and substantial violation. A violation is deemed to be "significant and substantial" if there is "a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." U.S. Steel Mining Co., Inc., 7 FMSHRC 327, 328 (1985); Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981); Mathies Coal Co., 6 FMSHRC 1,3-4 (1984). This evaluation is made in terms of "continued normal mining operations." U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. Texasgulf, Inc., 10 FMSHRC 498 (1988); Youghioghney & Ohio Coal Company, 9 FMSHRC 2007 (1987).

The respondent concedes that it is ". . . indisputable that an accumulation of coal dust did exist in the transfer house on the morning of August 22, 1991." (Respondent's Br.1). The issue for determination is whether there was a reasonable likelihood that these accumulations would result in combustion causing serious injury. It is fundamental that float coal dust is combustible only if 1) the float coal dust is in suspension; 2) there is an ignition source; and 3) there is an actual ignition or explosion. (Tr.45).

With regard to suspension, Santee testified that although he did not visualize any float dust in suspension, the widespread nature of the accumulations was indicative of suspended coal dust. (Tr.49-50). In addition, he testified that there were several common occurrences which could place the dust in suspension. For example, Santee stated that the starting and stopping of conveyor belts, the movement of those belts and tail rollers, and the opening of doors causing air circulation were all potential causes of float dust suspension. (Tr.63-64).

With respect to the second element of ignition, I accept the un rebutted testimony on behalf of the Secretary concerning the presence of potential ignition sources from arcing or sparks from the electrical boxes or motors, from heat build up and sparks related to friction from the conveyor belts and from occasional welding activities. (Tr. 46-47, 121). The proximity of float coal dust to these sources of ignition further demonstrates the serious nature of this violation.

Finally, in the event of actual combustion, it must be established that a fire or explosion is reasonably likely to cause serious injury or death. Santee's citation noted that one person was affected by this hazardous condition. Apparently, one employee on each shift is assigned to the transfer house where he is responsible for cleaning up the belt areas and hosing down the chute. (Tr.118). The foreman on each shift also travels through the transfer house to inspect the condition of the facility. (Tr. 177). Santee and Campbell also testified that personnel enter the transfer building for maintenance and repair. (Tr.51,121). The potential for explosion and/or fire engulfing the entire building would subject anyone inside to the substantial risk of serious injury or death. Admittedly, while the discrete hazard in this instance, i.e., combustion and resultant injury, requires the coincidence of several events, I find that the Secretary has established a significant and substantial violation by virtue of the extensive nature of the accumulations, their proximity to ignition sources and the likelihood of suspension given the accumulations' exposure to moving conveyor belts.

Unwarrantable Failure

The remaining issue concerns whether the respondent's failure to timely remove the subject accumulations constitutes an unwarrantable failure. The Commission has noted that unwarrantable failure is "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act. Emery Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghiogheny & Ohio Coal Company, supra; Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988). Referring to its prior holding in the Emery Mining case, the Commission stated as follows in Youghiogheny & Ohio, at 9 FMSHRC 2010:

We stated that whereas negligence is conduct that is "inadvertent," "thoughtless", or "inattentive," unwarrantable conduct is conduct that is described as "not justifiable" or "inexcusable." Only by construing unwarrantable failure by a mine operator as aggravated conduct constituting more than ordinary negligence, do unwarrantable failure sanctions assume their intended distinct place in the Act's enforcement scheme.

In Emery Mining, the Commission elaborated on the meaning of the phrase "unwarrantable failure as follows:"

"Unwarrantable" is defined as "not justifiable" or "inexcusable." "Failure" is defined as "neglect of an assigned, expected, or appropriate action." Webster's Third New International Dictionary (unabridged) 2514, 814 (1971) ("Webster's"). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by "inadvertence," "thoughtlessness," and "inattention." Black's Law Dictionary 930-31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention. 9 FMSHRC at 2001.

The evidence in this case reflects widespread coal dust accumulations, including those located on electrical motors and inside electrical boxes, which were permitted to accumulate over an extended period of time. These conditions were indicative of an inadequate cleanup policy which involved periodic cleanup rather than effective cleanup on an as needed basis. The

~272

existence of these accumulations in proximity to ignition sources manifests a reckless disregard of this serious risk of explosion which goes beyond mere inattentiveness or thoughtlessness. Moreover, the presence of these accumulations despite previous meetings with the Safety Committee concerning this problem in the transfer house provides an additional basis for concluding that the respondent's inaction constituted more than ordinary negligence. As such, this violation is attributable to the respondent's unwarrantable failure.

Conclusions

In view of the above, I conclude that the gravity associated with the respondent's violation of Section 77.202 was serious given the risk of life threatening injury and that the underlying degree of negligence exhibited by the respondent was high. I therefore concur with the \$1,200 assessment proposed by the Secretary in this matter as it is consistent with the evidence of record and the criteria in Section 110(i) of the Act.

ORDER

Accordingly, Order No. 3691990 IS AFFIRMED and the respondent IS ORDERED TO PAY a civil penalty of \$1,200 in satisfaction of the violation in issue. Payment is to be made within thirty (30) days of the date of this decision, and upon receipt of payment, this matter IS DISMISSED.

Jerold Feldman
Administrative Law Judge

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