

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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October 20, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 97-34
Petitioner	:	A. C. No. 46-01286-03969
v.	:	
	:	Windsor Mine
WINDSOR COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Alan Paez, Esq. Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia; William Hulvey, Conference and Litigation Representative, Mine Safety and Health Administration; Barbourville, Kentucky, for the Secretary; David M. Cohen, Esq., American Electric Power, Lancaster, Ohio, for Respondent.

Before: Judge Fauver

This is a civil penalty action under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801et seq., involving a section 104(d)(1) citation.¹

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the Findings of Fact and further findings in the Discussion below:

FINDINGS OF FACT

1. Citation No. 4179895 was issued on June 21, 1996, by MSHA Inspector Ronald G. Taylor, alleging a significant and substantial (S&S) violation of 30 C.F.R. ' 75.400 due to an unwarrantable failure to comply.

2. Inspector Taylor observed extensive accumulations of loose coal and coal dust along

¹/Section 104(d)(1) Citation No. 4179895 was originally issued as a section 104(d)(1) order. The Mine Act provides for increasingly severe enforcement sanctions under section 104(d) of the Act so that some violations hinge on the issuance of a prior citation. In this case, the section 104(d)(1) citation on which Order No. 4179895 was based subsequently was reduced to a section 104(a) citation. This had the effect of changing Order No. 4179895 to a section 104(d)(1) citation.

the No. 9 conveyor belt, varying from a few inches deep to as much as 54 inches deep and spread out along the length of the No. 9 conveyor belt, which approximately 3,000 feet long.

3. Tom Kacsmer, who was the UMWA escort, accompanied Inspector Taylor on his inspection of the No. 9 belt and also observed extensive accumulations of loose coal and coal dust along both sides of the belt with coal piled up under the bottom rollers. In some areas Mr. Kacsmer observed bottom rollers running in loose coal, stuck rollers and places where the belt was turning in loose coal. He noted that the belt was running in dry, loose coal.

4. Inspector Taylor measured the accumulations with a 16-foot retractable metal tape measure. He was also familiar with the distance between the belt structures, which was ten feet.

5. The No. 10 belt head conveys coal to the No. 9 belt tail, at Crosscut No. 227. The coal proceeds to the No. 9 belt head, at Crosscut 191, which feed the No. 8 belt tail, and belt No. 8 takes the coal out of the mine.

6. Inspector Taylor found accumulations of loose coal and coal dust on the No. 9 belt head up to Crosscut 206. In places, the accumulation was up to the bottom of the belt with rollers turning in coal dust and loose coal. At Crosscut 204 and 205, Inspector Taylor observed an accumulation 50 feet long, with rollers and the belt running in the accumulation. In places, the bottom of the belt was turning in or rubbing on the loose coal and coal dust. In some areas the coal was packed up around the rollers.

7. From the beginning of the No. 9 belt, at Crosscut 191, to about Crosscut 194, the accumulations were dry. The remaining accumulations varied from wet to damp to dry.

8. At the tail of the No. 9 belt, Inspector Taylor observed the deepest accumulation, which measured 54 inches deep, 122 feet long, and 75 inches wide and was higher than the belt. The loose coal and coal dust had humped up and pushed the belt up.

9. At Crosscut 201, Inspector Taylor observed a bottom roller that was hot to the touch because the bearing was defective. There was loose coal and coal dust under that area.

10. Inspector Taylor observed no methane along the No. 9 belt at the time of the inspection. However, Windsor Mine liberated about 50,000 cubic feet of methane in a 24-hour period, subjecting the company to 15-day spot methane checks under the Mine Act.

11. Inspector Taylor issued 11 citations charging a violation of section 75.400 at the Windsor Mine between April 12 and June 5, 1996. After the issuance of each citation, Inspector Taylor discussed with mine management the problem of accumulations and the need to maintain the belts free of loose coal and coal dust.

12. Wayne Porter, the belt coordinator, was aware that there were major spillage problems with the No. 9 belt prior to the issuance of Citation No. 4179895. A few days before the citation, Larry Moore observed the No. 9 belt fabric had a center tear, about 150 feet long, and a second tear along the side of the belt about 5 inches wide and 500 feet long, that caused major spillages.

13. Mr. Moore observed the coal rolling off the belt, and he could hear the coal pinging against the rollers as it went down the belt line. Mr. Moore informed Foreman Barton of this problem and the foreman said he would take care of it.

14. The next day, Mr. Moore was assigned to clean up the tail area along the No. 9 belt. He observed that the tear down the middle had been repaired. However, the accumulations from the 500-foot tear on the side caused most of the spillage and that tear had not been repaired. When he told another foreman, Bob Talbert, about the problem, Mr. Talbert said he already knew about it.

15. Inspector Taylor and Tom Kacsmar, the UMWA escort, were informed on June 21, 1996, by Wayne Porter, belt coordinator, and Bob Talbert, foreman, that a piece of the No. 9 belt fabric, 5 inches wide and 500 feet long, had ripped the week before the inspection, causing spillage, and the company was trying to get by until vacation.

16. Larry Moore was assigned to help clean up the accumulations along the No. 9 belt to abate the violation cited by Inspector Taylor. Mr. Moore saw coal packed up around the tail roller and belt, and he could not see the bottom of the belt when he arrived on the scene at 3:20 a.m. The tail piece was completely covered with coal from the tail roller out to the crossover, which was about 25 feet away. Another miner who was helping to abate the violation arrived and had done a lot of shoveling on the walk side where he could still not see halfway up the frame of the tailpiece because of accumulations. On the side opposite the walk side he could not see the tailpiece because of the accumulation. Mr. Moore observed float coal dust on the belt structure and rails, and the accumulations he shoveled were comprised of loose coal and fine coal that did not contain big lumps. Mr. Moore observed rock dust on the ribs in the area around the tailpiece but saw no rock dust on the floor of the tailpiece, which sat on a cement slab. He observed coal all over the cement slab area with no rock dust underneath it, and he did not find any rock dust mixed in with the coal accumulations that he shoveled.

17. In order to abate Citation No. 4179895, Mr. Moore worked with another miner to shovel the areas on both sides and under the tailpiece for 20 to 25 feet. Mr. Moore came onto the section at about 3:20 a.m., and worked with the other miner until about 6:25 a.m., until the 25-foot area around the tailpiece was cleaned up. Both men took a 25 minute lunch break.

18. Mr. Moore was also assigned to clean the area around Crosscuts 195 and 196 near the No. 9 head drive, to abate the violation. He and another miner came from the tailpiece and began working there at about 6:40 a.m. They worked with three other miners who had been on

the site already, and the five of them worked until 7:30 a.m., when the next shift came to relieve them. These miners were directed by Mr. Porter to continue shoveling further up the belt line since Mr. Moore and the crew had nearly cleaned up the accumulations around Crosscut 195 and 196. Mr. Moore observed that the accumulations he shoveled in the area from Crosscut 192 (the drive) to Crosscut 196 were fairly dry.

19. At 10:22 a.m., on June 21, 1996, Inspector Taylor terminated Citation No. 4179895 after the cited accumulations were cleaned up. It took eight or more men on the midnight shift and ten or more men on the day shift to clean up the accumulations and abate the violation.

DISCUSSION WITH FURTHER FINDINGS, CONCLUSIONS

Violation of Section 75.400

The evidence shows a violation of the safety standard involved, which 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.

Respondent does not contest that section 75.400 was violated, but contends that the Secretary failed to prove that the violation was **significant and substantial** (AS&S) and due to an **unwarrantable failure** to comply within the meaning of section 104(d)(1) of the Act.

Significant and Substantial

The Commission has held that a violation is S&S if, **based** upon 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 (1981). In *Mathies Coal Company*, the Commission delineated a four-prong test for determining whether a violation is S&S:

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 **C** that is, a measure of danger to safety **C** 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.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984); see also *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103-04 (5th Cir.1988) (approving the *Mathies* test).

Under the third element of the *Mathies* test, evaluation of the likelihood of an injury is made assuming continued normal mining operations. (*U. S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1130 (1985)) and the relevant time frame includes both the time that the violative condition existed prior to the citation and the time that it would have existed if normal mining operations had continued. (*Halfway, Inc.*, 8 FMSHRC 8, 12, (Jan 1986)). A reasonable likelihood as used in the *Mathies* test does not mean a probability greater than 50 percent or that the Secretary must prove that it was more probable than not that the violation would result in injury. It simply means that the violation was reasonably likely to result in injury. *U. S. Steel Mining Co., Inc.*, 18 FMSHRC 865 (1996).

The extensive accumulations in this case presented discrete safety hazards of causing a fire or propagating a fire. Inspector Taylor observed stuck and broken rollers along the No. 9 belt in the areas of the cited accumulations. These could reasonably act as ignition sources. He also observed a hot bottom belt roller with a missing bearing underneath the No. 9 conveyor belt in the area of the accumulations at Crosscut 201, as noted in the body of Citation No. 4179895 and listed in Citation No. 4179894. Citation No. 4179894, issued by Inspector Taylor on the same day, and not contested, indicates that approximately 18 top and bottom rollers were either broken or stuck along the No. 9 belt. Other citations issued on the same day by Inspector Taylor and not contested add to the hazards of the loose coal and coal dust accumulations cited in Citation No. 4179895. (See Gov. Exhs. 2, 3, 4, 5, 6.) The conditions cited in Citation No. 4179893, issued that morning, increased the hazard of a belt fire along the No. 9 belt because holes in five permanent stoppings along the adjacent intake aircourse track entry would allow smoke from a fire to travel to the other sections.²

The evidence amply supports Inspector Taylor's opinion that in the event of a fire serious injury was likely due to inhalation of smoke and fire contaminants, and possibly death due to asphyxiation. As the Court of Appeals for the Seventh Circuit observed in considering a similar case:

Nor was anything more than [the inspector's] opinion necessary to support the common sense conclusion that a fire burning in a coal mine would present a serious risk of smoke and gas inhalation to miners who are present. Indeed, a brief review of the legislative history of the 1977 Act makes clear that fire is one of the primary safety concerns that has motivated federal regulation of the coal mining

² / Although Inspector Taylor did not detect methane during his inspection of the No. 9 belt, he testified that methane emitted at the Windsor Mine was 521, 562 cubic feet per 24-hour period for the 3rd Quarter of FY 1996, and this placed the company on 15-day methane spot checks, pursuant to section 103(i) of the Act.

industry. [Citations omitted.]

Buck Creek Coal, Inc. v. Secretary of Labor, 52 F.3d 133, 135 (7th Cir. 1995)).

I find that the violation was reasonably likely to result in a fire or the propagation of a fire causing death or serious injuries. The violation was therefore S&S under the *Mathies* test.

Unwarrantable Failure

The Commission has held that a violation is unwarrantable within the meaning of section 104(d)(1) of the Act if it is due to aggravated conduct constituting more than ordinary negligence. *Emory Mining Corp.*, 9 FMSHRC 1997, 2001-2004 (1987). Unwarrantable failure is characterized by conduct such as reckless disregard, intentional misconduct, indifference, or a serious lack of reasonable care. *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (1991).

In considering a violation of section 75.400, the extensiveness and duration of the combustible accumulations, prior notices to the operator, and the operator's efforts to clean up and prevent accumulations are all important factors in determining whether the violation was due to an unwarrantable failure to comply. *Jim Walter Resources, Inc.*, 19 FMSHRC 480, 485 (1997); and *Doss Fork Coal Co.*, 18 FMSHRC 122, 125 (1996).

The preshift reports revealed significant accumulations along the No. 9 belt from June 13 until June 21, 1996 the day Inspector Taylor issued Citation No. 4179895. The on-shift records revealed that only some of the areas had been cleaned. Inspector Taylor's visual inspection of the belt line on June 21, 1996, revealed significant accumulations along the No. 9 conveyor belt, varying from a few inches deep to as much as 54 inches and spread out along the length of the No. 9 belt. The evidence shows that Respondent failed to take adequate measures to clean up and prevent the extensive and widespread combustible materials, and that the violative accumulations existed for a substantial period before the date of the citation.

Mine management was well aware of the accumulations along the No. 9 belt prior to the issuance of Citation No. 4179895. Larry Moore was assigned to do clean up work along the No. 9 belt on two occasions several days before Citation No. 4179895 was issued. On the first occasion, he observed that the accumulations were extensive and widespread and that major spillage problems were caused by two tears in the conveyor belt. One tear was in the center of the belt. The other tear, which was much longer, was about 5 inches wide, 500 feet long, on one side of the belt. He reported the accumulations and belt tears to a supervisor on his assignment to clean up accumulations; second, before the date of the citation, Mr. Moore observed that the center tear had been repaired, but the 500 foot tear had not been repaired and that the accumulations were extensive and widespread. He reported these conditions to a supervisor, Bob Talbert, but Respondent decided to delay repairing the belt until the belt was shut down during the miners' 2-week vacations, which was to begin July 1.

When Inspector Taylor and Mr. Kacsmar met with Supervisor Porter after the issuance of the citation, Mr. Porter told them that a rip in the belt fabric about 5 inches wide, 500 feet long caused excessive spillage of loose coal, but that the company was trying to get by until the belt would be shut down for repairs during the upcoming vacation period. Thus, even after its own employee, Larry Moore observed the excessive accumulations and belt problems on two separate shifts a few days before the issuance of Citation No. 4179895, and reported the conditions to two supervisors, Respondent failed to take the necessary measures to clean up the violative accumulations and prevent further accumulations. See: *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (1988) (unwarrantable failure where violative conditions were obvious and extensive, and operator had knowledge of conditions and history of similar conditions); and *Peabody Coal Co.*, 14 FMSHRC 1258, 1262-1263 (1992) (unwarrantable failure where the violative accumulations were obvious and extensive). The detailed description of the coal dust and loose coal accumulations in the body of the citation, in Inspector Taylor's notes, and in the testimony of Inspector Taylor and other government witness establishes that these were extensive and obvious accumulations. Indeed, the accumulations observed by Inspector Taylor at the tailpiece alone (70 inches wide, 12 feet, 6 inches long, and 45 inches deep) are similar to the accumulations in *Jim Walter Resources, Inc.*, 19 FMSHRC 480, 487-88 (1997), where the Commission reversed an administrative law judge's finding of no unwarrantable failure concerning an accumulation 20 feet by 15 feet and nearly 4 feet deep, which the Commission observed to be both substantial and extensive.

In addition, before the instant citation was issued, Respondent assigned only one miner (Larry Moore) to clean up around the No. 9 tailpiece and he had to cover several other belts as well. The efforts of this one person could be nothing more than an empty gesture in light of the major accumulations at the tailpiece and the number of man-hours actually required for abatement of the violative accumulations. See: *Peabody Coal Co.*, 14 FMSHRC at 1262.

I find that Respondent's violation of section 75.400 was due to aggravated conduct beyond ordinary negligence. It was therefore an unwarrantable violation within the meaning of the Act.

Civil Penalty Criteria

Under section 110(i) of the Act, the Commission and its judges assess all civil penalties under the Act. The Commission or judge is not bound by the penalty proposed by the Secretary. Penalties are assessed de novo based upon the six criteria provided in section 110(i).³ *Secretary*

³/Section 110(i) provides: "The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors."

of Labor v. Sellersburg Stone Co., 5 FMSHRC 287 (1983), *aff'd Sellersburg Stone Co. v. FMSHRC*, 736 f.d 1147 (7th Cir. 1984).

The purpose of civil penalties is to deter violations of the Act and safety and health standards. To be successful in inducing effective and meaningful compliance, Aa penalty should be of an amount which is sufficient to make it more economical for an operator to comply with the Act's requirements than it is to pay the penalties assessed and continue to operate while not in compliance. @ S. Rep. No. 181, 95th Cong., 1st Sess. 40-41 (1977), reprinted in *Senate Subcommittee on Labor, Committee on Human Resources*, 95th Cong. 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 628-29 (1978).

Size of the Operator

Respondent is a large operator.

History of Violations

In the 24-month period before the inspection, Respondent's overall history of violations was moderate. However, its history of violations of 30 C.F.R. ' 75.400 was poor.

Gravity

The gravity of the violation was very serious. The violation was S&S within the meaning of the Act.

Good Faith Abatement

After the citation was issued, Respondent made a good faith effort to achieve rapid compliance.

Ability to Continue in Business

Payment of the penalty assessed will not adversely affect Respondent's ability to continue in business.

Negligence

The evidence shows that the violation was due to a high degree of negligence and an unwarrantable failure to comply.

Assessment of Penalty

The Secretary submits that her proposed penalty of \$1,200 is inadequate to effectuate the intent and purpose of the Act with respect to the last factor discussed, negligence. The Secretary points out that, prior to the issuance of Citation No. 4179895, Inspector Taylor spoke to mine management not once but nearly a dozen times about the need to clean up accumulations around

the mine's conveyor belts. This last fact, which would not have been known to MSHA's assessments office when it was proposing a penalty, is a factor that must be taken into consideration in assessing a penalty.

Respondent clearly was on notice about the problem but chose to ignore the accumulations and treat the violation as part of the cost of doing business. As shown in the Findings of Fact, above, Respondent chose to delay belt repairs and clean up work necessary to abate the violation until the vacation period began, i.e., when production of coal would cease. This calculated business decision demonstrates aggravated conduct far beyond ordinary negligence. Negligence was high and the violation was Unwarrantable within the meaning of the Act.

The record shows that section 75.400 violations began rising well before the issuance of Citation No. 4179895, nearly doubling from the 2nd to 3rd quarter of Fiscal Year 1995. Furthermore, all 11 of the recent section 75.400 citations were for coal dust and float dust accumulations along belt lines (Gov. Exh. Nos. 9-19), and 2 of the 11 were for violations specifically along the No. 9 belt (Gov. Exh. Nos. 13, 14).

Exhibit R-17 shows that three other section 104(d)(1) citations (unwarrantable violations) were issued to Windsor Coal Company in the last 24 months for section 75.400 violations. Two were assessed at \$2,000 and one at \$1,500. The proposed penalty of \$1,200 for the instant section 104(d)(1) citation is low and out of line with the others when all the relevant factors of this case are taken into consideration, especially where the inspector repeatedly spoke to mine management about the need to prevent belt accumulations and management decided to continue using the defective belt and not abate the instant violation until an upcoming vacation period, when production would cease.

Based upon the six statutory criteria, I find that a civil penalty of \$4,000 is appropriate for the violation found above.

CONCLUSIONS OF LAW

1. Respondent's Windsor Mine is subject to the Act.
2. Respondent violated 30 C.F.R. ' 75.400 as alleged in Citation No. 4176895.

ORDER

WHEREFORE IT IS ORDERED that:

1. Citation No. 4179895 is **AFFIRMED**.
2. Respondent shall pay a civil penalty of \$4,000 within 30 days of the date of this Decision.

William Fauver
Administrative Law Judge

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