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SOL (MSHA) v. R B COAL  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges  
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Falls Church, Virginia 22041

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
PETITIONER

v.

R B COAL COMPANY, INC.,  
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. KENT 90-338  
A. C. No. 15-13362-03571

Mine No. 3

DECISION

Appearances: Mary Sue Taylor, Esq., Office of the  
Solicitor, U. S. Department of  
Labor, Nashville, TN, for the  
Petitioner;  
Susan C. Lawson, Esq., Harlan, KY,  
for the Respondent.

Before: Judge Fauver

The Secretary of Labor seeks a civil penalty for an alleged violation of a safety and health standard, under the Federal Mine Safety and Health Act of 1977, 30 U. S. C. 801 et seq.

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 following Findings of Fact and further findings in the Discussion below:

FINDINGS OF FACT

1. Respondent operates R B Coal Company No. 3 Mine, an underground coal mine, in Harlan County, Kentucky, where it produces coal for sale or use in or affecting interstate commerce.

2. On February 23, 1990, Federal Mine Inspector Robert Rhea issued 104(d)(1) Citation No. 3392184 at the No. 3 Mine for a violation of 30 C.F.R. 75.517, because the trailing cable for the Gallis roof bolting machine contained four temporary splices that were worn through and exposed live wires. These four worn and exposed places, located in well traveled areas, presented a serious danger, particularly to the roof bolter helper who regularly handled the cable. The inspector found that the cable's condition had existed for at least one to two weeks. Section Foreman Earl

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Hensley told Inspector Rhea that Respondent had not repaired the cable because it was behind in roof-bolting.

3. Inspector Rhea found that this was an unwarrantable violation because Section Foreman Hensley and Mine Superintendent Phillips knew or should have known of the condition, the damage was located in a highly visible area, and the cable had been in a damaged condition for a substantial period.

4. The roof bolter helper, who frequently handled the cable, depended on a sound outer jacket of the cable for protection from electrical shock. Because of the frequency and manner in which the cable was moved by the roof bolter helper, Inspector Rhea found that the violation was reasonably likely to result in a fatal accident involving the helper. He found that the violation was significant and substantial. The operator abated the violation within 45 minutes.

5. No clean inspection of the mine was conducted between February 23, 1990, and March 20, 1990.1

6. Ventilation, methane and dust control plans for underground coal mines are required to provide for water application at the face, in order to control coal dust, float coal dust and respirable dust. The health risk in overexposure to respirable dust is the development of pneumoconiosis or black lung disease. There are also important safety reasons for using water to control dust, to dilute the dust at the face, and to prevent float coal dust from accumulating in the return airways and belt entry airways. Float coal dust creates a serious hazard of a mine explosion or fire. Coal dust is a serious fire hazard.

7. Water sprays on Respondent's continuous miners are on a spray bar or a spray block with as many as six to eight sprays on the block or bar. Water is conveyed to the spray block through a plumbing system of pipes and hoses.

8. On January 14, 1990, Inspector Calvin Riddle issued 104(d)(1) Citation No. 2996545 to Tommy Phillips at No. 3 Mine for a violation of 30 C.F.R. 75.316, for having only 20 water sprays on the continuous miner, and 104(d)(1) Citation No. 2996546, for having zero psi water pressure on the miner. Respondent's ventilation, methane and dust control plan required that 75 psi of water be maintained on the sprayer system for the continuous miner when the machine was running, and that the continuous miner have 31 operational water sprays.

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9. Inspector Riddle returned to the mine on February 2 and 7, 1990, to check on the abatement of citations issued in January. On February 2, the water pressure was 80 psi; the operator achieved this figure by increasing the pressure from the sump pump. Inspector Riddle noticed some leaks in the hoses when the operator increased the pressure. He did not stay to see how long the operator could maintain the increased water pressure.

10. On February 7 and 8, while conducting a respirable dust survey, Inspector Riddle again tested the continuous miner to see if the operator had sufficient water pressure. He found that the operator could not maintain any water pressure. The operator worked on the pumps and was not able to maintain water pressure sufficiently to make production, so Inspector Riddle discontinued the dust survey and left the mine.

11. Inspector Riddle returned to the mine on March 19, 1990, for a follow-up inspection prompted by citations issued for excessive dust violations. After laboratory analysis, Inspector Riddle's dust survey had shown that there was excessive respirable dust in the mine. The March 19 inspection was to check on controls the operator had installed to correct the excessive dust levels.

12. Mine No. 3 was operating on an adjusted (higher) respirable dust standard because of the quartz level in the coal. If airborne dust contains more than five per cent quartz, the regulations require that there be less respirable dust present in the mine environment to compensate for the presence of the quartz. Excessive quartz in the dust increases the danger of contracting pneumoconiosis.

13. Inspector Riddle arrived at the mine on March 19 at about 10:00 or 11:00 a.m. When he arrived on the surface, he sat in his vehicle for about 15 - 20 minutes and observed coal flowing from the mine on the surface belt, indicating that the continuous miner was producing coal. Mine management indicated to the inspector that they were having problems with the jeep used to transport miners underground and that they did not know if they would be able to transport the inspector underground that day. Inspector Riddle accepted this explanation and, since he had other appointments, left the mine at 12:30 p.m. that day. He observed a regular flow of coal on the surface belt while he was there.

14. On March 20, Inspector Riddle returned and saw coal coming out of the mine for a sufficient time to indicate that coal was being produced at that time. The operator stopped production between the time the Inspector left the office to go underground and the time he arrived at the face. When he arrived at the face, the continuous miner had been pulled back from the face waiting for him to make a water pressure check. Inspector Riddle found that the operator was producing coal on March 20 based on the continuous flow of coal on the surface beltline, the appearance of the coal,

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and the time he observed the loaded belt running.

15. Inspector Riddle went underground with Tommy Phillips on March 20. When they arrived at the section, the continuous miner was 50 to 100 feet outby the face, which was the normal position to check the water pressure considering mine conditions. The miners were preparing the miner for the inspector to check the water pressure. He saw no indication that the men were working on repairs (of the water system or anything else). The inspector used a water gauge to check the water pressure. He found 50 psi when he took the first reading, but the continuous miner could not sustain this level for more than 15 minutes. Each time the operator attempted to raise the water pressure, the continuous miner's water supply system would blow a hose outby after 5-15 minutes. The hose was worn and had the appearance of being old. It appeared to the inspector that the hose had been in a deteriorated condition for more than a week and possibly more than a month. Based on his observations, the inspector believed that even if the satellite pump had been 100% operational, the hose would not have been able to maintain 75 psi. The hose had been stretched and pulled along the ribs and was worn showing a lot of age and wear and tear. During the inspector's test of the water pressure, the operator's representatives tried to maintain water pressure but would lose it. They checked both inby and outby the continuous miner motor. When the pressure got to 50 psi the system would blow a hose and they could not maintain water pressure even at 50 psi. The dust control plan required 75 psi of water pressure.

16. On March 20, 1990, Inspector Riddle issued 104(d)(2) Order No. 2996559 for the failure to follow its ventilation, methane and dust control plan, which required 75 psi of water pressure when the continuous miner was running. He had been at the continuous miner for two hours before writing the order, and the operator could not maintain the system at or above 50 psi the entire time he was there. It was evident that the hose could not withstand a pressure of 75 psi. This condition had existed for some time, at least a week, and the general condition of the continuous miner was poor. On March 21, 1990, Inspector Riddle modified the order to be a 104(d)(1) order, and to allege high negligence instead of moderate negligence.

17. To abate the condition cited, the operator replaced the hose to the miner and ran an independent water system to the block of water sprays and replaced 250 feet of main supply hose. The abatement involved the modification of the water line on the continuous miner. At the place where water came to the miner, the operator installed a "T" joint, which bypassed a major part of the system including a choke point where only a certain amount of water would pass through the orifice and go into the motor. The operator also adjusted the main pump down the line to increase the water pressure on the booster pump (piston pump) on the continuous miner.

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18. At all relevant times, Tommy Phillips and Carson Shepherd were supervisors at Respondent's No. 3 Mine, Lick Branch No. 1 Mine and Lick Branch No. 2 Mine. Each man simultaneously held a supervisory position in each mine.

19. Before March 20, 1990, Respondent, through its supervisors, had direct and thorough knowledge of a number of violations of operating a continuous miner without adequate water pressure. Citations for this kind of violation were served on Tommy Phillips on March 28, 1989 (only 10 psi), January 24, 1990 (only 20 water sprays when 31 sprays were required), January 24, 1990 (zero psi); on Robert Stanley on October 11, 1988 (only 20 psi); and on Carson Shepherd on February 6, 1990 (zero psi).

#### DISCUSSION WITH FURTHER FINDINGS

As amended, 104(d)(1) Order No. 2996559 charges a violation of Respondent's ventilation, methane and dust control plan, for inadequate water pressure on the continuous miner as follows:

The operator was not following his approved ventilation, methane and respirable dust control plan in that, the water pressure was measured at 50 psi at the sprays. The plan requires 75 psi.

Respondent contends that the order is invalid because it does not allege that the continuous miner was running or producing coal when the water pressure was only 50 psi. However, by charging a violation of Respondent's ventilation, methane, and dust control plan, the order implies, and reasonably puts Respondent on notice, that the continuous miner was running without required water pressure.

The order charges a violation of 30 C.F.R. 75.316, which provides that a ventilation, methane, and dust control plan approved by the Secretary shall be adopted by the operator. The evidence establishes that on March 20, 1990, the continuous miner did not have 75 psi and in fact had much less than 50 psi on a sustained basis. The operator contends that the miner was not in operation on March 20 and that the order must therefore fail. The Secretary contends that coal was produced on March 19 and 20. I find that the reliable evidence shows that coal was being produced by the continuous miner when the inspector observed coal flowing out of the mine for more than 15 minutes on March 19 and 20, 1990. In addition, the reliable evidence demonstrates that the water system for the continuous miner was mechanically unable to sustain 75 psi for at least one week prior to March 19, and the evidence shows coal production during that week.

An inspector may use his judgment to find a violation based on circumstantial evidence. It is not necessary that the inspector be

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present when the violation occurs to issue a citation or order under 104(d). Florence Mining Co., 11 FMSHRC 747, 751 (1989); Emerald Mines Corp., 9 FMSHRC 1590 (1987), aff'd sub nom. Emerald Mines Corporation v. FMSHRC, 863 F.2d 51 (D.C. Cir. 1988). A mine inspector may make unwarrantable failure findings under 104(d) of the Mine Act for violations that have been abated before the inspector arrives at the mine. Emerald, supra, 863 F.2d at 59.

#### Unwarrantable Failure to Comply

Section 104(d)(1) of the Act provides that:

If, upon 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 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 Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

The Commission has held that an "unwarrantable" failure to comply means "aggravated conduct constituting more than ordinary negligence." Emery Mining Corp., 9 FMSHRC 1997, 2004 (1987); Youghioghney & Ohio Coal Co., 9 FMSHRC 2007, 2010 (1987). As defined in the legislative history, an "unwarrantable" failure is "the failure of an operator to abate a violation he knew or should have known existed, or the failure to abate a violation because of a lack of due diligence, or because of indifference or lack of

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reasonable care on the operator's part." Senate Committee on Labor and Public Welfare, 94th Con., 1st Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 1512 (1975); see also id, at 1602; and see: 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 620 (1978). A continuing safety or health problem places on the mine operator the need for heightened scrutiny to assure compliance with the Act. Eastern Associated Coal Corp., 13 FMSHRC 178, 187 (1991).

Prior to March 20, 1990, Respondent had continuing problems and violations concerning its water supply system to the continuous miner. Supervisors Shepherd and Phillips were served citations (to Respondent) for the same or similar violations at this mine and at other mines operated by the company in the year prior to this citation. The operator did not take adequate action to remedy the problem at Mine No. 3 when it received the citations, but took only such minimal action as was needed to abate the citations temporarily. It did not address the overall water system at the mine which demanded greater repair and attention.

Respondent's conduct in mining coal without regard for the deteriorated condition of its water system, despite numerous prior violations involving lack of water pressure, extensive respirable dust, and excessive float coal dust, shows a disregard for the requirements of the dust control plan and high negligence in operating the miner without the required water pressure. The violation found on March 20, 1990, was due to high negligence and an unwarrantable failure to comply with its methane, ventilation, and dust control plan.

#### A Significant and Substantial Violation

The Commission has held that a violation is "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).

Analysis of the statutory language and the Commission's decisions indicates that the test of an S&S violation is a practical and realistic question whether, assuming continued mining operations, the violation presents a substantial possibility of resulting in injury or disease, not a requirement that the Secretary of Labor prove that it is more probable than not that injury or disease will result. See my decision in Consolidation Coal Company, 4 FMSHRC 748-752 (1991). The statute, which does not use the phrase "reasonably likely to occur" or "reasonable

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likelihood" in defining an S&S violation, states that an S&S violation exists if "the 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" ( 104(d)(1) of the Act; emphasis added). Also, under the statute, (1) an "imminent danger" is defined as "any condition or practice . . . which could reasonably be expected to cause death or serious physical harm before [it] can be abated,"<sup>2</sup> and (2) an S&S violation, is less than an imminent danger.<sup>3</sup> It follows that the Commission's use of the phrase "reasonably likely to occur" or "reasonable likelihood" does not preclude an S&S finding where a substantial possibility of injury or disease is shown by the evidence, even though the proof may not show that injury or disease is more probable than not.

Black lung disease is one of the most crippling occupational health hazards facing a coal miner. Health violations exposing miners to respirable dust, even though black lung may take years to develop, are significant and substantial violations of the Act. Consolidation Coal Co., 8 FMSHRC 890 (1986), aff'd sub nom. Consolidation Coal Co., v. FMSHRC 824 (F.2d) 1071 (D. C. Cir. 1987). In affirming the Commission's presumption that such violations are S&S, the Court stated:

The legislative history of the [Act] suggests that Congress intended all except "technical violations" of mandatory standards to be considered significant and substantial. \*\*\*. [824 at 1085.]

The Court also recognized that "the determination of the likelihood of harm from a violation of an exposure-based health standard necessarily rests on generalized medical evidence concerning the effects of exposure to the harmful substance, rather than on evidence specific to a particular violation." Id., at 1084.

In addition, the dust in Respondent's mine contains an excessive amount of quartz, which is more likely to lead to development of the disease. Respondent's violation also involved a clear safety hazard from float coal dust accumulations in active workings. The mine has a history of excessive dust violations, including violations for excessive float coal dust. The presence of excessive dust presents a serious danger of a mine explosion or fire.

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The evidence demonstrates that, assuming continued mining operations, the cited violation presented a substantial possibility of resulting in black lung disease as well as a mine explosion or fire.

The inspector's finding of a significant and substantial violation is sustained.

Considering all the criteria for a civil penalty in 110(i) of the Act, I find that a civil penalty of \$1,000 is appropriate for this violation.

#### CONCLUSIONS OF LAW

1. The judge has jurisdiction in this proceeding.
2. Respondent violated 30 C.F.R. 75.316 as alleged in Order No. 2996559.

#### ORDER

Respondent shall pay the above civil penalty of \$1,000 within 30 days of the date of this decision.

William Fauver  
Administrative Law Judge

Footnotes start here:-

1. A clean inspection is one in which the entire mine or the sum of its parts has been inspected without a finding of an unwarrantable violation.
2. Section 3(j) of the 1969 Mine Act, unchanged by the Federal Mine Safety and Health Act of 1977; emphasis added.
3. Section 104(d)(1) limits S&S violations to conditions that "do not cause imminent danger . . . . "