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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

C F & I STEEL CORPORATION, APPLICANT	Application for Review
	Docket No. DENV 78-417
v.	Maxwell Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. DENV 79-127-P A/C No. 05-02820-03001
v.	
C F & I STEEL CORPORATION, RESPONDENT	

DECISION

Appearances: Richard L. Fanyo, Esq., Welborn, Dufford, Cook and Brown, Denver, Colorado, for Applicant/Respondent
Robert A. Cohen, Trial Attorney, Office of the Solicitor, U.S. Department of Labor, for Respondent/Petitioner

Before: Judge Littlefield

Introduction

This is a combined application for review and proceeding for assessment of civil penalty which is governed by sections 107(e)(1) and 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1977 Act). Section 107(e)(1) provides in relevant part:

> Any operator notified of an order under this section or any representative of miners notified of the issuance,

> modification, or termination of such an order may apply to the Commission within 30 days of such notification for reinstatement, modification or vacation of such order. The Commission shall forthwith afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, vacating, affirming, modifying, or terminating the Secretary's order. The Commission and the courts may not grant temporary relief from the issuance of any order under subsection (a).

Section 110(a) provides:

> The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense.

Alleged Violation

On May 8, 1978, Applicant/Respondent, C F & I Steel Corporation (CF&I), filed for review of Order of Withdrawal No. 387928 dated April 26, 1978. On January 8, 1979, the Mine Safety and Health Administration (MSHA), through its attorney, filed a petition for assessment of a civil penalty charging one violation of the Act. Said were consolidated for hearing.

Tribunal

Hearings were held in Denver, Colorado, on February 28, 1979, at which both MSHA and CF&I were represented by counsel. Thereinafter, posthearing briefs were submitted.

Evidence

1. Stipulations: Testimony

A. The Maxwell Mine is subject to the 1977 Act (Tr. 3).

B. The Judge has jurisdiction to hear this matter (Tr. 3-4).

C. The mine employed between 25 and 28 miners (Tr. 9).

D. Daily production was about 300 tons (Tr. 9).

E. Payment of a reasonable penalty would not put the company out of business (Tr. 9).

F. There was a good faith abatement of the cited conditions (Tr. 9).

2. Stipulations: Exhibits

A. Government Exhibit No. 1, a copy of Order of Withdrawal No. 387928, issued April 26, 1978, at 1:40 p.m. and terminated at 3:20 p.m. (Tr. 7; Govt. Exh. No. 1).

B. Government Exhibit No. 2, a copy of a map of the Maxwell Mine, dated January 4, 1979, received by MESA(FOOTNOTE 1) at the Denver Office on February 8, 1979 (Tr. 7; Govt. Exh. No. 2).

C. Government Exhibit No. 3, a copy of a dust sampling report, received from the MESA lab from a sample taken at the time the order was issued (Tr. 7; Govt. Exh. No. 3).

D. Government Exhibit No. 4, a computer printout from the Office of Assessments, showing the operator, the mine and the previous history of violations for the 24-month period prior to the issued order (Tr. 7; Govt. Exh. No. 4).

E. CF&I Exhibit No. 1, a map showing the area which is subject to the withdrawal order (Tr. 7; CFI Exh. No. 1).

3. Exhibits on Testimony

A. Government Exhibit No. 5, the inspector's statement (Tr. 98-99; Govt. Exh. No. 5).

B. CF&I Exhibit No. 2, a report from graveyard foreman of duties and reply by Mr. George Argurello identified by Mr. Massarotti (Tr. 163-170; CF&I Exh. No. 2).

4. Testimony

A. Inspector Lawrence Rivera

Exclusive of stipulations, the Government initiated its case through the testimony of inspector Lawrence Rivera, a duly authorized representative of the Secretary (DAR) for 7-1/2 years (Tr. 10).

Therein, he testified, in relevant part, that he was on a regular health and safety inspection at the Maxwell Mine (Tr. 11-12). He stated that he had completed an investigation of the face area at Unit No. 1, approximately 3,000 feet from the portal (Tr. 14). He determined to return along the belt entry. Approximately 300 feet from the coal pocket, a point which transfers coal from one belt to another (Tr. 14-16), he encountered a substantial amount of float coal dust (Tr. 17-18). After proceeding approximately 50 more feet, he concluded that he would not go on (Tr. 17-18). The area had gotten darker and darker, such that he was unable to see more than 4 or 5 feet ahead (Tr. 18). There was some dust sticking to the roof and ribs and some on top of the water in the entry (Tr. 19). He was unable to tell whether the area had been rock dusted as it was too dark to see (Tr. 19).

After he asked a CF&I employee to shut the belt off so that he could determine what action was appropriate (Tr. 19-20), he waited about 15 minutes before proceeding to the pocket area (Tr. 20).

He described the belt pocket conditions as consisting of a 12-foot accumulation at the end of the tail of the belt. The material measured 24 inches in depth, approximately uniform for the 12-foot distance (Tr. 21). The roof and ribs were black. There was a little float coal dust in suspension (Tr. 21).

The belt rollers were running in the fine coal dust and the belt was warm to the touch and, in fact, the belt was starting to get hot (Tr. 22).

The inspector did not observe any water sprays at the coal pocket (Tr. 22-23). The belt was in good shape (Tr. 23). The only thing that he was told about how the problem was started was that the accumulation had started to build up 3 hours prior to the incident (Tr. 23).

The inspector took a sample from under the belt because he felt it was creating the float coal dust (Tr. 24). Government Exhibit No. 3 was identified as a report on the above-noted sample (Tr. 24-27; Govt. Exh. No. 3).

There was water in the coal pocket, but not where the coal dust was accumulating (Tr. 27). The condition of the material was dry and black (Tr. 28). The mine regularly emits methane (Tr. 28).

Sources of ignition included the rollers and the possibility of flaws in the electrical cables (Tr. 29). He issued the order because he was concerned for a possible explosion (Tr. 29). With any little spark or hot roller or belt roller with float coal dust in the area, an explosion could have occurred which would have gone to the face area (Tr. 29). There were men who regularly worked in the face area (Tr. 30).

A Mr. Pugnetti told Inspector Rivera that he had known of the condition for about 3 hours, but that he did not realize that it had built up so fast (Tr. 31).

He characterized the float coal dust as the worst he had seen (Tr. 32). He believed that adequate dust to constitute an imminent danger, existed when he could not walk through and see with his light (Tr. 32).

Though he considered the conditions collectively prior to issuance of the order (Tr. 34), he did not know whether the operator had a cleanup program, nor whether rock dusting was regularly done (Tr. 34).

He was told that the operator intended to take care of this at the beginning of the afternoon shift, but the inspector believed that an imminent danger already existed (Tr. 35). He characterized the condition cited as very serious (Tr. 35). The operator knew of the condition based on the statements made.

There was no evidence that the operator had done any cleanup in that particular area (Tr. 37).

With respect to abatement, there was the following colloquy:
(By Inspector Rivera):

> A. They immediately started some men on it to clean up the area, and when the day shift went out, they brought the day shift in and they immediately took steps towards correcting the condition.

(By MSHA counsel, Mr. Cohen):

> Q. How did they abate the condition of spillage along the belt?
>
> A. They removed all the fine coal dust from under the belt and put it on one side, and they rock dusted the area approximately 300 feet, and then loaded the fine coal dust on the belt after it was removed from under the belt.
>
> Q. How many men did it take?
>
> A. They took two men immediately, and after that, I counted four there at all times, and at times I believe there was more there because they were all trying to work together.

Q. How about along the main belt entry inby from the coal pocket, what did they do to abate the conditions in that area?

A. They applied some additional rock dust on to it.

Q. Did your observe them doing this?

A. Yes.

(Tr. 38).

Q. (By Mr. Cohen) Just tell us what the operator did to abate the condition in the main belt outby from the coal hopper or inby from the coal hopper?

A. Like I said, they removed all the fine coal and coal dust from under the belt and moved it over to a site, because they asked me if they could use a belt and load directly into the belt, and I said no. They would have to remove it over to the side and then they could load it onto the belt.

Q. And this was in the belt entry itself?

A. Under the pocket. That is where the condition existed for the fine coal and coal dust.

(Tr. 39).

Q. But the float coal dust was in the belt entry?

A. Yes.

Q. And in that area, I think you previously said they basically rock dusted?

A. Rock dusted the whole area.

Q. After they went through this abatement procedure, did you walk through the entire area?

A. That's right.

Q. Did you decide the conditions were abated?

A. Yes.

(Tr. 40).

Inspector Rivera further testified on cross-examination that he did order the belt shut off, but did not issue the withdrawal order at issue at that time (Tr. 47).

The inspector reiterated his conclusion, that some time had passed, because the coal had been pulverized (Tr. 55, 57). He made no checks of the electrical equipment in the pocket to see if there were faults (Tr. 59). He was aware of instances where there have been friction-caused explosions (Tr. 61). The area was not wet next to the belt, despite sloping of the floor (Tr. 62). There was no methane present when the inspector did his methane check (Tr. 66).

The inspector was unsure whether he was going to issue an order or notice when he told the company to turn off the belt (Tr. 70). He reiterated that he went into the pocket to see what was creating the dust (Tr. 71).

At the point when he ordered the belts stopped, he was aware that there were electrical sources in the pocket, including a pump (Tr. 71-72). The inspector did not believe that his original order to turn off the belt was the imminent danger order herein at issue (Tr. 73).

During the cleanup, which took about 55 minutes (Tr. 75-80), he was in the general vicinity of the pocket (Tr. 80).

The inspector further testified that a ventilation door was closed rather than opened, thus affecting the flow of air (Tr. 84-85). Had the door been open, the explosion would have taken the shortest way, out of the exhaust shaft, and thus not encountered any people (Tr. 87).

The inspector believed that the dust had only traveled 300 feet because there is less ventilation on the belt than in the intake entries (Tr. 91).

The inspector again testified on redirect examination that his imminent danger order was not issued until he had gathered further information from the pocket (Tr. 97). He asked management to shut off the belt so that he could see what he was doing (Tr. 98). He believed that the alleged violation was significant and substantial and marked it as such on Exhibit No. 1 (Tr. 103; Govt. Exh. No. 1).

B. Robert D. Vigil

MSHA's second witness was Robert David Vigil, a coal miner who worked at he Maxwell Mine and served as a safety and pit committee representative (Tr. 104). He testified that the belt area had to be ventilated and bled to prevent a methane buildup (Tr. 107). The company did not have a man assigned to be just a belt cleaner (Tr. 109).

He also previously observed float coal dust during the time in question (Tr. 109-110). The color of the area was black (Tr. 110). He observed between four and six people working on the cleanup (Tr. 110). He had previously observed black entry conditions and brought them to management's attention (Tr. 111-112).

When he arrived at the pocket 10 or 15 minutes after 3 o'clock, he did not observe float coal dust in the atmosphere (Tr. 113). The operator hauled a lot of rock dust to pursue the abatement (Tr. 115). He did not know whether the door in question was open or shut (Tr. 117-118).

C. Frank Perko

CF&I initiated its case through the testimony of Mr. Frank Perko, who served as a mine safety inspector at the CF&I mine (Tr. 121). He had served in that capacity for 1-1/2 years with 7 years prior to that as an engineer's helper (Tr. 121).

He provided detailed testimony as to the nature of the belt system in the mine (Tr. 122-126). At the pocket in question at about 10:30-11 o'clock (Tr. 126), he found coal spillage, two piles at the tail of the roller, approximately a foot in diameter by 6 inches deep (Tr. 127). Otherwise, every thing looked all right in the pocket area (Tr. 127-128). He informed the general mine foreman of the stated condition (Tr. 128). Apparently, nothing was done to remedy the condition (Tr. 127-128).

He attended Mr. Rivera at the pocket where he observed another pile of coal which was not previously there. It appeared to have been caused by a side rubber becoming unfastened (Tr. 130).

He did not see any dust in the atmosphere (Tr. 132). He observed water generally flowing under the belt with a slight slope in the concrete floor toward the pump in the pocket (Tr. 132-133).

The cleanup was initiated through the use of a 1-inch hose and shoveling (Tr. 135-136). As it was mixed with water, he was unable to tell how much coal there was when they finished piling it up (Tr. 136).

On cross-examination, Mr. Perko conceded that the absence of water sprays in the pocket could create a dust control problem if it was not watched by the fire boss (Tr. 143). He conceded as well that there had been a change in the color of the roof and ribs from a grayish color when he had been through in the morning (Tr. 145-146).

The coal that was on the rollers was a fine coal (Tr. 149-150). He was not present when rock dusting was done (Tr. 153).

A discussion ensued between counsel on the admissibility of testimony with reference to the extent of the area of belts shut down (Tr. 156-158). The Judge ruled that testimony with respect to the entire belt was admissible (Tr. 158), considering that it was all shut down (Tr. 157) and the fact that there was an imminent danger order issued (Tr. 158).

D. Florie Massarotti

CF&I's final witness was Florie Massarotti, general mine foreman at the Maxwell Mine (Tr. 163). He had previously served as dust mine inspector for CF&I for 3 years (Tr. 163-164). He testified as to the contents of Respondent's Exhibit No. 2 (Tr. 164-170), which was admitted (Tr. 170; CF&I Exh. No. 2).(FOOTNOTE 2)

On the day in question, the witness was called by Mr. Richard Oxford, who was the person who was conducting the preshift examination for the second shift which was due at 3 o'clock (Tr. 171). Mr. Oxford stated on the phone to Mr. Massarotti that Mr. Rivera wanted the belt turned off. Mr. Rivera spoke to the witness and stated that coal had spilled into the pocket (Tr. 171).

The witness stated that he believed, based on the spacing of phone calls, that it took two men 7-1/2 minutes to shovel all the spilled coal onto the belt (Tr. 175-176).

With reference to the door being opened, he stated that the door must have been open because there were no accumulations of methane which there would have been had the door been closed (Tr. 177-179).

On cross-examination, the witness admitted that there were times when loose coal or float coal or dust did accumulate on the framework of the belt, but such was washed off (Tr. 181-182).

He was not sure whether they had water sprays at the pocket because they had only been in operation 30 days (Tr. 183). He believed the first shift foreman would have begun the cleanup, however, he was not sure. If he intended to clean it up, he would have been there at the time the inspector wrote the order (Tr. 184).

Mr. Oxford mentioned to the witness that the dust in the atmosphere was not bad enough to require a belt shut down (Tr. 187).

Issues Presented

1. Whether the conditions observed and known by Inspector Rivera on April 26, 1978, at the Maxwell Mine were such as to support the issuance of a section 107(a) withdrawal order.

2. Whether the aforementioned conditions constitute a violation of 30 CFR 75.400.

3. Assuming a violation of 30 CFR 75.400 is established, what is the appropriate civil penalty?

Discussion

A. Imminent Danger; Time and Place

Section 107(a) of the 1977 Act provides:

> If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

The cognate provision of the Federal Coal Mine Health and Safety Act of 1969, P.L. 91-173 (December 30, 1969) (1969 Act), section 104(a), provides:

> If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the area throughout which such danger exists, and thereupon shall issue forthwith an order requiring the operator of the mine or his agent to cause immediately all persons, except those referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger no longer exists.

There are no substantive distinctions in the causes for issuance of orders on the face of the two statutory sections, nor are there

differences in the definitions of "imminent danger" provided by the two Acts. Compare section 3(j) (1969 Act), with section 3(j) (1977 Act). Therefore, previous judicial construction of the concept of imminent danger under the 1969 Act controls the construction of the same concept under the 1977 Act, exclusive of the carry-over provision, section 301, of the 1977 Act.

The purpose of the imminent danger withdrawal order is to assure that miners will not carry on routine mining operations in the face of imminent danger. Freeman Coal Mining Company v. Interior Board of Mine Operations Appeals, 504 F.2d 741 (7th Cir. 1974). Imminent danger also requires that the condition or practice observed could reasonably be expected to cause death or serious physical injury. Eastern Associated Coal Corporation v. Interior Board of Mine Operations Appeals, 491 F.2d 277 (4th Cir. 1974). However, the term is not confined to situations of immediate danger. Old Ben Coal Corporation v. Interior Board of Mine Operations Appeals, 523 F.2d 25 (7th Cir. 1975). Finally, it has been held that situations involving accumulations may rise to the level of an imminent danger justifying a withdrawal order. Id.; Freeman, supra.

In assessing the existence of such a danger, it is also noted that Respondent must prove the absence of an "imminent danger." Old Ben, supra.

One aspect of Respondent's attack on the order, is alleged confusion on the part of the inspector as to when the 107(a) order was issued (Brief of CF&I at 5-6). As asserted by CF&I, the inspector allegedly concedes that he did issue his order when he initially required that the belt be stopped (Tr. 46-47).

I conclude that the evidence does not support the assertion. The inspector stated specifically that he did not issue his "withdrawal order" at the time of the belt stoppage (Tr. 47, 97), and that he was not sure what enforcement action was warranted, if any, at the time of the stoppage (Tr. 70-71). The alleged ambiguity found by CF&I (Brief of CF&I at 5), is purely linguistic, not conceptual, and substantially reflects the clever phrasing of the question on cross-examination (Tr. 46-47).

Lurking behind CF&I's argument is the theory that every instructional action of the inspector is an enforcement action cognizable under the Act,(FOOTNOTE 3) at least when an order follows. Thus, the focus on propriety would be limited to what the inspector knew at the time

of the belt stoppage. Such an analysis would tie the inspector's hands as he were caught between Scylla and Charybdis--the rock and the hard place. He would either issue the order too soon and lack supporting evidence, or wait too long until he could be sure of factual and legal foundations, running the risk of injury to himself or others.

Undoubtedly, there has to be some authority on the part of the inspector to order reasonable actions which are not enforcement actions. Such an area of discretionary power is the rough equivalent of a "Terry stop." See Terry v. Ohio, 392 U.S. 1 (1968). Such residual authority to issue a fundamentally nonrestrictive request/order must be an implied authority of the inspector for him to perform his inspection function. Clearly, an inspector has the inherent authority to request/order an operator to turn off the power on a cutting machine to inspect a trailing cable, pursuant to 30 CFR 75.600 et seq., or to check other electrical equipment. 30 CFR 75.500 et seq. In the instant case, the inspector had to request that the belt be turned off so that he could contrive to inspect it (Tr. 17-20, 98). Certainly, CF&I would not expect the inspector to check the temperature of the belt rollers when the belt was running.

That it took 15 more minutes for the inspector to continue his inspection is indicative of the seriousness of the dust problem. It does not change the point of issuance of the withdrawal order.

I conclude that the request/order to stop the belt was an order based on the residual power of the inspector to issue orders pursuant to the many necessary steps in the conducting of his investigation. See Terry, supra. I further conclude the proper factual focus is the cumulation of information which the inspector had prior to the issuance of the withdrawal order.

B. Adequacy of the Notice Provided by the Order

CF&I also argues that the evidence of dust down entry No. 8 (belt No. 2) must be disregarded as such was not referred to on the face of the order (Brief of CF&I at 3-4). The essence of the argument is that CF&I lacks adequate notice of the conditions charged and that other interested parties, miners' representatives, state officials, and others, were also deprived of that notice (Tr. 38-40; Govt. Exh. No. 1).

In support of its argument, on the required notice, CF&I cites Armco Steel Corporation, 8 IBMA 88 (1977) (Armco I). I conclude that Armco I is factually distinguished in that the order cited therein provided no description of the conditions or practices constituting imminent danger. Id. at 96. Here, we have such a description, "coal, coal dust, and float coal dust were present at the hopper %y(3)5C Such a description notifies both CF&I and others

interested, that float coal dust is involved. One of the characteristics of "float" coal dust is that it floats with the direction of the ventilation. As the intent of Armco I and II was to give notice of the generalized problem to miners' representatives, state officials and others, and as float coal dust is not static, the order is reasonably construed as giving adequate notice of the general extent of the problem to third parties.

Further, CF&I states that there is a due process notice problem in the order and that such problem was the concern of Armco I (Brief of CF&I at 4). Assuming, arguendo, that CF&I was right in that it really did not know that the order which shut down the whole main belt would involve consideration of dust on the whole main belt (Tr. 156-158; Govt. Exh. No. 1), CF&I still has not demonstrated a due process problem with the notice received. The order is not a pleading in the case, it was not drafted for the purpose of defining the full and complete extent of MSHA's case at a hearing. As CF&I has argued, supra, that the order was issued when the belt was first stopped, it is clearly on actual notice of the presence of dust in the No. 8 entry (belt No. 2). If CF&I had a question as to the extent of the issues to be addressed by its application in this case, it had only to file for a bill of particulars or pursue discovery. Failure to so act constitutes a waiver of its argument on lack of notice. See Mathies Coal Company, PITT 77-39-P (May 5, 1978) at 8-10.

C. Factual Support for the Order

Prior to the issuance of the order, the inspector knew that 300 feet or so from the belt pocket there was a sufficient accumulation of float coal dust to lower vision to 4 or 5 feet (Tr. 14-18). There was dust sticking to the roof and ribs and some on top of water in the entry (Tr. 19). The belt pocket revealed a 12-foot long accumulation of coal at the end of the tailpiece approximately 24 inches deep (Tr. 21). The roof and ribs were black and there was a little float coal dust in suspension (Tr. 21). The belt rollers were running in fine coal dust and the belt was warm to the touch and, in fact, getting hot (Tr. 22). There were no water sprayers in the pocket (Tr. 22-23).

The inspector believed ignition was possible from the roller belts or flaws in the electrical cables (Tr. 29). The inspector was aware of men regularly working in the face area (Tr. 30).

The inspector was told by Mr. Pugnetti that Mr. Pugnetti had been aware of the condition for about 3 hours, but did not realize it had built up so fast (Tr. 31). The inspector was not aware of any defects in the electrical equipment nor was methane found to be present (Tr. 59, 66).

He was also aware that a ventilation door was closed which would have prevented an explosion from taking the shortest way out of the mine, which way would have avoided the men at the face (Tr. 84-85, 87). Mr. Vigil supported the inspector's testimony as to the black color of the area (Tr. 110).

Mr. Perko stated that he was aware of the coal spillage between 10:30 and 11 o'clock (Tr. 127), thus supporting the inspector's testimony as to knowledge of the operator. He did not, however, see dust in the atmosphere (Tr. 132). He did see a blacker area than when he had passed through in the morning (Tr. 145-146) and also saw fine dust on the rollers (Tr. 149-150).

Mr. Massarotti indirectly supported the inspector's testimony as to atmospheric dust when he related Mr. Oxford's conclusion that there was not enough dust in the atmosphere to warrant a shut down (Tr. 187).

The only testimony of the inspector which was controverted by eyewitness accounts, in his statement that there was float coal dust in the pocket. Mr. Perko did not see dust (Tr. 132). However, the fact that the color of the area was black proves that there had been float coal dust. I conclude that the weight of the evidence establishes the presence of float coal dust in the atmosphere when the order was issued. Had the belt been turned on before cleanup, more would have been added. As there was accmulated coal 24 inches deep for 12 feet, and as the belt was hot and would have gotten hotter if the belt were reactivated prior to cleanup, there was a substantial potential for an explosion. Zeigler Coal Company, 6 IBMA 132, 136 (1976). I further conclude that the existence of apparently permissible electrical equipment (Tr. 59) was not a source of potential ignition.

I conclude that the likely direction of an explosion was toward the face area, due to the ventilation door being closed. I conclude that the door was closed due to the uncontradicted, positive testimony of the inspector. The inspector's testimony was corroborated by the drifting of float coal dust 300 feet up toward the face area from the pocket. The contrary, fully rational, speculation of Mr. Massarotti is not persuasive (Tr. 177-179) in light of the above.

As explosions can cause death or serious physical injury and as there was a reasonable possibility that an explosion could have occurred due to the presence of loose coal, dust and a hot belt, I conclude that CF&I has failed to prove the absence of an imminent danger. The order is upheld.

D. Existence of a Violation of 30 CFR 75.400

The violation charged, 30 CFR 75.400, provides:

75.400 Accumulation of combustible materials

> 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.

Under section 301 of the 1977 Act, the interpretation of the regulation is controlled by Old Ben Coal Company, 8 IBMA 98 (1977). As noted by MSHA, the case is currently being addressed by the Federal Mine Safty and Health Review Commission (Brief of MSHA at 5).

At a minimum, there must be an accumulation of coal to warrant a finding of a violation. Such has been found. See, supra.

Further, it is argued that MSHA must show notice of the accumulation. Mr. Perko testified that he had seen two piles of coal at the pocket, each 1 foot in diameter, and 6 inches deep (Tr. 127). While such might not be substantial enough to be considered an imminent danger, it still constitutes an accumulation of which CF&I had notice for purposes of the mandatory standard (Brief of CF&I at 10). As this inspection by Mr. Perko revealed the presence of an accumulation, CF&I had actual knowledge of its existence for 2-1/2 to 3 hours (Tr. 127-128). As Old Ben, supra, requires an effective cleanup program, it is difficult to see how CF&I can demonstrate that effectiveness with the passage of time involved here and the knowledge available.

Further, CF&I shows knowledge of the limitations of its cleanup system when Mr. Perko conceded that absence of water sprays could create a dust control problem if the area was not watched by the fire boss (Tr. 143).

As accumulations are more dangerous when they are fine and dry, and as CF&I knew that these small piles existed, CF&I had a higher standard of care for cleaning up small piles of dust than it would have if it was providing a sprayer.

The requirement of a more immediate response to even small accumulations is further supported by the fact that no one was assigned as a designated belt cleaner who would have had the specific job to look for accumulations (Tr. 109). The weakness of the cleanup system is shown by the failure to respond to an identified accumulation which later rose to the level of an imminent danger.

I conclude that MSHA has demonstrated CF&I's failure to conform with 30 CFR 75.400 as construed by Old Ben, supra.(FOONOTE 4)

E. Penalty Criteria

Assessment of a civil penalty, upon the finding of a violation, is mandatory. Section 110(i) of the Act provides the following criteria for de novo(FOOTNOTE 5) review:

> 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.

1. History of Previous Violations

Respondent has been shown to have violated 30 CFR 75.400 only once in the 2 years preceding the order (Govt. Exh. No. 4). However, such violation also involved an imminent danger withdrawal order. The relative seriousness of such an order, combined with the 124 total violations for the period (Govt. Exh. No. 4), leads me to conclude that CF&I does have a history of violations sufficient to increase the size of a penalty.

2. Size of Business

The mine employed between 25 and 28 workers and produced approximately 300 tons daily (Tr. 9). I conclude, therefrom, that the mine was medium in size.

3. Ability to Stay in Business

A stipulation was entered that a reasonable penalty would not put the operator out of business (Tr. 9). As the operator introduced nothing to demonstrate that the imposition of a maximum penalty for a single violation would affect the operator's ability to stay in business, and as the mine is of medium size, I conclude that

a maximum penalty is a reasonable penalty and would not affect the operator's ability to continue in business. See Hall Coal Company, 1 IBMA 175, 179-182 (1972).

4. Good Faith

It was also stipulated that the operator acted in good faith in abating the cited conditions (Tr. 9). Such is accepted (Tr. 38-40).

5. Gravity

By virtue of the affirmance of the order charging imminent danger, the condition cited must be and is construed as inherently grave.

Further significant in terms of gravity, is the very real likelihood of an explosion. The inspector testified that the belt was running in fine coal dust and was warm and starting to get hot (Tr. 22). It appears that the inspector misspoke himself. As the belt had been off for 15 minutes or more prior to his touching the roller and belt (Tr. 20), they both had had that amount of time to dissipate heat. Thus, the condition was even more serious than the inspector stated because the belt and rollers would have been hot, thus increasing dramatically the likelihood of a spark which could have created an explosion. As the float coal dust in the atmosphere was extremely heavy as far as 300 feet down the belt (Tr. 18, 32), and the coal in which the belt was running was dry (Tr. 22-23, 28), and black (Tr. 28), and fine (Tr. 22, 149-150), the likelihood of an actual explosion was much greater than in the normal accumulation situation where relatively large chunks of damp coal might be found.

I conclude that the situation would have been extremely grave, due to the nature of the threat (explosion), the possible victims (men at the face), and the likelihood of occurrence (dry fine coal dust in suspension accumulated for 12 feet, 2 feet deep exposed to a hot belt).

6. Negligence

The problem of negligence is first addressed in terms of the knowledge of the two small accmulation piles (Tr. 127). The fire boss' knowledge is clearly imputed to the operator. Pocahontas Fuel Company, 8 IBMA 136 (1977), aff'd sub nom. Pocahontas Fuel Company v. Andrus, 77-2239 (4th Cir., filed January 8, 1979). Further, this problem was known to the general mine foreman for 2-1/2 to 3 hours (Tr. 127-128). Mr. Massoratti testified that if the shift foreman had intended to clean up the accumulation, he would have been in the pocket when the inspector arrived (Tr. 189).

There is no evidence that the shift foreman was there when Inspector Rivera arrived. Therefore, it is not possible to infer that the accumulations would have been discovered if there were no Federal inspection. Given the fact that dust had accumulated slowly down 300 feet of the belt way, the belt and/or rollers must have been running in coal sometime. The operator knew of the dry coal conditions (Tr. 143), knew of two piles of coal being formed (see, supra), had 3 hours to act on the piles (Tr. 127), failed to find or act upon 300 feet of heavy, suspended coal dust during the period when such conditions developed, which must have taken some time, perhaps almost 3 hours, as the coal was pulverized (Tr. 91), and failed to find or act upon the accumulation which caused the coal dust during that same time (Tr. 21). The conditions of which the operator was specifically aware, dry coal and two small piles of loose coal, should have put it on inquiry notice to at least pass through the area within the 3 hours and keep a check on the accumulations. I therefore find that the operator was grossly negligent, even though it was not aware of the alleged specific cause of the spilling coal, to wit, a side rubber unfastening (Tr. 130).

Findings of Fact

Upon consideration of the entire record, I find:

1. The Judge has jurisdiction over the subject matter and parties in this proceeding;

2. The preponderance of the evidence establishes the fact of violation of 30 CFR 75.400;

3. CF&I has failed to rebut the inspector's finding of imminent danger. Therefore, an imminent danger existed on April 26, 1978, at CF&I's Maxwell Mine as cited in Order No. 387928;

4. CF&I has once previously violated 30 CFR 75.400 and had 123 other previous violations (Govt. Exh. No. 4);

5. CF&I is a medium-sized operator (Tr. 9);

6. The penalty imposed will not affect the operator's ability to remain in business;

7. The operator showed good faith in remedying the cited violation (Tr. 9);

8. The violation was extremely serious;

9. The operator was grossly negligent in allowing the cited condition to continue to develop for the time period in question.

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Conclusions of Law

1. This case arose under sections 107(e)(1) and 110(a) of the Federal Mine Safety and Health Act of 1977, P.L. 95-164 (November 9, 1977);

2. All procedural prerequisites established by the above-cited statute have been complied with;

3. An imminent danger existed at the Maxwell Mine on April 26, 1978;

4. CF&I has violated 30 CFR 75.400, a mandatory health and safety provision of the above-cited statute.

5. A civil penalty must be assessed in accordance with the provisions of the above-cited statute.

Application of Penalty

All evidence in the record bearing on the criteria and mitigating and aggravating circumstances have been considered fully.

Accordingly, Respondent is assessed the following civil penalty:

Order No.	Date	Section	Penalty
387928	4/26/78	30 CFR 75.400	$2,000

ORDER

WHEREFORE IT IS ORDERED that CF&I Steel Corporation pay the above-assessed civil penalty in the amount of $2,000 within 30 days from the date of this decision.

Malcolm P. Littlefield
Administrative Law Judge

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FOOTNOTES START HERE
~FOOTNOTE_ONE
1. Statutory predecessor-in-interest to MSHA.

~FOOTNOTE_TWO
2. Said exhibit purports to show in relevant part that the area in question was rock dusted on the graveyard shift the night before the order (Tr. 165).

~FOOTNOTE_THREE
3. It is doubtful that CF&I would really like to see such a construction as civil penalties are mandatory for violations of any provision of the Act and mandatory safety or health standard. Section 110(a), supra.

~FOOTNOTE_FOUR

4. Pursuant to this conclusion, it is not necessary to address the issue of whether a penalty could be imposed for a violation of section 107(a) absent a finding of a violation of 30 CFR 75.400.

~FOOTNOTE_FIVE

5. See Shamrock Coal Company, Docket No. BARB 78-82-P et seq. (FMSHRC, June 7, 1979).