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U.S. STEEL V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

U.S. STEEL CORPORATION,	CONTESTANT	Contests of Citation and Order
		Docket No. WEVA 80-54-R
	v.	Citation No. 657116
SECRETARY OF LABOR,		October 3, 1979
MINE SAFETY AND HEALTH		Docket No. WEVA 80-55-R
ADMINISTRATION (MSHA),		
UNITED MINE WORKERS OF AMERICA,	RESPONDENTS	Order No. 657117
		October 4, 1979
		No. 50 Mine

DECISIONS

Appearances: Louise Q. Symons, Esq., Pittsburgh, Pennsylvania,
for the contestant John H. O'Donnell, Trial
Attorney, U.S. Department of Labor, Arlington,
Virginia, for the respondent

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern contests filed by United States Steel Corporation (contestant) challenging the propriety and legality of a section 104(a) citation and a 104(b) withdrawal order issued by MSHA Mine inspector David L. Pack pursuant to the Federal Mine Safety and Health Act of 1977. Respondent filed timely answers in the proceedings, and pursuant to notice, a hearing was held in Charleston, West Virginia, on January 8, 1980, and the parties appeared and participated therein. Posthearing proposed findings and conclusions, with supporting arguments, were filed by the parties and I have considered the arguments presented in the course of these decisions.

Issues Presented

1. Whether the conditions cited in the citation constitute a violation of cited standard 30 C.F.R. 75.400, and if so, is the violation significant and substantial as alleged by the inspector?

2. Was the time fixed for abatement of the conditions cited reasonable, and if so, was the issuance of the order proper?

Additional issues raised by the parties are discussed in the course of these decisions.

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, effective March 9, 1978, 30 U.S.C. 801 et seq.

2. Section 104(a) of the Act provides as follows:

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a violation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

3. Section 104(b) of the Act provides as follows:

If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issue pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, 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.

4. Section 104(d) provides in pertinent part as follows:

If, upon any 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. * * *

Discussion

Section 104(a) Citation No. 0657116, issued October 3, 1979, citing a violation of 30 C.F.R. 75.400, states as follows: "Float coal dust was permitted to accumulate along the South Mains mother belt and crosscuts left and right starting at the belt conveyor drive and extending in by the stopping No. 69, a distance of approximately 2800 lineal feet."

The inspector fixed the abatement time as 8 a.m., October 4, 1979,

Section 104(b) Withdrawal Order No. 0657117, issued at 10 a.m., October 4, 1979, states as follows:

It is the opinion of the writer that not enough effort and attention has been given to inerting the float coal dust which was permitted to accumulate along the South Mains mother belt in that no attention or work had been done (rock dusting) from the belt conveyor drive to No. 40 stopping.

The inspector ordered withdrawal from the South Mains mother belt from the belt conveyor drive inby.

Testimony and Evidence Adduced by the Parties

Respondent's Testimony

MSHA inspector David L. Pack testified as to his mining background and experience, and he described the mine in question as a large bituminous coal mine which liberates a great amount of methane gas. The mine employs approximately 650 to 700 miners, has five shafts and 11 sections, and the mining height ranges from 42 to 60 inches (Tr. 4-10). He confirmed that he issued Citation No. 657116 on October 3, 1979, citing a violation of 30 C.F.R. 75.400 after walking the area described in the citation and observing that 90 percent of it was blanketed with float coal dust. He looked into every crosscut, and while he did not measure the accumulations, he estimated the depth as between a 32nd to a 64th of an inch, and he described the float coal as a "thin sheet." He believed the accumulations of float coal came from the belt dumping points on the section, and indicated that the float coal is put in suspension at these points as the coal is moved and dumped from feeder belt to feeder belt. The extent of the accumulations is indicated on the citation as 2,800 lineal feet, and he computed this distance

by reference to a mine map kept on the surface, and he used a scale of 100 feet to an inch and did not actually measure the distance underground. The width of the accumulations extended from rib to rib in the 20-foot entries. The accumulations of float coal dust he observed were black in color, but he did observe some rock dust, and he considered the accumulations to be combustifile material because float coal dust is combustible and highly explosive when it is deposited over a large area (Tr. 10-14).

Inspector Pack testified that he considered the conditions cited to be a significant and substantial violation and that he considered all of the circumstances which were present in making that finding. He considered the area involved, possible ignition sources, the thickness of the accumulations, the time that they were left unattended, and the time required for abatement. Some of the area within the 2,800 feet was damp in about three locations and if the accumulations were confined to those areas the gravity would not be as great as the accumulations in dry areas. However, in this case, the accumulations were deposited on all surface areas, such as belt ropes and structures. The equipment in use was nonpermissible, and permissible equipment is not required. The belt conveyor motors, transformers, and various electrical and power cables would "interrelate" with the float coal dust. Miners pass through the area, and one individual walks the belt daily while others may be stationed at the belt discharge points. The mine operates three shifts a day, 5 days a week, and one shift is a maintenance shift. The area in question is not preshifted. (Tr. 14-17).

Inspector Pack stated that he issued the citation at 12:15 p.m., on October 3, 1979, and fixed the abatement time as 8 a.m., the next morning. In fixing the abatement time, he took into consideration the area involved, the availability of rock-dusting materials, the work involved, and the available manpower required to do the job. The respondent has the option of rock dusting by hand or machine, and while the mine has a "fantastic rock dust machine," the respondent chose to rock dust by hand (Tr. 18).

Inspector Pack testified that float coal dust does not present an ignition problem unless it is suspended in the upper atmosphere from the mine floor. He determined that the accumulations did not present an imminent danger and he did so on the basis of the fact that the mine is very well kept and there is a good ventilation which adequately takes care of the liberated methane. The areas where he found the accumulations in question is by no means typical of the No. 50 Mine. He believed that 20 hours was adequate time within which to hand-rock dust the area cited (Tr. 35). Regarding any "interrelation" between methane and float coal dust, he indicated that a "potential" for an explosion existed, but also stated that "[t]his is not to say that this is the case here, which it was not." He explained that the ventilation was adequate and would reduce any methane present down to "the tenths of percent." If an ignition were to occur, it would pick up the deposited float coal dust from the surface areas in the entry, and the mine has experienced prior

ignitions (Tr. 18-21).

Inspector Pack confirmed that he issued Withdrawal Order No. 657117 on October 4, 1979, and that he first issued it verbally to safety inspector Grover Roland at 10 a.m., and later reduced it to writing. He decided to issue the order after finding that the rock dusting had not been completed, and he was informed by the belt foreman that five men were used to rock dust on one shift, and the prior second shift worked four men. The foreman advised him that enough men were not available because he had to send some of his crew to other mine areas where coal production was taking place. Mr. Pack indicated that had the 10 or 12 men who were in by the area on the section producing coal been utilized to rock dust to abate the conditions cited, he would not have issued the withdrawal order. No explanation was offered as to why the men had to be sent to another mine area and he did not ask. Approximately half of the cited area had been rock dusted at the time he issued the order, and he observed four men working on abatement. There was no doubt in his mind that the area cited could have been rock dusted and abatement achieved within the time fixed (Tr. 22-25). Abatement was finally achieved by 1:30 p.m., and he remained on the scene while abatement was going on (Tr. 26). Although the men were sent to another mine area to produce coal, when the general mine foreman heard about the withdrawal order, he promptly sent them back to work on abating the cited conditions, and 10 to 12 men were put to work on the abatement (Tr. 27).

Inspector Pack described the procedures used for hand-dusting the mine. Bags of rock dust are unloaded at the mandoor stoppings adjacent to the belt entry, hand-carried into the belt entry, and then transported on the belt to the areas where needed and off-loaded at those points (Tr. 28). He did not believe that using nine men over two shifts to achieve abatement was an adequate effort to abate the accumulations, particularly when coal was being mined at the time the order issued. Mine management offered no explanation as to why abatement had not been achieved earlier and no one protested the time fixed for abatement (Tr. 29-30). The area cited was not an active working section, but it was an "active workings" (Tr. 31).

On cross-examination, Inspector Pack confirmed that mine management is usually very cooperative in abating citations. He observed that rock dusting had been accomplished in the areas in the past and that in all probability this had been done many times. However, he had no idea when it was last rock dusted prior to his inspection. The cited area was clean of any loose coal and all that was required was the rock dusting in order to cover the blanket of float coal dust. He confirmed that he used a map located on the surface and a scale on the map to determine the extent of the area cited, but he had no idea how many stoppings or crosscuts were involved, but he did walk the area from the drive pulley to the other end. He indicated that there were approximately 60 to 70 crosscuts in the area cited, and that when he fixed the abatement time he took into consideration these crosscut areas (Tr. 31-35).

Inspector Pack indicated that while the area cited was not a

"high risk" area, he nonetheless considered the violation to be "significant and substantial" because the layer of float coal dust presented a potential for

it to become suspended and ignition sources were present. In addition, he considered the fact that the accumulations were there for some time because they were black, but he had no way of determining precisely how long the accumulations were present. Regarding the prior ignition, it was not in the area which he cited, but rather, in the face area and no one was hurt. Further, he was not aware of any of the details of other mine ignitions, and indicated there were "not many." In addition to the citation in question, he also issued another float coal dust citation covering area inby the South Mains section belt conveyor drive (Tr. 36-40).

Inspector Pack stated that 50-pound bags of rock dust are stored in a surface supply area and transported into the mine on flat cars, and he described the procedures for making it available on the section. At the time the citation issued, he did not go to all 11 sections of the mine, had no idea of any operational problems, did not know whether the rock-dusting machine was operative, and he did not ask. He contemplated that rock dusting would be achieved by hand rather than by the machine (Tr. 40-43). He walked to the point where rock dusting had begun from the No. 69 stopping before issuing his order and a closure sign was hung at the belt conveyor drive. He did not walk the entire belt length from the drive to the tailpiece before issuing the closure order (Tr. 46-47). Less than half of the belt had been dusted, and he spoke with Belt Foreman Bishop and Mr. Roland about the situation. Mr. Pack did not know whether coal had been produced on the second shift, but speculated that it was. The third shift was a maintenance shift, and his concern was over the fact that the first shift at 8 a.m., on October 4, was used for production rather than rock dusting (Tr. 50-51).

On redirect, Inspector Pack testified that the belts in the areas cited were equipped with water sprays and that the sprays are intended to keep the dust down. The float coal dust was present on the surface areas of the belt components, and the normal procedure in the mine to take care of the problem is to rock dust. He estimated it would take four persons 15 to 16 hours to rock dust 2,800 feet (Tr. 53).

In response to bench questions, Inspector Pack testified that while he could have cited the same belt for insufficient rock dusting, he did not do so because he could not accurately sample float coal dust. He determined the existence of float coal dust by picking it up and observing the air currents carrying it away, and when he brushed it, it was placed in suspension. He indicated that he walked the entire 2,800 feet of belt before issuing the citation and his observations concerning the existence of float coal dust indicated a consistent black area along the entire 2,800 feet. Mr. Roland was with him and expressed no disagreement with his observations. Mr. Pack made one methane check at the belt conveyor drive and it was less than one-tenth of 1 percent. Under the mine cleanup plan, the areas in question are cleaned on an "as needed" basis, but the belt must be walked every shift by a belt examiner who must record his observations, including violations, in a book kept on the

surface. He did not review the books before citing the conditions on October 3. Although Mr. Roland expressed surprise at the extent of the accumulations of float coal dust, he offered no explanation.

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Mr. Pack did not know for a fact that coal had been produced for the two production shifts subsequent to the issuance of the citation, and since Mr. Roland expressed no disagreement with the time that he fixed for abatement, he assumed that the time was sufficient. Prior to issuing the order, he was told that some of the men were doing other work and he concluded that management was not putting enough effort into abating the conditions, but once the order issued they did, and the order "increased the movement" in this regard. None of the float coal dust was heavy enough to sample with a sieve, and he speculated that the accumulations were caused by an inoperative belt spray system which may have been down for some time. However, he checked the water sprays and since he found them working properly, he could only speculate that they were down and then repaired. He confirmed that the accumulations he found were unusual and that the mine does not normally have float coal dust problems (Tr. 54-73).

Contestant's Testimony

Grover C. Roland, health and safety engineer, U.S. Steel Corporation, testified that he accompanied Inspector Pack during his inspection on October 3, and he identified a mine map and indicated thereon the area inspected on that day (Exh. A-1). He indicated that he walked the entire area, which included the mother belt at the South Mains section, and the South Mains section belt. The distance between the mother belt drive at the No. 7 stopping and the tail pulley at the No. 72 stopping, as shown on the map is 5,800 feet. At the time the citation issued on October 3, the belt was not running because the belt conveyor mother belt bull gear was being repaired. After the citation issued, the section crew began dusting on the South Mains section belt, and the fact that the belt was down for repairs affected the transportation of rock dust since it would have to be hand-carried down the belt from the No. 7 stopping, but if it were brought in at the No. 72 stopping, it could be transported by the belt. The first shift after the citation issued rock dusted about 550 feet of the South Mains belt and nothing was done to bring rock dust to the area during that shift. On the second shift, it took 5 hours to repair the bull gear, and after the belt was able to run, eight men were assigned to the belt; four for rock dusting, two carrying rock dust, and two were delivering the rock dust to the section or the belt. Four flats of rock dust, or approximately 1,920 bags of rock dust, were delivered to the section (Tr. 75-80).

On voir dire, Mr. Roland indicated that he was not present during the abatement efforts on the first two shifts after the citation issued, but that the belt foreman advised him of these efforts and he is required to document those efforts in the belt book. He did, however, go back to the area with Inspector Pack after he returned and before he issued his order on October 4, and he observed the area which had been rock dusted (Tr. 80-82).

Mr. Roland indicated that the citation was issued halfway into the first shift on October 3, and since men were working on

the belt it would not have been practical to reassign them to abatement work since not very much could be done before the rock dust was actually delivered to the area. The

second shift had rock dusted from No. 73 stopping to the No. 59 stopping. The third shift had seven men working, and three additional men were sent in to help distribute some of the rock dust. One of them got sick and left the section, and the other two were called out to repair another belt. The third shift dusted from stopping No. 59 to stopping No. 40. During the first shift on October 4, four men were in the general area rock dusting, and two more were reportedly coming to the section. He confirmed the fact that Inspector Pack had spoken with Shift Foreman Rose about the situation at the South Mains mother belt on October 4. Mr. Pack subsequently informed him that he was shutting the belt down because not enough work had been done to abate the conditions cited, and Mr. Pack discussed the matter underground with the belt foreman and the mine superintendent (Tr. 83-86).

Mr. Roland reiterated that the belt distance from the conveyor to the junction point is 5,800 feet, but that Mr. Pack did not mention the fact that he had underestimated the belt distance. Mr. Roland testified further that he went back to the area on October 4 and took three dust samples from the mine floor, and the samples were taken before the area was rock dusted. He sent them to the laboratory for analysis and the results indicated the incombustible amount of rock dust materials present and the moisture content. The test results indicated 80 percent incombustibility before the area was re-rock dusted (Exh. A-2; Tr. 89-90). At the time the citation issued, Mr. Roland did not believe the conditions cited presented a high probability of serious injuries, and he did not recall that the inspector made any inquiry as to what method would be used to rock dust. The rock-dusting machine could not have been used on October 3 or 4, because it was down for maintenance (Tr. 91). In addition to the 5,800 feet of belt line required to be rock dusted, an additional 3,780 feet of crosscuts had to be covered, and this made a total of 9,580 feet of area that required to be rock dusted in order to achieve abatement (Tr. 92).

On cross-examination, Mr. Roland testified that on previous occasions when citations were issued to him by Mr. Pack, they discussed the amount of time required to achieved abatement. Although he knew at the time the citation in question was issued that the belt bull gear was down for maintenance and needed to be replaced, he did not discuss that fact with Mr. Pack, even after Mr. Pack fixed the abatement time as 8 a.m., the next morning. Mr. Roland indicated further that he believed that the abatement time initially fixed by Mr. Pack was adequate and that abatement could have been achieved within that time frame. In explanation as to why only 50 percent of the area had been rock dusted when Mr. Pack returned on October 4, when it only took 3-1/2 hours to complete the remaining 50 percent, Mr. Roland stated that it took some time to deliver the rock dust during the second and third shifts, and additional help was obtained from the day shift to complete the rock dusting (Tr. 94).

Mr. Roland testified that he observed the area described by Inspector Pack as "black," could offer no explanation as to why

it was black, and indicated that this was not a common occurrence. He indicated further that he made no inquiries as to what caused the black conditions on the belt, and

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he did not know when the area had been previously rock dusted (Tr. 94, 97). He was not aware of any written rock-dusting program for the cited belt areas, and the replacement of a belt bull gear is not a common occurrence (Tr. 98). He indicated that rock dust is transported to the belt areas in question by track-mounted flatcars and then hand-carried to the belt itself for a distance of some 90 feet through the stoppings. Scoops cannot be used to transport the rock dust because the area is confined and the belts are isolated, and he is not aware of any other equipment which could be used to transport the rock dust to the area (Tr. 99-100). Although there is methane in the mine, the ventilation is maintained so that there is no methane problem (Tr. 100).

Mr. Roland stated that it was his opinion that Inspector Pack should not have issued a withdrawal order because men were working to achieve abatement during the second and third shifts subsequent to the issuance of the citation, and during the first shift the next day. He confirmed the fact that he said nothing to Mr. Pack about the belt being down on October 3, nor did he discuss the matter with him when he verbally advised him that he was issuing the order. Mr. Roland admitted that he was surprised that more work had not been done to achieve abatement prior to the issuance of the order (Tr. 101-102).

In response to bench questions, Mr. Roland stated that he could not explain why the inspector indicated on the citation that the distance required to be rock dusted was 2,800, when in fact it was 5,800 feet, and he did not ask the inspector about it. He also testified that he and the inspector walked the entire distance described in the citation, from the belt conveyor drive inby to stopping No. 69, and he did not dispute the inspector's findings with respect to the existence of the float coal dust as described in the citation (Tr. 108-109). At the time the citation issued, the belt was down, and it was down during the subsequent shift (Tr. 110). The other dust citation for the section belt was issued during the same inspection, and work was begun to abate that citation first, and then continued to abate the citation at issue here (Tr. 112). He could offer no explanation as to how such an extensive area could accumulate so much float coal dust without being detected earlier (Tr. 114).

John Bodner, general mine foreman, testified that he first learned about the order being issued by Mr. Pack while conducting a safety meeting on the mine surface on October 4. He left the meeting, and accompanied by the mine superintendent and the belt foreman, they proceeded to the area underground. While walking the area, he stirred up the mine dust on the floor and observed rock dust as well as the "blackness." He did not consider the area to be a "high probability of serious injury." He observed mine personnel rock dusting, met Mr. Pack at the No. 73 stopping, and discussed the situation with him, and the belt did not move while he was there (Tr. 115-119).

On cross-examination, Mr. Bodner stated that he discussed the fact that there was dampness in the area, including a water

hole along the belt line, and that he advised Mr. Pack that he did not believe the conditions were

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"that bad," but that Mr. Pack had already made up his mind to issue the order (Tr. 120). Although conceding that there were quite a few black spots, Mr. Bodner stated there was also "a lot of white showing" (Tr. 121).

In response to bench questions, Mr. Bodner stated that the conversation with Mr. Pack underground took place after he had closed the belt down, and that he (Bodner) was aware of the fact that Mr. Pack had issued the citation the day before, but did not discuss the citation with him (Tr. 124-125). Mr. Bodner indicated further that he was not aware of the belt bull gear problem until the day the order issued, and he conceded that on prior occasions Inspector Pack has extended the time for abatement of citations he has issued (Tr. 126).

Inspector Pack was called in rebuttal, and he explained the circumstances surrounding the calculations he made to determine the belt distances described in his citation. He indicated that he calculated the distances from a mine map on file in the mine safety department and apparently used a scale of 1 inch-to-100 feet when in fact the scale is 1 inch-to-200 feet, and he conceded that he had made a mistake when he described the affected area as 2,800 feet (Tr. 128). In view of the fact that mine management was aware of the belt area in question and had walked the distances with him, he believed that the increased actual distance of 5,800 made no difference in terms of the time fixed by him for abatement of the conditions cited. He would still have fixed the time for abatement as 8 a.m., the next morning since he believed that was ample time to abate, and on previous occasions, mine management always abated conditions cited by him within the time fixed (Tr. 129). He first learned that the belt was down by observation at the time the closure sign was hung on the belt line. At that time, he did observe two or three people working on it, and the fact that the belt was down would not influence him in giving additional time to abate because he believed that the rock dust could be dropped off at places parallel to the manddoors and carried through to the belt entry. There was no doubt in his mind that abatement could have been achieved within the time fixed if enough men had been assigned to the abatement work (Tr. 129-131). He confirmed the conversation with Mr. Bodner and refused to rewalk the area with him as requested by Mr. Bodner because he had already walked it once or twice (Tr. 132).

On cross-examination, Mr. Pack confirmed that using the belt would make it easier to distribute the rock-dust bags and affect the time required to finish the abatement job, but he had no idea how much longer it would take to hand-carry the rock dust to the belt areas. He believed that mine management did it the best and easiest way available (Tr. 134).

In response to bench questions, Mr. Pack stated that he believed 12 men working on the belts could have achieved abatement within the time fixed by him, and this was true even if the belt were down during the entire abatement process. He indicated further that he was very familiar with the area in

question and had traveled it many times, and in his judgment abatement could have been achieved within the time given if the men who were assigned at the

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face producing coal had been assigned to abate the conditions (Tr. 139, 141). Similar mine areas have been cited by him for float coal dust violations and the same amount of time was given for abatement, and abatement was achieved within that time (Tr. 143). However, these prior incidents did not influence him in fixing the abatement time in question and he fixed the time after considering all of the circumstances presented (Tr. 143). In the final analysis, he issued the order because he did not feel that enough people were assigned to abate the conditions cited (Tr. 145).

Findings and Conclusions

Fact of Violation--104(a) Citation No. 0657116, October 3, 1979, 30 C.F.R. 75.400

Citation No. 0657116 charges the contestant with a violation of the provisions of 30 C.F.R. 75.400, for an accumulation of float coal dust along the underground South Mains mother belt. The extent of the accumulations is described on the face of the citation and the inspector testified as to the conditions he found at the time the citation issued. Although the inspector miscalculated the distances involved when he apparently used the wrong map scale, the fact remains that both he and contestant's Safety Engineer Roland both walked the entire area in question and contestant had fair notice as to the area which concerned the inspector. Under the circumstances, I conclude that the fact that the inspector misstated the extent of the accumulations in terms of distances on the face of the citation, does not render the citation void.

With regard to the existence of the float coal dust as cited and described by the inspector, I find that the evidence and testimony adduced in these proceedings establishes the existence of the float coal dust as found by the inspector, and contestant's evidence does not rebut this fact. As a matter of fact, Mr. Roland conceded the presence of the float coal dust and could offer no explanation for it. Mine Foreman Bodner also confirmed the observations of the inspector with respect to the "blackness" of the area cited, and his observation that it "was not that bad," is in itself to some extent an admission of the existence of the conditions cited. The fact that Mr. Bodner may have observed some patches of rock dust showing through the black, thin layer of float coal dust deposited on top of the rock dust, and the fact that he may have observed some wet areas, does not in my view rebut the overwhelming evidence as to the existence of the float coal dust as described by the inspector. I find that the inspector adequately described the accumulations of black, "thin sheet" of combustible float coal dust deposited in the areas described by him in the citation and during his testimony, that the accumulations were present in active workings, and I conclude that MSHA has established a violation of section 75.400 as charged. The citation is AFFIRMED.

Significant and Substantial

On January 29, 1980, I decided five cases in which I made findings and conclusions concerning the application of the "significant and substantial"

violation provision found in section 104(d) of the 1977 Act, and I refer the parties to those prior decisions for my interpretation of that section, *Sunbeam Coal Corporation v. MSHA*, Dockets PITT 79-210 through 79-214, decided January 29, 1980. Further, I incorporate by reference my prior conclusions as to the meaning and application of the term "significant and substantial" as my conclusions in the instant proceedings, and attached hereto and incorporated by reference herein are copies of pages 21-24 of my decision in *Sunbeam*, wherein I discuss my conclusion as to the construction and application of that term.

In the instant proceedings, the parties have not submitted any detailed arguments concerning the statutory application and interpretation of the term "significant and substantial," but merely cite the testimony by the inspector to support his conclusion that the violation was in fact a significant and substantial one. Contestant merely sets out proposed findings of fact based on references to the transcript of the testimony presented, and MSHA does elaborate somewhat in its discussion of the possible ignition sources, the extent of the float coal accumulations found by the inspector, the length of time the accumulations had been unattended, and the time required for abatement (pp. 6-8, MSHA posthearing brief, filed February 21, 1980). Based on these factors, MSHA concludes that the violation was significant and substantial. After careful review and consideration of the arguments presented, I agree with MSHA's proposed findings and conclusions on this issue and find that the violation cited was significant and substantial, and my reasons for reaching this conclusion follow.

Following the court decision in *International Union, United Mine Workers of America (UMWA) v. Kleppe*, 532 F.2d 1403 (1976), cert. denied, sub nom. *Bituminous Coal Operators' Association, Inc. v. Kleppe*, 429 U.S. 858 (1976), and the decision in *Alabama By-Products Corporation*, 7 IBMA 85 (1976), I conclude and find that practically all or most violations occurring at a mine are of a "nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard," except in the following two categories:

1. Those violations which pose no risk of injury at all, such as the so-called "purely technical violations"; and
2. Those violations which pose a source of injury which has only a remote or speculative change of happening.

For the reasons set out at pages 6 through 8 of MSHA's posthearing brief, which I accept and adopt as my findings and conclusions, I find that the violation in question was not technical. To the contrary, I find that the extent of the accumulations of float coal dust in the active workings of the mine where production is going on and along a belt line where coal is being transported and men are present, presents a serious hazard to the safety and health of the miners in the area cited. I am not persuaded by

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the fact that the belt may have been down for repairs at the time the citation issued. On the facts presented in these proceedings, coal production was going on in the face areas, and apparently resumed once the repairs to the belt bull gear were completed. However, abatement had not been totally achieved at that point in time, and potential ignition sources were present in the areas where the float coal dust was deposited on the belt structure itself, as well as in the other areas described.

Citation No. 0657117, 104(b) Withdrawal Order, Issued October 4, 1979

Upon issuance of the citation at approximately 12 p.m., on October 3, 1979, the inspector fixed the abatement time as 8 a.m., the following morning. Upon his return to the mine on October 4, at approximately 10 a.m., he found that only approximately half the area cited by him had been rock dusted. Since he believed that abatement could have been achieved within the 20-hour period initially fixed for this, he issued his withdrawal order. Once issued, mine management assigned additional men to the abatement, and the remaining area initially cited was rock dusted, and complete abatement was finally achieved by approximately 1:30 p.m., on October 4. In short, it seems obvious to me that the inspector believed that mine management could have abated the citation within the 20-hour period initially fixed for this task, but mine management apparently decided to utilize part of the work crew for other chores. However, once the closure order issued, mine management reassigned the crew to abatement duties and the area cited was ultimately rock dusted and the order abated.

Contestant takes the position that the extent of the area cited by the inspector, coupled with the fact that the crew on duty were either needed elsewhere to perform routine maintenance chores, precluded the completion of the abatement, and that since abatement was in progress when the inspector arrived on the scene on the morning of October 4, it was arbitrary for him to issue a closure order. This defense is rejected. I find that in the circumstances presented, the inspector acted reasonably in finding that mine management was less than diligent in achieving abatement. Taking into consideration the logistical problems involved in transporting the rock dust to the area cited, I believe that the record supports a finding that abatement could have been achieved within the 20-hour period fixed by the inspector. Once the order issued, the crew which was present on the section was taken off its assigned other duties and concentrated on abatement. Within 3 hours or so, the remaining area was rock dusted to the inspector's satisfaction and the order was terminated. Had these people been initially assigned to abatement duties, rather than to routine additional duties, I am convinced that abatement would have been accomplished in a timely fashion and the order probably would not have been issued. Further, after listening to the testimony of Mr. Roland and viewing him on the stand, I was impressed with his candor and honesty, particularly with respect to his candid admission that he too was surprised that more work was not done to complete the

rock dusting at the time the inspector returned to the area the day after the citation issued. Coupled with his opinion that abatement could have been achieved within the time frame initially fixed by the inspector, I can

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only conclude that the inspector acted reasonably in the circumstances when he issued the closure order.

With regard to the question of whether the inspector acted unreasonably or arbitrarily by not extending the abatement time further, as correctly pointed out by MSHA's counsel at pages 17-20 of his posthearing brief, this issue was never raised by the contestant, and its posthearing arguments do not specifically address this question. However, on the basis of the record adduced in these proceedings, and considering the fact that I have concluded that the inspector fixed a reasonable time for abatement of the cited conditions, I find and conclude further that his failure to further extend the abatement time was not arbitrary or unreasonable. Under the circumstances, I conclude and find that the issuance of the order was proper and reasonable and it is AFFIRMED.

ORDER

In view of the foregoing findings and conclusions, Citation No. 067116, issued on October 3, 1979, and Citation No. 067117, issued on October 4, 1979, are AFFIRMED, and contestant's request for any relief with respect to the citation and order are DENIED, and the contests are DISMISSED.

George A. Koutras
Administrative Law Judge