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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

MABEN ENERGY CORPORATION, CONTESTANT	Contest of Order
v.	Docket No. WEVA 80-674-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Order No. 0654036 August 26, 1980 Maben No. 3 Mine

DECISION

Appearances: Robert A. Burnside, Jr., Esquire, Beckley, West Virginia, for contestant, Maben Energy Corporation; Stephen P. Kramer, Attorney, Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for respondent

Before: Judge Koutras

Statement of the Case

This proceeding was initiated by the contestant pursuant to section 105(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., to review the validity of a section 104(d)(2) unwarrantable failure withdrawal order issued by a Federal mine inspector on August 26, 1980. Respondent filed a timely response to the notice of contest and a hearing was convened at Beckley, West Virginia, November 6, 1980, and contestant and respondent participated fully therein. Respondent UMWA failed to appear and was dismissed as a party. Although given an opportunity to file posthearing proposed findings and conclusions, contestant and respondent declined to do so and opted to stand on the record made at the hearing.

Issue

The principal issue presented in this proceeding is whether the withdrawal order was properly issued in accordance with the Act, and any additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory Provisions

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(d) of the Act provides as follows:

> (d)(1) 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 standards, 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.
>
> (2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

Discussion

Upon inspection of the mine on August 26, 1980, MSHA mine inspector William L. Ross issued section 104(d)(2) Withdrawal Order No. 0654036, citing a violation of 30 C.F.R. 75.400. Mr. Ross also found that the citation was "significant and substantial, " marked the appropriate box on the citation form to that effect, and also made reference to an "initial action" which he

identified on the face of the form as Order No. 0651213, dated July 24, 1980. The condition or practice described by Mr. Ross on the face of the order which he issued is as follows:

> Loose coal, coal dust and float coal dust was present in the No. 2 entry and cross-cuts right off No. 2 entry and in the No. 3 entry (chain line conveyor entry) starting at survey station No. 2639 in the No. 2 entry and extending inby for a distance of about 120 feet; and starting at the tail piece of the 4 Right section belt No. 3 entry and extending inby No. 3 entry chain line conveyor entry; 100 feet inby 4 right 012 section belt tail piece and No. 2 entry from spad 2639 + 120 feet for a distance of about 100 feet. Subject loose coal, coal dust and float coal dust ranged in depth from 3 to 16 inches throughout the affected areas in the 4 right 012 0 section. This accumulation was in the active workings of the No. 2 and No. 3 entries. Section supervised by Jim Brown.

Respondent MSHA's Testimony and Evidence

MSHA inspector William L. Ross testified as to his training and experience in the mining industry, and he confirmed that he visited the No. 3 Mine on August 26, 1980, for the purpose of conducting a complete inspection. He reviewed the onshift and preshift records for the 4 Right and 7 Left sections for August 25 and 26, and the notations he found reflected that the sections needed to be cleaned and rock dusted. The mine has one production shift, and the evening shift is usually a combined cleanup and maintenance crew and no production takes place (Tr. 7-11).

Inspector Ross stated that he went underground at 7 a.m. on August 26, and proceeded to the 4 Right section, and arrived there at approximately 8 a.m. He identified Exhibits G-1, G-2, and G-3 as the order he issued on the 4 Right section, the abatement of that order, and a sketch or map of the area which he inspected (Tr. 11-16). Mining was taking place in an area to the right of the rooms shown on the sketch and he recalled a scoop traveling from the No. 2 room to the right of the areas shown on the sketch. The section was a conventional mining section where blasting, cutting, and drilling take place before the coal is hauled out by scoops. He could not recall the exact route followed by the scoops but he did state that the mined coal was dumped at the tailpiece of the left conveyor located in the No. 3 entry and he marked the sketch with a dark triangle to indicate the dumping location. He also indicated the location of a chain line conveyor in the No. 3 entry as an "x" on the sketch (Tr. 16-20).

Inspector Ross indicated that when he arrived at the crosscut off the No. 2 entry at the chain line conveyor and one crosscut inby the tailpiece, he observed loose coal and coal dust along the ribs and on the mine floor and along the chain line conveyor, and float coal dust was deposited on the ribs along the

chain line conveyor. Upon traveling to the conveyor tailpiece, he

observed loose coal and coal dust and spillage along the chain line and tailpiece. He also observed coal spillage between the two blocks separating the crosscuts off the No. 3 entry where the scoops were dumping coal, and he observed loose coal and coal dust spillage along the ribs and mine floor in these areas (Tr. 20-21).

Inspector Ross confirmed that he took measurements of the depth of the coal spillages he observed and stated that the maximum depth was 16 inches, and the smallest was 3 inches. He detailed the specific locations and measurements which he made, including a hole in the mine floor filled with coal, and he indicated that none of the accumulations which he observed appeared to be rib sloughage. He concluded that it had not sloughed off the ribs because of the amount and location of the accumulations. He attributed some of the accumulations along the chain conveyor to material falling off the conveyor, and some of the spillage along the No. 2 roadway to spillage from the scoops (Tr. 21-26).

Inspector Ross stated that he discussed the conditions with section foreman Jim Brown and Mr. Brown advised him that he "would get somebody on it right away." Mr. Ross also stated that he observed no one cleaning the area when he arrived on the section and he observed a scoop dumping coal on the end of the chain line conveyor (Tr. 26-27). Mr. Brown assigned men to clean up the accumulations after he was informed about the violation (Tr. 28). Mr. Brown stated that the conditions were normal but would not respond to Mr. Ross' inquiry as to how long the accumulations had existed, but mine foreman Donald Hughes told him that he had visited the section on August 25 and told Mr. Brown that "this condition was the worst that he had ever seen and that it should be cleaned up" (Tr. 28-29, 31). Mr. Brown later admitted that the accumulations "stay like this" and that "I've been so short of men and can't produce and clean up like I should" (Tr. 31). Mr. Brown also admitted tht the accumulations were present since the prior Friday, August 22, and Mr. Ross indicated that his notes confirm the conversations with Mr. Brown and Mr. Hughes (Tr. 32).

Mr. Ross stated that he issued the order because of the statements received from the mine foreman and section foreman indicating prior knowledge of the existence of the accumulations and the fact that the amounts which he observed could not have occurred within the 40-45-minute time frame prior to his arrival on the section (Tr. 34). He also believed that the accumulative conditions which he found were dangerous and could contribute to an explosion or fire if an ignition source were present, but he observed no such ignition sources in the areas where the accumulations were present (Tr. 38). However, permissible battery-powered electric scoops operated in the section hauling coal from the face area and he found a permissibility violation on the CX-492 scoop, Serial No. 492013 in that it had openings in excess of four-thousandths of an inch present in the covers of the methane monitor control box, the tram motor inspection cover, and the insulation and conduit were damaged in the trail leads

serving the right battery tray (Tr. 40, 43-44). Mr. Ross conducted a test for methane, but found none present (Tr. 44). He also observed electrical wires on the chain line conveyor control line and a telephone wire which provided communication for the section, but found no

defects in either of these (Tr. 45). He did not consider the conditions he observed to be an imminent danger (Tr. 45). Although the conveyor tail and head roller bearings could create heat if they were worn, he found nothing wrong with the conveyor (Tr. 45).

Regarding the abatement, Mr. Ross stated that some of the accumulations were scooped up and some were shoveled onto the chain line conveyor, but he did not know how much material was removed from the section during the cleanup process (Tr. 47). The scoop permissibility violation was issued after the order was issued and he did not know about the scoop condition at the time his order was issued (Tr. 48).

Mr. Ross stated that he went to the face areas on the 4 Right section at 8:45 and observed the scoop loading coal from the face and traveling to the dump area. He also observed a roof bolter operating in the last room to the right off the No. 5 entry, and he believed that six men and a foreman were on the section at that time (Tr. 84-86). He also indicated that he observed no rock dust applied to the ribs, roof, or floor of the areas where he observed the accumulations which he cited (Tr. 91).

On cross-examination, Inspector Ross confirmed that he observed one scoop of coal being dumped on the chain line conveyor when he arrived on the section and that the belt was running. He assumed that the coal came from the face (Tr. 57-79). Aside from the potential ignition source from the scoop, he observed no other defects, hazards, or problems on the section (Tr. 60). He observed no moisture or rock dust among the accumulations which he found and the accumulations were loosely compacted and he observed tracks over the loose coal (Tr. 61). He confirmed that the application of rock dust is an acceptable means of abating an accumulation citation in lieu of cleaning up the coal (Tr. 62). He took no samples of the materials which he visually observed and indicated that none are required to support the violation he cited (Tr. 63).

Mr. Ross confirmed that he based his unwarrantable failure order on the fact that he observed quantities of accumulated coal and coal dust, the notations made in the preshift book, and the statements made to him by Mr. Brown and Mr. Hughes (Tr. 64). Mr. Ross concluded that the accumulations had been present since the previous Friday, and these conclusions were based on the statements made by Mr. Hughes and Mr. Brown (Tr. 65). He discussed the cleanup program with Mine Superintendent Ferguson and Mr. Ross did not believe compliance with that plan had been achieved even though the preshift books noted "cleaned on cycle" (Tr. 66-67).

In response to questions concerning the guidelines he applies in citing an unwarrantable failure violation, Mr. Ross stated that he would not cite a spillage per se, and would consider whether the spillage grew in quantity over a period of time and was neglected and failed to be cleaned up. Although Mr.

Brown advised him that a belt broke on Monday and gave this as an excuse for failure to clean up the accumulations, he still indicated that he knew of the accumulations as early as the previous Friday, and any broken belt would

be irrelevant to the accumulations in the other areas on the section (Tr. 82-83). The fact that a belt may have broken on Monday was no excuse for failing to clean up the accumulations on the shifts prior to his inspection (Tr. 84).

Mr. Ross stated that he issued the closure order verbally at 11:50 a.m. when he advised Mr. Brown and Mr. Hughes that the No. 2 and No. 3 entries on their section were closed, and the 8 a.m. notation on the order indicates the time when he advised Mr. Brown that there was a violation (Tr. 96).

In response to bench questions, Mr. Ross stated that he did not cite the contestant for failure to adequately rock dust because he did not take samples to determine whether the rock dust was inadequate (Tr. 99). During the period from 8 a.m. to approximately 11:50 a.m., he was attempting to ascertain all of the circumstances surrounding the accumulations and production stopped and abatement began as soon as the closure order issued. Abatement was completed at 12:55 p.m., but it actually began at 8 a.m. when he advised the section foreman that he was in violation because of the accumulations. He conceded that it was reasonable for the foreman to assume that the citation was a section 104(a) citation at that time because he did not advise him that he was going to issue an unwarrantable citation (Tr. 107-109).

Contestant's Testimony and Evidence

James E. Brown, section foreman, testified as to his general duties, and he confirmed the inspection conducted by Inspector Ross on August 26, and that he was with the inspector. Mr. Brown stated that excessive coal spillage was in fact present on the pan line and he attributed the spillage to a break in the pan line chain which had occurred the day before the inspection. He indicated that he was not at the mine the previous Thursday or Friday, and he denied telling Mr. Ross that the coal had been present since the previous week, and he indicated that he told him that it had been there "this week," meaning the Monday before the inspection. Due to a misunderstanding between the scoop operator and the pan line operator, coal continued to be dumped on the belt after the chain broke and that accounted for the excess spillage. Cleaning of the spillage began at approximately 10 a.m., Monday, after the mine foreman came on the section and advised him to start cleaning up. He assigned one man to begin cleaning up, but when the belt broke at 10 a.m., the foreman called him for additional men and he dispatched all but one crew member to assist in the cleanup and the belt as down the rest of the day on Monday. Cleanup could not be finished on Monday because of the broken pan line and that was the only way to remove the coal from underground. The belt was down until it was repaired within the hour of the second shift on Monday, and when he reprorted to work on Tuesday, the belt had been repaired. The second Monday shift is a cleanup and maintenance shift and no coal is mined (Tr. 119-126).

Mr. Brown stated that when Mr. Ross arrived on the section on Tuesday morning no coal was being taken from the face area but

a scoop was dumping coal on the pan line and that coal had been scraped up from the roadway in the No. 2 entry. When Mr. Ross informed him of the violation at 8 o'clock he assigned a man to begin cleaning up and then proceeded to mine coal from

the face area. He did not inform Mr. Ross about the broken pan line, nor did he know whether any of the coal spillage had been present since the previous week because he left the mine on the previous Wednesday and there was a rock fall on the No. 2 belt on Thursday and the section was down (Tr. 126-128). Mr. Brown did not believe that the cited spillage resulted from a lack of care for safety and he has never believed that mine management has no concern for the safety of the men (Tr. 129).

Mr. Brown testified that the No. 2 entry is a roadway used by the scoops bringing materials from the supply area to the face, and the entry is not normally used as a coal transportation route. Mr. Brown confirmed that "coal dirt" was packed in the hole in the roadway and that this was done to facilitate the movement of equipment through the area. He did not believe that dumping coal in that hole was a violation of any safety standard, and he indicated that this had been a longstanding practice observed by other MSHA inspectors who made no issue over it (Tr. 131). Mr. Brown stated that the No. 2 entry had been previously rock dusted, but he could not recall the exact dates when it had been last dusted, and indicated that it is dusted when the conditions warrant (Tr. 131). There are four holes in the entry in question, at a depth of approximately 12 inches, and he conceded that loose coal accumulations were present but denied that any float coal dust was present in the area. The holes were cleaned out, but not refilled, and this has resulted in the equipment not being able to operate in the area. The holes are presently filled with water from the mine floor (Tr. 134).

On cross-examination, Mr. Brown conceded that Inspector Ross told him he could fill the empty holes with rock or "bridge" over them (Tr. 136). He also conceded that holes in haulage roads were routinely filled with coal, packed down, and then wet down with water. He also agreed with Mr. Ross that the roof area had not been dusted, and agreed with the depths of the accumulations found by the inspector in the first crosscut inby the tailpiece between the Nos. 2 and 3 entries. Mr. Brown believed the accumulations there resulted from rib sloughage which had been ground into fine dust by the scoops traveling through the area. Since the scoops make 17 to 20 daily trips, spillage could occur from the previous shift, and he conceded that "ridges of coal" were present in the crosscut when the inspector arrived on the scene (Tr. 137-140).

Mr. Brown confirmed that coal was mined and loaded on the section during the hours of 8 and 10 on Monday morning, the day before the inspection, and he indicated that most of the spillage was there and that it was possible that some of it had been there from the previous Thursday or Friday, but since he was not at the mine on those days he could not be sure (Tr. 140-141). Aside from the pan line spillage, which he attributed to the broken chain, he believed the spillage found in the two crosscuts and the No. 2 entry resulted from spillage form the scoops traveling in the area on Monday as well as from the scoop blades as they start into a crosscut and from sloughage from the ribs. Coal was mined for about an hour and a half on Monday morning but ceased

for a short time when the pan chain broke. Mining resumed again at 9:15 a.m., and continued throughout the shift (Tr. 142-146). The broken belt

previously mentioned was located outby the pan line and was not in this area and the location of that belt is not shown on the sketch identified on Exhibit G-3. When the inspector arrived on the scene, men were not assigned to clean up because they were working on greasing and servicing the pan line, but cleaning began when the mine foreman instructed him to assign men to this task (Tr. 147-150).

On redirect examination, Mr. Brown confirmed that cleaning began at 9 a.m., Monday morning after the mine foreman informed him that it was necessary, but cleaning ceased after the pan line broke, and on Tuesday morning the conditions were the same as they were when he left the mine on Monday and the "shovel was still in the coal" where it was left on Monday (Tr. 150). The pan line malfunction caused the spillage on Monday, one man was cleaning during the day shift that day, and coal was also mined (Tr. 151). Moisture was present on the roof in the No. 2 entry, but he did not know how much, and he did not know when the No. 2 entry had been last rock dusted (Tr. 152-154).

In response to bench questions, Mr. Brown stated that he did not initially inform Inspector Ross about the problems with the belt or pan line because when Mr. Ross informed him about the violation at approximately 8 a.m., he believed that it was a routine citation. Mr. Brown stated that he did not know that the citation was an unwarrantable failure until he learned this at 11:50 a.m. (Tr. 156). He reiterated that the coal accumulations found in the No. 2 entry were due to dumping it in the hole (Tr. 159). The other spillages identified by the inspector at five locations were caused by sloughage off the scoops and the scoops moving in and out of the areas (Tr. 160).

Donald Hughes, mine foreman, testified that he was present in the 4 Right area on Monday morning, the day before the inspection in question, and he found the pan chain line "dirty" and informed Mr. Brown to proceed with cleaning it up. Shortly after cleanup had begun, the chain line broke and that resulted in coal spillage accumulating quickly, but he did not know how much had accumulated. Trouble then developed with the No. 2 belt which had broken and he instructed Mr. Brown to take his men off his section and assign them to work on the spillage resulting from the No. 2 belt breakage (Tr. 161-163).

Mr. Hughes stated that he was not underground when Mr. Ross first arrived there on Tuesday morning, but went to the 4 Right section at 9 or 9:30 a.m., and he advised Mr. Ross that the belt had broken the day before and that he had not had a chance to clean up the spillage. He surmised at that time that Mr. Ross would issue a citation, but he did not believe that it would be an unwarrantable failure citation (Tr. 164).

On cross-examination, Mr. Hughes stated that he could not estimate the amount of spillage which could have accumulated between 9 and 9:30 a.m. on Monday, but stated that the amounts described by the inspector along the pan line could have accumulated in an hour. The amounts described by Mr. Ross in the

two crosscuts in the No. 2 entry were "normal" and would take 15 to 20 minutes to clean up. On Tuesday, some of the men were cleaning the pan line and some were cleaning the roadway, and cleanup operations continued until 12:55 (Tr. 165-168).

In response to bench questions, Mr. Hughes confirmed that he told Inspector Ross that the section was "in the worst shape I've seen it in" and that was the reason why he was taking the steps to have it cleaned up (Tr. 172).

Fred Ferguson, mine superintendent and part-owner, testified that the practice of filling holes in the mine floor with coal is one that is followed by most coal companies in West Virginia and that no inspector, other than Mr. Ross, has ever questioned it. He also stated that he was formerly employed by MSHA from 1967 to 1977 as a supervisory mine inspector and that MSHA has always accepted blanket rock dusting in lieu of cleaning up accumulations of coal and coal dust in areas such as return airways and where it is physically impossible to move equipment. He is certain that Mr. Ross worked under his supervision at one time or another during his tenure with MSHA (Tr. 173-175).

Mr. Ferguson explained "rib sloughage," and he stated that if it is permitted to be ground up and moved into the roadways and entries by the action of the equipment running over it, it could become a violation. He stated that he was present on the section a month before the citation in question was issued by Mr. Ross, and at that time the entire section was rock dusted. He also walked through the section approximately 2-1/2 weeks before the citation issued and he observed no loose coal or coal dust present. He explained his cleanup program as well as problems that he was having with filling pot holes on the underground roadways (Tr. 176-181). He did not recall discussing the specific accumulation problems with Mr. Ross on the day the citation issued (Tr. 181).

On cross-examination, Mr. Ferguson conceded that any rib sloughage which may have been present on the 4 Right section was not to the point where it would have reached its "angle of repose" (Tr. 182). During the course of a colloquy with MSHA's counsel, he took the position that normal rib sloughage, which in effect remains at its angle of repose against the rib, need not be cleaned up, even though it constitutes an accumulation of loose coal and coal dust, as long as it is rock dusted (Tr. 183-187). However, once the rib sloughage is dragged and spread through an entry and ground up by the movement of equipment, it must be inerted by rock dust or cleaned up and removed from the mine immediately after the shift or during the cleanup cycle (Tr. 188-190).

Mr. Ferguson stated that the mine cleanup cycle was followed in this case, and he indicated that when rib sloughage is dragged into an entry, it could be ground up and mixed in with the rock dust and that it is normally removed by the scoop. Spillage is expected at the dumping point and this area is normally cleaned up three times a day by the scoop pushing the material into the dumping point. In one of his one-section mines, the production crew runs coal from 7 a.m. to 3 p.m., and after that a crew of three or four men and a boss on the section service the equipment and check for needed repairs. They then scrape every dumping point and roadway, and may also shoot coal in preparation for

loading (Tr. 193). The No. 3 Mine has two sections, but at

the time in question he only had one maintenance crew which he had to utilize for other work on a third shift and he in effect lost one maintenance crew for one of his sections (Tr. 194). He also stated that a cleanup man is regularly assigned to clean the belt head and pan line (Tr. 195).

Mr. Ferguson confirmed that he was not present with Mr. Ross on the 4 Right section at the time he issued the citation in question and he did not observe the conditions described by him in the order (Tr. 196).

Inspector Ross was recalled by me and he confirmed that he would cite an operator for a violation of section 75.400 if he found pot holes filled with loose coal. However, if he observed rock dust being mixed in with the coal used to fill the holes, or if he observed that there was rock dust mixed with the coal, he would not cite a violation for accumulations (Tr. 206). He also indicated that before citing an operator for accumulations which may have been caused by a defective belt he would first ascertain all of the facts, including the time period over which the accumulations were permitted to exist and the efforts made at taking corrective action (Tr. 208). In the instant case, Mr. Ross stated that he decided to issue the unwarrantable failure citation because Mr. Hughes and Mr. Brown advised him that while the belt broke on Monday, the conditions had existed since the previous Friday and a weekend had elapsed before cleanup was accomplished. In addition, once the belt was repaired on Monday, there was ample time to clean up before he arrived on the scene on Tuesday. The accumulations could have been cleaned up during the remainder of the first shift or the second shift on Monday (Tr. 209).

Stipulations

Although this is not a civil penalty proceeding, the parties stipulated that Maben Energy Corporation owns three additional small mines, that the No. 3 Mine produces 400 tons of coal a day and employs 34 miners, and that Maben may be considered to be a small-to-medium-sized mine operator. The parties also agreed that the mine is subject to the Act that assuming a violation is affirmed, any reasonable penalty which may be assessed in a future civil penalty proceeding will not adversely affect Maben's ability to remain in business (Tr. 211-213).

Findings and Conclusions

As pointed out earlier in this decision, Inspector Ross issued the contested section 104(d)(2) withdrawal order upon inspection of the mine on August 26, 1980, and the discovery of accumulations of loose coal, coal dust, and float coal dust at the locations described by him on the face of the order. A copy of the order, Exhibit G-1, reflects that Mr. Ross cited a violation of 30 C.F.R. 75.400, found that the violation was significant and substantial, and in the space marked "Initial Action," he makes reference to the underlying order, No. 0651213 issued on July 24, 1980. He also testified that he was aware of

the fact that the underlying citation and order had previously been issued (Tr. 51-54).

The statutory scheme concerning the issuance of unwarrantable failure citations and orders pursuant to section 104(d) of the Act involves a chain of enforcement actions. It begins when an inspector issues a section 104(d)(1) citation notice based on his findings of (1) a violation of a mandatory safety standard, (2) the violation does not create an imminent danger, but could significantly and substantially contribute to the cause and effect of a mine hazard, and (3) the violation was caused by the unwarrantable failure of the operator to comply with the mandatory standard in question. "Significant and substantial" has been interpreted to exclude only technical violations which pose no risk of injury at all, or violations which pose a risk of injury which has only a remote or speculative chance of coming to fruition, Alabama By-Products Corporation (On Reconsideration), 7 IBMA 85 (1976). "Unwarrantable failure" has been defined to mean the operator failed to abate the conditions or practices cited as a violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference, or lack of reasonable care. Zeigler Coal Company, 7 IBMA 280, 295-296 (1977).

The second link in the enforcement chain authorizes the issuance of a section 104(d)(1) withdrawal order if the inspector finds another violation during the same inspection or during any inspection over the next 90 days caused by the operator's unwarrantable failure to comply. There is no requirement for this order to be based on a violation which "significantly and substantially" contributes to the cause and effect of a mine hazard, International Union, United Mine Workers of America v. Kleppe, 532 F.2d 1403 (D.C. Cir.), cert. denied, sub nom. Bituminous Coal Operators' Association v. Kleppe, 429 U.S. 858 (1976).

Once the conditions or practices which prompted the section 104(d)(1) order are abated, the order is terminated, but liability for the issuance of a subsequent section 104(d)(2) order begins. That is, an inspector is authorized to issue such an order during any subsequent mine inspection where he finds any violations similar to those that resulted in the issuance of the section 104(d)(1) order until such time as an inspection of the mine discloses no similar violations. There is no requirement of substantive similarity of violations. "Similar" violations does not mean violations of a similar mandatory standard, but rather means violations which similarly occur through the operator's unwarrantable failure to comply, Zeigler Coal Company (On Reconsideration), 4 IBMA 139 (1975). In other words, a section 104(d)(2) order is not invalid simply because the underlying violation as set forth in the section 104(d)(1) order involves a different mandatory health or safety standard.

In a proceeding to review a section 104(d)(2) withdrawal order, MSHA must establish a prima facie case with respect to: (1) the existence of the underlying section 104(d)(1) citation and order, (2) the fact of violation, (3) unwarrantable failure, and (4) the other requirements for issuance of a section

104(d)(2) order. Kentland-Elkhorn Coal Corporation, 4 IBMA 166, 82 I.D. 234, 1974-1975 OSHD par. 19,633 (1975).

The underlying section 104(d)(1) citation which began the enforcement chain in this case is an unwarrantable citation numbered 653368, issued by an MSHA inspector on May 19, 1980 (Tr. 5). A contest regarding that citation was filed by the contestant, the case was heard by Judge Melick (Docket No. WEVA 80-437-R), and it is my understanding that he affirmed the citation from the bench, and finalized his decision in writing on January 28, 1981. Contestant made reference to that underlying citation when it filed its September 8, 1980, notice of contest in this proceeding, and while MSHA and the contestant did not submit copies of that citation during the hearing in this matter, contestant does not deny its existence and it seems clear to me that the citation was in fact issued and received by the contestant.

The underlying section 104(d)(2) unwarrantable failure order is an order numbered 0651213, issued by an MSHA inspector on July 24, 1980 (Tr. 5-6). That order is mentioned by the contestant in its notice of contest filed in this case, is the same order identified by Inspector Ross in the "Initial Action" block on the face of his order, and it was discussed on the record during the hearing of November 6, 1980, in Docket No. WEVA 81-72-R. That case was subsequently dismissed by me on January 21, 1981, because of the contestant's failure to timely file its notice of contest, and a copy of the transcript concerning the arguments advanced on MSHA's motion to dismiss that case is included in the record of this proceeding for the convenience of the parties.

Contestant has not denied the existence of the underlying section 104(d) citation and order on which the contested section 104(d)(2) order in this case was based and has not raised this as an issue. Accordingly, I find that MSHA has met its burden in establishing the existence of those underlying citations, and contestant has not rebutted this fact.

Fact of Violation

Contestant is charged with a violation of the provisions of 30 C.F.R. 75.400, which provides as follows: "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."

With respect to the question as to whether the evidence adduced in this proceeding supports a finding that the contestant violated the provision of 30 C.F.R. 75.400, as charged by the inspector, I take note of the fact that the Commission, in Old Ben Coal Company, 1 FMSHRC 1954, 1 BNA MSHC 2241, 1979 CCH OSHD 24,084 (1979), held that "the language of the standard, its legislative history, and the general purpose of the Act all point to a holding that the standard is violated when an accumulation of combustible materials exist," 1 FMSHRC at 1956. At page 1957 of that decision, the Commission also stated that section 75.400 is "directed at preventing accumulations in the first instance, not at cleaning up the materials within a reasonable period of

time after they have accumulated." See also, MSHA v. C.C.C.-Pompey Coal Company, Inc., Docket No. PIKE 79-125-P, decided by the Commission on June 12, 1980, remanding the case to the judge to apply its holding in Old Ben.

Turning to the evidence and testimony adduced in this case, the preponderance of the evidence establishes the existence of the accumulations of loose coal and coal dust, including float coal dust, in the areas described by Inspector Ross on the face of his order. The detailed testimony of Mr. Ross concerning the conditions which he observed in the active workings at first hand, including a sketch, measurements, and notes that he took on the day in question more than adequately establish the conditions he described on the face of his order (Tr. 20-32, 38-46). He also testified that he sifted through the coal and coal dust and determined that it contained no moisture, was not compacted, that he could observe tracks from equipment which had passed through the areas, that he could kick the loose coal around with his foot, and that he observed no other materials, such as rock or rock dust, mixed in with the loose coal and coal dust (Tr. 61-64, 98-103).

Respondent's testimony does not rebut the fact that the accumulations existed as described by Mr. Ross. As a matter of fact, during arguments at the close of MSHA's case in support of a motion to dismiss (which I denied), contestant's counsel more or less conceded the existence of the accumulations but denied that the violation was an unwarrantable failure (Tr. 110-115). Further, the testimony of contestant's witnesses does not rebut the existence of the cited accumulations, and contestant's defense is essentially based on asserted mitigating circumstances surrounding a broken pan chain and a defective belt in another mine area which contestant contended caused the initial spillage and subsequent accumulations found by the inspector. Under the circumstances, I conclude and find that MSHA has established by a preponderance of the evidence that the accumulation of the materials cited by the inspector in the order existed as alleged, that they constituted a violation of section 75.400, and the citation is AFFIRMED.

Significant and Substantial Contribution to the Cause and Effect of a Mine Safety Hazard

Section 104(d)(2) does not condition the issuance of an order of withdrawal on a finding that the condition found significantly and substantially contributed to the cause and effect of a mine safety hazard. There is no such gravity requirement for orders of withdrawal issued under section 104(d)(2). See, International Union, United Mine Workers of America v. Kleppe, 532 F.2d 1403, 1407 (D.C. Cir. 1976). Even if there had been such a requirement, it would have been met in this case, and my reasons for this conclusion follow.

While it is true that the inspector found no imminent danger and stated that he detected no methane during the course of his inspection, the fact is that the accumulations of loose coal, coal dust, and float coal dust which he observed visually, were not inerted with rock dust. While there is some testimony from the contestant that the areas were previously rock dusted, the fact is that when Inspector Ross observed the conditions all that he saw was loose coal and coal dust. He believed the conditions

presented a hazard, and that they could have contributed to a mine fire or explosion. Even though Mr. Ross stated that he observed no ready ignition sources in the area where

he found the accumulations, permissible electrical battery-powered scoops were operating in the section during active mining operations, men were working on the section, electrical components and cables were present, and Mr. Ross had also cited a later permissibility violation on one of the scoops while he was on the section (Tr. 34-45). Thus, it can hardly be said that the violation in question was of a technical nature. To the contrary, I find that the facts presented support a finding that the cited violation of section 75.400 presented a clear potential hazard and danger to the miners working on the section. As pointed out by the Commission in MSHA v. Old Ben Coal Company, Docket Nos. VINC 75-180-P et seq. (October 24, 1980):

> We have recognized that some spillage of combustible materials may be inevitable in mining operations. However, it is clear that those masses of combustible materials which could cause or propagate a fire or explosion are what Congress intended to proscribe. Thus, we hold that an accumulation exists where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary, it likely could cause or propagate a fire or explosion if the ignition source were present.

See also, Old Ben Coal Company, Docket No. VINC 74-11; Peabody Coal Company, Docket No. VINC 77-91, and Freeman United Coal Company Docket No. VINC 78-395-P, all decided by the Commission on December 12, 1979.

Unwarrantable Failure

As stated earlier, a violation of a mandatory standard is caused by an unwarrantable failure to comply with the standard where "the operator involved has failed to abate the conditions or practices constituting such violations, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care." Zeigler Coal Company, 7 IBMA 280, 295-296 (1977). While it may be true that a violation of a mandatory safety standard is not negligence per se, and that a violation may exist without negligence on the part of an operator, the record adduced in this proceeding establishes negligence and an unwarrantable failure to comply well beyond the guidelines enunciated in Zeigler, and my reasons for this conclusion follow.

Inspector Ross testified that he initially based his unwarrantable failure order on the fact that he had been informed by Mine Foreman Hughes that the section was in the "worst shape" that he had ever seen, and the admissions by Section Foreman Brown that the accumulations were present since the previous Friday and that the accumulations "stay like this" because "I've been so short of men I can't produce and clean up like I should" (Tr. 27-32). Although Mr. Brown denied making the statements to Mr. Ross, Mr. Ross stated that his notes taken at the time of the

conversation confirm the prior admissions made to him by Mr. Brown. Mr. Hughes was not on the section on Tuesday morning when Mr. Ross arrived on the scene, but he candidly admitted that he was on the section the previous Monday and found the pan line "dirty," and

while he instructed Mr. Brown to begin clenaup, he admitted that he did not have ample time to clean up the accumulations found by Mr. Ross. Mr. Hughes also candidly admitted that he told Mr. Ross that the section was the "worst" he had ever seen. Mr. Ross also testified that his review of the preshift and onshift records for Monday and Tuesday contained notations that the 4 Right section was in need of cleaning and rock dusting.

Although the parties waived the filing of posthearing arguments, contestant's arguments during the course of the hearing in defense of the order seem to rest on the assertion that the failure to timely clean up the accumulations resulted from a defective belt and a broken pan chain line. However, the record reflects that any problems which may have occurred with the belts happened early on in the Monday morning shift and it was corrected within a relatively short period of time. As a matter of fact, Section Foreman Brown admitted that once the problem with the chain was taken care of on Monday, he resumed mining on the section for the rest of the shift even though he was aware that the spillage and accumulations had not been cleaned up. Further, on the day of the inspection, the next day, his men were engaged in greasing and servicing the pan line, and only after Mr. Hughes instructed him to commence cleaning the area did he actually begin to clean up. Under these circumstances, I fail to understand how the contestant can argue that it acted to achieve cleanup as soon as it became aware of the problem. To the contrary, I find that cleanup could have been accomplished on the first shift on Monday as soon as the belt problems were taken care of, or at least during the maintenance shift. Contestant chose to continue mining coal and to perform maintenance work during the periods following the correction of the belt problems and this indicates a lack of due diligence and indifference amounting to a lack of reasonable care to insure the cleanup and removal of the accumulations found by the inspector. In these circumstances, I conclude and find that the citation in question resulted from an unwarrantable failure by the contestant to comply with the provisions of section 75.400, and the order was properly issued and it is AFFIRMED.

ORDER

In view of the foregoing findings and conclusions, Order of Withdrawal No. 0654036, issued on August 26, 1980, is AFFIRMED, and this contest is DISMISSED.

George A. Koutras
Administrative Law Judge