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PEABODY COAL V. SOL (MSHA)  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

PEABODY COAL COMPANY,  
CONTESTANT

v.

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

CONTEST PROCEEDINGS

Docket No. KENT 84-97-R  
Citation No. 2338145; 1/16/84

Docket No. KENT 84-98-R  
Citation No. 2338146; 1/16/84

Docket No. KENT 84-99-R  
Citation No. 2338147; 1/16/84

Docket No. KENT 84-100-R  
Citation No. 2338148; 1/20/84

Docket No. KENT 84-101-R  
Citation No. 2338151; 1/20/84

Docket No. KENT 84-102-R  
Citation No. 2338153; 1/20/84

Docket No. KENT 84-104-R  
Citation No. 2338156; 1/23/84

Docket No. KENT 84-105-R  
Citation No. 2338157; 1/23/84

Docket No. KENT 84-106-R  
Citation No. 2338158; 1/25/84

Docket No. KENT 84-107-R  
Citation No. 2338703; 1/30/84

Docket No. KENT 84-117-R  
Citation No. 2338710; 2/03/84

Docket No. KENT 84-118-R  
Order No. 2338711; 2/03/84

Docket No. KENT 84-119-R  
Order No. 2338712; 2/03/84

Camp No. 2 Underground Mine

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

v.

PEABODY COAL COMPANY,  
RESPONDENT

CIVIL PENALTY PROCEEDINGS

Docket No. KENT 83-133  
A.C. No. 15-02705-03537

Docket No. KENT 84-149  
A.C. No. 15-02705-03539

Docket No. KENT 84-223

DECISION

Appearances: Michael O. McKown, Esq., St. Louis, Missouri,  
for Contestant/Respondent;  
Deborah A. Persico, Esq., Office of the  
Solicitor, U.S. Department of Labor, Arlington,  
Virginia, for Respondent/Petitioner.

Before: Judge Melick

These consolidated cases are before me pursuant to sections 105(a) and 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," to contest citations and withdrawal orders issued to the Peabody Coal Company (Peabody) and for review of civil penalties proposed by the Mine Safety and Health Administration (MSHA), for the violations alleged therein. At hearing, Peabody admitted the existence of the violations and the special unwarrantable failure findings (as alleged in the two orders before me) and challenged only the "significant and substantial" findings made by MSHA.

In order to establish that a violation of a mandatory safety standard is "significant and substantial" the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety contributed to by the violations; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984).

With the exception of Citation No. 2338155 which had been the subject of a settlement and final disposition prior to the filing by the Secretary of the civil penalty proceedings now before me (Docket No. KENT 84-149), all of the citations and orders at issue involve a violation of the permissibility requirements set forth in the standard at 30 C.F.R.

~2653

75.503. The admitted violations all concern openings in excess of .004 of an inch between plain flange cover plates and electrical enclosures on electrical face equipment taken or used in by the last open crosscut. Several of the citations/orders allege, in addition, other electrical hazards charging independent violations of the cited standard. The corresponding citations and orders are noted in the discussion that follows.

In determining whether the violations are "significant and substantial" several factors are relevant to all of the alleged violations. In this regard it is not disputed that each of the cited pieces of equipment was being used, or would have been used in the near future, in by the last open crosscut and in close proximity to working faces. In addition, within the cited electrical compartments sparking and arcing were frequent and sufficient to ignite a methane concentration in the atmosphere of between 3 percent and 15 percent. Further, that during the time the violations were cited ventilation in excess of that required by the operator's ventilation plan and an amount deemed adequate by MSHA was ventilating relevant face areas; that there had been adequate rock dusting in relevant areas; that in many of the units in which the citations were issued no methane was detected and in none of the units was more than .8 percent methane found; and that methane checks were made at least every 20 minutes.

According to MSHA Inspector George Dupree, the violations were "significant and substantial" because of the danger of fire and explosion which could be triggered by concentrations of methane between 3 percent and 15 percent entering electrical compartments in which sparking and arcing occurs. While conceding that there had been little or no evidence of methane and recognizing the apparent adequacy of the ventilation, rock dusting and methane testing at the time of these violations, Dupree nevertheless noted that methane in explosive concentrations can be liberated at any time and indeed at the mine cited in this case, he observed significant fluctuations in methane liberation. The exhibits in evidence depicting variations in methane liberation at the Camp No. 2 Mine support the inspector's testimony in this regard. In further support of his estimation of the hazard presented, Dupree cited MSHA records of fatal methane explosions in mines with no history of methane.

In addition, in light of the large number of similar violations and, indeed, of the continuing violations after warnings from the MSHA inspector, it is reasonable to infer that, in the normal course of events, the cited conditions would not have been corrected. Within this framework of

~2654

evidence, it is apparent that the violations are indeed "significant and substantial." See Secretary v. U.S. Steel Mining Co., Inc., 6 FMSHRC 1866 (1984) affirming similar "significant and substantial" violations of the permissibility standards. The violations were in any event also "significant and substantial" based on the uncontested evidence that electrical shock and electrocution were reasonably likely from water seepage into the cited electrical compartments and the resulting short circuiting.

While there is also evidence that some of the equipment was furnished with methane monitors which, if properly functioning, will trigger a warning light at a 1 percent concentration of methane and cut off power to the equipment upon the presence of 2 percent methane, it is not disputed that these monitors can and do malfunction. Explosive concentrations of methane could also reach the exposed electrical compartments before reaching the methane monitor. Under the circumstances, I do not find the existence of methane monitors to be sufficient to negate the "significant and substantial" findings made herein.

According to Inspector Dupree, the large number of permissibility violations at the Camp No. 2 Mine was quite unusual and reflected a totally inadequate maintenance program. Indeed, Dupree found that 70 percent of the violations were the result of loose bolts on the cover plates. Moreover, even after several permissibility violations were cited on the first day of his inspection, thereby giving notice to the mine operator of this deficiency, the violations nevertheless continued. I agree with Dupree's evaluation and I conclude that these factors warrant a finding of significant negligence. In addition, with respect to Citation Nos. 2338143, 2338144, 2338145, 2338147, 2338151, 2338153, 2338156, 2338157, 2338703, and 2338710, and Order No. 2338711, the undisputed evidence is that the bolts and lock washers holding the cover plates onto the electrical compartments were loose, protruding, and clearly visible. It could reasonably be inferred from these obvious conditions that the cover plates were also loose, unsafe, and in violation of the cited standard. Accordingly, for this additional reason, I find that the noted violations were the result of significant negligence.

In addition, with respect to Citation No. 2338146, it is undisputed that the cover plate over the electrical compartment had rusted to such an extent that the cover had to be replaced. It is further undisputed that the amount of rust observed could have accumulated only after a lapse of 3 or 4 months. Accordingly, the deteriorated condition should have been detected during the weekly electrical inspections. Therefore it may reasonably be inferred that

~2655

those electrical inspections were not being adequately performed. The violation was thus the result of significant negligence.

Finally, with respect to Order No. 2338712, it is undisputed that, in addition to the cited loose cover plate, the conduit and cable had been torn out of the resistor panel, thereby creating an independent hazard. The condition was readily visible, since the light was inoperative, and was therefore the result of gross negligence.

Further negligence is attributable to the operator in those cases cited after January 16, 1984, since the mine operator was forewarned on that date of the recurrent problem of these permissibility violations. It is apparent that even after these warnings management took no effective corrective action. Accordingly, I am assessing a greater penalty for the corresponding citations and orders.

In determining the amount of penalties to be assessed in these cases, I have also considered that the operator is large in size and has a substantial history of violations including a number of violations of the standard cited herein. The violations were all abated in a timely and good faith manner.

#### ORDER

Citation No. 2338155 having been previously withdrawn before the filing of the instant civil penalty proceeding is hereby severed from these cases. The contest proceedings, Dockets No. KENT 84-97-R, KENT 84-98-R, KENT 84-99-R, KENT 84-100-R, KENT 84-101-R, KENT 84-102-R, KENT 84-104-R, KENT 84-105-R, KENT 84-106-R, KENT 84-107-R, KENT 84-117-R, KENT 84-118-R, and KENT 84-119-R are dismissed.

The Peabody Coal Company is ordered to pay the following civil penalties within 30 days of the date of this decision:

Citation No. 2338142	\$ 100
Citation No. 2338143	100
Citation No. 2338144	100
Citation No. 2338145	500
Citation No. 2338146	500
Citation No. 2338147	300
Citation No. 2338151	300
Citation No. 2338153	300
Citation No. 2338156	300
Citation No. 2338157	300
Citation No. 2338158	300

~2656

Citation No. 2338703	300
Citation No. 2338710	300
Order No. 2338711	400
Order No. 2338712	750

Total	\$4,850
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Gary Melick  
Assistant Chief Administrative Law Judge