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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. WEVA 83-211 A.C. No. 46-01456-03541
v.	Federal No. 2 Mine
EASTERN ASSOCIATED COAL CORP., RESPONDENT	

Appearances: Kevin C. McCormick, Esq., Office of the Solicitor, U.S. Department of Labor, Pittsburgh, Pennsylvania, for Petitioner; R. Henry Moore, Esq., Rose, Schmidt, Dixon & Hasley, Pittsburgh, Pennsylvania, for Respondent.

DECISION

Before: Judge Fauver

This civil penalty case involves an order, No. 2115661, issued by a Federal mine inspector under section 104(d)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. The order alleges a violation of 30 C.F.R. 75.400 at Eastern's Federal No. 2 Mine, as follows:

> Damp to wet coal fines were being stockpiled in the #4 crosscut of the 10 Right Section Longwall #1 belt. The stockpile of fines was about 18 feet long, 15 feet wide, and about 6 inches deep. This belt is examined each production shift by a certified foreman and this condition was easily visible to any miner passing this area.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the reliable, probative, and substantial evidence establishes the following:

FINDINGS OF FACT

1. Respondent's Federal No. 2 Mine is an underground coal mine that produces coal for sale or use in or affecting interstate commerce.

2. On February 18, 1983, Federal Mine Inspector Terry Palmer inspected the subject mine and observed an accumulation of coal fines stockpiled in No. 4 crosscut in 10 Right section. The accumulation covered the floor of the crosscut, and was black, about 18 x 15 feet, and up to 6 inches deep. It was wet in the middle and damp to dry toward the edges. About three feet of the edge area had a thin dry crust and when the inspector tamped this area the material did not exude moisture. This part of the accumulation was about three or four feet from the belt rollers.

3. The accumulation was intentionally stored there about 16 days before the inspection, when the belt line had been extended about 200 feet.

4. The belt entry was about 15 feet wide. A 110-volt control wire ran up the heading and the belt was transporting coal at the time of the inspection.

5. Samples of the accumulation "in place" were not taken to test combustibility, but some samples were taken of material after it was put on the belt conveyor during the abatement of the cited condition. The material placed on the belt was a mixture of the wet and dry parts of the accumulation. The samples of the mixed material showed 21% moisture, 43% ash, and the rest presumably coal.

DISCUSSION WITH FURTHER FINDINGS

Pursuant to the safety standard (30 CFR 75.400), coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials shall be cleaned up and not permitted to accumulate in any active workings of a mine. This standard, which is a statutory mandate (304(a) of the Act), was originally included in the 1969 Coal Act as a method of eliminating fuel sources for explosions or fires in the mines. By prohibiting accumulations of these substances, Congress attempted to achieve one of the prime purposes of the Act, that is, the prevention of loss of life and serious injury arising from explosions and fires in the mines (see Old Ben Coal Corp., 1 FMSHRC 1954 (1979)).

Consistent with this broad policy to protect the health and safety of miners, the Commission has further defined the contours of this standard. For example, in Old Ben Coal Corporation, 2 FMSHRC 2806 (1980), the Commission ruled that an accumulation under 30 C.F.R. 75.400 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 fire or explosion if an ignition source were present." The Commission also noted that the actual or probable presence of an ignition source is not an element of the violation. So long as an accumulation of combustible materials exists, there is a violation of both section 304(a) and 30 C.F.R. 75400. Old Ben Coal Corporation, 1 FMSHRC 1954 (1979)

Under these principles, it is clear that a violation of 30 C.F.R. 75.400 occurred in this case.

The standard by its terms applies to "coal dust . . . loose coal and other combustible materials" (30 C.F.R. 75.400, emphasis added). Inspector Palmer visually identified the coal fines as small particles of coal, too large to be considered coal dust, yet too small to be classified as loose coal. It was, nevertheless, an accumulation of coal. Therefore, under the standard, Respondent was not permitted to store or allow the coal fines to accumulate in an active working of the mine.

The fact that the center of the accumulation was wet does not preclude a finding of a violation under this standard, because water does not inert coal. In the event of a mine fire, the heat from the flames could dry out the wet portions of the coal, and thus provide additional fuel for the fire. Water on the coal would only slow down the burning process; it would not make the coal incombustible. Furthermore, only a part of the accumulation was wet. The outer edges of the fines had begun to dry out. According to Palmer, the edges of the accumulation were dry enough to intensify an existing mine fire and could possibly cause a fire if an ignition source were close by. In a somewhat similar case, Judge James Broderick found a violation of 30 C.F.R. 75.400 even where the accumulations were so wet that they could not be shoveled, United States Steel Mining, Inc., 5 FMSHRC 1873 (1983). In that case, rock dust had to be applied to soak up the water before the accumulation could be removed. Despite that fact, Judge Broderick found that there was an accumulation of combustible material in violation of 30 C.F.R. 75.400. In the instant case, there was no such difficulty removing the coal fines, and only a portion had to be bucketed out.

The fact that Eastern's sample of the accumulation showed approximately a 64% incombustible content is no defense to the charge. First, the combustible content of the accumulation is not relevant to 30 C.F.R. 75.400. That section concerns the accumulation of coal dust, loose coal and other combustible materials in the active workings of a mine. It does not address the combustible content of any particular materials. Section 75.403 does address this issue as it relates to permissible amounts of rock dusting in particular areas of the mine. But this case involves an accumulation of coal fines left in a crosscut for over two weeks, not an issue whether the roof, ribs and floor were sufficiently rock-dusted to meet permissible limits.

Second, the sample taken is not representative of the accumulation, because it was not taken until the fines, both wet and dry, had been placed on the belt line and mixed, thereby changing its previous separate consistency.

I find that this is a serious violation. With an energized belt line running in close proximity to the coal fines, the arcing or sparking from a severed power cable or a stuck roller on the belt line could be a sufficient ignition source to cause an explosion or fire in the area. The accumulation of coal fines could intensify a fire or explosion and could possibly cause a fire if there was an ignition source close by. As mentioned, the fact that some of the coal fines were wet did not make the accumulation incombustible because water does not render coal inert, and because the outer edges of the accumulation were only damp or dry.

Respondent was negligent in storing and leaving the accumulation in the mine, because by the exercise of reasonable care it could have prevented the violation. Respondent contends that the material was stored in No. 4 crosscut because, when it was first discovered (February 3, 1983) the belt had already been dismantled, and "material could not be placed immediately in the belt and taken out of the mine" (Respondent's Brief, p. 4). However, when the belt was assembled and running again by February 8, the accumulation could have been removed from the mine but was not removed. Respondent contends that the material was left there because it was so wet that it presented no hazard, and the belt foreman was keeping an eye on it so that when it dried out it would be promptly removed. This vague procedure of "keeping an eye on" an accumulation of coal fines is not permitted by the safety standard. The standard proscribes the accumulation of combustible material in the

active workings of a mine. Wet coal is combustible, because a fire can dry out the moisture and then iguite the coal. Moreover, a substantial part of this accumulation was only damp or dry and was thus more readily combustible than the wet part.

The parties have stipulated as to the rest of the six statutory criteria for assessing a civil penalty, that is: the size of the operator (large) and the mine (large); whether a penalty will adversely affect Eastern's ability to remain in business (no); whether the condition cited was timely abated in good faith (yes); and Eastern's history of previous violations (903 paid violations amounting to $106,409).

I conclude that special findings in a section 104(d)(2) order ("significant and substantial" or "unwarrantable") are not reviewable in a civil penalty proceeding. However, based on the findings as to negligence and gravity, above, I would affirm the inspector's findings that the violation was "significant and substantial" and "unwarrantable" if I were reviewing those allegations of the order.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this proceeding.

2. On February 18, 1983, Respondent violated 30 C.F.R. 75.400 as alleged in the "Condition or Practive" part of MSHA's section 104(d)(2) Order No. 2115661.

3. Considering the criteria for assessing a civil penalty under section 110(i) of the Act, Respondent is ASSESSED a civil penalty of $305 for the above violation.

ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay a civil penalty of $305 within 30 days of this Decision.

William Fauver
Administrative Law Judge