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SOL (MSHA) V. CONSOLIDATION COAL CO.
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

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

v.

CONSOLIDATION COAL COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. WEVA 88-139
A.C. No. 46-01867-03739

Blacksville No. 1 Mine

Docket No. PENN 88-144
A.C. No. 36-04281-03616

Dilworth Mine

DECISION

Appearances: Covette Rooney, Esq., Office of the Solicitor,
Department of Labor, Philadelphia, Pennsylvania,
for the Secretary;
Michael R. Peelish, Esq., Consolidation Coal Company,
Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Weisberger

Statement of the Cases

In these cases the Secretary (Petitioner) seeks civil penalties for alleged violations by the Operator (Respondent) of 30 C.F.R. 75.400. Pursuant to notice, these cases were heard in Pittsburgh, Pennsylvania, on August 23, 1988. In Docket No. WEVA 88-139, James D. Underwood, Raymond Ash, and James E. Bowman testified for Petitioner and John Weber, Robert W. Gross, and Carl Steven Casteel testified for Respondent. In Docket No. PENN 88-144, James Samuel Conrad, Jr., and Edward Daniel Yankovich, Sr. testified for Petitioner and Steven Wolfe, Walter Joseph Malesky, and John Leo Weiss testified for Respondent.

At the hearing, on Docket No. WEVA 88-139 at the conclusion of Petitioner's case Respondent made a motion to dismiss which after argument was denied. Petitioner filed its Post Trial Memorandum and Proposed Findings of Fact on November 14, 1988 and Respondent filed its Post Hearing Brief on November 9, 1988. Time was reserved for the filing of Reply Briefs but none were filed.

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Docket No. WEVA 88A139

Stipulations

1. The Blacksville No. 1 Mine is owned and operated by Respondent, Consolidation Coal Company.

2. The Blacksville No. 1 Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. This administrative law judge has jurisdiction over these proceedings.

4. The subject Order was properly served by a duly authorized representative of the Secretary of Labor upon an agent of the Respondent at the dates, times, and places stated therein, and may be admitted into evidence for the purpose of establishing its issuance, and not for the truthfulness or relevancy of any statements asserted therein.

5. The assessment of a civil penalty in this proceeding will not affect Respondent's ability to continue in business.

6. The Operator's history of previous violations in total was 478 violations over 554 inspection days; 48 of these violations were for violations of 30 C.F.R. 75.400 (7 of which were section 104(d)(2) Orders).

7. The Operator's size is as follows:

a. Blacksville No. 1 Mine employees approximately 241 employees.

b. Daily production of Blacksville No. 1 Mine equals approximately between 6,500 and 7,000 tons. Annual production equals approximately 1,500,000 tons.

c. Consolidation Coal Company operates approximately 30 mines.

d. The annual production of all Respondent's mines is approximately 52.5 million tons.

e. The annual dollar volume of sales by the Respondent for 1988 will not be released by the Respondent.

f. E.I. DuPont de Nemours and Company is the parent company, Consolidation Coal Company is a wholly-owned subsidiary.

8. The Operator abated the cited condition immediately. The Order was terminated at 11:55 a.m. on October 23, 1988.

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9. Approximately seven miners were exposed to the cited condition.

10. A comparison of the fatality and disabling injury frequency rates for the mine and for the Operator's operation overall with those of the industry are as follows:

a. Blacksville No. 1 Mine

	1986	Rate	F - Fatel NFDL - No Fatel Days lost NDL - No Days Lost
	0 - F	0	
	13 - NFDL	5.16	
	4 - NDL	1.59	
Total	17	6.75	
	1987	Rate	
	0 - F	0	
	41 - NFDL	15.34	
	3 - NDL	1.12	
Total	44	16.46	

1st Quarter 1988

		Rate
	0 - F	11.38
	8 - NFDL	1.42
	1 - NDL	0
Total	9	12.81

b. Consolidation Coal Company

	1988	Rate
	9 - F	.09
	309 - NFDL	3.23
	142 - NDL	1.49
Total	460	4.81
	1987	Rate
	2 - F	.02
	680 - NFDL	7.20
	169 - NDL	1.79
Total	851	9.01

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Ist Quarter 1988	Rate
0 - F	0
177 - NFDL	7.94
31 - NDL	1.39
Total 208	9.33

c. Nationwide

1986	Rate
84 - F	.05
9,165 - NFDL	5.70
2,696 - NDL	1.68
Total 11,945	7.43

1987	Rate
58 - F	.04
11,538 - NFDL	7.81
3,867 - NDL	2.62
Total 15,463	10.46

1st Quarter 1988	Rate
10 - F	.03
3,102 - NFDL	8.64
983 - NDL	2.74
Total 4,095	11.40

11. The Parties stipulate that there had been on clean intervening inspections of the entire mine between the date of the instant violation and the previously issued order. Thus, the mine, at that time, was on a 104(d) chain. (Sic.)

12. The Parties stipulate the authenticity of their exhibits, but not to the truth or relevance of the matters asserted therein.

Findings of Fact and Conclusions of Law

I.

Order No. 2943442

James D. Underwood, an inspector for MSHA, testified that in visiting Respondent's Blacksville No. 1 Mine on the morning October 23, 1987, in the P6 Section he observed float coal dust

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deposited on the roof in the third entry in the areas outby the portal bus station. He continued to walk in the area and observed coal dust further outby in this entry and also in crosscut 25 between entries 3 and 4 and crosscut 26 between entries 3 and 2. (The area he observed coal dust is shaded in red on Government Exhibit C.) Underwood described the color of the dust as "dark" and closer to black than gray. He said that the darkest area was in the crosscut 26 between the 2nd and 3rd entries. He said that after abatement with rock dust the areas in question became white in color. Underwood's testimony was corroborated by James E. Bowman an employee of Respondent, who as representative of the miners accompanied Underwood on his inspection on October 23. Bowman indicated that in the areas outlined in red on Government Exhibit C, he saw coal dust that he described as "black."

In arguing that it did not allow any coal dust to accumulate in the areas cited by Underwood, Respondent, in essence, refers to the fact that on the day prior to Underwood's inspection, MSHA Inspectors conducted an intensified Triple A Inspection, walked through the area in question, and did not issued any citations for violation for section 75.400, supra. In this connection, Raymond Ash, a MSHA supervisor, indicated that, in essence, when he walked though the area in question there were accumulations of float dust, but the accumulations "weren't that bad" (Tr. 65). He said that the whole section was rock dusted in a fashion that was "pretty well within standards" (Tr. 65). He said, in essence, to the best of his recollection there was nothing outstanding about the section, and it was not either a very bad condition or a very good condition. He further said the conditions were not bad enough to issue a citation.

John Weber, a mine escort employed by Respondent, testified that coal dust is black, and that when he observed the areas in question on October 23, along with Underwood, they were not black, but were "medium grey" in color (Tr. 102). (sic.) He indicated that the color was essentially the same as was observed the day before. Robert W. Gross, Respondent's safety supervisor, indicated that when he observed the area, on October 23, before the alleged violation was abated, the material that he observed was between light gray to medium gray in color. He said that in his opinion there was no accumulation of coal dust. Carl Steven Casteel, Respondent's section foreman, was asked whether on October 23, when he walked through the cited area if there was float dust present. He stated that he did not see anything not acceptable and said that the color of the material there was gray.

According to Gross when the area in question was initially mined it was rock dusted and rock dust is white. Gross indicated that with dampness rock dust becomes "off white," (Tr. 132) and described the area in question as damp. However, he indicated that he felt the material in question, but he did not describe what it felt like. He was asked if he recalled whether the accumulations were wet or dry, and he said "It was October, they're not going to be what be call wet, they would be damp" (TR. 136). Thus his statement that it was "damp," appears thus to be based not upon his personal knowledge, but upon his opinion, based on the time of year of the alleged violation. On the other hand, when Underwood was asked how he would classify the area, he described it as a dry area.

Accordingly, I cannot find that it had been established that the area in question was damp. Thus, I cannot find that the material in question, rock dust, was made dark by dampness.

Underwood in his testimony described the material in question as being dark and closer to black than gray. His testimony was corroborated by Bowman. Weber although describing the material in question as being medium gray conceded that the area in question although having a range of colors was not as good as the rest of the section which was white. In the same fashion although Gross indicated that the material in question was between light gray to medium gray, he described the material in the crosscut 26 between the 2nd and 3rd entries, and the material in the area outby the power center in Entry No. 3 to be a little darker than the rest of the area. Also Casteel described the material in the cited area as being gray. In contrast the material outside the cited areas was described as being a lighter gray. Based upon all of the above, I conclude that Respondent, in the cited area, had allowed some coal dust to accumulate and had not cleaned it up when cited by Underwood. As such, I find that a violation of 75.400, supra, has occurred.

II.

According to Underwood, the violation herein by Respondent resulted from its unwarrantable failure inasmuch as the cited area is the entry to the P6 Section and as such all supervisory personnel would walk though the area on a daily bases to get to the working section. As such, in essence, Underwood maintained that these personnel should have observed the condition by making an adequate inspection and should have cleaned it up. In this connection it was Underwood's opinion that the coal dust in question had accumulated when the area was originally cut, and in his opinion had been there for a week.

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In the recent case of Emery Mining Corporation, 9 FMSHRC 1997 (December 1987), the Commission held that "unwarrantable failure," is more than ordinary negligence and requires "aggravated conduct." I find that Underwood did not refer to any facts to support his opinion that the violating condition had existed for a week. Indeed, he indicated on cross-examination, in essence, that the condition that he observed could develop in minutes. Also Weber was present the day prior to Underwood's inspection, when he accompanied four MSHA Inspector, who walked throughout the area and did not issue any violations for allowing any coal dust to accumulate. Ash, who was present during this examination, indicated in his opinion that the rock dusting he had observed "pretty well" met their standards and described the accumulation of coal dust as "not that bad." I thus find that Respondent did not act with more than ordinary negligence when it did not clean up a condition that was observed the day before, and not cited, by four MSHA Inspectors. According, I cannot find that the violation herein resulted from Respondent's unwarrantable failure.

III.

According to Underwood the violation herein should be considered significant and substantial, because arcing off a energized trolley wire in the area could have ignited the coal dust. Also a 7200 volt wire and power center were both in the area and according to Underwood "Anything could have happened" to them (Tr. 29), and "it could have intensified it with the float coal dust accumulation" (Tr. 24). Underwood further maintained that any ignition would be reasonably likely to cause serious injuries to the crew of seven working inby in the area. However, crosscut 26, between entries 2 and 3, described by Underwood as the darkest area in question contained neither a trolley wire nor a 7200 volt cable. Also, although Underwood, in essence, testified that the presence of the coal dust was a dangerous situation if anything would "happen" (Tr. 29) to the 7200 volt cable, this event seems unlikely due to Underwood's having conceded under cross-examination that the cable was very well insulated. Also the only location of the coal dust that Underwood testified to was on the roof whereas the cable was placed on the left rib. Also it does not appear reasonably likely that the coal dust in question would contribute to any hazard occasioned by a malfunction of the power center, as the power center and its connectors were not within the cited area, and there is no evidence as their distance to the cited area.

Nor does it appear that it was reasonably likely that the presence of coal dust would contribute to the hazard of an ignition occasioned by arcing in the trolley wire. The trolley

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wire did not run at all in the most inby of the two areas cited, and ran for only a portion of the other cited area. In this latter area although the trolley wire was between 3 to 6 inches of the roof, there was an insulated guard between the wire and the roof which hung over the side of the wire and which covered, as agreed to by Underwood, the "majority" of the wire in the area (Tr. 37). According to Underwood approximately 15 feet of the wire was not guarded and arcing, which he agreed was a common occurrence, could occur in that area if there were dust or other obstructions between the arc of the vehicle and the wire. However, he indicated that he did not see any dust on the wire.

Taking all of the above into account, I conclude that it has not been established that there was a reasonable likelihood that the rock dust which had been allowed to accumulate, contributed to the hazard of an ignition or other hazard which would result in an injury of reasonably serious nature. (See, Mathies Coal Company, 6 FMSHRC 1 (January 1984). As such, I conclude that it has not been established that the violation herein was significant and substantial.

In assessing a penalty for the violation found herein, I have taken to account the factors set forth in section 110(i) of the Act as stipulated to by the Parties and adopt them. I also conclude essentially for the reason set forth above, (II., infra) that the Respondent herein acted with a low degree of negligence. Should the accumulation of coal dust herein result in an explosion or ignition, such would result in grave consequences of injury to persons. However, it has not been established that such an event is reasonably likely to occur. As such, I find that the violation herein to be of a low level of gravity. Taking all of the above into account, I conclude that a penalty herein of \$50 is appropriate.

Docket No. PENN 88A144

Stipulations

1. Consolidation Coal Company is the owner and operator of the Dilworth Mine located in Rices Landing, Greene County, Pennsylvania.
2. Consolidation Coal Company and Dilworth Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
3. The Administrative Law Judge has jurisdiction over this case pursuant to Section 105 of the Act.

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4. In the 2 year period prior to November 25, 1987, the Dilworth Mine had an undetermined number of violations of the standard contested in this case, 30 C.F.R. 75.400.

5. The size of the operator is reflected by the following data:

a. The Secretary has no knowledge and therefore cannot stipulate as to the number of employees employed in the Dilworth Mine.

b. The Secretary had no knowledge and therefore cannot stipulate as to the daily production of the Dilworth Mine. Annual production tonnage of the Dilworth Mine is 1,432,626.

c. The Secretary has no knowledge and therefore cannot stipulate as to the number of mines operated by the operator and the total number of miners employed by the operator.

d. The annual production tonnage of all the operator's mines is 41,221,321.

e. Information regarding the annual dollar volume of sales by the operator during 1985 will not be released by the operator.

f. DuPont E.I. De Nemours & Company is the parent company; Consolidation Coal Company is a wholly-owned subsidiary.

6. The violation was abated within a reasonable period of time; the subject area was rerock dusted.

7. Any one miner would be affected or was exposed to the hazard created by the violation.

8. The Operator's history of previous violations in total was 405 violations over 504 inspection days. Seventy-five of these violations were for violations of section 75.400.

9. The Parties stipulate the authenticity of their exhibits, but not to the truth or relevance of the matters asserted therein.

In a telephone conference call on November 30, 1988, the Parties further stipulated that: The Dilworth Mine had not had a clean intervening inspection since the issuance of the previous d(2) order at this mine, and thus was on a (d)(2) chain.

Order No. 2937915

On November 25, 1987, James Samuel Conrad, Jr., a MSHA Inspector, performed a spot inspection of Respondent's Dilworth Mine pursuant to a request of one of Respondent's miners. During the course of this inspection he observed coal dust in the ribs, floor, and belt structure of the 3AD section. He said that with the cap lamp that he was wearing the coal dust appeared to be black, with a reddish tint. He explained that it gets to have such a tint if it is "real black" (Tr. 186). He explained that under the coal dust he was able to see rock dust and that the rock dust accumulated in nooks and crannies of the ribs. He said that on the belt structures he was able to brush the dust off and that at one point he measured the dust with a ruler and it was a half inch deep.

Edward Daniel Yankovich, Sr., a miner who accompanied Conrad as a walkaround, stated that the area in question was completely covered with black coal dust, including the roof, ribs, floor, and belt structure. He estimated the depth as 2 to 3 inches.

Walter Joseph Malesky, Respondent's belt foreman, who examined the area in question on November 25, 1987, in a preshift examination, at approximately 6:45 a.m., indicated that in the front-end of the belt there was an area that was starting to get dark in color. He described the color as dark gray to light black and provided his opinion that it should have been rock dusted in the next shift. Steven Wolfe, Respondent's construction boss, testified that the floor of the area in question was darker than the ribs and contained rock and coal dust which was the normal condition at the mine. He indicated that in general the color was dark gray. He also opined that when he arrived in the section on November 25, it needed rock dusting. John Leo Weiss, Respondent's assistant foreman, stated that when he walked the length of the area in question at 9:15 a.m. on November 25, he observed coal dust on the belt and material on the bottom that was dark in color. He described the ribs as having some float dust that was gray in color. He also indicated he believed the area needed to be rock dusted. Wolfe indicated that the coal dust was thin coated and not "thick" and Weiss indicated that the depth of the coal dust was between a quarter of inch to a half inch, but in most areas there was a light coating. He provided his opinion that the areas in question needed to be rock dusted. He said that the ribs were gray and not dark, the bottom was dark gray, with small spots of black on the bottom of the left rib and indicated that wetness turns the material dark.

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Based upon the above, I find that at the time in question Respondent had not cleaned up coal dust in the area in question and had allowed it to accumulate. In this connection I accorded more weight to the testimony of Conrad as to the depth of the coal dust inasmuch as he measured it with a ruler. As such I find that the citation was properly issued and Respondent herein did violate 30 C.F.R. 75.400 as alleged in the citation.

II.

According to Conrad the belt line in question has a history of coal dust. According to Wolfe it probably took a shift for this dust to develop. At approximately 6:45 a.m. on November 25, Walter Joseph Malesky, Respondent's belt foreman, in a preshift examination of the belt in question noticed that the area was starting to get dark in color and opined that it should be rock dusted in the next shift. He noted this condition in writing in the examiner's report of daily inspection for that date. Malesky indicated that he observed the coal dust as being dark gray to light black, and when asked what the depth of the material was indicated that he did not think that it was "any inches" (Tr. 274). He said that some of the material was part dry and some of it was damp, and that he made a ball of the mud which assisted him in determining that in his opinion it was not dangerous. He indicated upon cross-examination that he had the authority to stop the belt and assign men to abate the condition. He did neither, but in addition to the entry of the condition in the daily inspection report at 7:50 a.m., he informed Robert Burgh, Ken Dudics, the belt coordinator, and the Assistant Foreman Mark Watkins of the need to rock dust. Wolfe testified that he was informed at about 8:00 a.m. by Mark Watkins that the belt in question needed dusting. He indicated that he went to the bore hole to obtain the rock duster, but that this equipment had a hose that was plugged up and that it took between 25 and 30 minutes to change the equipment. The rock duster was then filled up with 12 tons of dust which took about 30 minutes and was then transported to the area in question, but that on the way it was derailed. He indicated that it took another 15 to 20 minutes from the derailling to transport the rock duster to the section.

It appears to be Petitioner's position, as articulated by Conrad, that Respondent herein was negligent to a high degree in that it was aware of the fact that the area in question needed rock dusting, but did not assign anyone to immediately correct the condition. According to Conrad, Respondent should not have relied on its abatement by using a bulk duster as this equipment

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could fail, and instead should have either assigned men to distribute dust manually or to drag the area. He indicated that it could have taken two men to perform this work in approximately 10 to 15 minutes. Conrad indicated that dragging or hand dusting might have been more "expedient" than using a duster (Tr. 229). I note that according to Wolfe, bag or hand dusting is used in areas of approximately 100 feet whereas on November 25, the day of the citation he was informed that area to be dusted was approximately 300 feet. I thus find that there was not aggravated conduct in Respondent's condition to eliminate the hazard of rock dust with the use of a rock duster as opposed to assigning men to hand dust or drag. It appears that a decision as to the method to be used was a matter of judgment. As such any delays in cleaning the coal dust occasioned by the breakdown and derailment of the rock duster is clearly not evidence of aggravated conduct. Also although Malesky did not either shut off the belt or assign men to rock dust the area in question, and did not notify other management officials of the existence of this condition until approximately 1 hour after he observed it, I find that any maleficence in this regard to have been a matter of negligence rather than "aggravated conduct," or serious lack of reasonable care (Emery Mining Co., supra, c.f. U.S. Steel Corp., 6 FMSHRC 1423 (June 1984)), inasmuch as it was based solely upon an error of judgment. In this connection, I note that Malesky, in supporting his not shutting off the belt or ordering the men to hand dust, indicated that he did not believe that the condition was dangerous. In this connection he noted that part of the material was dry, but that some of it was damp. The fact that he made a ball of the material assisted him in determining that it was not dangerous. He also had indicated that when asked with regard to the depth of the material that he did not think that it was "any inches" (Tr. 274). Thus, I find that Respondent's conduct herein was not aggravated conduct, did not rise above near negligence, and thus the violation herein cannot be characterized as resulting from Respondent unwarrantable failure (see Emery Mining, supra). (Footnote 1)

III.

According to Conrad, and not contested by Respondent's witnesses, coal dust is a major contributor to explosion and to the severity of fires. He described coal dust as being very volatile. At the time of the citation the belt was running and according to Conrad a running belt could be knocked out of line by a falling rock causing the belt line to rub against various structures causing heat. He also indicated that the belt rollers could malfunction and generate heat, and that the electrical motors were of an open type and could blow up or short out. He said that all these events are potentially ignition sources which would be enhanced by the coal dust in the area. In this connection, Conrad indicated that all the dust that he touched was dry. Areas of the floor were described as having either puddles or being damp. However, according to Conrad the coal that lies on top of the water was dry. In this connection, it is noted that Wiess indicated on cross-examination that coal dust on top of water can still ignite. I note also that Yankovich indicated that he stirred the coal dust with his finger and described it as dry. In contrast Wolfe testified that there was real moist muck on the bottom of the area which contained rock and coal dust, and this condition is normal at the mine. Malesky who indicated that he made a ball of the mud described some of the area as wet, some damp, and "part of it was dry" (Tr. 273).

Based on the testimony of Conrad and Yankovich that the dust they touched was dry, I find that the area in question contained coal dust that was dry. I find, based on Conrad's measurements, that the dust was at least 1/2 inches deep in some places. In addition, I note Conrad's testimony that on the day of the citation the area in question in the belt line had two tenth of one percent of methane. Taking all these factors into account, I conclude that the coal dust in question contributed to the hazard of an ignition. According to Conrad should such an ignition or explosion occur it would be reasonably likely to result in an injury of a reasonably serious nature. In this connection he indicated that those fighting the fire, or persons working inby the section, would likely be burned or injured by having inhaled carbon monoxide. Accordingly, based upon all these factors, I conclude that the violation herein was significant and substantial. (Mathies Coal Company, supra.)

IV.

I conclude that the Respondent herein was negligent to a moderately high degree, in that Malesky did not inform any of Respondent's managers of the condition in question until approximately 1 hour after it was observed by him. I further find, as

