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SOL (MSHA) V. METTIKI COAL
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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	CIVIL PENALTY PROCEEDING Docket No. YORK 88-13 A. C. No. 18-00621-03615
v.	Mettiki Mine
METTIKI COAL CORPORATION, RESPONDENT	

DECISION

Appearances: Mark D. Swartz, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Susan E. Chetlin, Esq., Crowell & Moring, Washington, DC, for Respondent.

Before: Judge Weisberger

Statement of the Case

On April 6, 1988, the Secretary (Petitioner) filed a petition for Assessment of Civil Penalty for alleged violations by the Respondent of 30 C.F.R. 75.200, 30 C.F.R. 75.400, 30 C.F.R. 77.205(b), and 30 C.F.R. 77.202. Respondent filed its Answer on May 5, 1988. Subsequent to a Prehearing Order issued May 17, 1988, requiring the Parties to confer for the purposes of discussing settlement, exchange exhibits which may be endorsed at a hearing, and lists of witnesses who may testify, the Parties engaged in prehearing discovery.

Pursuant to notice, the case was scheduled and heard in Pittsburgh, Pennsylvania, on November 15 - 16, 1988. Phillip Martin Wilt, Steven Polce, Stanley A. Martin, Barry Lane Ryan, Thomas Andrew Reed, and Horace Joseph Theriot testified for Petitioner. Timothy Clay Rush, Joseph Eugene Peck, Carl Randall Johnson, Alan B. Smith, William Allen Hartman, Horace Joseph Theriot, and Thomas Andrew Reed testified for Respondent. At the hearing Petitioner indicated that Order No. 2943340 issued on November 9, 1987 was vacated on November 2, 1988, and that Petitioner has withdrawn its petition for assessment of civil penalty with regard to the violation alleged in Order No. 2943340.

Proposed Findings of Fact, Conclusions of Law, and Briefs were filed by Petitioner and Respondent on January 25, 1989. Reply Briefs were filed by Respondent and Petitioner on February 3 and February 6, 1989, respectively.

Both Parties, on January 25, 1989, filed Motions to Correct the hearing Transcript. The Respondent's Motion incorporates all the corrections noted by Petitioner in its Motion, and includes additional corrections. Respondent indicated that Petitioner does not object to Respondent's Motion. Accordingly, these Motions are granted.

Stipulations

The following stipulations were submitted by the Parties at the hearing:

1. The Respondent, Mettiki Coal Corporation, has owned and operated the Mettiki Mine at all times relevant to these proceedings.

2. The Mettiki Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction over these proceedings.

4. The subject orders were properly served by a duly authorized representative of the Secretary of Labor upon authorized agents of the Respondent at the dates, times, and places stated in the orders.

5. The assessment of civil penalties in these proceedings will not affect Respondent's ability to continue in business.

6. The appropriateness of the penalty, if any, to the size of the coal operator's business should be based on the following production tonnage information:

a. That production tonnage of 2,525,216 at the Mettiki Mine in 1986, and

b. Production tonnage of 9,225,921 at all of Respondent's mines in 1986.

7. Mettiki Mine's history of previous violations with respect to the orders in this case is as follows:

With respect to Orders Nos. 2944821 and 2944822, which were issued on November 16, 1987, there is a history of 441 assessed violations in the 24 month period from November 16, 1985

to November 15, 1987, and then with respect to Order No. 2944834, which was issued on December 8, 1987, there is a history of 450 assessed violations in the 24 month period from December 8, 1985 to December 7, 1987.

8. Respondent has demonstrated good faith in abating the violations alleged in Orders Nos. 2944821, 2944822, and 2944834.

9. Mettiki Mine was issued Order No. 2701558 on May 30, 1986. There was no intervening clean inspection from May 30, 1986 through December 8, 1987. Therefore, the Mettiki Mine was on a section 104(d)(2) cycle or chain at all times relevant to these proceedings.

10. On December 8, 1987, the Mettiki Mine was in the 15 working day spot inspection program for methane as specified in section 103(i) of the Act.

11. In terms of specific dates, November 16, 1987, was a Monday; December 8, 1987, was a Tuesday.

12. The Parties stipulated to the authenticity and admissibility of Order Nos. 2944821, 2944822, and 2944834.

Order No. 2944834

Order No. 2944834 issued on December 8, 1987, alleges a violation of 30 C.F.R. 75.400 in that:

> Combustible materials, loose coal, some very fine and dry is accumulated under, and around the drive, and take-up rollers to the B-mains No. 3 conveyor belt, the drive roller had been permitted to turn in the materials, also there is loose coal deposited on the mine floor along and under the bottom belt on the left side beginning at the drive rollers and extending inby to the tail rollers, a distance of approximately 1,000. The bottom belt and rollers had been permitted to turn in the materials in several locations. Also there was fine dry coal accumulated on the two 200 PLO HP energized electrical motors to the conveyor drives. Alan Smith, Company Safety Director, is the responsible person.

Findings of Fact and Discussion

I.

Phillip F. Martin Wilt, a MSHA Coal Inspector, testified, in essence, that when he inspected Respondent's Mettiki Mine on December 8, 1987, at approximately 8:20 a.m., he observed damp

coal along the belt line for approximately 1000 continuous feet. He indicated that he also observed loose dry fine crushed coal at an estimated depth of 2 to 6 inches in the area of the take up rollers, and around the drive. Wilt was accompanied by Barry Lane Ryan, a MSHA Field Office Supervisor, who corroborated Wilt's testimony with regard to the depth of the coal dust of approximately 2 to 6 inches at the base of the motors. In contrast, Joseph Eugene Peck, Respondent's Shift Supervisor, indicated that there was "some small accumulations" of coal by the motor, which he indicated was maybe a couple of inches (Tr. 209). He also indicated that in some places the accumulation was to a depth of a few inches, and there were possibly 3 to 4 inches under the rollers. He described the material in the belt areas as containing rocks and large material. Alan B. Smith, Respondent's Safety Director, indicated that on December 8, 1987, there was coal accumulation on the motors, drive rollers, and under the take up unit.

Based upon the above testimony, I conclude that when observed by Wilt, on the morning of December 8, 1987, there was indeed an accumulation of coal dust and loose coal which had not been cleaned up in the area of the No. 3 belt, which is an "active workings." As such, I conclude that it has been established that Respondent herein violated 30 C.F.R. 75.400.

II.

In essence, according to Wilt, the coal that had accumulated in the belt area was damp i.e., containing moisture, but not saturated. The accumulation in the area of the drive and the take-up rollers was described as having a fine texture and being loose and dry. Wilt's testimony in this regard was essentially corroborated by Ryan, who also indicated that he observed coal dust in the air as the consequence of persons kicking it up while walking. Both Wilt and Ryan indicated essentially that, based upon their experience, dry fine coal dust can be combustible. According to Wilt, the belt bottom had been turning in the material, and the belt rollers could cause friction rubbing against the coal dust possibly causing it to ignite. Wilt also indicated that there was an electrical current in the lighting system above the belt starter box, and that a possible short in a motor or electrical system could cause an ignition. He indicated that if the coal would ignite there would be a fire and that the resulting smoke could cause injuries. It was also Ryan's uncontradicted testimony that the mine in question liberates more than 2 million cubic feet of methane in a 24 hour period.

Joseph Eugene Peck, Respondent's Shift Supervisor, testified that he touched the material along the belts as he gathered some of the rocks by hand. He indicated that some of the material was probably wet enough so that "possibly" water could have been squeezed out of it (Tr. 215). He said some of the material was

damp i.e., not absolutely wet but not dry. Carl Randall Johnson, Respondent's Section Foreman, indicated, in essence, that in the take up area that he cleaned, the material that he shoveled was wet and that it stuck to the shovel. He also described the material under the rollers as being wet and that it soaked into the clothing although he did not touch it. Alan B. Smith, Respondent's Safety Director, indicated that he saw the Inspector put his stick in some of the coal that had accumulated, and there was wetness on it. Essentially he described the area in question as very damp to wet, but indicated that the drive area was drier than the balance of the area. Based on the above, I find the testimony of Wilt and Ryan to be uncontradicted in that in the area of the drive and take-up rollers, the accumulated coal dust was dry. I accept the description of the material as contained in the testimony of Wilt and Ryan inasmuch as they both touched the material at these areas. Although the material in the area of the belt was clearly damp, and Johnson and Peck described some of the material as wet, I accept the testimony of Wilt and Ryan that the material was not wet or saturated, inasmuch as both testified that they actually touched the material. Furthermore, I find persuasive Ryan's testimony, as it was not contradicted, that in order for the water content of coal dust to be a barrier to an explosion, the coal dust must have the "consistency of catsup" (Tr. 126). He specifically indicated that none of the coal along the left side of the belt had this consistency, and none of Respondent's witnesses adduced testimony to establish that any of the material in question had such a consistency.

Accordingly, I conclude that on the date in question there had been an accumulation of dry coal dust. Based on the uncontradicted testimony of Wilt and Ryan, I conclude that dry fine coal dust can be combustible. Smith indicated essentially that the hazard of a fire would be somewhat negated by the facts that the cables in proximity to the accumulated coal dust were insulated and grounded, circuit breakers were in operation, the motors were grounded, a fire suppresser system was on the belt line, and the belting was MSHA-approved fire resistant. Respondent also cites the lack of evidence of methane at the time, and the fact that the belts were not running at the time of the inspection. However, no evidence was adduced which contradicted Wilt's statement that the belt bottom had been turning in the accumulated material, and the belt roller could cause friction which could serve as an ignition source for the accumulated dry coal dust.(FOOTNOTE 1) I also note that although Smith

indicated he had seen "numerous" methane spot inspections at the A & B Portals, in which methane was not detected, none of Respondent's witnesses contradicted Ryan's statement with regard to fact that the mine in question liberates 2 million cubic feet of methane over a 24 hour period. Also, there was no contradiction of the testimony of Ryan and Wilt that should a fire occur, it would result in serious injuries due to the presence of smoke. Employees exposed to this hazard would be those conducting examinations in the area and those assigned to clean the area. Taking these factors into account, I conclude that the violation herein contributed to the hazard of an explosion or fire, with a reasonable likelihood of this hazard resulting in injuries of a reasonably serious nature. As such, the violation herein was significant and substantial.(FOOTNOTE 2) (Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984)). I do not find Mettiki Coal Corp., 8 FMSHRC 1768, (November 1986), cited by Respondent in its Brief, to be relevant to the case at bar. In Mettiki, supra, Judge Melick stated that he could not find the violation therein to be significant and substantial in light of the inspectors admission that "there was little likelihood of an explosion." (8 FMSHRC 1768, supra at 1770). In contrast, in the case at bar, Wilt opined that the fine texture of the coal around the drive and take up rollers could have been ignited by friction.

III.

It is Petitioner's position that the violation herein resulted from Respondent's unwarrantable failure. In this connection, Wilt testified, in essence, that the accumulation was easily observed. Wilt's testimony in this regard was corroborated by Ryan, who termed the condition "very obvious," (Tr. 127). Further, Wilt testified that he felt the accumulation around the motors and it felt warm to the touch, and was "baked like" (Tr. 43). Accordingly, he concluded that the accumulation had been in existence "for a period of time" (Tr. 42), to permit a drying out process. Smith, in essence, opined that it would take 45 minutes to an hour to dry coal out on the motors. I do not place much weight on Smith's opinion in this regard, as although he had touched the coal, he did not describe its dryness. In contrast, Wilt handled the coal and described how it felt (Tr. 43).

According to Polce, Rush, and Smith, due to the mining conditions around the date in question, water from the coal seam being mined frequently ran back along the belt knocking coal off the belt. According to Peck, the violative condition looked recent, and due to water from the longwall, accumulations can occur in a matter of minutes. I give more weight to the testimony of Wilt, as his testimony was not contradicted, with regard to the conditions specifically at the drive and take up rollers. In addition, I find his description credible, inasmuch as he actually had touched the material. Also, his testimony, that the observed condition was obvious, as corroborated by Ryan, has not been contradicted. Also, Smith, while indicating that the accumulation on the belt line could have occurred in 5 or 10 minutes, opined that the coal in the belt area was there for several hours, and on the motors for 45 minutes to an hour. Also, Government Exhibit 2, EXAMINATION OF BELT CONVEYORS, indicates that on all three shifts on the day prior to the date of the inspection, it was reported that on the belt in question the head and take up "needs cleaned and dusted." (Sic.) In this connection, I find purely speculative testimony by Polce and Stanley A. Martin, Respondent's Fire Boss, that, in essence, the reported conditions could have been cleaned up and then reoccurred. I do not find support in the record for Respondent's position, as articulated in its Post Hearing Brief, that the cited condition was extraordinary and occurred after the preshift and last regularly scheduled cleanup. None of Respondent's witnesses presented any testimony, based on personal observations, as to when the accumulations in question actually occurred, and as to whether the conditions cited in the EXAMINATION OF BELT CONVEYORS on the day prior to the day in question, were actually cleaned up. Smith indicated that the conditions he observed on the day in question were "much more severe" than when recorded in the EXAMINATION OF BELT CONVEYORS (Tr. 251). I do not place much weight on this conclusion, as there is no evidence that Smith had personal knowledge of the nature of the conditions cited in the EXAMINATION OF BELT CONVEYORS. Similarly, Timothy Clay Rush, a miner engaged by Respondent who fire bosses the second portion of the shift, indicated, in essence, that the condition described in the Order in question is not consistent with what was reported in the preshift examination. I do not find this probative in establishing that the violative condition occurred subsequent to, and was in excess of, the condition found on preshift examinations, as his testimony does not establish he had personal knowledge or recollection of the conditions existing at the preshift examination (Tr. 173). Nor does it appear that he had any personal knowledge of the conditions existing at the time of the Order in question. Inasmuch as the evidence fails to establish that the cited condition occurred after one preshift examination and before another, as asserted by Respondent in its Brief, I find that the

case at bar, is distinguished from Freeman Coal Mining Co., 3 IBMA 439 (1979), and Target Industries Inc., 10 FMSHRC 161 (1988), cited by Respondent. In both Target Industries supra, and Freeman Coal Mining Co., supra, the violative conditions occurred after one preshift examination and before another.

I thus find, based upon all the above, that the accumulation of coal dust herein was obvious, and in existence for a time period longer than that immediately prior to the inspection. I also find that the coal accumulation, in the area in question, was reported to management on three successive shifts immediately prior to the shift in question in which the violation was observed. I also find there was insufficient evidence to conclude that Respondent either cleaned up the reported accumulative coal or made any effort to do so. Based upon all the above, I conclude that the violation herein resulted from Respondent's aggravated conduct and thus constitutes an unwarrantable failure (See, Emery Mining Corp., 9 FMSHRC 1197 (December 1987)).

IV.

The testimony of Smith and Respondent's other employees who testified, would appear to indicate that the accumulation of coal herein was not caused by Respondent's negligence, but rather inherent in the normal mining conditions, and operations on the date in question. However, based on the rationale set forth in III. above, infra, I conclude that the Respondent herein was negligent to a high degree in not clearing the obvious accumulation once it occurred. Taking into account the presence of dry fine coal dust, as testified to by Wilt and Ryan, in the area of the rollers and drive, along with the possibility of friction from the belt rollers, and the history of methane production in the mine as testified to by Ryan, I conclude that the ignition of the coal dust was likely, and consequently find the gravity of the violation herein to be moderately high. Taking these matters into account, as well as the remaining factors in section 110(i) of the Act, as stipulated to by the Parties, I conclude that a civil penalty of $1000 is proper for the violation found herein.

Order No. 2944821

Order No. 2944821 alleges as follows:

> The cat-walk leading from the ground level to the top of the raw coal silo which is a distance of approximately 500 feet in length is not being kept free of stumbling and slipping hazards, because with the exception of two isolated areas of distances of approximately 20 feet each, the entire length of the walkway

is obstructed with loose coal and rock averaging from 2 to 6 inches deep and 20 to 24 inches wide. Jody Theriot, company, and miner representative is the responsible person.

I.

On November 16, 1987, at approximately 8:55 a.m., Wilt, in the presence of Horace Joseph Theriot, Respondent's Safety Coordinator, climbed up to a catwalk that ran approximately 700 feet connecting a metal building to a coal silo and providing access to the top of the coal silo. He observed that, with the exception of two isolated areas of approximately 20 feet in length, the balance of the approximately 700 foot long by 24 inch wide catwalk was generally covered with loose coal and rocks. He described the catwalk as being totally obstructed, with the exception of the two isolated areas, and indicated that the depth of the material was measured to be an average of 2 to 6 inches. In essence, he testified that although he could have walked on the material without a rail, he used a rail as he considered the material on the catwalk to constitute a stumbling hazard as it would tend to turn one's feet when walking on it.

Thomas Andrew Reed, an employee of Respondent, who has the responsibility for clearing the middle portion of the catwalk, testified, in essence, that when he was on the catwalk at approximately 1 to 2 a.m., on November 16, 1987, there were only some lumps on the catwalk, but not a lot of material. He also indicated that when he left his shift, there was no coal in the approximately 400 feet that he had cleaned. Theriot, who was with Wilt at the time of the inspection, indicated that he did not have any difficulty walking on the catwalk. Also, William Allen Hartman, an employee of Respondent, who was cleaning the catwalk at approximately 9:30 in the morning on November 16, indicated that he could walk on the material on the catwalk.

Although there was a vertical ladder providing access to the silo, there was no evidence contradicting Wilt's testimony that the catwalk in question does provide access to the top of the silo. According to Wilt's uncontradicted testimony, an electrical motor and a gear reduction unit are located in an enclosed area at the top of the silo. As such, the catwalk would be a means of an access to this area to service and repair such equipment. Also, it appears from Wilt's testimony that the belt line is parallel to the catwalk at the same level, and without any separation between them. Respondents's employees, who clean and grease the belt line would apparently have access to it by way of the catwalk. Also, William Allen Hartman, who was responsible for cleaning the uppermost portion of the catwalk, would have to walk along the catwalk from the steps to reach his area of responsibility. Therefore, I find that the catwalk is a travel way or a means of access to areas

where persons are required to travel or work, and as such is within the purview of 30 C.F.R. 77.205(b). Although Reed indicated, in essence, that there was not a lot of coal on the catwalk when he observed it at 1 or 2 a.m., on November 16, I find that, essentially, Wilt's detailed description of the extent, depth, and description of the material that had accumulated on the catwalk, was not contradicted. Although essentially Reed, Theriot, and Hartman indicated that they did not have any difficulty walking on the material, I conclude, based upon Wilt's description of the material, its extent, and depth, along with evidence of the slope of the catwalk, as depicted in Exhibit R-2, that the accumulated coal and rocks constituted a stumbling hazard. As such, I conclude that Respondent herein did violate 30 C.F.R. 77.205(b).

II.

In essence, Wilt testified that it was his opinion that, taking into account the size and shape of the material that had accumulated on the catwalk, as well as its slope, and considering the difficulty that he himself experienced walking on the catwalk, it was highly likely that the accumulation could contribute to an injury to one person by causing that person to slip and fall, resulting in broken bones, sprains, or lacerations. In contrast, neither Theriot, who walked on the material along with Wilt, nor Reed, who walked on the material a few hours prior to Wilt, nor Hartman, who walked on the material shortly after Wilt, experienced any difficulty walking. Clearly the extensive presence of coal and rock accumulations on the sloped catwalk did present a hazard of stumbling and falling. However, I note that the catwalk had a rail, and Wilt who used the rail in traversing the catwalk did not specifically testify to the degree of hazard when using the rail. Hence, I conclude that it has not been established that the presence of the rail would not have minimized the likelihood of one stumbling or falling. As such, I conclude that, although it was certainly possible for one traversing the catwalk to have stumbled and fallen and suffered a reasonably serious injury, it has not been established that the hazard of falling and suffering a serious injury was reasonably likely to have occurred. (c.f. Mathies Coal Co., supra). As such, I conclude that the violation herein was not significant and substantial. (Mathies Coal Co., supra).

III.

According to Wilt, the extensive amount of material present on the catwalk indicated to him that it had been permitted to continue for "some time" (Tr. 337). He also indicated that he observed two areas on the catwalk that had been cleaned, four shovels, and foot prints in the material on the catwalk above him towards the silo. He thus concluded that Respondent knew of the condition.

Steven Polce, Respondent's employee who has supervisory responsibilities over the catwalk, indicated essentially that three men are assigned to clean a portion of the catwalk, and that he never told them to clean another section aside from their own. William Allen Hartman, who was assigned to clean the upper portion of the catwalk, indicated that when the day shift ended on Friday, November 13, 1987, he walked the catwalk, and it was clean top to bottom. Thomas Andrew Reed, Respondent's employee who is responsible for the middle portion of the catwalk, indicated that on the last shift on Friday, November 13, when he left, his area was "fairly clean" (Tr. 384). (When called as a witness for Respondent, Reed described his areas as "clean" at the end of that shift (Tr. 428)). He also indicated that on the shift from 11 p.m., November 15 to 7 a.m., November 16, he spent 3 1/2 to 4 hours cleaning, but only cleaned his area and when he left there was no coal in his area and the area was clean. He said he told Hartman, who had the responsibility of cleaning on the next shift, that there was a little bit of binder and coal on the catwalk. Reed indicated that, in general, Respondent does not have any policy requiring the catwalk cleaners to call for help to clean up the catwalk, and they are not required to inform management of any coal accumulation on the catwalk when they leave their shift. Reed also indicated that in October/November 1987, the catwalk was covered with material completely 2 to 3 times a week, and that material could accumulate in less than 15 minutes after it was cleaned. (Hartman indicated, in essence, that an accumulation in these conditions could occur in 5 minutes).

I have taken into account Wilt's opinion with regard to the existence of the material for a period of time, but conclude, based on the uncontradicted testimony of Hartman, that in actuality, as observed by him, there was no accumulation of coal on the catwalk at the end of the day shift on Friday, November 13. However, based on Reed's testimony, I conclude that at least as early as the 11 p.m. to 7 a.m shift November 15 to November 16, there was an accumulation of coal and rocks on the catwalk, and that this condition was known to Reed. Inasmuch as Respondent did not have any procedures requiring the belt cleaners to report to management when there was an accumulation of coal they could not clean up, and inasmuch as only one employee per shift was assigned to clean only one third of the catwalk,(FOOTNOTE 3) I conclude

that the existence of the coal accumulation observed by Wilt on the morning of November 16, resulted from Respondent's aggravated conduct. Thus, I conclude that the violation herein was the result of Respondent's unwarrantable failure (See, Emery Mining Corp., supra).

IV.

The extensive presence of coal and rocks to a depth of 2 to 6 inches on the sloped catwalk clearly presented a stumbling hazard. However, due to the presence of a rail, I conclude that the gravity of the violation herein was only moderate. Inasmuch as Respondent did not provide for more than one employee per shift to clear more than one third of the catwalk, and inasmuch as Reed knew of the accumulation of coal in the night shift between November 15 and November 16, I conclude that the failure of Respondent to clean the accumulated coal on the catwalk constituted a high degree of negligence. Taking these factors into account, as well as the remaining statutory factors in section 110(i) of the Act, as stipulated to by the Parties, I conclude that a penalty of $500 is appropriate for the violation found herein.

Order No. 2944822

Order No. 2944822 reads as follows:

> Loose coal, including fine dry coal, and coal dust is accumulated between the top, and bottom moving conveyor belt leading from the mine portal to the top of the raw coal silo, these conditions exist the entire length of the conveyor which is approximately 500 feet in length. The accumulations are such as to permit numerous top rollers and belt to run in the materials, also due to the accumulations several to rollers are frozen and will not turn. Also when the conveyor reaches the ground level near the belt portal there is accumulation of coal from 2 to 5 feet in thickness, for a distance of 60 feet, the distance was measured with a tape rule. Jody Theriot, Company, miner representative is the responsible person.

I.

At approximately 9:05 a.m., on November 16, 1987, Wilt observed coal and coal dust in the pan, which is a structure separating the top and bottom of the belt which runs alongside the catwalk. He described the material in and around the rollers as being fine, dry, and dusty. He said that several of the belt

rollers were turning in the material. He described the material that the belt had been running in as fine, dry, and dusty. In contrast, Reed was asked on cross-examination whether the coal was wet on the night shift of November 15 - 16, and he indicated that he touched it in the process of cleaning and indicated that it was wet. Hartman, who worked on cleaning up the belt on November 16, at approximately 10 to 10:30 a.m., described the coal on the pan line as "definitely wet," (Tr. 440). and said that he did not see coal dust or dry coal on the belt. Also, Theriot, who accompanied Wilt, indicated that he did not see dust in the pan and did not recall dust being there.

I place most weight on Wilt's testimony as to what he actually observed in the specific area of the rollers. Neither Reed nor Hartman, who described the material as being wet, nor Theriot contradicted the testimony of Wilt, as neither of them presented testimony specifically as to the area in and around the rollers. Also, although Hartman indicated that he did not see coal dust or dry coal on the belt, it is noted that he observed this area approximately an hour and a half after it was cited and after clean up had already begun. Thus, based upon Wilt's testimony, I conclude that on approximately 9:05 a.m. on November 16, there was coal dust around the rollers. I accept Wilt's testimony, as it was not contradicted, with regard to the description of the pan, and conclude that it was a structure within the purview of 30 C.F.R. 77.202.

However, in order for a violation of section 77.202, supra, to occur, the coal dust must exist "in dangerous amounts." In The Pittsburgh & Midway Coal Mining Co., 6 FMSHRC 1347 (May 1984), aff'd 8 FMSHRC 4 (January 1986), Commission Judge Broderick interpreted the phrase "in dangerous amounts" as follows: "Whether an accumulation is dangerous depends upon the amount of the accumulation and the existence and location of sources of ignition. The greater the concentration, the more likely it is to be put into suspension and propogate (sic.) an explosion." (Pittsburgh v. Midway Coal Mining Co., supra, at 1349). I adopt this interpretation.

At best, as argued by Petitioner in its Brief, the record contains Wilt's observations as to rollers turning in accumulated materials and rollers being frozen in place by accumulated materials. There is no evidence with regard to the specific amounts of the accumulation such as its color, depth, or measurement of the area it covered. Also the record is devoid of evidence with regard to the location and existence of sources of ignition. Thus I conclude that it has not been established that the coal dust present in the mine existed "in dangerous amounts." As such, it has not been established that a violation of 77.202, supra, occurred, and Order No. 2944822 must accordingly be dismissed.

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ORDER

It is ORDERED that Respondent, within 30 days of this Decision, pay $1,500 as Civil Penalties for the violation found herein. It is further ORDERED that Order No. 2944821 be amended to reflect the fact that the violation therein is not significant and substantial. It is further ORDERED that Order No. 2944822 be DISMISSED.

Avram Weisberger
Administrative Law Judge

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FOOTNOTES START HERE

~FOOTNOTE_ONE

1. On redirect examination Johnson estimated that there were 3 to 4 feet between the rollers and the accumulation of coal. However, I did not place much weight in this testimony as Johnson had previously, on cross-examination, admitted that he did not clean the rollers, and did not see the coal around the drive rollers (Tr. 230).

~FOOTNOTE_TWO

2. In this connection I note that Smith, Respondent's Safety Director, agreed that the violation herein was significant and substantial.

~FOOTNOTE_THREE

3. Hartman indicated that he did help clean other areas, although he did not have any such direct order. Although this action is commendable, it does not exonerate Respondent's conduct in assigning only one employee per shift to clean only one third of the catwalk.