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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

UTAH POWER & LIGHT COMPANY,
CONTESTANT

CONTEST PROCEEDING

v.

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

Docket No. WEST 89-161-R
Order No. 2876489; 3/20/89

Cottonwood Mine
Mine ID 42-01944

DECISION

Appearances: Susan E. Chetlin, Esq., Timothy M. Biddle, Esq.,
Crowell & Moring, Washington, D.C.,
for Contestant;
Robert Cohen, Esq., Office of the Solicitor
U.S. Department of Labor, Arlington, Virginia,
for Respondent.

Before: Judge Morris

This case is before me under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (the "Act"), to challenge the issuance by the Secretary of Labor of an order charging Utah Power & Light Company ("UP&L"), with a violation of the regulatory standard published at 30 C.F.R. 75.400.

After notice to the parties a hearing on the merits was held in Denver, Colorado on April 5, 1989. The parties relied on oral arguments, waived the filing of post-trial briefs and further requested a decision without receiving the transcript of the proceeding.

Summary of the Case

Order No. 2876489, issued on March 20, 1989, involved an alleged violation of 30 C.F.R. 75.400.

The cited regulation provides as follows:

Subpart E - Combustible Materials and Rock Dusting
75.400 Accumulation of combustible materials

[Statutory Provision]

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.

Order No. 2876489 states as follows:

Accumulations of coal fines (first cuttings) was permitted to accumulate along the left rib in the #1 Bleeder entry on the 9th East working section.

The accumulations were behind the line curtain installed on the left side and measured to be 104 feet 6 inches in total length and ranged between 1) 16 inches deep x 16 inches wide starting 40 feet outby the face; 2) 14 inches deep x 26 inches wide 52 feet outby the face; 3) 31 inches deep x 26 inches wide 70 feet outby the face; 4) 16 inches deep x 24 inches wide 80 feet outby the face; 5) 14 inches deep x 20 inches wide 90 feet outby the face; 6) 20 inches deep x 34 inches wide 100 feet outby the face; 7) starting 4 feet outby the face at the last row of permanent roof supports and extending outby 40 feet 3 1/2 inches deep x 12 inches wide 4 feet outby the face; 8) 9 inches deep x 12 inches wide 20 feet outby the face; 9) 30 inches deep x 18 inches wide 35 feet outby the face. The accumulations were damp and had "salt and pepper" amounts of rock dust from the mouth of the entry and extending inby 60 feet. The last 40 feet had not been rock dusted at all on the ribs or coal fines.

Contributing factors:

1) The section foreman, Bob Wilson, stated the day shift (his shift this day) on 3-17-89 had mined approximately 1 1/2 cuts (60 feet).

- 2) The afternoon shift (swing shift) had mined the next cuts to 108 feet or 48 feet on 3-17-89.
- 3) The roof bolting machine was in the #1 entry when crew arrived on section this shift and completed installing 4 1/2 rows of permanent roof supports.
- 4) After completing the bolting cycle, the roof bolt machine left #1 entry and went to #2 entry and the miner was observed tramming into the #1 entry.
- 5) There was no cleanup down prior to the miner entering the #1 entry or while the miner was being trammed to the face. There was no rock dusting being performed during this time.
- 6) Mr. Bob Wilson, section foreman, had done an onshift while roof bolter in #1 entry and stated "he saw the last 40 feet needed rock dusted but didn't know the last 60 feet outby behind the line curtain that bad."
- 7) The practice of cleaning first cuttings has been discussed numerous times with management by inspection personnel out of this office.
- 8) This is an obvious condition and must be cleaned and removed from the mine.
- 9) First cuttings must be cleaned after each bolting and cutting cycle.
- 10) There are only 2 working places (entries) at the present time due to the cutting of "bleeder" entries for a longwall panel being developed.

11) This was not rib sloughage due to the fact that the ribs were straight up and down without any fractures being observed.

12) The miner is operated by radio remote from the left side. The trailing cable for the miner is also on the left side (side with accumulations) and is supplying the miner 950VAC.

Issues

The issues were whether a violation of 30 C.F.R. 75.400 occurred; if it occurred, should the violation be designated as S & S; further, if the violation occurred was it due to the unwarrantable failure of the operator to comply with the regulation.

Stipulation

The parties stipulated as follows:

1. The Commission and the Administrative Law Judge hearing this dispute have jurisdiction to determine the issues herein.
2. Donald E. Gibson, an MSHA Inspector, was a duly authorized representative of the Secretary at the time of the inspection.
3. The Cottonwood Mine is a large coal mine.
4. Various exhibits can be admitted into evidence without further authentication.

Secretary's Evidence

RANDY TATTON, chief safety engineer for respondent at the Cottonwood mine, was familiar with the 104(d)(1) order issued in this case. He is also familiar with this section of the mine but did not observe the conditions involved in the order.

This area was developed in the continuous miner section for the purpose of advancing the longwall development entries.

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There was no problem with any ribs sloughing in this area.

Mr. Tatton was questioned about certain allegations in UP&L's motion to expedite.

Mr. Tatton identified the company's cleanup plan (see Exhibit C-3). The plan was dated November 16, 1977, and was signed by the mine manager. It had been originally forwarded to MSHA on March 17, 1987. The MSHA district manager returned the plan saying it did not require his approval and he merely indicated the company should keep it on file for any MSHA inspectors who might inquire about it.

Company miners are expected to follow the plan and clean up after each cut. The first cuttings must be cleaned up as part of the mining cycle and this includes a cleanup close to the ribs. The continuous miner itself determines how close you can approach the ribs or clean up the cuttings. On the brattice side notches will be cut in the rib by the continuous miner. This increased the difficulty of a cleanup (see Exhibit C-2 showing "line curtain" printed on the exhibit).

The company had been previously advised by Mr. William Ponceroff, the local MSHA office supervisor, that the first cuttings should be cleaned up as part of the mining cycle.

The law requires that the company have a cleanup plan and they must comply with it.

Witness Tatton indicated he was familiar with a citation issued by Inspector Jones on January 6. However, the company was not cited for a violation of 75.400 at that time. Mr. Tatton was not present and did not know the details of the Jones' citation (Jones' citation No. 3296223 was issued for a violation of 75.316, as contained in Exhibit C-4).

The operator does its initial cleanup by sweeping along the ribs with the continuous miner.

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A line curtain keeps the air out of the area of low pressure and, thus, the intake air is channeled directly to the working face. (Witness Tatton marks route of air with a red marker on Exhibit C-2; witness further marks channeling of air with a blue marker showing, by arrows, airflow if the line curtain is not installed.)

The company must maintain ventilation otherwise a violation of the ventilation plan could occur and the health and safety of the miners would be affected.

The operator has encountered burn-out areas in this section where the coal has previously burned. Such a rib condition is the worst possible situation as far as sloughage of the ribs is concerned.

The company does not want its miners exposed to any fall from the ribs.

The first cuttings occur when coal is dislodged by the mining cycle when the initial cut is made. Sloughage occurs sometimes thereafter due to pressure on the ribs.

Mr. Tatton and Inspector Gibson discussed Inspector Jones' citation for the violation of 75.316, relating to approved ventilation. Jones cited the company because the line curtain was rolled up in order to clean behind it. On the other hand, Inspector Gibson cited the company for not cleaning the cuttings behind the curtain. It is apparent the company cannot do both. It cannot roll up the curtain (which Inspector Jones complained about) and it cannot clean the cuttings behind the curtain unless it rolls it up. It is necessary for the company to leave the line curtain intact to maintain ventilation at the face and the operator cleans the area after the next crosscut is broken through.

At the time Inspector Gibson issued his order in this case, he also read the Jones' citation but it did not have any impact on his order.

Jones' citation was written because there was insufficient air movement at the face but the citation does not say anything about rolling up the curtain.

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Witness Tatton agrees that the area must be cleaned up but it is not necessary that it be done immediately. He particularly relies on paragraph 2 of the company's cleanup plan.(FOOTNOTE 1)

Inspector Gibson required the company to clean up all first cuttings behind the line curtain and the company did that to the best of the capability of the continuous miner.

The company has difficulty complying because they would be violating its ventilation plan. There would be no air movement at the face.

DONALD E. GIBSON, an MSHA inspector, is a person experienced in mining as well as electrical specialist.

On March 20, 1989, Inspector Gibson was in the Cottonwood mine continuing the inspection he started on March 14, 1989.

He entered the 9 East working section and saw the condition that caused him to issue the 104(d) order. This condition involved an accumulation of coal behind the ventilation line curtain. He observed the continuous miner cutting the coal and he was present when a shuttle car tore down a section of the line curtain by the mouth of No. 2 entry (marked with a black X on Exhibit C-2).

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The inspector did not see any rock dust applied behind the line curtain and in fact there was no rock dust for 40 feet outby the face behind the curtain. From an area 40 feet outby the face to the corner there were coal accumulations. For 40 feet outby the accumulations of coal cuttings varied in width and depth. They measured a distance of 104 feet 6 inches for a total length and ranged between 16 inches deep x 16 inches wide. The greatest accumulation was 2 feet x 34 inches. The greatest amount was at a point 65 feet outby the face. The inspector took six different measurements and the depths ranged from 14 inches to 31 inches. He estimated that the total amount of coal in the area was between 500 and 800 pounds.

When he observed the accumulations he told the company representative that "You have a (d)(1) order." The company representative was surprised.

The accumulations were measured and recorded in the order issued by Inspector Gibson.(FOOTNOTE 2)

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Inspector Gibson questioned the section foreman who said he had made an on-shift inspection and he had told the crew to rock dust. He said that the area behind the curtain was not that bad. The area was not listed in the on-shift book.

The company had asked Inspector Gibson to do an electrical examination on the afternoon shift and he had been in this section on March 17. Subsequently, the company rotated the shift and the foreman, Bob Wilson, stated that he had cut coal on the 17th on the day shift. He also indicated they would clean up on the down shift.

The company had in fact not cleaned up the first cuttings during the idle shift.

It took about 45 minutes to remove the accumulations and this was accomplished by using a battery-powered scoop. The company also had two men shoveling it up. When cleaning up the accumulation they were not disturbing the ventilation and there was perceptible air movement.

In the inspector's opinion it is possible to clean up the accumulations without disrupting the ventilation.

The continuous miner would back up 40 feet to 60 feet and push the cuttings to the face; then the miner could get within 6 inches to 1 foot of the left and right ribs.

The ribs were not fractured. The line curtain was 24 to 30 inches away from the rib.

Inspector Gibson was familiar with the Cottonwood cleanup plan although he did not see the plan before he issued his order. After looking at the plan he concluded it conflicted with 75.400.

This particular entry is a bleeder entry which allows air to pass behind the gob of the longwall.

In the inspector's opinion, leaving 210 feet of coal accumulations is a violation of 75.400. The regulation requires that accumulations be removed immediately.

The initial cleanup plan applies only to the face area and the cleanup plan violates 75.400.

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This operator had been previously cited for accumulations under 75.400.

Inspector Gibson issued a 104(d)(1) order because he thought the operator had acted willfully in not removing the accumulations. In June he had previously discussed the removal of first cuttings with management and also discussed it with company representatives, Lauriska and Baker.

The company was aware of the first cuttings problem and he believed the (d)(1) order was proper because of the amount of accumulations and no attempt had been made to remove them.

The continuous miner generates sparks and it uses a trailing cable to supply its power. In the inspector's opinion, the accumulations were of a sufficient amount that an explosion could result.

The inspector also described a "salt-and-pepper" float dust condition on the accumulations. Some of the accumulations were damp, but if a fire occurs any damp coal will quickly dry out. The condition was obvious.

Inspector Gibson's order, which consists of four pages, states that the first cuttings must be cleaned after each bolting and cutting cycle. The operator can do that without violating the ventilation plan and it could be done while the roof is being bolted.

The operator can also use vent tubing to supply air to the face; other mines use that approach. It is also possible to move the line curtain to the center of the entry and use a scoop to clean the entry and then return the curtain. The ribs here are in good shape. In other parts of the mine, however, they do have problems concerning loose ribs.

The inspector did not agree with the company's claim that workers were exposed to any loose ribs; however, he understands about such conditions and he realizes any loose ribs must be supported before the area is cleaned up.

No accidents have occurred during any cleanup effort in the last two years in the Cottonwood mine.

~720

The inspector considers this a serious violation which could affect the safety and health of the entire crew. The cuttings were generating coal dust and a 480 volt electrical roof bolter was present in the area.

The operator must have been following some type of cleanup plan because they had cleaned up the other entries.

Inspector Gibson was familiar with the MSHA policy manual which addresses clean up. The exhibit is national in scope (see page 74 and 75 of Exhibit R-3). The language of the manual indicates the operator must have a cleanup program available for inspection at the mine. The program does not permit accumulations to exist. Exhibit C-3 does not deal with accumulations as required by 75.400. The inspector has been at the Orangeville office for two years and he has been instructed concerning accumulations since he began working at MSHA.

He has also discussed with the operator six other mines they inspect from the Orangeville office.

In the inspector's view, the violation was S & S because a violation of 75.400 occurred. Further, there was a measure of safety involved and, in addition, it was reasonably likely that an injury could result and that such an injury would be serious. Such an injury would involve burns or even a fatality of the mining crew.

In cross-examination, the inspector agreed that the second page of the order indicates that the last 40 feet had not been rock dusted. But there is no requirement to rock dust when within 40 feet of the working face. In his order the inspector had not relied on the failure of the operator to provide rock dust within 40 feet of the face.

Section 75.400 requires accumulations to be cleaned up immediately, but immediately is not otherwise defined in the MSHA policy manual.

No mention was made of bolting and cutting cycles and the regulations are in the policy manual. But accumulations are not defined and the degree of accumulation is a judgment call.

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You anticipate you will find coal in a mine and the inspector, when questioned closely, indicated that 30 pieces of coal lying together would constitute an accumulation.

The inspector believed the amount of coal accumulations involved here would fill one-third of a 14-ton shuttle car.

Exhibit R-3, page 52, discusses a cleanup program. MSHA approval is not required for a cleanup plan.

Inspector Gibson felt there was perceptible air movement. He did not take any air readings, nor did he take a methane reading.

It is apparent that the company followed something in the nature of a clean up in the area.

FORREST ADDISON, JR. is a fire boss and mine examiner for UP&L. He has been on a UMWA safety committee for three years.

On March 20, 1989, he accompanied Inspector Gibson.

Before that date he hadn't seen the company cleanup plan but he had seen the roof control and ventilation plans.

The miners were not told about the cleanup plan.

He helped the inspector measure the area of the coal cuttings and took notes. In Addison's opinion a violation of 75.400 existed since there was an excessive accumulation of coal.

The union also conducted inspections of the 9th East working section on February 24. At that time they found coal accumulations behind the curtain from the crosscut back to the tailpiece. These accumulations were behind the line curtain (see Exhibit R-4 for UMWA inspection on February 24.)

The committee reported these conditions to the company but they do not know what action the company took.

First cuttings must be cleaned up before the miners leave the area.

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Mr. Addison agrees that an unwarrantable failure existed because the company should have seen the excessive coal cuttings. The operator generally removes accumulations from behind the curtain during the mining cycle and it appeared to have cleaned up along the ribs. Coal in the mining sequence is mined for 40 feet by the continuous miner (see Exhibit C-2 for numbered mining sequence printed on the exhibit).

WILLIAM PONCEROFF, supervisor of the Orangeville field office, has discussed first cuttings with company officials and particularly with upper management.

He further discussed cleaning behind the line curtain and these discussions began in 1988 when they started the two-entry system. Ponceroff recommended to the company that they keep the problem under control and the accumulations behind the curtain had virtually become nonexistent. In previous discussions the company had not mentioned their cleanup program.

The first time Mr. Ponceroff saw the operator's cleanup plan was when Inspector Gibson brought it to him after he issued his order in the instant case.

In Mr. Ponceroff's view the program does not comply with 75.400. Inspector Jones had issued the previous citation (No. 3296223) and the company had been cited for a lack of air movement at the face. Further, he had instructed the foremen that they should clean up as they go.

Inspector Jones made it clear to the operator that it had to comply with 75.316.

MSHA has been consistent in enforcing its policy regarding removal of first cuttings and he agreed with Gibson's order.

Mr. Ponceroff made it clear to the company that they had excessive accumulations although he had never given the company anything in writing.

UP&L's Case

JAMES BEHLING, a safety specialist for UP&L, is a person experienced in mining. He was traveling with Inspector Gibson at the time of the inspection. They initially went to the kitchen area then walked to the transformer in the face area.

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Normally, the miner helper sets the drilling sites and that starts the entire mining cycle.

They checked the air, rock dust, and they usually rock dust the last 40 feet. They would then cut in the sequence printed on Exhibit C-2. They make five cuts, then clean the left side, and then back up and clean the right side.

On the left side there are gouges caused by the continuous miner because it cannot mine in a straight line. The miner cable exits on the left side of the continuous miner and, as a result, the miner cannot get close to the left rib.

Inspector Gibson saw the coal when he walked behind the line curtain. He said he was going to write a (d)(1) order.

The witness disagrees with the measurements taken by Inspector Gibson. (The witness illustrates his point in Exhibit C-5; he stated that the height and width of the first cuttings were in fact irregular.)

The witness also felt that there was more rock dust present than the "salt-and-pepper" description given by Inspector Gibson.

The area was also wet and there was a water hole (water hole marked on Exhibit C-2 as "water hole") which was located outby the last open crosscut.

In the witness' opinion there was no violation of 75.400 because the cleanup plan provides how they are to clean up the area.

Supervisor Wilson, in charge of this section, told the witness he cleaned up in the best fashion he could; the graveyard shift would do the balance.

The witness asked if there was any way for the inspector to write a citation rather than an order. Inspector Gibson replied that he was going to write an order.

The witness' notes indicate that "I showed Don [Gibson] the cleanup plan and he said he was going to write the order; he made this statement as he was reviewing the plan."

Gibson wrote the order the following day at 4:00 p.m.

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The witness did not agree with the S & S designation because the coal was wet and there was no problem inasmuch as they were following the cleanup plan. Accumulations would be removed when the crosscut was broken through (Exhibit C-2 at the top shows a crosscut not yet broken through and establishes its relation to the mining face.)

In addition, the witness did not agree with the unwarrantable failure feature. The section foreman was cleaning the area and the crosscut had not yet been broken through.

Inspector Gibson said the coal would have to be cleaned up before the company could proceed with its mining.

The witness asked Gibson if they could roll up the curtain although they would need acceptable air at the face.

However, in early January the company received a citation for doing the same thing, that is, rolling up the curtain.

The witness described the instability of burned areas; there are such areas in 9th East section. In the witness' opinion, no violation occurred because the company was following its cleanup plan.

The witness did not know if the crosscut (located at the top of Exhibit C-2) had been cut through as of the date of the hearing. Under the company's cleanup plan such cuttings could still be there if the succeeding crosscut had not been cut through.

Gibson also took notes during his conference.

The line curtain was 3 feet from the rib.

DIXON PEACOCK, a safety engineer for UP&L, identified Inspector Jones' citation of January 6, 1989, for the violation of 75.316 (Exhibit C-4).

The company was in the process of cleaning the No. 1 entry when Inspector Jones tested with smoke tubes. He found there was no air moving and he stated the company had a violation.

They discussed the plan and the the violation because of a lack of perceptible movement at the face.

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The maintenance crew had to roll up the brattice to facilitate the cleaning.

Inspector Jones felt this permitted the face area to be unventilated. At the time of the Jones' citation the last open crosscut had not been broken through.

The operator did not contest the Jones' citation. The last portion of the Jones' citation states as follows: "(T)he approved cleanup plan states that the curtain side of the entry will not be cleaned up until the connecting crosscut has been made."

After the Jones' citation, Peacock made certain the UP&L supervisors received a copy of the cleanup plan.

Peacock did not know how Jones had gotten a copy of the plan. Jones did not state that the plan was inadequate, ineffective or that it would have to be changed.

JOHN C. BOYLEN, JR. is the Mine Manager and responsible as head of the mine.

Witness Boylen identified the present cleanup plan. It applies throughout the mine.

Concerning paragraph 2, the company has spent \$2,000,000 for new roof bolting machines and they also use remote control miners.

Also concerning paragraph 2, the operator uses a line curtain to keep miners away from the ribs. In this mine Mr. Boylen is more concerned about the ribs than he is about the roof.

If they shovel the area by the ribs they expose their miners to possible sloughing ribs. As a result they try to keep the people out of the area and then clean up with the continuous miner.

The company does not intend to change the cleanup plan between different sections in the mine. The ribs can become bad depending upon which section of the mine you were working in.

The ventilation tubing is an alternative to the line curtain.

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Mr. Boylen worked for Consol Coal in West Virginia for 18 years where they used vent tubing because of methane and because of relatively narrow entries.

In Mr. Boylen's view line brattice is safer; the company does not use tubing.

Tubing uses a fan and the entries in the Cottonwood mine are 20 feet wide, whereas the entries as the Consol mine were 13 feet wide.

They could not use a fan because that would create turbulence. The entries are higher here. It is possible to spade the curtain while standing on the floor. MSHA has not discussed ventilation tubing with him.

They have talked to the inspectors about first cuttings and also about rock dusting the area. Mr. Boylen was familiar with the order that was issued in this case.

A letter from MSHA District Director said the company did not have to submit the cleanup plan. The particular plan, identified by the witness (Exhibit C-2), was one submitted to MSHA after the company's initial submission.

Mr. Boylen's only contact with the Jones' citation was to the effect that the company was not following the cleanup plan.

The witness did not remember discussions of accumulations behind the line curtain nor did he remember that they were discussed on June 30, 1988.

Prior to the (d)(1) order issued in this case the company was never told its cleanup plan was inadequate.

Mr. Boylen has no plans to change his cleanup plan. He did not recall discussing the plan with Mr. Ponceroff.

The witness did not go to the section before the condition was abated. He does not believe the company violated the regulation.

In Mr. Boylen's opinion they could have used the curtain to remove accumulations, but if you pull out the curtain you disrupt ventilation. To facilitate matters you could put an entire new curtain in the entry.

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After the order was issued he talked to company supervisor Wilson and he required the area to be cleaned up when the connecting crosscut was put through.

The company designed its cleanup plan for a "worst case" scenario whereas the roof control plan is a "minimum case" scenario.

In rebuttal Inspector Gibson identified his notes. He also conferenced the citation on the spot.

Inspector Gibson agrees with Mr. Boylen that there is a need to be consistent in the application of the cleanup plan as it relates to the condition of the ribs. In other words, if the ribs are sloughing in one area, that should be taken into account in the cleanup plan. In the inspector's view, accumulations should not be permitted to go 300 feet in length and 6 inches wide.

The inspector's measurements were taken every 10 feet behind the curtain.

Discussion

The initial issue centers on whether a violation of 75.400 occurred. The evidence on this point is essentially uncontroverted. The regulation in its relative portion provides that "loose coal shall be cleaned up and not permitted to accumulate in active workings." It is apparent that the loose coal involved here was of a substantial amount. The total amount of the coal was estimated at 500 to 800 pounds. I find the inspector's opinion credible. Permitting 210 feet of coal to accumulate along the ribs constitutes a violation of 75.400. See Old Ben Coal Company, 1 FMSHRC 1954 (1979).

The fact that some of the coal was damp because of water does not cause me to reach a different conclusion. Any fire will quickly dry out damp or wet coal. In addition, the water hole (as shown on Exhibit C-2) is a relatively small area in relation to the total area involved.

Throughout this case UP&L relied on its cleanup plan to justify its action. However, it is apparent that the cleanup plan developed pursuant to 75.400-2 cannot overrule the mandatory duties required in 75.400.

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In short, I agree with the inspector's view that the cleanup plan is invalid to the extent it conflicts with 75.400.

The second issue is whether the violation should be designated as significant and substantial within the meaning of the Act.

I conclude that such a designation is warranted. The credible evidence testified to by Inspector Gibson established this feature of the case within the Commission's guidelines as expressed in Mathies Coal Company, 6 FMSHRC 1 (1984) and U.S. Steel Mining Co., 6 FMSHRC 1573-74 (1984); compare Old Ben Coal Company, supra.

The final issue is whether the violation of the regulation was due to the operator's unwarrantable failure to comply.

In this connection the credible evidence establishes MSHA and the operator's upper management personnel had discussed the practice of cleaning first cuttings. In fact, the problem had been virtually nonexistent.

With this background the operator nevertheless permitted substantial coal accumulations to exist along the ribs in this active workings.

In short, the operator chose to ignore 75.400 and to rely on its cleanup plan. It did not clean the accumulations, nor did it intend to clean them until the next connecting crosscut had been broken through.

It is obvious that a cleanup plan cannot overrule a mandatory regulation.

In its defense to the issue of unwarrantability, the operator relies on the Jones' citation and states that it is faced with the choice of (1) rolling up the line curtain and cleaning behind it and then receiving a Jones' citation for inadequate ventilation at the face; or, (2) receive a Gibson order for having accumulations behind the curtain.

The operator's defense is neither credible nor substantial. For one thing, the operator could rehang the line curtain at a point further out from the rib. In addition, the operator must have successfully met this problem before. This was the only section involved. Other sections had been cleaned. In these other areas coal accumulations were not a problem. As MSHA's witness Ponceroff indicated the problem of accumulations behind the curtain had become virtually nonexistent.

Under the operator's scenario once it started to mine the entry it would begin to accumulate coal. The accumulation would not be removed until the next open crosscut was broken through.

In Exhibit C-2 the measured distance between crosscuts is 104 feet. Under these circumstances in excess of 208 feet of loose coal would accumulate on both sides of the return entry. (The excess would be generated by the mining sequence of the continuous miner). This would be an accumulation prohibited by 75.400.

On the other hand if the circumstances are such that only the area in the return entry behind the line curtain contained loose coal then accumulations in excess of 104 feet would exist. (The excess again would be generated by the mining sequence of the continuous miner.) This amount would likewise be an accumulation prohibited by 75.400.

The operator's decision to mine in this manner presented here constitutes an unwarrantable failure to comply with 75.400. Further, such a failure to comply is aggravated conduct constituting more than ordinary negligence. Accordingly, the Commission doctrine expressed in Emery Mining Corporation, 9 FMSHRC 1997, 2004 (1987) is not applicable.

For the foregoing reasons I enter the following:

ORDER

The contest of Order No. 2876489 is dismissed.

John J. Morris
Administrative Law Judge

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FOOTNOTES START HERE

~FOOTNOTE_ONE

1. Paragraph 2 of the operator's cleanup plan provides as follows:

After the day and afternoon production mining cycles, section roadways that have been broken through will be pushed to the faces (cabs of equipment used to clean will not advance past last row of bolts). Faces that have not been broken through will be cleaned on the off curtain side. The curtain side will be cleaned after the connecting crosscut is broken through to prevent the short circuiting of the face ventilation. All cleaning of section roadways and faces other than initial cleanup

with continuous miner will be done on graveyard or idle shifts.
(Exhibit C-3)

~FOOTNOTE_TWO

2. The order contains the following detail:

The accumulations were behind the line curtain installed on the left side and measured to be 104 feet 6 inches in total length and ranged between 1) 16 inches deep x 16 inches wide starting 40 feet outby the face; 2) 14 inches deep x 26 inches wide 52 feet outby the face; 3) 31 inches deep x 26 inches wide 70 feet outby the face; 4) 16 inches deep x 24 inches wide 80 feet outby the face; 5) 14 inches deep x 20 inches wide 90 feet outby the face; 6) 20 inches deep x 34 inches wide 100 feet outby the face; 7) starting 4 feet outby the face at the last row of permanent roof supports and extending outby 40 feet 3 1/2 inches deep x 12 inches wide 4 feet outby the face; 8) 9 inches deep x 12 inches wide 20 feet outby the face; 9) 30 inches deep x 18 inches wide 35 feet outby the face.