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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 PROCEEDINGS

Docket No. WEVA 88-328  
A.C. No. 46-06686-03590

v.

Docket No. WEVA 88-329  
A.C. No. 46-06686-03591

SMOOT COAL COMPANY,  
RESPONDENT

Smoot Mine

DECISIONS

Appearances: Mark Malecki, Esq., Office of the Solicitor, U.S.  
Department of Labor, Arlington, Virginia, for the  
Petitioner;  
Mike Carpenter, Mining Engineer, Fork Lick Coal  
Processors, Webster Springs, West Virginia, for  
the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments for eleven alleged violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations. The respondent filed timely answers and requested a hearing. A hearing was conducted in Charleston West Virginia, and the parties waived the filing of any posthearing briefs. However, I have considered all of the arguments made by the parties in their pleadings, including their oral arguments on the record during the hearing in my adjudication of these cases.

Issues

The issues presented in these proceedings are (1) whether the conditions or practices cited by the inspector constitute violations of the cited mandatory safety standards, (2) the appropriate civil penalties to be assessed for the violations, taking into account the statutory civil penalty criteria found in

~1257

section 110(i) of the Act; and (3) whether the violations were significant and substantial." Additional issues include the inspector's "unwarrantable failure" findings with respect to one contested section 104(d)(2) order.

#### Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977; Pub L. 95-164, 30 U.S.C. 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).

3. Commission Rules, 29 C.F.R. 2700.1 et seq.

#### Stipulations

The parties stipulated to the following (Tr. 7-8):

1. The respondent is subject to the Act.
2. The respondent agrees that the conditions or practices cited by the inspector in the contested citations and order are true, and the respondent does not dispute the fact that the violations occurred as stated therein.
3. The issues presented in these proceedings concern the inspector's negligence and gravity findings.

#### Discussion

Docket No. WEVA 88-328, concerns six section 104(a) citations, with special "S&S" findings, and one section 104(d)(2) order, with special "S&S" and "unwarrantable failure" findings, and they are as follows (exhibits P-1 through P-12):

Section 104(a) S&S Citation No. 2724242, April 6, 1988, cites a violation of 30 C.F.R. 75.403, and the condition or practice states as follows:

Based on the results of a rock dust survey taken on 3-3-88 in the 3rd right entries 004-0, beginning inby for approximately 1,000 feet, in the No. 1 thru 6 entries, the laboratory analysis showed that 19 of the 40 samples collected were less than the required incombustible contest.

Section 104(d)(2) S&S Order No. 2724637, May 17, 1988, cites a violation of 30 C.F.R. 75.1722(b), and the condition or practice states as follows:

~1258

The guards that were provided for both sides of the head roller on the mains (005-0) section belt conveyor #10, were not installed and maintained and did not extend a distant sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley. You could easily reach into the pinch point between the belt and the head roller on both sides.

Section 104(a) S&S Citation No. 2727872, June 6, 1988, cites a violation of 30 C.F.R. 75.316, and the condition or practice states as follows:

The approved ventilation plan was not being followed on the 3rd right (004-0) section, three permanent stoppings on the intake and three stoppings on the return side of the section belt conveyor, were not constructed so as to prevent and minimize leakage and loss of air in that the stoppings were not plastered, and large openings permitting excessive leakage were present and also one stopping on the intake side was crushed to the extent that it was not solid and substantial.

Section 104(a) S&S Citation No. 2727873, June 8, 1988, cites a violation of 30 C.F.R. 75.517, and the condition or practice states as follows:

The high voltage 12,400 volts alternating current, transmission cable providing power for the mains (005-0) section contained one location (splice) where the outer insulation was damaged for approximately 24 inches. This splice was located in the neutral entry just outby the section. Ground wire and metallic shields were exposed.

Section 104(a) S&S Citation No. 2727874, June 18, 1988, cites a violation of 30 C.F.R. 75.211(c), and the condition or practice states as follows:

Two overhanging coal ribs (corners), ranging up to 48 inches in length, 18 inches thick, and undercut 30 inches (sloughing), were present on the mains (005-0) section. The mining height in this area is 48 to 50 inches. The area is traveled by mobile equipment and persons on foot.

Section 104(a) S&S Citation No. 2727875, June 8, 1988, cites a violation of 30 C.F.R. 75.503, and the condition or practice states as follows:

~1259

The continuous-mining machine SN 7725, approval 2G-3182A, used in the face areas of the mains (005-0) section was not maintained in permissible condition in that one bolt was missing from the plane flange joint of one head light lens in front of the operator's deck. Methane detection ranges from 0.2 to 0.3 percent in these faces at any given time.

Section 104(a) S&S Citation No. 2727876, June 8, 1988, cites a violation of 30 C.F.R. 75.1704-2(e), and the condition or practice states as follows:

The practice escapeway drills and fire drills at this mine did not ensure that each miner travel the escapeways through the working sections up to the main escapeway at least once every 90 days and that at least two miner's including the supervisors travel through the main escapeways up to the portal at least once every six weeks, on all shifts.

Docket No. WEVA 88-329, concerns four section 104(a) citations, with special "S&S" findings, and they are as follows (exhibits P-13 through P-20):

Section 104(a) S&S Citation No. 2127863, May 24, 1988, cites a violation of 30 C.F.R. 75.1722(b), and the condition or practice states as follows:

The guard provided for the tail pulley of the No. 3 belt conveyer was loose and open away from the frame and the belt roller could easily be contacted by persons.

Section 104(a) S&S Citation No. 2727864, May 24, 1988, cites a violation of 30 C.F.R. 75.400, and the condition or practice states as follows:

Quantities of loose coal wet to damp to dry was accumulated under the No. 1 belt conveyor on the (off) side at several locations, this material ranged up to 6 ft. in length, 12 inches in depth and 18 inches in width and was accumulated up around the bottom idler rollers and against the bottom belt at several locations.

Section 104(a) S&S Citation No. 2727869, May 27, 1988, cites a violation of 30 C.F.R. 75.211(c), and the condition or practice states as follows:

Loose broken, (broken between roof bolts) (area showing signs of pressure) mine roof was present outby the 3rd right (004-0) pillar section, in the No. 6 intake entry

~1260

one crosscut inby survey station 2128 for one crosscut and also one crosscut to the left of this survey station. Roof bolts were the sole means of roof support in these two areas.

Section 104(a) S&S Citation No. 2727870, June 6, 1988, cites a violation of 30 C.F.R. 75.400, and the condition or practice states as follows:

Quantities of loose coal, ranging 36 inches wide, up to 18 inches in depth and 25 feet in length was accumulated under the 3rd right section (004-0) belt conveyor drive.

#### Petitioner's Testimony and Evidence

MSHA Inspector John Dotson testified as to his background and experience, and he confirmed that he issued all of the violations which are the subject of these proceedings in the course of his inspections at the mine. He also testified with respect to his special "S&S" findings, the gravity of the violations, his unwarrantable failure order, and the respondent's negligence in connection with each of the violations (Tr. 8-115).

#### Respondent's Testimony and Evidence

Although the respondent's representative cross-examined the inspector who issued the violations, and presented oral arguments on the record during the course of the hearing, he presented no independent sworn testimony or other evidence with respect to any of the contested violations in issue in these proceedings.

#### Findings and Conclusions

Inspector Dotson's testimony, which I find reliable and probative, establishes that all of the conditions and practices which he observed at the time of his inspections, and which prompted him to issue the citations and order, clearly support violations of the cited mandatory safety and health standards. Further, the respondent agreed and stipulated that all of the conditions and practices cited by the inspector did in fact constitute violations of the cited standards, and it offered no testimony or evidence to rebut the inspector's findings. Accordingly, I conclude and find that all of the violations have established by a preponderance of the credible and probative evidence adduced in these proceedings, and they are all AFFIRMED.

#### Significant and Substantial Violations

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause

~1261

and effect of a coal or other mine safety or health hazard." 30 C.F.R. 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

Citation No. 2724242

Inspector Dotson stated that rock dust samples were taken on March 3, 1988, and that the laboratory test results reflected that 19 of the 40 samples collected contained less than the

~1262

required incombustible content. He confirmed that he based his S&S finding on the fact that the mine has a problem with rib sloughing which causes an accumulation of combustible coal on the mine floor, particularly in the area at the third right entrance which liberates a considerable amount of methane. He stated that on the day the rock dust samples were taken, air samples indicated that the mine liberated in excess of one million cubic feet of methane in a 24-hour period, and he produced copies of the air samples reflecting the amounts of methane accumulated from the No. 4 entry along the belt line, belt drive, main return inby the fan, and the right side of the No. 3 entry. He believed that the amounts of methane detected in these areas presented a possible ignition and explosion hazard, and that the areas contained electrical ignition sources such as energized cables and belt drives. In view of the fact that mining machines, roof-bolting machines, and shuttle cars operated in these areas while coal was being mined, any electrical faults or machine sparks would provide ignition sources, and in the event of an explosion or ignition in the areas of insufficient rock dusting, the face areas would be affected, and these conditions would contribute to the severity of any ignition (Tr. 11-17).

Mr. Dotson confirmed that seven to nine miners working in the section would be exposed to a hazard, and in the event of an ignition, they would be exposed to disabling and possible fatal injuries resulting from burns, low oxygen, and bad air (Tr. 17). Since the mine liberated excessive methane, an MSHA inspector is required to check it every 10 days, and he confirmed that MSHA closed the mine in 1988 because of excessive methane buildup on two sections (Tr. 22).

Mr. Dotson confirmed that he found no methane in any explosive ranges on the day of his inspection, and that he was not aware of any methane ignitions at the mine (Tr. 20). He confirmed that the air ventilation was approximately 34,000 cubic feet per minute (Tr. 19). He also confirmed that methane could rapidly accumulate in the working section due to interruptions of ventilation in the face area caused by torn ventilation curtains, or curtains which are not up and torn down, and damaged stoppings resulting in the short circuiting of the air. He confirmed that such conditions had occurred at the mine where ventilation line curtains are continuously moved as the equipment moved through them, and concrete stoppings have crushed out due to pressures (Tr. 21-22).

The respondent asserted that the violation is not S&S because there have been no known ignitions in the mine, and the amount of liberated methane was .2, or two-tenths of one percent, which is well below the explosive range of 5 percent (Tr. 20). The respondent also asserted that the inspector confirmed that he found no interruptions to the ventilation on the day of his inspection, that the closure of the mine earlier in the year had



~1263

nothing to do with the cited conditions, and that the amount of available air ventilation on the day in question was more than adequate to dispel any accumulations of methane (Tr. 23-25).

Order No. 2724637

Inspector Dotson stated that he based his S&S finding on the fact that the mining height in the area where he found inadequate guarding on both sides the belt head roller was 60 inches, and the guards were "hanging there and loose." He believed that the guards were in such condition that anyone could reach into the pinch point and get caught between the head roller and conveyor, and that in the event anyone were to stumble, they would come in contact with the pinch point. He confirmed that belt cleaners, greasers, belt shift examiners, and electricians travelled the belt, and they would be exposed to the hazard and disabling injuries of a reasonably serious nature (Tr. 25-27).

Mr. Dotson confirmed that guards were installed, but were partially bolted to the belt structure and "were hanging loose away from the head." They were not secured, and even if they were, he believed that were not of sufficient size to prevent anyone from contacting the exposed pinch point, and that this is contrary to the intent of the cited standard (Tr. 33-34). Mr. Dotson described the height of the belt as "chest high," and in view of the height of the mine, anyone walking by the area would be bent over, and if he were to stumble, he could easily come in contact with the pinch points which were totally exposed (Tr. 26-37).

Citation No. 2727872

Inspector Dotson confirmed that he considered the ventilation violation to be S&S because the cited stoppings were crushed "to the extent that it had a large opening near the top," and "it was possible for it to collapse at any time." Three other cited stoppings had holes in them caused by the lack of mortar or sealing materials which resulted from installing them "dry" without the use of sealing materials to prevent ventilation leakage. The stoppings on the intake side were installed to maintain air separation for the belt conveyor and intake air, and the return stoppings were installed to separate the return air entries from the belt. In the event of a belt fire, smoke could find its way through the openings in the stoppings into the intake air which is used as the intake escapeway out of the mine. The conditions of the stoppings could also contribute to a loss of air at the face area. Although the required amount of air was present, persons in the belt conveyor area would be exposed to smoke inhalation in the event of a belt fire, and if the stoppings had crushed out, the intake air would have short circuited into the return. If this had occurred, ventilation

~1264

would be interrupted, and a possible buildup of methane would result (Tr. 40-43).

On cross-examination, Mr. Dotson confirmed that at the time of the inspection coal was being run, and although ventilation leakage may be common, he stated that such leakage is a problem in the mine in question because of past ventilation problems. He confirmed that no such problems were present on the day of his inspection and that he found no buildup of methane (Tr. 48).

Resonant asserted that the S&S finding is not justified because the inspector made a finding of "moderate negligence," found no excessive levels of methane, and the ventilation was adequate (Tr. 48-49).

Citation No. 2727873

Mr. Dotson confirmed that he based his S&S finding on the fact that the cited 12,400 volt current transmission cable had sustained damage to its outer insulation for a distance of approximately 24 inches, and the interior ground wire, monitor wire, and metallic shields were exposed. Any moisture in the area would contribute to the deterioration of the metallic shield conductor, and could effect the cable safeguard short circuit protection. Mr. Dotson confirmed that the area was travelled by mine examiners and other miners, and although he observed no miners in the area at the time of his inspection, the mantrip travelled through the area, and mine sampling and supply personnel would have occasion to travel the area where the cable was located. If anyone were to come in contact with the cable, Mr. Dotson believed that electrocution would result (Tr. 51-53).

On cross-examination, Mr. Dotson confirmed that the cable was hung and laying to the side of the travelway, and was not on the mine floor. It was not located at a designated "cross-under," and the outer mechanical splice had been damaged "completely into the inner conductors," and he believed it had been damaged when it was moved up and reconnected (Tr. 54, 58). He conceded that a mantrip would not likely run over the cable, unless it were struck and knocked down to the floor, and that it was not possible that the mantrip would have run over it the way it was installed on the day of his inspection (Tr. 55). He believed that it was possible for someone sitting in the mantrip to contact the cable, but only if the mantrip had gotten close enough to it, but conceded that this would not occur if the mantrip stayed on its normal route and the individual was seated at his normal position in the mantrip (Tr. 56-57).

Citation No. 2727874

Mr. Dotson confirmed that he considered the overhanging coal rib conditions to be S&S because they were located on an active

~1265

section where the coal height was 48 to 50 inches, and seven to nine miners travelled the area during the course of a shift either by walking bent over, crawling, or on mobile equipment. In the event of a rib roll, they could strike these individuals and cause injury. The ribs are normally cut down by the miner or pushed and pryed down with bars. The ribs were heavy enough to break a bone if they were to fall on anyone (Tr. 59-60).

Mr. Dotson identified copies of two MSHA accident reports concerning coal rib rolls which had occurred in the working face area of the mine, and he conceded that the cited ribs in question were not directly in any face area. The prior accidents resulted in facial lacerations, and a possible concussion or facial fractures sustained by one miner, and back injuries to another miner (Tr. 61). Mr. Dotson also stated that the mine has "a sloughing of ribs problem" (Tr. 63).

The respondent pointed out that the prior rib roll accidents occurred on sections other than those where the citation in question was issued, that the mining height in these areas was 6 to 7 feet where there is a more frequent opportunity for ribs to roll if the coal had just been cut, and that under the approved mine roof-control plan, roof bolts are not required in areas where the mine height is less than 6 feet, because "in the lower heights it doesn't slough as bad" (Tr. 66). The respondent also pointed out that the accident which occurred on November 18, 1987, involved a roof bolter who was struck by a rib while installing roof bolts in higher coal, and that in the cited area where the height was 48 to 50 inches, "we very rarely have rib problems in that height because the coal is strong up there where it doesn't slough as bad." Since MSHA does not require bolting or "rib boards" in heights under 6 feet, respondent suggested that MSHA agreed that there are little problems in areas under 6 feet in height (Tr. 67).

Citation No. 2727875

Inspector Dotson stated that he based his S&S finding with respect to the cited continuous miner permissibility violation on the fact that the failure to maintain the machine in a permissible condition while it is operating at the coal face could contribute to a possible face ignition while the machine is in operation. He further stated that the permissibility requirement for this equipment is to prevent the entrance of methane into the enclosure of the permissible machine component, and that the machine operator and any helper present while the machine is being operated would be exposed to a hazard (Tr. 68-69).

Mr. Dotson explained that one of the four bolts on the machine headlight was missing, and with the "shaking, jamming, and tramming" of the machine, the missing bolt could contribute

~1266

to the weakening deterioration of the flame path joint, and in the event of any interruption of the ventilation at the face in the presence of an explosive mixture of methane, a spark from the head light connector could ignite the methane (Tr. 70). The function of the flange joint "is to kill the flame before it gets to the outside atmosphere," and he conceded that he found no "opening" in this instance (Tr. 72). He explained further that the bolts serve to hold the plane flange joint together where the head light is secured to the machine, and that the purpose of the plane flange joint is to prevent an ignition should methane get inside the permissible light component (Tr. 75).

Mr. Dotson confirmed that 5,000 cubic feet of air per minute is required to be maintained at the end of the ventilation line curtain where the miner machine and roof bolter are working, and at any given time, with this amount of air, .2 to .5 percent methane will be present (Tr. 69). He confirmed that he had no knowledge of any prior mine face ignitions, and that on the day of his inspection he found .2 to .5 percent methane present in the area where the machine was working. This is not an explosive mixture, and the air ventilation was adequate (Tr. 71). He confirmed that an explosion or ignition hazard would be present if the flange joint had shaken loose, a spark had occurred, and the right amount of methane and/or coal dust were present to cause an ignition (Tr. 72).

The respondent did not deny that the bolt was missing, but argued that "several things had to be happen before we could have an ignition," and that given the fact that there was adequate air, no explosive mixtures of methane present, and the absence of any opening or loosening of the flange joint to allow any methane to find its way into the component, the respondent did not believe that the violations was S&S (Tr. 72-73).

Citation No. 2727876

Inspector Dotson stated that he issued the citation after finding no record that the required escapeway drills were being conducted, and the admissions by mine management and some of the miners that the drills were not conducted. He based his S&S finding on the fact that the mine is approximately three and one-half miles deep, has two working sections operating on two, and sometimes three shifts, and is a hazardous mine because of its high methane levels. Escapeway drills are necessary to familiarize all miners on the working shifts with the mine escapeways, and a foreman cannot be relied on to show the miners the way out of the mine in an emergency because he may one of the injured persons (Tr. 77-79).

On cross-examination, Mr. Dotson stated that there is no requirement for recording the fact that the required drills were made (Tr. 84). He confirmed that his review of the mine records

~1267

established that the required fire boss examinations were being conducted on the escapeways, and that escapeway maps were posted on each of the working sections. He also confirmed that the respondent conducts safety meetings at the mine, but he has never attended any (Tr. 80-82).

Mr. Dotson stated that escapeway drills are necessary in order to that newly hired miners, or miners shifted from one section to another, know of the escapeways, and to insure that at least one person on each shift, other than a supervisor, knows how to exit the mine in the event of an emergency. Mr. Dotson confirmed that if each of the miners knew the escapeway routes, he would not consider the violation to be S&S (Tr. 82). He believed that in the event of a methane ignition, every person in the mine would be affected, and depending on the work shift, at least 30 miners would be exposed to hazards, including entrapment, a possible mine fire, and smoke inhalation (Tr. 87).

Citation No. 2127863

Mr. Dotson stated that he considered the failure to adequately guard the No. 3 belt conveyor tail pulley to be an S&S violation because the existing guard had been pulled away from the frame, leaving an unguarded opening of approximately 8 by 12 inches through which someone could easily reach and contact the moving tail pulley. In addition, given the fact that the belt tail piece is located at a place where the mine bottom dips and a step was cut with a continuous miner, he believed that a person could easily stumble while stepping down into the area and come in contact with the moving belt. He confirmed that belt examiners and cleaners travel the area, and if they came into contact with the moving belt they could sustain permanent disabling injuries. Mr. Dotson confirmed that the belt is normally shut down when any cleaning is done (Tr. 88-92).

Citation No. 2727864

Mr. Dotson stated that he considered the cited loose coal accumulations located at the "off side" of the number 1 belt conveyor to be S&S because they were packed around and against the bottom of the belt and roller, and if these conditions were allowed to continue the roller would have frozen and resulted in the heating of the rollers due to the friction of the belt rolling across them. He believed that this condition could have contributed to a mine fire exposing a belt examiner or belt cleaner who is the area on a regular basis to a smoke inhalation hazard (Tr. 93-95).

Mr. Dotson confirmed that the accumulations were not noted in the belt examiner's book, but based on the appearance of the coal packed around the roller and belt, he believed the conditions had existed for "over a period of several shifts" (Tr.

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95). Mr. Dotson described the accumulations as coal spillage located at approximately five different locations along the belt line, and that each accumulation was 6 feet long, 18 inches wide, and 12 inches deep. He confirmed that the accumulations were not rock dusted, and were "dark black" and combustible, and he characterized the spillage as "just plain raw coal spills" (Tr. 103). Although the belt was running when he observed the conditions, he could not recall whether coal was being transported on the belt (Tr. 100). He also confirmed that he observed no stuck rollers, but stated that "it probably wouldn't have been too long and it would have been frozen" (Tr. 97).

The respondent's representative asserted that the third shift is normally a maintenance shift, and that he was told by people on the shift that rock dust bags were scattered in the area and that they were in the process of cleaning the belt on the production shift when beltmen were available. However, he conceded that he was not present during the inspection, and that "they do maintenance part of the shift and run coal part of the shift" (Tr. 99-100).

Citation No. 2727869

Mr. Dotson stated that he considered the cited loose broken roof conditions to be S&S because there was evidence of roof pressure and weight shifting just outby the pillar section. The roof had broken down the center in the No. 6 entry and "dropped down to a large crack" and mantrip vehicles and mine examiners travelled the cited areas which included a designated escapeway. Mr. Dotson described the roof as "sagging," and he found it very likely that a roof fall would occur, and that in the event of a massive fall, fatal injuries would result. He stated further that adverse roof conditions were present in the areas inby the locations which he had cited, and two roof falls had occurred in other entries. He believed that roof weight shifting had occurred after pillaring had begun more than a week earlier (Tr. 104-106).

Mr. Dotson could not recall whether coal was being mined on the day of the inspection, and although some work was being performed in the cited areas, he did not believe that any work was being done on the roof. He confirmed that miners would be present in the cited areas at least once a day or more (Tr. 107).

On cross-examination, Mr. Dotson agreed that the sagging roof conditions could have occurred after the section was preshifted, and that the conditions did not obstruct travel through the area. He stated that the cited roof locations definitely needed additional support and that the respondent's safety inspector who was with him during his inspection "agreed whole heartedly with my opinion" (Tr. 108). Mr. Dotson confirmed

~1269

that the area was dangered off and arrangements were made to have the roof supported (Tr. 109).

Citation No. 2727870

Inspector Dotson confirmed that he considered this coal accumulations violation to be S&S because "pure, black, dry, loose coal" was accumulated and packed tight underneath the bottom belt and appeared to have been there for several shifts. He believed that the accumulations, which he described as ranging from 36 inches wide, 18 inches deep, and 25 feet long, could contribute to a source of heat in the event they froze and caused friction between the belt and roller. The accumulations were located close to the belt drive which had a power source (Tr. 110). In the event of a fire, seven miners on the section would be exposed to a smoke inhalation hazard (Tr. 111-112).

On cross-examination, Mr. Dotson confirmed that he did not check the belt conveyor drive for permissibility, and while water sprays were installed on the belt head, he did not observe any of them working at the time of the inspection, nor did he observe any sprays on the belt (Tr. 113).

Based on the credible testimony of the inspector, I conclude and find that the two equipment guarding citations (2724637, 2127863) were significant and substantial. The guarding on the cited belt conveyor head roller was loose and hanging away from the area which should have been guarded, thereby exposing a pinch point between the head roller and conveyor. The guarding on the cited No. 3 belt conveyor tail pulley had been pulled away from the frame exposing an opening through which anyone could have easily reached the moving belt pulley while the belt was running. In both instances, the evidence establishes that miners would be in the area of the unguarded equipment in the normal course of their work shifts cleaning, or examining the belts, and in the event of a stumble or other inadvertent contact with the exposed pinch points, they would likely suffer injuries of a reasonably serious nature. Under the circumstances, the inspector's S&S findings with respect to both citations ARE AFFIRMED.

With regard to the overhanging coal ribs and loose and broken roof conditions (2727874, 2727869), I agree with the inspector's S&S findings. The inspector's un rebutted testimony establishes that the mine had a rib sloughing problem, and although most of the problems were at the face areas, two prior rib rolls resulted in injuries to miners, and the overhanging ribs in question were in a low area of the mine where miners travelled. The loose roof conditions were in an area of the mine where the roof was taking pressure and sagging, and the inspector observed one area where the roof had broken and cracked, and he confirmed that roof falls had previously occurred in other areas of the mine. I conclude and find that the cited rib and roof

~1270

conditions posed a discrete roof fall and rib roll hazard, and that a potential accident hazard was present. In the event of any such occurrence, I conclude that it would be reasonably likely that the miners working in those areas would likely suffer fatal injuries or injuries of a reasonably serious nature. The inspector's S&S findings with respect to both citations ARE AFFIRMED.

With respect to the two citations for coal accumulations along the belt conveyors (2727864, 2727870), the evidence establishes that significant amounts of dry, loose, and black coal dust was packed around and against the conveyor belts and head rollers in areas where miners would normally be working during the course of mining coal while the belts were in operation. The inspector's un rebutted credible testimony establishes that these coal accumulations, which one may reasonably assume were combustible, posed a discrete fire hazard in that any frozen or stuck rollers would provide a source of heat and friction to ignite the coal and propagate a fire. In the likely event of a belt fire, the miners in the area would be exposed to burn and smoke inhalation hazards of a reasonable serious nature. Under the circumstances, the inspector's S&S findings with regard to both citations ARE AFFIRMED.

I conclude and find that the cited damaged splice in the 12,000 volt transmission cable (2727873) was a significant and substantial violation. The inspector's un rebutted credible testimony reflects that the outer insulation of the cable was damaged for a distance of approximately 2 feet and that the interior ground wire, monitor wire, and metallic shields were all exposed and posed an electrocution hazard. Although it was unlikely that the cable would be run over by a mantrip or contacted by anyone sitting in the mantrip, the inspector confirmed that the damage occurred while the cable was advanced and hung in the location where he observed it. In the event the cable were again moved and advanced, I believe that anyone doing that work would likely be exposed to a serious shock and probable electrocution hazard in the event he inadvertently handled the cable, and that injuries of a reasonably serious nature would result. Accordingly, the inspector's S&S finding IS AFFIRMED.

With regard to the ventilation citation concerning the condition of the cited ventilation stoppings (2727872), I agree with the inspector's S&S finding. Although the inspector found no excessive levels of methane present and found the air to be sufficient, the fact remains that the condition of the stoppings, some of which were crushed and contained holes and lacked adequate sealing, posed a discrete air leakage hazard which in time could have caused further deterioration resulting in the likely short circuiting of the air ventilation and lack of air separation in the intake and returns. Further, the inspector's un rebutted credible testimony reflects that in the event some of



~1271

the cited stoppings had crushed out, ventilation would be interrupted, and a possible buildup of methane would occur, and would contribute to the loss of air at the working faces. In this event, miners working in the affected areas would be exposed to the hazards associated with a loss of adequate air ventilation, including smoke inhalation in the event of a belt fire. The inspector's S&S finding is therefore AFFIRMED.

With regard to the inadequate rock dusting citation (2724242), I agree with the inspector's S&S finding. The evidence establishes that a significantly large area of the mine was inadequately rock dusted, and notwithstanding the fact that the inspector found adequate air and no explosive levels of methane at the time of the inspection, the mine does liberate excessive levels of methane at any given time, has had past problems with methane, and was apparently being monitored and spot checked for methane. The obvious intent of the cited safety standard is to insure that the incombustible content of coal dust is maintained at the required levels to preclude fires and explosions. The inspector's credible testimony reflects the presence of methane at levels which presented a potential ignition and explosion hazard, and given the fact that potential ignition sources were present while coal was being mined, and miners were working in the affected areas, the presence of inadequate rock dusting presented a discrete fire and explosion hazard in the likely event of an ignition or interruption to the ventilation while mining was being accomplished. If this were to occur, one can reasonably conclude that the miners working underground would be exposed to the hazards associated with lack of adequate air, burns, and inadequate oxygen during any attempts to exit the mine, and would sustain injuries of a reasonable serious nature. Under the circumstances, the inspector's S&S finding IS AFFIRMED.

With regard to the permissibility violation for the missing flange joint on a continuous miner headlight (2727875), I cannot conclude that this condition was a significant and substantial violation. The inspector confirmed that no opening was present in the flange and that it had not loosened to the point of presenting an opening for methane to find its way into the component. The inspector confirmed that the machine was equipped with a methane detector device to automatically shut down the machine, and I assume that it was operable and would have deenergized the machine if high levels of methane were encountered. Considering the lack of any significant levels of methane at the face area, the presence of sufficient air at the face, and the inspector's testimony that .2 and .5 percent of methane will normally be present at the face with the amount of air being used to ventilate the face, and the fact that several variables would have to present any hazard, I cannot conclude that the violation was significant and substantial. Accordingly, the inspector's finding in this regard IS VACATED.

~1272

With respect to the citation for the failure to conduct practice escapeway drills (2727876), I conclude and find that the evidence does not support a finding of a significant and substantial violation. The inspector confirmed that in his inspection experience other mines "generally" complied with the escapeway drill requirements of section 75.1704-2(a), and that experienced miners would have knowledge of the escapeways. In the instant case, there is no evidence that any of the miners in question were new miners or were inexperienced and did not know where the escapeways were located. The evidence establishes that escape maps were posted on each of the working sections, that safety meetings are conducted at the mine, and that the required fire boss examinations were being conducted on each of the escapeways. Under the circumstances, I find no evidence to support any conclusion of the presence of any discrete hazard associated with the failure to conduct the drill in question, and the inspector's S&S finding IS VACATED.

#### Unwarrantable Failure Violation

The governing definition of unwarrantable failure was explained in Zeigler Coal Company, 7 IBMA 280 (1977), decided under the 1969 Act, and it held in pertinent part as follows at 295-96:

In light of the foregoing, we hold that an inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care.

In several recent decisions concerning the interpretation and application of the term "unwarrantable failure," the Commission further refined and explained this term, and concluded that it means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Energy Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghioghney & Ohio Coal Company, 9 FMSHRC 2007 (December 1987); Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988). Referring to its prior holding in the Emery Mining case, the Commission stated as follows in Youghioghney & Ohio, at 9 FMSHRC 2010:

We stated that whereas negligence is conduct that is "inadvertent," "thoughtless" or "inattentive," unwarrantable conduct is conduct that is described as

"not justifiable" or "inexcusable." Only by construing unwarrantable failure by a mine operator as aggravated conduct constituting more than ordinary negligence, do unwarrantable failure sanctions assume their intended distinct place in the Act's enforcement scheme.

In Emery Mining, the Commission explained the meaning of the phrase "unwarrantable failure" as follows at 9 FMSHRC 2001:

We first determine the ordinary meaning of the phrase "unwarrantable failure." "Unwarrantable" is defined as "not justifiable" or "inexcusable." "Failure" is defined as "neglect of an assigned, expected, or appropriate action." Webster's Third New International Dictionary (Unabridged) 2514, 814 (1971) ("Webster's"). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by "inadvertence," "thoughtlessness," and "inattention." Black's Law Dictionary 930-31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention. \* \* \*

Inspector Dotson testified that he issued the section 104(d)(2) Order No. 2724637 on May 17, 1988, for the lack of adequate belt conveyor guarding, because of "aggravated circumstances" on the part of the respondent. He explained that during prior inspections he had issued other guarding citations pursuant to section 75.1722, and had discussed with mine management the requirements for the proper installation of guards. He confirmed that these prior citations were issued for guards which did not extend for sufficient distances to comply with the standard, and that he had spoken to the company safety inspector, and the mine foreman, section foreman, and superintendent (Tr. 27-28).

Mr. Dotson confirmed that there was nothing unusual about the cited belt which was cited for inadequate guarding, and that it had only been installed on the day prior to his inspection of May 17, 1988. He also confirmed that the cited belt in question was not the same belt that he had previously cited or discussed for inadequate guarding, and although the cited belt had a guard installed, it was hanging loose and was not securely bolted to the belt structure. Even if the guard had been tightly secured, he did not believe that it was of sufficient size to prevent a person from reaching behind the guard and contacting the pinch point between the belt or the roller. Abatement was achieved by installing additional guards rather than extending the existing guards (Tr. 28-32).

~1274

Exhibit P-4(a) consists of three prior guarding citations issued by Mr. Dotson on February 1, 19, and 25, 1988. One of the citations is for inadequate guarding on the head and drive rollers of a belt conveyor (75.1722(b)), one is for inadequate guarding on a take-up roller of a conveyor belt (75.1722(a)), and one is for missing guards on the cutting head drive shaft and coupling on a continuous-mining machine (75.1722(a)). All of these citations were section 104(a) citations, and in each instance Mr. Dotson made findings of "moderate negligence."

Exhibit P-13 is a copy of the guarding citation issued by Mr. Dotson on May 24, 1988, a week after he issued the unwarrantable failure order, and it was issued because the guard provided for the tail pulley of a belt conveyor was loose and pulled open exposing the pinch point which "could easily be contacted by persons." In this instance, Mr. Dotson again made a negligence finding of "moderate negligence." Given the theory and rationale for his unwarrantable failure finding with respect to the contested order, I find these moderate negligence findings for essentially the same kind of conditions to be contradictory and inconsistent.

The contested order charges the respondent with a violation of the equipment guarding requirements of section 75.1722(b), which provides as follows:

(b) Guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley.

The regulatory language found in the standard in question provides no guidance as to what may be considered a "sufficient distance" for the extension of guards to prevent persons from contacting a potential pinch point. What may be sufficient for one inspector may not be sufficient for another, and Inspector Dotson agreed that these differences of opinion can possibly occur. In fact, most of the litigation resulting from applications and interpretations of this particular standard attests to the fact that reasonable persons can differ as to the meaning of the term "sufficient distance" in the context of equipment guarding, and each case must necessarily be considered on its own facts.

I reject any notion that simply because a mine operator has been previously cited with a guarding standard in the past, he may be considered per se guilty of "aggravated conduct" for any repeat citations. Further, I find no credible evidence here that the inspector previously instructed the respondent as to any particular or specific way for providing guards for its equipment. Although the cited standard addresses guards which

~1275

have already been installed on the equipment, two of the prior violations were abated by the installation of additional guards, rather than extending the existing ones, and one citation concerned a violation of subsection (a) of section 75.1722, rather than subsection (b), and it concerned a guard which was missing from the cutting head of a continuous-mining machine rather than a belt conveyor.

In view of the foregoing, I find no credible evidence to support the inspector's opinion that the violation in question resulted from "aggravated circumstances." The evidence establishes that in all of these instances of inadequate equipment guarding, with the exception of the missing guard on the mining machine, guards were in fact provided, but were inadequate in the judgment of the inspector. Under the circumstances, the inspector's unwarrantable failure finding IS REJECTED AND VACATED, and the contested order is modified to a section 104(a) citation, with S&S findings.

Size of Business and Effect of Civil Penalty Assessments on the Respondent's Ability to Remain in Business

The parties agreed that the respondent is a small mine operator, and the respondent's representative stated that at the time of the inspections the mine employed 90 to 100 miners, and that the annual coal production for the mine was approximately 351,422 tons (Tr. 117-118). I conclude and find that the respondent is a small mine operator.

The respondent's representative stated that the Smoot Coal Company is no longer in operation and has ceased to exist (Tr. 117). He confirmed that the company went out of business sometime in August 1988, has no assets and owns none of the mine equipment, and that another contractor has taken over the mine and the mine permit has been changed to the new company (Tr. 119). He explained that the Spring Ridge Coal Company owned the mine property and hired several contractors to mine the coal, and that the respondent Smoot Coal Company was one of the contractors mining the coal. He confirmed that Spring Ridge still owns the mine assets, including the equipment, and still controls the mine leases, and that Smoot Coal has no employees and does not mine any of the coal. However, he confirmed that Smoot Coal is still in existence as a corporation, but that its attorneys are taking steps to revoke its corporate charter in the State of West Virginia (Tr. 120-122).

The petitioner takes the position that the fact that Smoot Coal Company is no longer active in business, is irrelevant and that MSHA can seek payment of any civil penalty assessments for the violations in question in these proceedings from the corporate successor (Tr. 120). The respondent confirmed that at the time the violations were issued, Smoot Coal Company was in

~1276

fact mining the coal as a contractor, and that no other contractors were engaged in the mining of the coal at that time (Tr. 122).

MSHA Supervisory Inspector Francis Nutter testified that "I have spent a considerable amount of time in the mine in view of the paperwork." He stated that Smoot Coal Company had previously leased the mine to another contractor, the D.C. & M Coal Company, and that during the operation of the mine by this contractor MSHA issued an imminent danger order at the mine "for ventilation and methane accumulations," and D.C. & M then went out of business. Smoot Coal then filed to have the mine legal identity changed back to Smoot Coal so that it could continue working to abate the conditions which resulted in the imminent danger closure order. Mr. Nutter stated that the respondent's representative, Mr. Carpenter, served as the chief engineer and "probably the superintendent" for Smoot Coal, and also submitted some engineering maps for D.C. and M, and that some of the supervisors and employees remained in the employ of Smoot Coal (Tr. 122-125).

Mr. Nutter confirmed that at the time the violations were issued, Smoot Coal Company operated the mine. He had no knowledge that Smoot Coal was no longer in business and that MSHA's current legal identity number still reflects that Smoot coal is the operator of the mine, and that Smoot Coal filed the necessary MSHA paperwork to reflect its operation of the mine in order to correct the conditions resulting in the closure order (Tr. 127-128).

Respondent's representative Carpenter confirmed that the mine is still in the legal name of Smoot Coal Company, and that Smoot Coal took the mine back from D.C. and M Coal Company, but that Smoot has no employees and "is financially broke" (Tr. 130-131). He asserted that Spring Ridge Coal still controls all of the mine assets, and stated that Smoot Coal assumed the operation of the mine "just to protect the mine, from shutting the mine down, keep the mine open at the present" (Tr. 132). He further confirmed that while coal is not being mined at the present time, the mine is still "active" and has not been sealed or abandoned, but that in order to resume mining, Smoot Coal would have to abate the MSHA closure order (Tr. 132).

After careful consideration of all of the testimony and available evidence with respect to the status of the respondent Smoot Coal Company, I find no credible or probative information or evidence to establish that the payment of the civil penalty assessments for the violations in question in these proceedings will adversely affect the respondent's ability to continue in business. The record establishes that the respondent is the legal operator of the mine, that it is still a viable corporate entity, and that the mine is still an active mine. Further, the record is clear that all of the violations occurred at a time

~1277

when Smoot Coal Company was operating the mine, and that the only impediment to its continued operation of the mine is the outstanding closure order which apparently has not been abated or lifted.

#### History of Prior Violations

Exhibit P-21, is a summary of the respondent's assessed violations history for 1987 and 1988, and it reflects that the respondent received 111 violations, excluding timely paid "single-penalty" assessments, over a period of 197 inspection days. Exhibit P-22, is an MSHA computer print-out reflecting that the respondent paid \$20,089, in civil penalty assessments for 163 violations, 151 of which are S&S violations during the period July 27, 1987 through June 8, 1988. This history includes 25 prior violations of mandatory safety standard section 75.400 (coal accumulations), 15 violations of section 75.503 (permissible face equipment), and 14 violations of section 75.316 (ventilation and methane). For an operation of its size, I conclude and find that the respondent has an average to less than average history of prior compliance, particularly with respect to the permissibility, ventilation, coal accumulations standards.

#### Good Faith Compliance

The parties agreed that all of the violations were timely abated by the respondent in good faith, and I conclude and find that this is the case, and I have taken this into consideration in the civil penalty assessments which have been made for the violations in question.

#### Gravity

In light of my S&S findings and conclusions, and on the basis of the inspector's credible testimony with respect to the hazards connected with each of the violations, I conclude and find that they were all serious.

#### Negligence

With regard to Citation No. 2727875, the inspector found a low degree of negligence on the part of the respondent, and the parties stipulated that this was the case (Tr. 70). With regard to nine additional violations, the inspector found that they were the result of moderate negligence (Tr. 17-21, 44, 52-53, 58, 62, 79, 89-90, 95-97, 106, 111). I adopt these findings as my findings on this issue, and I conclude and find that the 10 violations in question were the result of the respondent's failure to exercise reasonable care, and that they all constitute ordinary negligence by the respondent.

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With regard to the modified section 104(a) Citation No. 2724633, and in light of my rejection of the inspector's unwarrantable failure finding, I conclude and find that this violation also resulted from the respondent's failure to take reasonable care, and that this constitutes ordinary negligence.

#### Civil Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the following civil penalty assessments for the violations which have been affirmed are reasonable and appropriate in the circumstances of these proceedings:

Docket No. WEVA 88-328

Citation No.	Date	30 C.F.R. Section	Assessment
2724242	04/06/88	75.403	\$200
2724637	05/17/88	75.1722(b)	\$175
2727872	06/06/88	75.316	\$150
2727873	06/08/88	75.517	\$150
2727874	06/18/88	75.211(c)	\$105
2727875	06/08/88	75.503	\$ 30
2727876	06/08/88	75.1704-2(e)	\$ 35

Docket No. WEVA 88-329

Citation No.	Date	30 C.F.R. Section	Assessment
2127863	05/24/88	75.1722(b)	\$125
2727864	05/24/88	75.400	\$105
2727869	05/27/88	75.211(c)	\$168
2727870	06/06/88	75.400	\$168

#### ORDER

The respondent IS ORDERED to pay civil penalty assessments in the amounts shown above within thirty (30) days of the date of these decisions, and upon receipt of payment by the petitioner, these proceedings are dismissed.

George A. Koutras  
Administrative Law Judge