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SOL (MSHA) v. R B M ENTERPRISES
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, Virginia 22041

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

v.

R B M ENTERPRISES, INC.,
RESPONDENT

CIVIL PENALTY PROCEEDINGS

Docket No. KENT 90-410
A.C. No. 15-16316-03515

No. 1 Mine

Docket No. KENT 90-418
A.C. No. 15-16735-03506

No. 2 Mine

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee, for
the Secretary;
Billy R. Shelton, Esq., Baird, Baird, Baird and
Jones, P.S.C., Pikeville, Kentucky, for the
Respondent.

Before: Judge Melick

These cases are before me pursuant to section 105(d) of the
Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et
seq., the "Act," in which the Secretary of Labor has proposed
civil penalties for alleged violations by R B M Enterprises,
Inc., (RBM) of regulatory standards. The general issues before me
are whether RBM committed the violations as alleged and, if so,
the amount of civil penalty to be assessed.

Docket No. KENT 90-410

At hearings the parties submitted a proposal for settlement
of the one citation at issue in the amount of \$20. The motion was
granted at hearing on the basis of the Secretary's representation
that she has agreed to alternate means of achieving the purpose
of the cited standard and that the operator has complied with
that alternate method i.e. providing a fire proofing agent to be
sprayed on the coal ribs at the battery station cited in this
case. Under the circumstances the proposal for settlement is
approved and the corresponding penalty will be incorporated in
the order following this decision.

Docket No. KENT 90-418

Citation No. 3535703 issued pursuant to section 104(d)(1) of

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the Act (Footnote 1) (Footnote 2) charges a "significant and substantial" violation of the standard at 30 C.F.R. 75.400 and charges as follows:

Combustible material in form of float coal dust from grey to black was allowed to accumulate along under the No. 2 belt conveyor line and the connecting cross cuts and in the No. 3 [illegible] the left side the belt going toward the 001 section with loose wet coal and coal dust from one-inch to approximately 14 inches in various locations, starting at head drive and extending inby for 600 feet in length. This condition has existed for sometime due to the coal that was left along ribs from when the belt line had been moved up.

The standard at 30 C.F.R. 75.400 provides as follows:

Coal dust, including float coal dust deposited on rockdusted 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.

MSHA Supervisory Inspector Kellis Fields testified that on March 6, 1990, he was performing a general inspection of the cited No. 2 Mine accompanied by Mine Superintendent Ellis Adkins. It is not disputed that at the time of this inspection there were 8 to 10 miners working on the sections but that the mine was not then producing coal because the motor on the coal feeder had earlier broken down. According to Inspector Fields the belts were nevertheless still running for the clean-up of loose coal. According to Fields, he and Superintendent Adkins entered along the No. 1 belt and turned right along the No. 2 belt (see Government Exhibit No. 3). The areas marked in green on that exhibit comport with the description in the citation that there was float coal dust under the No. 2 belt conveyor and the connecting crosscuts. In addition, according to Inspector Fields there was loose wet coal and coal dust from one inch to approximately to 14 inches deep in various locations starting at the head drives and extending inby for 600 feet. He found the larger accumulations (up to 14 inches) in locations where the coal feeder had previously been situated. Based on estimated mining progress, Fields concluded that the feeder had been moved from 14 to 16 days before his inspection. He observed that spillage normally occurs at feeder locations as a result of overflowing.

According to Inspector Fields, Superintendent Adkins admitted to him several days after the inspection that he had been aware of the coal spillage, but had not had time to have it cleaned up. The coal spillage had apparently been left at the feeder locations after the belt had been moved.

Inspector Fields believed that there was a serious potential for ignition from various electrical components including the 112-volt belt control line, the 440-volt "AC" belt control box and the 4160 "AC" power center. Fields noted in particular that the belt control box was a "nonpermissible" box and that one quarter inch of coal dust lay inside the box and on the components inside. He further noted that the coal dust within the control box was dry and that it could have been ignited by a spark inside the box resulting in fire or explosion. He opined that the belt rollers themselves could also become stuck causing friction with the belt resulting in the drying and ignition of adjacent coal dust. The 112-volt control line could also become damaged causing an arc and triggering an explosion.

The record shows that additional citations were also issued at this time for other extant conditions, namely for coal dust within the belt control box, for an inadequate water spray (fire

suppression) system on the belt line, for failure to provide a fire hose where a 500-foot hose was required, for the absence of water outlets onto which fire hoses could be attached, and for the absence of fire sensors to automatically activate the belt water deluge system in the event of fire. These citations were not challenged and were issued for violations occurring concomitantly with the violation at issue herein. This evidence provides a basis for finding highly aggravating circumstances.

Accordingly, within this framework, Inspector Fields' conclusion that it was highly likely that all of the miners (estimated to be 8 to 10 working at the face alone) would be killed by explosion or fire is clearly supported by credible evidence. I find the inspector's testimony sufficient to support the "significant and substantial" violation charged herein. See Mathies Coal Co., 6 FMSHRC 1 (1984).

In reaching these conclusions, I have not disregarded the testimony of RBM witnesses Ted Robinson, a certified electrician, Ronny Dean Smith, a miner helper, and Elmo Green, a mine inspector for the Kentucky Department of Mines and Minerals, that the mine at issue was so wet that the "coal dust" consisted of nothing more than soupy mud. Inspector Green opined that with the amount of water in the subject mine there would not be an explosion or fire hazard from coal dust. He observed that mud from 1 to 4 inches deep existed on the bottom of the mine.

Indeed there appears to be no dispute that the subject mine was an extremely wet mine and that much of the coal dust cited was in fact wet and muddy. However, those factors do not preclude a violation of the standard at 30 C.F.R. 75.400. See Secretary v. Black Diamond Coal Mining Company, 7 FMSHRC 1117 at p.1120-1121 (1985); Utah Power light Company Mining Division v. Secretary of Labor, 12 FMSHRC 965 (1990). The Commission observed in those decisions that even though such accumulations may be damp or wet they are still combustible and noted that in the case of a fire starting elsewhere in the mine the resulting heat may be so intense that wet coal can dry out and propagate a fire.

Moreover, in light of the many other aggravating conditions, noted above, considered in the context of continued normal mining operations, there was a confluence of factors present in this case to constitute a reasonable likelihood of a combustion hazard resulting in an ignition or explosion in spite of the wetness. See U.S. Steel Mining Co. Inc., 6 FMSHRC 1573 (1984) and Texas Gulf, Inc., 10 FMSHRC 498 (1988).

It is clear that the violation was also the result of "unwarrantable failure" and high negligence. The testimony of Inspector Fields that larger accumulations were located where the coal feeders had previously been located some 14 to 16 days

before his inspection, is credible. Indeed Superintendent Adkins admitted to Fields that he had been aware of such coal spillage, but had not had time to clean it up. Thus even assuming, arguendo, that miners were beginning to clean along the No. 2 belt line at the time of the inspection, it is clear that the existence of the accumulations for two weeks or more constituted such an aggravated omission and gross negligence that it was the result of unwarrantable failure. Emery Mining Company, 9 FMSHRC 1997 (1987). Accordingly, the section 104(d)(1) citation at bar must be affirmed. Moreover, considering the criteria under section 110(i) of the Act it is clear that the proposed civil penalty of \$800 is indeed appropriate.

ORDER

R B M Enterprises, Inc. is directed to pay civil penalties of \$820 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

(Footnotes start here)

1. Section 104(d)(1) of the Act provides as follows:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significant and substantially contribute to the cause and effect of a coal or other mien safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, a nd to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

2. The Citation herein was modified at hearing from a Section 104(d)(2) order to a Section 104(d)(1) citation since there had in fact been an intervening cleaning inspection following the precedential Section 104(d)(1) order.