

CCASE:  
SOL (MSHA) v. PEABODY COAL  
DDATE:  
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TTEXT:

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.

PEABODY COAL COMPANY,  
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. KENT 90-194  
A. C. No. 15-02709-03724

Docket No. KENT 90-208  
A. C. No. 15-02709-03728

Camp No. 1

Docket No. KENT 90-441  
A. C. No. 15-07166-03634

Sinclair Slope UG #2

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor,  
U. S. Department of Labor, Nashville, Tennessee,  
for the Petitioner;  
David R. Joest, Esq., Peabody Coal Company,  
Henderson, Kentucky, for the Respondent.

Before: Judge Weisberger

Statement of the Cases

In these cases, which were consolidated for a hearing, the Secretary (Petitioner) seeks civil penalties for alleged violations by the Operator (Respondent) of various mandatory safety standards. Subsequent to notice, the cases were scheduled for hearing in Nashville, Tennessee, on January 28-29, 1991. At the hearing Harold M. Gablin, Steve Henshaw, and Donald Wayne Ervin testified for Petitioner. Jim Ricketts, Brad Williams, and William Plum testified for Respondent. Respondent filed a Post Hearing Brief on March 11, 1991. Petitioner filed a Brief and Argument on April 8, 1991.

Docket No. KENT 90-441

At the hearing, Petitioner indicated that it would be vacating Citation No. 3416852. Accordingly, this Citation is dismissed.

Subsequent to the hearing, on April 16, 1991, Petitioner filed a Joint Motion to Approve Settlement. In the Motion, Petitioner indicated that Order No. 3416856 is to be vacated. Accordingly, it is DISMISSED.

In addition, the Joint Motion seeks approval of a reduction in penalty from \$288 to \$20 for a violation set forth in Citation No. 3421270. I have considered the representations and documentation submitted along with the Motion, and conclude that the proposed penalty of \$20 is appropriate for the violation charged, and it is approved.

Docket Nos. KENT 90-194 and KENT 90-208

I. Order No. 3419559 (KENT 90-194)

a. Violation.

On February 1, 1990, MSHA Inspector Harold M. Gablin performed an inspection of Respondent's Camp No. 1 Mine. He testified that in the First Main North belt entry, he observed coal dust that extended the full width and length of the belt. (Footnote 1) Gablin also indicated that the accumulation was in the cross-cuts and that essentially it was "very black" (Tr. 148). He described the material that had accumulated as not being spillage and consisting of fine dust. Gablin testified that he measured the depth of the coal dust accumulation and it measured between a 1/4 to 1/2 inch. Gablin issued a 104(d)(1) Order alleging an accumulation of coal dust, including float coal dust in violation of 30 C.F.R. 75.400 which, as pertinent, proscribes the accumulation of coal dust including float coal dust deposited on rock dusted surfaces.

Donald Wayne Ervin, the Chairman of the Safety Committee, who accompanied Gablin on his inspection on February 1, testified that he observed Gablin measure the depth of the accumulation, and corroborated that it was 1/4 to 1/2 inch deep. Ervin further indicated that he also observed float dust in the cross-cuts and the dust was dry and extended throughout the belt.

William Plum, Respondent's belt foreman on the day shift, indicated that on the date of Gablin's inspection, he did not observe any accumulations 1/4 to 1/2 inch deep. Brad Williams, Respondent's mine foreman on the day shift, indicated that the accumulation was not as deep as 1/4 of an inch. I place more weight on the testimony of Gablin, as corroborated by Ervin, with regard to the depth of the accumulation, inasmuch as he (Gablin) actually measured it. Both Plum and Williams described the material as gray and not black. However, Williams stated that a gray color indicates that ". . . it's getting dust accumulation" (Tr. 264). Ricketts indicated that there was coal dust and rock dust, but did not contradict the specific testimony of Gablin, that there was float coal dust rib to rib the entire length of the belt line. Also, Plum indicated that the worst area of the accumulation was between the No. 12 cross-cut and the header. Since the centers of the cross-cuts are 70 feet apart, the length of this area is approximately 840 feet. I conclude that it has been established that on February 1, 1990, there was an accumulation of float coal dust in violation of Section 75.400, supra.

b. Unwarrantable Failure.

According to Gablin, because of the extent of the accumulation which extended the entire width of the entry, the depth of the accumulation, and the fact that the entry was dry, he concluded that the accumulation had been in existence for at least 30 days.

Steve Henshaw, a belt examiner employed by Respondent on the day shift, indicated that on January 25, 1990, he performed a preshift examination of the belt entry in question, and that the Preshift Mine Examiner's Report (Examiner's Report) contains the following notation: "clean track side 54-52, 49-48, 43-30, dust tail 21 & 12-drive . . ." (Government Exhibit 7, page 1). He said that on January 25, 1990, he had observed black float dust from the tail through cross-cut 21 and from cross-cut 12 to the drive, and the material extended from rib to rib. He testified that the following day the spillage and float dust was still there. The Examiner's Report for the day shift of January 26, contains the following notation for the belt entry at issue, "dust belt." (Government Exhibit 7, Page 8). Henshaw indicated that the condition was getting worse daily, and on January 30, he continued to observe float coal dust. The Mine Examiner's Report for the day shift January 30, 1990, contains the following notation for the First North belt. ". . . clean track side 54-52 & 49-48 & 53-40 & 34 & 1/2 & 32 & 1/2-30 & float dust at bottom roller, dust all, . . ." (Government Exhibit 7, Page 24). Henshaw testified that the following day on January 31, the accumulations of coal and float dust were still there. He indicated that the condition of the belt with regard to dust was the same on January 31, as it was on January 30. The preshift

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Mine Examiner's Report for January 31, day shift states as follows: "clean areas listed 1-30-90, dust belt . . . " (Government Exhibit 8, Page 32).

Jim Ricketts, the mine foreman for the third shift, midnight to 8:00 a.m., (a nonproduction shift), essentially indicated that unless there is a "trouble spot," or a hazard, each of Respondent's approximately 7 to 10 miles of belt line is dusted in a "cycle" (Tr. 241). He indicated that in a normal cycle each belt would be rock dusted every 2 weeks. He indicated that on the midnight to 8:00 a.m. shift February 1, 1990, he finished rock dusting the two North belt and thus, according to his normal cycle, would have rock dusted the First North belt the following night.

The Preshift Mine Examiner's Report for the 4:00 p.m. to midnight shift for January 25, 1990, does not contain any notation of dust or the need to clean the First North entry. The second shift Daily and On-shift Report (for January 25, 1990) indicates as follow: "cleaned on spillage 1st N." (Government Exhibit 7, Page 5). The Daily and On-shift Report for the second shift January 29, 1990, contains the following notation: "cleaned on spillage 1 N." (Government Exhibit 8, Page 21). The second shift Daily and On-shift Report for January 30, 1990, contains the following notation: "cleaned on spillage 1st N." (Government Exhibit 8, Page 28). The Preshift Mine Examiner's Report for the 4:00 p.m. to 12:00 midnight shift for January 31, contains the follow note: "1 N-cont. clean on track side." (Government Exhibit 8, Page 35).

In order for it to be found that the violation herein resulted from Respondent's unwarrantable failure the evidence must establish that there was aggravated conduct on the part of Respondent. (Emery Mining Corporation, 9 FMSHRC 1997 (1987)). For the reasons that follow, I conclude that the record establishes that Respondent's conduct did indeed reach this level.

Based on my observations of the demeanor of Gablin in this regard, and because his testimony has not been specifically contradicted or impeached, I accept his testimony that on February 1, there was an accumulation of coal that extended across the width of the entry and continued for its entire length. Further, the testimony of Gablin that he measured the accumulation, and it was at a depth of between 1/4 to 1/2 half inch, has been corroborated by Ervin. Respondent did not adduce any evidence of any measurements taken that contradict Gablin's testimony. Hence, based upon the extent of the accumulation, its depth, and fine consistency, as indicated by Gablin and Henshaw, I conclude that the accumulation had existed for at least a few days prior to February 1, 1990.

It is significant that, as evidenced by the Preshift Mine Examiner's Report (Government Exhibit 7), and as explained by Henshaw, in his testimony, he advised Respondent, on January 25, 26, 30, and 31, of the need to clean and dust the belt. Further, in the Examiner's Report of January 10, the areas noted by him to be cleaned on the track side between cross-cuts 30 to 32 1/2, 34 1/2, 48 to 49, and 52 to 54, were the same areas previously noted on January 25. Additionally, on January 31, Henshaw specifically noted to clean the areas previously listed on January 30.

The weight of the evidence fails to establish that Respondent paid heed to Henshaw's notations, and cleaned the accumulations in question. There are notations in the Examiner's Report for the second shift, on January 25, 29 and 30, that indicates as follows: "clean on spillage," (Government Exhibit 8, Pages 5, 21, 28) for the First North, and on January 31, as follows: "1 N cont. cleaned on track side." (Government Exhibit 8, Page 35). However, Respondent did not adduce the testimony of any witness who had personal knowledge as to exactly what cleaning, if any, was performed in the First North belt. Also, there is no evidence that any cleaning had been performed during the third or nonproduction shift, i.e., midnight to 8:00 a.m. Indeed, Ricketts, the foreman of that shift, could not establish the last time, prior to February 1, 1990, that the First North was cleaned. Although the need to clean or dust was not noted on the Preshift Mine Examiner's Report of the 4:00 p.m. to midnight shift of January 25, 26, 30, and 31, the conclusion is inescapable that Respondent failed to take action to eliminate the accumulations, in spite of having been notified by Henshaw, who was termed by Brad Williams, Respondent's day foreman, as being the ". . . an awful good belt walker, probably the best belt walker we've got" (Tr. 267). (Footnote 2)

I find that Respondent's failure to take action, in spite of being repeatedly informed by Henshaw of the need to clean or dust, is not mitigated to any great extent by testimony from Ricketts and Williams that, in contrast to Henshaw's customary practice, he neither personally advised Ricketts and Williams of the need to dust and clean, nor did he underline or otherwise highlight any of his notations on the dates in question. For all these reasons I conclude that it has been established that the violation herein resulted from Respondent's unwarrantable failure (See Emery, supra).

II. Citation No. 3419558 (KENT 90-208)

a. Violation

On February 1, 1990, Gablin issued to Respondent a Section 104(d)(1) citation, inasmuch as he had observed 17 frozen and damaged belt rollers in the First North belt line. Specifically, he indicated that on February 1, "I seen rollers that were partly worn in two, that they were worn completely in two, . . ." (Tr. 125). He indicated that the roller at cross-cut 42 1/2 was frozen.

It was Gablin's testimony that he spit on two rollers and he heard "frying" (Tr. 55-56). Ervin also spit on a roller and "it sizzled" (Tr. 228). Ervin testified that he observed damaged rollers when he accompanied Gablin on his inspection on February 1. He indicated that some rollers were "stuck, just not rolling at all, and the bottom roller was turning into the bottom" (Tr. 230). He also said that the cylinders of one or two of the rollers had "worn" to the extent that the cylinder had separated into two parts (Tr. 230). Also, according to Ervin the "bearings were out" (Tr. 229) on some rollers and one or two were running on the spindle.

William Plum, Respondent's belt foreman for the day shift, testified that he changed the rollers at Gablin's direction on February 1. He indicated that he could not find anything wrong on some of the rollers that Gablin had him replace. According to Gablin there were no rollers that he could tell were frozen. However not much weight was accorded this conclusion, as he stated on cross-examination that when he changed the rollers the belt was not running, and it cannot be ascertained if a roller is hot or frozen if the belt is not running. Also, it is noted that he indicated that two rollers were broken in two.

It was Gablin's testimony, which has not been rebutted, that a hot, damaged, or frozen roller can cause friction which can lead to a fire.

I thus conclude that it has been established that at least two rollers were broken in two, two were worn, one was frozen, and two were hot. Thus, the record supports a finding that Respondent herein did violate 30 C.F.R. 75.1725(A), as alleged in the Citation. 30 C.F.R. 75.1725(a) requires that machinery and equipment be maintained in safe operating condition, and if they are in an unsafe condition, they shall immediately be removed from service.

b. Unwarrantable Failure

Gablin testified that a frozen roller could happen within a shift. However, in essence, he indicated that if a roller is hot or damaged to the extent that the belt is running on the shaft, there is an indication that this condition has been in existence for a week or longer. I note in this connection that Gablin indicated that he did see the belts running on the shaft, although he did not recall how many he saw. As explained by the testimony of Henshaw and as evidenced by the Examiner's Report (Government Exhibit 7), Respondent was advised of a hot middle insert at cross-cut 45 on January 25, 26, and 30. A hot middle insert, at cross-cut 51, was noted on the day shift Examiner's Report on January 30 and again on January 31. (Footnote 3) Also, Henshaw in his Preshift Mining Examiner's Report noted rollers designated as MI51 and BSI 38 1/2 on January 25, 26, and 30. On January 31, he noted "hot" BSI 38 1/2. (Footnote 4) (Government Exhibit 8, Page 32) There is no evidence that Respondent took any action to fix or replace the rollers cited repeatedly by Henshaw, nor those indicated by him repeatedly to be "hot." Essentially for the reasons stated in the discussion of Order No. 3419559, I do not find sufficient circumstances to have mitigated Respondent's lack of action herein. Inasmuch as Respondent had been made aware of the hot rollers and other rollers set forth in a Preshift Mine Examiner's Report, under the heading "hazardous conditions," and had failed to correct same, I conclude that the violation herein was as the result of Respondent's unwarrantable failure (See Emery, supra.)

III. Citation No. 3419558 and Order No. 3429559  
Significant and Substantial

According to Gablin, the violative conditions cited in both Citation No. 3419558 and Order No. 3419559 are significant and substantial. For the reason that follow, I agree.

As set forth above, *infra*, the record has established a violation of Section 75.1725, *supra*, in that, on February 1, 1990, there were two hot rollers, two rollers that were in two pieces, and one or two rollers rolling on their spindle. Due to the heat and friction generated by these conditions a discrete safety hazard of heating and sparks was thereby contributed to. Indeed, although Ervin could not recall if he saw sparks, it was Gablin's testimony that he did see sparks at cross-cut 51 from either a belt roller or a frame. In addition, according to Ervin, one belt roller was turning in coal dust. Gablin testified that the belt between cross-cuts 29 and 30 was dragging in coal dust, raising coal dust in suspension. He also said that other belts were also rolling in dust. (Footnote 5) The hazard of the belt turning in dust was exacerbated by the fact, as testified to by both Ervin and Gablin, that the entry was dry. Given all these conditions, I conclude that there was reasonable likelihood that the hazard of a fire or explosion contributed to by the presence of extensive amounts of coal dust, as well as the rollers not being in a safe condition, would result in an injury of a reasonably serious nature, especially considering the effects of the resulting carbon monoxide, as testified to by Gablin. Based upon the above, I conclude that it has been established that the violations herein cited in Citation No. 3419558 and Order No. 3419559 were significant and substantial.

IV. Citation No. 3419558 and Order No. 3419559  
Penalties

a. Citation No. 419558

Due to the extensive amounts of float coal dust accumulation, its consistency, and the presence of ignition sources discussed above, *infra*, and considering that there was dust in suspension between cross-cuts 29 and 30 and at cross-cut 50, I conclude that the violation herein cited in Citation No. 3419558 was of a high level of gravity. Essentially, based

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upon the same factors set forth above, (II.b., infra, I conclude that Respondent's negligence herein was high. Taking into account the remaining factors set forth in Section 110(i) of the Act, as stipulated to by the Parties, I conclude that a penalty of \$1000 is appropriate for the violation cited in this Citation.

b. Order No. 3419559

The record establishes specifically, that there were two hot rollers at 38 1/2 and 51 cross-cuts, two rollers that had been broken in two, and one or two rollers that were rolling on their spindle. In general, Gablin testified that two other rollers were damaged or frozen, but did not specify the exact nature of the damage. Although his Citation listed various rollers, he could not specify the exact unsafe problem with regard to the rollers cited. Taking into account the fact, as explained above, III., infra, that damaged rollers could produce heat and sparks, and taking into account the extensive amounts of coal dust and dust in suspension, I conclude that the violation herein was of a high level of gravity. Further, based upon essentially the same reason set forth above, II(b), infra, I conclude that Respondent herein acted with a high degree of negligence. I conclude that a penalty of \$1000 is proper for the violation found herein.

ORDER

It is ORDERED that Respondent shall, within 30 days of this Decision, pay \$2020 as a civil penalty for the violations found herein.

It is further ORDERED that Citation No. 3416852 and Order No. 3416856 be DISMISSED.

Avram Weisberger  
Administrative Law Judge

Footnotes start here:-

1. Based on the testimony of Gablin, I conclude that the width of the belt was 20 feet. Gablin indicated that the length of the belt was 4000 feet. Jim Ricketts, Respondent's mine foreman for the third shift, indicated that the belt extended 4500 feet. Brad Williams, Respondent's mine foreman for the day shift testified that the length of the belt was 5600 feet. I conclude that the belt extended at least 4000 feet.

2. Also, Ricketts testified that the Preshift Mine Examiner's Report is examined prior to a shift in order to correct hazards that are noted, and that Henshaw is "thorough" and accordingly the first report he looks at is Henshaw's. (Tr. 245).

3. It is significant to note that the Citation issued to Respondent alleges as follow: "51 top center frozen and hot"

(emphasis added).

4. The Citation issued to Respondent lists "38 1/2 top center hot" and "51 top center frozen and hot." among the violative conditions. It is also significant to note that Henshaw, in his reports of January 30 and 31, under the heading Violations and other Hazardous Conditions Observed and Reported, listed "MI 41 1/2." (Government Exhibit 8, Page 24, 32). The Citation at issue lists "41 1/2 top center roller." Also, Henshaw's report of January 25, 26, 30 and 31, lists "BSI 54" as a hazardous condition. (Government Exhibit 8, Page 8, 24, 32). The Citation lists "54 top center."

5. I find the testimony of Plum that the belt was running in a "heated bottom" (Tr. 276, sic.) consisting of clay, inadequate to rebut the specific testimony of Gablin that the belt between the 29 and 30 cross-cut was dragging in coal dust. Also, I note that Plum testified that in two places the belt was in contact with the float coal dust that was mixed with fire clay.