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SOL (MSHA) v. PEABODY COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING
v.	Docket No. LAKE 91-11 A.C. No. 11-00585-03769
PEABODY COAL COMPANY, RESPONDENT	Mine No. 10

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Petitioner;
David S. Hemenway, Esq., Thompson & Mitchell, St. Louis, Missouri for the Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," charging the Peabody Coal Company (Peabody) with two violations of mandatory standards and proposing civil penalties of $2,700 for those violations. The general issue before me is whether Peabody violated the cited regulatory standards and, if so, the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

Citation No. 3035886, issued pursuant to section 104(d)(1) of the Act, alleges a violation of the mandatory standard at 30 C.F.R. 75.517 and charges as follows: (Footnote 1)

> The trailing cable supplying direct current power to the #21 Shuttle car had been damaged to the extent that a bare wire was visible. The cable had a nick in it 31 inches long exposing the bare wire and had been partially covered with black tape. This tape did not provide adequate insulation to the wire. 17 similar violations have been issued thus far in fiscal year 1990, and 26 were issued in fiscal year 1989. In the past, these similar violations of 75.517 have been discussed with mine management and the operator knows a problem with repeat violations exists at this mine.

The citation was subsequently modified as follows: "section 1, item 8, is hereby modified to include the physical location of No. 21 shuttle car which is the 1-east, 3-south, 6-east, main south (006) coal producing unit."

The cited standard, 30 C.F.R. 75.517, provides that "power wires and cables, except trolley wires, trolley feeder wires, and bare signal wires, shall be insulated adequately and fully protected".

Peabody admits the violation charged herein but maintains that it was not "significant and substantial" nor the result of "unwarrantable failure". It further maintains that it was not negligent in causing the violation.

The observations by Inspector Edward Banovic of the Federal Mine Safety and Health Administration (MSHA) regarding the violation are not disputed but only his conclusions regarding gravity, negligence and whether the violation was "significant

and substantial" and due to the "unwarrantable failure" of the operator to comply with the standard. During the course of a regular underground inspection on May 10, 1990, Inspector Banovic examined the cable to the cited shuttle car and immediately noticed a cut in the cable exposing bare wires inside. Banovic's testimony that the damaged area and the bare exposed wires were readily visible is unchallenged. There had been some black tape placed over a portion of the cut but the cut in the cable extended beyond the taped area. In any event it was not an approved tape for insulation purposes. According to Banovic the power cable to the shuttle car was energized when he arrived in the unit and when he asked to examine the cable the Respondent elected to operate the car to unspool the cable.

Banovic concluded that the 300 volts of direct current power supplied to the shuttle car through the cable made it reasonably likely that someone coming in contact with the shuttle car would suffer fatal injuries. He noted that the cable to the car had been energized and that, when unspooled, the defective part of the cable lay on the mine floor. Banovic also noted that as the cable would be rewound it could come into contact with the metal frame of the shuttle car. According to Banovic, persons walking by such as a foreman, touching the machine and persons carrying the cable would therefore be exposed to a shock hazard reasonably likely to result in fatal injuries. Banovic also opined that the cable could cause a fire within the reel compartment of the shuttle car thereby in this manner also creating a "significant and substantial" hazard. Within this evidentiary framework it is clear that the violation was indeed serious and "significant and substantial". Mathies Coal Company, 6 FMSHRC (1984). The credible expert testimony of MSHA supervisory Inspector Lonnie Conner fully corroborates these findings.

In reaching these conclusions I have not disregarded Peabody's claims that it had an inspection policy that would have resulted in discovery of the defective cable. Absent evidence of actual effective enforcement of such a policy however I can give but little weight to this self-serving declaration.

Banovic also opined that the violation was the result of "unwarrantable failure" and high negligence. He based his conclusion upon evidence that the cut in the cable was obvious and that it had been improperly covered with tape which failed to provide adequate insulation and which was even in violation of the operator's own corrective procedures. He inferred from this evidence that the damage to the cable should therefore have been known to the operator and that, in addition, inadequate and improper action had been taken in an attempt to correct the problem. I agree. Clearly, this evidence shows that the operator knew or should have known of this condition and that it failed to abate the condition because of a lack of due diligence, indifference or lack of reaonsable care. Quinland Coals, Inc.

10 FMSHRC 705 (1988). As the Commission stated in that case this formulation describes aggravated conduct constituting more than ordinary negligence within the meaning of the Emery Mining Corp., 9 FMSHRC 1997 (1987) decision.

In reaching his negligence findings Banovic also relied upon evidence of Peabody's repeated violations of the same mandatory standard over the recent past. In this regard Supervisory Inspector Conner observed that there had been 18 citations at this mine for violations of the mandatory standard at issue during fiscal year 1990 up to the date of the instant citation, May 10, 1990, (Exhibit P-4). All of these violations involved defective power cables and most specifically involved defective trailing cables. Moreover four of the violations were found in the two months preceding the instant violation. While those violations occurring most closely in time to the instant violation are most significantly related to the issue of negigence herein I find all of the violations to be sufficiently related in time to be probative on the issue of operator negligence herein. Clearly such a definitive pattern of repeated similar violations over a relatively brief period of time shows in itself such indifference and lack of reasonable care as to constitute such gross negligence and aggravated acts and/or omissions as to warrant the "unwarrantable failure" findings herein. Youghiogheny and Ohio Coal Company, 9 FMSHRC 2007 (1987).

Conner further testified that he conducted several meetings with management of the subject mine in March, June and November 1989 emphasizing the problems of these repeated violations. According to Mine Superintendent William Raetz, following the November meeting with MSHA officials, he met with his supervisory personnel and orally instructed them to physically walk and check their trailing cables before operation of equipment. There is no evidence however that this practice was actually thereafter followed and indeed a succession of violations of the same standard continued after this meeting. Thus, in spite of specific notice of these problems Peabody failed to take effective corrective action. This too is evidence demonstrating aggravated conduct and omissions. Under the circumstances the evidence separately and collectively warrants a finding of gross negligence and "unwarrantable failure". Emery Mining Co., supra; Youghiogheny and Ohio Coal Co., supra; Quinland Coals, Inc., supra.

Order No. 3035889, also issued pursuant to section 104(d)(1) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. 75.400 and charges as follows:

> Accumulations of coal and coal dust were present under the 7th west belt at the transfer point of the 2nd north belt line. There were two piles of coal 15 feet

> long and 30 inches high rubbing the belt and rollers were turning in coal. The drive of the 2nd north had coal dust and coal packed in it rubbing the belt and packed up to 24 inches high on the drive roller. Two piles were present between the head roller and drive roller 30 inches high and 4 feet wide by 4 feet long.

The standard at 30 C.F.R. 75.400 requires that "[c]oal 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." Peabody also admits this violation but maintains that it was neither a serious violation nor was it the result of high negligence or "unwarrantable failure".

Inspector Banovic testified that on May 18, 1990, before entering the underground portion of the No. 10 Mine, he inspected the mine examiner's book and noted that coal dust was reported to exist at the cited transfer point in about 7 of the preceding shift reports. Once underground, Banovic found that excessive loose coal and coal dust existed at 5 locations. There were two piles under the 7th west belt line 15 feet long and about 30 inches high and the coal was being rubbed by the belt rollers and the belt. There was another pile around the second north drive roller. He concluded that this coal had been packed for up to a week. Dust had been compressed around the 30 inch diameter roller. There were also two piles between the second north drive roller and the transfer point. According to Banovic these piles were "fresh" and looked as though they had been deposited within 24 hours.

Inspector Banovic concluded that coal dust in contact with the belt and rollers provided an ignition source from friction. He also noted that ventilating air proceeds inby to two working units and that any smoke from a fire would proceed over working miners possibly resulting in suffocation. The inspector noted that an electric motor runs the belt drive and could also provide an ignition source. He observed that some of the coal piles along the seventh west belt line were also not in an area covered by fire suppression devices. Under the circumstances Banovic's expert opinion that the violation was "significant and substantial" is clearly supported by a preponderance of the evidence. Mathies Coal Co., supra.

Banovic concluded that the violation was the result of high negligence since the cited area had been reported several times in the preshift book as having had loose coal. He noted that no one was then present to clean up these conditions and that it took five persons working four hours to clean up the cited coal. The inspector also concluded that the belt had recently been running because, in his presence, several foremen were asking on

the telephone why the belt was down. He felt that the violation was the result of "unwarrantable failure" not only because the condition had been recorded in the preshift examination book that morning and no one was then working to correct the condition but that violations of the same standard had been repeatedly occurring at this mine.

According to Supervisory Inspector Conner, he and other MSHA officials met with Peabody officials in March, June and November 1989, to bring to management's attention, among other things, the frequent and repeated violations of the standard at issue herein. Conner observed that there had been no decrease in these violations even after these meetings.

According to Mine Superintendent Raetz, in May 1990, at the time of the order herein, they employed 42 "belt shovellers" to clean up the belt lines. He acknowledged that the intersection at issue in this case was a dumping location and was frequently a problem area. While Raetz had no personnel knowledge concerning the violation herein he thought that the coal pile-ups could have resulted from the failure of the belts to coordinate after one belt went down from a roof fall. If that had occurred and the other belts continued to operate the coal spillage could, he speculated, have resulted.

Finally, Raetz testified that it was his understanding that when safety hazards are reported in the preshift book the oncoming shift foreman has until the completion of his 8 hour shift to abate any reported hazards. Raetz noted that an individual had been assigned to correct the instant violation but that she was working in another area of the mine at the time the violation was cited. It was Raetz' opinion that she would have arrived to clean up the cited violations by the end of her shift. It is noted however that in order to abate the instant violation it required 5 miners working 4 hours. Accordingly Raetz' opinion that one person working part-time to clean up the cited violation in less than one shift is not credible. This evidence clearly supports a finding that under all the circumstances the operator knew or should have known of these loose coal and coal dust deposits and failed to abate the violative conditions because of lack of due diligence, indifference or lack of reasonable care. Under the facts of this case the negligence was particularly aggravated.

Raetz also testified that following the meeting with MSHA officials he gave oral instructions to his supervisors to correct coal dust problems. Although Raetz indicated that Peabody maintains a computer record of disciplinary action, including in some cases reference to the specific regulatory standard which the disciplined employee failed to correct, he could not state whether any disciplinary action had in fact been taken for employees failing to correct any of the previous violations of

the standard at issue. Indeed the record shows that Peabody had been previously cited for violations of the standard at issue herein 17 times between October 30, 1989 and May 10, 1990. This evidence is relevant in showing a pattern of lack of due diligence, indifference or lack of reasonable care and supports the finding that the violation herein was the result of gross negligence and aggravated acts and/or ommissions constituting "unwarrantable failure". Youghiogheny and Ohio Coal Co., supra, Emery Mining, supra, and Quinland Coals, Inc. supra.

Considering all of the criteria under section 110(i) of the Act it is clear that the penalties proposed by the Secretary in this case are appropriate.

ORDER

Citation No. 3035886 is affirmed as a citation under section 104(d)(1) of the Act. Order No. 3035889 is affirmed as an order under section 104(d)(1) of the Act. Peabody Coal Company is directed to pay civil penalties of $1,300 and $1,400 respectively for the violations alleged in the above citation and order within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

Footnote start here:-

1. Section 104(d)(1) of the Act reads 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 mine 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.