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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDINGS Docket No. WEST 92-64 A.C. No. 42-01211-03582
v.	Docket No. WEST 92-317 A.C. No. 42-01211-03589
MOUNTAIN COAL COMPANY, RESPONDENT	Trail Mountain Mine
MOUNTAIN COAL COMPANY, (SUCCESSOR TO BEAVER CREEK COAL COMPANY), CONTESTANT	CONTEST PROCEEDINGS Docket No. WEST 91-489-R Citation No. 3582529; 6/20/91
v.	Docket No. WEST 91-490-R Withdrawal Order No. 3582466; 6/27/91
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Trail Mountain Mine Mine I.D. 42-01212

DECISION

Appearances: Susan J. Eckert, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner/Respondent;
David M. Arnolds, Esq., Scott W. Anderson, Esq., Denver, Colorado, for Respondent/Contestant.

Before: Judge Lasher

These consolidated contest/civil penalty proceedings came on for hearing in Salt Lake City, Utah, on March 3 and 4, 1992. Penalty Docket WEST 92-64 involves only the Citation (No. 3582529) involved in Contest Docket WEST 91-489-R.

The Section 104(d)(1) Withdrawal Order (No. 3582466) involved in Contest Docket WEST 91-490-R had not been the subject

of a penalty proposal issued by MSHA's Office of Penalty Assessments for a sufficient time before hearing to permit creation of a penalty docket therefor (T. 4). It is the subject of WEST 92-317 which docket was created after the hearing.

Stipulation

The parties entered on the record of hearing (T.12-14) the following general stipulations having applicability to both the citation and the withdrawal order (T. 289):

1. Mountain Coal Company (herein "MCC") is engaged in mining and selling of coal in the United States, and its mining operations affect interstate commerce.

2. MCC is the owner and operator of Trail Mountain Mine, MSHA I.D. No. 4201211.

3. MCC is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., referred to as the "Act" in the rest of the stipulations.

4. The Administrative Law Judge has jurisdiction in this matter.

5. The subject citation and order were properly served by a duly authorized representative of the Secretary (MSHA) upon an agent of MCC on the date and place stated therein, and they may be admitted into evidence for the purposes of establishing their issuance and not for the truthfulness or relevancy of any statements asserted therein.

6. The exhibits to be offered by MCC and MSHA are stipulated to be authentic, but no stipulation is made as to their relevance or the truth of the matters asserted therein.

7. The proposed penalties will not affect MCC's ability to continue in business.

8. MCC demonstrated good faith in abating the violations.

9. MCC is a mine operator with 501,306 tons of production in 1990.(FOOTNOTE 1)

10. The certified copy of the MSHA assessed violations history accurately reflects the history of the mine for two years prior to the date of the Citation and Order.(FOOTNOTE 2)

11. The penalty (proposed by MSHA) for Order No. 3582466 is $700.00.(FOOTNOTE 3)

The Standard

Both the Citation and Order which are the subject of these proceedings were issued pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq. (herein the "Act") and both allege an infraction of 30 C.F.R. 75.400(FOOTNOTE 4) which provides:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

Section 75.400-1, containing pertinent definitions, provides:

> 75.400-1 Definitions.
>
> (a) The term "coal dust" means particles of coal that can pass a No. 20 sieve.
>
> (b) The term "float coal dust" means the coal dust consisting of particles of coal that can pass a No. 200 sieve.

(c) The term "loose coal" means coal fragments larger in size than coal dust.

Issues and Contentions

MCC concedes the occurrence of both violations charged (T. 289-290) but as to the Citation contends that the accumulations were not as extensive as the Inspector described therein. MCC challenges both the "Significant and Substantial" designations on both the Citation and Order, and also contends that neither violation resulted from an "Unwarrantable Failure" to comply with the infracted regulation. (T. 289-291).

General Findings - Citation No. 3582529

MSHA Inspector Donald E. Gibson issued Section 104(d)(1) Citation No. 3582529 on June 20, 1991, charging a violation of 30 C.F.R. 75.400 as follows:

> Accumulations of loose coal, coal pieces, and pulverized coal fine were permitted to accumulate on the 3d left working section. The accumulations were along the travel-road entry from the feeder breaker to the miner in the No. 4 entry and ranged from 3-10 inches deep x 11-12 feet wide x 400 feet long. There was accumulations in the outby entries and cross-cuts from cross-cut 31 to 33. These accumulations ranged when measured 3-10 inches deep x 11-12 feet wide x 700 feet long. The back entries were in the return air course.
>
> These accumulations ranged from damp to dry in the travelroad and in the return entries was dry and powdery. The accumulations in the travel-road were being run over by diesel and electric equipment. The accumulations in the return had been run over by mobile equipment as cables had been installed through the area. Also, isolation stoppings had been installed in the return entry to isolate the 4th left section from the 3d left section.
>
> Numerous discussions and violations have been issued for this condition. Management is aware of running over rib sloughage, coal spillings, and

> clean-up of initial "first" cuttings. The section foreman was present on the section and had made examination of the section during this shift but failed to clean these accumulations. Spot sample taken in the return for rock dust content. In this condition, poses the hazard of adding to any force or a fire should an occurrence happen.

Accompanying Inspector Gibson on his inspection of the mine on June 20, 1991, were his immediate supervisor, William Ledford, other MSHA officials, and several management personnel of MCC including Maintenance Superintendent Steven D. Jewett who on the day in question was acting mine manager (T. 26-28, 85, 112, 124, 260) and George Perla, Mine Manager. (T. 27).

The accumulations in the Third Left working Section of the mine were in two general areas, along the travel road (roadway) from the feeder/breaker to the continuous miner, and in the outby entries and crosscuts from crosscuts 31 to 33. (T. 85-90, 122, 138-140, 145, 154, 250; Ex. G-4). Inspector Gibson, who had the responsibility to issue citations for any violations detected, and Ledford both observed accumulations of loose coal, coal fines, etc., in these outby entries, active roadways and travel-ways (T. 28, 36, 42, 60, 62, 87-93, 95, 113, 155; Ex. G-4).(FOOTNOTE 5) Loose coal was being allowed to accumulate in the haulage roads after being spilled or mined (T. 35, 151) and there was rib sloughage (coal which has fallen off the ribs onto the roadway) which was being run over by shuttle cars. (T. 30-31, 59, 67, 95, 189, 268). In the roadway area where accumulations were observed (Ex. G-4; T. 34, 64), the roadway was "being run over and pulverized by shuttle cars" in the process of hauling coal. (Tr. 34-35, 36, 61-66, 68, 155).

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As to the extent and amount of the accumulations observed on the travel way, there were substantial accumulations of coal, loose coal fines, and pulverized coal. The travel way is indicated in orange on the mine map. (Ex. G-4; T. 88, 90). At point A on the map, near the feeder breaker, there were three to ten inches of coal accumulations. (T. 90-91). Gibson measured the overall dimensions of the accumulations in the travel way and determined that they were 3 to 10 inches deep, 11 to 12 feet wide, and 700 feet long. (T. 91). The volume of these accumulations would be 38 tons (at 3-inches depth) and 127 tons (at 10-inch depth) of coal, filling up between 3 to 10 shuttle cars of coal. (T. 94-95). Gibson stated that this was a violation of section 75.400 because:

> . . . the accumulations were excessive[;] I mean a person with normal mining background ought to recognize, and as many discussions as I have personally had with the company and citations that I've written for accumulations, this constitutes an excessive amount. It's on an active roadway. We had electrical equipment[;] we had diesel, mobile equipment running over these accumulations. (T. 95).

The second general area of accumulations was crosscuts 31-32 and the five outby entries. In crosscut 32, there were accumulations throughout the crosscut and into the No. 5 entry down to crosscut 31. According to Inspector Gibson "[t]he majority of the accumulations was in crosscut 31, but it was loose coal in 32, coal fines that had been left, some rib sloughage." (T. 113) Ledford confirmed that there were accumulations in piles and scattered all over the entries. This area was marked in yellow on the mine map [Government Exhibit 4]. (T. 36). The volume of the accumulations in the "yellow" area based on Gibson's measurements was 3 to 10 inches deep, 11 feet wide, and 400 feet long, totaling between 22 to 77 tons of coal accumulations. (T. 122, 123). These accumulations were "dry, powdery coal accumulations," i.e., fine, pulverized. There were coal pieces, but for the most part it was powdery, dry, black coal dust. (T. 124).

Significant and Substantial

Both enforcement documents (Citation and Order) were designated as "Significant and Substantial."

A violation is properly designated "Significant and Substantial" if, based on the particular facts surrounding that 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:

> 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.

Accord, Austin Power v. Secretary of Labor, 861 F.2d 99, 103 (5th Cir. 1988).

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, and that the likelihood of injury must be evaluated in terms of continued normal mining operations. U.S. Steel Mining Co., 6 FMSHRC 1573, 1574 (July 1984). See also Monterey Coal Co., 7 FMSHRC 996, 1001-1002 (July 1985). The operative time frame for determining if a reasonable likelihood of injury exists includes both the time that a violative condition existed prior to the citation and the time that it would have existed if normal mining operations had continued. Halfway, Inc., 8 FMSHRC 8, 12 (January 1986); U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985). 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. Texasgulf, Inc., 10 FMSHRC 498, 500-501 (April 1988); Youghiogheny and Ohio Coal Company, 9 FMSHRC 2007, 2011-2012 (December1987). The Commission has emphasized that 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 Co., 6 FMSHRC 1834, 1836 (August 1984).

With respect to the violation described in the Citation, it is found that it was reasonably likely that if normal mining had continued in the areas cited that the hazard posed by the accumulations, i.e., fires or explosions, would have occurred resulting in fatalities or serious injuries to miners since the three elements for the propagation of such--oxygen, fuel (ignitable coal), and ignition sources--were all present. (T. 52-53, 54, 55, 59, 61-64, 95-97, 106-109, 115-119, 120, 126-129, 138-140, 159-163, 165, 178, 183, 189, 192, 231-232, 262, 286).

The ignition sources in the cited section were numerous, i.e, electric shuttle cars, 950-volt cables which could fault, roof bolters, a continuous miner, auxiliary fans, and diesel-powered equipment. (T. 53-55, 56, 64-66, 67, 73, 96, 110, 169, 178).

The electrical equipment operating on June 20 was in permissible condition (T. 244-245) and no "permissibility" violations were cited on that day. (T. 55, 57, 70, 265). Nevertheless, in the perspective of there being continued mining in the section, it was reasonably likely that an ignition or fire could occur since failures in cables do occur even though not planned, and all equipment is "not maintained permissible at all times." Also, failures occur in electrical equipment. (T. 57, 58, 64-66, 102-103, 170-178, 189, 268-269).

While MCC contended there was no actual cutting of coal from the face being carried on on the day of inspection, it conceded that the continuous miner and shuttle cars were being operated. Since Mr. Ledford crisply and credibly testified he personally observed active mining going on at the face, I choose to accept his version of the facts on this issue. (See T. 59).

In addition to the proliferation of ignition sources in the section, the likelihood of an ignition or fire was increased by the fact that shuttle cars were running over and pulverizing coal (rib slough) in the roadway. (T. 64, 95, 105). Since pulverizing the accumulation puts such into a powder form, it is made more volatile and easier to ignite. (T. 64-66, 95-97, 103-105). There were ignition sources in the area. (T. 104-106).

Inspector Gibson's explanation why it was likely that the coal dust in the area where the roof bolter was operating would ignite was highly detailed and persuasive. (T. 96-98). He pointed out that there were various ways a fault could occur

(T. 97) and that the area behind the roof bolter was "very dry, powdery, pulverized, etc." (T. 98)(FOOTNOTE 6)

Likewise, he credibly explained how even the areas which were damp or wet could dry out (T. 98-101). He considered it "very likely" that a trailing could become damaged (T. 102) and pointed out that there were already splices in the trailing cable to the continuous miner. (T. 103). MCC, in many areas, was not cleaning up the accumulations. (T. 42, 50-51, 59, 71, 91, 120, 132-133, 141-142, 150, 151, 157, 232).

Had an ignition of coal dust or a fire caused by the accumulations occurred, it was likely that injuries would occur to miners working on the section. (T. 53, 108). Such miners, approximately eight in number, would be exposed to burns, smoke inhalation injuries, possible permanently disabling injuries, and fatal injuries. (T. 108-109, 136-137, 178, 189-191).

MCC introduced evidence that on June 19 and the morning of June 20 it did some cleanup, that the roadway, which had a coal bottom (T. 227), was wet and rutted, and that there were no accumulations in the roadway (T. 207-211, 212, 250). MCC's witness, then section foreman Brent Migliaccio, claimed that the material cited by Inspector Gibson in the roadway was material that had been turned up from the road itself, rather than material which had been spilled from ram cars. (T. 213). He conceded that the condition of the outby entries was "dry" and that there was a lot of "floor heave," i.e., floor that has buckled. (T. 213-214). He said the rib sloughage in the crosscuts was no worse than normal.(FOOTNOTE 7) Based on his testimony, it is found that MCC has no history of fires resulting from coal accumulations. (Tr. 224). There was no methane in the section on the day of inspection. (T. 224).

John Perla, who was MCC's general mine foreman at pertinent times (T. 249) testified that in his "opinion" the accumulations observed by Inspector Gibson in the roadway was a mixture of fire clay, shale, and coal which was pushed up from the floor of the roadway by the tires of the ram cars traveling through, and was not actually coal spilled from the ram cars. (T. 251). He also stated his "opinion" that there were no first cuttings from mining in the area 11 months previously because, in his words, "We would clean the place." (T. 252). He felt that there were no ignition sources in the area because the equipment was in permissible condition and that such equipment has fire suppression devices and fire extinguishers. (T. 255; see also T. 266). He said that while there was a cable running to the continuous miner, he had never seen a fire started by a cable and that there was no methane in the section above 1/10th of 1 percent. (T. 254-256). He did not know all the places which had been cleaned on the day of the inspection. (T. 256-257). In other respects, he was unable to remember or did not know, and some of his testimony on factual matters was qualified by the statement that he was giving his "opinion." His testimony was not as certain or convincing as that of the MSHA witnesses.

While MCC's witnesses all felt that some areas of the section which were cited for accumulations were wet or damp, or muddy, one witness indicated that there were areas which were dry and powdery (T. 262-263) and there was evidence from MCC's own samples of the roadway material that "many of the samples" had combustible content above 50 percent. (T. 286).

I conclude that the testimony and description of violative conditions of MSHA's witnesses, Inspector Gibson and Mr. Ledford, are entitled to acceptance in this matter.

In terms of the Commission's formulae for determining whether violations are significant and substantial, the violation of the mandatory standard here has been conceded and also otherwise clearly established by the evidence of record. This violation contributed to the hazard of fire and/or explosion described hereinabove. The primary question raised is whether there was a reasonable likelihood that the hazard contributed would come to fruition and cause an injury, there being no question that if the hazard envisioned did occur that serious injuries and even fatalities would occur. This evaluation of "reasonable likelihood" is to be made in the perspective of the continuance of "normal mining operations." There was strong evidence that active mining including the cutting of coal from the face (T. 59) was actually ongoing at the time of inspection. See U.S. Steel Mining Co., Inc., supra.

There are presently at least two analytical processes for determining the "reasonable likelihood" question. The first is a general, broad system of setting forth the conditions or practices which might lead to the occurrence of the contemplated hazard and then a reaching of the conclusion whether or not the hazard is "reasonably likely" to come about. The second approach is one which first appeared in Secretary v. Texasgulf, Inc., 9 FMSHRC 748 (April 1987) where the concept of "substantial possibility" (9 FMSHRC at page 764) was first raised. This test was urged as a refinement of "reasonable likelihood" for the reasons stated in the decision, including avoidance of confusion with the "imminent danger" concept, and also because it appeared as a practical matter to be the test actually being used by both tribunals, judges, and laymen involved at the various levels of mining safety enforcement and administrative and judicial review. Its strength is in its being less mysterious since it can be compared to other understandable concepts such as "remote possibility," "strong possibility," "probability," etc.

Since understanding what a law means also is consistent with increased faith in American justice and fairplay, I adopt the "substantial possibility" test, although the end result in the instant matter would be the same whichever method of analysis were used. Judge William Fauver, in his Decision in Secretary v. Coal Mac Incorporated, 9 FMSHRC 1600 (September 25, 1991) succinctly states the test as follows:

> Analysis of the statutory language and the Commission's decisions indicates that the test of an S&S violation is a practical and realistic question whether, assuming continued mining operations, the violation presents a substantial possibility of resulting in injury or disease, not a requirement that the Secretary of Labor prove that it is more probable than not that injury or disease will result. See my decision in Consolidation Coal Company, 4 FMSHRC 748-752 (1991). The statute, which does not use the phrase "reasonably likely to occur" or "reasonable likelihood" in defining an S&S violation, states that an S&S violation exists if "the violation is of such nature that an S&S violation exists if "the violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety and health hazard" (104(d)(1) of the Act; emphasis added). Also, the statute defines an "imminent danger" as any condition or practice . . . which could reasonably be expected to cause death or serious physical harm before [it] can be abated," and expressly places S&S violations below imminent

> dangers. It follows that the Commission's use of the phrase "reasonably likely to occur" or reasonable likelihood" does not preclude an S&S finding where a substantial possibility of injury or disease is shown by the evidence, even though the proof may not show that injury or disease was more probable than not.

A remote possibility of the violation's resulting in injury (or disease) is not sufficient. On the other hand, to meet the "S&S" requirements, MSHA would not seem to be required to show a "strong" possibility, a probability, or a certainty of a resultant injury. If, for example, one of the various ignition sources present here had been in impermissible condition, the Inspector might well have been justified in finding an imminent danger existed.

In relating the "substantial possibility" test to the conditions present in the mine which constituted the violation and aggravated the potential of harm to miners, it is clear that the accumulations were extensive in terms of depth, distance, and areas involved,(FOOTNOTE 8) oxygen was present, the volatile conditions were on an active roadway as well as other places, the accumulations (even limited to the areas conceded by MCC's witnesses) were combustible and ignitable and there was not just one--but numerous--potential ignition sources in the areas involved. The contribution of the violation cited to the cause and effect of the contemplated fire or explosion hazard was clearly significant and substantial. Had normal mining continued there existed a substantial possibility and reasonable likelihood that the hazard contributed to would result in an injury or injuries of a reasonably serious nature or fatalities. The "Significant and Substantial" designation on the Citation is AFFIRMED.

Unwarrantable Failure

"Unwarrantable Failure" means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Emery Mining Corporation, 9 FMSHRC

1997, 2004 (December 1987), Youghiogheny and Ohio Coal Company, supra. An operator's failure to correct a hazard about which it has knowledge, where its conduct constitutes more than ordinary negligence, can amount to unwarrantable failure. Secretary v. Quinland Coals, Inc., 10 FMSHRC 705 (June 1988). While negligence is conduct that is "thoughtless," "inadvertent," or "inattentive," conduct constituting an unwarrantable failure is "not justifiable" or is "inexcusable."

MSHA Supervisor Ledford said that MCC's conduct amounted to more than ordinary negligence and was aggravated conduct, stating:

A. What I seen was large amounts of accumulation with no effort to clean it up.

Q. How do you know there was no effort being made?

A. I seen that. I was looking.

Q. So there was none being made at the time?

A. There was none being made at the time, and they continued to mine coal at the face.

Q. Do you know that they were mining coal at the face?

A. Yes, sir. I watched them mine coal.

Q. They weren't cleaning up at the face?

A. No, sir. (T. 59).

As noted in prior findings, MCC had failed to clean up the accumulations. This was a repeated failure. Thus, Inspector Gibson testified:

A. Numerous occasions I've spoken to the president of the company, Richard Pick. At one time the mine manager was Dan Manners. On one particular occasion, I had the safety director, Dan Lucy, brought to the section . . . to let him see firsthand what I was talking about as far as accumulation. I've spoken to section foreman Doug Cox, who at one time worked at the mine. Section foreman, Mr. Peacock . . . I talked to John Perla. I've talked to Gary Curtis who was the maintenance foreman.

Q. What did you talk to them about in relation . . .

A. Cleanup, running over of rib slough. We've discussed that numerous, numerous times. And I had just recently conducted an electrical inspection at the mine and issued violations for this same condition, running over rib sloughage. (T. 132-133).

Mr. Ledford testified that he "observed from the breaker itself all the way up to the face areas," and saw no evidence of any cleaning being done. (T. 71)(FOOTNOTE 9)

There is no credible basis to conclude that any of the accumulations--which were observed and cited by Inspector Gibson--were being cleaned up by MCC. (T. 42, 54, 59, 61, 95, 149-151).

Neither Gibson nor Ledford saw any cleanup during the hour to hour and a half that they were present. (T. 42, 54, 59, 61-62, 71, 95, 132-133, 149, 151, 179-180).

The amount of the accumulations in the general areas cited demonstrates that they existed a considerable period of time, and constituted an obvious violation of which MCC's management should have been aware. (See T. 95). Inspector Gibson on the day of inspection did not see a scoop (used for cleanup) or shovels on the section. (T. 150-151, 180).

MCC should have known, indeed must have known, of the existence of the accumulations and failed to clean them up. In view of the obvious nature of this problem, the repeated warnings and effort of MSHA to bring about compliance in the past, and the tendency of MCC's responsible management to persist in allowing such conditions to exist, I find such conduct inexcusable, aggravated, and sufficient to justify the Inspector's conclusion that it constituted an unwarrantable failure to comply with the pertinent standard.

Withdrawal Order No. 3582466

MSHA Inspector John R. Turner issued Section 104(d)(1) Withdrawal Order No. 3582466 (originally issued on June 27, 1991 as a 104(a) Citation) alleging an infraction of 30 C.F.R. 75.400, to wit:

> Accumulation of float coal dust and loose coal and coal fine were found to exist on and around all of the electical compartments of the continuous mining machine in the 1st South working Section. There was coal arched in back of the tram motors and around other electrical compartments up to eight inches deep.

On June 28, 1991, Inspector Turner issued the modification changing the Citation to a Withdrawal Order basing it on underlying 104(d)(1) Citation No. 3582529, and showing that the Order affected the Continuous Mining Machine in the 1st South Working Section. This modification from Citation to Order was issued at 10 a.m. and was terminated at 3 p.m. on the same day, June 28, 1991. (T. 293).

As above noted, MCC concedes the occurrence of the violation, but contests the "Significant and Substantial" designation on the basis that the condition was neither "reasonably nor highly likely to cause injury," and also contends that the violation was not the result of an "unwarrantable failure" because the violative condition did not result from a high degree of negligence.

On June 20, 1991 (seven days prior to the issuance of this Withdrawal Order and on the inspection previously discussed in connection with the Citation), Mr. Ledford examined the mine's new continuous haulage system. The subject continuous miner was not in operation at the time, but Ledford observed that it was "quite dirty" (T. 297, 315) explaining that:

> . . . there was accumulations on the machine. Some of the plates that have small holes, you can see excessive accumulations of float coal dust, coal fines, some grease and oil that need to be cleaned from the machine. (T. 297-298).

Mr. Ledford advised Mr. Jacobs, MCC's maintenance foreman, that "the machine should be cleaned up prior to putting it back into operation, any production." (T. 298). He also advised acting mine manager Steve Jewett later the same day that the machinery should be cleaned. (T. 310). After the Withdrawal Order was issued by Inspector Turner seven days later, Mr. Ledford felt that MCC had not complied with his instructions to clean the continuous miner. (T. 300-301, 335-336). Mr. Ledford indicated that some of the accumulations he observed on the miner on June 20 were both "on the exterior" and "under some compartments" (T. 302-304, 307),

contrary to MCC's allegations. (See MCC's Post-hearing Brief, p. 31). Mr. Ledford did not believe that the extent of accumulations found on June 27 could have reoccurred during the seven-day interim from the time he observed such had the miner been cleaned as he had instructed. (T. 304-306, 307, 308, 310, 311). He had advised Mr. Jacobs that coal fines were "under the covers" (T. 308). When the accumulations get "into the cracks and crevices and around the electrical compartments and motors and areas that just gather up loose coal and float coal dust and coal fines" it can cause the motors to overheat and if there is a failure in the electrical components, a "very serious fire hazard" is created. (T. 311, 312, 313, 315-316, 345).

Inspector Turner issued the Withdrawal Order (then a Citation) while on a regular inspection on June 27, 1991. He was accompanied on this inspection by LaVon L. Turpin, a safety adviser for MCC. (T. 320). He issued a Citation for a permissibility violation on the subject continuous miner during this same inspection. (T. 323-324; Ex. G-1). He also issued a Citation (No. 3582464) for a violation involving the same continuous miner for not having proper fire-fighting equipment, to wit:

> The fire-fighting equipment was not being maintained in a usable and operable condition on the continuous mining machine on the first south working section. The fire suppression water outlet above the left flange motor for the machine was inoperable. (Ex. G-2; T. 325-326).

Inspector Turner described the situation as follows:

> . . . The top of the machine was pretty much clean. As I get into the other components of the machine, the machine was very, very filthy. I could not get to the back side of the tram motors, the control motors and other areas with my feeler gauge and tools that I work in my trade, because it was too dirty. So I informed Mr. Turpin that he had an S&S Citation, definitely that the machine was filthy, and he agreed, and we would have to agree on a time to abate. (T. 327).

Inspector Turner specifically described numerous electrical compartments on the miner, including in the operator's cab, on the main control box on the framework of the miner, the auxiliary lighting systems and light boxes, the tram motors on the sides of the miner and the pump motors. He said that numerous electrical

components had coal packed around them. (T. 327-328). The extent of such accumulations was up to "eight to ten inches of loose coal, float coal dust, coal fines and coal particles" which were packed around and on top of the compartments. (T. 328, 330).

He discussed the matter with Mr. Turpin who said it would take a significant amount of time to remove the accumulations because it would be necessary to pull off the covers and to "get somebody in here to clean it off." (T. 328-329). The accumulations were dry and were visible without removing the covers. (T. 329, 342-344).

While the continuous miner was not being operated at the time it was observed by Inspector Turner, it had been in operation earlier on the day of inspection. (T. 322).

Numerous sources of ignition were present (T. 331, 332, 333, 345, 346-347) including overheated motors, "blown up cable," "bits off of the machine," and from "rock spars or cutting of the coal" (T. 345) and sparks off a cutting head. (T. 346). The existence of so much potential ignition increased the likelihood that a fire would be started or that an ignition would occur. (T. 346-347).

After being cited for the violation, it took MCC over four hours to clean the continuous miner. (T. 329, 339).

The hazards posed by this violation, taking into consideration the background factors in which they occurred (including the fire suppression system inadequacy and the impermissibility violations) were fire and a coal dust ignition. (T. 331-334). Inspector Turner's analysis and rationale concerning the existence of these hazards, the reasonable likelihood that such would occur in the context of continued mining, and the serious injuries which would likely ensue had the hazards come to fruition were well-stated, credible, and convincing. (T. 331, 332, 332-334).

After pointing out that MCC's practice was not to remove the accumulations (T. 331) he said:

> Left in this state, the hazard involved there would be the heating scenario from the motors which are pulling 950 volts from this particular machine, which is the highest voltage that we have on any piece of equipment therein, and the amperage there and the current flow that can get out of those electrical motors, for example, the auxiliary lighting box, and if we

were to ignite the float coal dust and the amounts that we had there, and with the little effect that the fire suppression would have had over that particular tram motor, that thing would have went rapidly.

Q. Why wouldn't the fire suppression system have any effect on the motor?

A. The fire suppression couldn't have no effect over that one tram motor because it was inoperable. There was no water coming out of it when we activated it.

Q. Was there any connection between the gap that you found for the permissibility violation and the accumulations?

A. Just the fact that they were within four inches of one another. The permissibility violation that I found on the one auxiliary box was on top of the machine. This is the only permissibility that I completed on this machine because I could not get to the other compartments, they were too filthy. (Tr. 331).

Inspector Turner considered it highly likely that serious injuries (T. 334) would occur from the fire hazard:

> The contributing factor would have been the amount of accumulations that we had on the tram motors and things that existed at the time of my observation. The permissibility gap that we could expose an arc to the outside atmosphere and these accumulations, and the fact that the fire suppression system would not help you, in fact, if those things were to happen, and normal cutting procedures in there. We have rock bars in that mine, and all tied together, it would have made it very highly likely that it would occur. (T. 332).

It is noted that Inspector Turner on June 28, 1991, modified the Order to change the likelihood from "Reasonably Likely" to

"Highly Likely." At hearing he appeared to back off this modification (T. 351) and there is not sufficient explanation therefor to justify the "Highly Likely" determination. There is more than adequate support for a determination of "Reasonably Likely," however, and the Withdrawal Order will be subsequently modified to reflect this.

I conclude that it was reasonably likely that injuries such as severe burns, smoke inhalation, and possibly fatalities would have occurred had the contemplated hazard happened. (T. 334, 338).

There was also a reasonable likelihood of a coal dust ignition had mining continued. (T. 331, 334, 336-337, 345-347). As the Inspector explained:

> The coal dust ignition could occur from the normal mining cycle of the machine. The machine generates coal dust which it extracts from the coal from the faces. We have the water sprays, but if the other dust that is suppressed around the machine and the amount of float coal dust and stuff that was on the machine, if an arc were to come out of that control panel and ignite the coal dust, then it would ignite the whole area wherever the coal dust was to exist. (T. 334).

The violation occurred as a result of MCC's high degree of negligence and unwarrantable failure to comply with the infracted safety standard. (T. 336, 337, 339, 340). MCC's history of previous violations indicates a persistent pattern of violations of this standard. Inspector Turner pointed out that on June 20, Mr. Ledford had told MCC "that the machine needed cleaning" and that it was "obvious that all they did was sprayed off the top of the machine; they did not spray off the motors or get any integral components of the machine and make any effort to clean it." (T. 336). He also persuasively indicated that:

> From my mining experience, I know that the amount of accumulations that were on that machine, cannot accumulate in a day or two or three days. That amount of accumulations has

> to occur over several shifts, days, possibly a week or better. (T. 336).(FOOTNOTE 10)

Inspector Turner's basis for determining "unwarrantable failure" was because of the negligence involved, and "because of what the coal company has been made aware of in the past and six days prior by my supervisor, and on many occasions on pre-inspection and post-inspection on accumulations, and our concern for the accummulations on the working section and the equipment is the number one priority . . . ." (T. 339).

Respondent's Evidence

Steven D. Jewett, MCC's maintenance superintendent, indicated that he accompanied Mr. Ledford on June 20 and that there aren't "openings" on the miner that one could see through to determine if there were accumulations under the covers. (T. 359). He said he was "not aware" that Mr. Ledford moved any of the hoses or peered down to look closely so as to be able to see holes and determine if there were accumulations. (T. 358-359). He denied that Ledford mentioned accumulations, other than some "oil spillage" (T. 358, 361). He indicated that the machine would be cleaned on the outside after each entry was cut, but that it would be cleaned under the covers on a weekly basis. (T. 361, 362, 372). Mr. Jewett's testimony was for the most part brief and general and it in no way approached the detail and specificity of MSHA's witnesses. He was not present on June 27 when Inspector Turner issued the withdrawal order. (T. 368). He did not know about the permissibility citation and the "fire suppression" citation "until this started" (T. 371), nor did he know when the last time the covers on the miner were removed for cleaning or if such were cleaned during the period from June 20 to June 27. (T. 372).(FOOTNOTE 11)

MCC's second witness, safety adviser LaVon Turpin, testified that the accumulations violation was discovered when he and Inspector Turner pulled one of the covers on the machine to see if a hose to the fire suppression system was broken. (T. 374). He felt it would be "very difficult" for a person to look through the "holes" and see the accumulations four to eight inches deep under the covers. (T. 381). He said the accumulations were "somewhat a damp compact condition" (T. 375) under the first cover pulled (T. 383) but did not know the condition of the accumulations under the covers subsequently pulled. (T. 383).

As with Mr. Jewett, Mr. Turpin's testimony was brief and not of a sufficiently probative nature to rebut the more positive, reliable testimony of MSHA's witnesses, whose accounts and opinions I credit in determining the issues of reasonable likelihood ("Significant and Substantial") and "Unwarrantable Failure."

In conclusion, the extent of the accumulations and the amount of time it took to achieve abatement (cleanup) are strong evidence in support of the expert opinions of MSHA's witnesses that they existed a considerable length of time and had not been cleaned up during the interim between June 20, 1991, and June 27, 1991. The lack of knowledge and generality of MCC's witnesses on this point certainly in no way weakened the prima facie presentation of MSHA that MCC's failure to clean up constituted inexcusable, aggravated conduct, particularly in view of its less than commendable history of violations of this standard, and the frequent (and proximate) warning it had received concerning such, and the fact that these accumulations were present in dangerous amounts for a long period of time with obvious ignition sources extant.

It is therefore concluded that MSHA has established that the violation resulted from MCC's unwarrantable failure to comply with the standard and from a high degree of negligence on the part of MCC.

The violation was both proven and conceded and, in addition, MSHA established that it contributed a measure of danger of safety by the hazards it posed and contributed to. It has previously been determined at some length that there was a reasonable likelihood and a substantial possibility that the envisioned hazards would occur in the event of continued mining and that such would, upon occurrence, result in serious injuries or fatalities. The contribution of the violation to the hazards of fire and or ignition was significant and substantial. The Commission's four prerequisites to the existence of a "Significant and Substantial" violation are found to have been established by MSHA and these special findings are here AFFIRMED. Mathies Coal Company, supra.

Penalty Assessment

Based on the parties' stipulations and information of record it is found that MCC is a medium-sized coal mine operator (T. 20) which proceeded in good faith to promptly achieve compliance with the standard in question after notification of the two violations. The penalties assessed will not affect MCC's ability to continue in business. During the pertinent two-year periods preceding the issuance of the Citation and Order, MCC had a history of 110 and 92 violations, respectively. (T. 17-19). MCC had committed numerous violations of the pertinent safety standard involved in this matter during the two-year period in question. Its history of violations is not commendable. The violations involved in both the Citation and the Order resulted from a high degree of negligence on MCC's part, were inexcusable and since aggravated conduct was involved were also found to have resulted from MCC's unwarrantable failure to comply with the standard. Further, both violations were very serious in nature, both in terms of the gravity of the hazards they created and contributed to and the likelihood of such hazards occurring and causing serious injuries or fatalities.

In Black Diamond Coal Company, 7 FMSHRC 1117, 1120 (August 1985), the Commission stated as follows:

> We have previously noted Congress's recognition that ignitions and explosions are major causes of death and injury to miners: "Congress included in the Act mandatory standards aimed at eliminating ignition and fuel sources for explosions and fires. [Section 75.400] is one of those standards.' Old Ben Coal Co., 1 FMSHRC 1954, 1957 (December 1979). We have further stated [i] t is clear that those masses of combustible materials which could cause or propagate a fire or explosion are what Congress intended to proscribe." Old Ben Coal Co., 2 FMSHRC 2806, 2808 (October 1980). The goal of reducing the hazard of fire or explosions in a mine by eliminating fuel sources is effected by prohibiting the accumulation of materials that could be the originating sources of explosions or fires and by also prohibiting the accumulation of those materials that could feed explosions or fires originating elsewhere in a mine.

Substantial penalties are warranted. Accordingly, a penalty of $3,000.00 is assessed for Citation No. 3582529 and penalty of $1,500.00 is assessed for Withdrawal Order No. 3582466.

ORDER

1. Withdrawal Order No. 3582466 is MODIFIED to change paragraph 10 A thereof from "Highly Likely" (as shown in Inspector Turner's modification thereof dated June 28, 1991) to "Reasonably Likely" and this Withdrawal Order including the special findings theron is otherwise AFFIRMED.

2. Citation No. 3582529 (Docket No. WEST 91-489-R and WEST 92-64) including the special findings thereon is AFFIRMED.

3. Contestant/Respondent MCC, within 40 days from the date of this decision SHALL PAY to the Secretary of Labor the total sum of $4,500.00 as and for the civil penalties assessed herein.

Michael A. Lasher, Jr.
Administrative Law Judge

FOOTNOTES START HERE-

1. MCC is found to be a medium-sized coal mine operator. (T. 20).

2. Based on this information, it is concluded that MCC had a history of 18 prior violations in the pertinent two-year period prior to issuance of the Citation and 92 prior violations in the two-year period preceding issuance of the Withdrawal Order. (T. 17-20).

3. MSHA's proposed penalty for the Citation was $2,000.00. (T. 4-5).

4. Section 75.400 entitled "Accumulation of combustible materials" is contained in Subpart E entitled "Combustible Materials and Rock Dusting."

5. Ledford did not personally observe all the areas cited by Gibson. (T. 37). In the area where he personally observed accumulations being run over by shuttle cars, he testified that it was "dry". (T. 36, 37). He indicated the travel road was "damp" in other areas. (T. 49).

Ledford felt Gibson's "evaluation" was correct in view of the amount of accumulations, the areas that were involved, the fact that mining was continuing and that "there was no evidence of any work being done to clean up the section." (T. 42).

6. See also, Testimony of MCC's acting mine manager, Steven D. Jewett, at T.262-263.

7. On direct examination, it appears that this witness's

testimony resulted from leading questions in some important areas. (T. 209, 210, 211, 213). This witness's testimony was not particularly persuasive in the areas contradictory to Petitioner's MSHA's witnesses (see T. 231-231, 241, 242, 247) and it is not credited as to the presence, nature, and extent of the accumulations observed and reliably described by Petitioner's witnesses.

8. These accumulations are found to be dangerous. The greater the concentration, the more likely it is to be put into suspension or propagate an explosion. See, Pittsburg and Midway Coal Mining Co., 6 FMSHRC 1347, 1349 (1984); Mettiki Coal Corporation, 11 FMSHRC 331, 343 (1989).

9. See also Transcript at pages 42, 54, 142-143, 149, 151, 179).

10. See also T. 337, where the Inspector testified the negligence was high because. . . "Mr. Ledford's notifying six days before. They had a weekend there. So you're talking a minimum of three days or four days where there must not have (been) no effort to clean the machine. They cleaned the top of the machine."

11. As to whose responsibility this was, there was some ambiguity in his testimony. (T. 369-370).