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SOL (MSHA) V. MCELROY COAL
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SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 92-749
Petitioner	:	A. C. No. 46-01437-03770
v.	:	
	:	McElroy Mine
MCELROY COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Patrick L. DePace, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for the Secretary;
Daniel E. Rogers, Esq., Consol, Inc., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Maurer

STATEMENT OF THE CASE

In this docket, the Secretary of Labor seeks a civil penalty of $1300 for a single alleged violation of 30 C.F.R. 75.403 cited in section 104(d)(2) Order No. 3331715. Pursuant to notice, a hearing was held on the alleged violation in Wheeling, West Virginia, on September 9, 1992. Both parties have filed posthearing briefs, which I have duly considered in amking the following decision.

STIPULATIONS

The parties stipulated to the following, which I accepted (Tr. 6-8):

1. McElroy Coal Company is the operator of the McElroy Mine, which is the subject of this proceeding.

2. Operations at the McElroy Mine are subject to the Mine Safety and Health Act.

3. The undersigned Administrative Law Judge has jurisdiction to decide this case.

4. MSHA Inspector Charles J. Hall was acting in an official capacity as a duly authorized representative of the Secretary of Labor when he issued Order No. 3331715 on October 31, 1991.

5. A true copy of Order No. 331715 was properly served on the operator.

6. The proposed penalty will not adversely affect respondent's ability to continue in business.

7. Respondent is a large operator and has an average history of prior violations for a mine operator of its size.

DISCUSSION

Section 104(d)(2) Order No. 331715 was issued by MSHA Inspector Charles J. Hall on October 31, 1991. The inspector cited a violation of the mandatory safety standard found at 30 C.F.R. 75.4031 and the cited condition or practice is described as follows:

> The floor of the number 1, 2 and 3 entries and connecting crosscut in the 8 left off 4 south section was not adedquately rock dusted on the following location. The No. 2 (intake) Intry from plus 35&50 to 39+50 of distance of 400 feet. No. 1 entry (return) from 34+50 to 38+50 a distance of 400 feet. No. 3 entry (intake) from 35+20 to39+50 a distance of 430 feet. Eight rock dust smaples were collected to substantite this order. This was unwarrantable on part of the operator because the section foreman whould have observed the black bottom area throught out the section from 10-1-90 to 10-1-91. There have been 41 violations of 75.400 cited at this mine.

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1/ 30 C.F.R. 75.403, ENTITLED "Maintenance of incombustible content of rock dust," provides impertinent part:

> Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than 65 per centum, but the incombustible content in the return aircourses shall be no less than 80 per centum. . . .

On October 31, 1991, Inspector Hall was conducting a weekly ABC spot inspection of respondent's McElroy Mine. Such an inspection is required for all mines which, on average, liberate more than one million cubic feet of methane gas within a 24 hour period, and McElroy Mine is such a mine. He was occompanies that day by Thomas Stern, a union safety committeeman, Thom Biega, a company safety inspector, and training inspector, and also a regional safety inspector for the company, Pat Korsnick.

Inspector Hall observed that the floor of the mine in the cited areas was black, indicating to him that the area had not been adequately rock dusted. Mr. Stern corroborated the inspector's testimony that the floor of the cited areas was black. Various witnesses presented by the operator testified that the floor in the cited areas was grey, not black, and that these areas were adequately rock dusted. However, these witnesses also acknowledged that certain places in the cited areas were not adequately rock dusted. Section Foreman Corley testired that the No. 3 entry did need dusting, and that he had planned to rock dust that area prior to the issuance of the order by Inspector Hall. In addition, Thom Biega, a safety inspector for the respondent, acknowledged that there were several areas in the No. 2 entry which needed to be rock dusted. Finally, Jim Siko, superintendent of the McElroy Mine, admitted that prior to abatement of the order issued by Inspector Hall, rock dusting was needed in at least one area in the No. 1 entry. It should also be noted that it is undisputed that the areas which Inspector Hall cited were in an active area of the mine.

Opinion evidence aside, Inspector Hall also obtained eight spot samples off the floor throughout the cited areas, using a so-called rock dust kit. He used a scoop, 6 inches long and 6 inches wide to collect the dust. The technique he used was to scoop down on inch deep and from rib to rib across the floor, to collect the accumulated dust mixture. He acknowledges that in scooping up the sample, he had to avoid wet material because it would not go through the 20 mesh screen that is used to strain out lumps of coal and rock.

After the samples were collected, they were secured in spearate plastic bags and each individuallly collected sample was marked with an identification tag. Inspector Hall then placed the eight plastic bags into a larger canvas bag, which he inadvertently left in Mr. Biega's office when he left the mine that day. The samples were returned to Inspector Hall by another MSHA inspector who visited the McElroy Mine early the following week. Although the samples were left unattended at the mine site

over a weekend, when they were returned to Inspector Hall, they were in the same condition as when he had placed them in Mr. Biega's office. He then prepared and sent the samples to the MSHA laboratory in Mt. Hope, West Virginia for analysis.

Results from the loboratory analysis of the samples collected and submitted by Inspector Hall revealed the following:

SAMPLE NO.	INCOMBUSTIBLE CONTENT
l	41%
2	46%
3	37%
4	48%
5	43%
6	32%
7	29%
8	24%

None of the samples collected were in compliance with the requirements of 30 C.F.R. 75.403 because the incombustible content of the material collected in each sample was below 65 percent. Furthermore, the samples taken by Inspector Hall in the No. 1 return (Sample Nos. 4 and 5) were further out of compliance inasmuch as the regulation requires that the incombustible contesnt in the return entry shall be at least 80 percent.

Inspector Hall further opined that these eight samples provided a representative sample of the dry material on the mine floor in the cited area. Mr. Stein again concurs with the inspector's opinion. Respondent, on the other hand, objects to the methodology of the inspector's sampling technique. Respondent alleges that the material in the dust amples collected by Inspector Hall were selectively, rather than randomly, chosen for collection based upon Inspector Hall's judgment as to whether certain areas were too wet to sample. Wet material was admittedly intentionally excluded by Inspector Hall from the materials he collected for sampling because it would not to through the mesh screen. But, I note that any wet material would very likely contain the identical percentage of conbustible content as dry material adjacent to it as soon as it dried out, which it would if subjected to heat and flame.

In any event, it is well settled by Commission precedent that accumulations of coal and coal dust, even when wet or damp, are combustible, and do pose an explosion or ignition hazard if an ignition source is present. Utah Power and Light Company v. Secretary of Labor, 12 FMSHRC 965, 969, (May 1990); Black Diamond Coal Mining Company, 7 FMSHRC 1117, 1120-1121 (August 1985).

Respondent also objects because Inspector Hall took none of the eight samples he did take from the foof or ribs in the cited area, but I note that bond sampling of an entry is not required.

An administrative appellate decision with respect to this issue can be found at North American Coal Corporation, 1 MSHC 1130, 1134 (1974). It is a decision of the Interior Board of Mine Operations Appeals, the predecessor to the Federal Mine Safety and Health Review Commission in which the Board held:

> With respect to Order 3 TJD, August 16, 1971; 1 JF, September 3, 1971, and 1 TJD, September 16, 1971, North American challenges the findings of violation on the ground that the samples relied on reflected only the incombustible content of the floor. North American urges that the samples should have reflected the combined incombustible countent of the roof and ribs, as well as the floor, at the cited locations.
>
> Section 304(d)2 was designed to prevent the occurrence of conditions which could lead to a fire, or still worse, an explosion. The floor samples in the instant case, falling as they did within the proscribed area indicated a dangerous condition because a spark might very well have led ao at least a fire. We hold therefore that a floor sample standing alone may be the basis of a finding that a section 304(d) violation has occurred.

Therefore, I find the sample collected by Inspector Hall provided a representative smaple of the conditions of the floor in the cited areas because they were collected in eight widely scattered locations throughout the cited areas and because his collection methods were allowable, reasonable, and produced a reliable and representative result.

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2/ Section 304(d) of the 1969 Coal Act is identical in language to 30 C.F.R. 75.403.

Inspector Hall also determined that the violation for which he issued Order No. 3331715 was significant and substantial (S&S); because the area cited was a very large, active area of the mine, there was electrical equipment operating in the area which could provide an ignition source, and the mine is gaseous.

A "S&S" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. 814(D)(1). A violation is properly designated significant and substantial "if based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 825 (April l981).

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

> In order to establish that a violation of a manatory 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 contriuted to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reeasonable serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

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

Government Exhibit No. 4, the Dust Sampling Lab Report, by it self, establishes that the eight rock dust samples submitted had in combustible contesnts less then the required percentages by a substantial margin in every instance. Evidence, alone, without more, establishes a violation of 30 C.F.R. 75.403 to my satisfaction.

The area which Inspector Hall observed as being inadequately rockdusted totalled approximately 1800-1900 linear feet of mine floor located within the three entries and various crosscuts constitution the Eight Left off Four South section of the mine. At the time the order was issued, respondent was producting coal and roof bolting in the cited area. This activity involved several pieces of mining equipment which could have provided an ignition source. This mine is also a gaseous mine which liberates more than one million cubic feet of methane in a 24 hour period. The presence of methane at these levels increases the hazard created by inadequate rock dusting in that any ignition or explosion and resultant fire could be spread more quickly and become a very serious incident/accident.

Because the cited area which was inadequately reckdusted was active and a relatively large area which also contained multiple ignition sources, in addition to potentially high levels of methane, it was at least reasonably likely that in the course of normal continued mining operations, a serious injury resulting in lost workdays or restricted duty would occur.

In the event an ignition occurred, the loose coal and coal dust which had not been properly neutralized by rockdust could contribute to the hazard of fire or further explosion or at least propagate the results of an otherwise unrelated explosion and/or fire which could in turn spread throughout and even beyond the cited areas. Consequently, the individuals working in the area could be burned, overcome by smoke or seriusly injured by the force of the explosion. I therefore conclude that the violation was S&S.

The Secretary also urges that I find this S&S violation to be an "unwarrantable failure."

The Commission has held that an "unwarrantable failure" to comply with a mandatory standard 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 (December 1987); Youghiogheny & Ohio Coal Company,

9 FMSHRC 2007 (December 1987); Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988). Referring to its prior holding in the Emery Mining case, the Commisision stated as follows in Youghiogheny & Ohio, at 9 FMSHRC 2010:

Roy J. Maurer
Administrative Law Judge

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