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SOL (MSHA) V. MID-CONTINENT RESOURCES
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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January 27, 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 91-168
Petitioner	:	A.C. No. 05-00301-03764
	:	
v.	:	Docket No. WEST 91-421
	:	A.C. No. 05-00301-03765
MID-CONTINENT RESOURCES INC.,	:	
Respondent	:	Dutch Creek Mine
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 91-594
Petitioner	:	A.C. No. 05-00301-03785 A
	:	
v.	:	Dutch Creek Mine
	:	
	:	
THOMAS SCOTT, employed by	:	
MID-CONTINENT RESOURCES INC.,	:	
Respondent	:	
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 91-626
Petitioner	:	A.C. No. 05-00301-03784 A
	:	
v.	:	Dutch Creek Mine
	:	
	:	
TERRANCE J. HAYES, employed by	:	
MID-CONTINENT RESOURCES INC.,	:	
Respondent	:	
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 91-627
Petitioner	:	A.C. No. 05-00301-03787 A
	:	
v.	:	Dutch Creek Mine
	:	
	:	
WILLIAM M. PORTER, employed by	:	
MID-CONTINENT RESOURCES INC.,	:	
Respondent	:	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Edward Mulhall, Jr., Esq., Glenwood Springs,
Colorado,
for Respondent.

Before: Judge Morris

These cases are civil penalty proceedings initiated by Petitioner, the Secretary of Labor, against Respondents, Mid-Continent Resources, Inc. ("MCR") and three supervisors, pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq. (the "Act"). The civil penalties sought here are for the violation of mandatory regulations promulgated pursuant to the Act.

Evidentiary hearings were conducted on April 15 and 16 and June 16 and 17, 1992, in Glenwood Springs, Colorado.

The parties filed post-trial briefs.

WEST 91-168, WEST 91-594 and WEST 91-626

The narrative allegations of Order No. 3410351 is the subject matter of Docket Nos. WEST 91-168 (MCR), WEST 91-594, (Scott), and WEST 91-626, (Hayes). The order issued by MSHA Inspector Frank Carver under section 104(d)(2) alleges a violation of 30 C.F.R. 75.400 1 and states:

Coal fines and lump coal, from damp to extremely dry to the touch was [sic] stored in the downdip crosscut, adjacent to the number 18 crosscut on the 211 Longwall intake roadway. Plus very dry coal fines, float coal dust and lump coal was (sic) stored in the first crosscut inby the longwall face in the number 2 entry on the right hand side facing inby. In the outby crosscut the accumulations were 21 feet in length, 18 feet

1 75.400 Accumulation of combustibile materials.

[STATUTORY PROVISION]

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

in width and 6 feet in height. Power cables were approximately 20 feet from the accumulations and a diesel Ford tractor was parked in the roadway adjacent to the accumulations. In the most inby crosscut the accumulations were 24 feet in length, 30 feet in width, and 6 feet in height. A diesel scoop was parked 40 feet outby the accumulations. No work was being done to remove the accumulations from either crosscut. The accumulations could of been transported approximately 3-400 feet inby and dumped onto the face conveyor from the most outby crosscut and the accumulations from the most inby crosscut could have been transported approximately 75 feet and dumped onto the face conveyor. (Ex. M-1).

WEST 91-421 and WEST 91-627
103 Longwall Headgate

The evidence in the above two cases is initially considered as the events occurred on May 1, 1990. The events in the later cases occurred May 29, 1990.

Summary of Evidence

In the 103 longwall there were heavy loose coal accumulations observed by the inspector. MCR's evidence shows the accumulations occurred because the 103 strike conveyor belt broke.

Order No. 3412700

The narrative allegations of Order No. 3412700 are the subject matter of Docket No. WEST 91-421 (MCR) and WEST 91-627 (Porter). The order, issued by MSHA Inspector James Kirk under section 104(d)(2), alleges a violation of 30 C.F.R. 75.400 and states:

The operating 103 longwall belt had accumulations of loose coal beginning at the belt drive and extending into the stage loader. The accumulations were at varies [sic] locations: [sic] Approximately 100 feet outby stage loader (from stage loader 100 feet outby)[.] Belt & rollers in contact with coal[.] Also just out-by shark pump. outby crosscut 11, by crosscut 9 for a distance of 260 feet, crosscut 8, cross [sic] 7 & 6. The coal in these areas were [sic] up to 18 inches deep. The area around the drive takeup were also built up. In general the entire belt were [sic] in need of clean up &

rock dusting. Belt was operating [.] The distance from drive stage ldr[.] 4000 feet. (Ex. M-2).

Issues

The issues are whether the two section 104(d)(2) orders are violations of the cited regulation; whether individuals Porter, Scott and Hayes, the MCR supervisors, violated section 110(c) of the Act. Alternately, further issues involve special findings of significant and substantial ("S&S") and unwarrantable failure. Finally, if violations occurred, what penalties are appropriate.

In connection with this order, I find that a preponderance of the substantial, reliable and probative evidence establishes the following:

Findings of Fact

1. MCR is an underground bituminous coal mine located in Pitkin County, Colorado. (Tr. 10).
2. During an MSHA inspection on May 1, 1990, James Kirk, a federal coal mine inspector, issued Order No. 3412700. At the time he was accompanied by Don Rippy of MCR's safety department. (Tr. 11, Ex. M-2).
3. The two men proceeded to the 103 longwall, an active advancing mining section. (Tr. 11).
4. Exhibit M-14 shows the direction the coal would normally move from the face to the stage loader and crusher. (Tr. 13, 16).
5. The 103 strike belt is a conveyor belt from the face area that normally transports coal from the face outby to the drive and dumps it onto the B-2 belt which moves it out of the mine. (Tr. 16, 17).
6. Mr. Kirk estimated the conveyor belt measured 3,000 to 4,000 feet from the drive area to the tailpiece. (Tr. 17, 18).
7. Mr. Kirk saw accumulations of coal at the belt tailpiece, the stage loader area and up to the end of the conveyor belt. Outby coal was compacted underneath the belt. The belt rollers and belt were in contact with the coal. (Tr. 18, 19).
8. Mr. Kirk marked the coal accumulations on Exhibit M-14 in orange. The accumulations, mostly compacted under the conveyor, ranged up to 12 inches high; the coal was dry. (Tr. 19).

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9. At the shark pump, located outby the drive area, there were some 50-foot accumulations. (Tr. 19-20).

10. There were accumulations between crosscut 10 and 11, as well as at the 10 and 11 doors. The belt rollers and belt were in contact with the coal. (Tr. 21, 22).

11. At the number 9 door, outby there was a windrow of coal approximately 260-foot long, up to 18 inches deep. (Tr. 22).

12. It took the inspector approximately three to four hours to travel from the tailpiece to the drive examining for accumulations. (Tr. 22).

13. There was coal at number 6, 7 and 8 doors. The accumulations ranged at various heights. One section was 20 feet long, another was 40 feet long. At the number 6 door the rollers were in contact with the coal. (Tr. 23).

14. The coal, beginning at the tailpiece and going outby, was moist to extremely dry. (Tr. 24).

15. The coal within the takeup area was pretty much dry. From the takeup by the number 6 door out to the drive area there were accumulations. As they approached the drive area, the accumulations became very wet. (Tr. 23, 24).

16. Mr. Kirk marked on Exhibit M-14 the "mostly dry" and "wet" areas. (Tr. 24, 25).

17. Accumulations were concentrated around the drive area of the strike belt and the tailpiece of the B-2 belt. (Tr. 25).

18. The accumulations by the tailpiece of the B-2 belt were almost like a slurry. (Tr. 25, 26, 27).

19. The accumulations were mostly dry from the number 6 door inby to the tailpiece of the conveyor. (Tr. 24). Outby from the number 6 door towards the belt drive area the accumulations were moist or wet. (Tr. 25).

20. There were a lot of accumulations ranging up to two feet deep around the drive area of the strike belt and around the tailpiece of the B-2 belt. (Tr. 25).

21. Mr. Sam Salaz, the outby foreman, stated that occasionally the coal was so wet water would run off the belt when the coal landed on it. Mr. Salaz stated it was extremely difficult to maintain the area free of accumulations. (Tr. 27).

22. On May 1st Mr. Kirk did not see anyone cleaning up the accumulations. (Tr. 27).

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23. Fire is one of the hazards of coal accumulations. (Tr. 28).

24. The Dutch Creek Mine is a gassy mine subject to five-day spot inspections. (Tr. 28).

25. Potential ignition sources included the area where the rollers rubbed on the coal as well as where the conveyor belt rubbed the framework of the conveyor. MSHA also found one area in the longwall that was not maintained. That area could also be considered as an ignition source. (Tr. 29).

26. Accumulations could be ignited by frictional contact. The amount of coal along the conveyor could be introduced into an ignition causing a more severe ignition. (Tr. 30).

27. Injuries from the described hazard could be serious and possibly fatal. (Tr. 30).

28. Prior to his inspection Mr. Kirk reviewed the mine file and learned MCR was on the D series.

29. In issuing the (d)(2) Order, Mr. Kirk considered the dryness and the amount of accumulations as well as their length, the area involved and the friction points. (Tr. 32).

30. Normally the 103 longwall produced coal on the graveyard shift. (Tr. 32).

31. The drier the coal, the more likely it will burn. (Tr. 34).

32. There were electrical cables for the shark pump and the normal electrical devices for the longwall. In addition, on May 1st there was a permissibility violation. (Tr. 42).

33. Mr. Kirk identified the pre-shift, on shift daily examination referring to the 103 longwall. (Tr. 43, Ex. M-11). The examinations, as reported, listed accumulations on the 103 longwall from April 25, 1990 to May 1, 1990. (Tr. 43-52). The conditions were reported and on one occasion the report noted that shoveling was undertaken. (Tr. 50, 51).

34. In Mr. Kirk's opinion, the fire boss and the pre-shift inspection noticed that there were accumulations on the 103 longwall belt at the drive and in-by. This was the area Mr. Kirk cited. (Tr. 52).

Discussion and Further Findings

MCR states the principal issues are whether Inspector Kirk properly issued the 104(d)(2) order since he failed to determine

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the combustibility or ignitability of the Coal Basin Coal; further, Mr. Kirk failed to establish if there were ignition sources in the area of the "accumulations." (MCR brief at 21, 23).

It is clear that there were accumulations along the 103 longwall strike belt. Inspector Kirk marked these accumulations in orange on Exhibit M-14. (The exhibit was received in evidence to illustrate the inspector's testimony). As hereafter noted, MCR agrees accumulations existed and the operator's evidence further identified the cause of the accumulations.

It is uncontroverted that Inspector Kirk did not test the combustibility or ignitability of the coal accumulations. However, the regulation does not require that such a determination be made. In addition, the Commission has stated that 30 C.F.R.

75.400 "is violated when an accumulation of combustible materials exists." Old Ben I, 1 FMSHRC 1954, at 1956. Further, "[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) ("Old Ben II").

"Loose coal" is one of the combustibles prohibited by 30 C.F.R. 75.400.

I agree that due to its low-oxygen, high-ash content MCR's coal burns only with great difficulty. (Reeves, Tr. 359, 411-412, 471, 750). However, burning "with difficulty" is not a factor considered by 30 C.F.R. 75.400.

Ignition sources: The record establishes such sources. One location was where the conveyor rollers rubbed against the coal and also where the conveyor belt rubbed on the framework of the conveyor. Additional ignition sources could also include the electrical cables required to run the conveyor, the impermissible condition he cited as well as the electrical cables for the shark pump. The conveyor itself could contribute as an ignition source since it was "operating" when Mr. Kirk entered in the section. (Kirk, Tr. 28) but not continually as it would only "start and stop." (Rippy, Tr. 508). No ignition sources could arise from the mining of coal since production took place on the graveyard shift before Mr. Kirk arrived on the premises. Mr. Kirk confirmed that the stage loader, the face conveyor and the shearing machine were not running while he was in the mine. (Kirk, Tr. 69).

Ken Abbott, the 103 longwall foreman, told Mr. Kirk he wanted to "run coal" off the face. I believe Mr. Kirk misinterpreted Mr. Abbott's statement to mean MCR was intending to mine coal from the face. (Kirk, Tr. 34). Actually, the foreman was stating he wanted to run coal off the face chain conveyor. When Mr. Abbott ran the face chain conveyor it would intersect

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the 103 longwall strike belt in close proximity to the coal accumulations.

MCR's principal contentions have been discussed. However, it is necessary to consider MCR's evidence as to whether a break in the belt occurred during the regular production (graveyard) shift for the 103 longwall.

Witnesses Reeves (Tr. 338), and Porter (Tr. 578, 580) were confirmed by Mr. Kirk's notes of May 1st that "Belt had operated on graveyard and had broken." (Kirk, Tr. 66). Mr. Kirk made no further inquiries and issued his order based on the assumption that there had not been a belt break. (Kirk, Tr. 89).

Mr. Kirk properly issued his order since there were accumulations in the section. The order as to MCR should be affirmed since the Commission and various courts recognize that the Mine Act (as well as its predecessor, the Coal Act) impose liability without fault. *Asarco, Inc.-Northwestern Mining v. FMSHRC and AMC*, 8 FMSHRC 1632 (1986), 868 F.2d 1195, 1197-98, 10th Cir. 1989; *Western Fuels Utah, Inc. v. FMSHRC* 870 F.2d 711, D.C.C.A. 1989; *Bulk Transportation Services*, 13 FMSHRC 1354, (September 1991).

However, evidence of the belt break will impinge on other issues in these cases and it is appropriate to enter the following additional:

Findings of Fact

35. On May 1, 1990, WILLIAM PORTER, an experienced miner, arrived at work at 6:20 a.m. The lampman advised him that the belt had broken. Production had been shut down for 1 1/2 to 2 hours to repair the belt. Excluding clean-up time, it normally takes between two and four hours to resplice the 103 longwall strike belt. (Porter, Tr. 550, 553, 578).

36. The strike belt had broken on the "C" shift, a regular production shift. (Porter, Tr. 578).

37. On March 1990, the 3,000 foot 103 longwall strike belt was in poor condition with 117 previous splices. The 42 inch belt (doubled for both sides) was 6000 feet long. (Tr. 542, 555).

38. If the belt breaks, it will scatter coal off on the sides and dump it on the bottom belt. (Tr. 544, 545).

39. If the belt breaks, production is shut down. (Tr. 549-550). No cleanup can be started until the belt is spliced and ready to run. (Tr. 553).

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40. Mr. Porter described in detail how the belt is spliced. (Tr. 548-553).

41. The estimated load on the strike belt at any one time is 50 tons of coal. (Scott, Tr. 642).

In his testimony Mr. Kirk opined that the strike belt conveyor had not broken but was spilling coal in its normal operations. Further, the accumulations were scattered the entire distance of the conveyor.

I am not persuaded. MCR's witnesses Reeves and Porter testified the belt had broken on the graveyard shift. Further, Mr. Kirk's own notes taken on May 1, 1990 state: "Belt had operated on graveyard and had broken." (Tr. 66). Mr. Kirk's testimony that the accumulations were scattered the entire distance of the conveyor conflicts with his drawing (Ex. M-14) placing the accumulations at five principal places. It further conflicts with other portions of his testimony.

MCR established that the conveyor belt broke but as previously stated the defense cannot prevail.

103 Strike Belt Transfer Point (Drive Area)

The parties offered extensive evidence as to the coal accumulations in the drive area. This area (See Exhibit M-14) is where the 103 strike belt intersects the B-2 belt. The accumulations were described as being "like a slurry" and about two feet deep.

As to the drive area, it is necessary to consider several points of critical evidence.

I credit the testimony of MCR's geologist, Bruce Collins. Mr. Collins with a mining degree in geology has done field work at MCR. (Tr. 514, 516). He identified a piece of carbonaceous siltstone taken from the roof of the transfer point. (Tr. 522). After describing the siltstone, Mr. Collins indicated it is "virtually incombustible." (Tr. 524). Further, when material falls to the floor in flakes and become wet, its color turns "absolutely black." (Tr. 523). I find that Mr. Collins as a geologist has more knowledge than the Secretary's witness as to the rock composition of the material in the slurry. Although it appeared to be coal at least a part of it was virtually incombustible siltstone. (Tr. 514-530, Ex. R-22, R-23).

Additional critical uncontroverted evidence is that the drive area, at the intersection of the belts, normally builds some coal accumulations. In fact, an MCR employee was grading the area when Mr. Kirk was in the section.

In short, the material in the drive area and the slurry were at best incombustible rock and some coal. The evidence fails to convince the writer that the drive area material was combustible.

The Judge is aware of the testimony of MSHA Supervisor Lee Smith to the effect (with Ex. M-12) that water can cause coal mine fires to burn more intensely and therefore, water saturation of coal does not inert it. (Tr. 746-747). The evidence in M-12 applies to the explosibility and ignitability of coal dust, not siltstone. It is accordingly not persuasive to the issues involved in the drive area.

For the above reasons, that portion of the order citing the drive area is stricken.

Significant and Substantial

MCR contends Mr. Kirk's order should not be designated as "S&S."

A violation is properly designated as being S&S "if, based on 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 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 standard is significant and substantial under National Gypsum the Secretary 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.

See also *Austin Power Co. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g*, 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria). The question of whether any specific violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, inc.*, 10 FMSHRC 498, 500-01 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011-12 (December 1987).

On the S&S issue as to the ignitability of MCR's coal I enter the following:

Findings of Fact

42. Due to its low oxygen, high ash content MCR's coal burns only with great difficulty and will not spontaneously combust. (Reeves, Tr. 411-412).

43. MCR must add diesel oil to its coal, the fuel to keep its coal-fired thermal dryers at the coal preparation plant burning. (Reeves, Tr. 410).

44. A major methane fire in the roof of the tailgate of the 211 advancing longwall section in the summer of 1990 failed to ignite adjacent coal pillars. (Reeves, Tr. 359).

45. The coal in the B-seam (1-Mine) contains 23.5 percent volatile matter while the M-seam (2-Mine) contains 27 to 28 percent volatile matter. (Reeves, Tr. 337).

Mr. Kirk confirms MCR's evidence as to the ignitability of the MCR coal. He testified that while the coal was in contact with the conveyor belt at four places, he didn't recall any hot areas. He also tested the friction points for heat. (Tr. 76, 88). Mr. Kirk testified the usual scenario is that the more friction the greater the heat. Thus, a smoldering fire then goes to full fire. (Tr. 98). However, Mr. Kirk agreed that if contact fails to heat the coals and the contact remains minimal, there would probably be no injury to an individual miner. (Tr. 100). Mr. Kirk describes the friction in four places as "light to heavy." (Tr. 104).

The Judge is aware of the testimony of MSHA's Lee A. Smith. He testified that at one point in his career at MCR he smelled smoke. When he located its source he found a roller turning in coal. This hot coal readily went out when he crushed it. (Tr. 742, 743).

I am not persuaded by the described event that occurred at some undisclosed time. The testimony weighs for naught since Mr. Smith agreed he had not seen any fires at MCR. Further, he did not even know of any coal fires at MCR. (Tr. 748, 750).

On the S&S issue, the record here does not satisfy paragraph (3) of the Mathies formulation. Due to the lack of ignitability of the loose coal I conclude there was not a reasonable likelihood that a fire would occur.

In support of her position the Secretary relies on Consolidation Coal Corp. v. FMSHRC, 824 F.2d 1071 (D.C. Cir. 1987) and Coal Mac, Inc., 13 FMSHRC 1600, 1601.

In Consolidation Coal Co., the appellate court affirmed the Commission's presumption that the Secretary's respirable dust

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regulation was S&S. In the instant case the Commission's precedent is set forth in the Mathies formulation.

In the second cited case the Secretary relies on Judge Fauver's rationale dealing with "substantial possibility" rather than "reasonable likelihood" as mandated in Mathies. I declined to follow Judge Fauver's reasoning in FMC Wyoming Corporation, 14 FMSHRC 1482, 1497 (August 1992) and I adhere to that view.

The S&S allegations should be stricken.

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); Youghioghney & Ohio Coal Company, 9 FMSHRC 2007, 2010 (December 1987). 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 "inattentative" conduct constituting an unwarrantable failure is "not justifiable" or is "inexcusable".

The Secretary asserts unwarrantable failure is established by MCR's adverse history. In the period beginning October 1, 1988 and ending March 18, 1992, MCR was cited 215 times for violations of 75.400 (Ex. M-3). I agree that such a large number of citations establish unwarrantable failure by MCR and for that reason such allegations should be affirmed. Peabody Coal Co., 14 FMSHRC 1261 (August 1992).

The Secretary's additional reasons to assert unwarrantable failure have been examined and found to be without merit.

Civil Penalties As to MCR

Section 110(i) of the Act mandates consideration of the criteria to assessing appropriate civil penalties.

MCR is in Chapter 11 Bankruptcy (Case No. 92-11658 PAC, District of Colorado). The penalty herein is appropriate considering the company has virtually shut down at this time.

MCR is only a debtor-in-possession and is no longer mining coal.

MCR's prior adverse history is not favorable: from October 1, 1988 to March 18, 1992, the company paid 375 violations of a

total 1,407 violations. (Ex. M-3). From May 1, 1988 to April 30, 1990, MCR paid 604 violations of 1,436 assessed. (Ex. M-15).

The operator was negligent since its strike belt was in poor condition.

However, the gravity of the violation was low since the MCR's coal will not combust and does not readily burn.

The company is entitled to statutory good faith for prompt abatement. The entire production crew was 1 1/2 to 2 hours into the 4 hour resplicing job when Mr. Kirk arrived at the mine. Cleanup cannot begin until the resplicing is accomplished.

The civil penalty of \$400 hereby assessed in WEST 91-421 is appropriate.

Docket No. WEST 91-627

William M. Porter, employed by Mid-Continent Resources Inc.

In this case, the Secretary seeks a civil penalty and charges Respondent, William M. Porter, the 103 longwall foreman, with violating Section 110(c) of the Act in that he knowingly authorized, ordered or carried out the violation of 30 C.F.R.

75.400

Section 110(c) of the Act provides:

(c) Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsection (a) and (d).

It has been ruled that the word "knowingly" as used in this section does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowingly or having reason to know. A person has reason to know when he has such informations that would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence. United States v. Sweet Briar, Inc., 92 F. Supp. 777,779 D.S.C. 1950, quoted

approvingly in *Secretary v. Kenny Richardson*, 3 FMSHRC 8 (1981), affirmed, *Richardson v. Secretary of Labor and FMSHRC*, 689 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983).

As previously noted, the evidence establishes that the coal accumulations were caused when the 103 strike belt broke. This occurred on the shift before Mr. Porter came to work. Accordingly, there is no evidence that Mr. Porter knowingly authorized, ordered or carried out the violation of the regulation.

Case No. WEST 91-627 against William M. Porter should be dismissed.

WEST 91-168, WEST 91-594, and WEST 91-626

I find that a preponderance of the substantial, reliable and probative evidence establishes the following:

Findings of Fact

46. On May 29, 1990, FRANK D. CARVER, an experienced MSHA underground coal mine inspector issued Order No. 3410351 under Section 104(d)(2) of the Act. Mr. Carver has inspected MCR on an almost daily basis from January 1988. (Tr. 184-187).

47. When he was proceeding towards the face of the 211 longwall Mr. Carver saw coal and timbers in Crosscut 18. The crosscut itself was 20 feet wide, 6 to 7 feet high and 40 to 50 feet deep. (Tr. 187, 188).

48. The crosscut was mostly full. Mr. Carver also found coal dust, coal fires and float coal dust as well as lump coal. The area was lightly salt and peppered. (Tr. 188-189).

49. Mr. Carver at hand-depth picked up hands full of the material at different locations and measured the accumulations with a 6-foot wooden ruler. (Tr. 189, 237).

50. Crosscut 18 was 300 feet from the face. (Tr. 191).

51. When Mr. Burham (MCR representative) was asked what this was all about he merely shrugged, "more or less." (Tr. 191).

52. In the 211 longwall gassy section ignition sources included the power cables, and a non-permissible diesel. (Tr. 193-195).

53. Float coal dust and coal dust fines relate to fire and explosion hazards. (Tr. 192).

54. Fire and explosion could cause death or serious injury. (Tr. 193).

55. Mr. Carver checked the preshift and on shift books and except for May 28 through May 29, he was not alerted to the accumulations. Crosscut 18 should have been reported in the shift book. (Tr. 196).

56. Mr Carver knew there had been an order issued due to coal accumulations at tailgate 211 on May 1. (Tr. 200-201, Ex. M-7)). He considered this factor when he issued the May 29 order. (Tr. 201).

57. On May 29, 1990, MCR was on the (d) series that started on April 20, 1990. (Tr. 209, 210).

58. Mr. Carver did not see anyone cleaning up the accumulations in Crosscut 18. (Tr. 214).

59. MCR was not mining when Mr. Carver arrived in the section. (Tr. 216).

60. Mr. Carver believed the violation was S&S. (Tr. 193). It was further due to the unwarrantable failure of MCR. Specifically, it was because of the (d)(1) citation on April 20, 1990 and the (d)(1) order May 1. (Tr. 225).

61. When he issued his order on May 29, Mr. Carver was aware of two prior orders for accumulations within the previous month. (Tr. 251).

62. Exhibit M-16 (first page) shows coal accumulation at Crosscut 18, low side. The book recited the condition was reported. (Tr. 259).

63. Coal accumulations also shown for May 27 at Crosscut 18. (Tr. 259-261).

Discussion and Further Findings

MCR raises the combustibility and ignitability arguments it raised in connection with the previous order.

However, the facts are different. The record establishes that at Crosscut 18 there was considerably more than loose coal. Specifically, the accumulations in Crosscut 18 included very dry coal dust, coal fines and float coal dust. I credit Mr. Carver's experience that these accumulations relate to fire and explosion hazards which could cause death or serious injury. Mr. Carver further identified ignition sources including power cables and a non-permissible diesel. An additional ignition source would be in Eimco used to move the power center on the Memorial Day weekend. (Baley, Tr. 155).

It is true that MCR established by the credible evidence that the power in the 211 longwall was shut down over the Memorial Day weekend so the power center could be moved. (Hayes, Tr. 596). In addition, MCR was scheduling a gearbox change for the 211 longwall. (Hayes, Tr. 587). While some immediate ignition sources may have been without power other ignitions sources were present. In addition, fires elsewhere in the mine could have been propagated by the accumulations in Crosscut 18.

A dispute exists as to the composition of the accumulations in Crosscut 18. MCR asserts it was mostly rock from floor leave within the crosscut and floor material stored there from the power center move. MCR further cites the testimony of Bruce Collins, MCR's geologist who testified in connection with the previous order.

I am persuaded by Mr. Carver's prompt action at Crosscut 18 as well as Mr. Buram's unresponsive reply at the same time and place. Mr. Buram in describing the activity at Crosscut 18 stated "Dave [Carver] put his hands down and dug into it a little bit and said the section was closed down" (Tr. 267). Mr. Carver asked Mr. Buram what this was all about and he "got a shrug, more or less, and he [Buram] didn't want to discuss it." (Tr. 191).

Bruce Collins, MCR's geologist, testified as to the rock material that accumulated at the 103 strike belt and the B-1 belt intersect. While he testified the 211 longwall was carbonaceous siltstone (Tr. 527), he failed to indicate how these could be an accumulation almost large enough to fill a single crosscut 20 feet wide and 6 to 7 feet high. (Tr. 188). In addition, if the area was not combustible MCR would hardly have dusted it; or "lightly salt and peppered it." (Tr. 188).

John Reeves testified that he and his son toured the mine over the Memorial Day weekend. He walked in the 211 headgate roadway and observed that the crosscuts were badly heaved but he did not notice any accumulation in Crosscut 18. (Tr. 360). Terrance Hayes also testified he did not see anything remarkable in Crosscut 18 during the graveyard shift preceding Mr. Culver's order. (Tr. 601).

Mr. Reeves and Mr. Hayes may simply have been unobservant as to the contents of Crosscut 18.

I am persuaded by Mr. Carver's testimony as to the conditions in Crosscut 18.

Modification of Roof Control Plan

As a further defense in the 211 longwall MCR interposes MSHA's modification of the operator's roof control plan. (Ex.

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R-11, R-12, R-13). The modification, in April 1990, approves the lengthening and extension of two crosscuts to allow for advance of the face.

MCR's defense is rejected. It is apparent that MSHA's modifications in the roof control plan did not directly or implicitly authorize MCR to violate 30 C.F.R. 75.400.

Significant and Substantial

The formulation to be followed in determining whether a violation is S&S is set forth in connection with the previous order.

Following the Mathies formulation I conclude the Secretary proved the underlying violation of 30 C.F.R. 75.400. There was a measure of danger contributed to by the violation. Mr. Carver testified the lump coal, the float coal dust and the coal fines relate to fire and explosion hazards. (Tr. 188-193). MCR's witness Burham conceded float coal dust is a hazard. (Tr. 271, 282). The third factor of the Mathies formulation was established by the opinion of Mr. Carver. (Tr. 193, 213). The propensities of a fire establish the final factor: A mine fire can cause serious injuries.

For the foregoing reasons the S&S allegations should be affirmed.

Unwarrantable Failure

For the reasons previously discussed in connection with Order No. 3412700 and as evidenced in Exhibit M-3 the special findings of unwarrantable failure should be affirmed.

Civil Penalties

MCR's financial status and prior history have been previously reviewed.

In connection with Crosscut 18 MCR was negligent. The accumulations were placed in Crosscut 18 because MCR was moving the power center and it was necessary to make additional space for it (Boram, Tr. 270; Baley, Tr. 155). At the time of the power center move, most of the power and ignition sources had been disconnected. MCR's did not properly schedule the move of its power center. Better planning could have been to make room for the power center and remove the accumulations from the mine before moving the power center. In short, I reject MCR's concept that the accumulations were "in transit." The preshift and on-shift reports in Exhibit M-16 indicate otherwise.

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The gravity in connection with Crosscut 16 was high. The ingredients involved were such that if a fire and explosion occurred, serious injuries or fatalities could result.

MCR is entitled to statutory good faith as it rapidly abated the violative conditions.

The civil penalty of \$600 assessed in WEST 91-168 is appropriate.

Docket No. WEST 91-594
Thomas Scott, employed by Mid-Continent Resources, Inc.

In this case the Secretary charges Respondent, Thomas Scott, with violating Section 110(c) of the Act in that he knowingly authorized, ordered or carried out the violation of 30 C.F.R. 75.400

The statutory mandate and the case law are set forth in the William M. Porter case, supra.

In connection with this case I find that a preponderance of the substantial, reliable and probative evidence establishes the following:

Findings of Fact

64. In May 1990 Thomas Scott was the MCR underground mine superintendent. (Tr. 629-630).

65. On Friday night Mr. Scott told miner Mike Jerome that the face was going to be shut down.

66. Over the Memorial Day weekend Mr. Scott was busy with family matters. He also went fishing at Trappers Lake. (Tr. 630).

67. When he returned home Monday evening he learned the 211 gearbox was not yet ready for installation. (Tr. 633).

68. On Tuesday Mr. Scott got the "rundown" from Terry Hayes, the graveyard foreman. (Tr. 631).

69. When he got back to work Tuesday morning the surprise waiting for him was that Dave Carver was underground. At approximately 8:30 or so his phone rang and they said he had an order for accumulations. (Tr. 634).

70. Mr. Scott looked at Crosscut 18 after Mr. Carver issued his order.

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71. Mr. Scott didn't review the MCR books when he returned to work. (Tr. 649-650).

72. Mr. Scott went in after Mr. Carver issued his order. He agreed there were accumulations to some degree in Crosscut 18 but he didn't feel the accumulations were all coal. (Tr. 645, 646).

73. Mr. Carver had issued an order about a month before May 29 for accumulations in the same crosscut. The accumulations came about because the stamler had to be moved. (Tr. 650).

Discussion and Further Findings

If Mr. Scott had reviewed the books (Ex. M-16) he would have found reports of coal accumulations at Crosscut 18 on the low-side. Those accumulations are reported for May 27 at 5:45 a.m., 2:14 p.m. and 5:10 a.m. Subsequent shifts are recorded as idle. Since these conditions were reported to the company, Mr. Scott, as mine foreman should have known them.

Accordingly, the citation as to Thomas Scott should be affirmed and a civil penalty assessed.

Civil Penalty

Section 110(i) of the Mine Act mandates consideration of six criteria to be considered in assessing civil penalties under the Mine Act.

Criteria as to size, ability to continue in business and prompt abatement do not appear to be relevant in this 110(c) case.

As to the remaining criteria: Mr. Scott has no prior adverse history.

Mr. Scott was negligent: As superintendent he should have known of the accumulations in Crosscut 18.

The gravity of the violation was serious even though many of the potential ignition sources were not operative.

The penalty of \$200 assessed in the order of this decision is appropriate.

Docket No. WEST 91-626

Terrance J. Hayes, employed by Mid-Continent Resources, Inc.

In this case the Secretary charges Respondent, Terrance J. Hayes, with violating Section 110(c) of the Act in that he knowingly authorized, ordered or carried out the violation of 30 C.F.R. 75.400.

The statutory mandate and the case law are set forth in the William M. Porter case, supra.

In connection with this case I find that a preponderance of the substantial, reliable and probative evidence establishes the following:

Findings of Fact

74. In May 1990 Mr. Hayes was the shift foreman on the C or graveyard shift. (Tr. 586).

75. Mr. Hayes was off the Memorial Day weekend. (May 26, 27 and 28). (Tr. 587).

76. He was not in touch with the Mine until he returned to work at 11 o'clock at night on the C shift, Monday, May 28th. (Tr. 587, 588).

77. Various bullgang work were performed during the weekend. (Tr. 588, 589).

78. On the holiday weekend a power center move and a gearbox change were scheduled. (Tr. 589).

79. No one was present when Mr. Hayes entered the mine except Bruce Huntley who had been in charge of the power center move. (Tr. 595).

80. Mr. Ben Griego asked Mr. Hayes if he could kill the power in the whole mine. Mr. Hayes agreed. (Tr. 596).

81. Those present worked on the power center move except two men drilling the face. (Tr. 596-597).

82. Mr. Hayes countersigned all of the books even though he was not present at all times. (Tr. 598-599).

83. When Mr. Hayes saw there was an outstanding "ticket" on the 211 tailgate, he directed that the area be dusted. (Tr. 599).

84. Mr. Hayes walked by the area to where the power center was being moved. However, he didn't observe anything unusual nor did he observe any coal accumulations. (Tr. 601, 604).

85. The power center is 4 feet high by 16 feet long by 6 feet wide. (Tr. 604).

86. There was something in the books referring to a coal accumulation but the entry was before Mr. Hayes' shift. (Tr. 605).

87. The whole area was white from dusting. (Tr. 606).

88. Mr. Hayes didn't look at the accumulation referred to by Mr. Carver. (Tr. 606).

89. Mr. Carver wrote his order during the day of May 29th for the accumulation in the Crosscut 18. Mr. Hayes first became aware of the order when he came to work that night when he came on at 1 o'clock. (Tr. 614). This was the second shift after the Memorial Day weekend. (Tr. 618).

90. When he heard about the order Mr. Hayes went immediately to the 211 longwall. They were removing the last bucket out of Crosscut 18. (Tr. 614).

Discussion and Further Findings

Mr. Hayes was shift foreman on May 28 and on that day he read and signed the on-shift books. The books clearly refer to the accumulations in Crosscut 18.

One of MCR's defenses is that the power center move and the gear box changeover eliminated MCR's capacity to remove any accumulations in Cross 18. Mr. Hayes should have known of these circumstances.

Mr. Carver wrote his order on May 29th and it was not until after Mr. Hayes learned of the order that he went to Crosscut 18.

The above uncontroverted facts show that Mr. Hayes knew or should have known of the accumulations yet he failed to take remedial action.

The 110(c) case against Terrance Hayes should be affirmed and a civil penalty should be assessed.

Civil Penalties

As previously noted the statutory criteria as to size, ability to continue in business and prompt abatement do not appear to be relevent in a 110(c) case.

As to the remaining criteria: Mr. Hayes has no prior adverse history.

Mr. Hayes was negligent; he read and signed the pre-shift and on-shift reports and should have known of the accumulations in Crosscut 18.

The gravity of the violation was serious but many of the ignition sources were not operative.

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The penalty of \$200 assessed in the order of this decision is appropriate.

For the foregoing reasons I enter the following:

ORDER

I

As to WEST 91-421, Order No. 3412700:

The allegations of significant and substantial are stricken.

Order No. 3412700 is affirmed.

A civil penalty of \$400 is assessed against Mid-Continent Resources, Inc.

II

As to WEST 91-627, William M. Porter, employed by Mid-Continent Resources, Inc.:

This case is dismissed.

III

WEST 91-168, Order No. 3410351:

Order No. 3410351 is affirmed and a civil penalty of \$600 is assessed against Mid-Continent Resources, Inc.

IV

WEST 91-594, Thomas Scott, employed by Mid-Continent Resources, Inc.

This petition is affirmed and a civil penalty of \$200 is assessed.

V

WEST 91-626, Terrance J. Hayes, employed by Mid-Continent Resources, Inc.

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This petition herein is affirmed and a civil penalty of \$200 is assessed.

John J. Morris
Administrative Law Judge

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