CCASE:
SOL (MSHA) V. PEABODY COAL
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SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 92-748
Petitioner	:	A.C. No. 15-14074-03610
v.	:	
	:	Martwick Underground
PEABODY COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Darren Courtney, Esquire, Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner; David R. Joest, Esquire, Peabody Coal Company, Henderson, Kentucky for Respondent

Before: Judge Melick

This case is before me upon the petition for assessment of civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., the "Act," charging the Peabody Coal Company (Peabody) with one violation of the mandatory standard at 30 C.F.R. Section 75.400 in a citation issued pursuant to Section 104(d)(1) of the Act.(Footnote 1)

The citation at bar, No. 3417103, alleges a "significant and substantial" violation of the mandatory standard at 30 C.F.R. 75.400 and charges as follows:

_____

1 Section 104(d)(1) of the act provides, in part, as follows:

"If, upon the inspection or a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also find that, while the conditions created by such a violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act."

> Coal dust and float coal dust were permitted to accumulate under the bottom rollers with the bottom rollers running in the coal dust at twelve locations along the 2nd North West main conveyor belt, three rollers between Nos. 6, 8, and 70 crosscuts and (1) between No. 71 and 72 with accumulations measured 12 inches deep, five feet long and four feet wide, measured with steel tape, No. 1 sample collected, one between Nos. 75 and 76 crosscut, one between No. 81 and 82 crosscut, four (4) bottom rollers running in coal dust at No. 84 crosscut No. 2 spot sample collected, accumulative measured at locations five (5) feet long, eleven inches deep and four feet wide, one roller in coal dust at No. 88 crosscut, accumulations measured five (5) feet long and 12 inches deep four (4) feet wide No. 5 Spot sample collected and one bottom roller running in coal dust at No. 89 crosscut.

The cited standard provides that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

At hearings Peabody admitted the violative conditions and conceded that those violations were "significant and substantial." It denies only that those violations were the result of its "unwarrantable failure." "Unwarrantable failure" has been defined as conduct that is "not justifiable" or is "inexcusable." It is aggravated conduct by a mine operator constituting more than ordinary negligence. See Youghiogheny and Ohio Coal Co., 9 FMSHRC 2007 (1987); Emery Mining Corporation, 9 FMSHRC 1997 (1987). Within this framework of law, it is clear that the admitted illegal accumulations in this case were the result of Peabody's unwarrantable failure.

According to the undisputed testimony of Mine Safety and Health Administration (MSHA) inspector, Darrold Gamblin, the twelve cited accumulations in fact existed on October 28, 1992, as he described them in the citation at bar. The existence of such a large number of significant accumulations along the northwest belt line in itself constitutes such an obvious and unusual number and size of violative conditions that it may reasonably be inferred from that evidence alone that management knew of the conditions. Moreover, the absence of any evidence of any concurrent cleanup efforts, particularly in the presence of such

a large amount of accumulations constitutes and inexcusable omission of an aggravated circumstance. See Peabody Coal Company, 14 FMSHRC 1258 (1992).

In addition, the undisputed testimony of Peabody's belt examiner, David Arbuckle, that the conditions he reported in the belt inspection report (Joint Exhibit No. 2) needed correction on October 25, 1991 (i.e., "second northwest-clean bottom rollers from No. 68 to No. 83-bad [top roller] No. 94") also clearly describes a serious and major problem with the accumulation of loose coal in proximity to an ignition source. Again, according to Arbuckle's undisputed testimony, that problem remained uncorrected at the time of the examination three days later when he again inspected the area and again noted in the belt inspection report that the same coal accumulations still needed correction. Since these reports were countersigned by the mine foreman or other "certified official" of Peabody, the operator was placed on written notice of the condition and failed to correct it for at least three days. It may reasonably be inferred that this was one of the conditions also cited on October 28, by Inspector Gamblin since it was within the same area cited by Gamblin. These aggravated circumstances are sufficient alone to constitute unwarrantable failure.

Finally, the practice at the Martwick Mine at the time of the instant violation of failing to note in the belt inspection reports that "corrections" to the conditions noted in the reports (in this case, the cleanup of coal accumulations) had in fact been made was a particularly serious omission of an aggravated nature and constituting high negligence. For this additional and independent reason the violation herein was the result of unwarrantable failure.

Considering the above evidence, it is clear that the Secretary has sustained her burden of proving that the violations charged in Citation No. 3417103 were the result of the unwarrantable failure of the operator to comply with the law.

ORDER

Citation No. 3417103 is AFFIRMED and Peabody Coal Company is directed to pay a civil penalty of $500 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge
703-756-6261

Distribution:

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