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COSTAIN COAL V. SOL (MSHA)
SOL (MSHA) V. COSTAIN COAL
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COSTAIN COAL INCORPORATED, : CONTEST PROCEEDINGS
Petitioner :
v. : Docket No. KENT 93-102-R
: Order No. 3552700; 10/16/92
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Docket No. KENT 93-103-R
ADMINISTRATION (MSHA), : Order No. 3552934; 10/16/92
Respondent :
: Wheatcroft No. 9 Mine
: :
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 93-325
Petitioner : A.C. No. 15-13920-03803
v. :
: Pyro #9 Wheatcroft
COSTAIN COAL INC., :
Respondent :

DECISIONS

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for the Petitioner/Respondent;
Carl B. Boyd, Esq., Henderson, Kentucky, for the
Respondent/Contestant.

Before: Judge Koutras

DECISIONS

Statement of the Proceedings

These proceedings concern a civil penalty proceeding initiated by the petitioner (MSHA) against the respondent (Costain Coal Incorporated) pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments for four (4) alleged violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations. The respondent filed a timely answer contesting the alleged violations and assessments, and also filed Notices of Contest pursuant to Section 105(d) of the Act, seeking review of two of the section 104(d)(1) orders which are the subject of the civil penalty proceeding. The matters were consolidated and heard in Evansville, Indiana. The parties

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filed posthearing briefs and I have considered their arguments in the course of my adjudication of these matters.

Issues

The issues presented in these cases are (1) whether the conditions or practices cited by the inspectors constitute violations of the cited mandatory safety standards, (2) whether the alleged violations were "significant and substantial" (S&S), (3) whether the alleged violations were the result of an unwarrantable failure by Costain Coal to comply with the cited standards, and (4) the appropriate civil penalties to be assessed for the violations, taking into account the statutory civil penalty assessment criteria found in section 110(i) of the Act.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. 801 et seq.
2. Commission Rules, 29 C.F.R. 2700.1 et seq.
3. Mandatory Safety standard 30 C.F.R. 75.400.

Discussion

Section 104(d)(1) "S&S" Order No. 3552700, issued on October 16, 1992, cites an alleged violation of 30 C.F.R.

75.1704, and it was consolidated with contest Docket No. KENT 93-102-R. The cited condition or practice is described as follows:

The primary designated intake escapeway for the longwall "y" panel tailgate entry was not maintained with 6 feet of clearance and coal bed height located one cross-out inby overcast and two cross-cuts outby survey station No. 69745, where a previous roof fall had occurred and is rubbed off. But evidence indicates shale roof material was scooped (pushed) outby fall in order to crib or support area, leaving low clearance from immediate roof.

This area was inspected on 10-15-92 by this authorized representative and conditions of primary escapeway were noted and discussed with the operator in detail.

Before any enforcement action was taken reference of this violation was brought to the attention of District #10 MSHA ventilation supervisor along with Roof control Specialists.

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MSHA's counsel asserted that the evidence now known to her reflects that the gravity findings of the inspector should be modified to reflect the number of persons affected by the cited conditions as five (5), rather than ten (10), as originally noted by the inspector. In addition, it is noted that the order was modified by the inspector on October 19, 1992, to change his initial gravity finding to "Highly Likely", rather than "Occurred".

MSHA's counsel stated that the evidence supports a modification of the contested section 104(d)(1) "S&S" order to a section 104(d)(1) "S&S" citation, and that the respondent has agreed to pay a civil penalty assessment of \$4,500, in settlement of the modified citation. Respondent's counsel confirmed the proposed settlement agreement, and it was approved from the bench (Tr. 136-137).

Section 104(d)(1) non-"S&S" Order No. 3552934, issued on October 16, 1992, cites an alleged violation of 30 C.F.R. 75.220, and it was consolidated with contest Docket No. KENT 93-103-R. The cited condition or practice is described as follows:

Loose rock from a previous roof fall had been pushed into the tailgate entry of the "y" panel which would have prevented miners from traveling the intake escapeway entry. The roof control plan was not being followed on page 17 which requires certain safety precautions to be followed in the event of a failure or blockage in the tailgate entry. The safety precautions had not been implemented. The blocked tailgate was discovered on 10/15/92, and the longwall unit was in production. Roof control plan dated February 5, 1992.

Costain Coal's defense is that the partially blocked entry was the result of additional rock that had fallen from the brow of the previous fall and that all longwall personnel were notified of the situation, immediate action was taken to correct the cited condition, and the condition was corrected before the inspector wrote the order.

MSHA's counsel asserted that the available evidence supports a modification of the Section 104(d)(1) order to a section 104(a) citation, and that the parties agreed to settle the violation on that basis and the respondent has agreed to pay a civil penalty assessment of \$500, as part of their settlement agreement. Counsel for the respondent confirmed that this was the case, and the settlement was approved from the bench (Tr. 133-136).

Section 104(d)(2) "S&S" Order No. 3552424, issued on March 17, 1992, cites an alleged violation of 30 C.F.R. 75.316, and the cited condition or practice is described as follows:

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Item 5 of the dust control plan that is written in the modified order was not being followed in that the No. 1 Shear cut out in one item 5 states when the No. 1 shear cuts out, a step-out procedure will be conducted. The full web will not be cut out in one pass.

MSHA's counsel stated that the facts and evidence now known to her support a modification of the contested section 104(d)(2) order to a section 104(a) citation with "S&S" findings, that the parties have agreed to settle this matter on that basis, and that the respondent has agreed to pay a civil penalty assessment of \$500, to settle the violation. The respondent's counsel confirmed the proposed settlement agreement, and it was approved from the bench (Tr. 132-137).

In addition to the aforementioned arguments presented by the parties in support of the settlements, the parties agreed that Costain Coal is a large mine operator, and MSHA presented information concerning Costain's history of prior violations for all of its mines for the period July 23, 1990, through July 22, 1992. In addition, the record reflects that all of the cited violative conditions were timely abated and that two of the violations (No. 3552934 and 3552424) were terminated within five minutes of their issuance.

Section 104(d)(1) "S&S" Order No. 3553244, issued on October 29, 1992, cites an alleged violation of 30 C.F.R. 75.400, and the cited condition or practice is described as follows:

Accumulation of combustible materials consisting of loose coal, coal dust, and float coal dust from 4 inches to 12 inches in depth had been allowed to accumulate underneath and alongside the No. 4 unit belt conveyor head drive dumping on the 11C belt conveyor.

Starting at the No. 4 unit 11B belt conveyor head drive and continuing outby on the No. 11C belt conveyor for an approximate distance of 150 feet as measured with a metal measuring tape.

Petitioner's Testimony and Evidence

MSHA Inspector Donald L. Milburn, confirmed that he issued the contested order after finding accumulations of combustible material in a belt entry outby the No. 4 working unit. He observed coal spillage on the back side and bottom of the "mainline" belt conveyor head drive. The belt was running in the accumulations in an area of 10 to 15 feet. He also observed loose coal spillage down the belt entry at several places for a distance of approximately 150 feet. The coal "looked like it had been there for several shifts" (Tr. 14-18).

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Mr. Milburn stated that he issued the section 104(d)(1) order after finding "high negligence" because the respondent's belt boss Philip Prince informed him that there was an ongoing problem with the belt, that the condition was present for several shifts, if not days, and that people had been working for several days cleaning up the spillage. Mr. Milburn stated that the belt was later replaced because of some tears and bad splices, and he indicated that with these conditions present "you're going to lose some coal". Mr. Milburn observed no one cleaning the belt when he observed the accumulations (Tr. 18-19).

Mr. Milburn believed that the respondent failed to take adequate corrective measures "to stay on top of it where they knew they had a spill" (Tr. 20). Mr. Milburn confirmed that in addition to Mr. Prince, he discussed the matter with maintenance foreman Don Gess and former belt boss Bruce Morris, and Mr. Gess agreed that the spillage was excessive and that he would assign people to take corrective action. Mr. Milburn stated that Mr. Morris showed him a "belt book" for a different belt, but later produced the correct belt book, and "the same conditions were in it as the first book I looked at" (Tr. 22).

Mr. Milburn stated that the mine is on a ten-day spot inspection cycle because of the high liberation of methane. The loose coal spillage was black in color and he observed no rock dust on the spill. There were no additional belt violations or problems and he observed no stuck rollers running in the coal. However, the accumulations presented a fire hazard because most fires occur on belt conveyor entries because of stuck rollers or a belt rubbing against the frame creating friction and heat build-up (Tr. 23-24).

Mr. Milburn confirmed that there was a fire suppression system at the belt head drive location. However, the spillage was also located feet 150 outby and down the entry, and the available CO monitoring system would only serve as a quick reference to locate any fire, but it would not control any fire. He indicated that 16 miners normally would be present in the working section, and with the location of the affected area "it would take some time for them to even get to the area to put out a fire" (Tr. 25).

Mr. Milburn stated that he had previously inspected the mine over a ten month period prior to his inspection of October 29, 1992, and has issued other violations of sections 75.400 and 75.402, and discussed them with the respondent's personnel, including Mr. Gess, Mr. Morrison, and Mr. Prince (Tr. 26-27).

Mr. Milburn confirmed that the respondent has had an effective mine examination program to correct problems with equipment and permissibility, and has greatly reduced its repeat violations. However, he believed "they still needed to improve

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on their rock dust applications and accumulations in the mine" (Tr. 28). Mr. Milburn was aware of only one prior mine fire or ignition, and this was an explosion that occurred in 1989, but he was not at the mine at that time, and that incident occurred "several thousand feet away" from the cited area that he inspected on October 29, 1992 (Tr. 29).

On cross-examination, Mr. Milburn stated that the accumulations located 150 feet outby the 11-C belt were at the side by the belt, and it was two feet deep at the head drive up to the bottom side of the belt. He did not know what caused the spillage at the time of his initial observations, but later found out that a baffle-type board had been installed on the backside of the belt to catch any coal spillage. He confirmed that the person in charge of the conveyors, Ricky Phillips, told him that the baffle-board had been installed "a couple of days prior" to October 29, and that there was an ongoing problem and that people were assigned each day to shovel the area and they were trying to stay on top of it. Mr. Phillips acknowledged the spillage problem and he had people working on it, but Mr. Milburn observed no one in the spillage area when he observed it during his inspection (Tr. 33).

Mr. Milburn examined copies of certain entries made by the belt examiners in the 11-C and 11-B belt books for October 28, the day before his inspection, and although he did not believe the entries showed that corrective measures were written in the books, he agreed that a notation indicating "spillage is good" might indicate some improvement. However, he stated that "without seeing any corrective measure, I had no idea at that time what they had done to the spill" (Tr. 35-38).

Mr. Milburn confirmed that based on the amount of coal spillage that he observed, he concluded that it must have been there for sometime (Tr. 38). He agreed that a malfunction of the belt skirting or baffle board could cause coal to accumulate rather quickly (Tr. 39). He confirmed that the 11-C and 11-B belt books indicated a spillage problem with the two belts that were connected together, and that although people may have been in the areas working on the problem on the days prior to his inspection, no one was there at the time of his inspection (Tr. 42).

Mr. Milburn stated that he was told that the 11-C belt was going to be changed out because of the tears and bad splices, and that the backboard had been installed, but he did not believe it was adequate enough to correct the condition (Tr. 42). He further confirmed that Mr. Phillips may have told him that the area had been cleaned up the day before his inspection, and that a mechanical malfunction had been corrected and was not present the morning of his inspection. He further explained as follows at (Tr. 43-44):

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Q. Mr. Milburn, what, in your eyes, would the company have had to do in order for their negligence to be less than aggravated conduct in this -- on this violation if you'd been the operator?

A. I'm not saying that they didn't make a -- an attempt previously on days prior to this inspection to correct the problem. I'm saying that they didn't take adequate measures.

They knew they had a problem of spillage in this area. They installed this backboard brace. They knew they had spillage in this area. They should've had somebody on top of this and observing this after they installed this backboard to see if it was going to correct the condition.

At the time of inspecting it, the -- the excessive amount of accumulation I observed and measured just couldn't have happened that morning. It had to have happened for several days if -- if not several shifts.

Q. What would you have them do different on October 29 before you got there at 11 o'clock in the morning?

A. Personally, I think they -- they knew they had a problem in this area. They installed a back -- this backboard. And the reason for installing the backboard, the belt, like I say, shifts from side to side when loaded with coal. They installed this backboard to catch the coal before it would shift to one side or it wouldn't spill.

They should have changed this belt. I -- they knew they had a bad belt, bad tears, splices. They should have changed this out prior to this day. They knew they had a recurring, ongoing problem.

And, at (Tr. 45-46):

THE COURT: If you observed somebody shoveling through fairly well that day, would you have found that that was sufficient?

WITNESS MILBURN: I would assume that if there were -- if they had a condition recorded in the belt

books that they had a problem in this area and they had people working on it, then to me they were -- would have been making an effort to correct the condition.

THE COURT: Am I correct in this assumption that you agree that -- with what Mr. Phillips told you when you spoke to him, that he told you that there was a problem. They installed the backboard. They were attempting to do something with it. You don't disagree with all that, do you?

WITNESS MILBURN: No, I don't disagree.

THE COURT: It's just that you found these accumulations that day, and you came to the conclusion that nothing was being done about it that day to take care of the problem?

WITNESS MILBURN: Yes, sir.

Respondent's Testimony and Evidence

Clifford D. Burden, Director of Loss Prevention, produced copies of the belt book for the No. 11-C belt, for the dates October 21, through November 23, 1992 (Exhibit R-1; Tr. 58-60). He confirmed that the third shift entries for October 28, are for the shift immediately before the 11:00 A.M. time period when Inspector Milburn conducted his inspection (Tr. 61).

Mr. Burden explained the entries made in the belt book, beginning on October 28, 1992, and he identified a copy of notes given to him by belt supervisor Ricky Phillips who told him that the spillage was caused by a missing skirt board belt component where the coal was being dumped and that the coal found by the inspector was fresh belt spillage that was accumulating very rapidly (Tr. 63-64; Exhibit R-2). Mr. Burden confirmed that he was personally familiar with the 11-C and 11-B locations and he explained the belt book entries for those locations (Tr. 66-67).

On cross-examination, Mr. Burden reviewed and explained the belt book entries for October 24 through 28 (Tr. 68-70). In response to further questions, Mr. Burden confirmed that the entire belt was 2,000 feet long, and based on the belt book entries, he concluded that the conditions noted changed from day to day during the period from October 25 through 28, and that there was "light spillage" (Tr. 78).

Robert Bailey, belt mechanic, testified, that the 11-C belt was one of his responsibilities, and that on October 28, 1992, while checking out the belt header, he found a spill on the back

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side of the 11-B header on the 11-C belt. He described the spill as one-foot to one-and-one-half foot deep, extending over a 20 to 25 foot area. He stated that he cleaned up the spill with a shovel at approximately 1:00 P.M. in the afternoon and put the coal back on the belt. He stated that he did not observe any coal accumulations under the belt at the header area, and did not observe the belt running in coal. He also observed accumulations behind the inby 11-B header wiper and he cleaned that up (Tr. 81-84).

Mr. Bailey stated that the 11-B header, as well as all belt headers along the belts, have sprinkler-type fire suppression systems which shut the belt down and turn on the water sprays in the event of a fire (Tr. 85). He also confirmed that the belt is equipped with computerized CO sensors which will quickly detect any fire (Tr. 86).

Mr. Bailey stated that he returned to the area on the second shift on October 29, after the cited accumulations had been cleaned up and he had no trouble for the rest of the evening (Tr. 86-87). An hour or two later, Mr. Phillips asked him if there had been a coal spill the night before, and Mr. Bailey told him "no" (Tr. 88). Mr. Phillips stated that Ben Wilson, another belt mechanic, informed him that a belt skirt rubber came out and caused a spill where the 11-B belt dumped on the 11-C belt, but that it had been put back on the belt and that he should watch it to make sure it would be all right that day (Tr. 88-89).

On cross-examination, Mr. Bailey stated that he worked the first day-shift on October 28, and the second shift on October 29. He stated that he was a certified belt examiner and that he worked for Mr. Phillips and Mr. Prince. He confirmed that he makes regular belt rounds once or twice a day, and that if a serious problem develops "I'll stay with it" until it is fixed (Tr. 92).

Mr. Bailey described the spillage that he observed on October 28, as "more than normal", and that prior to this time he had no problems with the belt and had no prior occasion to clean up the amount of spillage he cleaned up that day (Tr. 94). He stated that a belt skirt and baffle board are essentially the same thing, and that they are used at every belt dumping point. He confirmed that the only problem he had with the 11-C belt was the spillage that he cleaned up. He stated that "we were in the midst of replacing that belt at the time" because some of the belt was narrow and there was an increase in the coal that was being loaded on the belt (Tr. 95).

In response to further questions, Mr. Bailey reiterated that Mr. Wilson advised him about the header skirt board problem after Inspector Milburn had been to the area on October 29 in order to make sure that "it didn't spill on me like it did - - - had on

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him" (Tr. 100). Mr. Bailey stated that had he observed the accumulations described by the inspector he would have cleaned them up, and if the skirt board had come out, he would have replaced it and aligned the belt to prevent spills (Tr. 102).

Benjamin Wilson, day shift belt mechanic, testified that he was familiar with the 11-C belt. He stated that on October 29, 1992, he worked the day shift from 6:00 A.M. until 4:00 P.M. He stated that he observed the 11-B belt header at the junction of the two belts at approximately 7:30 A.M. or 8:00 A.M. He checked the header rollers, skirt, and splices, and observed an inch of coal, six foot long, under the header. He saw no problems and left the area to check other belts. He observed no pile of coal dust with the belt running, and he observed no accumulations for any substantial distance (Tr. 103-105).

Mr. Wilson stated that he was called back to the area at approximately 11:00 A.M. and saw the spill, and was told to get some shovels and have it cleaned up. He confirmed that the spill he observed at this time was more extensive than what he had previously observed earlier in the morning, and someone told him that the skirt rubber came out and went under the belt. When this occurs, coal will spill over the edge of the belt (Tr. 105-107). Mr. Wilson stated that he worked the day shift on the prior day, and passed by the same area. The accumulations were the same as those he previously observed (Tr. 108). He was not aware of any 11-E belt problems except for some narrow belts, and the physical condition of the belt was okay (Tr. 108).

On cross-examination, Mr. Wilson stated that other than "the little spill" that he initially observed on the 11-C belt, "which it does every day with, you know, the narrow belt running through it", he observed no problems on that belt during the week prior to October 29, and observed no accumulations other than what he would consider "normal" (Tr. 110). He confirmed that he has been a certified belt examiner for six or seven years (Tr. 111).

Mr. Wilson confirmed that a new production unit had started up a few days before October 29, and if two units are dumping on a narrow belt "it will affect the way the belt runs" (Tr. 113). In such a situation, he would observe how the belt runs. He did not believe any changes were necessary until he observed the spill when he was called back to the belt on October 29 (Tr. 114).

Randy Wiles, employed in the respondent's loss prevention department, testified that he was informed of the coal spill cited by the inspector on October 29, and was told that "a skirt rubber had kicked out" on the 11-C belt at the 11-B dumping point (Tr. 115-116). He was not aware of any tears or bad splices in the 11-C belt prior to this time (Tr. 117).

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Inspector Milburn was recalled by the presiding judge, and he confirmed at the time of his inspection he did not speak with any of the respondent's witnesses who testified in this case or with the belt mechanics (Tr. 119-120). In response to a question as to whether he gave any credence to the explanations offered by the respondent's witnesses, Mr. Milburn stated as follows at (Tr. 120-124):

WITNESS MILBURN: They said they had a problem with it for several days, and they were going to change the belt out. And they had -- where they had -- they said spillage each day, and they had people down there to correct it, shovel it. But on this particular day, they didn't have anybody down there in this area.

And my question to him was why didn't -- if this belt had a history of spilling or ongoing problem, why they didn't have somebody there at this stage to watch this belt.

THE COURT: Is it altogether possible that -- that this event happened that day just due to this malfunctioning belt rubber and that that belt rubber was causing the spillage?

WITNESS MILBURN: Part of it might have been attributed to -- to that right at the head drive, but the spillage down the belt was not related to the head drive.

* * * * *

WITNESS MILBURN: I didn't know at the time what was causing all the spillage. I could only guess that is was either bad splices or tears until I got outside, and later on they mentioned to me, Philip Prince, that they were going to change the belt out, that they had a problem with that belt before. And they had a problem with splices and tears in this belt, and they were going to change the whole belt out.

THE COURT: Now, in order to terminate this, though, they just simply cleaned up the spillage, right?

WITNESS MILBURN: Yes, sir.

THE COURT: How soon after this event was this belt replaced; do you have any idea?

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WITNESS MILBURN: I don't have those statistics as far as when they did change it out.

THE COURT: But the fact is that they didn't change the belt out to abate this particular cited condition.

WITNESS MILBURN: No, sir.

THE COURT: Do you suppose that Prince and Morris and Phillips were telling you all this just trying to justify the accumulations?

WITNESS MILBURN: I think they were trying to tell me that they had a problem with this belt, and I didn't question them. And I'm not going to question that they didn't have people down there working on this spill each day. But this particular day -- if they knew they had a problem with it previous days and had people assigned to it, why didn't they have somebody down there this day watching it?

THE COURT: But you don't know that the problems that they had earlier was at the magnitude they had the day that you showed up, in other words, whether they had previous spills of this magnitude? When I say "magnitude," I'm talking a hundred and fifty feet.

WITNESS MILBURN: That -- that I don't know. The crosscuts underground, there are a lot of places that are not marked. You don't have survey stations and place little tags in the roof telling you where you're at.

Findings and Conclusions

Fact of Violation. Order No. 3553244.

The credible testimony of the inspector establishes the existence of the coal and coal dust accumulations that he cited during the course of his inspection on October 29, 1992. The existence of such accumulations constitutes a violation of the cited section 75.400. See: Old Ben Coal Company, 2 FMSHRC 2806 (October 1980); C.C.C. -Pompey Coal Company, Inc., 2 FMSHRC 1195 (June 1980); Utah Power & Light Company, 12 FMSHRC 965, 968C May 1990). I conclude and find that the violation has been established, and IT IS AFFIRMED.

The Unwarrantable Failure Issue

The governing definition of unwarrantable failure was explained in Zeigler Coal Company, 7 IBMA 280 (1977), decided under the 1969 Act, and it held in pertinent part as follows at 295-96:

In light of the foregoing, we hold that an inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care.

In several decisions concerning the interpretation and application of the term "unwarrantable failure," the Commission further refined and explained this term, and concluded that it means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Energy Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghioghney & 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 Commission stated as follows in Youghioghney & Ohio, at 9 FMSHRC 2010:

We stated that whereas negligence is conduct that is "inadvertent," "thoughtless" or "inattentive," unwarrantable conduct is conduct that is described as "not justifiable" or "inexcusable." Only by construing unwarrantable failure by a mine operator as aggravated conduct constituting more than ordinary negligence, do unwarrantable failure sanctions assume their intended distinct place in the Act's enforcement scheme.

In Emery Mining, the Commission explained the meaning of the phrase "unwarrantable failure" as follows at 9 FMSHRC 2001:

We first determine the ordinary meaning of the phrase "unwarrantable failure." "Unwarrantable" is defined as "not justifiable" or "inexcusable." "Failure" is defined as "neglect of an assigned, expected, or appropriate action." Webster's Third New International Dictionary (Unabridged) 2514, 814 (1971) ("Webster's"). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by "inadvertence," "thoughtlessness," and "inattention."

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Black's Law Dictionary 930-31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention. * * *

Costain Coal asserted that MSHA failed to establish the proper underpinning for the unwarrantable failure order in question because the inspector cited Citation No. 3857525, issued on October 4, 1992, as the underpinning, and that citation was not produced by MSHA's counsel in the course of the hearing. Even if the proper underpinning is established, Costain Coal takes the position that the facts presented in this case do not justify the inspector's unwarrantable failure finding.

Notwithstanding its failure to produce the underlying citation recorded by the inspector in support of the order, MSHA points out that Costain has conceded a previously issued section 104(d)(1) Citation No. 3552700, October 16, 1992. Since Costain did not contest that citation, MSHA concludes that the contested Order in this case was properly issued under the sequence requirements found in section 104(d) of the Act.

I agree with MSHA's position with respect to the procedural correctness associated with the section 104(d) "chain" and I conclude and find that the previously issued section 104(d)(1) citation of October 16, 1992, which was not contested, may serve as a proper underpinning for the order issued by the inspector in this case. However, for the reasons which follow, I cannot conclude that the disputed unwarrantable failure finding of the inspector is supportable.

The inspector cited two areas where he observed coal accumulations. He concluded that the 4 to 12 inch deep coal at the conveyor head drive had existed "for several shifts". At the second location, outby the head drive and extending for a distance of 150 feet, he observed spillage at several places that he believed had existed "for awhile" (Tr. 18). It seems clear to me that the inspector did not know how long the accumulations in question had existed, and he simply concluded that from the amount of coal he observed that it was there "for sometime". The respondent's evidence, including the belt examination book entries for at least four days prior to the inspection on October 29, confirmed some spillage along the belt line, but not to the extent that it existed at the head drive at the time of the inspection. Indeed, the inspector admitted that he did not know the extent of any earlier spills or accumulations (Tr. 124). The inspector's testimony concerning the description of the accumulations outby the head drive and down the entry ranges from sparse to nil.

The inspector alluded to prior coal accumulation citations that he issued at the mine, but there is no evidence that they

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were at the same cited locations that were cited during the inspection in question, and although the inspector believed that the respondent needed to improve "on their rock dust applications and accumulations", he confirmed that the respondent has an effective mine examination program to correct equipment and permissibility problems and has "greatly reduced its repeat violations" (Tr. 28).

The respondent's belt examination books contain notations by the belt examiner for the preceding work shifts which reflect "light to medium" spillage in the crosscuts, and "good" spillage condition. Other entries show some header spillage which was cleaned up, and belt mechanic Benjamin Wilson testified credibly that when he observed the area at the start of the shift before the inspector's arrival, he observed "an inch of coal and no problems" and left the area. When he was called back to the area, he observed the spill cited by the inspector and he was informed by someone that it was caused by a belt rubber skirt that had come loose and caused the coal on the belt to spill over the edge and accumulate.

Certified belt examiner Robert Bailey, who was responsible for the 11-C belt, testified that he routinely checks the belts once or twice a day. He confirmed that he found some spillage around the header the day before the inspection but cleaned it up. He confirmed that belt supervisor Ricky Phillips informed him that belt examiner Wilson had informed him that a displaced belt rubber skirt had caused some spillage where the 11-B and 11-C belts came together, but that it had been cleaned up, and Mr. Bailey was told to watch it to avoid additional spillage. Although Mr. Phillips did not testify, respondent's loss prevention director Clifford Burden introduced a copy of Mr. Phillips' notes (Exhibit R-2), which contain notations concerning the defective skirt device which all of the respondent's witnesses believed caused the spillage cited by the inspector. After careful review of all of the testimony in this case, I am not convinced that the cited coal accumulations existed for an unusual or protracted period of time prior to the arrival of the inspector on the scene.

The inspector confirmed that he was informed by mine management personnel of the belt problem at the time of his inspection and that people were assigned to clean up the spillage. The inspector testified that he had no reason to doubt what he was told. Although he indicated that someone had mentioned a problem with belt splices and tears, and he suggested that this way have caused the spillage problem, I take note of the fact that the inspector abated the violation after the spillage was simply cleaned up and the replacement of the belt was accomplished at some later time.

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I conclude and find that the respondent's evidence supports a reasonable conclusion that the coal spillage and accumulations found by the inspector were the result of the defective rubber belt skirting problem described by the respondent's witnesses. The inspector did not question the respondent's contention that people were assigned to take care of the spillage in question (Tr. 124).

However, the inspector questioned why no one was there when he was in the area. In my view, the fact that no one was shovelling at the precise moment the inspector appeared on the scene, does not constitute "aggravated conduct" amounting to an unwarrantable failure to comply with the requirements of section 75.400.

Based on the foregoing findings and conclusions, and after careful review and consideration of all of the testimony and evidence in this case, I conclude and find that MSHA has failed to prove that the violation in question constituted an unwarrantable failure on the part of Costain Coal. Under the circumstances, the inspector's finding of an unwarrantable failure IS VACATED, and the section 104(d)(1) order IS MODIFIED to a section 104(a) citation.

Significant and Substantial Violation

A "significant and substantial" 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 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 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 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.

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In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, 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 1834, 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, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

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, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

In support of the inspector's "S&S" finding, MSHA asserts that it is undisputed that there was a large and deep accumulation of loose coal and coal dust on the cited 11-C belt line at the time of the inspection. MSHA concludes that there are "clearly a confluence of factors sufficient to find that an ignition was reasonably likely to result from this accumulation". In support of this conclusion, MSHA states that the mine liberates a great deal of methane, has a history which includes a deadly explosion in 1989, that the belt was running in coal, and that a number of belt rollers were sticking or had other problems. Given this combination, MSHA further concludes that it would take a very short time for an ignition to occur.

The respondent asserts that the accumulations would have been cleaned up in the normal course of business, and that the 11-B header was equipped with a spray fire suppressant system to attack any fire, and that CO monitors were located along the beltway to alert the respondent about such an event. In response to these arguments, MSHA points out that the next person who would have been in the area according to the respondent's normal course of business would be the preshift examiner for the second shift, and he would not have been in the area for a number of hours. With regard to any fire, MSHA states that everyone testifying in this case agreed that the sprays located at the head drive would be inadequate to deal with an ignition down the beltline. As for the CO monitor, MSHA points out that it notifies someone on the surface after smoke or heat are detected. MSHA believes that a serious mine fire could occur during the four or five minutes travel time required under normal

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circumstances given the location of the miners working inby and the speed at which a fire can spread in the high presence of methane. Further, MSHA believes that it cannot be assumed that the miners could travel the same path or in the same amount of time as under normal circumstances.

Although Inspector Milburn testified that he observed no problems with the beltline itself, other than the spillage that he cited, he confirmed that the belts were running at the time of his observations, and that the accumulations were dry and black in color. He further testified that the 11-B "short belt" dumped coal onto the 11-C "main line" belt, and that at the back side and head drive of the 11-B belt where he observed a large amount of spillage, 4 to 12 inches in depth, the belt was running in the spillage for a distance of 10 or 15 feet. From that point outby for a distance of approximately 150 feet along the 11-C beltline, the inspector observed similar coal spillage along the side of the belt. He confirmed that the mine is a "gassy" mine and that it is on a ten-day "spot inspection" cycle because of the amount of methane liberated (Tr. 16-23).

Inspector Milburn testified that most underground mine fires occur at belt conveyor entries where coal is transported out of the mine, and that fires are started by stuck belt rollers or the belt rubbing against the belt frame (Tr. 24). In the instant case, the inspector believed that the belt running through the combustible coal accumulations at the 11-B belt head drive would result in friction against the belt frame, and that the belt rollers turning through these accumulations would create and provide a heat source (Tr. 23-24).

The belt inspection reports for the 11-C belt (Exhibit R-1), for the three shifts on October 28, 1992, the day before the accumulations were observed by the inspector on October 29, 1992, identify eleven (11) rollers by number. The third shift report for October 29, 1992, for that same belt also contains a notation concerning those same rollers. Although the reports do not further explain these entries, and the individuals who made them were not called to testify, respondent's loss control director Burden testified that identifying the rollers by number indicates a problem with the roller, such as sticking or a loose bearing, but that "sticking would be the main thing" (Tr. 70).

The respondent's position that the cited accumulations did not constitute an "S&S" violation because the accumulations would have been detected in the ordinary course of business and that any fire would have been detected or taken care of by the CO monitoring system is not well taken and it is rejected. Although the inspector made reference to a fire suppression spray at the head drive, he pointed out that while it may have taken care of a fire at that particular location, it would have no effect on the

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accumulations outby that location for a distance of some 150 feet down the 11-C beltline. The inspector further pointed out that the CO monitoring system along the beltline would not control any fire and that the system only serves to indicate the location of a fire (Tr. 24-25).

The respondent's belt mechanic, Robert Bailey, testified that the fire suppression sprinkler and sensors at the belt head drive would activate in the event of a fire, and that water would automatically be sprayed on the head drive and the sensors would shut the belt down (Tr. 85-86). However, Mr. Bailey confirmed that the CO monitoring system deals with the entire belt system, and that the water sprays and sensors located at the head drives serve only the head drives, and if there were a fire down the beltline where the belt is running in coal or in a major spillage, the head drive sprays would not provide water at those locations. He also confirmed that the CO monitoring system along the beltlines, which is the only defensive fire suppression system available at those locations, including the location of the major spillage where the rubber belt skirting was located, may or may not detect a fire (Tr. 97-98).

Based on the testimony and evidence in this case it would appear to me that the coal spillage resulting from the backed-up rubber skirting at the belt head drive was causing a rather rapid buildup of accumulations of dry, black, combustible coal materials under the back of the head drive as well as outby along the 11-C beltline. The credible testimony of the inspector establishes that the belt and belt rollers were running and turning through these coal accumulations, and I find that they were potential sources of ignition. Further, although there is no direct evidence that any of the eleven belt rollers along the beltline were in fact sticking, based on the testimony of the respondent's own witness (Burden), as corroborated by the section inspection reports, there was a problem with the rollers. Indeed, Mr. Burden indicated that they were most likely sticking.

I have concluded that a violation of section 75.400, has been established, and the violation has been affirmed. After careful consideration of all of the evidence and testimony, I conclude and find that the cited accumulations of loose coal, coal dust, and float coal dust, which I conclude were combustible materials within the meaning of section 75.400, constituted a discrete hazard of a potential mine fire. The belt and belt rollers were turning in the accumulations at the belt head drive while the belts were running, and some of the rollers along the beltline were more than likely sticking, thereby creating potential ready sources of ignition. Although there is some testimony that water sprays were located at the immediate head drive, belt mechanic Bailey confirmed that if a fire were to occur along the beltline where there is major spillage, and the belt is turning in the coal, there would be no available water

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because the sprays are only located at the head drives and not along the belt. Although CO monitors are installed along the beltline, the evidence reflects that such monitors only serve to signal the existence and location of smoke or fire, and do not act as fire suppression devices. Further, Mr. Bailey indicated that these sensors may or may not detect a fire at a major spillage along the beltline (Tr. 98).

In view of the foregoing, I conclude and find that in the normal course of continued mining at the time the inspector observed the cited coal accumulations, it was reasonably likely that an ignition would have occurred as the dry black combustible coal continued to accumulate and turn in the belt and rollers, and that a belt fire was reasonably likely to occur as a result of these accumulations and ready sources of ignition that were present. I further conclude and find that in the event of a belt fire, it would be reasonably likely that the men on the section would suffer smoke inhalation, and fire related injuries of a reasonably serious nature. Under the circumstances, I conclude and find that the violation was significant and substantial (S&S), and the inspector's finding in this regard IS AFFIRMED.

Size of Business and Effect of Civil Penalty Assessment on the Respondent's Ability to Continue in Business

The pleadings reflect that as of January 6, 1993, the mine had an annual production of 2,021,177, and the overall production for all of the respondent's mines was 12,670,082. I conclude and find that the respondent is a large mine operator. In the absence of any evidence to the contrary, I further conclude and find that payment of the civil penalty assessment for the violation that was litigated and affirmed in this case will not adversely affect the respondent's ability to continue in business.

History of Prior Violations

The respondent's history of prior violations for the period July 23, 1990, through July 22, 1992, reflects that the respondent paid \$211,195, in civil penalties for 1,239 violations. The print-out reflects 165 prior violations of section 75.400, six (6) of which were issued as section 104(d)(2) orders. Considering the size of the respondent's mining operations, I cannot conclude that its overall compliance record is particularly bad. However, given the number of past violations for coal accumulations, it would appear to me that the respondent needs to pay closer attention to its cleanup practices and I have considered this in the penalty assessment that I have made for the violation.

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Gravity

Based on my "S&S" findings and conclusions, I find that the violation was serious.

Negligence

I conclude and find that the respondent failed to exercise reasonable care to insure that all of the cited accumulations were timely removed from the mine, and that this failure on its part constitutes a moderate degree of negligence.

Good Faith Compliance

The record establishes that the violation was timely abated in good faith.

Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that a civil penalty assessment of \$2,000, is reasonable and appropriate.

ORDER

In view of the foregoing findings and conclusions, IT IS ORDERED AS FOLLOWS:

1. Section 104(d)(1) "S&S" Order No. 3553244, October 29, 1993, 30 C.F.R. 75.400, IS MODIFIED to a section 104(a) "S&S" citation, and the respondent IS ORDERED to pay a civil penalty assessment of \$2,000, for the violation.
2. Section 104(d)(1) "S&S" Order No. 3552700, October 16, 1992, citing a violation of 30 C.F.R. 75.1704, IS MODIFIED to a section 104(d)(1) "S&S" citation, and the respondent IS ORDERED to pay the agreed upon settlement amount of \$4,000, for the violation.
3. Section 104(d)(1) non-"S&S" Order No. 3552934, October 16, 1992, citing a violation of 30 C.F.R. 75.220, IS MODIFIED to a section 104(a) non-"S&S" citation, and the respondent IS ORDERED to pay the agreed upon settlement amount of \$500, for the violation.
4. Section 104(d)(2) "S&S" Order No. 3552424, March 17, 1992, citing a violation of 30 C.F.R.

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75.316, IS MODIFIED to a section 104(a) "S&S" citation, and the respondent IS ORDERED to pay the agreed upon penalty amount of \$500, in settlement of the violation.

Payment of the aforementioned civil penalty assessments, including the settlement amounts, shall be made to the petitioner (MSHA) within thirty (30) days of the date of these decisions and Order. Upon receipt of payment, these matters are dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

R. Eberley Davis, Legal Affairs Manager, Costain Coal Inc.,
P.O. Box 289, Sturgis, KY 42459 (Certified Mail)

Carl B. Boyd, Esq., 223 First Street, Henderson, KY 42420
(Certified Mail)

Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department
of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN
37215 (Certified Mail)

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