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SOL (MSHA) V. CONSOLIDATION COAL
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEVA 92-1050
	:	A.C. No. 46-01968-04015
v.	:	
	:	Blacksville No. 2 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	
	:	Docket No. WEVA 92-1156
	:	A.C. No. 46-01452-03873 R
	:	
	:	Arkwright No. 1 Mine

DECISIONS

Appearances: Wanda Johnson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
Daniel E. Rogers, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent 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 several alleged violations of certain safety standards found in Part 75, Title 30, Code of Federal Regulations. The respondent filed timely answers and contests and hearings were conducted in Morgantown, West Virginia. The parties 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 the respondent to comply with the cited standards, and (4) the appropriate civil penalties to be assessed

for the violations, taking into account the civil penalty assessment criteria found in section 110(i) of the Act.

Stipulations

The parties stipulated as follows in these matters (Tr. 10-12).

1. The presiding judge has jurisdiction to hear and decide this matter.

2. The subject coal mine is owned and operated by the respondent, and the mine is subject to the Act.

3. The inspector who issued the contested violations was acting in his official capacity as an MSHA inspector.

4. The contested violations were properly served on the respondent's agents.

5. The cited conditions and practices were timely abated by the respondent in good faith.

6. The maximum civil penalty assessments for the violations will not affect the respondent's ability to continue in business.

7. MSHA's computer print-outs with respect to the respondent's history of prior violations for the two-year period shown may be admitted in these proceedings.

The parties agreed that there is no issue with respect to the section 104(d) "chain" and I conclude and find that the issuance of the disputed orders was procedurally correct insofar as the underlying section 104(d) citation is concerned (Tr. 13).

Discussion

Docket No. WEVA 92-1156

This case concerns proposed civil penalty assessments for nine (9) alleged violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations, and they are as follows:

Citation/Order No.	Date	30 C.F.R Section	Assessment
3314179	8/23/90	75.403	$192
3113921	9/6/90	75.514	$329
3314293	9/6/93	75.1722(a)	$213
3314297	9/7/90	75.1003(a)	$213
3307182	9/10/90	75.512	$625
3314299	9/10/90	75.1722(a)	$213
3308049	10/11/90	75.202(a)	$213
3306265	10/17/90	75.400	$178
3307787	10/16/90	75.400	$616

In the course of several prehearing conference with the parties, they advised me that settlements were reached with respect to six (6) of the contested citations. Pursuant to the proposed settlement, the respondent agreed to pay the full amount of the proposed assessments for Citation Nos. 3314293, 3307182, 3314299, and 3306265, in settlement of the violations. With respect to Citation No. 3314179, the petitioner agreed to delete the "S&S" designation and the respondent agreed to pay a reduced penalty of $115 in settlement of the violation. With regard to Citation No. 3314297, the petitioner agreed to delete the "S&S" designation, and the respondent agreed to pay a reduced penalty of $128 in settlement of the violation. The parties further advised me that the three (3) remaining violations could not be settled during their prehearing negotiations and a hearing would be required. Insofar as the proposed settlements are concerned, after review of the pleadings and available information concerning the civil penalty criteria found in section 110(i) of the Act, the settlements were approved in the course of the pretrial conferences, and my decisions in this regard are herein reaffirmed.

In the course of the hearing in this matter, the parties further advised me that they proposed to settle Section 104(a) "S&S" Citation Nos. 3308049 and 313921. Under the terms of the settlement, the respondent agreed to accept Citation No. 3308049, as issued and to pay the full amount of the proposed penalty assessment of $213. With respect to Citation No. 3113921, petitioner's counsel asserted that if this violation were to proceed to trial, the evidence would not support the "S&S" finding, and that under the circumstances, she agreed to modify the citation to non-"S&S", and the respondent agreed to pay a reduced penalty of $197, in settlement of the violation (Tr. 21-22). The proposed settlements were approved from the bench, and my decisions in this regard are herein reaffirmed. The parties informed me that they were unable to settle the remaining violation, Section 104(d)(2) Order No. 3307787, and it proceeded to trial.

Section 104(d)(2) "S&S" Order No. 3307787, issued on October 26, 1990, cites an alleged violation of mandatory safety standard 30 C.F.R. 75.400, and the cited condition or practice states as follows:

> Combustible material in the form of dry float dust has been permitted to accumulate in varying thickness on the roof and ribs and a line brattice in the 10 left belt return air entry to the regulator, a distance of approximately 300 feet, and outby the regulator through the intersection and down the 1st Main Butt entry for approximately 1,000 feet on the roof, ribs, and mine floor.

Docket No. WEVA 92-1050

Section 104(d)(2) "S&S" Order No. 3312960, issued on March 19, 1992, cites an alleged violation of mandatory safety standard 30 C.F.R. 75.1700, and the cited condition or practice states as follows:

> The operator failed to comply with item number one of the procedures for cutting through a plugged well. The 060-025 longwall shearer intersected and cut into the steel casing of well #B2-196 on day shift at approx. 1420, 19 March 1992. The engineering spads in the head and tail entries indicate the well to be approx. 7 feet deeper in the block then it actually was.
>
> The operator shall submit additions to the cut through plan which will eliminate the likelihood of a reoccurrence to the MSHA Dist. Manager prior to termination of this citation.

Section 104(d)(2) "S&S" Order No. 3718887, issued on May 11, 1992, cites an alleged violation of 30 C.F.R. 75.400, and the cited condition or practice states as follows:

> Combustible material in the form of dry black float coal dust has been permitted to accumulate in the 14M longwall tailgate entry as follows: A thick layer of dry black float coal dust was permitted to accumulate on the mine floor and on rib sloughudge (sic) and on roof support cribs from 7+60 outby to 3+50. A medium layer of dry black float coal dust on floor-rib sloughage-2nd cribs 3+50 to 0+100. A medium layer of dry black float dust from the regulator outby for 50 feet and outby for 2 blocks. A total of approximately 1,000 feet.

In the course of the trial, the parties advised me that they proposed to settled Order No. 3312960. In support of the

settlement, the petitioner's counsel took note of the fact that the order had been modified numerous times. She stated that if the order were to proceed to trial, the evidence would not support the unwarrantable failure finding. Counsel explained that the evidence would show that the cited well was inadvertently cut and that once the respondent became aware of this, it immediately notified MSHA, and MSHA went to the mine to investigate. Counsel asserted further that the violation was not significant and substantial as originally determined, and that the order should be modified to a section 104(a) non-"S&S" citation, with a penalty reduction from $1,400, to $550. The parties agreed to this settlement disposition of the matter, and the respondent agreed to pay the $550 penalty in settlement of the violation (Tr. 179-183). The proposed settlement was approved from the bench, and my bench decision is herein reaffirmed. The parties confirmed that they were unable to settle the remaining contested order in this docket, and it proceeded to trial.

Petitioner's Testimony and Evidence

Docket No. WEVA 92-1156

MSHA Inspector Lynn A. Workley confirmed that he conducted a mine inspection on October 26, 1990, and issued the order after finding the cited float coal dust accumulations deposited over previously rock dusted surfaces on the mine floor in a return air course, including the coal ribs, and mine roof, and on a line brattice and mine ribs and floor at the cited belt conveyor intersection (Tr. 23-26). As a result of these observations, he issued a closure order on the ten left belt (Exhibit P-1).

Mr. Workley confirmed that at the time of his inspection the ten left conveyor belt and section were operating (Tr. 28). He stated that he found the weekly examiner's initials and the date for two days prior to his inspection noted on a crib, and he believed the initials "D.F." were those of David Fazio. Mr. Workley stated further that "he left footprints in the float coal dust which appeared white to pale grey on a black background where he walked up to the crib and dated up" (Tr. 28-29).

Mr. Workley stated that he issued the order because the float coal dust "was very obvious" and the footprints indicated that the float coal dust was present when the examiner made his examination two days earlier. Mr. Workley stated that the float dust posed a hazard to the miners, and that the left conveyor belt was running and presented an ignition source. Further, the float coal dust presented "a generous fuel supply", and there was available air and oxygen in the area, "the three things necessary for a fire" (Tr. 29).

Mr. Workley stated that the float coal dust accumulations covered an area of 1,000 feet, and most of the area was black in color, and the dust was dry and powdery. He confirmed this by patting the dust with his hand at various locations or blowing on it with air from his mouth, and "it blew up into a cloud in the air" (Tr. 30). He believed that the dry and powdery coal dust, suspended in the air, contributed greatly to an explosion hazard (Tr. 30).

Mr. Workley believed that the accumulations had been present for several weeks because "it doesn't all accumulate at once" and he stated that the dust is generated by the ten left longwall belt conveyor and is carried down the return air course. The dust accumulates more each shift, and part of the coal dust was there for at least two weeks (Tr. 31).

Mr. Workley believed that the violation was "significant and substantial" because the accumulations were adjacent to an active conveyor belt which contained ignition sources such as bottom rollers and bearings which can get hot when they wear out and rub the roller. Mr. Workley believed that it was reasonably likely that a serious mine fire or potential explosion would occur and that this would result in serious injuries to one or more miners. In addition, if the conveyor belt were to run to one side it would rub against the belt brackets and it could spark, and the belt splices could also spark with "steel striking steel". Mr. Workley indicated that the inby end of the float coal accumulations were within five feet of the edge of the conveyor belt, but there were no ignition sources in the main return air course. If there were a hot belt roller, or the belt was rubbing, it could cause a fire. If a fire were to occur he believed it was reasonably likely that it would ignite the float coal dust. If a belt spark were to occur, he believed it was reasonably likely that it would ignite the fine coal dust. If an ignition were to occur in the belt line, it would propagate into the main return and through the regulator. If the float coal dust were to ignite, there was nothing to suppress it from spreading to these areas because there was no fire suppression system in that area (Tr. 31-34).

Mr. Workley was not positive that he examined the preshift books at the time of his inspection, but he stated that he "probably did" and normally does. He did not believe that he noted any recorded hazards in the preshift books, and he stated that he would normally make a note of any reported hazards (Tr. 35). He confirmed that he has issued prior float coal dust accumulation citations or orders on the section, and believed that he issued one at the ten left transfer area three days prior to his inspection (Tr. 35).

Mr. Workley confirmed that he made a finding of "high negligence" for the following reasons (Tr. 35-36):

A. The coal company management is well aware that operating coal conveyor belts produce float coal dust and it is carried by the air current, down the return air course.

A person, certified person, was assigned the job by the operator to make a weekly examination two days prior to me finding the accumulation. And his footprints were evident in the float coal dust, proving it was there when he walked down through there, and he took no action to correct it.

Q. Now, I believe you said that the footprints where pale gray.

A. Pale gray to white.

Q. Pale gray to white.
And based on that, you could tell, you could make a decision that someone had been through there?

A. That is correct.

Q. Let's say if no one had been through there, what would it have looked like?

A. The float coal dust would have been uniform and black throughout the entire area.

Mr. Workley stated that the respondent was not taking any action to eliminate the accumulations prior to the issuance of his order. He confirmed that abatement was achieved in three days. It took two hours to abate an area of 400 feet, and he modified the order to allow the belt to start running again and bulk dusting machines were brought in to apply additional rock dust to the main return entry, and six to eight employees did this work (Tr. 37).

On cross-examination, Mr. Workley stated that the minimum legal times for examination of the cited return is seven days between examinations. He confirmed that the area had been examined two days prior to his inspection, and this was noted by the date, time, and initials on the crib, and an entry had been made on the weekly examination book attesting to the examination. The examiner did not note any problems in the return in the book, and Mr. Workley did not personally know the examiner, David Fazio (Tr. 37-38).

Mr. Workley confirmed that he did not know who made the foot prints, and that he saw no other foot prints. He did not believe that other foot prints could have been in the return after the float coal dust accumulated, and did not believe that any one else walked in the return. He did not cite a violation for any inadequate examination of the return, but believed that he had cited the respondent for such a violation in the past (Tr. 39).

When asked what he would have expected of the respondent, Mr. Workley stated as follows at (Tr. 40):

> A. Provide the margin of safety for the miners working in that area of the coal mine which should be provided for them to keep that return free enough of float coal dust so that a fire and explosion hazard did not exist.
>
> Q. Isn't it true that you feel that this particular return should be examined more often than once every seven days. Isn't that correct?
>
> * * * * * * * *
>
> THE WITNESS: I believe that the operator of the mine -- If I were the operator of the mine and I knew that I had a source that generated float coal dust or some other hazard to the extent that I needed to make examinations more frequently than every seven days to make sure that a serious hazard did not exist, I would do so.
>
> Q. That is not required by the regulations.
>
> A. No, it's not.

Mr. Workley confirmed that the accumulations in the entry were not in the same entry as the belt, and they extended from "approximately five feet from the edge of the belt line to about 1,000 feet away from the belt line" (Tr. 41). He confirmed that he found two-tenths of one percent of methane at the regulator, and that he detected no hot rollers or any heat caused by the belt rubbing. He described the fire detection and suppression systems installed on the cited beltway (Tr. 42-43).

Mr. Workley stated that he concluded that there was two weeks of accumulations in the entry, and that he based this conclusion on "my experience". He confirmed that the float coal dust "was not in depths that could be measured at that location", and that it was less than one-sixteenth of an inch thick

Tr. 43). He described the degree of darkness with respect to the accumulations at various locations (Tr. 43-44). He confirmed that the belt entry itself was well rock dusted and that the mine floor had been "freshly drug" (Tr. 45).

In response to further questions Mr. Workley stated that although section 75.305, provides for a minimum of seven-day examination intervals, it also provides for more frequent examinations if needed. He believed that based on the amount of accumulations, he would make more frequent examinations if he were the mine operator (Tr. 46).

Although Mr. Workley stated that he has found collapsed rollers with missing bearings, steel to steel friction, belts cutting into the stands, and belts riding to one side when he has inspected other conveyor belts at the subject mine and other mines, he found no such conditions on the day of his inspection (Tr. 47). He also conceded that he was not positive about the "more frequent examinations if needed" requirement in section 75.305, and was not sure if this was covered by the regulation, but "it does not say you can't examine it every day if you need to" (Tr. 49).

In response to certain bench question, Mr. Workley confirmed that the cited conditions did not constitute an imminent danger even though the three conditions necessary for a fire or explosion were present because "the ignition source has to be present at the instant the other two, the fuel and the air, are present". He stated that he could not take the time to inspect the belt to determine if there was an ignition source and an imminent danger because he was obligated to the miners to shut the belt down so that the accumulations could be taken care of immediately. Mr. Workley confirmed that he contacted the examiner who he believed made the footprints in the dust, and the examiner offered no excuse, did not state that the accumulations were not present when he examined the area, and was reluctant to speak with him. Mr. Workley believed that the examination book showed "no hazards", and he confirmed that Mr. Fred Morgan accompanied him during his inspection, but he could not recall any comments made by Mr. Morgan (Tr. 49-51).

Respondent's Testimony and Evidence

Fred D. Morgan, mine respirable dust and noise foreman, testified that he accompanied Inspector Workley during his inspection on October 26, 1990, and he described the areas that they visited by referring to a mine map and Mr. Workley's notes and citation, and he agreed that the accumulations constituted a violation of section 75.400 (Tr. 59-67).

Mr. Morgan believed that the closest distance between the belt and the accumulations cited by Mr. Workley was approximately

70 to 90 feet. Mr. Morgan confirmed that he observed no hot belt rollers and that a person is stationed at the belt transfer point to watch for spillings and other occurrences. He also described the belt fire suppression and detection devices. He saw no part of the belt rubbing on the conveyor structure, saw no electrical equipment sparking or arcing, or any ignition sources. Methane checks reflected one-tenth of one percent (Tr. 68-69).

Mr. Morgan stated that the examination book for the week ending October 28, 1990, reflects that the cited area was examined two days prior to the inspection by Mr. Workley and that no hazards were noted on October 14, 1990. He confirmed that he knows the examiner David Fazio, and that he is a certified examiner. He stated that Mr. Fazio was acting in the capacity of fire boss (Tr. 73-74).

Mr. Morgan explained the routine followed with respect to "dragging" certain mine areas, and he believed that the coal dust came from the belts that fed into the returns and that the dry mine atmosphere dries the dust and it accumulates faster (Tr. 76-78). Mr. Morgan did not believe the violation was "S&S" because it was not reasonably likely to lead to death or serious injury to a miner (Tr. 78).

On cross-examination, Mr. Morgan stated that the belt "was in good shape" and that it was "white with rock dust and well rock dusted" (Tr. 79). He stated that he visually observed the belt area while walking next to it, and he confirmed that the belt is subject to "wear and tear" if it is rubbing the belt structure. He confirmed that he was outside of the mine prior to accompanying Inspector Workley, and that he went underground to accompany him. He confirmed that he did not examine the belt rollers and only made "a visual walk through" in the area. He did not believe that the violation was "S&S" because the nearest ignition source would have been the 50 to 75 foot belt line leading to the crosscut and it was "heavily rock dusted and in good shape" (Tr. 82). Mr. Morgan did to recall any coal accumulations on the ribs, but he did observe accumulations "up the chute and on the line curtains" (Tr. 84).

Mr. Morgan stated that his primary duties are to do noise surveys, collect dust samples, and check belt lines and water sprays. He stated that a running belt can accumulate coal dust and get on the coal ribs. He indicated on a sketch where he observed coal dust and float coal dust (Tr. 85-87). He confirmed that in the course of mining, coal dust can accumulate if the belt is shut down or the water sprays plug up (Tr. 88).

In response to further questions, Mr. Morgan confirmed that he observed coal dust on the rib in the area cited by the inspector and he described the area as the "return area". However, he did not observe coal dust on the ribs at the crosscut

leading over to the return. He stated that the crosscut was well rock dusted, "but they had float dust accumulated on top" (Tr. 88-89).

Mr. Morgan was recalled by the petitioner's counsel, and he reiterated that he observed no float coal dust in the crosscut leading over to the belt recovery chute. He confirmed that in order to abate the violation, the area outby the recovery chute had to be dragged "to knock the dust off the curtain", and that the area from the chute to the regulator had to be swept in order to remove the float coal dust from the ribs, and he described the areas where he observed accumulations (Tr. 91-94). He reiterated that the accumulations he observed "were at the end of the crosscut, up the line curtain and in that chute, back to the regulator" (Tr. 94). He confirmed that he did not observe the abatement work the entire time and could not state exactly what was done to abate the violation (Tr. 95). Mr. Morgan believed that the nearest potential ignition source was the belt line 50 to 70 feet away from the accumulations, and he disagreed with the inspector's belief that the ignition sources were five feet away because "the crosscut that the inspector walked through was clean" (Tr. 96).

Inspector Workley was recalled by the petitioner's counsel, and he described in detail the areas that were cleaned and swept to abate the violation and remove all of the cited accumulations. He confirmed that he abated the violation in two intervals. He modified the order to allow the belt to run again, and he gave the respondent additional time to bring in the bulk rock dust equipment to rock dust the main return. Referring to a mine map sketch, Mr. Workley again described the area where he found the cited accumulations (Tr. 98-102). In response to several bench questions, Mr. Workley stated as follows at (Tr. 108-110):

BY JUDGE KOUTRAS:

Q. You heard the testimony of Mr. Morgan, correct?

A. Yes, I did, your honor.

Q. He put the potential ignition sources further away than you did. Is there an explanation for that, why there is such a disparity in the testimony when you were both there looking at the same thing?

A. As I tried to explain before, Your Honor, the existence of float coal dust varies from pale gray through pitch black. What is recognized by one

person to be a hazardous accumulation of float coal dust may not be recognized by another person to be a hazardous accumulation of float coal dust.

Mr. Morgan and I agreed that the areas where the line curtain and the rib were black was a hazardous accumulation of float coal dust. Apparently, we did not agree about the ribs in the crosscut extending from the belt entry to the recover chute.

Q. Now, if he was correct that there was no float coal dust in the crosscut, his testimony that the potential ignition source would be a seventy-foot distance, would that be an accurate statement?

A. Yes, it would, Your Honor.

Q. But your contention is that that area in there was float coal dust and you put it within two feet of a potential ignition source. Is that correct?

A. Approximately five feet.

Q. Five feet, rather. Is that correct?

A. Yes.

Q. And the potential ignition source being what, now, again?

A. Any stuck rollers, hot rollers, rollers with the bearings out on the belt line, the belt rubbing metal structure, metal to metal friction.

Docket No. WEVA 92-1050

MSHA Inspector Lynn A. Workley confirmed that in the course of an inspection on May 11, 1992, he examined the tailgate entry of the 14-M longwall section which was in the process of mining coal. He entered the tailgate entry near the regulator through a man door from the 13-M supply track area, and when he come into the tailgate entry he encountered float coal dust on the mine roof, ribs, and floor. He proceeded toward the 14-M longwall section tail and the float coal got darker and thicker as he

proceeded toward the tail. He identified a copy of the order that he issued (Tr. 115, Exhibit P-1).

Mr. Workley stated that he issued the order because of the extent of the float coal dust accumulations and their proximity to the active longwall. He believed these conditions posed a serious hazard to all of the miners working the six north area of the mine, and that the conditions were obvious to an observer (Tr. 115).

Mr. Workley stated that all of the accumulations were black in color, and they were fine, dry, and powdery and would be dispersed in the air when patted with his hand (Tr. 116). He confirmed that the accumulations were located in the tailgate section that was required to be inspected at least once each week, at maximum seven-day intervals (Tr. 116-117). He believed there are times when it should be inspected more often than once a week, and he indicated that float coal dust tends to accumulate at frequent intervals at the longwall tailgate entry which is a return air course (Tr. 117).

Mr. Workley stated that an additional reason for issuing the order was the fact that the certified examiner Charles Underwood told him that he had examined the entry on May 4, 1992, and walked and dragged it on May 5 and 6, but was off for three days. Mr. Underwood also told him that he dragged the entry every shift because it got dirty and needed dragging every shift (Tr. 118, 119, 121).

Mr. Workley stated that it is not unusual for float coal dust to accumulate rapidly each shift because of the way the longwall is mined (Tr. 121). He believed that the mine cleanup program required rockdusting the tailgate after each pass at the longwall face (Tr. 121). When asked if the failure to do this would constitute a violation of the cleanup plan, Mr. Workley responded as follows (Tr. 121-122);

> JUDGE KOUTRAS: If that doesn't happen, then they would be susceptible to a violation of their cleanup plan?
>
> THE WITNESS: It's not MSHA's policy. MSHA's policy has never been to allow inspectors to write violations of the cleanup program.
>
> JUDGE KOUTRAS: Why not?
>
> THE WITNESS: I don't know, Your Honor.
>
> JUDGE KOUTRAS: You hit them with unwarrantable failure orders. That gets their attention more than citing them for the cleanup plan. I don't understand. They're required to have a cleanup plan, aren't they?

THE WITNESS: Yes, your honor.

JUDGE KOUTRAS: And if they don't clean up as the cleanup plan requires, then why not issue violations for that?

THE WITNESS: I do not know, Your Honor.

JUDGE KOUTRAS: Is that a policy?

THE WITTNESS: That is a policy.

Mr. Workley stated that he reviewed the weekly examination books and saw no indication of any accumulations in the cited area (Tr. 123). Based on his "experience", he believed that portions of the accumulations existed for "a shift or two", and that portions had existed for "several weeks" (Tr. 124). He described the areas cited in the order where he believed the accumulations had existed for weeks (Tr. 124-125).

Mr. Workley stated that the tailgate entry could be used as an emergency escapeway in the event of a fire or emergency (Tr. 126). He explained his "S&S" finding as follows at (Tr. 126-128):

A. Each time that the shear cuts to the tail, you have the bits on the shearing machine which are high carbon steel, carbide, cutting coal and hitting stone that is imbedded in the coal or in the mine roof or in the floor can create sparks. So you have an ignition source from that right at the corner of the tailgate entry.

You have nine hundred ninety-nine volts ac running to the tail conveyor motor and other electricity coming to the lighting circuits and to the electrics on the shield.

Q. And you said this is when the shear is operating and cuts over to the tailgate?

A. That is correct. It comes right to the tail, right where the float dust accumulation started.

Q. And approximately how many feet would you say there is between where the float coal dust started and where the shear comes down to the tailgate?

A. Less than a foot.

Q. And in the normal course of mining, how likely is it that you would have had an ignition source or that one of these sources you had mentioned would have produced a spark?

A. At least reasonably likely, in my opinion.

Q. And why is that?

A. Anytime the bits on the mining machine strikes rock in the coal face or the mine roof or the mine floor fire flies off the bits. Those sparks are hot enough to ignite a methane and air mixture. They're also hot enough to initiate an explosion if you have enough float coal dust in the air. Huge amounts of coal dust are generated when they're cutting.

Mr. Workley confirmed that it was not unusual for dust to generate when the shear is cutting the longwall face, and although water sprays are available to control the dust, they can go off at any time. He stated that if a fire or explosion were to occur, seven or eight people on the longwall section would be exposed to injury. If float coal dust were ignited and propagated an explosion or serious injuries or death would result (Tr. 129).

Mr. Workley explained the basis for his "unwarrantable failure" finding as follows at (Tr. 129-130):

A. Management of the mine is well aware that the float dust generating source is there. They are aware of the mining laws requiring that the float dust be kept to a minimum, cleaned up, rock dusted over top of, not allowed to accumulate, and they didn't do it.

Q. Does that requirement excuse an operator from fulfilling more requirements till they become necessary?

A. No, it does not.

Q. And in your opinion, in this situation, more care would have been required than a regular weekly examination?

A. That is correct.

Mr. Workley confirmed that the order was abated in approximately two hours and that eight people assisted in abating

the order (Tr. 130). He described the rock dusting work that was done to abate the order (Tr. 131-133).

On cross examination, Mr. Workley stated that float coal dust will not ignite unless it is "agitated, put up in the air". He confirmed that he did not see much dust in the air when he inspected the tailgate. He also confirmed that he tested for methane and found "zero at shield ten, two-tenths of one percent at the tail," and that the explosive concentration of methane is 5 to 15 percent (Tr. 135).

Mr. Workley stated that the regulations do not require that a longwall tailgate entry be examined more than once a week. He confirmed that an examination was made on May 4, and that he conducted his inspection May 11. He confirmed that he met Ron Neeley in the tailgate entry shortly after he issued the order and that Mr. Neeley was in the process of conducting the weekly examination in the tailgate area.

In response to a question as to whether he would have issued a (d) order if he had arrived on the section after Mr. Neeley and found him conducting his examination Mr. Workley responded "it would depend on what action Mr. Neeley had taken" (Tr. 137). Mr. Workley confirmed that his belief that "more care is required than a weekly examination on tailgate entries" is not a part of any regulation. The regulation requires a weekly examination as a minimum requirement (Tr. 138).

Mr. Workley believed that the accumulations had existed "for weeks", and he described the areas where the float coal dust was an eigth of an inch thick and believed that it had existed for "two or three weeks". The area described as containing a "medium thick" layer of float coal dust existed for "a week", and the area containing a "thin layer" existed for "a couple of days" (Tr. 140-142). He stated that he returned to the cited area the next day after abatement and that the area was "white to very pale gray" with no appreciable accumulation of float coal dust (Tr. 143).

Mr. Workley stated that the thickness of the float coal dust would be "probably the most determining factor" as to how long it had existed (Tr. 144). He confirmed that he reviewed the weekly examination book before his inspection and found the initials of Charles Underwood (Tr. 145).

In response to further questions, Mr. Workley stated that the quantity of coal dust generated is not strictly a measure of time, and that other conditions, including increased production, could generate a lot of dust (Tr. 146-147).

Mr. Workley confirmed that the cited standard says nothing about a "minimum" requirement and says "at least once each week,

maximum seven-day intervals". He stated that the regulation does not require examinations more than once a week and that he confused it with section 75.304 (Tr. 148). He confirmed that he was unaware of any ignitions every occurring at the longwall face (Tr. 153).

Ronald E. Thomas, mine safety escort, testified that he accompanied Mr. Workley during his inspection on May 11, 1992. They walked the 750 foot entry, and Mr. Workley informed him that he was issuing an order due to the float coal dust conditions (Tr. 158-159). He stated that Mr. Workley cited an area of 350 feet. He conceded that the tailgate entry had float dust on it and that "it needed some attention", and that "we were mining and there was still being float dust dispersing through this return air" (Tr. 159-160).

Mr. Thomas stated that he observed no ignition sources as they walked across the longwall face. Although Mr. Workley cited a loose light fixture at the 1/13 shield, Mr. Thomas did not believe it was an ignition source because it was "low rated voltage. It's essentially a safe voltage" (Tr. 161).

Mr. Thomas stated that the dust generated by the longwall shear is rock dusted periodically down the entry and that persons are not permitted inby the shear where the dust is generated (Tr. 161). He also indicated that a bantam duster is operated during the shift at the mouth of the tailgate entry to control the dust (Tr. 162-164).

Mr. Thomas stated that the weekly examination is conducted from Monday through Monday. He confirmed that while he was with Mr. Workley, they encountered the weekly examiner, Ron Neeley, but the order had already been issued at that time (Tr. 165-166).

On cross-examination, Mr. Thomas confirmed that he did not personally see the rock dusting taking place after the shear had taken a cut at the longwall (Tr. 166). He confirmed that Mr. Neeley noted in the examination book that "the area needed to be drug", but Mr. Thomas did not believe that a sweep down was necessary (Tr. 169). In response to further questions, Mr. Thomas identified copies of the examination book entries for May 4, and 11, 1992 (Exhibits R-1 and R-2). Mr. Underwood's entry shows "no violations, no hazardous conditions" for May 4, and Mr. Neeley's notation shows "needed drug" for the 14-M left tailgate entry return (Tr. 171).

Inspector Workley was recalled, and he stated as follows at (Tr. 178-179):

> Q. Would you please clarify for us why you said that you walked down a certain side versus the side that Mr. Thomas stated that he walked?

A. This order was issued a little over a year ago. My memory is not that good, but I did write details, naturally, the best I could write on the day that the inspection was conducted. And I do have the notes in front of me.

And they clearly indicate that I examined the longwall face, down to the tailgate; went back to one/fourteen shield; waited while the mechanic repaired the light cord on the shield; went back across the face; entered the intake air escapeway; walked to cotton shaft; walked the supply track, back to 14-M mouth; then walked back down to 13-M, and entered the tailgate entry on the 13-M side; and examined from there toward the 14-M tailgate.

Q. And you say that is written in your notes?

A. Yes, it is.

Q. Now, also, the fact that the presence of these accumulations was not recorded in the weekly book, does that necessarily establish that the area was clean?

A. No, it does not.

Q. And the reason for that, would it be because maybe the person just didn't see it or maybe they just didn't feel it necessary to note it?

A. I wouldn't know what reason. It could be either one of those or various other reasons.

Findings and Conclusions

Docket No. WEVA 92-1156

Fact of Violation. Section 104(d)(2) "S&S" Order No. 3307787, October 26, 1990, 30 C.F.R. 75.400.

The respondent admitted and conceded that the coal accumulations cited by the inspector in the course of his inspection did in fact exist in the entries cited by the inspector and that the cited accumulations constituted a violation of the requirements found in mandatory safety standard 30 C.F.R. 75.400 (Tr. 9 Posthearing brief). Under the circumstances, I conclude and find that the respondent's admission, coupled with the credible testimony and evidence presented by the inspector, establishes the violation 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); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987); Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988). Referring to its prior holding in the Emery Mining case, the Commission stated as follows in Youghiogheny & 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 that 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." 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. * * *

Petitioner's Arguments

Citing Secretary of Labor v. Peabody Coal Company, 14 FMSHRC 125, 1261 (August 1992), the petitioner asserts that the violation was the result of a high degree of negligence on the part of the respondent. In support of this conclusion, the petitioner states that the respondent was aware that operating coal conveyor belts produce float coal dust and that the certified person assigned to conduct a weekly examination of the area left his foot prints in the float coal dust, which proves that the examiner had walked in the area and took no corrective action. Since the cited area generated float coal dust, the petitioner believes that more frequent examinations than every seven days should have been conducted.

The petitioner concludes that the respondent's failure to remove the cited coal dust accumulations on the 10 left return air entry to the regulator was the result of an unwarrantable failure to comply with the cited standard section 75.400. In support of its conclusion, the petitioner asserts that allowing the accumulations to continue to exist constitutes aggravated conduct because the presence of the pale gray-to-white footprints on the mine floor indicated that the float coal dust was present when the weekly examiner, Dave Fazio, had conducted his examination. The petitioner contends that although Mr. Fazio certified that he had conducted an adequate examination of the area for hazards, he failed to record the accumulations in the weekly examination book "even after he had literally stopped in the accumulations".

The petitioner states that the accumulations had been present for several weeks prior to the issuance of the order, the area had not been cleaned up or inerted, and the respondent offered no explanation as to why the cited accumulations had not been removed. Given the fact that it took two to three days and six to eight miners to abate the conditions, the petitioner concludes that the conditions had existed for several weeks. Further, the petitioner assets that the respondent had been placed on notice that greater efforts were necessary for compliance with the requirements of section 75.400, especially since the same inspector had just issued another citation or order at the same mine on the 10 left transfer section three days prior to the October 26, 1990, date of the violation in this case.

Respondent's Arguments

The respondent asserts that pursuant to 30 C.F.R. 75.305, return air entries are only required to be examined by a certified mine examiner no less often than every seven days for hazards and violations of mandatory standards. The respondent contends that it should not be charged with aggravated misconduct for failing to discover and correct the dust accumulations found by the inspector because it was under no such obligation except to the extent that any float coal dust accumulations are prohibited ab initio. The respondent takes the position that dust accumulations in returns should be considered unwarrantable only if the company's weekly examiner fails to make note of such accumulations or if mine management fails to take prompt action to correct such accumulations once they are noted by the examiner or some other responsible manager. Under any other circumstances, the respondent believes that such accumulations should be considered ordinary violations not subject to the severe sanctions reserved for aggravated conduct.

The respondent points out that the purpose of air returns is to receive all of the dust, methane, and other air impurities that are generated by the mining and transportation of coal, and that they are bound to accumulate coal dust over time. The respondent states that "It is one of the more prominent anomalies of the Mine Health and Safety Act that such accumulations are absolutely prohibited from occurring, even though everyone knows that such accumulations cannot be avoided, and even though the Act does not require that air return entries be examined for accumulations and other such violative conditions more often than once each week."

The respondent asserts that the inspector found the violation to be unwarrantable because he assumed that the footprints he detected on the floor of the entry were those of examiner Fazio, indicating to him that Mr. Fazio was the last examiner to pass through the area and walk through the accumulations that the inspector observed on October 26, 1990, and had failed to report those accumulations. The respondent points out that the inspector did not issue any violation because of any inadequate weekly examination of the cited entry, and it believes that the inspector over-reacted, and by the next day or two after speaking with Mr. Fazio, be no longer viewed the cited condition as such a serious, unwarrantable violation. The respondent concludes that Mr. Fazio's failure to offer any excuse for the accumulations was perhaps due to the fact that he had done nothing which required an excuse, or that the return entry was not in bad condition when he examined it on October 24.

The respondent further observes the reticent and inconsistent testimony of the inspector with respect to his contacts with Mr. Fazio, and it points to the fact that the

inspector first indicated that he knew Mr. Fazio's last name, but did not know him personally, and later testified that he might have spoken to Mr. Fazio,but was not sure (tr. 38, 50). Still later, the inspector testified that he had spoken to Mr. Fazio, but that Mr. Fazio was reluctant to speak with him (Tr. 51). Since the respondent believes that the inspector charged it with an unwarrantable failure based entirely on his assessment of Mr. Frazio's competence or honesty, (Tr. 35-36), the respondent finds it strange that the inspector was so hesitant in recalling anything about his discussions with Mr. Fazio.

I am not convinced that a mine operator's prior history of accumulations citations may per se justify an unwarrantable failure finding. In my view, prior history of any violation must be taken in contest, and is but one of any number of facts that a judge may rely on in considering whether a violation is the result of aggravated conduct amounting to an unwarrantable failure. In the Peabody Coal Company case, relied on by the petitioner, supra, the judge focused on the fact that the cited accumulations had been noted in approximately seven of the preceding preshift reports, and that only one miner had been assigned to clean up the affected along with other assigned duties.

In Drummond Company, Inc., 13 FMSHRC 1362 (September 1991), the Commission vacated and remanded a judge's decision that an accumulations violation of section 75.400, was not the result of unwarrantable failure. The Commission took particular note of the fact that the operator had been cited for the same type of violation in the three days prior to the date of the contested citation in question and that this should have put it on "heightened alert" to clean up the cited accumulations before the inspector found them, 13 FMSHRC at 1368.

The petitioner's assertion that the respondent was placed on notice that greater efforts were necessary for compliance with section 75.400, because the same inspector issued another violation at the 10 left transfer section three days prior to his October 26, 1990, is lacking in any credible proof. The inspector testified that he had issued several accumulations violations at the mine and "believed" that he had issued one on the 10 left transfer section three days earlier. However, none of these citations are a matter of record in this case, and the petitioner did not produce copies of any prior citations or orders. The inspector's notes made at the time the order was issued (Exhibit P-2), do not reflect the issuance of any prior accumulations violations. Further, the petitioner's computer print-out listing the respondent's prior violations history for the two-year period up to October 26, 1990, does not include section 75.400, violations three days prior to October 26, 1990. The latest citation of section 75.400, prior to October 26, 1990, the day the cation in this case was issued, was on October 17,

1990, when two violations of 75.400, were issued. One was a section 104(a) non-"S&S" which was contested with the Commission, and the other one is a section 104(a) "S&S" citation for which the respondent paid a penalty assessment of $213. None of these prior violations are further explained.

The inspector testified that his belief that the cited accumulations had existed for two weeks was based on his "experience". However, I take note of his further testimony that the float coal dust that had accumulated was less than one-sixteenth of an inch thick, and could not be measured. Given the fact that the inspector agreed that the longwall belt conveyor generates a lot of coal dust as it is carried down the return air course, I have difficulty understanding why the dust that he observed was not of more substantial thickness. I also note the inspector's testimony that the belt entry itself was well rock dusted and that the mine floor had been "freshly drug". This leads me to conclude that the respondent addressed the accumulations at that location.

I find no credible evidence to support the petitioner's assertion that the accumulations had existed for several weeks prior to the issuance of the violation in this case. The fact that abatement took two or three days utilizing six or eight miners must be viewed in context. The evidence shows that it took two hours to abate an area of 400 feet, after which the inspector permitted production to resume and allowed the belt to be turned back on. The inspector also afforded the respondent additional time to bring in rock dusting machines and rock dust, and I am not convinced that the actual abatement consumed two or three total days as the petitioner would have me believe.

Although the petitioner suggest that examiner Fazio conducted an inadequate weekly examination because he failed to record the accumulations observed by the inspector in his examination book, the fact is that the inspector issued no violation for any inadequate examination. Further, although the inspector indicated that he "normally" examines the preshift books at the time of an inspection, and "probably did" in this case, he was not positive that he did so, and produced no notes. Further, he did not believed that he noted any hazardous conditions recorded in the preshift books because he would have made a note of any recorded hazards.

I have given little weight to the inspector's testimony concerning his contacts with examiner Fazio. The burden of proof is on the petitioner, and it occurs to me that a critical witness such as the examiner who apparently observed the accumulations and placed his initials on the crib two days before the inspection, indicating that he had examined the area, would be the individual in the best position to testify first-hand about events that took place three years ago. The record reflects that

Mr. Fazio is still employed with the respondent, but he was not called to testify and his deposition was not taken.

On the basis of the foregoing findings and conclusions, and after careful review of all of the evidence and testimony adduced in this case, I conclude and find that the petitioner has failed to establish by a preponderance of any credible evidence that the violation resulted from the respondent's aggravated conduct and unwarrantable failure to comply with the requirements of section 75.400. Accordingly, the inspector's finding in this regard IS VACATED, and the contested order IS MODIFIED to a section 104(a) citation.

The Significant and Substantial (S&S) Violation Issue

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.

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).

Petitioner's Arguments

In support of the inspector's "S&S" finding, the petitioner states that it has established a violation of section 75.400, and that given the fact that the 10 left conveyor belt was running while the accumulations were located within five feet of the edge of the belt, a discrete safety hazard existed. The petitioner further argues that in the normal course of mining operations, it was reasonably likely that a belt roller would have become hot enough to produce sparking that would have ignited the float coal dust accumulations located within five feet of the belt. If a fire had started in the belt line, it would have propagated into the main return through the regulator and a fire suppression system would have been ineffective in putting out the fire. Petitioner concludes that it was reasonably likely that an ignition would have occurred, and that an explosion or fire would have also occurred when the float coal dust was placed in the air and became ignited by an electrical spark. If an explosion or fire had occurred, petitioner further concludes that at least one miner would have been seriously injured, and at the time that the order had been abated, at least six to eight miners could have been seriously injured.

Respondent's Arguments

The respondent asserts that the violation was not "S&S" because the third and fourth elements necessary to establish such a violation, as enunciated by the Commission in its Mathies Coal Company and Cement Division, National Gypsum Company decisions, are missing in the case of the contested order. In support of its position, the respondent states that the only ignition source identified by the inspector that might have been "likely" to ignite the coal dust in the return entry was the 10 left coal conveyor belt in the entry adjacent to the return. Although the inspector described how belt rollers can wear and cause heat and friction, and how the belt structure itself can run out of line and rub against the steel structural framework, the respondent points out that the inspector confirmed that there were no hot rollers or belt rubbing problems that he could detect anywhere in the area, and that the methane content of the air in the area was

well below the explosive concentration level. Under the circumstances, the respondent does not believe that it was reasonably likely that there would be an ignition of the coal dust in the return entry resulting in serious injuries or death. The respondent believes that in the normal course of mining it was far more likely that the conveyor belt would have continued to run normally, that dust from the belt would have continued to be drawn down the return, and that the next weekly examination of the return would have resulted in the routine dragging and rockdusting of the entry.

The respondent maintains that there is a considerable dispute as to the proximity of any float coal dust to the end of the 10 Left coal conveyor belt, the potential ignition source identified by the inspector. The respondent states that the inspector testified that float coal dust was deposited on the ribs and roof of the crosscut leading from the belt ever to the return, and that this crosscut was included in his order. However, the respondent points out that there is a distinction between the "longwall recovery chute" and the crosscut that the inspector testified about. The respondent concedes that the longwall chute and the line curtain hung in that chute had accumulations of coal dust, but it insists that the crosscut testified to by the inspector was not included in his order, and that a sketch included as part of his order, as well as the abatement activity, do not reflect or mention any accumulations in the crosscut leading over to the conveyor belt entry.

After careful consideration of all of the evidence in this case, as well as the arguments advanced by the parties, I conclude and find that the respondent has the better part of the argument and that the petitioner has failed to establish that an ignition or fire was reasonably likely to occur as a result of the accumulations cited by the inspector.

The inspector testified that the accumulations in the return air entry were not in the same entry as the belt, and he confirmed that there were no ignition sources in the return air course (Tr. 32, 41). He also confirmed that he made a methane measurement and found two-tenths of one percent methane at the regulator (Tr. 41). Although the inspector believed that the float dust could be ignited by a hot roller or the belt rubbing, and that an electrical arc could have ignited the float coal dust if it were suspended in the air, he confirmed that he observed no hot rollers, and did not detect any belt rubbing that would cause surface heating (Tr. 42). He further confirmed that the belt entry was well rock dusted and that the mine floor had been "freshly drug" (Tr. 45). When asked to explain the likelihood of a roller getting hot, the inspector stated that in the course of other mine inspections, he has found defective rollers and the belts cutting into the steel belt frames causing friction, but he conceded that during the inspection on the day he issued the

violation he did not find any of these potential ignition sources present (Tr. 47). The inspector offered no testimony with respect to the source of any electrical arc, and he confirmed that he did not, and could not, take the time to inspect the belt to determine if there was an ignition source (Tr. 50).

The inspector estimated the distance of any accumulations to the edge of the belt that he considered a potential ignition source to be five feet. Foreman Morgan, who accompanied the inspector, estimated the closest distance of any accumulations to a potential ignition source to be 50 to 70 feet, and the inspector conceded that if there were no accumulations in the crosscut extending from the belt entry to the "recovery chute", Mr. Morgan's estimated distances would be accurate (Tr. 95-96, 109). I take note of the fact that the disputed order was issued close to three years ago, and I find merit in the respondent's arguments concerning the inconsistency in the inspector's hearing testimony, and the absence of critical and specific information in his notes and sketch, as well as his order, with respect to the existence of any float coal dust in the crosscut that the inspector claimed was in close proximity to the belt that the considered an ignition source.

Mr. Morgan testified credibly that he observed no hot belt roller, no rubbing of the belt against the support structure, and no electrical equipment that may have been sparking or arcing. He confirmed that he observed no ignition sources of any kind connected with the belt (Tr. 68-69). Petitioner's counsel conceded that none of these conditions were present at the time of the inspection (Tr. 83), and the inspector identified no electrical equipment or components, other than the belt, that he considered a source of arcing, sparking, or other ignitions. Under all of these circumstances, and in the absence of any credible evidence to establish the existence of any ready sources of ignition, or that the cited accumulations were in close proximity to any such sources of ignition, I cannot conclude that an ignition or fire was reasonably likely to occur. Under the circumstances, I cannot conclude that an "S&S" violation has been established, and the finding of the inspector in this regard IS VACATED, and the violation IS MODIFIED to reflect a non-"S&S" violation.

Docket No. WEVA 92-1050

Fact of Violation. Section 104(d)(2) "S&S" Order No. 3718887,

May 11, 1992, 30 C.F.R. 75.400.

The respondent admitted and conceded that the coal accumulations cited by the inspector in the course of his inspection did in fact exist at the cited longwall tailgate entry locations described by the inspector and that the cited

accumulations constituted a violation of the requirements found in mandatory safety standard 30 C.F.R. 75.400 (Tr. 113, Posthearing Brief, pg. 1). Under the circumstances, I conclude and find that the respondent's admission, coupled with the testimony of the inspector and the respondent's witness (Morgan), establishes the violation, and IT IS AFFIRMED.

The Significant and Substantial (S&S) Violation Issue.

In its posthearing brief, the respondent concedes that because of the proximity of the cited coal accumulations to the mining face, the violation was properly designated a significant and substantial (S&S) violation. Under the circumstances, the inspector's "S&S" finding IS AFFIRMED.

The Unwarrantable Failure Issue

Petitioner's Arguments

Citing Secretary of Labor v. Peabody Coal Company, 14 FMSHRC 1258, 1261 (August 1992), the petitioner asserts that the violation was the result of a high degree of negligence on the part of the respondent. In support of this conclusion, the petitioner states that the respondent was aware at the time of the violation that the longwall shearer generated float coal dust and knew that the area should have been cleaned up or rock dusted after each production shift, and the fact that the area was required to be examined once a week did not excuse the respondent from its obligation to exercise more care in examining the area for accumulations more than once a week.

The petitioner concludes that the respondent's failure to remove the cited float coal dust accumulations from the longwall tailgate entry was the result of its unwarrantable failure to comply with the requirements of section 75.400. In support of this conclusion, the petitioner asserts that allowing the accumulations to continue to exist constitutes aggravated conduct because the presence of the accumulations in the tailgate entry was brought to the respondent's attention on May 4, to May 6, and had existed for some time prior thereto, and had not been cleaned up or rendered inert by May 11, 1992, when the inspector conducted his inspection.

The petitioner argues that the respondent knew that the tailgate area of the longwall section accumulated float coal dust very quickly and needed to be dragged each shift. The petitioner contends that the respondent's examiners had a practice of not reporting accumulations in the weekly examination reports unless told to do so, and that one of the examiners, Charles Underwood, who dragged the entry the previous Monday, Tuesday, and Wednesday, May 4, 5, and 6, 1992, knew that the area required dragging each shift. Although the accumulations of float coal

dust were present on Monday, May 4, and Mr. Underwood placed his initials on the crib that day, indicating that he had conducted an examination of the area, the accumulations had not been reported in the weekly examination book. The petitioner states that the accumulations were actually noted in the weekly examination book on May 11, 1992, after the inspector issued the order that day, and after Mr. Thomas instructed examiner Ron Neely to enter the accumulations in the book.

The petitioner asserts that although Mr. Thomas testified as to the respondent's standard operating procedure regarding removal of coal dust, he did not actually observe the miners following the procedures and applying rock dust after each pass of the shearer during mining operations. Petitioner further contends that Mr. Thomas testified inconsistently as to whether rock dust is applied during each shift, or periodically (Tr. 161-162, 167).

The petitioner concludes that given the extent of the float coal dust, and the fact that it took two hours and eight miners to remove the accumulations, the conditions had existed for several weeks. The petitioner also concludes that since the respondent had been placed on notice that greater efforts were necessary for compliance with section 75.400, its failure to remove the accumulations was the result of its unwarrantable failure to comply with the requirements of the cited mandatory standard.

Respondent's Arguments

The respondent asserts that the inspector cited the violation as an unwarrantable failure violation because he believed that the entry in question should have been examined more often than once every seven days, when in fact he knew that the entry was examined more frequently than that. The respondent believes that it is apparent from the inspector's testimony that he believed the violation was unwarrantable because there were dust accumulations on coal sloughage along the ribs, outside the passageway between the cribs, and on the cribbing ties themselves, which had not been removed or covered over, while the center passageway itself had been "dragged" repeatedly since the prior weekly examination on May 4. The respondent concludes that since this routine-but-not-required housekeeping had not resulted in the complete removal of all accumulations which, in the inspector's estimation, would have been noticed by the persons dragging the entry, the inspector decided to charge the respondent with unwarrantable aggravated conduct, even though he did not identify any of the persons who supposedly had seen the accumulations and failed to correct them.

The respondent states further that its most telling argument is the inspector's testimony that he would not have cited the

violation as an unwarrantable failure if the weekly examiner (Neeley), had arrived on the scene before the inspector got there and had taken action with regard to the accumulations. The respondent concludes that Mr. Neeley's arrival a few minutes after the inspector apparently made all the difference to the inspector between an unwarrantable and an ordinary violation. The respondent suggests that the Mine Act should not be subject to such capricious enforcement decisions by MSHA inspectors, and that the violation was either unwarrantable or it was not, and that the arrival time of the examiner should have nothing to do with that determination.

Former section 75.305, now codified and renumbered as section 75.364, does not require "more frequent examinations", as the inspector believed, and simply requires examinations in those areas covered by the regulation "at least every 7 days". Although the respondent may not be cited for a violation of section 75.364, for not conducting examinations more frequently than every 7 days, I find nothing to preclude an inspector from citing it for an accumulations violation pursuant to section 75. 400, a totally separate standard that requires cleanup and removal of coal accumulations. Further, it would appear to me that in light of the Commission's decision in Drummond Coal Inc., supra, at 13 FMSHRC 1367-68, reaffirming its decision in Eastern Associated Coal Corp., 13 FMSHRC 178, 187 (February 1991), actual knowledge of a violative condition is not a necessary element to establish aggravated conduct amounting to an unwarrantable failure.

In the instant case, the inspector based his order on two principal factors. He considered the extent and proximity of the accumulations to the active longwall, and a conversation that he had with an examiner (Underwood) a week before the inspection on May 11, 1992. According to the inspector, Underwood told him that he had examined the cited area on May 4, 5, and 6, and had "dragged" it on May 5 and 6, as well as after every shift, because "it got dirty and needed dragging every shift".

With regard to the extent of the accumulations, the inspector conceded that it was not unusual for float coal dust to accumulate rapidly when the shear is cutting coal at the longwall face, and he indicated that accumulations occur at the longwall tailgate entry which is a return air course. Given the fact that the return air course is designed to allow the removal of coal dust generated at the longwall during the mining cycle, I do not find it particularly significant that coal dust will be deposited and accumulate as it makes its way down the return. The critical issue is how fast is an operator reasonably expected to react to coal dust that has been allowed to accumulate for a protracted period of time.

The inspector confirmed that he reviewed the weekly examination books and found nothing to indicate the presence of coal accumulations in the areas that he cited. In his opinion, the cited accumulations had existed for time periods ranging from "several weeks", "a shift or two", "a couple of days", and "two or three weeks", and his beliefs in this regard was based on his "experience" and the thickness of coal dust, which ranged from "an eight of an inch", "medium thick", to "a thin layer". I find the inspector's opinions to be speculative and lacking in probative value.

I emphasize again that the burden of proof in this case is on the petitioner, and I take note of the fact that the two examiners responsible for examining the cited area prior to and during the inspection on May 11, 1992, (Underwood and Neeley), were not called to testify, nor were they deposed. With respect to Mr. Underwood, the fact that he believed the area needed dragging the week before Inspector Workley viewed the area, does not establish that it needed dragging on May 11, nor does it establish that dragging or rockdusting is required under the mine cleanup plan after every production shift as the inspector believed. If the inspector believed this was the case, it was incumbent on him to produce a copy of the cleanup plan to prove that this was the case. Further, I find it rather strange that MSHA'S policy prohibits an inspector from citing an operator for a violation of its required cleanup plan or program if it fails to rockdust or drag an area after each shift pursuant to its approved or required plan.

With respect to examiner Neeley, the inspector confirmed that he met Mr. Neeley in the tailgate entry after he had issued the violation and order, and that Mr. Neeley was in the process of conducting the weekly examination of the tailgate entry. The inspector confirmed that had he encountered Mr. Neeley conducting the weekly examination before he issued the order he may or may not have issued it depending on "what action Mr. Neeley had taken". Since Mr. Neeley did not testify, his intentions remain a mystery. However, one cannot speculate that Mr. Neeley would have recognized the accumulation as less than hazardous requiring no immediate corrective action. Indeed, the previous examiner (Underground), examined the area one day, found nothing that needed correcting that day, but subsequently found the need to take corrective action the next two days. This indicates to me that the respondent's examiners are taking care of business as required, and it is just as probable as not that given time to complete his examination, examiner Neeley may have taken corrective acetoin if he believed the conditions warranted it.

On the facts here presented, and after careful consideration of all of the evidence and testimony adduced in this case, I cannot conclude that the petitioner has made a case that the

violation was the result of the respondent's aggravated conduct amounting to an unwarrantable failure to comply with section 75.400. I short, I find no convincing credible or probative evidence to establish that the cited accumulations had existed for any protracted period of time and that the respondent failed to take any reasonable corrective action. Under the circumstances, the inspector's unwarrantable failure finding IS VACATED, and the section 104(d)(2) order IS MODIFIED to a section 104(a) "S&S" citation.

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

I conclude and find that the respondent is a large mine operator and the parties have stipulated that payment of the civil penalty assessments for the violations in question will not adversely affect the respondent's ability to continue in business.

History of Prior Violations

The petitioner's computer print-out for the Blacksville No. 2 Mine for the period March 20, 1990 through March 19, 1992, reflects that the respondent paid $229,523, for $1,055, assessed violations, and that 117 of these were for violations of section 75.400. I take note of the fact hat the violation in this case was issued on May 11, 1992, and the petitioner did not supplement its violation history from March 19, 1992 to May 10, 1992. The latest citation of record for violations of section 75.400, prior to May 11, 1992, was a February 26, 1992, section 104(a) "S&S" citation, the details which are not of record.

The petitioner's computer print-out of prior violations for the Arkwright No. 1 Mine for the period October 27, 1988 through October 26, 1990, reflects civil penalty assessment payments of $120,,371, for 651 assessed violations, and that 71 of these were for violations of section 75.400. 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 assessments that I have made for the violations.

Good Faith Compliance

The parties stipulated that the cited conditions were timely abated in good faith by the respondent.

Gravity

Based on my "S&S" findings and conclusions, I conclude and find that the modified Citation No. 3307787 (WEVA 92-1156), was a non-serious violation, and that Citation No. 371887 (WEVA 92-1050) was a serious violation.

Negligence

I conclude and find that both of the section 75.400, violations that I have adjudicated and affirmed resulted from the respondent's failure to exercise reasonable care amounting to a moderately high degree of negligence.

Civil Penalty Assessments

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 $500, is reasonable and appropriate the section 75.400, violation in Docket No. WEVA 92-1156, and that a penalty assessment of $1,000, is reasonable and appropriate for the section 75.400, violation in Docket No. WEVA 92-1050.

ORDER

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

Docket No. WEVA 92-1156

1. The respondent IS ORDERED to pay the full amount of the proposed civil penalty assessments for the following violations that have been settled by the parties:

Citation/Order No.	Date	30 C.F.R. Section	Assessment
3314293	9/6/93	75.1722(a)	$213
3307182	9/10/90	75.512	$625
3314299	9/10/90	75.1722(a)	$213
3306265	10/17/90	75.400	$178
3308049	10/11/90	75.202(a)	$213

2. Section 104(a) "S&S" Citation No. 3314179, August 23, 1990, citing a violation of 30 C.F.R. 75.403, IS MODIFIED to a non-"S&S" citation, and the respondent IS ORDERED to pay a civil penalty assessment of $115 in settlement of the violation.

3. Section 104(a) "S&S" Citation No. 3314297, September 7, 1990, citing a violation of 30 C.F.R. 75.1003(a), IS MODIFIED to a non-"S&S" citation, and the respondent IS ORDERED to pay a civil penalty assessment of $128, in settlement of the violation.

4. Section 104(a) "S&S" Citation No. 3113921, September 6, 1990, citing a violation of 30 C.F.R. 75.514, IS MODIFIED to a non-"S&S" citation, and the respondent IS ORDERED to pay a civil penalty assessment of $197, in settlement of the violation.

5. Section 104(d)(2) "S&S" Order No. 3307787, October 26, 1990, citing a violation of 30 C.F.R. 75.400, IS MODIFIED to a section 104(a) non-"S&S" citation, and the respondent IS ORDERED to pay a civil penalty assessment of $500, for the violation.

Docket No. WEVA 92-1050

1. Section 104(d)(2) "S&S" Order No. 3312960, March 9, 1992, citing a violation of 30 C.F.R. 75.1700, IS MODIFIED to a section 104(a) non-"S&S" citation , and the respondent IS ORDERED to pay a civil penalty assessment of $550 in settlement of the violation.

2. Section 104(d)(2) "S&S" Order No. 371887, May 11, 1992, citing a violation of 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 $1,000, for the violation.

IT IS FURTHER ORDERED that 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

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