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SOL (MSHA) V. R B COAL
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 93-715
	:	A.C. No. 15-08293-03567
v.	:	
	:	No. 4 Mine
R B COAL COMPANY, INC., Respondent	:	

DECISION

Appearances: Donna E. Sonner, Esquire, Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
Darrell Cohelia, Safety Director, R B Coal Company, Pathfork, Kentucky, for the Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," charging R B Coal Company, Inc. (R B) with three violations of mandatory standards and seeking civil penalties of $8,900 for those violations. The general issue is whether R B violated the cited standards and, if so, what is the appropriate civil penalty to be assessed. Additional specific issues are addressed as noted.

Order No. 3829635 issued pursuant to Section 104(d)(1) of the Act alleges a "significant and substantial" violation of the standard at 30 C.F.R. 75.400 and charges that "float coal dust was allowed to accumulate along the No. 1 belt conveyor for a distance of 31 brakes [sic]."(Footnote 1)

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1 Section 104(d)(1) of the Act provides as follows:
"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to
fn. 1 (continued)

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

Roger Dingess is a roof control specialist for the Mine Safety and Health Administration (MSHA) with considerable mine industry experience, including work as a roof bolter and section foreman. On March 8, 1993, during the course of an inspection and accompanied by Mine Superintendent Paul Goins and MSHA Electrical Inspector Guy Fain, Jr., Dingess observed at the air lock along the No. 1 belt conveyor, a 2-foot pile of fine loose coal. Traveling the entire the No. 1 beltline he further observed black coal dust along the beltline for 31 breaks (approximately 1800 feet). The dust was on top of a layer of rock dust, was a fine powdery coal and, according to Dingess, could easily become suspended. Based primarily on the particularly black color of the coal, Dingess opined that the condition had been present for one or two weeks. In addition, Dingess opined that the dust had been deposited at a rate of about 1/4 inch per shift at the air lock where the coal dust was two feet deep. Based on this credible evidence, I find that the Secretary has sustained his burden of proving the violation as charged.

The violation was also "significant and substantial" and of high gravity. A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that 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

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1 (...continued)
be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

Gypsum Co., 3 FMSHRC 822, 825 (1981). In Mathies Coal Co., 6 FMSHRC 1,3-4 (1984), the Commission explained:

> In order to establish that a violation of a mandatory standard is significant and substantial under National Gypsum the Secretary must prove: (1) the underlying violation of a mandatory safety standard, (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation, (3) a reasonable likelihood that the hazard contributed to will result in an injury, and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.
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> See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (1987) (approving Mathies criteria).

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 (1984), and also that in the likelihood of injury be evaluated in terms of continued normal mining operations (U.S. Steel Mining Co., Inc., 6 FMSHRC 1473, 1574 (1984); see also Halfway, Inc., 8 FMSHRC 8, 12 (1986) and Southern Oil Coal Co., 13 FMSHRC 912, 916-17 (1991).

In determining that this violation was "significant and substantial" Inspector Dingess noted that the fire sensor powerlines had been severed and were lying on the mine floor along side the No. 1 belt conveyor. According to Dingess this severed powerline could itself ignite the coal dust from sparks and, if there was a fire, with the fire sensor lines cut, there would be no fire alarm and the automatic water deluge system would not function. In addition, he observed that a belt roller, as well as the belt itself, was running in the two-foot pile of coal dust at the airlock. On the basis of these ignition sources and with no functioning fire sensor alarm and water deluge system, Dingess concluded that it was "highly likely" for fatal injuries to occur from an explosion or mine fire.

It is noted that Electrical Inspector Fain corroborated Dingess' observations of the amount of coal dust and confirmed that the severed fire sensor line could indeed provide a source of ignition for the coal dust. This credible evidence clearly supports the "significant and substantial" findings. In reaching this conclusion I have not disregarded the testimony of Superintendent Goins in response to the question whether there was enough power in the exposed leads to cause a spark. He responded, "I'm not sure on it, but I don't think the fire

sensor line works off power" (Tr. 198). This testimony is, however, too equivocal to be given probative weight.

Inspector Dingess further concluded that the violation was the result of R B's "unwarrantable failure." In Emery Mining Corp., 9 FMSHRC 1997, 2004 (1987), the Commission held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence and that it is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or "a serious lack of reasonable care." Rochester and Pittsburgh Coal Co., 13 FMSHRC 189 (1991).

In support of his "unwarrantable" findings the Secretary notes that Superintendent Goins told Inspector Dingess that he had performed a preshift examination on the beltlines the day before the order was issued. Indeed, Goins himself acknowledged that he then observed these conditions. It is not disputed, however, that the conditions were in fact not reported in the appropriate examination books for March 7. While Goins also maintains he had at the time the order was issued already assigned men to commence cleanup along the belt-line he acknowledges that he failed to advise the inspectors of this fact at the time the order was issued. Under the circumstances I can give Goins' testimony in this regard but little weight. It would be reasonable to expect Goins to inform the inspection party that he had commenced cleanup when he was issued the order.

The evidence therefore that Goins knew of the cited conditions at least the day before the order was issued yet failed to report those conditions in the appropriate exami-nation books and failed to take sufficient cleanup action is evidence of high negligence and "unwarrantable failure." The history of six prior violations of the same standard dating from June 13, 1991, further supports a finding of high negligence and "unwarrantable failure." See Youghiogheny and Ohio Coal Co., 9 FMSHRC 2007 (1987).

In reaching these conclusions, I have not disregarded the testimony of Superintendent Goins, who, while admitting that the beltline needed cleaning, stated that it was not a dangerous condition because half of the area was wet (and that even if there was an explosion the air locks would limit the explosion) and that no one was apparently working along the beltline at the time of the violation. The fact is, however, that the inspection party itself was present within the area of the cited conditions, that an explosion, even assuming it could be contained within two air locks, would be serious and at least one half of the cited area was admittedly dry. Goins' testimony therefore would not in any event negate the findings in this case. In addition, I can give no weight to the arguments in Respondent's Brief based on evidence not in the trial record.

Order No. 4043391, also issued pursuant to Section 104(d)(1) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. 75.515 and charges as follows:

> The 300 KVA power center located at No. 33 P.U. were [sic] the high voltage (7,200) enters the power center had exposed conductors, were [sic] the insulated bushing had been pull [sic] out of the power center.

Electrical Inspector Fain testified that during the course of the inspection on March 8, 1993, he observed that on the cited power center the bolts on the entrance gland had been sheared off and the bottom of the plate on the outside had separated from the frame by four to six inches. According to Fain, the sheared portion of the bolts was "fresh looking" and he therefore concluded that the damage had only recently occurred. According to Fain the two wire phases were touching inside the metal box and there was very poor insulation on the wires since the mesh protection had been removed. Fain opined that if the wires had become exposed, for example, through vibration and friction to the insulation, and contacted the metal frame of the power center it could become energized and someone touching it could be electrocuted.

Inspector Dingess opined that the violation was "significant and substantial" because it would be highly likely for someone touching the power center under the circumstances to suffer fatal electrocution. Under the circumstances, I agree with Dingess and Fain that there was a reasonable likelihood because of the damage to the power center that it could become energized subjecting anyone touching the metal box to electrocution. In this regard I have also considered the testimony of Certified Electrician Tim Creech that if the insulation was off the lead then the metal frame of the box would become energized. The violation was accordingly "significant and substantial."

I do not, however, agree with the conclusions that the violation was the result of "unwarrantable failure." The Secretary's findings in this regard were based upon an alleged statement by Superintendent Goins that the box had been worked upon the night before and the condition should therefore have been discovered and corrected at that time. Clearly, however, the cited condition could have occurred subsequent to any such work and indeed Fain testified that the condition had occurred only very recently. Under the circumstances, I find that the Secretary has simply failed in his burden of proving this issue. Accordingly, the order must be modified to a citation under Section 104(a) of the Act.

Order No. 3829637 alleges a "significant and substantial" violation of the standard at 30 C.F.R. 75.202(a) and, as amended at hearing, charges as follows:

> Unsupported roof was present along the No. 1 belt conveyor and area 60 feet times eight feet was unsupported at brake 23 and extended to the 24 brake [sic] on off side of belt conveyor where persons are required to travel. An area eight feet by eight feet was unsupported where the bolt had been knocked out and draw rock had fallen at the brake [sic] 31 on right side of belt in the travelway. The roof of areas where persons work or travel was not supported or otherwise controlled to protect persons from hazards related to falls of the roof.

The cited standard, 30 C.F.R. 75.202(a), provides that "the roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts."

Inspector Dingess testified that during the course of his inspection along the No. 1 beltline on March 8, 1993, he observed the cited conditions. In the first area cited there were no roof bolts in the cited 60-foot-by-8-foot area and, according to Dingess, there should have been four bolts every four feet for the entire 60 foot length. This was on the off side of the belt which, according to Dingess, is used for cleanup and to check offside rollers. According to Dingess the belt had been located in the position for at least 18 months before the citation. Mine Superintendent Goins reportedly stated that he did not know how the area had been left unsupported.

Dingess concluded that the violation was of high gravity and "significant and substantial" particularly because of "draw rock" within the cited area. He opined that this could contribute to a roof fall onto persons working not only on the off side but also extending across the beltline. Dingess also concluded that the violation was the result of the operator's "unwarrantable failure" because the citation had existed for such a long period and involved such a large unsupported area. Superintendent Goins acknowledged that he had traveled over the cited area the previous two years but that he had never previously noticed the absence of roof support. He testified that the mine height in the area is only 45 inches and it is difficult to see any missing bolts as you are crawling in such low coal.

In particular, because of the large area of unsupported roof in an area of "draw rock" and the likelihood of a roof fall affecting both the tight side and the wide side of the belt entry, I conclude that the violation was indeed "significant

and substantial" and of high gravity. In addition, because of the extensive area of exposure and the fact that it existed for such a long period of time, i.e., approximately two years, I conclude that the violation was the result of high operator negligence and "unwarrantable failure." In reaching my conclusions herein I have also considered the arguments by Respondent that the cited area was not as large as alleged. However, even assuming these allegations were correct, it would not affect the findings herein. Under the circumstances the order is affirmed as issued.

Considering all of the criteria under Section 110(i) of the Act, I find that the following civil penalties are appropriate:

Order No. 3829635	$2,000
Order No. 3829637	$1,500
Citation No. 4043391	$ 500

ORDER

Order Nos. 3829635 and 3829637 are affirmed and R B Coal Company Inc. is directed to pay civil penalties of $2,000 and $1,500 for the violations charged in those orders, respectively within 30 days of the date of this decision. Order No. 4043391 is hereby modified to a citation under Section 104(a) of the Act and R B Coal Company, Inc. is directed to pay a civil penalty of $500 for the violation charged therein within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge
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