

CCASE:
CONSOLIDATION COAL V. SOL (MSHA)
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

CONSOLIDATION COAL COMPANY, : CONTEST PROCEEDINGS
Contestant :
v. : Docket No. WEVA 94-157-R
: Citation 3305270; 12/28/93
: SECRETARY OF LABOR, Mine : Humphrey No. 7 46-01453
Safety and Health :
Administration, (MSHA), : Docket No. WEVA 94-158-R
Respondent : Citation 3305893; 12/29/93
: Docket No. WEVA 94-159-R
: Order No. 3305392; 12/30/93
: Loveridge No. 22 46-01433

DECISION

Appearances: Elizabeth S. Chamberlain, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania for the Contestant;
Caryl L. Casden, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia for the Respondent.

Before: Judge Feldman

This consolidated proceeding concerns Notices of Contest filed On January 18, 1994, by the Consolidation Coal Company (the contestant) pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. 815(d), challenging two 104(d)(1) citations and a 104(d)(1) order issued at the above captioned facilities on December 28 through December 30, 1993. The Notices of Contest were accompanied by the contestant's Motion for Expedited Hearing. The contestant's motion was opposed by the Secretary on January 25, 1994. The Motion for Expedited Hearing was denied on February 14, 1994. Order, 16 FMSHRC 495. These matters were subsequently called for hearing on March 30, and March 31, 1994, in Morgantown, West Virginia. The contestant has stipulated that it is a mine operator subject to the jurisdiction of the Act. (Tr. 11-12). The parties' posthearing proposed findings and conclusions are of record.

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The 104(d)(1) citations and order concern an alleged unsafe condition in primary and secondary escapeways in violation of the mandatory safety standard in Section 75.380(d), 30 C.F.R. 75.380(d), as well as alleged accumulations of combustible materials prohibited by Section 75.400, 30 C.F.R. 75.400. The issues for resolution are whether the cited violations in fact occurred, and, if so, whether they were properly designated as significant and substantial and attributable to the contestant's unwarrantable failure.

The Criteria for a Significant and Substantial Violation

The Secretary has the burden of proving that a particular violation is significant and substantial in nature. A violation is considered significant and substantial if "... there exists a reasonable likelihood that the hazard contributed to [by the violation] will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). The Commission enumerated the elements that must be established for the Secretary to prevail on the significant and substantial issue in Mathies Coal Company, 6 FMSHRC 1 (January 1994). The Commission stated:

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. 6 FMSHRC at 3-4.

With respect to the third element in Mathies, the Secretary is not required to present evidence that the hazard will actually occur. Rather, the Secretary is required to establish, by a preponderance of the evidence, that there is a reasonable likelihood that the violation will contribute to the occurrence of an injury causing event. Youghioghney & Ohio Coal Company, 9 FMSHRC 673, 678 (April 1987). The likelihood of this event must be evaluated in the context of continued normal mining operations. Halfway, Inc., 8 FMSHRC 8, 12 (January 1986). Finally, the question of whether a violation is properly designated as significant and substantial must be based on the particular facts surrounding the violation. Texasgulf, Inc., 10 FMSHRC 498, 501 (April 1988).

The Criteria for an Unwarrantable Failure Finding

Unwarrantable failure is "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Emery Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghiogheny & Ohio Coal Company, *supra*; Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988). In distinguishing aggravated conduct from ordinary negligence, the Commission stated in Youghiogheny & Ohio, 9 FMSHRC at 2010:

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

Docket No. Weva 94-157-R(Footnote 1)
104(d)(1) Citation No. 3305270

Section 75.380, the cited mandatory safety standard in this instance, requires at least two separate and distinct travelable passageways to be designated as escapeways. 30 C.F.R.

75.380(a). The escapeway ventilated with intake air must be designated as the primary escapeway. 30 C.F.R. 75.380(f)(1). An escapeway that is separated from the primary escapeway must be designated as an alternative (secondary) escapeway. 30 C.F.R. 75.380(h)

There are four entries in the contestant's headgate in its 13 East longwall section. The No. 1 entry (left-most entry) is a return entry. The No. 2 intake entry is the designated primary escapeway. The No. 3 track entry is the designated secondary escapeway. Entry No. 4 (right-most entry) is the belt entry. (Joint ex. 2).

On December 28, 1993, Mine Safety and Health Administration (MSHA) Inspector William Ponceroff issued Citation No. 3305270 for an alleged violation of Section 75.380(d) as a result of a broken waterline, four inches in diameter, which resulted in flooding of all four entries in the headgate section. The citation specified that the water level was knee-deep in the

1 There are two volumes of testimony transcribed in these consolidated proceedings. All references to transcript pages in Docket No. WEVA 94-157-R relate to the transcript dated March 31, 1994.

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No. 2 primary intake and No. 3 secondary track escapeway entries. The citation noted that coal was being mined while this condition existed. The citation essentially quoted the language in Section 75.380(d) that each escapeway shall be "maintained in a safe condition to always insure passage of anyone, including disabled persons (emphasis added)." Although initially issued as a 104(a) citation, Ponceroff modified it to a 104(d) citation when he learned the midnight shift was sent to the face beginning at midnight December 28, 1993, despite the flooded condition of the escapeways.

Findings of Fact

On the afternoon shift of December 27, 1993, between the hours of 4:00 p.m. and 8:30 p.m., a four-inch waterline burst in the No. 4 entry of the contestant's 13 East longwall headgate section at its Humphrey No. 7 Mine. (Tr. 395). The waterline was repaired that afternoon but ruptured again at approximately 11:30 p.m. (Tr. 391).

Kathy Slifko, a belt shoveler on the midnight shift, testified that she arrived late at the mine site at approximately 11:30 p.m. on December 27. She was sent underground to join the midnight crew at approximately 12:01 a.m. on December 28. (Tr. 316). Slifko was transported in a mantrip to the mouth of the 13 East section. She then entered the No. 3 track entry and walked for a distance of approximately five blocks until she could no longer travel because the entry was blocked with water. (Tr. 317). Slifko then proceeded to the No. 4 belt entry where she met foreman Frank Rose. (Tr. 317). Rose informed Slifko that the midnight crew had already gone to the face. Rose stated that several of the crew had walked over to the No. 2 intake entry to determine if it was passable. However, Rose indicated these crew members returned to the belt entry and traversed over the water by crawling over the belt. (Tr. 318).

Slifko testified that she checked all of the entries in an effort to determine the best way to proceed to her work site. At the No. 2 primary escapeway intake entry, she walked to the edge of the water and checked the ribs. She testified that there is sloughage piled on the ground against the ribs. However, no sloughage was visible. She concluded the water was at least one foot in depth because the water obscured the sloughage. (Tr. 319-320). The elevation of the headgate entries is pitched downward from the No. 4 belt entry towards the adjacent No. 3 and No. 2 entries. This resulted in the flow of water from the broken waterline in the No. 4 belt entry through the stoppings into the No. 3 and No. 2 entries. (Tr. 190, 211-214). Consequently, while standing at the edge of the water in the No. 2 intake entry, Slifko heard and observed water pouring through the stoppings from the track entry into the intake entry.

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(Tr. 319). Slifko described the intake entry as dark and the water therein as murky. (Tr. 320).

At approximately 1:00 a.m., Slifko returned to the belt entry where she again spoke with Rose who was then wearing hip boots and standing in water up to his thighs. (Tr. 322-323). Slifko told Rose that the water level prevented her from traversing the intake entry. (Tr. 322). Rose informed Slifko that Larry Herrington, the crew foreman, had crawled up the belt with his crew. (Tr. 322). Slifko then crawled over the belt to avoid the water below the beltline and proceeded to her work station. (Tr. 325).

The waterline was repaired on the midnight shift between 1:30 and 2:00 a.m. (Tr. 391). At that time, a 7« horsepower Thromore pump and a 3« horsepower Altman standup pump were installed to remove the water accumulation in the headgate section. (Tr. 373-374). Inspector Ponceroff testified that these pumps were inadequate given the magnitude of the flooding. At approximately 4:00 a.m. on the midnight shift (December 28), the contestant began to mine coal even though the accumulations of water remained in the escapeways. (Tr. 325).

On the morning of December 28, at the end of her shift, Slifko was advised to exit the mine through the belt entry with Tim Shaffer (Tr. 326). When they reached the water Ike Coombs, the assistant shift foreman, locked the belt and told Slifko and Shaffer to crawl on the belt to avoid the water below. They proceeded to crawl over the belt which was loaded with approximately five to six inches of coal. (Tr. 326-328). No escapeway route other than the No. 4 belt entry was suggested to Slifko either at the start or the end of her shift. (Tr. 329).

MSHA Inspectors Ponceroff and Thomas May arrived at the contestant's Humphrey No. 7 Mine site at approximately 7:30 a.m. on December 28. After holding an opening conference with mine management and reviewing the preshift examination books, the inspectors proceeded underground. (Tr. 183, 291). After the inspectors reached the bottom, Brian Whitt, the company safety escort, asked them if they would return to the surface to speak with the superintendent. (Tr. 183, 291). When the inspectors refused to return to the surface, Whitt spoke to the superintendent by phone. (Tr. 183). Whitt then asked the inspectors whether mining was permissible with knee-deep water in the escapeway. (Tr. 183, 291, 310). The inspectors informed Whitt that the company could not mine with knee-high deep water in the escapeway.

The inspectors then traveled through the No. 3 track entry to the 13 East longwall section. At the No. 7 or No. 8 block, they observed water from rib to rib for a distance of approximately two hundred feet. (Tr. 190, 292). No sloughage

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was visible. (Tr. 191). May waded into the water. He backed out when the water was getting deeper to the point where it was approaching the top of his boots. (Tr. 292). The inspectors observed a very small pump that had been installed improperly in the track entry. (Tr. 190).

The inspectors entered the No. 2 intake escapeway, where they encountered the same conditions they had observed in the track entry. (Tr. 191, 292). Ponceroff stepped into the water in the intake escapeway. He retreated when the water was approaching the top of his boots because the slope of the intake entry was downhill and the water was getting deeper. (Tr. 191). The height of Ponceroff's boots from heel to the top is approximately 12- inches (Tr. 192).

The inspectors found similar flooding in the No. 1 return and No. 4 belt entries. (Tr. 193-194). A small sump pump had been installed in the belt entry. The inspectors crawled up the belt entry measuring the water as they went along. (Tr. 194). The water in the center of the entry was 19 inches deep and water along the side of the entry was between 23 inches and 24 inches deep. (Tr. 194). As they crawled on the beltline past the stoppings, they could see the waterline had dropped between eight and ten inches. (Tr. 194). It took the inspectors approximately fifteen minutes to crawl through the flooded area, a distance of approximately two hundred feet. (Tr. 195).

There were tripping and stumbling hazards on the mine floor in the intake and track entries. In the track entry, the track itself was covered with water. (Tr. 199). After the water was finally removed, May observed that the mine floor in the intake escapeway had cracks and openings in it and that it was very uneven. (Tr. 427). He also observed sloughage on the floor along the sides of the entry which would have made it difficult to walk safely. (Tr. 427). A 10 horsepower Flyte pump was ultimately set up on the morning of December 28, 1993. (Tr. 373-374). Ponceroff testified that this pump was powerful enough to effectively remove the flood water.

The contestant called John Demidovich, shearer operator on the 13 East longwall section, Richard Krynicki, assistant superintendent, and Brian Whitt, safety escort. These individuals approximated the depth of the water in the intake escapeway to be approximately ten to twelve inches. (Tr. 356, 358, 361, 373, 378-380, 396, 415-416). Demidovich testified that, although the water in the intake escapeway was two inches from the top of his 12 to 14 inch rubber boots, he did not notice any slipping or tripping hazards or anything that was atypical that would have prevented a disabled person from being carried through the water. (Tr. 356-358, 361). In this regard, Larry Herrington, longwall foreman on the 13 East longwall section on the midnight shift in question, testified that his crew examined

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the water in the track and intake escapeways and did not feel that the water presented a hazard. (Tr. 363-366).

Although the longwall crew entered and exited through the headgate belt entry, Demidovich testified that the crew was instructed to exit through the tailgate entries if necessary. (Tr. 358-360). Herrington also testified that the tailgate entries could be used as escapeways. (Tr. 366-368).

Fact of Occurrence

In Consolidation Coal Company, 15 FMSHRC 1555, 1557 (August 1993) the Commission, citing the legislative history of the Federal Coal Mine Health and Safety Act of 1969, noted Congress' recognition of the importance of maintaining separate escapeways in a "travelable" and "safe condition." Consistent with this legislative interest, the mandatory safety standard in Section 75.380(d) requires that each escapeway must be maintained in a safe condition to always insure passage of anyone, including disabled persons. The Commission has construed this mandatory standard to require the functional test of "passability." See Utah Power and Light Company, 11 FMSHRC 1926, 1930 (October 1989).

Citing Utah Power, the contestant asserts the inspectors' testimony regarding the nature and extent of the flooding does not establish the escapeways were not "passable" at midnight on December 28, 1993, because the inspectors did not observe the conditions in the escapeway until approximately 8:00 a.m. the following morning. However, the uncontroverted testimony is that the waterline was repaired between 1:30 a.m. and 2:00 a.m. on December 28. During the interim period between the 2:00 a.m. waterline repair and the 8:00 a.m. inspection, the 7« Thromore pump and the 3« Altman standup pump were being utilized to clear the entries of floodwater. Therefore, the extensive flooding observed by inspectors Ponceroff and May at 8:00 a.m. could only understate the magnitude of the flooding prior to the remedial pumping.

Significantly, the testimony reflects mine personnel elected to use the beltline in the No. 4 entry rather than the No. 2 primary escapeway or the No. 3 secondary escapeway to avoid the significant accumulations of water. Moreover, it is clear that the condition of these escapeways, conceded by the contestant to be at least inundated with eleven inches of water, would preclude the rapid and safe evacuation of miners under exigent smoke contaminated circumstances. The condition of these escapeways would also preclude the safe removal of a disabled person, particularly an individual who required to be transported on a stretcher. It is clear, therefore, that the condition of the primary and secondary escapeways did not satisfy the passability

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test in Utah Power. Thus, the subject escapeways were not maintained in the requisite safe condition as contemplated by Section 75.380(d).

Significant and Substantial

Section 75.380 requires the designation of primary and secondary escapeways. These escapeways are designated as such because they are determined to be the most effective means of evacuation. Under the traditional significant and substantial test set forth by the Commission in Mathies, it is apparent that there is a reasonable likelihood that the hazard contributed to by the cited violation, i.e., inhibiting or preventing evacuation, will result in injuries of a reasonably serious nature when viewed in the context of continued normal mining operations and the constant danger of fire or explosion. Notwithstanding emergency conditions, the routine traversing of escapeways in such hazardous condition creates the reasonable likelihood that an individual could sustain serious injuries as a result of slipping or falling. See Eagle Nest, Incorporated, 14 FMSHRC 1119 (July 1992). In addition, it is reasonably likely that disabled individuals requiring rapid evacuation, particularly those in need of transport by stretcher, could be adversely affected by the flooded condition of the escapeways.

Although it is clear that the traditional Mathies test is satisfied, I noted in Consolidation Coal Company, 15 FMSHRC 505, 510, (March 10, 1993), that violations of mandatory safety standards that expose miners to fundamental hazards are significant and substantial. For example, in Consolidation Coal Company, I concluded that an inadequate length of firehose resulting in the inability to fight a fire results in a fundamental hazard which constitutes a significant and substantial violation. So too, the failure to provide unobstructed primary and secondary escapeways deprives mine personnel of the most effective means of evacuation. To characterize the creation of this fundamental hazard as anything other than a significant and substantial violation would impede the Mine Act's statutory role in minimizing the potential for accidents that could cause serious injury or death.

In the alternative, the contestant asserts that even if the primary and secondary escapeways were not passable, the tailgate entries provided an efficient alternative means of escape. I find this argument unpersuasive. The purpose of designating primary and secondary escapeways is to identify the safest and most expeditious means of escape. In this regard, the primary escapeway must be an intake escapeway to prevent escaping miners from exposure to contaminated air. Consequently, alternative means to primary routes of escape are not significant mitigating factors as they are, by definition, less desirable than the

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primary escapeway.(Footnote 2) In fact, as a belt shoveler in the No. 4 headgate belt entry, Slifko would lose valuable time if she were required to traverse up the headgate entry and across the longwall face in order to use the tailgate as a means of evacuation. Consequently, I conclude the violation cited in Citation No. 3305270 was properly designated as significant and substantial.

Unwarrantable Failure

As noted above, determining whether the contestant's actions manifest an unwarrantable failure requires a qualitative analysis of the degree of negligence to ascertain if it is properly characterized as aggravated conduct. There is a positive correlation between the degree of negligence attributable to a mine operator's violative conduct and the foreseeability and degree of the risk caused to mine personnel by the hazard contributed to by the violation. As the eminent jurist Benjamin Cardozo stated in his landmark decision in *Palsgraf v. Long Island R.R.*, 248 N.Y. 339 (1928):

We are told that one who drives at reckless speed through a crowded city street is guilty of a negligent act and, therefore, of a wrongful one irrespective of the consequences. Negligent the act is, and wrongful in the sense that it is unsocial, but wrongful and unsocial in relation to other travelers, only because the eye of vigilance perceives the risk of damage. If the same act were to be committed on a speedway or race course, it would lose its wrongful quality. The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or others within the range of apprehension (emphasis added).

Thus, in assessing the degree of negligence, it is important to consider whether the operator was aware of the hazard contributed to by the violative condition, and, if so, whether the operator took any action to minimize the risks associated with the hazard. In this case, the operator was aware that all four entries were inundated with water and that these entries were escapeways. Despite the flooded conditions, the operator proceeded to mine during the midnight shift. The obvious impropriety of such action is demonstrated by the superintendent's futile attempt to avoid culpability by seeking the inspectors' permission to continue mining in the face of knee-deep water in the escapeways. Such conduct constitutes a

² Webster's New Collegiate Dictionary, (1981 edition) defines "primary" as "1: something that stands first in rank, importance, or value: FUNDAMENTAL..."

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conscious disregard of the risks associated with obstructed escapeways and provides an adequate basis for concluding that the cited violation is attributable to the operator's unwarrantable failure.

Accordingly, violation of Section 75.380(d) cited in 104(d) Citation No. 3305270 was properly characterized as significant and substantial in nature and directly attributable to the contestants' unwarrantable failure. Consequently, the contest of Citation No. 3305270 IS DENIED.

Docket No. WEVA 94-158-R(Footnote 3)
Citation No. 3305893

On December 29, 1993, MSHA inspector John Sylvester issued Citation No. 3305893 at the contestant's Loveridge No. 22 Mine. The citation was issued as a Section 104(d) citation for an alleged violation of the mandatory safety standard set forth in Section 75.400 of the regulations, C.F.R. 75.400. This mandatory standard provides:

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

MSHA inspectors John Sylvester and Chris Weaver inspected the 8 North belt at the Loveridge No. 22 Mine. Upon their arrival at the belt drive, they noticed accumulations of float coal dust. (Tr. 27, 150). The accumulations were observed around the belt drive, on the framework of the drive, on the screen of the roof, and on the waterline overhead. (Tr. 27, 159). Float dust coal consists of particles that are finer than fine coal dust. Consequently, float coal dust is more easily put into suspension and is therefore more hazardous. (Tr. 315). The inspectors were certain that the material they observed was float coal dust because the particles were so fine that they were difficult to discern. (Tr. 314).

The belt structure on the 8 North beltline is the elevated metal frame that keeps the belt in place. (Tr. 28). The height of the structure along the beltline is mainly eye-level. However, the height ranges from three to eight feet above the mine floor. (Tr. 78, 196). The inspectors walked the entire

3 There are two volumes of testimony transcribed in these consolidated proceedings. All references to transcript pages in Docket No. WEVA 94-158-R relate to the transcript dated March 30, 1994.

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length of the belt, which is approximately 1,200 to 1,500 feet, and found the entire belt structure was covered with float coal dust. (Tr. 29). Sylvester ran his hand through the float coal dust at various locations along the beltline and determined that most of the deposit was dry. (Tr. 31).

At the drive, Sylvester noted only a trickle of water being supplied to the bottom belt, with no sprays running on the top belt, despite the fact that it was winter and conditions in the mine are drier in the winter season. (Tr. 32). Sylvester testified operators generally spray large quantities of water on the top belt in order to control dust. (Tr. 32-33). Sylvester testified that Mine Superintendent Robert Omeear told Sylvester that he had ordered the sprays removed several weeks prior to the inspection. (Tr. 33). Omeear testified that he felt that top belt water sprays were not required to control float dust and that the top sprays were removed from the 8 North beltline in order to remedy a serious slipping and tripping hazard. Omeear testified that the top sprays were replaced by center sprays. (Tr. 81, 256, 260). Sylvester stated that a foreman informed him the dust on the 8 North belt had worsened since the sprays were removed. (Tr. 34).

Inspector Weaver, who accompanied Sylvester, estimated that approximately one third of the belt structure that he examined had rock dust underneath the float coal dust. Weaver stated that the float dust coal had accumulated to such an extent he could not see the bottom layer of rock dust. The remaining length of the structure had float coal dust accumulations directly on top of the structure. (Tr. 154). Sylvester and Weaver estimated the depth of the float coal dust along the length of the structure to be from a trace to approximately one-half inch in depth. (Tr. 78, 315). Mary Conaway, a miner who worked on this belt frequently, confirmed that during the inspection, float coal dust, gray to black in color, covered the belt structure for almost the entire beltline and that this condition had existed for several days. (Tr. 192, 193.)

Upon arriving at the tail roller at the 8 North beltline, Sylvester smelled "something...burning." (Tr. 35). As he walked from the left side of the belt around the tail roller to the right side, Sylvester observed sparks coming from the tail roller and he saw "hot cherry red coals" on the ground around the tail roller itself. (Tr. 35). Mary Conaway also observed sparks flying at the tail roller. (Tr. 201). Sylvester determined that the entire tail roller, which was approximately 12 to 15 inches in diameter, was hot. (Tr. 36). Sylvester concluded that the set screws in the tail roller had backed off and were causing the tail roller to shift to one side so that it was rubbing against the main frame of the tailpiece, creating friction. (Tr. 37). The contestant's escort, David Olson, conceded that the tail roller was malfunctioning. (Tr. 215-218). Sylvester informed

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Olson that he was issuing a 104(d)(1) citation for a significant and substantial violation as a result of the impermissible combustible accumulation in the presence of a hot roller. (Tr. 47, 233).

Fact of Occurrence

The contestant challenges the cited violation of the mandatory safety standard contained in Section 75.400 which obliges an operator not to permit float coal dust, as a combustible material, to accumulate in active workings. A threshold issue is whether the float coal dust observed by the inspectors, described as from a trace to one half inch in depth, constitutes an accumulation under the cited safety standard. In *Pittsburg & Midway Coal Company*, 8 FMSHRC 4, 5 (January 1986), the Commission concluded coal dust accumulations ½ inch in depth in close proximity to an ignition source constitute "dangerous" accumulations. Consequently, it is clear that the cited float coal dust located near a hot tail roller was of sufficient magnitude to be considered combustible accumulations as contemplated by Section 75.400. (Footnote 4)

As coal dust is a natural consequence of the extraction process, the next issue for determination is whether the contestant permitted these combustible accumulations to occur. In *Utah Power and Light v. Secretary of Labor*, 951 F.2d 292, 295 (10th Circuit 1991), the Court of Appeals, applying the mandatory safety standard in Section 75.400, stated that coal dust accumulations must be "...cleaned with reasonable promptness, with all convenient speed." Therefore, it is obvious that Section 75.400 does not contemplate citations for coal dust accumulations that are generated as a by-product of the extraction process. It is only the accumulation of coal dust particles, which inherently require a period of time to develop, that is prohibited by the mandatory safety standard.

In the instant case, Sylvester opined that it took approximately three to five shifts for the observed accumulations to occur. (Tr. 59). Sylvester's opinion with regard to the

4 Contestant witnesses Earl Kennedy, David Olson and Robert Omeare opined that the area in question was adequately rock dusted and did not warrant a Section 75.400 citation. In support of their opinions, the contestant submitted its own laboratory analysis of the incombustible content of purported relevant dust samples that it had obtained. (Tr. 212, 259-260, 262, 266-271, 293; Contestant's Exs. 5(a), 5(b), and 6). To ensure reliability, samples requiring analysis must be obtained by, and, remain in the possession of, enforcement personnel. I can conceive of no alternative enforcement procedure. Therefore, the contestant's laboratory findings are afforded little weight.

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duration of the accumulations is supported by the testimony of Mary Conaway who stated that the accumulations had existed for days. (Tr. 192-193). Significantly, Superintendent Omeat testified that Conaway is a general inside laborer who "spends the most time working on [the Number 8] belt." (Tr. 255). Therefore, the testimony of Conaway, who is admittedly familiar with the subject beltline, is entitled to great weight. Consequently, the evidence reflects that the contestant permitted the subject accumulations to occur over a period of at least several shifts in contravention of the mandatory safety standard in Section 75.400.

Although I have concluded that the contestant did not timely clean up, and thus permitted the accumulations, the evidence also reflects the contestant failed to take adequate measures to prevent this combustible accumulation. Superintendent Omeat admitted that the top sprays were removed from the No. 8 beltline. (Tr. 81, 256-260). Although Omeat testified that the top sprays were replaced by center sprays, the presence of the accumulations observed by the MSHA inspectors and confirmed by Conaway establish that the water spray dust suppression methods employed by Omeat were inadequate. Therefore, the record evidence provides an adequate basis for concluding that the contestant's failure to take adequate water suppression measures to prevent the accumulations also constitutes a violation of the mandatory safety standard in Section 75.400.

Significant and Substantial

In applying the Commission's Mathies criteria for establishing a significant and substantial violation it is clear that the impermissible accumulation of combustible materials contributes to a discrete safety hazard, i.e. the danger of combustion. It is also apparent that in the event of combustion, there was a reasonable likelihood that serious burn or smoke inhalation injury to mine personnel would occur.

The remaining issue is whether there is a reasonable likelihood that the hazardous event, namely combustion, could result as a consequence of the subject violation. Combustion requires a combustible fuel source in the presence of oxygen that is exposed to a source of heat constituting a source of ignition. Float coal dust is a combustible fuel source if it is placed in suspension. I credit the testimony of Inspector Weaver that float coal dust, comprised of particles small in size, can be easily placed in suspension. The suspension characteristics of float coal dust are particularly important in areas around a tail roller where dust particles can be easily mobilized. The presence of float coal dust around a tail roller that is malfunctioning and creating heat demonstrated by smoke, sparks, and "hot cherry-red coals," is particularly hazardous in that it provides all the elements of combustion. It is clear, therefore,

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that the circumstances in this case satisfy the Commission's significant and substantial criteria in Mathies. Accordingly, the cited violation of Section 75.400 was properly designated as significant and substantial.

Unwarrantable Failure

A violation is properly attributable to an operator's unwarrantable failure if the circumstances surrounding the violation reflect that the operator's conduct was "not justifiable or inexcusable. Such conduct is properly characterized as aggravated. See Youghiogheny and Ohio, at 9 FMSHRC 2010. In mitigation, the contestant argues, in essence, that it did not know about the malfunctioning tail roller prior to Sylvester's inspection. As noted by Justice Cardozo in Palsgraf, the degree of negligence must be viewed in the context of the risk to be reasonably foreseen by the conduct in question. A mine operator must ensure that a tail roller, a source of coal dust suspension, is properly aligned to prevent friction and the resultant heat that could precipitate an explosion. Thus, the responsibility lies with the operator to discover and promptly remedy such a situation. The contestant's failure to do so until after Inspector Sylvester discovered the condition constitutes unjustifiable and inexcusable conduct on the part of the contestant rather than mitigating circumstances. Thus, the violation in question was properly attributable to the contestant's unwarrantable failure. Accordingly, the contestant's contest of 104(d)(1) Citation No. 3305893 IS DENIED.

Docket No. WEVA 94-159-R(Footnote 5)
104(d)(1) Order No. 3305392

On December 30, 1993, MSHA Inspector Frank Bowers issued Order No. 3305392 at the contestant's Loveridge No. 22 Mine. The order was issued for an alleged violation of the mandatory safety standard concerning the prevention of combustible accumulations as set forth in Section 75.400.

Order No. 3305392 was issued as result of an inspection by Inspector Bowers and Inspector Joe Belacastro. Prior to proceeding underground to inspect the Loveridge 22 Mine, Bowers and Belacastro examined the preshift books. (Tr. 15). Inspector Bowers noticed that from December 22, 1993, the preshift examiners had noted that additional rock dust was needed in the No. 1 entry of the 1 Right 1 South section. (Tr. 17).

5 There are two volumes of testimony transcribed in these consolidated proceedings. All references to transcript pages in Docket No. WEVA 94-159-R relate to the transcript dated March 31, 1994.

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Upon arriving at the No. 1 entry of the 1 Right 1 South section, the inspectors observed accumulations of float coal dust on the roof and ribs for a distance of approximately 180 feet outby the last open crosscut. (Tr. 12-13, 96). As a consequence, Inspector Bowers issued Order No. 3305392 for failure to prevent the accumulation of float coal dust in this area.

A trickle duster is a fan which holds approximately 100 to 150 lbs. of rock dust. It propels the rock dust a distance of approximately 400 feet inby in order to coat the roof and ribs. (Tr. 56-57, 59, 133-144). The purpose of the trickle duster is to contain float dust by mixing with rock dust to create an incombustible mixture. (Tr. 57-58). In addition to the trickle duster, the loading machine and hand dusting are additional sources of rock dust. The most effective method of rock dusting is utilization of a bulk duster. (Tr. 126). Section Foreman Ralph Cowger testified that it is standard operating procedure to operate a trickle duster at all times during mining operations. (Tr. 116).

Although Bowers characterized the subject accumulations as black in color, Bowers also testified that there was evidence of rock dusting efforts in the cited area. In fact, Bowers described the mine floor as gray in color. (Tr. 12-14, 68). On a scale of 1 to 10, one being perfect rock dusting and ten being no rock dusting, Bowers testified that he would rate the area between 5 and 7. (Tr. 76-77). Bowers characterized the rock dusting job done by the contestant in outby areas of the section as "pretty good" and "beautiful." (Tr. 30, 80).

Fact of Occurrence

The mandatory safety standard in Section 75.400, in pertinent part, prohibits the accumulation of float coal dust on top of rock dusted surfaces. The operator can escape liability under this standard if it complies with the rock dusting provisions of Section 75.402, 30 C.F.R. 75.402, which requires rock dusting within 40 feet of all working faces. The adequacy of rock dusting is determined by the provisions of Section 75.403, 30 C.F.R. 75.403, which sets forth the requisite content percentages of coal dust and rock dust materials.

In determining whether the Secretary has prevailed in establishing the fact of occurrence of this alleged violation of Section 75.400, it is helpful to compare this case to the facts in Docket No. WEVA 94-158-R discussed above. In that docket, the contestant was charged with permitting float coal dust accumulations on top of rock dusted surfaces and on the structure of its beltline. Here, the evidence reflects that the area 180 feet inby the last open crosscut was repeatedly rock dusted. The sole issue is the adequacy of the rock dusting. In this regard,

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both Inspector Bowers and Mine Safety Escort Franklin C. Ash testified that the accumulations looked darker when viewed from the outby side facing into the air flow than from the inby direction. (Tr. 45, 149-150). This was attributable to the particle patterns that form as a result of the mixture of rock dust and float coal dust that is influenced by the inby direction of the air flow.

Bowers testified that he issued the order on December 30, 1993, because the condition had been reported in the preshift examination book on December 22, 1993, but had not been corrected. (Tr. 35-36). However, Bowers conceded that it was possible that remedial action might have occurred over the period from December 22 through December 30, 1993, but that float coal dust continued to accumulate as a result of continued mining operations. (Tr. 52).

In fact, the preshift examination book, relied upon by Bowers as evidence that the contestant had ignored the condition, documents the contestant had made several efforts to rock dust the area. For example, the day shift on December 29 reflects that the "last 180 feet was dusted by hand although additional dusting was needed." The notation on the morning of the issuance of the citation on December 30, 1993, reflects that the last 180 feet of the return was "dusted with loader - needs more." See Joint Ex. 1, pps. 35, 37 and 39.

Thus, the evidence establishes the area in question had been repeatedly rock dusted with the trickle duster, hand dusted and dusted with the loader. Given the entries in the preshift examination book, as well as the description of the variation in color of the accumulations depending upon the inby or outby orientation of the observer, it is apparent the appropriate issue should be whether the cited area was adequately rock dusted.

Consequently, the relevant mandatory safety standards are the rock dusting provisions in Section 75.402 and the incombustible content requirements set forth in Section 75.403. Dust samples for the purpose of analyzing the incombustible content of the accumulations in question were not obtained as the contestant was not charged with a violation of these mandatory standards. Therefore, the question of whether or not these rock dusting safety standards were violated is not before me.

Given Bowers' conflicting testimony, the grey color of the subject accumulations, and pertinent notations in the preshift examination book concerning relevant rock dusting efforts, the Secretary has failed to establish by a preponderance of the evidence that float coal dust was permitted to accumulate on rock dusted surfaces in violation of Section 75.400. Accordingly, Order No. 3305392 IS VACATED and the contestant's contest with respect to this order IS GRANTED.

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ORDER

In view of the above, the contests of Citation No. 3305270 in Docket No. WEVA 94-157-R and Citation No. 3305893 in Docket No. WEVA 94-158-R ARE DENIED. IT IS FURTHER ORDERED that Order No. 3305392 IS VACATED and the contest of this order in Docket No. WEVA 94-159-R IS GRANTED.

Jerold Feldman
Administrative Law Judge

Distribution:

Elizabeth S. Chamberlain, Esq., Consolidation Coal Company, 1800
Washington Road, Pittsburgh, PA 15241 (Certified Mail)

Caryl L. Casden, Esq., Office of the Solicitor, U.S. Department
of Labor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified
Mail)

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