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SOL (MSHA) V. JBD FUELS
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 93-337
Petitioner : A.C. No. 16-16508-03555
v. :
 : Docket No. KENT 93-411
JBD INDUSTRIAL FUELS, INC., : A.C. No. 15-16508-03561
Respondent :
 : Harlan #1 Mine

DECISION

Appearances: Marybeth Bernui, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for Petitioner;
Mr. Jefferson B. Davis, President, JBD Industrial
Fuels, Inc., Pathfork, Kentucky, for Respondent.

Before: Judge Fauver

These actions for civil penalties were brought under
105(d) of the Federal Mine Safety and Health Act of 1977
30 U.S.C. 801 et seq.

Having considered the hearing evidence and the record as a
whole, I find that a preponderance of the substantial, reliable,
and probative evidence establishes the Findings of Fact and
Further Findings in the Discussion below:

FINDINGS OF FACT

1. Respondent, JBD Industrial Fuels, Inc., a small-sized
coal company, operates an underground mine known as Harlan No. 1.
The mine produces coal for sales in or substantially affecting
interstate commerce.

2. On November 2, 1992, Federal Mine Inspector Roger
Dingess issued 104(d)(1) Order No. 3003138 at the mine,
alleging a violation of 30 C.F.R. 75.303 for failure to conduct
an adequate preshift examination. The inspector observed that
there was float coal dust on the number one belt, the fire sensor
line was severed in several places and there were power cables
that had exposed wires. These hazards were not reported in the
pre-shift book and were not corrected before the miners went
underground.

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3. The float coal dust on the No. 1 belt could propagate a fire and, if put in suspension with an ignition source, could cause a mine explosion. Ignition sources present included power wires and belt rollers. The float coal dust observed by Inspector Dingess was from 1/4 to 1/2 inch deep.

4. The fire sensor line was cut in several places in two locations, about 10 feet apart. This was an unsafe condition. If a fire occurred, with the line cut there would be no warning to the outside attendant. The severance of the fire sensor line was obvious.

5. On the same day, Inspector Dingess issued 104(d)(1) Citation No. 3003133 alleging a violation of 30 C.F.R. 75.400 for the float coal dust accumulations found on the No. 1 belt. This citation was not contested by the operator.

6. On November 2, 1992, Inspector Dingess issued Order No. 3003136 alleging a violation of 75.1722. Inspector Dingess observed that the roller fins and pinch points of the tail roller on the No. 1 belt were exposed and not adequately guarded.

7. Section 107(a) Order No. 3832918, Citation No. 3832919, and Citation No. 3832920 were all issued on September 9, 1992, concerning a roof fall that trapped the mine owner and shift foreman around 11:30 p.m., September 8, 1992.

8. Inspector Dingess issued the 107(a) order when he observed there had been a roof fall and miners were working under an unsafe roof. In conjunction with the order, the inspector issued Citation No. 3832919 for a violation of 75.220, alleging that the approved roof control plan was not being followed. The inspector observed unsafe roof conditions in the three entries that were being mined in the area where the roof fall had occurred. He found that crossbars or steel straps required by the roof control plan were not installed.

9. Inspector Dingess issued Citation No. 3832920 on September 9, 1992, for a violation of 50.10, alleging that the operator had failed to notify MSHA immediately after the roof fall accident on September 8, 1992, at 11:30 p.m. MSHA was not notified of the accident until about 10:30 a.m. the following day.

10. Respondent withdrew its contest of Citation No. 3003151, issued on November 20, 1992, for a violation of 75.1714, and agreed to pay the proposed penalty of \$50

DISCUSSION WITH FURTHER FINDINGS, CONCLUSIONS

Order No. 3003138

This order was issued for failure to conduct an adequate preshift examination, in violation of 75.303. The evidence shows there was float coal dust on the No. 1 belt, the fire sensor line was severed in several places, and there were power cables in the same area with exposed wires. These conditions were unsafe and should have been reported and corrected before miners were sent underground.

Section 75.303 of the regulations repeats section 303(d)(1) of the Mine Act, which was carried over without change from the 1969 Act. As both the Senate Report and the Conference Report explain:

No miner may enter the underground portion of a mine until the preshift examination is completed, the examiner's report is transmitted to the surface and actually recorded, and until hazardous conditions or standards violations are corrected.

Birchfield Mining Co., 11 FMSHRC 31 (1989) citing 94th Cong., 1st Sess. Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969 at 183 and 1610 (1975).

Respondent's failure to conduct a proper preshift examination was a significant and substantial violation. The accumulation of float coal dust is one of the most serious hazards in mining which Congress sought to eradicate in passing the Mine Act. As the Commission stated in Black Diamond Coal Mining, 7 FMSHRC 117, 1120 (1985):

We have previously noted Congress' recognition that ignitions and explosions are major causes of death and injury to miners: "Congress included in the Act mandatory standards aimed at eliminating ignition and fuel sources for explosions and fires. [Section 75.400] is one of those standards." Old Ben Coal Co., 1 FMSHRC 1954, 1957 (December 1979) The goal of reducing the hazard of fire or explosions in a mine by eliminating fuel sources is effected by prohibiting the accumulation of materials that could be the originating sources of

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FOOTNOTE 1

A violation is "significant and substantial" if there exists a reasonable likelihood that the hazard contributed to will result in an injury of a reasonably serious nature. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981).

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explosions or fires and by also prohibiting the accumulation of those materials that could feed explosions or fires originating elsewhere in a mine.

In addition to hazardous accumulations of float coal dust and exposed wires, the fire sensor line had been cut so that in the event of a fire or explosion the miners would not have been alerted to evacuate the mine.

I also find that this was an unwarrantable violation, which the Commission has defined as a violation due to aggravated conduct constituting more than ordinary negligence. An unwarrantable violation is especially clear when the person who committed the violation was a supervisor. *Youghiogheny & Ohio*, 9 FMSHRC 2007, 2011 (1987). In the instant case, the preshift examination was conducted by the shift foreman who, despite the existence of unsafe conditions in the area where the miners were required to work or travel, failed to report the hazards in the preshift examination book and have them corrected before sending the miners underground.

Order No. 3003136

This order was issued on the same day as the previous order. The inspector observed the tail roller unguarded in an area where the coal seam height was only 28 to 32 inches and visibility was poor. Persons passing by the unguarded tail roller had to crawl with limited illumination (their cap lights). It was reasonably likely that persons passing by the unguarded tail roller would come into contact with moving parts and suffer a serious injury. The violation was therefore significant and substantial.

An unwarrantable violation may be indicated where the mine has a history of similar violations. See e.g., *Quinland Coals*, 10 FMSHRC at 709 (a history of similar bad roof conditions); and *Peabody Coal Co.*, 8 FMSHRC 1258, at 1263 (operator cited 17 times for a violation of the same standard in the preceding six and one-half months). In the instant case, Respondent had been cited at least six times for similar violations in the preceding 18 months, including a citation in August 1992 for an unguarded tail roller on the No. 2 belt.

An unwarrantable violation may also be indicated where the violation was obvious and existed for a substantial period. Inspector Dingess testified that the unguarded tail roller was obvious to anyone who crawled by it and that material on top of the folded-back guard was dry and packed, indicating the tail roller had been unguarded for several days.

On balance, I find the violation charged in Order No. 3003136 was due to aggravated conduct beyond ordinary negligence and was therefore an unwarrantable violation.

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Citation Nos. 3832919 and 3832920

These citations were issued during an investigation of a roof fall that had trapped the mine owner and shift foreman for over one and one-half hours. Citation No. 3832919 charges a violation of 30 C.F.R. 75.220 for failure to comply with the operator's approved roof control plan after the accident.

The evidence substantiates this charge. The plan required roof bars and steel straps in areas of pots and slips, as well as narrowing the area down to 14 feet with wooden roof supports. The night before the investigation, the owner and shift foreman were working on the section when the roof fell and trapped them for about one and one-half hours. Despite this accident, the owner and foreman failed to provide the additional roof support required by the roof control plan, thus exposing the miners working in the area to the hazards of another roof fall. The Inspector observed that these measures had not been taken in an area where pots and slips revealed an unsafe roof.

Respondent contends that Inspector E.C. Smith had been to the mine a day or so before the roof fall and failed to issue a citation with regard to the roof conditions. MSHA records indicate the last time Inspector Smith was on the section before the roof fall (on September 8, 1992) was August 26, 1992. Failure by an inspector to issue a citation for a particular violation does not estop him or another inspector from issuing a citation for that violation during a subsequent inspection. Midwest Minerals Coal Co., Inc., 3 FMSHRC 1417 (1981); Missouri Gravel Co., 5 FMSHRC 1359 (1983); and Conesville Coal Preparation Co., 12 FMSHRC 639 (1990). Moreover, the roof fall on September 8, 1992, placed an added burden on Respondent to examine the roof and add support where needed.

Citation No. 3832920 charges a violation of 50.10 because the operator failed to notify MSHA immediately after the roof fall accident. The operator could have called MSHA's 24-hour phone number to comply with this regulation. However, the operator delayed almost 12 hours. The requirement that an operator immediately report certain types of accidents to MSHA is an important part of mine safety and enforcement in terms of both accident investigation and assistance to injured or trapped miners. I find that this was a serious violation although it was not "significant and substantial" within the meaning of 104(d) of the Act.

Assessment of Civil Penalties

Respondent is a small-sized operator producing less than 100,000 tons of coal a year. Its compliance history (Exhibit G-1) shows Respondent has been delinquent in paying prior civil penalties. However, after the hearing Respondent negotiated a payment plan with MSHA and has been making timely payments. Respondent made a good faith effort to achieve rapid compliance after notification of each violation cited in this case.

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Considering all the criteria for assessing civil penalties in 110(i) of the Act, I find the following civil penalties to be appropriate for the violations found herein:

Order or Citation	Civil Penalty
No. 3003138	\$2,500
No. 3003136	\$ 400
No. 3832919	\$1,200
No. 3832920	\$ 250
No. 3003151	\$ 50
	\$4,400

CONCLUSIONS OF LAW

1. The judge has jurisdiction.

2. Respondent violated the safety standards as alleged in Orders Nos. 3003138 and 3003136 and in Citations Nos. 3832919, 3832920, and 3003151.

ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay civil penalties of \$4,400 within 30 days from the date of this decision.

William Fauver
Administrative Law Judge

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