CCASE:
SOL (MSHA) V. BOB & TOM COAL
DDATE:
19800928
TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDING |
| | : | Docket No. KENT 94-116 |
| | : | A.C. No. 15-16927-03541 |
| v. | : | |
| | : | No. 6 Mine |
| BOB & TOM COAL COMPANY, INC., Respondent | : | |

DECISION

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner.

Before: Judge Barbour

In this proceeding the Secretary, on behalf of the Mine Safety and Health Administration (MSHA) and pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977 (Mine Act or Act), filed a petition for assessment of civil penalties against Bob & Tom Coal Company, Inc. (Bob & Tom). The Secretary alleged that in eight instances the company violated mandatory safety standards for underground coal mines. (The standards are found in Title 30, Part 75 of the Code of Federal Regulations (C.F.R.).) The Secretary further alleged that the violations were significant and substantial (S&S) contributions to mine safety hazards and that they occurred at Bob & Tom's No. 6 Mine, an underground bituminous coal mine located in Harlan County, Kentucky.

Joe Hensley, President of Bob & Tom, filed a timely answer on the company's behalf in which the company challenged various aspects of the Secretary's petition as it related to each alleged violation. Following the issuance of a prehearing order and the parties' responses thereto, the matter was noticed for hearing on June 7, 1994, in Middlesboro, Kentucky.

The hearing was convened as scheduled and counsel for the Secretary entered her appearance. No person appeared on behalf of Bob & Tom. (The notice of hearing dated April 19, 1994, was served on Mr. Hensley by certified mail. The return receipt indicates that it was received on April 25, 1994.)

At my request, counsel for the Secretary described her contacts with the representatives of Bob & Tom. She stated

that during the week prior to the hearing she twice called Hensley and both times was told he was not in the office. She left messages for Hensley to call her, but her calls were not returned (Tr. 6-7).

The day prior to the hearing, counsel received a telephone call from David Williams, an engineer for Bob & Tom. Williams told counsel that the "meeting" on June 7 would have to be canceled. Counsel stated that she told Williams it was "probably too late," that he should appear at the hearing and that if he failed to appear the company could be defaulted (Tr. 7-8).

Noting that the notice of the specific site for the hearing had been sent by facsimile copy and by certified mail to the parties on June 2, 1994, I recessed the hearing while counsel attempted to telephone a representative of the company (Tr. 9). Forty five minutes later counsel reported that the person who answered the telephone told her that neither Hensley nor Williams would be at the mine office during the day. She also indicated that she had checked with her office and that no messages had been left for her there (Tr. 10-11). In addition, I too placed a telephone call to my office and was advised that no one from the company had called for me (Tr. 11).

I stated that the Commission and the Secretary had gone to considerable expense to prepare for the hearing and that a party's unexplained failure to appear at a duly noticed hearing indicated contempt for the Act in general and the Commission's hearing process in particular. I further stated my belief that such contumacious conduct undermined the ability of the Act to provide miners with more effective protection against hazardous conditions and practices. Finally, I requested that counsel present her case in full so that I might have the benefit of a complete record (Tr. 12-13).

## THE NO. 6 MINE and BOB & TOM

Jim Langley, a coal mine inspector and accident investigator, testified that he conducted a regular inspection of the No. 6 Mine on August 11, 1993. According to Langley, the mine employed approximately 10 persons. Coal was mined with a continuous mining machine on one section. The height of the coal seam averaged 32 to 33 inches. The mine is located above the water table. Although Langley never detected methane at the mine, he believed others had (Tr. 17-18).

Counsel for the Secretary maintained that the company quit mining under the name Bob & Tom, but that mining effectively continued under the name of Day Branch Coal Company (Day Branch) and that Hensley controlled both operations (Tr. 102). According to counsel, the No. 6 Mine was renamed the Day Branch No. 10 Mine. It was one of several mines that Day Branch and Hensley operated. Id.

CITATION NO. 4040112

Citation No. 4040112, alleges a violation of 30 C.F.R. 75.400, and states that "float coal dust has been allowed t accumulate inside the section power center. The dust was black in color and was present over the energized components of the power center" (Exh. P-1). The citation also contains a find that the alleged violation was S&S.

Langley stated that while inspecting the section power center on August 25, 1993, he observed float coal dust inside the power center and spread over the center's energized components (Tr. 19). He viewed the dust through the power center's windows, located on its sides. The dust was black, but he could not determine its depth due to the covers on the equipment (Tr. 20). The power center, which received 4160 volts of electricity, was located approximately four crosscuts outby the face. Id.

Langley considered the condition to be hazardous because electrical arcs were created inside the power center when the power to equipment was turned on or off. These arcs could have ignited the coal dust (Tr. 21).

Because there was an ignition source in close proximity to the coal dust, Langley believed it was reasonably likely a fire could have occurred. It was not unusual for miners to work at the power center and a fire would have exposed miners to the dangers of flame, smoke and carbon monoxide, any of which hazards could have resulted in serious injuries (Tr. 22-24).

The power center was examined weekly by mine management. Because of the color of the accumulation, Langley believed that the coal dust had been present on the power center for more than one week and that the company examiner had passed it by (Tr. 25).

THE VIOLATION

Section 75.400 prohibits the existence of accumulations of combustible materials. The Commission has held that a violative "accumulation" exists "where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary, it likely could cause a fire or explosion if an ignition source were present." Old Ben Coal Co., 2 FMSHRC 2806, 2808 (October 1980). In defining a prohibited "accumulation" for section 75.400 purposes, the Commission explained that "some spillage of combustible materials may be inevitable in mining operations. However, it is clear that those masses of combustible materials which could cause or propagate a fire or explosion are what Congress intended to proscribe." Old Ben Coal Co., 2 FMSHRC at 2808.

Langley's testimony was clear. I find that the float coal dust located on the electrical components in the interior of the power center was such that it could have caused or propagated a fire. In the judgement of the inspector, the quantity of the dust in the immediate vicinity of electric arcs presented the very real danger of an ignition as mining progressed on the section. I accept this view and find that the violation existed as charged.

S&S and GRAVITY

The test set forth by the Commission in Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1994) for determining whether a violation is S&S in nature is well known and need not be repeated here. I have concluded that a violation of the mandatory safety standard existed. Moreover, the evidence establishes a discrete safety hazard in that the existence of the accumulation in the vicinity of electric arcs subjected miners working at the power center to the possibility of an ignition and to burn and inhalation injuries arising therefrom. Fortunately, such injuries did not occur, but they were reasonably likely. An actual ignition source to ignite the coal dust was present and would have continued to be present as mining progressed and as power was turned on and off. Moreover, miners were required to work in the immediate vicinity of the power center. Finally, any such injuries would have been reasonably serious, if not fatal. I conclude therefore that the violation was S&S.

The concept of gravity involves analysis of both the potential hazard to miners and the probability of the hazard occurring. Here, the hazard was of burn injuries or of injury due to the inhalation of smoke or carbon monoxide. Given the conjunction of the accumulation and electrical arcing inside the power center, the probability of an ignition was high. This was a serious violation.

NEGLIGENCE

The accumulation was visually obvious. Langley could see its extent and color through the side windows of the power center. Further, I credit his belief that the accumulation existed for more than one week and consequently that it should have been observed and cleaned up. Bob & Tom's failure in this regard was a sign of its lack of due care. I therefore conclude the company was negligent.

CITATION NO. 4040113

Citation No. 4040113, alleges a violation of 30 C.F.R. 75.1101, and states that "the section belt drive was no provided with a deluge water spray system" (Exh. P-2). The

citation also contains a finding that the alleged violation was S&S in nature.

Langley testified that during his inspection he observed that the section belt drive was not provided with a deluge water spray system. (However, there was a fire extinguisher at the belt head (Tr. 31).) The purpose of the spray system is to suppress belt fires. The sprays automatically turn on when the system's sensors are activated by heat (Tr. 27).

Langley further testified that there was no evidence such a system had ever been installed at the belt drive (Tr. 28). Langley believed the belt drive was set up on August 13, 1993 and that the violation existed from that date.

Langley also observed loose coal and coal dust under the belt and float coal dust on the belt. Indeed, the belt was running in the coal and coal dust and Langley believed the friction from the belt rubbing in the material could cause an ignition (Tr. 29-30). The belt itself was dry (Tr. 31).

In Langley's view, the combustible material in the presence of the ignition source, coupled with the lack of a deluge fire suppression system, made it reasonably likely an accident would have occurred, an accident that would have resulted in miners being exposed to smoke and carbon monoxide as well as to possible burn injuries (Tr. 35-36). Further, if the belt itself burned, additional toxic fumes would have been liberated. Id.

Langley observed the conditions at 2:40 p.m. (Exh. P-2). He cited the company for a violation of section 75.1101, and he gave Bob & Tom slightly more than two and one half hours to abate the violation. When Langley returned to the mine on August 26, the system had not been installed and no one was working to install it (Tr. 33). The only reason offered for the failure to install the spray system was that the section repairman had not gotten around to it (Tr. 33). Therefore, Langley issued an order of withdrawal closing the section belt (Exh. P-3, Tr. 33). Bob & Tom abated the condition by installing a deluge water spray system whose parts were taken from an old belt drive (Tr. 34).

## THE VIOLATION

Section 75.1101, which reiterates section 311(f) of the Act, 30 U.S.C. 871(f), states, in part, that "deluge-type water sprays ... or other no less effective means approved by the Secretary of controlling fire, shall be installed at main and secondary belt-conveyor drives." Here, where the belt-conveyor drive for the continuous haulage system did not have a deluge-type water spray or any other system approved by the Secretary, the violation existed as charged. See Tr. 40-41.

S&S and GRAVITY

As I have just found, there was a violation of the cited standard. There also was a discrete safety hazard in that the lack of a deluge-type fire suppression system at the belt drive, together with the fact that the belt was running in coal and coal dust and that there were accumulations of coal dust on the belt and around the belt drive, meant that an ignition at the belt drive was unlikely to be quickly extinguished. (Although it is true that a fire extinguisher was located in the vicinity of the belt drive, its immediate and therefore effective use could not be assured because a miner was not present always at the belt drive.) That a fire and injuries resulting therefrom were reasonably likely is established by the fact that all of the elements necessary for the potential hazard to come to fruition were in place at or near the belt drive -- an ignition source, combustible material, exposed miners and a lack an automatic means to extinguish an ignition. Moreover, and as Langley noted, any injuries resulting from an unextinguished ignition, whether in the form of burns or the inhalation of smoke or toxic gases, were likely to be of a reasonable serious nature. The violation was S&S.

The violation also was serious in that the potential hazard to miners was grave given the confluence of conditions at and around the belt drive.

NEGLIGENCE

Negligence is the failure to exercise the care required by the circumstances. Langley could see no evidence that a deluge-type water spray system ever was installed. He noted the condition on August 25. I accept his testimony that the spray system had been missing for 12 days, that is, since the belt drive had been set up (Tr. 28). The standard is clear as to what is required. Bob & Tom had materials on hand necessary for the spray system. Certainly, the operator knew the spray system was missing, and its failure to have had one installed signaled its failure to meet the required standard of care. Bob & Tom was negligent.

CITATION NO. 4040114

Citation No. 4040114, alleges a violation of 30 C.F.R. 75.383(a), and states that "an up-to-date escapeway map wa not provided for the mine 001 section" (Exh. P-4). The citation also contains a finding that the alleged violation was S&S in nature.

Langley testified that a map showing the escapeways was not present on the 001 Section (Tr. 41). The map is required in order to illustrate for miners the way to the surface in the event of a fire or of an explosion.

In Langley's opinion, if a fire occurred, miners were likely to panic and forget the location of escapeways or become disoriented by smoke and loose their way (Tr. 42). Indeed, Langley discussed an accident where this very thing happened (Tr. 46).

The danger of miners being unable to find their way out of the mine was aggravated by the fact that all of the self rescuer devices required by the regulations were not present on the section (Tr. 43-45). Miners who became lost in the smoke could have perished because they could not have found their way out in time (Tr. 48).

Langley cited the violation on August 25. He believed the mine had been without a map since August 13, the date the direction of mining on the section changed (Tr. 42). Langley also noted that there were several ignition sources on the section, as well as loose coal in every entry and loose coal and float coal dust along the beltline (Tr. 49-50).

Langley testified that all eight persons who worked on the 001 section would have been affected by the lack of the escapeway map. Given the fact that the map was missing and given the combustible materials on the section, Langley believed it reasonably likely there would have been injuries or fatalities in the event of a fire (Tr. 51-52).

## THE VIOLATION

Section 75.383(a) states in part, "A map shall be posed in each working section ... and shall show the designated escapeways from the working section." Clearly, such a map was not present on the 001 section, and I find the violation existed as charged.

## S&S and GRAVITY

I also conclude the violation was S&S. Because I credit Langley's testimony regarding the presence of ignition sources and combustible coal and coal dust, I believe that a fire or explosion was reasonably likely to have occurred had mining continued on the section. Further, I believe that Langley was right when he stated that without a map miners were likely to panic and to lose their way in the smoke. Therefore, I find that it was reasonably likely miners on the 001 section would have suffered serious injury or death due to the failure of the operator to ensure the presence of the escapeways map on the working section.

I find the violation was serious. As I have noted, the map could have made the difference between life and death to miners working underground.

NEGLIGENCE

The map was management's responsibility. There was ample time to provide one. In failing to ensure its presence, management failed to meet the standard of care required. I therefore find the operator was negligent.

CITATION NO. 4040115

Citation No. 4040115, alleges a violation of 30 C.F.R. 75.503, and states that "the S&S 482 scoop used on the mmu-00 section was not maintained in permissible condition because an opening greater than .005 of an inch existed in the cover of the starting box lid" (Exh. P-5). The citation also contains a finding that the alleged violation was S&S in nature.

Langley explained that section 75.503 requires that electric equipment operated on the section be maintained in permissible condition, which means that "equipment is maintained in the condition to prevent an explosion or a fire" (Tr. 53). To do this the electrical components of the equipment must be kept relatively air tight so that methane does not seep into the components. Id.

Here, the bolts on the starting box of the scoop were loose and there was a resulting gap in the box through which methane could have entered. (Langley measured the gap with a feeler gauge.) Once inside, methane could have been ignited by the electric arcs in the starting box. Further, the scoop was used in face areas, returns and old works, areas where methane was likely to accumulate.

If methane had been ignited, Langley believed it was reasonable to expect that the scoop operator would have received first or second degree burns, or even have been killed (Tr. 56). Moreover, a methane ignition could have effected the entire mine in that an explosion could have been propagated by the dust put into suspension by the force of the ignition. The explosion would have traveled toward the surface, as the coal dust and float coal dust along the beltline was ignited (Tr. 56-57). The scoop was energized when it was observed by Langley (Tr. 57).

THE VIOLATION

Section 75.503 states, in part, that "the operator of each coal mine shall maintain in permissible condition all electric face equipment ... which is taken into or used inby the last open crosscut." There is no question that the starting box of

the scoop contained a gap in excess of .005 inches. Likewise, there is no dispute that such a gap was not permissible and was in violation of section 75.503. Therefore, I find that the violation existed as charged.

S&S and GRAVITY

This violation posed a likelihood of serious injury, even of death, to miners. As Langley explained, methane could have entered the scoop's starting compartment through the gap and could have been ignited by an arc or spark within the box (Tr. 53). That this likelihood was reasonable is established by Langley's testimony that the scoop was operated in areas where methane was likely to accumulate and that electric arcs occurred within the starting box (Tr. 54.) Given Langley's uncontroverted testimony, I conclude the violation was S&S.

The violation was serious. Not only did it pose the hazard of a methane ignition, but, as Langley explained, given the presence of the coal dust and float coal dust on the section and along the belt, the ignition could have triggered an explosion that could have effected the entire mine and all personnel in it, whether or not they worked on the 001 section (Tr. 56-57).

NEGLIGENCE

Electric face equipment, such as the scoop, is required to be maintained in permissible condition. It is the operator's responsibility. The record reveals no mitigating factors for management's obvious failure to meet this standard of care. Therefore, I conclude Bob & Tom was negligent.

CITATION NO. 4040116

Citation No. 4040116 alleges a violation of 30 C.F.R. 75.1719-1(e)(6), and states that "lights were not provided fo the 482 S & S Scoop used on mmu-001" (Exh. P-6). The citation also contains a finding that the alleged violation was S&S in nature.

Langley stated that, in addition to having a gap in excess of .005 inches in the starting box, the scoop lacked lights (Tr. 58). The only light the operator of the scoop had available was from his cap lamp (Tr. 59). There should have been four lights on the scoop, two on the front and two on the back. The front lights had been torn from the machine, and the rear lights were not working (Tr. 64). If the lights had been operating, they would have illuminated the periphery of the scoop. The cap lamp did not (Tr. 60).

The scoop was used in 32 inch coal, and miners had to crawl in the area. Because of the mining height, the scoop

operator could not lift his or her head high enough over the frame of the scoop to illuminate the area opposite the scoop operator (the off side) (Tr. 63). Lights would have provided the operator with visibility on the off side (Tr. 63). The section foreman traveled in the area, as did those miners whose job it was to hang ventilation curtain and take methane readings. Langley guessed that the scoop traveled at a speed of approximately six miles per hour (Tr. 60).

Given these factors, Langley believed that it was reasonably likely the scoop operator would strike another miner (Tr. 61). A factor making an accident even more likely given the lack of lights was the noise made by the continuous mining machine and the bridge conveyor. Langley stated that both created "a lot" of noise and, if the scoop was in use in an entry adjacent to one being mined, it would have been difficult for a miner working or traveling in the vicinity of the scoop to hear the scoop (Tr. 61-62). A miner hit by the scoop could have been crushed (Tr. 61).

## THE VIOLATION

Section 75.1719-1(e)(6) states that unless the entire working place is illuminated by stationary lighting equipment, "luminaries shall be installed on each machine operated in a working place." These lights are required to illuminate areas both in front and in back of the machine. The testimony establishes that the two front lights were not present on the scoop and the two back lights were not working. Thus, front luminaries were not installed as required and the area in back of the machine was not illuminated as required. The violation existed as charged.

## S&S and GRAVITY

As Langley explained, the lack of proper illumination contributed to the likelihood of a miner being struck by the scoop. That this was reasonably likely to have happened and could have resulted in an injury was made clear by the fact that the area where the scoop was being operated was the very area where the section foreman was required to travel and miners were required to work. The scoop operator had inadequate visibility, especially on the off side, to see the foreman and miners. In addition, the fact that the shuttle car was a massive piece of equipment and traveled at speeds of up to six miles per made it a virtual certainty that any person struck by the equipment would have been seriously injured, if not killed outright. Therefore, I conclude the violation was S&S.

The likelihood of an accident, coupled with the potential for serious injury or death, meant that this was a serious violation.

NEGLIGENCE

It was management's duty to assure mining machinery was maintained in safe operating condition. The violation was visually obvious. Management knew, or should have known, of its existence. Operating the scoop in a condition that was obviously hazardous to miners was indicative of management's failure to meet the required standard of care. The company was negligent.

CITATION NO. 4040118

Citation No. 4040118, alleges a violation of 30 C.F.R. 75.1713-7(a)(1), and states that "adequate first-aid supplie were not maintained on the surface area of this underground mine" (Exh. P-7). The citation also contains a finding that the alleged violation was S&S in nature.

Langley stated that the company had three surface employees. One miner watched the belt and two drove coal haulage trucks (Tr. 65). In addition, all underground miners traveled on the surface to and from the mine. Langley stated that no first aid supplies were stored on the surface, not even a band-aid (Tr. 66). Langley agreed that the missing supplies could be described as "the basic stuff that keeps you going until the paramedics can get there" (Tr. 70). In the event of an injury requiring a tourniquet, none would have been present, and there were no splints for broken bones or blankets for shock victims (Tr. 66-67).

THE VIOLATION

Section 75. 1713-7(a)(1) requires each operator to keep specified first-aid equipment at the mine dispatcher's office or other appropriate work areas on the surface and in close proximity to the mine entry. As Langley indicated, among the equipment specified are tourniquets, blankets and splints. In addition, such basic things as bandages and compresses also are required. None of these items were present on the surface. The violation existed as alleged.

S&S and GRAVITY

The violation was both S&S and serious. If an injury had occurred, means for treating it until professional help arrived was lacking. Frequently, such stop-gap treatment is necessary to prevent the aggravation of an injury, or even to save a victim's life. If normal mining operations had continued, it is likely that sooner or later a miner would have been injured. When this happened, there was a reasonably likelihood that the hazard contributed to -- lack of prompt and effective emergency medical treatment -- would have compounded the injury. Given the

dangers inherent in mining, there is no doubt that the lack of first-aid equipment presented a serious hazard to miners.

NEGLIGENCE

In failing to provide the required first-aid equipment, Bob & Tom negligently failed to meet the standard of care required of an operator.

CITATION NO. 4248441

Citation No. 4248441 alleges a violation of 30 C.F.R. 75.364(a)(1) and states that "the weekly examination of th worked out areas inby where 1st right has started mining off the mains has not been conducted weekly" (Exh. P-8). The citation also contains a finding that the alleged violation was S&S in nature.

Langley stated the citation was issued for the failure to examine on a weekly basis worked out areas of the mine. Langley explained that mining operations had driven straight ahead for approximately 6,000 feet when the decision was made to pull back about 2,000 feet and to mine in a new direction. Once mining was started in the new direction, the old works were not examined (Tr. 72-73). Langley was sure they were not examined because no dates, times or initials were recorded (Tr. 73-74). Also, Langley asked the section foreman if he had conducted the examinations and the foreman replied he "didn't have time" to do them (Tr. 76).

Failure to examine the worked out area could have lead to accumulations of methane or of air with low oxygen content (Tr. 74). Supplies had been left in the area -- an old belt structure and roof bolting supplies -- and Langley feared that a miner would take equipment into the old works to retrieve the supplies, that the equipment would malfunction electrically and accumulated methane would be ignited (Tr. 76). Indeed, Langley testified that he was aware of a recent explosion at another mine caused in just this way, an explosion that killed two miners (Tr. 77-78).

If there had been a explosion, the heat and flames could travel out of the old works and the accumulations of coal and coal dust along the belt line could have ignited. In this way, the effects of the explosion could have traveled to the surface (Tr. 79). Depending upon the extent of the explosion, one person could have been affected (the person who went to the old works for the supplies) or, all miners working underground could have been affected. Any of those involved could have suffered injuries ranging from first or second degree burns to smoke inhalation (Tr. 79).

## THE VIOLATION

Section 75.364(a)(1) requires that at least once every seven days a certified person examine unsealed, worked-out areas measuring methane and oxygen concentrations. 30 C.F.R. 75.364(g) requires that such an examination be certified by th examiner posting his or her initials, the date, and the time of the examinations at enough locations to show the examination was made. Clearly, the required weekly examinations were not made. They were not certified as required and the section foreman stated he was not doing them. Therefore, I conclude the violation existed as charged.

## S&S and GRAVITY

I agree with Langley that the violation was S&S. As he explained, methane is present in the seam being mined and without the required weekly examination there was no way to know if the methane was accumulating in the old works. The presence of the belt structure and the roof bolting materials meant that it was likely miners and equipment would return to the old works. Indeed, Langley testified that the day before the violation was cited the scoop had been driven into the old works to retrieve part of the deluge water system from the old belt structure (Tr. 76). I conclude therefore that there was a discrete safety hazard in that methane could have accumulated undetected in the old works. Further, the record establishes it was likely the scoop would have been taken into the unexamined areas to retrieve the supplies. (This was the same scoop that was not maintained in permissible condition.) I therefore find it reasonably likely that a potential ignition source would have been present in the unexamined areas. In my view, the lack of the required examination, the possibility of methane accumulating in the old works, coupled with the presence of a ready ignition source, made it reasonably likely an ignition would occur. Moreover, first or second degree burns are injuries of a reasonably serious nature, as is smoke inhalation. I find therefore that the violation was S&S.

Because of the likelihood of an accident and the injuries it could have engendered, the violation also was serious.

## NEGLIGENCE

That the section foreman felt he did not have time to conduct the examinations is no excuse. If, in fact, he was too busy to examine the area, Bob & Tom was required to make sure another certified person did. Compliance is the operator's duty, and here the operator failed in that regard. The company was negligent.

CITATION NO. 4248555

Citation No. 4248555 alleges a violation of 30 C.F.R. 75.400 and states that "loose coal had been allowed t accumulate in the Nos. 1, 2 & 3 rooms of 001 section in depths up to 6 inches for a distance of approximately 80 feet from the faces outby." The citation also contains a finding that the alleged violation was S&S in nature.

MSHA coal mine inspector Roger Pace testified that during an inspection of the No. 6 Mine he observed accumulated loose coal in three entries that had been driven to the face. According to Pace, the accumulated material extended outby for 80 feet. (Pace's inspection occurred nearly a month before Langley's.) Pace measured the depth of the accumulations with a ruler and found that the coal measured up to six inches deep (Tr. 85-87). There was coal dust as well, and it was dry and black (Tr. 87).

In Pace's opinion the accumulations were the result of spillage along the bridges of the continuous haulage system. Id. Given the extent of the coal and coal dust, Pace believed it had been accumulating for approximately three shifts (Tr. 88, 99). No one was working to clean up the accumulations when they were observed by Pace. Indeed, the section foreman told Pace that he only had seven miners working on the section and because he was short handed there was no one to spare for clean up duties. As Pace put it, "production comes first to them" (Tr. 98). Cleanup began only after Pace advised the section foeman that he, Pace, was issuing a citation for a violation of section 75.400 (Tr. 91-92).

With regard to the hazard presented by the accumulations, Pace believed it was likely they would catch fire. He noted the electrical equipment on the section and the fact that given the movement of the equipment and the wear and tear on the trailing cables, an exposed conductor in one of the cables could have resulted in an arc or spark, which, in turn, could have resulted in a fire (Tr. 89-90). Although Pace did not inspect the cables, he believed they tended to fray and to separate as they were pulled around corners.

THE VIOLATION

As noted, the Commission has stated that Congress intended to proscribe "those masses of combustible materials which could cause or propagate a fire or explosion." Old Ben Coal Co., 2 at 2808. Since accumulations are to some extent an inevitable result of the mining process, an operator is given a reasonable amount of time to clean up the by-product of the mining cycle. Thus, the length of time that combustible material is present is relevant in determining whether a particular accumulation

is prohibited. Utah Power & Light Co. v. Secretary of Labor, 951 F.2d 292, 295 (10th Cir. 1991) (n.11).

Pace's testimony was not challenged and I accept his assessment that the accumulation of coal and coal dust on the section could have been ignited. As he testified, the coal dust was black and it was dry. Moreover, the accumulations were lengthy in that they extended outby from the face areas for approximately 80 feet. I also accept his assessment that the accumulations had existed for approximately three shifts and were not cleaned up with "reasonable promptness." Certainly, it is no excuse that the section foreman found himself short handed. I therefore conclude the violation existed as charged.

S&S and GRAVITY

The Secretary has not established the violation was S&S. The Secretary's case founders on the third element of the Mathies test -- the requirement that the Secretary prove "a reasonable likelihood that the hazard contributed to will result in an injury." Mathies Coal Co., 6 FMSHRC at 3-4. Although Pace testified that trailing cables to electrical equipment could constitute a potential ignition source for the accumulation, he did not inspect any of the cables to determine whether they were defective or out of compliance and he was unable to testify that any other equipment on the section that was out of compliance.

For me to find that a fire or ignition of the accumulations was reasonably likely, I would have to agree with what seems to be the thrust of the Secretary's case -- that trailing cables invariably become defective during the course of continued normal mining operations. On the basis of this record I am reluctant to make such an assumption. Aside from testimony that the cables had no visible defects, nothing was put on the record relating to the condition of the specific cables involved; and I believe it would be unwarranted to assume that they would inexorably deteriorate to the point where they could ignite accumulations. If this were the case, one would assume the Secretary would require their replacement on a regular basis.

This said, I find that the potential hazard to the safety of miners was such that this was a serious violation. Pace was justifiably concerned about their fate if the accumulations ignited. The extent of the accumulations meant that any fire and smoke and fumes could have traveled up the entries and could have endangered not only the section crew of seven but any other persons in the mine. While this hazard was not reasonably likely to come to fruition, it could have happened and the potential for injury or death was great.

NEGLIGENCE

I accept Pace's opinion that the accumulations existed for up to three shifts. As I have noted, the fact that the section foreman did not have a full crew was no excuse for failing to clean up the accumulation with reasonable promptness. It is the operator's duty to act to eliminate accumulations resulting from the mining process. Bob & Tom negligently failed to do so.

OTHER CIVIL PENALTY CRITERIA

HISTORY OF PREVIOUS VIOLATIONS

With regard to the operator's history of previous violations, the Secretary submitted into evidence a computer printout listing all violations assessed at the Day Branch mines during the two years prior to the first violation in this case (Exh. P-10). Counsel argued that in considering the operator's history of previous violations I should take into account the assessed violations at all of the operator's mines, rather than those solely relating to Mine No. 6 (also known as Day Branch No. 10 Mine). Counsel stated she believed there was Commission precedent on this point and, at my request, indicated she would submit a letter setting forth the relevant case law (Tr. 105-106).

I did not receive further information from counsel, but I agree with her to the extent that I conclude, in this particular case, consideration of the previous history of all of the mines of Day Branch is warranted.

First, and since there is no evidence to the contrary, I accept counsel's assertion that although mining may have ceased under the name of Bob & Tom, the operator continued to mine the No. 6 Mine under the name of Day Branch (Tr. 5, 102). I further accept what appears to be the essence of the Secretary's contention, that Bobby Joe Hensley, President of Bob & Tom, is also significantly involved in the management of Day Branch and represents the operator both for Bob & Tom and Day Branch.

Consideration of the history of previous violations in civil penalty assessments is based upon a theory that attaches punitive consequences to noncompliance in an effort to encourage future compliance. In general, I believe that where more than one mine is governed by the same entity, and where that entity has management control and responsibility over the conditions of such mines, compliance is furthered by considering past assessed violations at all mines, rather than one. Of course, there may be times when limiting consideration of previous history to the specific mine in which the violations were cited better fosters compliance, but no reasons for invoking such an exception to the general rule are apparent in this record. Therefore, when I

consider the history of previous violations in this case, I will, as the Secretary requests, take account of violations cited and assessed at all Day Branch mines.

During the 24 months prior to the date of the first violation in this case, a total of 808 violations were assessed. This is a large history of previous violations. (I will analyze the previous violations of the particular standards here involved when I assess the individual civil penalties.)

Consideration of the operator's history of previous violations also requires that I examine one additional factor -- the operator's compliance history. Counsel stated, and the computer print out confirms, that while $396,953 has been assessed for violations occurring in the two years prior to the first violation in this case, $25,219 has been paid (Tr. 105, Exh. P-10). In response to my inquiry about the Secretary's collection efforts, Counsel further stated, "The Secretary at this time is talking to the Department of Justice about seeking collection action against Mr. Hensley" (Tr. 105).

There is nothing in the record to explain why the operator has ignored $371,734 in final civil penalty orders (i.e., penalties not litigated). I can only assume that its decision to play the scofflaw arises from that same contempt for the Mine Act and the Commission that lead to its failure to appear at the hearing. In any event, the operator has amassed an extreme number of delinquent civil penalties and a significantly large debt to the government. As set forth below, I conclude this warrants sizably higher penalties than would otherwise have been appropriate. See May Resources Incorporated, 16 FMSHRC 170 (January 1994) (ALJ Fauver).

## SIZE OF BUSINESS OF THE OPERATOR

The Secretary's proposed assessment sheet, which is in the file and part of the record, indicates that the Secretary viewed the mine, as well as the controlling entity of which the mine is as part, as small in size (Proposed Assessment 2; Tr. 17-18). Other things being equal, assessed penalties would have been commensurate with this criterion. However, other things are not equal, especially the operator's significantly large history of previous violations and its exceedingly poor compliance history.

## ABILITY TO CONTINUE IN BUSINESS

If an operator contends its ability to continue in business will be impaired by the size of any penalties assess, it bears the burden of proof. Here, the operator presented no proof with regard to this criterion. (Indeed, the operator presented no proof with regard to anything.) I conclude the penalties will not affect its continuation in business.

RAPID COMPLIANCE

In no instance did the operator exhibit unusual expedition in abating the violations, and in no instance, other than the failure to install deluge-type water sprays on the section belt drives, did the operator fail to comply in a timely fashion. Therefore, the penalties will be neither increased nor decreased because of this criterion, except for the violation of section 75.1101, where the operator's failure to timely abate will warrant an increase in the penalty that would otherwise have been assessed.

ASSESSMENT OF PENALTIES

| CITATION NO. | DATE | 30 C.F.R. |
|---|---|---|
| 4040112 | 8/25/93 | 75.400 |

The Secretary has proposed a penalty of $189. (The largest penalty previously assessed for a violation of section 75.400 was $2,500 (Exh. P-10).) Given the serious nature of the violation, the negligence of the operator, the operator's generally large history of previous violations, its significant number of prior violations of section 75.400 (66 in all) and, given its woeful compliance record, I conclude a penalty significantly higher than that proposed by the Secretary is warranted. Accordingly, I assess a civil penalty of $5,000.

| CITATION NO. | DATE | 30 C.F.R. |
|---|---|---|
| 4040113 | 8/25/93 | 75.1101 |

The Secretary has proposed a penalty of $851. (The largest penalty previously assessed for a violation of section 75.1101 is $569 (Exh. P-10).) Given the serious nature of the violation, which was augmented by the fact that the belt was running through accumulations of coal and coal dust, and by the fact that smoke and fumes from a fire would have traveled to the face, the negligence of the operator, the operator's large history of previous violations, the operator's compliance record and the operator's lack of effort to achieve timely compliance with the cited standard, I conclude a penalty significantly higher than that proposed by the Secretary is warranted. Accordingly, I assess a civil penalty of $5,500.

| CITATION NO. | DATE | 30 C.F.R. |
|---|---|---|
| 4040114 | 8/25/93 | 75.383(a) |

The Secretary has proposed a penalty of $309. (There are no previously assessed violations of this standard.) Given the serious nature of the violation, which was augmented by the fact

that loose coal and coal dust and ignition sources were present on the section, the negligence of the operator and the operator's compliance record, I conclude a penalty significantly higher than that proposed by the Secretary is warranted. Accordingly, I assess a civil penalty of $3,500.

| CITATION NO. | DATE | 30 C.F.R. |
|---|---|---|
| 4040115 | 8/25/93 | 75.503 |

The Secretary has proposed a civil penalty of $189. (The largest penalty previously assessed for a violation of section 75.503 is $1,019 (Exh. P-10).) Given the serious nature of the violation, which was augmented by the presence of loose coal and coal dust on the section, the negligence of the operator, the fact that the operator's history of previous violations contains 40 assessed violations of section 75.503 and the operator's compliance record, I conclude a penalty significantly higher than that proposed by the Secretary is warranted. Accordingly, I assess a civil penalty of $4,000.

| CITATION NO. | DATE | 30 C.F.R. |
|---|---|---|
| 4040116 | 8/25/93 | 75.1719-1(e)(6) |

The Secretary has proposed a civil penalty of $189. (The largest penalty previous assessed for a violation of section 75.1719-1 is $362.) Given the serious nature of the violation, the negligence of the operator and the operator's compliance record, I conclude a penalty significantly higher than that proposed by the Secretary is warranted. Accordingly, I assess a civil penalty of $4,000.

| CITATION NO. | DATE | 30 C.F.R. |
|---|---|---|
| 4040118 | 8/26/93 | 75.1713-7(a)(1) |

The Secretary has proposed a civil penalty of $189. (There is one previous violation of section 75.1713-7 for which $20 is assessed (Exh. P-10).) Given the serious nature of the violation, the negligence of the operator and the operator's record of compliance, I conclude a penalty significantly higher than that proposed by the Secretary is warranted. Accordingly, I assess a civil penalty of $3,500.

| CITATION NO. | DATE | 30 C.F.R. |
|---|---|---|
| 4248441 | 8/26/93 | 75.364(a)(1) |

The Secretary has proposed a civil penalty of $189. (There were no assessed previous violations of this standard (Exh. P-10.) Given the serious nature of this violation, the

negligence of the operator, which was particularly egregious in view of the section foreman's self-proclaimed lack of time to inspect the worked out areas, and given the operator's record of compliance, I conclude a penalty significantly higher than that proposed by the Secretary is warranted. Accordingly, I assess a civil penalty of $4,500.

| CITATION NO. | DATE | 30 C.F.R. |
|---|---|---|
| 4248555 | 7/27/93 | 75.400 |

The Secretary has proposed a penalty of $431. (The largest penalty previously assessed for a violation of section 75.400 is $2,500 (Exh. P-10).) The serious nature of the violation is mitigated, to some extent, by the lack of proof of a ready ignition source. Given the operator's negligence, the fact that the operator's relevant history of previous violations contains 66 assessed violations of section 75.400 and the operator's compliance record, I conclude a penalty significantly higher than that proposed by the Secretary is warranted. Accordingly, I assess a civil penalty of $4,000.

## ORDER

Within 30 days of the date of this Decision, the operator shall pay civil penalties in the amount of $34,000. The Secretary shall modify Citation No. 4248555 by deleting the S&S designation.

David F. Barbour
Administration Law Judge

Distribution:

Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215-2862 (Certified Mail)

Bobby Joe Hensley, President, Bob & Tom Coal Company, Inc., P.O. Box 204, Cawood, KY 40815 (Certified Mail)

\lh