CCASE:
SOL (MSHA) V. NEW WARWICK MINING
DDATE:
19941209
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 PROCEEDINGS
	Docket No. PENN 93-445
	A.C. No. 36-02374-03875
v.	
	Docket No. PENN 94-54
	A.C. No. 36-02374-03888
NEW WARWICK MINING COMPANY, Respondent	Warwick Mine

DECISION

Appearances: Linda M. Henry, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Joseph A. Yuhas, Esq., Barnesboro, Pennsylvania, for Respondent.

Before: Judge Amchan:

These cases involve several inspections of Respondent's Warwick mine in southwestern Pennsylvania. In each the primary issue is whether Respondent violated MSHA regulations in failing to clean-up coal and coal dust accumulations in a timely manner, and if it did, whether those violations were significant and substantial. Docket PENN 94-54 contains several allegations charging Respondent with an unwarrantable failure to comply with the Secretary's regulations FOOTNOTE 1. Docket PENN 94-445 contains two failure to abate orders.

ÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄ

1/
At hearing I granted the Secretary's motion to vacate citations 3655711 and 3655712. These citations alleged respirable dust violations based on a single sample.

Docket PENN 94-54

Orders 3655504 and 3655505

On July 26, 1993, MSHA inspector Robert Santee issued Respondent citation 3655279 (Exh. G-4) alleging a violation of the Secretary's regulation at 30 C.F.R. 75.400. That regulation requires that loose coal, coal dust and other combustible materials be cleaned up and not be permitted to accumulate in active workings or on electrical equipment therein. This citation alleged that accumulations ranging up to 1/4 inch deep were permitted on the surfaces of the 3 left (012) longwall section shields, numbers 4 through 22, and behind the shields.

After issuing the citation, inspector Santee discussed the violation with mine management, including mine superintendent, Jon Pavlovich (Tr. 23-24, Exh. G-3, pages 6-8 of entry of July 26, 1994). On July 26, the inspector told management that wash down hoses needed to be installed across the pan line and that the hose attached to the longwall shear was inadequate to prevent coal dust from accumulating (Exh. G-3, pp. 7-8 of 7/26/93 notes).

The next day, July 27, Santee issued another citation for an accumulation of loose fine coal on a pump car at the end of the 012 longwall supply track (Exh. G-5). He also noticed accumulations behind the longwall shields and on the toes of the shield (Tr. 25). Since they were in the process of being cleaned, a citation was not issued for the coal dust in and about the shields (Tr. 25-28). On July 27, Santee discussed with Respondent's safety director, Rod Rodavich, the necessity of continued efforts to prevent repeated violations of section 75.400 at the longwall (Exh. G-3, page 5 of July 27, 1993 notes).

On July 28, 1993, shortly before 5:10 a.m., inspector Santee observed coal dust of up to 1/4 inch in depth on the surfaces of shields 23 through 123, and behind those shields FOOTNOTE 2. He found coal dust accumulations on cables and as much as 6 inches of loose coal behind the shields (Exh. G-1) FOOTNOTE 3. He thereupon issued order

ÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄ
2/
The longwall was not operating at this time and apparently had not operated since 3:30 a.m. (Tr. 21)

ÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄ
3/
In its brief Respondent argues that inspector Santee's testimony should be discredited because it is inconsistent with the notes he made on July 28, 1993 (Respondent's brief at 13). The first two pages of those notes do in fact state that "small amounts of float dust observed on shield behind support legs which appeared the previous shift did not wash shield off during

3655504 pursuant to section 104(d)(2) of the Act for failure to clean-up the coal and coal dust in a timely fashion. He also issued order 3655505 alleging a violation of section 75.360. This order is predicated on Santee's conclusion that the preshift examination made between 1:00 a.m. and 3:00 a.m. on July 28, was inadequate in that it failed to detect the coal and coal dust accumulations cited in order 3655504 (Tr. 32-33, Exh. G-2).

To the inspector it appeared that the longwall shield area hadn't been cleaned at all recently (Tr. 28). He stated that foreman Paul Wells agreed with him that no cleaning had been done on the prior midnight shift (Tr. 28). Wells denies making such a remark (Tr. 118). Inspector Santee concluded that the coal and coal dust accumulations he observed had accumulated over the course of an entire production shift (Tr. 53-54). He also based his conclusion that the accumulations were the result of Respondent's "unwarrantable failure" on the fact that he had indicated to management, prior to the citation, that the water hose on the longwall shear was insufficient to keep the shields clean and that management had not installed additional hoses (Tr. 78-79).

During his inspection, Santee was accompanied by Barry Radolec, then a inspector-trainee. Radolec concurs with Santee's opinion that the coal and coal dust accumulations were extensive and that they built up over a shift or more (Tr. 92-93). Paul Wells, who was New Warwick's longwall foreman on the day shift of July 28, doesn't dispute that material had accumulated on and behind the shields. However, he contends that much of the material was not coal (Tr. 113, 119).

The longwall had run into a "rock binder" in the middle of the coal seam, which caused a lot of dust to be generated (Tr. 109-114). Wells insists that the dust accumulations cited by Santee were primarily shale and dirt, as opposed to coal (Tr. 113, 119). Inspector Santee, on the other hand, contends that when the dust he saw was mixed with slate, he recognized this and that the accumulations he cited were coal and coal dust (Tr. 157). With respect to this difference of opinion, I credit

ÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄ

the last pass." (Exhibit 3, pp. 1 and 2 of July 28, 1993 notes).

However, I find the conditions related in the order did exist. Santee's notes of the same date at pp. 5-6 are consistent with the allegations of the order. Moreover, Respondent's foreman, Paul Wells, did not deny that such accumulations existed. Rather he argued that the material on the shields was not coal dust and that they could not be kept any cleaner when the longwall shear was not operating (Tr. 117-19).

the testimony of inspector Santee and find a violation of section 75.400 as alleged.

Was this violation due to Respondent's unwarrantable failure to comply with section 75.400?

The Secretary's allegation of "unwarrantable failure" is predicated on the fact that this was the third day in a row that Santee had observed coal and coal dust accumulations on the longwall shields, the fact that the company had not implemented his suggestion that additional washdown hoses be installed, and Wells' "confirmation" that it appeared that no cleaning had been done on the prior shift.

Although Wells denies making such a statement, his testimony is not inconsistent with that of inspector Santee.

> Q. In that regard, what did you tell the inspectors?
>
> A. They had cut out at the headgate, which was number one shield. And when they cut out, that makes a greater deal of water mist and dust, and the guys normally cut the water back. If not, they get soaking wet because they've got 36,000 coming down the face and it just blows that water mist back onto you, because that shear uses 75 gallons of water a minute, and it's all blown out there in a mist. They normally cut the water back to 40 shield, which was probably a time of ten to 15 minutes, when they mined from headgate back to 40, I said, okay, that dust probably came from cutting out and it doesn't look like they hosed as they came back to this point.

(Tr. 118)

A few minutes later, however, Wells appeared to contradict himself.

> JUDGE: It looked to you like the last pass from one to 40, the hose on [mistranscribed as "and"] the shear had not operated?
>
> A. No. The shear was suppressing the dust, but they did not physically --- a man did not walk and hose down the shields as they mined for that last ten or 15 minutes that they mined. Which you don't do all the time. You're only required to do it the very first pass of the day.

(Tr. 121)

Although it is difficult to determine the precise import of Wells' testimony, I conclude that the coal and coal dust accumulations were in part the result of a reduced amount of water applied on the last pass of the longwall shear on the midnight shift FOOTNOTE 4. Respondent knew or should have realized that additional dust would be generated and I conclude that its failure to take sufficient measures to clean up this dust constitutes an unwarrantable failure to comply with section 75.400--particularly in light of the warnings given to them by inspector Santee on the two previous days.

Commission precedent requires consideration of three factors in determining whether a violation of section 75.400 is the result of an operator's unwarrantable failure. They are: 1) the extent of the violation; 2) the length of time the violation has existed; and 3) the efforts of operator to prevent or correct the violation. Peabody Coal Co., 14 FMSHRC 1258 (August 1992); Mullins & Sons, 16 FMSHRC 192 (February 1994).

I conclude that the violation cited in order 3655504 was due to Respondent's unwarrantable failure because the coal and coal dust accumulations were extensive. Although they had not existed for a long time, Respondent should have been on a "heightened alert" that such accumulations could occur--given the reduced water spray in the last pass and the discussions with inspector Santee on the two prior days, see, Drummond Company, Inc., 13 FMSHRC 1362 (September 1991). When inspector Santee came to the longwall no cleaning was in progress, and in light of the circumstances, I conclude that it was incumbent upon New Warwick to clean up these coal and coal dust accumulations immediately. FOOTNOTE 5.

Civil Penalty

The Secretary proposed a $4,100 civil penalty for order 3655504. I assess a penalty of $2,000. Although not a prerequisite to a section 104(d)(2) order, the Secretary characterized this violation as "significant and substantial."

ÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄ
4/
Wells, for example, also stated that did not assume that the dust observed by the inspectors had accumulated in ten minutes (Tr. 119).

ÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄ
5/ Night shift longwall foreman Michael Smith testified as to the additional shoveling of coal and coal dust on July 27-28 (Tr. 128-130). The fact that inspector Santee found nobody engaged in clean-up and no indication that clean-up had commenced prior to his arrival at the longwall section, leads me to conclude that no effort was made to clean this area after the accumulations observed by Santee were created.

The same considerations that are involved in a determination of the "S & S" issue are relevant to a consideration of the gravity of the violation under section 110(i).

Inspector Santee designated the order "S & S" because he detected one to two-tenths methane at the longwall and because the longwall shear was capable of operating (Tr. 33). I conclude that this is insufficient to establish that an ignition or explosion was reasonably likely to occur, or be exacerbated due to the 75.400 violation. Texasgulf, Inc., 10 FMSHRC 498, 500-01 (April 1988). As Respondent points out, the fact that the Warwick mine is a gassy mine does not establish that potential for methane liberation in the longwall section (Tr. 84-85).

Nevertheless, there was certainly some chance of ignition at the longwall section, a situation made much more dangerous by the presence of the cited coal and coal dust accumulations. I deem Respondent's negligence to be very high in failing to take immediate action to clean up these accumulations and conclude a $2,000 civil penalty to be appropriate given all six penalty assessment factors set forth in section 110(i) of the Act.

Order 3655505 is vacated

Order 3655505 is predicated on the assumption that the accumulations observed by inspector Santee were present when the pre-shift examination for the day shift (4:00 a.m. - 4:00 p.m.) was performed. Santee testified that the pre-shift was made between 1:00 a.m. and 3:00 a.m. (Tr. 21). The longwall section broke down at 3:30 a.m. Michael Smith, the longwall foreman on the night shift testified that when he performed this examination he observed no hazardous conditions in regard to coal and coal dust accumulations (Tr. 132).

I conclude that the accumulations observed by Santee on the day shift may not have been present or may not have been as extensive when Smith did his pre-shift examination. Thus, this examination may not have been inadequate. I therefore vacate order 3655505.

Orders 3655519 and 3655520

At about 10:55 a.m. on August 12, 1993, inspector Santee was traveling in the mocker area of the New Warwick mine (Tr. 37). This is an area where conveyor belts dump coal into a bunker and the bunker dumps the coal of the mainline number 6 conveyor belt (Tr. 37). At this location Santee observed extensive accumulations of loose coal and coal dust by the motor drive structure (Tr. 37-38). He also observed hydraulic oil, up to 1/4-inch deep on the bunker floor, next to a pump car (Tr. 39-40, 71).

The coal and coal dust accumulations were coated with rock dust and there were black footprints in the rock dust leading to a preshift examination board. Some of the accumulated coal and coal dust was soaked with hydraulic oil (Tr. 38). Santee issued order 3655519, which alleged a violation of section 75.400, concluding that the footprints to the preshift board indicated that the examiner had failed to take corrective action and that due to the compaction of the coal and dust, that the accumulations had existed for several shifts (Tr. 38-39).

In addition to the order for the accumulations, Santee issued order 3655520 alleging a violation of section 75.360 in that the preshift examination performed between 5:00 a.m. and 7:40 a.m. was inadequate (Exh. G-7). Mike Voithoffer, the mine examiner who performed the pre-shift inspection at issue, did not consider the accumulations he saw as hazardous (Tr. 138). While Voithoffer also testified that accumulations can build-up in the bunker area very quickly, I conclude from the black footprints in the rock-dusted coal and coal dust that conditions at the time of the pre-shift were pretty much the same as when inspector Santee came by several hours later.

Voithoffer concluded that there were no likely sources of ignition and that these accumulations would be taken care of by the clean-up man on the day shift at about noon (Tr. 138-39, 142-43). Frank Domasky, a New Warwick safety engineer, confirms that Santee observed two areas under the sprockets of the bunker drive where the top of the cone-shaped piles of loose coal and coal dust measured 20 inches (Tr. 149).

Domasky also indicated that the accumulations may have been cleaned up before Santee arrived except that the employee assigned to this duty was busy abating other citations issued by the inspector (Tr. 150-51). The issue thus becomes whether it was an unwarrantable failure for Respondent to fail to note these accumulations in its pre-shift examination and for it to fail to assign additional personnel to clean up this area.

I credit inspector Santee's opinion that the accumulations in this area were such that they warranted immediate attention. I therefore conclude that Respondent's failure to record these accumulations on the pre-shift examination and to assign additional personnel to clean-up this area was sufficiently "aggravated" to warrant the characterization of unwarrantable failure. In so finding I conclude that Mr. Voithoffer's belief that the accumulations need not be recorded, nor cleaned up immediately, was unreasonable, Cyprus Plateau Mining Corporation, 16 FMSHRC 1610 (August 1994). I therefore affirm both section 104(d)(2) orders issued on August 12, 1993.

Significant and Substantial and Penalties

With regard to these orders I am not convinced that the Secretary has established a confluence of factors that would make an ignition or explosion reasonably likely. Texasgulf, supra. There is no showing of potential high methane concentrations in the cited area. Although inspector Santee was concerned about a 7200 volt cable which was 12-15 feet from the coal and coal dust accumulations (Tr. 73), I am not persuaded that the presence of this cable made it reasonably likely that the section 75.400 violation would result in injury. Although there was a puddle of oil by the pump car, which was located 20-25 feet from the bunker, this pump car had its own automatic fire suppression system (Tr. 150) FOOTNOTE 6.

Having concluded that the Secretary has not established this violation to be "S & S", I find that the gravity of the violation was significantly lower than for the section 75.400 violation of July 28. Taking into account all six section 110(i) penalty criteria, I conclude that a $1,000 civil penalty is appropriate for order 3655519 and another $1,000 penalty is appropriate for Respondent's failure to record the accumulations on the pre-shift examination.

The defective ladder citation

During an August 31, 1993 inspection of the Warwick's mine preparation plant, MSHA inspector Mel Remington observed a 7-foot ladder on the third floor (Tr. 162-63). Upon close inspection of the ladder Remington observed that one of the support legs was broken, just below the lowest rung (Tr. 163). From the lack of dust on the ladder, the inspector concluded that it had been used recently (Tr. 165).

Inspector Remington issued Respondent citation 3667167 alleging a significant and substantial violation of 30 C.F.R. 77.206(a). That regulation requires that ladder be of substantial construction and be maintained in good condition.

ÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄ

6/
The Secretary argues that this violation was "S & S" because "the number 6 mainline conveyor belt was rubbing in loose wet coal just underneath this bunker area" (brief at 7). However, I find inspector Santee's testimony regarding the location of this and other ignition sources to be insufficient to establish that they were directly under the bunker (See, Tr. 103).

New Warwick's defense to this citation is that the defective ladder was a 4-legged step-ladder, not a 7-foot aluminum ladder and that the defect was so obvious nobody would have used it (Tr. 174). However, Respondent's evidence is based on a conversation between safety engineer Frank Domasky and union walkaround representative John Ellis (who did not testify at trial) a week before the hearing. On this basis I credit inspector Remington's testimony over that of Respondent.

On the other hand, I do not find this violation to be significant and substantial. The fourth element in the Commission's test for "S & S" violations is that there is a reasonable likelihood that an injury that is likely to result will be of a reasonably serious nature, Mathies Coal Company, 6 FMSHRC 1 (January 1984). Given the fact that the defect in this ladder was on the bottom rung, it is difficult to envision anyone getting up high enough on it to be injured seriously. The most likely scenario is that as soon as one put their foot on the ladder the support leg would break off. At worst the miner using the ladder would be likely to fall to same level on which he was standing.

As there is not really any evidence regarding the degree of negligence for this violation and as I deem the gravity of the violation to be moderate, I conclude that a $75 civil penalty is appropriate considering all six of the criteria in section 110(i) of the Act.

Docket PENN 93-445

Coal Dust Accumulations at the overland belt transfer stations

On May 19, 1993, MSHA inspector Frank Terrett examined the overland conveyor belt at the Warwick mine (Tr. 187) FOOTNOTE 7. At various points along this belt there are 6 transfer stations, which are two-story buildings housing a drive motor to provide power to the conveyor. In 5 of these transfer stations Terrett observed significant accumulations of coal dust on the surfaces of structures, enclosures and motors. He therefore issued a citation alleging a violation of 30 CFR 77.202 for each one of these belt transfer stations (Exhibits G17-22, Citations 3659083-87).

ÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄ

7/

"Overland" is mistranscribed as "overlaying" at Tr. 187 (see Exh. G-17, block 15; G-22, page 1).

These citations were characterized as "significant and substantial". Inspector Terrett found an electrical box open at the transfer station #4 and concluded that a fire was reasonably likely to occur in the continued course of normal mining operations (Tr. 206-07, Exhs. G24-28) FOOTNOTE 8.

A termination date of May 21, 1993, was established by Terrett for each of the five violations (See, e.g. box 16 of citation 3659086, Exh G-17, page 2). On May 24, Terrett returned to the mine. He found that transfer houses 1, 2, & 3 had been cleaned up but that the coal dust accumulations in transfer houses 4 and 5 hadn't been touched (Tr. 199-200). The electrical boxes in these two houses were open (Tr. 200-01, Exh. G-27, G-28). Terrett then issued Respondent orders 3659098 and 3659099 alleging a failure to abate the citations issued for houses 4 and 5 on May 19 (Exh. G-17, G-18).

The only evidence as to the reasons for the failure to abate is the inspector's account of his conversation with preparation plant supervisor Tom Cole (Tr. 200, Exh. G-23). Cole told inspector Terrett that the two hourly employees assigned to clean up the transfer houses had reported the task accomplished. Cole thus assumed the citations had been abated (Tr. 200).

Respondent concedes that there were dust accumulations in the areas cited on May 19, 1993, that needed to be cleaned (Tr. 229-30). It also appears to concede that transfer houses 4 and 5 were not cleaned up when inspector Terrett returned on May 24.

New Warwick, however, takes issue with the inspector's characterization of the gravity of the violations, and particularly with his characterizations of the original citations as significant and substantial FOOTNOTE 9. Terrett assumed that in the

ÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄ
8/
Terrett testified that the boxes at all the transfer stations were open on May 19 (Tr. 191). However, I find that the Secretary has established only that the box at transfer station #4 was open. Terrett issued a citation for the electrical box at station #4, but not any of the others on that date (Tr. 205-07). Moreover, his field notes of May 19 indicate that the power box at station #4 was open, but does not mention the same condition at the other transfer stations (Exh. G-22).

ÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄ
9/
Respondent's brief also argues that section 77.202 was not violated because the Secretary failed to establish that coal dust existed or accumulated in dangerous amounts. I deem safety director Rodavich's admission that the dust needed to be cleaned up (Tr. 230) as a concession that dust existed in dangerous amounts within the meaning of the standard.

case of a fire resulting from the violations, that employees would have to jump from the second floor of the transfer house to escape (Tr. 192, 203).

Respondent's Safety Director Rod Rodavich contends that there was no likelihood of an employee being trapped in the transfer house. I credit Rodavich's testimony that each transfer house had 2-3 exits on the upper level as well as 3 on the bottom level (Tr. 227-229). Therefore, an employee would not have to jump from the second floor to escape a fire.

I find that the Secretary has not established these violations to be significant and substantial. Step 3 in the Commission's test for a significant and substantial violation is whether there is a reasonable likelihood that the hazard contributed to will result in an injury. Step 4 is whether there is a reasonable likelihood that the injury will be of reasonably serious nature, Mathies Coal Co., 6 FMSHRC 1 (January 1984). Since the Secretary's theory of "S & S" is based largely on the need for an employee to jump from the second story to escape a fire resulting from the coal dust accumulations in the transfer house, I conclude these violations were not "S & S".

Respondent appears to have no argument with which it can legitimately challenge the validity of the section 104(b) orders. To establish the validity of such an order the Secretary need only show that the condition originally cited still existed at the time the 104(b) order was issued, and that the time allowed for termination had passed. Martinka Coal Company, 15 FMSHRC 2452 (December 1993); Mid-Continent Resources, Inc., 11 FMSHRC 505 (April 1989).

The fact that the employees assigned to clean-up the cited transfer houses may not have followed their instructions is not a defense to the orders, or even a mitigating factor in considering the appropriate penalty to be assessed. In Rochester & Pittsburgh Coal Company, 13 FMSHRC 189 (February 1991), the

ÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄ

I decline to address the issue as to whether the elements of a violation of section 77.202, the coal dust accumulation standard for surface coal mines and surface areas of underground coal mines, are different than the elements of a violation of the coal dust accumulation standard for underground coal mines at 75.400, and whether the Secretary's direct case met this additional burden, if any exists.

Commission held that a rank-and-file miner's negligent or willful conduct can be imputed to a mine operator for the purpose of making unwarrantable failure findings. The logic of that decision applies to this case where Respondent delegated its statutory responsibility to timely abate the original citations to rank-and-file miners.

This record is also devoid of any evidence on which I could conclude that Respondent had a reasonable expectation that the employees would clean the transfer houses as instructed. There is no indication, for example, that these employees had a work history demonstrating such reliability that management was justified in assuming that the task had been completed. Indeed, if the employees were told that Respondent was required by MSHA to have the transfer houses cleaned by May 21, it is difficult to believe that they cavalierly ignored their instructions and risked disciplinary action.

Civil Penalties for the Coal and Coal Dust Violations in the Transfer House

The Secretary proposed a $267 civil penalty for each of the original section 104(a) citations relating to coal and coal dust accumulations in the transfer houses. Given the fact that I find that the gravity of these violations was not as great as believed by MSHA, I assess a $100 penalty each for citations 3659083, 3659084, and 3659085, taking into account the six criteria in section 110(i) of the Act.

With respect to section 104(b) orders 3659098 and 3659099, and the original citations issued for the accumulations in those transfer houses, I assess civil penalties of $750 for each transfer house. I find that the gravity of these violations warrants a penalty lower than the $1,457 proposed by MSHA. However, I believe Respondent's negligence in failing to abate the original citations by the termination date warrants a significantly larger penalty than that assessed for the transfer houses in which the original citations were timely abated.

Battery Charger improperly ventilated

On May 20, 1993, MSHA representative Gerald Krosunger was inspecting a longwall section at the Warwick mine at which production was finished and miners were recovering shields (Tr. 245). He detected the odor of batteries and walked to an area in which he saw a battery-powered scoop being charged in the middle of an entryway (Tr. 233, 235). Krosunger then released a

cloud of chemical smoke which drifted in the direction of the longwall section from which he had just travelled (Tr. 235).

As the result of these observations Krosunger issued Respondent citation 3659432, alleging a significant and substantial violation of 30 CFR 75.340(a)(1). That regulation requires that battery charging stations be ventilated by intake air that is coursed into return air or to the surface. The air may not be used to ventilate working places.

Respondent at page 19 of its brief argues that the standard was not violated because the longwall area was not a working place as defined in 30 C.F.R. 75.2(g)(2). That regulation defines "working place" as "the area of a coal mine inby the last open crosscut." Last open crosscut is defined in section 75.362(c)(1) as "the crosscut in the line of pillars containing the permanent stoppings that separate the intake air courses and the return air courses".

While I agree with Respondent that the Secretary has failed to establish that the longwall area in which Krosunger smelled the battery fumes was a "working place" within the meaning of the above-mentioned definitions, I conclude that these definitions do not apply to the prohibition against ventilating working places with air that has ventilated battery charging stations in section 75.340(a)(1).

Section 75.340(a)(1) is intended to protect miners if a fire originates at a battery charging station, 57 Fed. Reg. 20888 (May 15, 1992). The purpose of this requirement would be seriously undercut if I were to interpret it to allow miners to be exposed to air that had passed over a battery charging station simply because the area in which they were working did not meet the criteria of 75.2(g)(2). The Commission has in the past declined to interpret definitional terms in way that defeats the underlying purposes of a standard, Jim Walter Resources, Inc., 11 FMSHRC 21 (January 1989). I decline to so in the instant case and conclude that the air that passed over the scoop ventilated a working place within the meaning of 75.340(a)(1).

Michael Smith, Respondent's longwall foreman, appears to concede that the scoop was not being charged in an appropriate location (Tr. 274). However, both Smith and New Warwick safety director Rod Rodavich challenge the inspector's contention that air from the scoop was flowing towards the longwall section (Tr. 263-65, 271-72, Exh R-1). As neither Rodavich nor Smith was with inspector Krosunger when he performed his smoke cloud test, I credit the inspector's testimony that the air from the scoop was moving in the direction of the longwall (Tr. 268-69, 274).

I therefore affirm the violation, concluding that the air from the battery charger was ventilating a working place.

On the other hand I find that the Secretary has not established that this violation was significant and substantial. Inspector Krosunger's opinion that an injury was reasonably likely to occur was based largely on his belief that in the event of a fire, miners at the longwall would have to exit the mine through the entryway in which the scoop was being charged (Tr. 236). However, I credit the testimony of safety director Rod Rodavich that this entryway was neither a primary or alternate escapeway, and that several alternative means of exit were available for the miners at the longwall (Tr. 263).

The Secretary proposed a $362 civil penalty for this violation. As I conclude that the gravity was considerably less than the Secretary believed, I find that a $100 penalty is appropriate given the six factors in section 110(i).

ORDER

Docket PENN 94-54

Order 3655504 is affirmed and a $2,000 civil penalty is assessed.

Order 3655505 is vacated.

Order 3655519 is affirmed and a $1,000 civil penalty is assessed.

Order 3655520 is affirmed and a $1,000 civil penalty is assessed.

Citation 3655511 is vacated.

Citation 3655512 is vacated.

Citation 3667167 is affirmed as a non-significant and substantial violation and a $75 civil penalty is assessed.

Docket PENN 93-445

Citation 3659083 is affirmed as a non-significant and substantial violation and a $100 civil penalty is assessed.

Citation 3659084 is affirmed as a non-significant and substantial violation and a $100 civil penalty is assessed.

Citation 3659085 is affirmed as a non-significant and substantial violation and a $100 civil penalty is assessed.

Citation 3659086 is affirmed as a non-significant and substantial violation. Section 104(b) order 3659098 is affirmed. A civil penalty of $750 is assessed for these two violations combined.

Citation 3659087 is affirmed as a non-significant and substantial violation. Section 104(b) order 3659099 is affirmed. A civil penalty of $750 is assessed for these two violations combined.

Citation 3659432 is affirmed as a non-significant and substantial violation. A $100 civil penalty is assessed.

Respondent shall pay the civil penalties totalling $5,975 for both dockets within 30 days of this decision.

Arthur J. Amchan
Administrative Law Judge
703-756-6210

Distribution:

Linda M. Henry, Esq., Office of the Solicitor, U. S. Department of Labor, Room 14480, 3535 Market St., Philadelphia, PA 19104 (Certified Mail)

Joseph A. Yuhas, Esq., 1809 Chestnut Ave., P. O. Box 25, Barnesboro, PA 15714 (Certified Mail)

/rb