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SOL (MSHA) V. JIM WALTER RESOURCES
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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 PENALLTY PROCEEDINGS
	:	Docket No. KENT 94-74
	:	A.C. No. 01- 140103987
v.	:	
JIM WALTER RESOURCES, INC., Respondent	:	Docket No. SE 94-84Docket No. KENT 94-84
	:	A.C. No. 01-01401-03988
	:	
	:	Docket No. SE 94-115
	:	A.C. No. 01-01401-03993
	:	
	:	Mine No. 7

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for Petitioner;
R. Stanley Morrow, Esq., Jim Walter Resources, Inc., Brookwood, Alabama, for Respondent.

Before: Judge Amchan

These cases arise from several MSHA inspections of Jim Walter Resources, Inc.'s (Respondent) No. 7 Mine in Tuscaloosa County, Alabama, in the summer of 1993. The primary issues concern the maintenance of Respondent's conveyor belts and clean-up of coal dust accumulations.

Docket No. SE 94-74

Conveyor Belt Alignment and Damaged Belt System Components

On August 17, 1993, MSHA inspector Kirby Smith issued Order No. 3015993, pursuant to section 104(d)(2) of the Act. The order alleged a violation of 30 C.F.R. 75.1725(a) which requires that mobile and stationary machinery be maintained in safe operating condition and that unsafe machinery or equipment be immediately removed from service.

The order was issued due to a number of defects observed by Inspector Smith while inspecting the East A conveyor belt. This belt was out of alignment and was running side to side cutting into the metal supporting structure of the conveyor at several places (Tr. 115-118). A number of the rollers on which the belt moves were dislodged and/or damaged (Tr. 77, 116-17) FOOTNOTE 1. Some rollers were stuck in mulk (a mud-like mixture of coal dust and water) (Tr. 77, 118-19).

Smith concluded that the friction of the stuck rollers and from the belt rubbing against the metal frame of the conveyor made it highly likely that a fire would occur along the belt line (Tr. 120-21). He therefore concluded that the violation was "significant and substantial."

The inspector also concluded that the violation was due to the "unwarrantable failure" of Respondent to comply with the cited regulation. He made this determination because most of the East A conveyor belt was located next to the main track which carried Respondent's miners to their work stations and because the area was subject to preshift examinations required by MSHA (Tr. 115, 122-24).

Inspector Smith does not know how long the damaged rollers he observed had been defective, nor how long the East A belt had been out of alignment and cutting into the supporting structure (Tr. 169-74, also see Tr. 87). He concedes that the conveyor belt could sever a piece of the supporting structure in a very short period of time and that belt rollers are damaged or become stuck on a recurring basis (Tr. 171-74). On the other hand, the record establishes that the conditions cited by Smith were persistent at Respondent's mine.

Two days prior to the issuance of Smith's order, Keith Plylar, Chairman of UMWA Local 2397's Safety and Health Committee, discussed these conditions with mine management. He complained to Larry Morgan, the dayshift mine foreman, about small smoldering fires that were occurring where the East A belt was rubbing against the belt structure (Tr. 41-45, 63). The belt had been improperly aligned for a least a week prior to the issuance of Order No. 3015093 (Tr. 49-50, 63). However, it is possible that the alignment was corrected during that week and that it then recurred (Tr. 68-70).

Respondent concedes that section 75.1725(a) was violated, but takes issue with the "significant and substantial" and "unwarrantable failure" characterizations contained in Order No. 3015093 (Respondent's

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1/ When abating this order, Respondent replaced approximately 200 rollers on the cited conveyor, as well as "training" or aligning the belt (Tr. 124-25, Order 3015093, block 17).

brief in Docket No. SE 94-74 pages 3-5, 7-8). An "unwarrantable failure" is aggravated conduct by a mine operator constituting more than ordinary negligence, Emery Mining Corp., 9 FMSHRC 2007 (December 1987).

The Commission formula for a "significant and substantial" violation was set forth in Mathies Coal Co., 6 FMSHRC 1 (January 1984):

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove:
> (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation;
> (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In challenging the "unwarrantable failure" characterization, the company first points out that the East A conveyor was approximately 5,000 feet long (Tr. 170). Each section of the belt has three top rollers spaced five feet apart and one bottom roller (Tr. 169). Bottom rollers are spaced 10 feet apart (Tr. 169).

Respondent calculates that the 200 defective rollers found when the instant order was abated indicates that 95 of the rollers on the East A belt were operating properly (Respondent's brief at 4). Respondent contends that the dimensions of the belt and the propensity of belt components to malfunction makes it impossible to judge their conduct "aggravated" on this record.

MSHA and the union witnesses contend that the Respondent's conduct is "unwarrantable" because it has no set procedure for maintaining and repairing the East A belt (See e.g. Tr. 51). The Secretary suggests that Respondent is hesitant to repair defective rollers because it would have to shut down this conveyor, which otherwise runs 24 hours a day (Tr. 52, 200, 223-24). By letting the belt fall into the state of disrepair that existed on August 17, 1993, The Secretary argues that Respondent failed to maintain the belt as would a prudent mine operator.

Respondent contends that the Secretary has simply failed to meet its burden of proving "unwarrantable failure." Respondent put on no witnesses regarding this order but submits that there is simply no evidence that this violation was due to more than ordinary negligence. I agree with Respondent.

To establish aggravated conduct, the Secretary must establish the standard of care from which the cited mine operator departed. The record in this case is completely amorphous in this regard. There is no question that there were many defective rollers and that the belt was misaligned, posing some degree of a fire hazard. However, I am left to guess at the reasonableness of the steps taken or not taken to correct these defects (See e.g., Tr. 54-55).

It may have been preferable for Respondent to introduce evidence establishing that it was acting prudently in maintaining the East A beltline, but the lack of evidence as to what constitutes prudent behavior inures to the detriment of the Secretary. Inspector Smith conceded that Respondent might not be acting imprudently if it failed to shut down the East A belt every time a single roller gets stuck--even though a single defective roller can cause a fire (Tr. 170-74). I am therefore left in the dark as to the circumstances under which a reasonably prudent employer would shut down the belt line, and how far beyond such circumstances were the conditions cited on August 17, 1993. I therefore vacate the characterization of "unwarrantable failure" contained in Order No. 3015093.

On the other hand, I conclude that the Secretary has established this violation to be "significant and substantial" (S & S). Given the number of defective rollers, the recurring nature of misalignments of the East A belt, and that Respondent's No. 7 Mine is a gassy mine, I conclude that it is reasonably likely that in the continued course of normal mining operations a fire would occur and such fire could result in serious injury.

I therefore affirm a "S & S" violation of section 104(a) of the Act, and assess a $2,000 civil penalty FOOTNOTE 2. This figure is derived primarily on the basis of the gravity of the violation, which I consider quite high given the number of defective rollers on the date of violation and the methane liberation of the No. 7 mine. Respondent is a medium-large operator (Tr. 13) and a $2,000 penalty will not affect its ability to stay in business. The record indicates the violation was timely abated in good faith.

The two remaining criteria that must be considered in assessing a civil penalty under section 110(i) are the operator's history of previous violations and negligence. I find nothing in the record regarding these factors that influences this penalty assessment.

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2/ $7,000 civil penalty was proposed by the Secretary.

Order 3015094, Float Coal Dust in East A Belt Conveyor Entry

On August 17, 1993, Inspector Smith also found accumulations of float coal dust throughout the 4900 feet of the East A conveyor belt entry (Tr. 78-79, 126-28) FOOTNOTE 3. Some of this dust was covering rock dust and some of it was floating in puddles of water on the mine floor (Tr. 125-26). The extent of the accumulation is indicated by the fact that Respondent used six pods of rock dust to abate the condition. One pod contains several tons of rock dust (Tr. 137).

As the result of his observations, Inspector Smith issued Order No. 31094__, alleging a violation of 30 C. F. R. 75.400 and section 104(d)(2) of the Act. The regulation requires float coal dust and other combustible materials to be cleaned up and that they not be permitted to accumulate on active workings or electrical equipment.

The order was characterized as "significant and substantial." Inspector Smith concluded that an ignition of the float coal dust was reasonably likely (Tr. 130-35). He opined that frayed chords and fibers of the conveyor belt which were being heated by friction could fall to the mine floor and ignite the coal dust. The belt fibers were being heated in places where they were caught in rollers and where the belt was rubbing against the conveyor structure (Tr. 133-35).

The determination of "unwarrantable failure" for this order was predicated on the fact that 2/3 of the East A belt was next to the track entry and therefore readily visible to everyone, including management officials (Tr. 136-37). Further, the accumulation of float coal dust was noted in Respondent's pre-shift examination book and no effort to abate the condition was underway when Smith observed the violation (Tr. 138).

I conclude that the violation herein was "S & S" as alleged. I find that the likelihood of the coal dust being ignited by heated belt fibers and the fact that this is a gassy mine is a sufficient "confluence of factors" to establish a reasonable likelihood of an accident and serious injury, Texasgulf, Inc., 10 FMSHRC 498, 501 (April 1988).

A "S & S" finding is not precluded by the fact that the East A belt had both a carbon monoxide detection system and point-type heat sensors (Tr. 67-68). The record establishes that miners may be exposed to smoke from such fire before being warned by either detection system (Tr. 70-71). Similarly, the

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3/ Dust is defined as coal dust particles that can pass through a No. 200 sieve, 30 C. F. R. 75.400-1.

fact that a miner has yet to be injured by a belt line fire at the No. 7 Mine does not mean that such injury is not reasonably likely to occur in the future. To hold otherwise would suggest that it is unimportant for operators to comply with sections 75.1725(a) and 75.400.

Similarly, I find that the Secretary has established an "unwarrantable failure" to comply with section 75.400 on the East A belt line. 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).

The extensive nature of the float coal dust accumulations along the East A beltline, the location of this beltline next to the track entry where it was readily visible to management, and the fact that inspector Smith found nobody engaged in cleaning up the accumu- lations, lead me to conclude that "unwarrantable failure" has been established in this case. While it is true that coal dust accumulations can occur in a relatively short period of time, the testimony of Inspector Smith and miner Troy Henson that the dust had accumulated throughout the belt entryway, make it very unlikely that this violation had just occurred when Smith observed it.

I find Respondent's exhibit JWR-1 to be insufficiently specific to be given any weight in determining whether this violation was due to unwarrantable failure FOOTNOTE 4. This document indicates that two people were shoveling and sweeping loose coal and coal dust on the East A belt on the day shift of August 17, 1993. The exhibit does not indicate how long this shoveling was done and in any event, I conclude from the extent of the accumulations found by Inspector Smith that whatever shoveling was performed was woefully inadequate to comply with the regulation.

The Secretary proposed a $7,000 civil penalty for Order No. 3015094, I assess a penalty of $3,500. I conclude that the gravity of the violation and Respondent's negligence as reflected by extensiveness of the accumulations warrant such a penalty in conjunction with consideration of the other four penalty criteria.

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4/ This exhibit was admitted over the Secretary's objection that it was not sufficiently authenticated (Tr. 161-68).

Order No. 3015095: Coal and Coal Dust Accumulations at the section 4 belt feeder

When inspector Smith arrived at the section 4 belt feeder on August 17, 1993, he found accumulations of loose coal and coal dust six to 42 inches in depth, 20 feet wide, and 15 feet long (Tr. 139-40). The belt feeder transfers the freshly mined coal from the ram cars coming from the working face to a belt conveyor (Tr. 139, 142-43). The section 4 belt feeder had been improperly positioned so that some of the coal from the ram cars was being dumped on the ground (Tr. 83-86, 139).

Smith issued Order No. 3015095 alleging a violation of section 75.400 and section 104(d)(2) of the Act. I find that the evidence falls short of that necessary to establish an "unwarrantable failure" to comply with the regulation. Although the condition was noted in the preshift examination book (Tr. 140) there is nothing in this record that would indicate Respondent's failure to correct this condition was anything more than ordinary negligence. This condition was not nearly as extensive, nor as persistent as that cited in Order No. 3015094.

On the other hand, I conclude that the Secretary has established this violation to be "S & S." The tail rollers on the conveyor were turning in loose material thus making ignition reasonably likely (Tr. 140). Considering also that this is a gassy mine, I find that the Mathies criteria have been satisfied.

I therefore affirm Order No. 3015095 as an "S & S" violation of section 104(a) of the Act. I assess a civil penalty of $500, rather than $5,000 as proposed by the Secretary. Respondent's negligence was not nearly as great as that assumed by the proposed assessment. However, the accumulation was recorded in the preshift book and there was no evidence of abatement measures when Smith observed the violation (Tr. 141). This degree of negligence and the gravity as reflected in the "S & S" determination warrant a penalty of $500, in conjunction with the other penalty criteria.

Citation No. 2807230: Improperly Secured Cover Guard

On September 22, 1993, MSHA representative Terry Gaither inspected the No. 1 longwall section at Respondent's No. 7 Mine. He observed that the cover guard for the main sprocket drive of the face conveyor was held in place by only one bolt (Tr. 20-21). Five other bolts for the guard had been sheared off (Tr. 20). The guard is approximately 30 inches by 30 inches and 1 1/2 - 2 inches thick (Tr. 20-21). It weighs approximately 200 pounds and is situated about four feet above ground level (Tr. 22, 25-26).

When Gaither observed the cover guard it was jumping up and down from vibration and rocks were coming out from under it and falling into a passageway (Tr. 20-23). Miners who passed by the cover guard could have been struck by a rock, or been hit on the foot by the guard if the last bolt sheared off and the guard became dislodged (Tr. 23-33).

Gaither issued Respondent Citation No. 2807230 alleging a "S & S" violation of 30 C. F. R. 75.1725(a). I affirm the citation as issued and assess a $362 civil penalty, the same as that proposed by the Secretary. I conclude that a conveyor on which a heavy metal plate is secured by one of the six bolts that are supposed to hold it in place is not "in safe operating condition" as that term is used in the standard.

I conclude further that if the cited condition persisted in the course of continued normal mining operations it is reasonably likely that a miner will be struck by a rock or by the metal plate itself and be seriously injured. A penalty of $362 is appropriate given the gravity of the violation and Respondent's negligence in not replacing the bolts when five of the six had sheared off.

Docket SE 94-84

This docket involves Order No. 3015087 issued on July 29, 1993, by MSHA inspector Kirby Smith. The allegations in this order are very similar to those in Order No. 3015993 in Docket SE 94-74, which was issued approximately three weeks later. This order involves the condition of the "isolated" portion of the East A conveyor belt at Respondent's No. 7 mine, rather than that portion of the belt which is adjacent to the track entry.

Smith observed a number of places where the top rollers of the conveyor belt had slid together, leaving portions of the belt inadequately supported (Tr. 215). The inspector also observed a number of the bottom rollers of the conveyor which had been taken out of service by detaching one side from the supporting structure (Tr. 215-16).

The belt was also improperly aligned so that it was rubbing against its supporting structure (Tr. 195-96, 215). This caused the belt to fray, with the fibers from the belt becoming entangled in the rollers and creating friction. Since the chords and fibers of the belt are flammable, inspector Smith concluded that a fire was highly likely. This and the fact that the air from the beltline was ventilated to the working face caused the inspector to characterize the violation as "S & S" (Tr. 221).

The inspector characterized the violation as an "unwarrantable failure" to comply with section 75.1725(a) for several reasons:

(1) the belt line was subject to preshift and onshift examinations;

(2) a large number of rollers were defective, and (3) his belief that the rollers taken out-of-service indicated management awareness of the cited conditions (Tr. 219-20).

The conditions observed by inspector Smith on July 29, 1993, were persistent and recurring problems on the isolated portion of the East A beltline. Union representative Keith Plylar had discussed them with management officials on numerous occasions, including just three days prior to the issuance of the instant order (Tr. 197-98). Plylar was told that the East A belt was prone to misalignment because it was constructed out of three different types of belting material (Tr. 202).

I conclude that Respondent committed a sS & S violation of section 75.1725(a) as alleged, but that the Secretary has failed to show that the violation is the result of Respondent's "unwarrantable failure" to comply. As with Order (now citation) No.3015993, the number of defective rollers and the persistence of this problem in a gassy mine lead me to conclude that there was a reasonable likelihood that this violation would contribute to a serious injury.

Similarly, I find the Secretary has failed to establish Respondent's "aggravated" conduct in the absence of any evidence indicating the measures that a reasonably prudent employer would have taken with regard to the East A belt. Given the fact that one of the defective rollers could have started a fire, I believe that the gravity of the violation, as well as the negligence of Respondent, warrants a civil penalty of $2,000, rather than the $7,000 proposed by the Secretary.

I conclude that the violation was the result of at least ordinary negligence on the basis of Mr. Plylar's testimony. Despite the fact that maintaining this beltline may be a Herculean task, it is readily apparent that in the three days between Mr. Plylar's complaint to management and the inspection, the condition of the isolated portion of the East A belt did not improve significantly (Tr. 197-209). Although this evidence is insufficient to find aggravated conduct, it is sufficient for the undersigned to conclude that Respondent should have done more in the way of maintaining the beltline than it did.

Docket No. SE 94-115

This docket pertains to two orders issued by MSHA Inspector Oneth L. Jones at Jim Walter's No. 7 mine. They allege excessive coal and coal dust accumulations in violation of section 75.400. The first was issued on August 16, 1993, and the second on September 2, 1993.

On August 16, at about 8:05 a. m., Jones was inspecting the West B conveyor belt and observed an accumulation of coal dust. It was wet on the bottom, damp in the middle and dry from the friction of the conveyer on top (Tr. 237, 241). This accumulation was about 19 inches deep, 20 feet in length and the width of the belt. The coal dust touched the bottom of the belt (Tr. 237-38).

Several conveyor rollers were stuck at the site of the accumulation and one was hot to the touch (Tr. 237-38). Jones characterized the violation as "S & S" because he believed that the heat generated by the rollers made an ignition of the coal dust reasonably likely (Tr. 244). I credit his opinion.

The "unwarrantable failure" characterization was predicated on the fact the violation was in an entry adjacent to the manbus stop (Tr. 239). Therefore, both the dayshift and the nightshift would have passed the cited area within an hour of Jones' arrival (Tr. 240). This area would have been subject to a preshift examination between 4 a.m. and 7 a.m. and Jones concluded that the accumulation was too extensive to have occurred after this examination (Tr. 242). Union walkaround representative Keith Plylar also believes that the accumulation occurred before 4 a.m. due to the amount of dust and the degree to which it was compacted (Tr. 274-75).

Respondent counters that coal dust accumulations of this magnitude have occurred in periods of less than an hour. It cites, in particular, an accumulation for which it was cited in August 1994 (Tr. 279-283). Given the lack of evidence on whether this accumulation existed when the preshift examination was done, I cannot credit the assumptions made regarding the duration of the violation by the Secretary's witnesses. I therefore find that it is unclear how long the condition cited had existed prior to Inspector Jones' arrival at the scene.

Applying the criteria set forth by the Commission in Peabody Coal Co., 14 FMSHRC 1258 (August 1992), I do not find that this violation rises to the level of "unwarrantable failure." The accumulation was not sufficiently extensive to lead to such a finding, and as stated above, I find the evidence regarding the duration of the violation similarly insufficient. The Secretary

also argues that 192 violations of this regulation by Respondent in the two years prior to the instant order mandate a finding of unwarrantable failure (Secretary's brief at 7-9).

This number of prior violations of the standard does not, standing alone, persuade the undersigned that the instant violation was due to an "unwarrantable failure." The record is clear that coal spills in coal mines and that it accumulates. It is also clear that this may happen rather quickly. I find nothing in this record to persuade me that Respondent's failure to start clean-up of the instant accumulation by the time of inspector Jones' arrival constituted aggravated conduct.

In conclusion, I affirm Citation No. 3183062 as a "S & S" violation of section 104(a) of the Act. I assess a civil penalty of $1,000--giving greatest weight to the gravity of the violation when considering the six penalty criteria.

Order No. 3183157

On September 2, 1993, at 7:50 a.m., Inspector Jones observed the East A belt tailpiece turning in an accumulation of fine dry pulverized coal dust (Tr. 252). The suspended dust was highly visible (Tr. 252). Jones issued Respondent 104(d)(2) Order No. 3183157.

His characterization of "unwarrantable failure" was based on the fact that he had cited an almost identical problem at the same location less than two weeks earlier on August 24, 1993 (Tr. 254-56), and that miners, including management personnel, passed right by the cited location getting on and off the manbus at the beginning and end of their shifts (Tr. 263). Jones also concluded that the accumulation must have been created prior to the preshift examination for the dayshift (Tr. 258-60).

I am not sufficiently persuaded by inspector Jones' opinion as to the duration of the violation to accord it great weight. Thus, for the same reasons that I stated with regard to the previous violation I find that the record fails to establish conduct sufficiently worse than ordinary negligence.

Citation No. 3183157 is affirmed as a "S & S" violation of section 104(a) of the Act and section 75.400 of the regulations. I assess a civil penalty of $1,000, primarily because the gravity of the violation in conjunction with the other penalty criteria warrant such an amount.

ORDER

Docket No. SE 94-74

Citation No. 3015993 is affirmed as a S & S violation of section 104(a) and a $2,000 civil penalty is assessed.

Order No. 3015994 is affirmed as a violation of section 104(d)(2) of the Act and a $3,500 penalty is assessed.

Citation No. 30150995 is affirmed as a S & S violation of section 104(a) and a $500 penalty is assessed.

Citation No. 2807230 is affirmed as a S & S violation of section 104(a) and a $362 penalty is assessed.

Docket No. SE 94-84

Citation No. 3015087 is affirmed as a S & S violation of section 104(a) and a $2,000 penalty is assessed.

Docket No. SE 94-115

Citation No. 3182957 is affirmed as a S & S violation of section 104(a) and a $1,000 penalty is assessed.

Citation No. 3183157 is affirmed as a S & S violation of section 104(a) and a $1,000 penalty is assessed.

The penalties assessed above shall be paid within 30 days of this decision. Thereupon these cases are DISMISSED.

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

Distribution:

William Lawson, Esq., Office of the Solicitor, U. S. Department of Labor, Chambers Bldg., Highpoint Office Center, Suite 150, 100 Centerview Drive, Birmingham, AL 35216 (Certified Mail)

F. Stanley Morrow, Esq., Jim Walter Resources, Inc., P. O. Box 133, Brookwood, AL 35444 (Certified Mail)

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