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CONSOLIDATION COAL V. SOL (MSHA)
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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

CONSOLIDATION COAL COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. WEVA 94-260-R
	:	Citation No. 3318787; 5/5/94
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Blacksville No. 2 Mine Mine ID 46-01968

DECISION

Appearances: Elizabeth S. Chamberlin, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Contestant; Elizabeth Lopes, Esq., and Robert S. Wilson, Esq., U.S. Department of Labor, Arlington, Virginia, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a Notice of Contest filed by the contestant pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, challenging the legality of a section 104(d)(1) "S&S" citation alleging a violation of mandatory safety standard 30 C.F.R. 75.1725(a). A hearing was held in Morgantown, West Virginia and the parties filed posthearing briefs which I have considered in the course of my adjudication of this matter.

Issues

The issues presented in this case are (1) whether the conditions or practices cited by the inspector constitute a violation of the cited mandatory safety standard, (2) whether the alleged violation was "Significant and Substantial" (S&S), and (3) whether the alleged violation was the result of an unwarrantable failure by the contestant to comply with the cited standard.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977; 30 U.S.C. 801 et seq.

2. Commission Rules, 29 C.F.R. 2700.1, et seq.

3. Mandatory safety standards 30 C.F.R. 75.1725(a).

Stipulations

The parties stipulated to the following (Tr. 12):

1. The Administrative Law Judge and the Federal Mine Safety and Health Review Commission have jurisdiction to hear and decide this contest proceeding pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977.

2. The contestant is the owner and operator of the Blacksville No. 2 Mine.

3. Operations of the Blacksville No. 2 Mine are subject to the jurisdiction of the Act.

4. The contestant may be considered a large mine operator for purposes of 30 U.S.C. 820(i).

5. The maximum penalty which could be assessed for this violation pursuant to 30 U.S.C. 820(a) will not affect the ability of the contestant to remain in business.

6. MSHA Inspector Lynn A. Workley was acting in his official capacity as an authorized representative of the Secretary of Labor when he issued Citation No. 3318787.

7. A true copy of Citation No. 3318787 was served on the contestant or its agent as required by the Act.

8. Citation No. 3318787, marked as Government Exhibit No. 1, is authentic and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

The contestant's counsel would not stipulate to the accuracy of MSHA's proposed civil penalty assessment "Data Sheet" and MSHA's computerized mine compliance history print-out (Exhibits G-5 and G-6). However the objections were overruled and the documents were admitted and made a part of the record (Tr. 13).

Discussion

Section 104(d)(1) "S&S" Citation No. 3318787, May 5, 1994, cites an alleged violation of 30 C.F.R. 75.1725(a), and the cited condition or practice states as follows:

> The 6 South No. 2 belt conveyor was not being operated in safe condition. The tailpiece was plugged with fine coal and coal dust. Several roller sections were missing and the belt was riding on the steel roller mounting brackets. Most of the remaining roller sections were stuck with fines and worn flat from belt friction. The side frame and floor adjacent to the tailpiece was covered with thick dry black float coal dust. A cloud of black float coal dust was present in the air above and behind the tailpiece. The belt was removed from service immediately when cited.

MSHA's Testimony and Evidence

MSHA Inspector Lynn A. Workley testified as to his experience and background, including 8 years of work for the contestant at an underground mine. He has served as an inspector for 12 years and is a certified mine foreman and underground electrical worker. He confirmed that he was familiar with the Blacksville No. 2 mine and has inspected it for 10 years (Tr. 14-16).

Mr. Workley confirmed that he inspected the mine on May 5, 1994, and was accompanied by Ron Thomas, a company escort, and Philip Nine, the miner's representative. Mr. Workley identified a copy of the citation that he issued and he explained what he observed and why he cited a violation of section 75.1725(a), requiring the cited conveyor to be removed from service. He stated that the belt was in operation and he observed "a cloud of float coal dust" in the air above and behind the tailpiece. He concluded that the tailpiece was clogged with fine coal and coal dust and that the belt was rubbing coal and generating float dust. He stated that it was difficult to see inside the tailpiece with the belt running, but that he could see in from the side view and observed that "the area between the top and bottom belt was packed with fine coal". He also observed coal dust accumulations a quarter of an inch in thickness on the right side of the tailpiece facing it inby (Tr. 16-21).

Mr. Workley stated that after the hinged tailpiece side guards were opened, he observed that the area under the top belt and around the impact rollers was completely plugged and full of dry coal and coal dust accumulations and part of the impact rollers were stuck and were "worn completely flat clear down to the shaft". He stated that a couple of rollers were missing under the tailpiece, and believed that only 2 out of 12 roller sections

were turning. He also stated that the belt was not aligned on the rollers and that it was running over to the right side and was contacting the metal brackets that the missing rollers had been mounted on. Approximately one inch of the top of two brackets had been worn away by frictional contact with the moving belt (Tr. 21-23).

Mr. Workley stated that heat was being generated at the area where the brackets were worn and where the thick float coal dust was on the tailpiece frame and on the floor beside it, and he could feel warm air coming out of that side of the tailpiece (Tr. 23). Mr. Workley explained why he believed that the conditions he observed constituted a violation of section 75.1725(a), as follows at (Tr. 24-25):

> A. As I said previously, that standard requires that mobile and stationary equipment be maintained in safe operating condition. This tailpiece was not maintained in safe operating condition. The belt was running. It was in contact with fine coal and coal dust accumulations inside the tailpiece. It was also in contact with metal brackets, producing frictional heat.
>
> Q. Was there evidence that any maintenance had taken place on this belt?
>
> A. No.
>
> Q. Why didn't you write a separate citation under section 75.400 for coal dust accumulation?
>
> A. I considered a violation of 75.400 initially, before the protective hinged sides were turned back and I could see that the belt was definitely wearing against the metal stand. Then I decided that .1725(a) -- That standard requires that it be removed from service -- It was adequate just to issue a citation under that standard. I didn't need to write both of them, in my opinion.
>
> Q. Mr. Workley, how was the violation abated?
>
> A. All of the combustible material was cleaned from inside the tailpiece, removed and put on the belt. The brackets that the belt had been contacting were bent back to prevent further contact if the belt ran out of alignment.
>
> Q. Would the operator have been able to completely abate this violation without stopping the belt?
>
> A. Not safely, no.

Mr. Workley confirmed that he designated the violation as significant and substantial and stated that the cited conditions created a fire hazard in the mine. He was aware of at least two belt fires, and he explained what was needed for a belt fire to occur as follows at (Tr. 26-27):

> A. Three things are necessary for a fire; adequate air, adequate fuel and an ignition source. There was adequate air in that area, with twenty-one percent oxygen in it. There was ample amount of dry coal and coal dust inside the tailpiece and on the frame, beside the tailpiece and on the mine floor, and in the air above and behind the tailpiece. And there was a frictional heat source from the belt rubbing the accumulations and from the belt rubbing against the metal stands where the rollers were missing. And, occasionally, at intervals of four hundred feet or less, there are metal splices that hold the belt together that come through and you have metal to metal friction against those metal stands that are being worn.

Mr. Workley stated that metal to metal friction would create sparks and the float coal dust or dry coal dust, which he described as "dry and black", could be ignited by the generated heat. He believed it was reasonably likely that a fire would occur if the belt continued to run without the cited conditions being corrected. He believed it was reasonably likely for an injury to occur if there was a fire because the heat and smoke area was confined and the heat and smoke would likely not be carried away, and someone there to fight the fire would be injured by smoke inhalation or burns (Tr. 28). He confirmed that two fire detection systems were installed on the No. 2 belt, one in the general tailpiece area, and the other some distance away.

Mr. Workley explained his high negligence and unwarrantable failure findings as follows at (Tr. 29-31):

> A. * * * Looking at the wear I saw to the impact rollers, it occurred while coal was being loaded onto this tailpiece and that had ceased happening months before this violation was cited. The rollers had been worn out for months.
>
> The amount of coal that had accumulated inside the tailpiece had been there shifts, days, weeks. I can't tell you how long for sure. It took a prolonged period of time for it to accumulate.
>
> The thickness of the float coal dust on the side of the structure and on the mine floor indicated that it had been like this for a long period of time.

A pool of water behind and under the end of the tailpiece which was black with coal dust, and the presence of a wash down hose, indicated to me that float dust had been present previously and had been washed off of this area repeatedly.

Q. When you observed the condition at the six south number two belt, was it obvious that it was in an unsafe condition?

A. Yes, it was.

Q. And would a reasonably competent preshift examiner have noticed this condition?

A. He should have, yes.

Q. In your opinion, the condition you just described, did it exist prior to the previous preshift exam?

A. There is no question in my mind that it did, Yes.

* * * * * * *

Q. How long do you believe it took for the brackets to be worn down?

A. Several days, weeks. They wear slowly. It's a rubber belt. I think the belt travels somewhere around three hundred and fifty feet per minute. It's enough to create a great deal of friction, but a steel bracket a quarter to three-eights of an inch thick wears rather slowly, so this took a long period of time.

Q. You described coal dust accumulations inside the tailpiece. How long do you think it took for that accumulation to build up?

A. Weeks.

Mr. Workley stated that as he approached the tail piece area to better evaluate the problem, safety escort Thomas picked up a washdown hose and started washing the left side of the tailpiece and the floor. When he informed Mr. Thomas that he was issuing a citation, Mr. Thomas became excited and left the area. When he returned he washed down the other side of the tailpiece after the belt was shut down and stated "I want to apologize to you for yelling. I didn't realize it was this bad" (Tr. 32). Several mine officials then appeared at the scene, and one referred to the condition of the tailpiece and commented that "he did not want this kind of junk -- only he used stronger language -- in his mine" (Tr. 34).

Mr. Workley explained why the belt was not aligned and why he believed that the worn impact roller conditions took place over multiple shifts and that no maintenance had been done for a long time. He also explained why he believed the float coal dust had accumulated over a period of multiple shifts (Tr. 35-37), and stated as follows at (Tr. 38):

> A. I'm not positive, but based on twenty years of experience as a miner and as an inspector, what I saw in the air, the amount of float dust that was in the air current there, it would have taken a long period of time for that thickness of float dust to settle on that structure and on the walkway beside it.

On cross-examination, Mr. Workley confirmed that his belief that the belt rollers had been dumping while coal was being dumped on the tailpiece was an inference on his part and that he had no other explanation for the roller wear that had occurred. He also confirmed that a belt alignment problem can be unexpected and occur at any time while the belt is in operation. If this occurs, coal spillage can be expected and it can get caught up in the bottom belt. Although the coal on the belt is normally wet to damp, the coal he observed around the impact rollers and plugging the tailpiece was fine and extremely dry, and the float coal dust was black and suspended in the air (Tr. 39-42).

Mr. Workley confirmed that he had not previously inspected the six south tailpiece and that he had no way of knowing how long it took for the float coal dust to be generated (Tr. 39, 43). He patted the accumulations on the belt frame and floor and it dispersed into a black cloud in the air. The float coal was "finely ground, the consistency of face powder", and he collected no samples (Tr. 44).

Mr. Workley stated that he did not speak to the fire boss about his examination, but he did speak to others in mine management who told him that no foreman had come to look at the six south tailpiece after the fire that occurred on sixth north (Tr. 45).

Mr. Workley stated that he found no problem with the tail roller on the cited tailpiece and detected no hot rollers or smell of combustion. He confirmed that it was possible that warm air would be generated from a continuously running piece of equipment. He confirmed that operating a tailpiece with missing impact rollers is not a violation as long as the belt is not contacting the frame. He confirmed that he observed the belt contacting the frame, and when the belt was not running "it was resting on portions of the frame when it stopped and portions of the frame were worn away by friction of the belt rubbing it" (Tr. 49).

Mr. Workley believed that the fire boss should have observed the cloud of float coal dust generated in the air above and behind the tailpiece and should have looked inside to determine what was generating the dust (Tr. 51). He did not know when the last preshift was conducted prior to his inspection, but indicated that at a minimum, it would have been close to four hours. He conceded that he was speculating that the fire boss encountered the same conditions that he observed, and confirmed that he did not issue a violation for an improper preshift examination (Tr. 52-54).

Mr. Workley stated that the two missing rollers were rubber impact rollers, and that no metal rollers away from the tail piece were missing, and he explained the worn bracket conditions that he observed (Tr. 55-58).

In response to further questions, Mr. Workley stated that "judging by the wear on those two brackets" he concluded that the belt had been out of alignment for "several shifts" (Tr. 58). He described the condition of the brackets as "worn down approximately one inch at the top and they were both bright and shiny" and he believed it took "shifts weeks" for this to occur (Tr. 59). He believed it unlikely that the coal dust accumulations he observed occurred over a short period of time because he found float coal dust "a quarter to more than a quarter of an inch thick" deposited adjacent to the tailpiece belt and he has inspected belt lines that had not been dragged or rock dusted for several shifts and found little or no accumulations of float coal dust (Tr. 59).

Mr. Workley stated that the float coal dust was washed down to terminate the citation and the clogged coal fines were removed with a bar, roof bolts, or a pointed instrument (Tr. 60). He explained that no coal had been transported over the tailpiece in question for three or five months before his inspection when it was operated as part of a working section. The tailpiece belt was running during his inspection because it was a continuation of the "mother belt", and it performed no useful function. However, the mother belt would not operate if the tailpiece were shut down (Tr. 62).

Mr. Workley confirmed that he reviewed the prior fire boss preshift and onshift reports and saw no indication of the cited conditions. The tailpiece area was part of the normal fire boss run and he saw no examination entries mentioning the brackets, the belt out of alignment, or the presence of any float coal dust (Tr. 63). He did not speak with the fire boss who worked the midnight shift and who was not present when the citation was issued (Tr. 64). He explained his concerns as follows at (Tr. 64-65):

Q. So missing rollers, per se, is not a violation.

A. No, sir, it's not.

Q. And the belt running out of alignment is not a violation.

A. No, your honor, it's not.

Q. I guess the bottom line is that it was in general disrepair, in that these two brackets were touching and caused the belt to run out of alignment, caused some friction. And there was float coal dust there and you were concerned it was a fire hazard. Is that it?

A. Yes, your honor.

Robert P. Nine, testified that he has worked for the contestant for 21 years, and that he currently works as a block mason. He confirmed that he accompanied Mr. Workley as the miner's representative during his inspection on May 5, 1994, at the tailpiece. He confirmed that he observed "heavy" float coal dust accumulations on the belt structure and tailpiece and estimated that it was "under a half inch, or quarter inch" thick. He estimated that it would take "two to three days, maybe" for the coal dust to accumulate. He looked into the side of the tailpiece and observed a roller that was worn flat with fine coal dust and pieces of coal or fines around it where it had frozen the roller. The belt was running, but the frozen roller was not turning (Tr. 66-69). He further described his observations as follows at (Tr. 70-71):

Q. Were the side guards ever removed so you could get a better look inside the tailpiece?

A. Yes. The beltman came later and the belt was shut off. And they pulled the skirts or the guard. The top of it come up and fell back.

Q. What did you see?

A. It was a mess. Rollers wore down, froze; accumulation of coal in the tailpiece.

Q. Can you estimate how long it would have taken for the coal to accumulate inside the tailpiece in the manner that you saw it?

A. I would say weeks.

Q. Did you see the belt rubbing on the steel bracket or on two steel brackets?

A. Yeah. That was on the other side of the belt. There wasn't any roller there. There was a bracket, and you could see where the belt had rubbed into the bracket.

* * * * * * *

A. Yeah, it was worn down. It was worn down past where the other belt -- I don't know how far. It was shorter than the others by an inch or so.

Q. Do you have an estimate as to how long that took?

A. On that, I don't know. I would say a day, couple days. I don't know how long it would take a belt to go through steel like that. I would say a day or two, maybe a week.

Mr. Nine stated that Mr. Thomas was initially angry with Mr. Workley for issuing the citation but later apologized to him after looking at the tailpiece. He stated that Mr. Thomas said it was bad but "didn't think it was that bad till he looked in it" (Tr. 72). He also confirmed that there have been three or four belt fires at the mine during the past year.

On cross-examination, Mr. Nine estimated that he had visited the cited tailpiece five to ten times prior to Mr. Workley's inspection. He confirmed that someone would be assigned to clean up coal accumulations and take care of problems on belt lines as they occurred. He confirmed that he did not know how long the belt was running off to one side of the tailpiece, and since the tailpiece is enclosed, one could not see that it running off of the brackets unless the enclosure was opened up. He confirmed that a casual observer could not see the belt running off unless they opened up the hinged guards and looked under the cover (Tr. 77-78).

Ray L. Ash, MSHA Inspector Supervisor, testified that he has 46 years of mining experience, 21 of which was in private industry as a mine superintendent, section boss, and mine foreman. He confirmed that he was with Mr. Workley during his inspection of May 5, 1994, and that he was there to conduct a quality control review and evaluation as to how inspections are conducted (Tr. 79-82).

Mr. Ash stated that he personally observed the conditions cited by Mr. Workley and he described them as follows at (Tr. 84-86):

A. We came off of the -- I believe it was the five-s belt. We came down it. Five-s belt, from one end to the other, is several hundred, maybe a thousand feet

long, a very good looking belt, very well maintained, everything in good shape, you know.

We came down to the corner there and I looked around the corner. I couldn't believe the contrast of what I saw up this little -- Up the entry where this tailpiece was setting, the contrast to the rest of the belt line. You know, it just indicated there was lot of trouble there from somewhere. I don't know where. But something was bad wrong.

Q. Why do you say that?

A. Well most of the rock dust had been washed off the ribs, float dust in the air. I could see float dust on part of the structures and thing up three, that had settled, and just -- I've been to many of them. And when you see that, you know, you've got trouble, when you see it look like that.

* * * * * * *

A. When I saw it up there, I stepped back and I let Mr. Workley go first, because I knew there was trouble. Then I walked along after he went up in there. And I saw -- tried to see in the tailpiece.

There wasn't too many places you could see in. I couldn't see any rollers in there as it's been testified to before. Everywhere I looked in there, it was packed with some kind of coal. Some of it was caked hard. Some of it was loose. I just couldn't see anything in there that much.

I could see a lot of float dust collected on the ribs and some float dust in the air. I could see it in the beam of my light.

Q. When the side guard was lifted, afterward, what did you see then?

A. I walked -- After the side guards were lifted, which was a good while later, I walked back up far enough to look, just to look in there. The reason I didn't go clear to the end, there must have been eight or ten people in this little confined place, trying to work and do things. So I tried to stay out of the way as much as I could.

But I did see the brackets. I wasn't close enough to tell how much they were wore down, a quarter inch, a half inch, inch, or what. But the brackets did show

signs they had been worn on. And the rollers and the other stuff was just a mess in there. Everything had been bound up with coal.

Mr. Ash believed that the danger of fire was very real, and based on his experience, he was of the opinion that it was highly likely that a belt fire would have occurred of the belt continued to run without correcting the cited conditions. He agreed with Mr. Workley's finding that an injury was reasonably likely to occur to people fighting the fire. He also believed that methane, which is released freely in the mine, could be present in the area, adding to the hazard (Tr. 87).

Mr. Ash expressed his "one hundred percent" agreement with Mr. Workley's high negligence and unwarrantable failure findings and he believed that the accumulations occurred over a long period of time. He saw no evidence of any coal spillage along the belt live and did not believe that the accumulations had occurred recently. He also believed that it took a long time for the worn bracket condition to occur and he stated that this would be a very slow process taking place over "several months". Based on his experience, he believed that a reasonably competent preshift examiner would have noticed the float coal accumulations in question. He confirmed that an examiner would not be able to see the belt rubbing on the steel bracket while waking by the belt. However, he believed that a competent examiner would have looked for the source of the float coal dust and reported it to his foreman (Tr. 88-91). Mr. Ash denied that he ever commented to Mr. Thomas that the conditions he observed "was not that bad" and he heard no comments from Mr. Thomas about the condition of the tailpiece (Tr. 94).

On cross-examination, Mr. Ash stated that he was impressed with management's quick reaction to the citation (Tr. 96). He confirmed that no one would open the tailpiece covers unless the belt were shut off and that it was difficult to open the covers "because it was hinged and I think it hadn't been opened for so long" (Tr. 97). He believed that the worn bracket condition would have occurred from the belt running off center on more than one occasion (Tr. 98-100). He had no reason to believe that the belt fire detection or fire suppression systems were not functioning and he found nothing wrong with them (Tr. 100).

Mr. Ash believed that the preshift examiner should have observed the absence of rock dust, and the presence of float dust in the area and on the ribs, and this should have alerted him to look in the tailpiece. He confirmed that the floor around the tailpiece "was wet, sloppy, muddy". Although it was possible that the float dust in the air was not there when the preshift was conducted he believed that this possibility is "very, very low", and that at least part, if not all, of the conditions were present (Tr. 102).

Mr. Ash confirmed that he found no methane problem at the tailpiece area, and no hot rollers or electrical problems. He found no problems on any of the other belts in the area. He confirmed that the problem was confined to the cited tailpiece area 45-feet from the transfer point and stated that "it looked like another world" (Tr. 105).

In response to further questions, Mr. Ash stated that the friction between the belt, the brackets, the frozen rollers, and the belt rubbing the coal in the tailpiece were all sources of ignition (Tr. 106). He stated that some of the coal he observed near the brackets was dry, indicating that heat was being generated, while the coal in other areas was damp (Tr. 107).

Mr. Ash stated that the float coal dust and packed coal conditions were observable from the side of the tailpiece but that the brackets underneath were not readily observable until the belt was shut down and the covers were opened up (Tr. 114). He summarized his agreement with the unwarrantable failure finding by Mr. Workley as follows at (Tr. 116):

> [S]o I guess the nuts and bolts of this citation is the fact that you found float coal dust accumulated on the belts. You came to the conclusion it had been there for a while. And after you opened the hinges, you found all these other conditions. You found, like you said, it was a marked contrast between another part of the mine. And you agreed it was unwarrantable, because the mine management should have been alerted to that or at least the fire boss should have been alerted to it and gone one step further than what he did.
>
> A. Yes, Sir.
>
> Q. Or what you believe he did or didn't do. Is that correct?
>
> A. Yes, sir.
>
> Q. So that is the aggravated conduct.
>
> A. Yes.
>
> Q. That supports the unwarrantable.
>
> A. Yes

The Contestant's Testimony and Evidence

John Straface, mine superintendent, testified that he holds a 1987 degree in mining engineering from West Virginia university, and has been employed by the contestant since that

time. Referring to a mine map, he stated that the cited tailpiece was a couple of miles away from the fire that occurred on the six north belt (Tr. 121). He explained the direction of the airflow over the tailpiece area and confirmed that there was a stopping 12 to 15 feet behind the tailpiece and that there was a dead end down the entry. The stopping was 12 to 15 feet from the tailpiece. He confirmed that fire sensors and suppression systems were installed in the area, including a water pump, bags of rock dust, and a fire extinguisher (Tr. 117-127). He also explained how the impact rollers functioned and how they are distinguished from the metal rollers found along the beltline. He confirmed that there are six similar tailpieces in operation in the mine and he has experienced no significant problems with them (Tr. 131-133).

Mr. Straface explained how the tail pieces are serviced and maintained, and he believed that adequate examinations are made and he could recall no prior citations for a violation of section 75.1725(a) (Tr. 134).

Mr. Straface explained the duties of a fire boss, and he stated that any hazardous conditions found by the examiner are taken care of immediately. He stated that hot impact rollers are not common and that he has never observed or known of any such rollers getting hot (Tr. 135). He examined and explained several preshift examination reports covering the area cited by Mr. Workley (Tr. 136-139).

Mr. Straface stated that he arrived at the cited tailpiece area fifteen minutes or one half an hour after the belt was shut down. He described the area as damp and wet, and stated that the ribs were moist and adequately rock dusted. He observed no cloud of float coal dust and confirmed that some work had already been done in the areas and the belt was not running. He also confirmed that he did not observe the conditions observed by Mr. Workley with the belt running. He did not consider the tailpiece to be in an unsafe operating condition (Tr. 140-143).

Mr. Straface stated that he observed wet muck material that had built up around some of the impact rollers and some wet buildup on part of the belt structure. The tail roller and belt rollers "were running free" and he did not consider missing impact rollers to be an unsafe condition. He did not believe that the impact roller bracket was causing a problem. He stated that "there were impact rollers that were not turning" and that they were "frozen" (Tr. 144). However, he did not consider this condition to be necessarily a hazard (Tr. 145).

Mr. Straface confirmed that a belt fire had occurred at approximately 1:00 a.m. on the six north belt on May 5, 1994, the shift before Mr. Workley's inspection of the sixth south tailpiece. He explained that a tail roller similar to the cited

one had failed and the hot bearing was against a piece of the rubber belt conveyor that had lodged in the area and it caused some smoldering of the belt line. The foreman at the scene had to cool it off with a fire extinguisher and water, and as a result of this incident, crews were dispatched to examine the other mine tailpieces (Tr. 146-148).

Mr. Straface confirmed that the cited tailpiece was checked for any problem similar to the one that caused the fire on the earlier shift but that the tailpiece guards were not opened to examine the area under the guards (Tr. 149). He reiterated that he did not observe the conditions observed by Mr. Workley before the citation was issued shutting down the belt (Tr. 153).

On cross-examination, Mr. Straface stated that some amount of float coal dust is unavoidable on belts, but it is a hazard and should be recorded in the preshift report. However, he explained that the foremen are instructed to correct float coal dust conditions immediately, and if this is done, the condition is not reported during the preshift, but it should be recorded on the on-shift side of the examination book (Tr. 158-159). He agreed that some of the wet and "sloppy" conditions be observed at the tailpiece could have occurred by washing off the tailpiece to take care of accumulations of spillage and float coal dust (Tr. 160).

Mr. Straface stated that it would take more than a shift, and possibly more than a day, for the impact rollers to be worn down to the shaft. He could not recall that any metal was showing on the worn rollers and stated that "they were worn to a flat place" (Tr. 162). He further stated that no coal was being dumped on the cited tailpiece and the section ceased developing in December, 1992. The tailpiece was used at that time as a section tailpiece when it was in production (Tr. 162). He stated that the tailpiece is examined regularly no more than every 2 weeks, and usually every week. He did not believe that a flat impact roller necessarily demands immediate maintenance, and he stated that the belt line was not in operation for 5 or 6 months during a strike (Tr. 163).

In response to further questions, Mr. Straface stated as follows at (Tr. 167-170):

Q. Do you think all these conditions that inspector Workley described on the face of this citation could have occurred within a week; struck rollers, bent bracket, all the stuff that the found in there? That could have happened between inspections?

A. All of those conditions?

Q. Yes.

A. It probably -- It probably could have grown in magnitude.

Q. What?

A. It probably could have grown in magnitude. All of those conditions that he noted would not have required the belt to be shut down to repair them on their own.

* * * * * * *

Q. Human nature being what it is -- this tail roller is kind of isolated. It hasn't ben used on a regular basis. It is altogether possible that somebody just forgot to look at this thing, open it up and look at it?

A. I'm sure that is possible.

JUDGE KOUTRAS: Nobody is going to admit that to you, are they? You're the mine superintendent. That is true, isn't it? Nobody is going to admit that to you, are they?

A. (No Response.)

Ray Campbell testified that he has an associate degree in mining from Belmont Technical College, and has worked in the mines since 1977. He has worked for the contestant since 1984, as a section foreman and fire boss, and "sometimes, whenever they need me to fill in, I do preshift examinations" (Tr. 173). He confirmed that he was familiar with the violation in this case and he stated that he conducted the preshift examination on the May 5, 1994, midnight shift. He stated that he looks for float dust, spillage, bad rollers, roof and rib conditions, and methane (Tr. 174).

Mr. Campbell stated that he was at the cited tailpiece on two occasions during the May 5, midnight shift, and he went there the second time after an alarm sounded on the six north tailpiece because of a hot bearing. He found no unusual conditions or circumstances at the cited tailpiece when he arrived there at 1:30 a.m. He stated that he looked around the tailpiece, checked the pillar block bearings, and found nothing unusual other then some water and slop which he pumped out. He found no accumulations of float dust on the tailpiece but did not pull the covers off to look inside because " I seen nothing out of the ordinary, I didn't feel it was necessary, and you cannot do that with the belt running" (Tr. 176).

Mr. Campbell stated that he considered hot rollers, coal spillage, the belt or roller rubbing in coal spillage, and float

dust to be hazardous conditions. He stated that he observed no evidence of the belt running in coal around the tailpiece, and saw no damage to the edge of the belt or the belt running out of train or off to one side at the tailpiece (Tr. 178). He returned to the tailpiece area at 6:00 a.m. to preshift it and it took him 5 to 10 minutes to do this. He checked for float dust, spillage, methane, and roof or rib conditions. He saw no float dust in the air, saw no quarter inch accumulations on the tailpiece structure and observed nothing that would have led him to pull the tailpiece covers open and look inside. The examination of the tailpiece interior is not a normal part of his examination and this job is assigned to the belt foreman. He stated that he would have taken care of any hazardous conditions if he had found any (Tr. 179-181).

Mr. Campbell stated that he would look at both sides of the tailpiece during his examination and could not recall ever having to use the washdown hose to wash float dust off the tailpiece. He described the area on the day he was there as "very wet and muddy", and the only explanation he had for any float dust observed by the inspectors was that someone turned the belt water off. He stated that the coal dust would come off the other belt lines, and believed it was possible that spillage and muck caught in the bottom belt may have been the source of the coal dust
(Tr. 183-186).

Mr. Campbell stated that he looks for ignition sources such as bad rollers, sparks, or signs of combustion, but observed none of these during his examination, and he smelled nothing unusual
(Tr. 188). He explained the absence of any float dust entries on his preshift reports and stated that "we do whatever is necessary to take care of the situation" and that this is standard mine procedure (Tr. 189).

On cross-examination, Mr. Campbell stated that he could examine the tailpiece tail roller bearings by looking at them from each side, and he had no reason to believe there were any bad or missing rollers inside the tailpiece and had no reason to look inside (Tr. 191). He stated that there is no reason to record a hazardous condition that is taken care of during the preshift examination because "its no longer a violation or hazardous condition" and "you have already cleared it" (Tr. 193). It is, however, noted on the on-shift book that the condition was there and that it was taken care of. Any float coal conditions detected are taken care of immediately (Tr. 197).

Don Chernok, belt foreman, stated that he has worked for the contestant for 22 years and holds fire boss and foreman's papers. He is responsible for the large rollers and bearings at the back of the tailpiece, the guarding and skirting, and the inside rollers. He stated that he examines the tailpieces "as often as

I can. I try to get them once a week. Sometimes it's a little more than a week that I finally get around to all of them
"(Tr. 209). He examines for conditions that cannot be detected when the belts are running and he opens the tailpiece lids to look inside (Tr. 209).

Mr. Chernok stated that a flat or frozen roller does not render a tailpiece unsafe to operate and it simply indicates that "there is a potential of maintenance for me, something that I do need to make corrections on as time warrants" (Tr. 210). He does not consider a missing impact roller to be an unsafe operating condition, and he removes lumped coal around a roller to avoid any damage. Fine coal around rollers, and accumulations of muddy materials are hosed out. He could not recall any float coal dust situations at the cited tailpiece (Tr. 212).

Mr. Chernok could not recall the exact day he examined the tailpiece prior to May 5, and stated that "it never goes more than a week and a half that I don't see every tailpiece" and that he never fails to examine the tailpiece in question (Tr. 212).

On cross-examination, Mr. Chernok stated that he does not routinely stop the belt during his examinations of the tailpiece unless he observes something out of the ordinary. He does not keep maintenance records for the tailpiece. He stated that he checks the tailpiece "at least every other week, maybe not weekly. And I do try to examine weekly" (Tr. 215). He explained how the cited conditions could have occurred at the tailpiece since his last examination, and he stated that no belt problems, such as tears, worn edges, or abrasions, ever came to his attention at any time when the citation was issued (Tr. 220).

In response to further questions, Mr. Chernok stated that he considers rollers turning in fine, black, dry float coal dust to be an unsafe condition because of the possibility of heat and combustion. He also believed that a belt riding on, and rubbing the brackets, could generate heat. He confirmed that the conditions found by the inspectors could have occurred a week or a week and a half prior to his last inspection (Tr. 222).

Mr. Chernok stated that he arrived at the tailpiece no more than 30 minutes after the citation was issued and that he was in no position to observe the float coal that the inspector testified about (Tr. 226).

Ronald E. Thomas, safety inspector, testified that he has 24 years of mining experience as a section foreman and safety escort, all at the Blacksville No. 2 mine (Tr. 227). He confirmed that he accompanied Inspectors Workley and Ash during the May 5, 1994, inspection, and he identified copies of his inspection notes (Exhibit C-6; Tr. 229). Mr. Thomas stated that he arrived at the tailpiece ahead of the inspectors and saw no

cloud of float coal dust. He did see some float dust which consisted of some dust generated off the belt line that had been deposited on the frame of the tailpiece. He stated that he began to wash the material off "because sometimes I get into trouble violations wise of somebody calling a float dust violation, and I just try to handle it. It was just a very light dusting from deposits from the belt line" (Tr. 232).

Mr. Thomas disagreed that there was a violation of section 75.1725(a), and he was of the opinion that there was no hazard. He described the dust as wet and damp, and stated that it had been rock dusted and that he tried to use a sump pump to remove the water out of the area, but it wouldn't work. The dust suppression sprays on the belt were operating and the belt was damp (Tr. 234). After the belt was shut down, the tailpiece covers were opened and "we seen that we needed some areas cleaned inside there" and he described the material as "belting, scrapes from old belt, looked like rope or string, mud, muck, some dried mud and muck" and he believed that it was material knocked down inside when he hosed off the tailpiece (Tr. 236).

Mr. Thomas stated that when he initially observed the tailpiece he saw no condition that would have caused him to open the covers and look inside and he saw no evidence that the belt was being cut by any part of the structure (Tr. 236). He described the material he saw around the impact rollers and belt structure as "muck, damp water that has dried out and then redampened again and dried out, and just water", and he saw no fine coal dust or float coal dust (Tr. 237). He believed there was sufficient rock dust in the area, and that the ribs were damp or wet (Tr. 238).

Mr. Thomas stated that when the citation was abated, the missing and flat rollers were not required to be replaced, and all of the rollers that were frozen were not free to turn and four of them were still frozen. The bare metal piece was bent back so that it did not touch the belt and the tailpiece was hosed down and "we continued to run after we cleaned it out a little bit more" (Tr. 238).

On cross-examination, Mr. Thomas stated that he initially picked up the water hose because he thought that Inspector Workley was going to issue a section 75.400 float dust citation. Mr. Thomas confirmed that float dust was on the tailpiece frame, and he stated that "I'm not calling it float dust" (Tr. 241). He stated that he did make the statement "I didn't realize the condition was that bad" after the tailpiece lids were opened (Tr. 242). He stated that three or four people, including himself, worked to abate the citation, and that it took approximately one-half hour.

Mr. Thomas stated that after he was informed that a section 75.1725(a), citation was issued, he left the area to tell his supervisors that the belt needed to be shut down. When he returned, Inspector Workley informed them that he was going to issue a section 104(d)(1) citation because of the fire at the number six north belt. He stated that he told Mr. Workley that the cited area had been preshifted and that no hazard was observed by the midnight preshift examiner (Tr. 245).

Inspector Workley was called in rebuttal by MSHA, and he stated that he decided to cite a violation of section 75.1725(a), after walking to the back and right side of the tailpiece and observing how much float coal dust was there. He informed Mr. Thomas that he was citing a violation of section 75.1725(a), and that he was required to remove the tailpiece from service immediately (Tr. 246). Mr. Workley stated that after Mr. Thomas left the area he informed the miner's representative Philip Nine that he was considering issuing a section 104(d)(1) citation became of the conditions he found. Mr. Nine then informed him about the fire at the six north belt on the previous shift, and Mr. Workley believed that this added to the operator's negligence and that the violation was unwarrantable (Tr. 247-248). He further explained his opinion that the dust he observed was not recent spillage as follows at (Tr. 248-249):

> A. In order for spillage to occur and cause the float dust condition at the tailpiece, the spillage would have to occur at the five-s or four-s transfer. And if the coal fell from there, onto the bottom belt, and was carried back to the two south -- or six south number two tailpiece, the scraper would have knocked a lot of the spillage off onto the mine floor and there would have been spillage all over the place at the tailpiece. There was none.
>
> Also, there would have been an entry in the preshift examination book from the shift before or two shifts before or three shift before, noting the spillage and the action taken to clean it up.
>
> Q. The belt foreman testified that he examines the belt approximately once a week, every seven to eight days. Is it possible this condition could have occurred over a one-week period?
>
> A. Parts of the condition may have occurred over less than a one week period, but part of the condition, as I described previously, occurred over months. The wear of the impact rollers did not occur in the last week or two before the violation was cited.

On cross-examination, Mr. Workley confirmed that he did not require the replacement of the worn impact rollers as part of the abatement. He stated that it was possible that a bad roller wiper could have pulled the material up into the tailpiece (Tr. 250).

Mr. Workley further explained the effect of the prior fire on his unwarrantable failure finding as follows at (Tr. 251-253):

> Q. Why would the fire on this other tailpiece cause you to decide to issue a (d)(1)?
>
> A. Your honor, a reasonably prudent person, if you were responsible for the operation of a coal mine and you have two mother belt tailpieces and you have an emergency, a fire, occur on one of them, wouldn't a reasonably prudent person send somebody or even go himself to the other one to make sure that the same condition didn't exist there, immediately or as soon as possible?
>
> Q. It's my understanding that is what they did. There was testimony here that the fire on the six north belt was caused by some defective bearing or something in the main tail roller. As a result of that, the preshift examiner went and checked the tailpiece that you cited and checked the bearings on the tail roller visually. Were you aware of that?
>
> A. One one ever offered that information to me, your honor. And I did question people if that had happen.
>
> Q. Had you had that information available to you, would you still have issued the (d)(1) order -- I mean, citation?
>
> A. Given the other conditions, your honor, I'm not positive, but probably not.
>
> * * * * * * *
>
> Q. Mr. Workley, to your knowledge, was the situation on the six north belt a reportable incident?
>
> A. You mean did it require reporting under federal guidelines? No, it didn't.
>
> * * * * * * *
>
> Q. You said you might not have issued a (d)(1) citation if you had known that the operator had sent someone to check the six south tailpiece. Is that correct?

A. That is correct.

Q. Would it make a difference, in your opinion, if you knew that the only thing that the, I believe it was a fire boss checked, when he went to examine the six south tailpiece was the bearing on the back tail roller. He didn't check the rest of the tailpiece. He only examined that part.

A. No. Then it wouldn't have changed my opinion.

Findings and Conclusions

Fact of Violation

The contestant is charged with a violation of mandatory safety standard 30 C.F.R. 75.1725(a), which provides as follows: "(a) Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

Inspector Workley based his citation for a violation of section 75.l725(a), on several factors, which taken as a whole, led him to conclude that the cited conveyor belt tailpiece was not maintained in a safe operating condition. Mr. Workley testified credibly that he observed float coal dust accumulations on the tailpiece frame, belt rollers that were plugged with dry coal dust, partially stuck rollers, rollers impacted with coal dust that were not turning, and a portion of the belt that was running to one side and rubbing or contacting some worn metal roller brackets and generating frictional heat. Mr. Workley believed that these conditions presented a belt fire hazard and rendered the cited tailpiece unsafe for continued operation.

Supervisory Inspector Ash, who was with Mr. Workley, personally observed the conditions cited by Mr. Workley and he testified credibly that he observed float coal dust in the air and the worn brackets. Mr. Ash saw the worn brackets after the tailpiece lids were opened, and he described the conditions as "just a mess" and that "everything had been bound up with the coal" Mr. Ash agreed with Mr. Workley that the cited conditions presented a fire hazard.

Miner's representative Nine, who was also present during the inspection, and who has worked for the contestant for 21 years, also testified credibly that he observed float coal dust accumulations on the tailpiece and belt structure, and a frozen roller that was not turning and impacted with coal and coal fines. Mr. Nine also observed the conditions inside the tailpiece after the lids were opened, and he saw that the belt had rubbed the metal roller bracket and worn it down, coal

accumulations, and a frozen roller. Mr. Nine also heard Mr. Thomas' comment that he (Thomas) did not believe the conditions were "that bad" until he looked inside the tailpiece.

Mine superintendent Straface, who arrived at the tailpiece area 15 to 30 minutes after the belt was shut down, and after some abatement work had been done, did not observe the cited conditions as they existed and were observed by Inspector Workley at the time he issued the citation. Under the circumstances, I have given little weight to Mr. Straface's opinion that the tailpiece was not in an unsafe operating condition because the area was wet, there was no float coal dust present, and the tail and belt rollers "were running free" of coal. It seems obvious to me that by the time Mr. Straface arrived at the scene, corrective action had been initiated to wash down the area and to free the belt rollers of impacted coal, and to bend back the rubbing brackets.

Belt foreman Chernok also arrived at the tailpiece 30 minutes after the citation was issued and after the abatement was well on its way, and he did not view the conditions that prompted Mr. Workley to issue the citation. Even though he did not view the conditions as observed by Mr. Workley, Mr. Chernok agreed that belt rollers turning in fine, black, dry float coal dust was an unsafe condition because of the possibility of heat and combustion, and that a belt riding on, and rubbing a bracket could generate heat.

Although safety escort Thomas testified that he arrived at the tailpiece ahead of Inspector Workley and Ash and saw no "cloud" of float coal dust, he confirmed that he observed float coal dust deposited on the tailpiece frame. He admitted that he immediately began washing down this material because he did not want to get into trouble with any float coal dust violations, and that after the tailpiece guarding lids were opened up exposing the inside area of the tailpiece he stated to Inspector Workley that he did not realize that the condition of the cited tailpiece "was that bad." Mr. Thomas also agreed that after the lids were opened the areas inside the tailpiece needed cleaning. Although Mr. Thomas believed that the coal dust he observed was rockdusted and light in color and was not float coal dust, I find the testimony of Inspector Workley, Inspector Ash, and miners'
representative Nine to the contrary to be more credible.

Preshift examiner Campbell testified that when he last inspected the tailpiece area at 6:00 a.m. on May 5, he found "no unusual" conditions, observed no float coal dust accumulations, and found no evidence of the belt running in coal or out of train. However, Mr. Campbell did not inspect the inside of the tailpiece where the inspectors found the cited conditions because it was not his job. Under the circumstances, I have given little weight to Mr. Campbell's testimony and find that it does not

rebut the credible testimony of the inspectors with respect to the cited conditions which they personally observed at the time the violation was issued.

After careful consideration of all of the testimony and evidence in this case, I conclude and find that the credible testimony of the inspectors, as corroborated by Mr. Nine, clearly establishes the existence of the cited conditions and reasonably supports Inspector Workley's conclusion that the cited belt tailpiece was not maintained in a safe operating condition as required by the cited section 75.1725(a). Accordingly, the cited violation IS AFFIRMED.

Significant and Substantial Violations

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> 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 United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it

is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987). Further, any determination of the significant nature of a violation must be made in the context of continued normal mining operations. National Gypsum, 3 FMSHRC 327, 329 (March). Halfway, Incorporated, 8 FMSHRC 8, (January 1986).

Citing Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 501 (April 1988), the contestant asserts that in order to determine the reasonable likelihood of a combustion hazard resulting in an ignition or explosion there must be a "confluence of factors" to create a likelihood of ignition. In the instant case, the contestant argues that the violation was not significant and substantial because an ignition was unlikely. In support of this conclusion the contestant asserts that (1) an adequate fire suppression and fire detection system was installed and in working order, (2) the area was wet, (3) there was no smell of combustion, and no electrical hazards or hot rollers, (4) any float dust in the area was minimal and did not represent a hazardous accumulation and (5) the lack of damage to the belt represents clear and convincing evidence that the belt was not in contact with the bracket while it was in operation.

In support of the inspector's "S&S" finding, the respondent argues that a violation of section 75.1725(a) has been established and that the failure to maintain the cited tailpiece in a safe operating condition and free of hazards presented a discreet fire hazard that exposed miner's to serious injuries.

The respondent further argues that the failure of the contestant to maintain the tailpiece would have resulted in a fire, and miners would have been injured had normal mining operations continued. Citing the testimony of Inspectors Ash and Workley that the float dust accumulations on the tailpiece frame existed for 10 to 12 hours and that the accumulations inside the tailpiece existed for a prolonged period of shifts, days or weeks and were not documented in the last preshift or onshift exams, the respondent concludes that it was highly unlikely that the accumulations would have been removed any time soon.

The respondent also relies on the fact that a preshift examiner would not normally look inside the tailpiece to examine the belt or rollers, and he cites the admission of the belt

foreman that he keeps no record of when he has last examined the tailpiece and has no set examination schedule, and the mine superintendent's testimony that given the remote location of the tailpiece, it could have been missed during a beltline examination. The respondent concludes that given the failure of preshift examiners to discover the unsafe condition of the tailpiece and the lack of a set plan for examining the tailpiece, it is not likely that the conditions would have been corrected before an accident occurred.

The respondent further argues that the coal dust accumulations inside the tailpiece and on the frame were dry and combustible and that there was sufficient air to accommodate a fire. The respondent cites the testimony of the inspectors that the belt has running in coal dust accumulations, causing friction that could likely result in a fire, and that the belt was not aligned and was wearing away at steel brackets on the right side of the tailpiece where Inspector Workley noted the greater amount of float coal dust. The respondent points out that both inspectors were of the opinion that given the conditions which they observed, it was reasonably likely that a fire wold occur.

Finally, the respondent asserts that Inspector Workley's belief that if a fire occurred, it was reasonably likely that there would be an injury of a reasonably serious nature, specifically smoke inhalation or smoke, stands uncontradicted.

I have considered the fact that the workable fire detection and suppression systems were installed along the belt line. However, Inspector Workley testified that the sensor was in the "general area" of the tailpiece and that a C.O. monitor was located "some distance" from the tailpiece (Tr. 28). Mr. Straface testified that the fire suppression system was located at the Five-S transfer area (Tr. 125). Further, even though these systems were provided, they did not prevent the prior two belt fires that occurred at belt tailpieces (Tr. 46-47). Indeed, the tailpiece fire that occurred on the immediate shift prior to the inspection by Mr. Workley was not put out by any supression system. A foreman was dispatched to the area, and he used a fire extinguisher to wet down the smoldering roller bearing that had overheated.

Although the inspector conceded that there was no smell of combustion, he nonetheless testified credibly that the three ingredients necessary for a fire were present, namely, adequate air, fuel, and an ignition source (Tr. 26). He found that the belt was running and was in contact with the metal brackets, producing frictional heat, and that the belt was in contact with the fine coal accumulations inside the tailpiece (Tr. 24). He also indicated that had he smelled combustion, he would have concluded that the belt was actually on fire and would have issued an imminent danger withdrawal order (Tr. 59-60). Under

all of these circumstances, the fact that there was no actual smell of combustion does not detract from the inspector's "S&S" finding.

While it may be true that there were no electrical hazards or hot rollers, Inspector Ash testified credibly that heat was being generated around the tailpiece area where the belt was rubbing the metal roller bracket because there was dry coal in that area and the rest of the coal was damp (Tr. 101). Mr. Ash also testified credibly that there were frictional ignition sources present at the tailpiece, namely the belt rubbing on the metal bracket and the rollers that were impacted and frozen in the coal accumulations. He also indicated from his long experience that belts rubbing belt stands and metal brackets produce heat quickly (Tr. 106).

Belt foreman Chernok admitted that a roller turning in fine, black dry coal dust is an unsafe condition because of the possibility of heat and combustion (Tr. 221). He also agreed that a belt riding on steel bracket could generate heat (Tr. 221). Safety escort Thomas confirmed that after the belt was shut down, he bent the bare metal bracket back "so it wouldn't touch the belt"(Tr. 238).

The contestant's conclusion that the lack of belt damage represents clear and convincing evidence that the belt was not in contact with the bracket while it was in operation is rejected. Although the brackets in question were not visible while the belt was in operation with the tailpiece guards in the closed position, there is ample credible evidence that lead me conclude that the brackets were contacting the belt while it was running.

Inspector Workley testified that after the belt was stopped he observed that it was resting on portions of the belt frame and that the frame was worn away by friction caused by the belt rubbing the frame (Tr. 49). He also saw that the belt was wearing away at the missing brackets which had worn down approximately an inch from the top, and that this wear was on the right side of the tailpiece where there was a greater concentration of float coal dust (Tr. 22).

Mr. Nine confirmed that the belt had rubbed the roller brackets, and that it was worn down and running off to one side (Tr. 70-71). He also confirmed that there were two prior tailpiece belt fires during the past year (Tr. 71). Inspector Ash believed that the wear on the brackets was ongoing (Tr. 99).

The contestant's suggestion that the tailpiece area was so wet as to render it harmless is rejected. As noted earlier, contestant's witnesses Straface, Campbell, and Chernok did not observe the tailpiece conditions at the time the inspectors observed them and ordered the belt shut down. Although safety

escort Thomas arrived just ahead of the inspectors, he picked up a water hose and began washing the area down. As indicated earlier, I have found the testimony of the inspectors and Mr. Nine with respect to the existence of the dry float coal dust and coal accumulations inside the tailpiece to be more credible than the testimony of Mr. Thomas.

After careful consideration of all of the evidence and arguments presented in this case, I conclude and find that the respondent has the better part of the argument and has established by a preponderance of the credible evidence that the violation was significant and substantial (S&S).

I have concluded that a violation of section 75.1725(a), has been established. I further conclude and find that the cited tailpiece conditions presented a discrete hazard of a potential belt fire and that in the normal course of continued mining at the time the inspector observed the cited conditions it was reasonably likely that an ignition would have occurred as the dry, black, combustible coal dust and float coal dust continued to accumulate and turn in the tailpiece that was plugged with fine coal and coal dust, and as the belt continued to run out of alignment and rub on the missing roller brackets in question. I further conclude and find that a tailpiece belt fire was reasonably likely to occur as a result of the ignition, and that it was reasonably likely that the miners on the working sections would suffer smoke inhalation, and possibly other fire related injuries of a reasonably serious nature. Accordingly, I conclude and find that the violation was significant and substantial (S&S), and the inspector's finding in this regard IS AFFIRMED.

Unwarrantable Failure Violation

The governing definition of unwarrantable failure was explained in Zeigler Coal Company, 7 IBMA 280 (1977), decided under the 1969 Act, and it held in pertinent part as follows at 295-96:

> In light of the foregoing, we hold that an inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care.

In several decisions concerning the interpretation and application of the term "unwarrantable failure," the Commission further refined and explained this term, and concluded that it

means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Energy Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987); Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988). Referring to its prior holding in the Emery Mining case, the Commission stated as follows in Youghiogheny & Ohio, at 9 FMSHRC 2010:

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

In Emery Mining, the Commission explained the meaning of the phrase "unwarrantable failure" as follows at 9 FMSHRC 2001:

> We first determine the ordinary meaning of the phrase "unwarrantable failure." "Unwarrantable" is defined as "not justifiable" or "inexcusable." "Failure" is defined as "neglect of an assigned, expected, or appropriate action." Webster's Third New International Dictionary (Unabridged) 2514, 814 (1971) ("Webster's"). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by "inadvertence," "thoughtlessness," and "inattention." Black's Law Dictionary 930-31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention. * * *

The contestant asserts that Inspector Workley's unwarrantable failure finding is materially flawed because mine examiner Campbell had made a special examination of the 6 South tailpiece within one-half hour of the alarm sounding because of the hot roller at the 6 North tailpiece and the inspector conceded that if he had known about this examination he probably would not have found an unwarrantable violation.

The contestant further argues that designating the violation as unwarrantable was also inappropriate in light of: (1) the fact that the inspector did not require many of the conditions addressed in the violation (i.e., missing and stuck impact rollers) to be corrected prior to putting the tailpiece back into service, (2) the credible evidence that the other conditions cited by the Inspector could have occurred after the last examination of the tailpiece and (3) the credible testimony that

the mine had a maintenance program that, as a rule, kept the six tailpieces installed at the mine in safe operating condition. Examined as a whole, the contestant concludes that these factors clearly establish that it was not indifferent to the hazards associated with the operation of the tailpiece.

The respondent asserts that the evidence fully supports the inspector's unwarrantable failure finding. The respondent argues that given the existence of the cloud of float coal dust over the tailpiece, the amount of float dust accumulations on the tailpiece frame, and the lack of any evidence of a spill, it was clear that there was an obvious problem with the tailpiece that should have been explored by the preshift examiner.

The respondent further argues that the coal dust accumulations inside the tailpiece and the wearing down of the bracket by the belt support Inspector Workley's belief that the accumulations and belt wearing conditions existed over a prolonged period of shifts, days, weeks, or months.

The respondent points out that Inspector Workley found that no maintenance had been done on the tailpiece for a long time, and the belt examiner could not state when he last examined the tailpiece, and admitted that he kept no tailpiece maintenance records. He also admitted that there was no set schedule for examining belts, and the mine superintendent testified that the isolated location of the tailpiece made it possible that it was missed during maintenance checks.

Finally, the respondent argues that while there is testimony that the cited tailpiece roller was checked following the fire at the 6 North belt prior to the inspection of May 5, 1994, it is unclear whether Inspector Workley would have concluded that the violation was unwarrantable if he knew that the cited tailpiece was checked to determine the condition of the tail roller. Although the respondent asserts that Mr. Workley testified that he "was informed that no one checked the tailpiece," the transcript record reflects that Mr. Workley testified that no one told him that anyone had checked the cited tailpiece after the prior incident at the 6 North tailpiece (Tr. 252). In any event, the respondent concludes that the remaining evidence supports a finding that the failure by the contestant to maintain the tailpiece rises to a level of aggravated conduct.

Inspector Workley, whose 20 years of experience included 8 years of underground mining and work as a mine foreman, testified credibly that the coal accumulations that he found inside the tailpiece, and the float coal dust in the area, had accumulated over a prolonged period of time. He also testified credibly that the worn tailpiece roller and bracket conditions and the lack of maintenance that he observed occurred over a period of multiple shifts and weeks.

Supervising Inspector Ash, who had 46 years of mining experience, including 21 years as a mine superintendent and foreman, was in total agreement with Mr. Workley's unwarrantable failure finding, and he testified credibly that the coal accumulation inside the tailpiece and the worm roller bracket conditions were very slow processes that would have taken place over several months.

The contestant's argument that Inspector Workley's unwarrantable failure finding is materially flawed because he conceded that if he had known that Mr. Campbell had preshifted the tailpiece on May 5, he probably would not have made that finding is rejected. Mr. Workley's testimony must be taken in context. Mr. Workley further testified that had he also known that Mr. Campbell only looked at the rear tailpiece roller and did not examine the rest of the tailpiece, it would not have changed his unwarrantable failure opinion.

Preshift examiner Campbell, who confirmed that he sometimes conducts preshift examinations as a "fill-in," as needed, in my view performed a rather cursory examination of the cited tailpiece. Mr. Campbell confirmed that he did not examine the inside of the tailpiece because the belt was running and he observed no hazardous conditions, and had no reason to examine the inside of the tailpiece. However, he further stated that the examination of the inside of the tailpiece was not his job and that this task was assigned to the belt foreman. Under the circumstances, it would appear to me that even if Mr. Campbell had some reason to examine the inside of the tailpiece, by his own admission he would not have done so because it was not his job. Given the fact that there was a hot roller and belt fire problem with another tailpiece on the shift prior to Inspector Workley's inspection, I would expect a reasonably prudent preshift examiner to ensure that the cited tailpiece was thoroughly examined, inside and outside, even if he had to shut the belt down to do so. If Mr. Campbell had done so, he would have found the conditions that company safety inspector Thomas characterized as "bad."

Belt foreman Chernok, who was responsible for the large rollers and bearings at the back of the tailpiece, and the guarding and inside rollers, testified that "I try to get them once a week. Sometimes it's a little more than a week that I finally get to all of them." Mr. chernok could not recall when he last examined the tailpiece prior to Mr. Workley's inspection, and he kept no tailpiece maintenance records. He also testified that he examines the tailpiece "at least every other week, maybe not weekly." He agreed that the cited tailpiece conditions could have occurred a week or a week and a half prior to his last examination. Since Mr. Chernok could not recall when he last examined the tailpiece, and maintained no records, this testimony

gives little support to the contestant's unwarrantable failure position. As a matter of fact, it lends support to the respondent's position that little or no attention was given to this particular tailpiece.

Mine superintendent Straface confirmed that the cited tailpiece had not been used as an active section coal production tailpiece since December, 1992, and that the belt line had not been in operation for 5 or 6 months during a strike. Given the fact that the tailpiece was in a rather isolated mine area and had not been used on a regular basis as part of the active coal production cycle, I believe one can reasonably conclude from the condition of the tailpiece, as testified to credibly by Inspectors Workley and Ash, and miners representative Nine, that the cited tailpiece was not given much if any attention, and that no one ever took the initiative to open the guarding lids to examine the inside of the tailpiece, particularly during the time immediately after the tailpiece fire incident on the 5 North belt, and immediately before the inspection by Mr. Workley. Indeed, Mr. Straface agreed that it was possible that someone forgot to open up the tailpiece and examine the inside before the inspector cited it. When asked from the bench if anyone would likely admit that they failed to examine the tailpiece thoroughly, Mr. Straface did not respond.

After careful review and consideration of all of the testimony and evidence adduced in this case, I conclude and find that the credible testimony of the respondent's witnesses supports the unwarrantable failure finding made by the inspector. I conclude and find that the failure of the contestant, over a protracted period of time, to clean up and remove the float coal dust on the outside of the cited tailpiece and the coal accumulations inside the tailpiece, and to thoroughly inspect the inside of the tailpiece and take corrective action to remedy the frozen rollers and the metal roller bracket that was rubbing the belt, particularly in view of a fire on a similar tailpiece on the shift immediately prior to the inspection of May 5, 1994, constituted sufficient "aggravated conduct" to support the inspector's unwarrantable failure finding. Accordingly, the inspector's finding IS AFFIRMED.

ORDER

Based on the foregoing findings and conclusions, the contested section 104(d)(1) "S&S" Citation No. 3318787, May 5, 1994, citing a violation of 30 C.F.R. 75.1725(a), IS AFFIRMED as issued, and the Notice of Contest filed by the contestant IS DENIED and DISMISSED.

George A. Koutras
Administrative Law Judge

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