

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 19, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 2008-1151
Petitioner,	:	A.C. No. 42-02028-152062-01
	:	
v.	:	
	:	Aberdeen Mine
ANDALEX RESOURCES, INC.,	:	
Respondent.	:	

Appearances: Francesca Cheroutes, Esq., and Amanda K. Slater, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner; Jason W. Hardin, Esq., and Rachel S. Anderson, Esq., Fabian & Clendenin, Salt Lake City, Utah, for Respondent.

Before: Judge Manning

DECISION

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor acting through the Mine Safety and Health Administration (“MSHA”), against Andalex Resources, Inc. pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (“Mine Act”). The parties introduced testimony and documentary evidence at a hearing held in Salt Lake City, Utah, and filed post-hearing briefs.

At the time the citations and orders were issued, Andalex operated the Aberdeen Mine in Carbon County, Utah. The mine is now closed. Andalex is owned by Murray Energy Corporation through its subsidiary, UtahAmerican Energy, Inc. This case included 20 citations and orders, but the parties settled 15 of these items. Three section 104(d)(2) orders and two section 104(a) citations were adjudicated at the hearing. The Secretary proposed a total penalty of \$197,267.00 for the five adjudicated items.

**I. DISCUSSION WITH FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

A. Order No. 7287490

On May 8, 2007, MSHA Inspector Barry Grosely issued Order No. 7287490 under section 104(d)(2) of the Mine Act alleging a violation of section 75.400 of the Secretary’s safety standards. (Ex. G-2). The order alleged that Andalex permitted combustible material to accumulate along the 12 East Longwall section belt from the head roller to the box check

stopping. There were accumulations of float coal dust throughout that area which covered the ribs, belt structure, water lines, belt drive motors, and take-up. The float dust was black in color, dry, and covered equipment with a uniform layer of float dust that was as thick as three sheets of paper. The order also stated that the pulley clusters of the belt take-up were covered with grease and coal fines and several of the roller shafts were wrapped with belt carcass string. In addition, loose coal was deposited upon the mine floor under the take-up, drives, and in the walkway. The loose coal ranged in depth from 0.5 foot to 1.5 feet, and some areas of the loose coal were covered with rock dust from previous applications. Finally, the order alleges that accumulations of loose coal contacted a moving belt and a spinning bottom roller. This belt was on top of the overcast where the belt line crosses the main return entry. The pile of loose coal measured 1.4 feet deep, 15 feet long, and 4 feet wide.

Inspector Grosely determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the violation was significant and substantial (“S&S”), the operator’s negligence was high, and that seven persons would be affected. Section 75.400 of the Secretary’s regulations requires that “[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.” 30 C.F.R. § 75.400. The Secretary proposed a penalty of \$60,000 for this alleged violation.

For the reasons set forth below, I affirm Order No. 7287490, including the inspector’s S&S and unwarrantable failure determinations, but I find that less than seven miners would have been affected by the violation.

1. Summary of Evidence

On March 1, 2006, MSHA sent a letter to each mine operator in the MSHA Coal District 9, informing them that MSHA would be conducting inspections along belt lines. (EX G-17, Tr. 27). Belt lines had been identified for inspection because MSHA believed that coal dust accumulations cause belt fires. (Tr. 28). During an inspection of the Aberdeen mine completed by Inspector Grosely in November 2006, he issued a number of citations for accumulations along the beltlines. (EX G-18, Tr. 29). In a discussion with mine managers, Inspector Grosely said that, given the company’s violation history and the citations that were issued during that inspection, Aberdeen needed to take additional steps to remove accumulations along its belt lines. (Tr. 31).

Inspector Grosely returned to the mine on May 1, 2007, to conduct a quarterly inspection. (Tr. 36). He noted that according to MSHA’s records, numerous section 75.400 citations had been issued at the Aberdeen Mine. (Tr. 37). In a pre-inspection meeting held on May 1, with foremen, examiners, and superintendents, Inspector Grosely notified them that he would be looking for accumulations along belt lines. (Tr. 38-41).

Inspector Grosely issued Order No. 7287490 on May 8, 2007, because he found accumulations of combustible material. (Tr. 42). Surfaces of equipment, ribs, the floor, belt drive motors, and pipelines in an area between crosscut 28 on the main line and crosscut 3 on 12

East, a distance of 600 feet, was covered with float coal dust. (Tr. 42-43). In addition, there was loose coal on the mine floor, under the take-up, under the drive area, and in the walkway. (Tr. 43). The loose coal had accumulated up to a depth of 1.5 feet and was in contact with the moving belt and spinning rollers. *Id.* Float coal dust had accumulated in some of the recessed areas, which indicated to the inspector that the condition had existed for several days. (Tr. 45-46). The coal was dry and black in color. (Tr. 46). Inspector Grosely determined that float coal dust was present by scraping a little off a structure, forming a pile and noting that the material did not support weight. *Id.* He also saw that there were coal fines. *Id.* Coal fines and loose coal were in contact with the moving belt and spinning rollers for a length of approximately 15 feet, which is a problem because frictional heat can cause ignition. (Tr. 49-50). The belt was moving at approximately 600 to 650 feet per minute. (Tr. 51). Previous accumulations had been rock dusted and covered with new accumulations that were not rock dusted. *Id.* The inspector determined that much of the dust he observed was float coal dust and not a mixture of float and rock dust given the very fine particle size and the concentration of the color: dark gray to black. (Tr. 52).

No hazardous conditions were noted in the pre-shift examination book, although there were notations that seemed to indicate spillage was present. (Tr. 55-57; Ex. G-4). The 12 East belt was running at the time of the inspection, but was only running intermittently because there had been a bounce in the 12 East longwall face. (Tr. 58-59; Ex. G-4). The Aberdeen mine experiences bounces near the face, in the headgate and tailgate areas, and in the yield pillars. (Tr. 181). There was a bounce on the morning of May 8, 2007 at 5:32 a.m. (Tr. 182). It is possible that a bounce could push a stage loader or the mobile tailpiece and cause the 12 East belt to come out of alignment. (Tr. 182-83). Such movement could cause coal to spill off a belt. (Tr. 183). The inspector believed that the accumulations cited in the order were unrelated to the bounce because any accumulation caused by the bounce would be thrown or blown out of the tailgate or into the bleeder given the airflow of the mine. (Tr. 60, 62-63).

Inspector Grosely marked the violation as S&S because, if uncorrected, the condition would be reasonably likely to result in a fire because the accumulations were in contact with the moving belt. (Tr. 63-64). A fire would likely lead to a serious injury. (Tr. 63, 67-68). Inspector Grosely indicated that seven persons would likely be affected because that is how many people were working in the longwall section. (Tr. 65). Although the accumulations were 1,000 feet away from the longwall at that time, a mine fire could destroy ventilating devices and expose the miners to smoke. *Id.* In fact, if there were a mine fire, it could affect miners working on other belts as well. (Tr. 66). The injuries would most likely lead to lost work days or restricted duty because a mine fire would expose the miners to heavy smoke. (Tr. 67). While miners wear self-contained self-rescuers, the smoke would initially affect them. *Id.* Aberdeen's negligence was considered high because a number of similar citations were previously issued, the condition was obvious, the operator should have known about the condition or had reason to know of the condition, and it took some time for the accumulation to form. (Tr. 69-70). Given the fact that the accumulations had layers of rock dust in them, the operator had merely covered the accumulations with more rock dust rather than removing the accumulations. (Tr. 71).

In examining the area, Inspector Grosely said that the accumulations presented an obvious hazard and that any trained miner would see that the condition created a hazard. (Tr.

74). Because the operator had been given notice several times and approximately 63 section 75.400 citations had been issued in the previous 15 months, there was a serious lack of reasonable care. (Tr. 75-76). To abate the citation, seven to ten men cleaned this area for approximately 9.5 hours, which demonstrates the seriousness of the violation. (Tr. 78-79).

Inspector Grosely also testified that he had repeatedly discussed the seriousness of accumulations and the need to remove them with mine management. (Tr. 328). Inspector Grosely advised management that repeated violations of the safety standard would eventually lead to the issuance of flagrant violations. *Id.* Andalex was on notice and was not confused about the requirements of the safety standard. (Tr. 329).

The inspector acknowledged that Andalex had numerous water sprays along the belts starting at the longwall shearer to suppress dust. (Tr. 173-74). Inspector Grosely determined that the accumulations were dry, however, by squeezing a handful of coal accumulations to see if water could be extracted. (Tr. 179).

Andalex safety manager Jim Poulson testified that when Murray Energy bought Andalex, the interest in fire prevention increased dramatically. (Tr. 352). He recognized that accumulations caused by spillage were an ongoing problem and such accumulations could occur over a very short period of time. (Tr. 405). When Andalex received information about MSHA's belt initiative, it initiated SCSR training and inspections, initiated escapeway drills, built teams for fire responses, verified the escapeways, and examined all the fire hoses. (Tr. 355-56). Andalex also checked the atmospheric monitoring system, which measures carbon monoxide (CO) and methane levels, and created a PowerPoint presentation to explain how to deal with and avoid accumulations. (Tr. 356).

Poulson testified that if a fire started in the 12 East box check area, miners could use the primary or secondary escapeway. (Tr. 366). As long as the ventilation controls worked properly, the primary escapeway and the cited areas were ventilated by different air courses. *Id.* Another way miners could escape was to cross the longwall face and exit the tailgate. (Tr. 370).

Poulson also said that there were CO monitors installed downwind from the head drive, in the drive area, in the take-up area, just before the box check, and just past crosscut 3. (Tr. 372-74). An employee on the surface continuously observed these monitors. (Tr. 374). There was also a fire suppression system between the box check and the main line transfer point. (Tr. 376-77). Hoses, nozzles, and two 10-pound fire extinguishers were located throughout the belt drive. (Tr. 377).

Poulson testified that seven people would not have been injured or affected by the alleged violation. (Tr. 419). The miners had extensive training, they knew the escapeway routes and they knew how to safely fight fires. (Tr. 420). At most one person could get injured from smoke inhalation. *Id.*

Guy Mills, a shift foreman, testified that the 12 East drive take-up area was a high maintenance area. (Tr. 484). During the graveyard shift on May 5, 2007, 1,848 tons of coal were mined and a bounce occurred during the shift. (Tr. 493; Ex. R-10 p. 2). Following the

bounce, miners cleaned and fixed equipment. *Id.* From 4:00 a.m. to 6:58 a.m. there was a full coal pass, which included some downtime. (Tr. 494-95). The last half pass was from 6:58-7:12 a.m. (Tr. 495). Completing half a pass in 20 minutes would overload the belt and cause significant spillage from the head roller to the tail and accumulations in the box check. (Tr. 496). Because their shift was nearly over, the crew wanted to switch out at the headgate in order to leave earlier. When coal comes into the box check and the belt is overloaded, the coal will hit the rubber flap throwing the coal off the belt. (Tr. 497). From approximately 5:00 a.m. to the end of the shift, accumulations would have developed very quickly. (Tr. 498).

2. Discussion and Analysis

Resolving the issues with respect to this order and the following two orders requires making credibility determinations. Inspector Barry Grosely holds an associate's degree in geology from Brigham Young University and a bachelor's degree in mining engineering from the University of Utah. Before becoming an MSHA inspector, he worked in various positions at several underground coal mines. As a mining engineer, he helped design belt systems and helped develop and ensure compliance with roof control plans. (Tr. 12-15). He operated various pieces of equipment in an underground coal mine. (Tr. 15). He holds mine foreman and fire boss certifications from the State of Utah. He has been an MSHA inspector since 1999 and was familiar with the Aberdeen Mine before the inspections at issue in this case.

Jim Poulson, safety manager at the mine, also has extensive experience in the coal mining industry. He started in the mid-1970s and has held various positions in maintenance departments at several mines. He transferred to the "safety arena" in about 1999. (Tr. 348). He has experience developing firefighting plans for underground coal mines and he was involved with extinguishing a "thermal event" at a coal mine. (Tr. 349-50). He started working at the Aberdeen Mine in July 2004.

One of the key issues for this order is the cause of the accumulations. Did the coal, coal fines, and float coal dust accumulate over time as testified to by the inspector or were these accumulations present as a result of a bounce that occurred at 5:30 a.m. that morning and the overloading of the belt by the previous crew? Based upon his knowledge and experience and the physical condition of the accumulations, I credit the testimony of Inspector Grosely with respect to this order including his determination that the accumulations were not suddenly created but had gradually developed over time.

Inspector Grosely arrived at 12 East Longwall Section Belt and observed 600 feet of coal accumulations and float coal dust that was two to three sheets of paper thick over all the machinery. The conditions were obvious and had formed over a period of days. Inspector Grosely found an ignition source where coal accumulations contacted spinning rollers. When he issued the order, the belt was running at 600 to 650 feet per minute. When he touched the rollers, he found that they were "slightly warm."

Andalex was aware of the accumulations before the order was issued. The pre-shift examination book noted that a single miner was sent to clean the accumulations, however, there

were no notations indicating that the miner did so. A reasonably prudent person would have recognized that these accumulations were hazardous and required immediate attention.

Inspector Grosely determined that the bounce was not responsible for the accumulations he observed because he did not see any accumulations between the longwall face and the cited area, the airflow would have carried accumulations resulting from a bounce through the return rather than the head pulley, and there would not have been layers of rock dust in the accumulation piles. It took seven to ten miners over nine hours to clean up the accumulations.

I reject Andalex's argument that the cited accumulations would not ignite because the float cold dust was not suspended in the air and could not propagate a fire. I also reject its position that, because water sprays were used to keep coal upon the belts wet, a fire could not have started. I also do not credit Andalex's position that no miners would have been injured if a fire were to start.

I also find that the violation was S&S. Andalex violated the safety standard and this violation created the discrete safety hazard of smoke and fire. The Secretary established that it was reasonably likely that the hazard contributed to by the violation would have resulted in an event in which there was an injury. All elements of the fire triangle were present; there was fuel, oxygen, and an ignition source. Coal fines and loose coal were in contact with the moving belt and spinning rollers in one location. The material was dry. Although the rollers were apparently not hot to the touch at the time of the inspection, they were warm and, assuming continued mining operations, they could get hot enough to ignite the coal fines. Smoldering coal can propagate a larger fire and miners would likely be injured by exposure to the fire or while fighting the fire. I find that there was a confluence of factors that made an injury-producing fire reasonably likely. The accumulations were extensive and had been present for some time, Andalex made little effort to remove the accumulations, and there was an ignition source. The Secretary is not required to establish that the hazard contributed to by the violation is "more probable than not" in order to establish the third element of the *Mathies* test. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996). I credit the testimony of Inspector Grosely that the bounce did not significantly contribute to the accumulations. Any injury was reasonably likely to be of a reasonably serious nature. Smoke inhalation was the most likely injury, which can result in lost workdays or restricted duty.

Carbon monoxide monitors and water sprays were present along the belts. CO monitors detect an increase in the concentration of carbon monoxide and the water sprays suppress or control a fire until miners trained to fight fires can arrive at the scene. Smoldering coal increases the level of carbon monoxide which will set off the CO monitors if the monitors are functioning properly. Andalex argues that the presence of water sprays and CO monitors made it unlikely that anyone would be injured if the accumulations started to burn or smolder with the result that the inspector's S&S determination should be vacated. The Commission, relying in part on *Buck Creek Coal, Inc.*, 52 F.3d 133, 136 (7th Cir. 1995), has rejected arguments that the presence of safety systems, such as carbon monoxide detectors and fire suppression systems, should automatically negate an S&S finding. *AMAX Coal Company*, 19 FMSHRC 846, 849 (1997); *Cumberland Coal resources, LP.*, 33 FMSHRC 2357, 2369 (2011); *Big Ridge Inc.* 35 FMSHRC 1525, 1529 (June 2013). The Commission reasoned that "adopting [the mine operator's]

argument that redundant, mandatory protections provide a defense to a finding of S&S would lead to the anomalous result that every protection would have to be nonfunctional before an S&S finding could be made.” *Cumberland Coal Resources*, 33 FMSHRC at 2369.

With respect to gravity, I find that it was unlikely that every miner working in the section would have been affected. Rather, the evidence establishes that only those miners who would be dispatched to combat the fire would have suffered any injuries. I credit the testimony of Respondent’s witnesses that the crew would have been able to escape from the mine in the event of a fire. Only one or two miners faced a reasonable possibility of injury.

Finally, I find that the violation was the result of high negligence and the unwarrantable failure of Andalex to comply with the safety standard. I credit the testimony of Inspector Grosely on this issue. Although I do not doubt that Andalex had been taking steps to ameliorate the hazards created by accumulations along its belt lines, it had not done enough to prevent the accumulations along the 12 East Longwall section belt on May 8, 2007.

The Commission has defined an unwarrantable failure as aggravated conduct constituting more than ordinary negligence and it includes conduct that demonstrates a “serious lack of reasonable care.” *Emery Mining Corp.* 9 FMSHRC 1997, 2004 (Dec. 1987). The analysis is necessarily specific to the facts in each situation. I credit the testimony of the inspector that the accumulations built up over a period of days. Although some of the accumulations may have resulted from overloading the belts or from belts that had become misaligned that morning, much of the material existed for a longer period of time. I also find that the accumulations were extensive, as established by the testimony of Inspector Grosely. It took seven to ten miners about nine hours to clean up the area. Andalex had been given notice that greater efforts were necessary for compliance with section 75.400. Inspector Grosely’s testimony was detailed and persuasive on this issue, as described above. Past violations of section 75.400 and previous discussions with MSHA inspectors about accumulations provided notice to Andalex that greater efforts were necessary to address accumulations along beltlines. *Black Beauty Coal Co. v. FMSHRC*, 703 F.3d 553, 561 (D.C. Cir. 2012); *San Juan Coal Co.* 29 FMSHRC 125, 131 (Mar. 2007).

The evidence also establishes that Andalex did not take any significant steps to remove the accumulations prior to the issuance of the order. The preshift examination book indicated that a single miner was dispatched to clean up the accumulations but the evidence demonstrates that such efforts were woefully inadequate given the extensiveness of the violation. I find that the evidence establishes that the violative conditions were extensive and obvious. The violation also posed a high degree of danger if not corrected in a reasonable period of time. Respondent’s management was put on notice of the violative conditions by the notation in the preshift examination book. I find that Order No. 7287490 was the result of Andalex’s unwarrantable failure to comply with section 75.400.

The Secretary based his proposed penalty for this order upon his special assessment regulation. 30 C.F.R. § 100.5. MSHA’s “Special Assessment Narrative Form” in the file shows the calculations for a regular assessment and a special assessment for this order. If the Secretary had calculated the penalty using the regular assessment formula, the proposed penalty would have been \$20,302, but he proposed a \$60,000.00 specially assessed penalty. I have reduced the

penalty to \$45,000 taking into consideration the penalty criteria in section 110(i) of the Mine Act. I reduced the gravity because the number of miners likely to be affected was not as great as Inspector Grosely indicated.

B. Order No. 7287683

On June 7, 2007, at 9:55 a.m. Inspector Grosely issued Order No. 7287683 under section 104(d)(2) of the Mine Act, alleging a violation of section 75.400 of the Secretary's safety standards. (Ex. G-7). The order states that Andalex permitted combustible materials to accumulate along the 12 East Longwall section belt from the return overcast to the box check stopping and out the dogleg entry in 12 East. He estimated the distance to be about 600 feet. The order states that there were significant accumulations of float coal dust in the cited area which covered the ribs, floor belt structure, belt control box, water lines, belt drive motors, and take-up. The float dust was black in color, dry, and it covered the equipment with a uniform layer of float dust that was as thick as three to four sheets of paper. In addition, there were accumulations of coal fines and loose coal compacted upon the steel frame of the belt take-up structure which were in contact with the moving belt and spinning bottom rollers. Loose coal was deposited upon the mine floor under the belt take-up area. The loose coal ranged in depth from .5 foot to 1.0 foot. Finally, loose coal accumulations were in contact with the moving belt and a spinning bottom roller on top of the overcast where the belt line crosses the main return entry. The pile of loose coal measured 1.2 feet deep, 10 feet in length and 4-feet in width.

Inspector Grosely determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be permanently disabling. Further, he determined that the violation was significant and substantial, the operator's negligence was high, and that seven persons would be affected. The Secretary proposed a penalty of \$60,000 for this alleged violation.

For the reasons set forth below, I affirm Order No. 7287683, including the inspector's S&S and unwarrantable failure determinations. This violation occurred in essentially the same location as Order No. 7287490 about one month later.

1. Summary of Evidence

Inspector Grosely testified that he issued this order in the 12 East area of the Aberdeen Mine called the "dogleg". (Tr. 81). At first, Inspector Grosely thought he was having déjà vu: the accumulations were in the same general area as the accumulations in Order 7287490, discussed above, and were just as serious if not more serious. (Tr. 82). The black float coal dust covered all surfaces between crosscut 28 and crosscut 3 in the dogleg, including the ribs, floor, equipment, the drive, and take-up area. *Id.* The float coal dust obscured the original color of the equipment structures. (Tr. 83). There were accumulations of grease upon the rollers and coal fines were mixed with the grease upon the pulley clusters. (Tr. 84). Grease mixed with coal provided fuel for a fire. (Tr. 85). These accumulations contacted the moving belts and rollers. (Tr. 84). Under the belt were intermittent piles of loose coal. *Id.* The belt moved at approximately 650 feet per minute. (Tr. 86). Inspector Grosely determined that the accumulations were there for at least four hours or more. *Id.* The accumulations were obvious.

(Tr. 88). The accumulations crested over the bottom belt, which was riding upon and cutting into these accumulations. (Tr. 89). The accumulations were compacted under the belt. *Id.* Inspector Grosely testified that he was told that there had been a bounce. (Tr. 90). The bounce was said to have happened at 9:48 a.m. and the order was issued at 9:55 a.m. (Tr. 91). Inspector Grosely testified that he did not hear, feel, or sense a bounce when he was in the area. (Tr. 92).

Inspector Grosely determined that this violation was reasonably likely to result in an injury because it was a fire hazard. (Tr. 103-04). At the time of the inspection, there was float coal dust in the air; sprays for water were present, but they were not operating at the time. (Tr. 104). The amount of float coal dust in the atmosphere, along with heat, air, confinement, and fuel, made it possible that there was enough float coal dust to create a “quick flash” of fire. (Tr. 107-08). If there was not such a flash, but a fire started by belt friction, the presence of suspended float coal dust could exacerbate the fire. *Id.* If a mine fire had started, it was likely that someone would be burned or suffer smoke inhalation.

The inspector believed that, in contrast to Order No. 7287490, the injuries associated with the present order were likely to be permanently disabling. (Tr. 109). Seven people would have been affected. (Tr. 110, Ex. G-8). Inspector Grosely did not observe anyone cleaning or signs that any cleaning had recently taken place. (Tr. 112). The operator was highly negligent because the violation was similar to the order Inspector Grosely issued on May 8 and the operator had previously been on notice that greater efforts were required. *Id.* Inspector Grosely concluded that the operator demonstrated a serious lack of reasonable care and indifference to the health and safety of miners. (Tr. 113). Inspector Grosely found no mitigating circumstances. (Tr. 114). He also found it unlikely that the bounce Andalex reported at 9:48 that morning created or worsened the condition. *Id.* Five to ten men worked in the area for 4.5 hours to abate the citation. (Tr. 115). The belt was intact and functioning, suggesting that the accumulations developed over a period of time.

Jim Poulson’s testimony was essentially the same as it was with respect to Order No. 7287490. Poulson testified that seven people would not have been injured or affected. (Tr. 419). The miners have extensive training, they know the escapeway routes, and the mine has firefighting capabilities, fire protection systems, and appropriate ventilation. (Tr. 420).

Poulson testified that if a mine examiner discovers a belt spinning in coal, he is required to shut the belt system down, proceed to the drive area to lock and tag it out, notify management of the conditions, and then start removing the accumulations. (Tr. 427). If Inspector Grosely found a belt spinning in coal and the pre-shift examinations said “none observed” it was likely that the condition developed between the pre-shift exam and Inspector Grosely’s inspection. (Tr. 428).

Timothy Paul Blanton performed the pre-shift examination at the end of the graveyard shift, between 4:00 and 7:00 a.m. in the morning. (Tr. 534). He examined the belt line and called the “book room” to report that there were accumulations at the return overcast that needed to be shoveled. *Id.* After the examination, he returned to the face where they were mining. *Id.*

Mr. Blanton also testified that, on June 7, the longwall shearer completed four-and-a half passes and mined 3,136 tons of coal. (Tr. 537). The bounce occurred at 9:48 a.m. (Tr. 538). He testified that the conditions in the box check were different from what he saw during his preshift exam: previously there had not been coal in the box check and there had only been some spillage three or four feet away from the belt. *Id.* Blanton reported that spillage needed to be cleaned. (Tr. 542; Ex. R-3 p 27 of Inspector Grosely's notes). Blanton's notes stated "Shovel return overcast," which means that the accumulations he found were cleaned. (Tr. 544; Ex. R-3 penultimate page). Mr. Blanton told Inspector Grosely that he had not taken the belt out of service earlier because he did not think the condition was a hazard. (Tr. 545).

2. Discussion and Analysis

I credit the testimony of Inspector Grosely as to the conditions he found during his inspection. The accumulations of float coal dust and loose coal were all along the dogleg, belt, and equipment in the same general area as the order he issued in May. I find that the Secretary established a violation of section 75.400.

I also credit the inspector's testimony that the float coal dust was so extensive that the color of the framework for the belt was not discernible. The belt was running at 650 feet per minute and no water sprays were on to address the float coal dust. The accumulations were in contact with the moving belt and there were intermittent piles of coal underneath and above the edges of the belt. Some of the accumulations were compacted under the belt structure and the rollers were covered in coal fines and grease accumulations. Additionally, float coal dust was suspended in the air. I find that these conditions were reasonably likely to result in permanently disabling injuries; the violation was S&S. The Secretary established all four elements of the *Mathies* test for the reasons discussed with respect to the previous violation. I find that any injuries would most likely be permanently disabling. This violation was more serious than the previous violation and more people could have potentially been injured.

I also find that the Secretary established that the violation was the result of Andalex's high negligence and unwarrantable failure to comply with section 75.400. I credit the testimony of Inspector Grosely that the conditions he observed existed for some period of time because accumulations were under the belt, the belt was running in the accumulations, and the edge of the belt was rubbing in the accumulations. I find that, although the bump may have added additional accumulations, the majority of the accumulations were present before the bump occurred. I credit the testimony of Inspector Grosely in this regard. The accumulations were obvious, extensive, had been present for significantly longer than four hours, and Andalex made little effort to remove them. The mine's examiner did not consider the conditions to be unsafe. The mine had been put on notice that greater efforts were necessary to comply with the standard.

The Secretary based his proposed penalty for this order upon his special assessment regulation. 30 C.F.R. § 100.5. MSHA's "Special Assessment Narrative Form" in the file shows the calculations for a regular assessment and a special assessment for this order. If the Secretary had calculated the penalty using the regular assessment formula the proposed penalty would have been \$41,574. I find that the proposed penalty of \$60,000.00 is appropriate for this violation taking into consideration the penalty criteria in section 110(i) of the Mine Act.

C. Order No. 7287776

On June 18, 2007, Inspector Grosely issued Order No. 7287776 under section 104(d)(2) of the Mine Act, alleging a violation of section 75.400 of the Secretary's safety standards. (Ex. G-10). Order No. 7287776 states that Andalex allowed combustible materials to accumulate at the #5 belt drive and take-up area from the head roller to the end of the #5 belt take-up. There were coal fines from the drive rollers through the belt take-up. The coal fines were 1 to 3.5 feet in depth and about 8 feet in width. The coal fines were dry to damp and in contact with the spinning drive rollers and moving belt. The coal fines were about 3.5 feet deep at the drive rollers and in contact with the full width of the belt for about 12 feet. The order states that the accumulations of coal fines were obvious and piling up. Also, the head roller structure was covered with coal fines.

Inspector Grosely determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be permanently disabling. Further, he determined that the violation was S&S, the operator's negligence was high, and that seven persons would be affected. The Secretary proposed a penalty of \$60,000.00 for this order.

For the reasons set forth below, I affirm Order No. 7287490, including the inspector's S&S and unwarrantable failure determinations, but I find that less than seven miners would have been affected by the violation.

1. Summary of the Evidence

Inspector Grosely issued Order 7287776 because accumulations from 1 foot to 3.5 feet in depth were in contact with the moving rollers of the belt drive for a distance of about 12 feet. (Tr. 120,123; Ex. G-11 p. 2). When Inspector Grosely observed this condition, the belts were running at about 600 feet per minute. (Tr. 121-22). The coal fines in this area were damp to dry, but were not wet. (Tr. 123). The accumulations were obvious and could be easily seen when walking through the area. *Id.* The coal fines were black, not white as they would have been if they were rock dusted. (Tr. 124). This type of accumulation, created as a result of carry back on the belt, would have taken days if not weeks to accumulate. (Tr. 124). This area should be examined by the operator during pre-shift examinations. *Id.* The pre-shift examination was completed between 4:00 a.m. and 6:30 a.m. (Tr. 125). The previous pre-shift exam did not list any hazards in the cited area. *Id.* Inspector Grosely did not believe that the violative condition could have developed after the pre-shift examination. (Tr. 126).

"Carry back" occurs when coal fines stick to the bottom of the belt because the fines are wet. As the belt moves through its cycle, it becomes dry causing material to fall off. (Tr. 127). A mine operator should take steps to avoid carry back by installing a belt scraper to remove accumulations from the bottom of the belt. *Id.*

Inspector Grosely determined that an injury or illness was reasonably likely to occur because there was a discrete safety hazard of fire, which leads to smoke inhalation. (Tr. 128). Inspector Grosely determined that a permanently disabling injury would likely occur. (Tr. 129). Even though some of the coal fines were damp, the coal fines that were in contact with the belt

would immediately dry out. (Tr. 130-31). The violation was marked as S&S because a fire was reasonably likely to occur and a fire was reasonably likely to cause injury or illness. (Tr. 131). Seven people would likely be affected by an accident because seven people worked in the 12 East longwall section. (Tr. 132-33).

The inspector believed that the violation was the result of Andalex's high negligence and its unwarrantable failure because the condition was obvious, the combustible material accumulated over a significant period of time, and the operator was on notice that it needed to do more to remove coal accumulations. (Tr. 133, 138). The condition demonstrated aggravated conduct that was more than ordinary negligence. To abate the citation, Andalex dispatched eleven men who worked about six hours to clean up the cited area. The inspector admitted that the cited area was more than 4,000 feet away from the longwall. (Tr. 291). He also admitted that if ventilation devices work properly, any smoke from a fire would not reach the longwall. (Tr. 292).

Guy Mills indicated that the belt scraper was not functioning properly. If the scraper was damaged or broken, coal and coal fines could accumulate around the #5 take-up drive very quickly. (Tr. 521). When a scraper fails, sometimes there is a small amount of spillage and other times there are large accumulations in an hour. *Id.* Although Mills did not have direct knowledge of the conditions at the belt, he testified that the belt could not have been operating if the accumulations had existed for a significant period of time. (Tr. 530). An accumulation of excessive coal fines in that area triggers a switch that will shut down the belt. (Tr. 522-23 530).

2. Discussion and Analysis

I find that Andalex allowed hazardous accumulations to occur, despite previous warnings and orders of withdrawal issued by MSHA. These accumulations were 1 foot to 3.5 feet deep. Inspector Grosely observed damp to dry coal fines in contact with rollers and the entire width of the belt for a distance of 12 feet. He was concerned that the belt was drying the coal where it contacted the belt. These accumulations were obvious and were formed over a period of days, possibly weeks. They were black in color and had not been rock dusted. The accumulation was so extensive it took 11 miners 6.5 hours to clean.

Andalex had pre-shifted the area, but no hazards were reported. Inspector Grosely testified that the accumulations could not have developed since the pre-shift examination. Inspector Grosely thought that the accumulations were likely caused by a malfunctioning or missing belt scraper. I credit the testimony of Inspector Grosely.

I find that if a fire were to develop, injuries would be permanently disabling or, at the least, would result in lost workdays or restricted duty. The violation would have affected at least one miner and up to seven miners. I find that this violation was S&S for the same reasons discussed above with respect to Order Nos. 7287490 and 7287683. My S&S analysis for those orders is hereby applied to Order No. 7287776.

I also find that the violation was the result of Andalex's high negligence and its unwarrantable failure to comply with section 75.400. I reach this conclusion for the same reasons I set forth with respect to the previous two orders issued by Inspector Grosely.

The Secretary based his proposed penalty for this order upon his special assessment regulation. 30 C.F.R. § 100.5. MSHA's "Special Assessment Narrative Form" in the file shows the calculations for a regular assessment and a special assessment for this order. If the Secretary had calculated the penalty using the regular assessment formula, the proposed penalty would have been \$35,543. I have reduced the penalty from \$60,000 to \$50,000 taking into consideration the penalty criteria in section 110(i) of the Mine Act. I reduced the gravity because the number of miners affected was not as great as Inspector Grosely indicated.

D. Citation No. 7288442

On February 9, 2008, MSHA Inspector Ronald Paletta issued Citation No. 7288442 under section 104(a) of the Mine Act, alleging a violation of section 75.223(a)(1) of the Secretary's safety standards. At hearing, the Secretary alleged in the alternative a violation of section 75.202(a). The citation states that a non-injury, reportable burst dislodged eight rocprops in the No. 2 entry that leads to the primary and secondary escapeways. The rocprops dislodged at a 60 degree angle, leaving only 1.6 to 1.7 feet between the rocprops and the stage loader. (Ex. G-20).

Inspector Paletta determined that an injury was highly likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was moderate, and that one person would be affected. Section 75.202(a) of the Secretary's regulations requires that "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." 30 C.F.R. § 75.202(a). Section 75.223(a)(1) states that the operator shall propose revisions of its roof control plan "[w]hen conditions indicate that the plan is not suitable for controlling the roof, face, ribs, or coal or rock bursts[.]" 30 C.F.R. § 75.223(a)(1). The Secretary proposed a penalty of \$11,306.00 for this citation.

For the reasons set forth below, I affirm Citation No. 7288442, including the inspector's S&S and negligence designations, but I find that the cited condition was reasonably likely and not highly likely to cause a serious injury.

1. Summary of Evidence

Inspector Paletta issued Citation No. 7288442 during an investigation of a non-injury accident on February 9, 2008 for a violation of section 75.223(a)(1). (Tr. 585, 588). Inspector Paletta estimated that there were 1,000 rocprops in the cited entry, which was an area that had a history of several bursts and also had constant traffic, making a serious injury highly likely to occur. (Tr. 615-16). Rocprops are pressurized cylinders used as roof support that weigh over 100 pounds each. (Tr. 597). At the mine, there is also chain link fencing that catches rock and coal bursts and is supported by the rocprops. (Tr. 598, 609-10). When properly pressurized and

installed, the inspector has never seen a rocprop move. (Tr. 598). Dislodged rocprops act like missiles and coal or rocks could also strike miners, meaning the likely injury to a miner as a result of the cited condition would be fatal. (Tr. 616, 710). Steve Richens, the mine superintendent, told the inspector that the cited rocprops were not installed properly. (Tr. 610-11).

The inspector testified that he designated Citation No. 7288442 as the result of Andalex's moderate negligence because Andalex had a responsibility to install rocprops properly. (Tr. 621). No one at the mine could tell or show Inspector Paletta the appropriate installation of the rocprops. *Id.* Poulson testified that the rocprops were installed by an independent contractor. (Tr. 714). Andalex mitigated its negligence by doing "quite a bit of work[.]" (Tr. 621).

2. Discussion and Analysis

I find that Andalex violated section 75.202(a); it failed to control the ribs of the cited area to protect persons from the hazard of rock bursts because it incorrectly installed eight rocprops. The Commission has held that "the adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purposes of the standard, would have provided in order to meet the protection intended by the standard." *Harlan Cumberland Coal Co.* 20 FMSHRC 1275, 1277 (Dec. 1998) (citing *Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987)). Andalex argues that Inspector Paletta's testimony should not receive judicial deference because it was unreasonable, overreaching, and inconsistent.¹ I credit the Inspector's testimony, however, that a properly pressurized and installed rocprop would rarely move. Although the inspector's testimony concerning the improper installation of these rocprops is unclear and suggests that he has sparse knowledge of the installation of rocprops, I credit the Inspector's testimony that the mine superintendent told him that the rocprops were incorrectly installed. I find that the cited rocprops fell because they were incorrectly installed. Andalex's roof control plan requires the installation of rocprops to control bursts. A reasonably prudent person familiar with the mining industry would have provided properly installed rocprops to protect miners from bursts. Andalex, through its contractor, failed to install the rocprops correctly, which means that Andalex failed to protect miners from bursts in violation of section 75.202(a).

I find that Citation No. 7288442 was S&S. Andalex violated section 75.202(a), which created the discreet safety hazard that a miner would be crushed by a burst. I find that these improperly installed rocprops, which were located in an area regularly traveled by miners, were reasonably likely to cause a serious injury to a miner. I credit Inspector Paletta's testimony that bounces were common in the cited area and the failure of these rocprops allowed coal to strike miners and turned the rocprops into missiles in the event of a bounce. Although Inspector Paletta testified that the cited conditions "could" cause an injury based upon these factors, I find that the conditions were *likely* to cause an injury, not merely able to cause an injury. Coal, rock, or the rocprops themselves unleashed due to a burst could cause a fatal injury by striking a

¹ Although the Secretary alternatively alleged violations of both sections 75.202(a) and 75.223(a)(1), the Secretary only addressed section 75.202(a) in his brief. Conversely, Andalex's brief focused mainly upon disproving a violation of section 75.223(a)(1).

miner. Although the rocprops were secured against movement with wire ropes, they moved far enough to be a hazard. As a result of Citation No. 7288442 leaving miners unprotected in the event of a burst, miners were reasonably likely to suffer a fatal injury.

The cited condition was reasonably likely to cause a serious injury, but not highly likely. The inspector surmised that Citation No. 7288442 was highly likely to cause a serious injury if Andalex continued to install rocprops improperly, while the secretary argued that it was “clear” that since eight rocprops failed due to a bounce, the conditions cited in Citation No. 7288442 were highly likely to cause serious injury. (Tr. 616). This violation of section 75.202(a), however, does not address the manner of rocprop installation used by Andalex, but rather the improper installation of eight specific rocprops. My findings are specific to the cited rocprops. The Secretary’s arguments, furthermore, provide no support for the “highly likely” designation of Citation No. 7288442 other than the comment that it is “clear” that the designation is correct. (Sec’y Br. at 22).

I find that Citation No. 7288442 resulted from Andalex’s moderate negligence because Andalex should have known that the rocprops in the cited area were incorrectly installed, were no longer functioning correctly, and therefore posed a hazard to miners. A penalty of \$8,000.00 is appropriate for this violation.

E. Citation No. 7288447

On February 19, 2008, Inspector Paletta issued Citation No. 7288447 under section 104(a) of the Mine Act, alleging a violation of section 75.1725(a) of the Secretary’s safety standards. The citation states:

[t]wo bottom conveyor rollers on the 14th east belt were found damaged with one end of each roller spinning in the fine loose dry coal. The end of one roller that was spinning in the dry coal was warm to the touch. The belt air is being used to supply intake air to the longwall working section.

(Ex. G-29).

Inspector Paletta determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to result in a permanently disabling injury. Further, he determined that the violation was S&S, the operator’s negligence was moderate, and that seven persons would be affected. Section 75.1725(a) of the Secretary’s regulations requires that “[m]obile 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.” 30 C.F.R. § 75.1725(a). The Secretary proposed a penalty of \$5,961.00 for this citation.

For the reasons set forth below, I affirm Citation No. 7288447, but I find that less than seven miners would have been affected by the violation and that the likely injury would be a lost workday or restricted duty injury.

1. Summary of Evidence

Andalex stipulated that it violated Section 75.1725(a) and that the conditions cited in Citation No. 7288447 were reasonably likely to lead to a serious injury and were S&S, but it disputed the number of miners affected, the likely injury, and the negligence. (Tr. 721).

Inspector Paletta testified that the cited rollers could cause a fire. The fire could spread quickly as there was no fire suppression in the area, rib sloughage could provide fuel, and methane tests showed 0.3% methane. (Tr. 725-26, 728). Both the inspector and Poulson testified that the main injury concern from a fire would be smoke inhalation. (Tr. 726, 748). The inspector believed that smoke inhalation could affect all seven miners at the longwall because it was inby the cited area. (Tr. 726-27). The inspector and Guy Mills testified that smoke inhalation could cause a fatality. (Tr. 725, 574). The inspector suffered smoke inhalation while working at a coal mine when a belt in the section he was working caused a fire; he suffered from “a couple hours” of coughing. (Tr. 728).

The inspector testified that Andalex should have been aware of the condition because he previously cited rollers at the mine twice. (Tr. 729). The condition existed since at least that morning or the shift prior to the graveyard shift, as Andalex does not run the belt during the graveyard shift. (Tr. 729). Both the Inspector and Guy Mills testified that if Andalex examined the area while the belt was off, it could be difficult to see the condition. (Tr. 731, 571). The side of the rollers that dropped into the coal, however, was on the walkway side, which made it “very visible.” (Tr. 732).

The longwall was at least 3,600 feet from the cited conditions. (Tr. 736). The inspector believed that Andalex both examined and rock dusted the area. (Tr. 739). The mine examiners traveled the location on a weekly basis. (Tr. 741).

2. Discussion and Analysis

I find that Citation No. 7288447 was the result of Andalex’s moderate negligence because Andalex should have known of the cited condition. Andalex was on notice that greater efforts were necessary to maintain their belts and rollers due to the previous citations that Inspector Paletta issued. Even if the belt was not running during the previous preshift examination, I credit Inspector Paletta’s testimony that the rollers contacted the coal on the side of the belt closest to the walkway, which made the rollers easier to see.

Andalex may have lacked actual knowledge of the condition because its examiner did not observe it, but it should have known of the condition. Andalex argues that it did not observe the cited condition and therefore could not correct it, but I find that Andalex should have identified and abated the cited condition. Although the belt was not running, the two rollers that were next to the walkway were still visible. Andalex’s negligence with respect to Citation No. 7288447 was moderate.

I find that smoke inhalation as a result of Citation No. 7288447 was most likely to cause a lost workday or restricted duty injury. I also find that Citation No. 7288447 was likely to affect

two, not seven miners for the same reasons I explained in relation to Order No. 7187490. A penalty of \$4,000.00 is appropriate for this violation.

II. SETTLED CITATIONS AND ORDERS

On May 16, 2013, I granted the Secretary's unopposed motion to approve partial settlement in this case. I approved the settlement of 14 section 104(a) citations and 2 section 104(d)(2) orders. I ordered Andalex to pay a total penalty of \$18,655.00 for the settled matters.

III. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. Andalex's history of previous violations is set forth in Exhibit G-1. Between 2/08/2006 and 5/07/2007, Andalex had a history of 299 paid violations at the mine of which 135 were S&S violations. Between 11/27/2006 and 2/26/2008, Andalex had a history of 234 paid violations at the mine of which 111 were S&S violations. At all pertinent times, Respondent was a large coal mine operator. The violations were abated in good faith. There was no proof that the penalties assessed in this decision will have an adverse effect upon Respondent's ability to continue in business. The gravity and negligence findings are set forth above. The gravity and negligence presented by the accumulation violations was a key factor in my assessment of the penalties for the three section 104(d)(2) orders.

IV. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

<u>Citation/Order No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
7287490	75.400	\$45,000.00
7287683	75.400	60,000.00
7287776	75.400	50,000.00
7288442	75.202(a)	8,000.00
7288447	75.1725(a)	4,000.00
TOTAL PENALTY		\$167,000.00

For the reasons set forth above, the citations and orders are **AFFIRMED** or **MODIFIED**, as set forth above. Andalex Resources, Inc., or its successors and assigns, is **ORDERED TO PAY** the Secretary of Labor the sum of \$167,000.00 within 40 days of the date of this decision.²

/s/ Richard W. Manning
Richard W. Manning
Administrative Law Judge

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² Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.