FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 16, 2015

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. VA 2012-619 A.C. No. 44-07087-297654
v.	
BIG LAUREL MINING CORPORATION, Respondent	Mine: Mine No. 2

DECISION

Appearances: Ryan M. Kooi, Esq., Office of the Regional Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;

Kelby T. Gray, Esq., Dinsmore & Shohl, LLP, Charleston, West Virginia, for Respondent.

Before: Judge Paez

This case is before me upon the Petition for the Assessment of a Civil Penalty filed by the Secretary of Labor ("Secretary") pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(d). In dispute is one section 104(d)(1) order issued by the Mine Safety and Health Administration ("MSHA") to Big Laurel Mining Corporation ("Big Laurel" or "Respondent") as the owner and operator of Mine No. 2 in Wise, Virginia. To prevail, the Secretary must prove the cited violation "by a preponderance of the credible evidence." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106–07 (D.C. Cir. 1998). This burden of proof requires the Secretary to demonstrate that "the existence of a fact is more probable than its nonexistence." *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations and internal quotation marks omitted), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001).

The parties stipulated to the following:

1. Respondent was an "operator" as defined in [section] 3(d) of the [Mine] Act, 30 U.S.C. § 802(d), at [Mine No. 2,] the [m]ine at which the order in this matter was issued.

2. The operations of Respondent at [Mine No. 2] are subject to the jurisdiction of the [Mine] Act.
3. [This] proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission, and its assigned Administrative Law Judges, pursuant to [s]ections 105 and 113 of the [Mine] Act.
4. The order in this matter was issued and served by a duly authorized agent of the Secretary of Labor upon a representative of Respondent at the date, time and place stated therein as required by the [Mine] Act.
5. The subject order is a true and authentic copy of the order issued and served on the mine operator.
6. The proposed penalty for the subject order will not affect the mine operator's ability to remain in business.
7. MSHA Inspector Kenneth Garrett issued Order No. 8181919 on May 23, 2012 during and inspection of Big Laurel Mining Corporation's Mine No. 2.
8. The inspection took place on the day shift.
9. Mine Foreman Tony Dean and Electrician Fabian Spears, Jr. travelled with Inspector Garrett during the inspection and were present when Order No. 8181919 was issued.
10. The photographs taken by Tony Dean, identified as [Exhibits GX–34(a), GX–34(b), GX–34(c), GX–34(d), GX–34(e), and GX–34(f), and also as] Exhibits 2R–9, 2R–10, 2R–11, 2R–12, 2R–13, and 2R–14, are authentic photographs.

(Joint Ex. 2.)[1]

I. STATEMENT OF THE CASE

This case involves a single alleged violation at Big Laurel's Mine No. 2. The alleged violation involves Order No. 8181919, which charges Big Laurel with a violation of 30 C.F.R. § 75.400[2] for failing to clean up an accumulation of float coal dust. The Secretary characterizes Big Laurel's negligence as both high and an unwarrantable failure to comply with a mandatory health or safety standard. Although a withdrawal order was issued to the mine, no miners were withdrawn as a result of this order, nor was production interrupted. The Secretary proposes a specially assessed penalty of $6,300.00.

Chief Administrative Law Judge Robert J. Lesnick assigned Docket No. VA 2013-619 to me, and I held a hearing in Abingdon, Virginia, alongside two other Big Laurel dockets that are the subject of a separate decision. The Secretary presented testimony from MSHA inspector

[1] In this decision, the hearing transcript, the Secretary's exhibits, Big Laurel's exhibits, and the parties' joint exhibits are abbreviated as "Tr.," "Ex. GX–#," "Ex. 2R–#," and "Joint Ex. #," respectively.

[2] Section 75.400 provides: "Coal 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.

Kenneth Garrett. Big Laurel presented testimony from former electrician Fabian Spears, Jr. The parties each filed post-hearing briefs and reply briefs.

II. ISSUES

For Order No. 8181919, the Secretary asserts that Respondent failed to fulfill the duty imposed by 30 C.F.R. § 75.400 by allowing float coal dust to accumulate along the mine's coal conveyor belt. (Sec'y Br. at 8–11.) The Secretary claims that Big Laurel's actions constituted an unwarrantable failure because MSHA had placed the operator on notice that greater efforts at compliance with section 75.400 were necessary and the operator should have discovered the obvious violation in the eight hours prior to the MSHA inspection. (*Id.* at 11–15.)

In contrast, Big Laurel argues that the cited conditions did not constitute a violation of section 75.400 because the accumulated material was not float coal dust. (Resp't Br. at 5–12.) Alternatively, Big Laurel claims it was not negligent in allowing the float coal dust to accumulate and that its actions did not amount to the kind of aggravated conduct supporting an unwarrantable failure determination. (*Id.* at 12–22.)

Accordingly, the following issues are before me: (1) whether the Secretary has carried his burden of proof that Respondent violated the Secretary's mandatory health or safety standards regarding the clean-up of accumulations of combustible material in an underground coal mine; (2) whether the record supports the Secretary's assertions regarding the gravity of the alleged violations; (3) whether the record supports the Secretary's assertions regarding Big Laurel's negligence in committing the alleged violations, including the unwarrantable failure determination; and (4) whether the Secretary's proposed penalties are appropriate.

For the reasons that follow, Order No. 8181919 is **MODIFIED** to remove the unwarrantable failure designation.

III. FINDINGS OF FACT

Big Laurel's Mine No. 2 was a room-and-pillar coal mine located in Wise County, Virginia. Big Laurel developed the mine by cutting a series of entries and perpendicular crosscuts that together form a grid if viewed from above. (Tr. 751:10–17, 863:16–19.) Crosscuts intersected the entries approximately every 80 feet. (Tr. 880:17–20.) Each crosscut was approximately 20 feet wide. (Tr. 744:15–18, 764:3–4.) To keep the mine's entries in a safe condition, Big Laurel put down gravel and other material in the travelway entries. (Tr. 853:7–10.) Big Laurel maintained these travelways by occasionally grading the floor to make it level and remove mud that had built up. (Tr. 853:7–13.) Big Laurel pushed this waste material, or gob, into piles in the crosscuts so it would be out of the way. (Tr. 853:14–854:4.)

Big Laurel transported its excavated coal to the mine surface on a series of motor-driven conveyor belts. (Tr. 786:5–12, 787:16–17.) Where two coal belts meet, one belt dumps coal from its head onto the tailpiece of the second belt. (Tr. 786:7–12.) This process of transferring the coal from one belt to another can create coal dust, including float coal dust. (Tr. 785:18–786:1, 786:7–12.) Float coal dust is particularly fine coal dust that can propagate an explosion

even in small amounts.[3] (Tr. 783:8–18.) Float coal dust is so fine that it can be suspended in the air and carried by the air current ventilating a mine. (Tr. 860:10–12, 863:10–15.) Float coal dust is particularly dangerous when suspended in the air. (Tr. 893:4–19.) Because conditions in a mine can change quickly, float coal dust can accumulate rapidly along a belt line. (Tr. 806:20–21, 882:10–16, 883:2–7.) To control the generation of this dust, Big Laurel equipped its coal conveyor belts with water sprayers that sprayed the mined coal as it traveled to the surface. (Tr. 819:1–3, 854:10–14.) In addition, Big Laurel regularly spread rock dust over the mine surfaces to coat the float coal dust and reduce its ability to cause an explosion. (Tr. 854:5–9, 854:15–855:5, 856:10–22.)

On May 23, 2012, Inspector Kenneth Garrett visited Big Laurel's Mine No. 2 as part of MSHA's regular quarterly inspection of the mine. (Tr. 743:16–18.) Garrett had worked in underground mines for approximately seven years at the time of the inspection, including two years as an MSHA inspector. (Tr. 737:1–4, 739:10–12.) Garrett was aware that Big Laurel had a history of accumulations violations at Mine No. 2, including violations for float coal dust. (Tr. 790:1–20.) During the pre-inspection conference in April 2012, Garrett emphasized MSHA's concern over Big Laurel's compliance with section 75.400, reiterating warnings that MSHA had issued a few months earlier. (Tr. 790:17–20.)

Afterward, Inspector Garrett, Mine Foreman Tony Dean, and Electrician Fabian Spears traveled down the No. 1 belt to inspect the condition of the coal conveyor belt and its drive motors. (Tr. 751:10–17.) When the party reached the No. 31 crosscut at approximately 10:00 a.m., Garrett noticed that the area appeared to have a coating of black float coal dust. (Tr. 755:10–15.) The black material covered an area approximately 20 feet long and five feet wide. (Tr. 801:3–6.) The black material not only covered the mine's floor, ribs, roof, and the belt structure but also a large pile of gob that had been pushed into the No. 31 crosscut. (Tr. 757:12–20.) This pile of gob spanned the entire crosscut and rose nearly to the mine roof, effectively closing off the entire crosscut. (Tr. 756:10–21.) The layer of black material had settled on top of a layer of lighter-colored rock dust that was still visible in patches. (Tr. 758:8–13.) The black material made the affected area stand out from the rest of the mine, which appeared well rock-dusted. (Tr. 757:5–11, 779:14–780:18.) Garrett reached up to the roof to feel the black material and determined it was float coal dust. (Tr. 759:15–760:1.) Although the belt, roof, and mine floor were wet, the black dust was drying out. (Tr. 774:20–22, 816:22–817:6.) This black dust was not suspended in the air. (Tr. 812:13–17.)

The affected area was located in an active working area. (Tr. 801:10–12.) In the entry for the No. 1 belt, the air current flowed from inside the mine out to the surface. (Tr. 786:22–787:7.) A coal belt exchange and belt drive motor were located at crosscut No. 32, one crosscut upwind from the area covered in black dust. (Tr. 856:4–6.)

Although the black dust covered a large area, Garrett did not find any belt rollers turning in accumulations of the material. (Tr. 816:18–21.) Garrett also did not find any methane or other ignition sources in the area. (Tr. 817:11–14.)

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[3] MSHA has defined float coal dust as "coal dust consisting of particles of coal that can pass a No. 200 sieve." 30 C.F.R. § 75.401(b).

Based on his observations, Garrett issued Order No. 8181919, alleging a violation of 30 C.F.R. § 75.400:

> Accumulations of float coal dust black in color has been allowed to exist deposited on top of rock dusted surfaces in the No. 31 x-cut between the belt and travelway entries. Float coal dust is observed the entire width of the x-cut approximately 20 [feet] wide and extending to the mine roof as a result of the dust deposited on a [five-foot] mound of gob. This condition exposes miners to explosion related accidents.
>
> 75.400 has been cited 44 times in the last two years. Mine management was notified 2/10/2012, and reminded at a pre-inspection conference this quarter that continued non-compliance of this standard would result in a[n] evaluation of high negligence.
>
> The affected area is located [one] break outby a date board used by the certified examiners that travel by this location on a regular basis conducting required examinations. The black float coal dust is obvious and extensive. Mine management has engaged in aggravated conduct constituting more than ordinary negligence by allowing float coal dust to accumulate. This violation is an unwarrantable failure to comply with a mandatory standard.

(Ex. GX–29.) Because there were no ignition sources in the vicinity, Garrett designated the violation as unlikely to cause an injury resulting in lost workdays or restricted duty. (Tr. 781:1–4; Ex. GX–29 at 1.) Garrett characterized Big Laurel's negligence as "high" and as an unwarrantable failure to comply with a mandatory health or safety standard. (Ex. GX–29 at 1.)

Mine Foreman Dean and one other miner abated the violation quickly by spreading two bags of rock dust by hand over the affected area. (Tr. 802:17–803:5.) Inspector Garrett issued the order at 10:00 a.m. and terminated it at 10:35 a.m. (Ex. GX–29.) Garrett did not require that the coal conveyor belt be shut down or miners removed from the area while the alleged accumulation was abated. (Tr. 818:16–22.)

IV. PRINCIPLES OF LAW

A. 30 C.F.R. § 75.400 – Accumulations

A violation of section 75.400 occurs "where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary, it could cause a fire or explosion if an ignition source were present." *Old Ben Coal Co.*, 2 FMSHRC 2806, 2808 (Oct. 1980) ("*Old Ben II*") (footnote omitted). This judgment is viewed through the objective standard of whether a "reasonably prudent person, familiar with the mining industry and the protective purposes of the standard, would have recognized the hazardous condition that the regulation seeks to prevent." *Utah Power & Light, Mining Div.*, 12 FMSHRC 965, 968 (May 1990), *aff'd*,

951 F.2d 292 (10th Cir. 1991) ("*UP&L*"). In addition to being combustible, the material cited must be of a sufficient quantity to cause or propagate a fire or explosion. *UP&L*, 12 FMSHRC at 968 (*quoting Old Ben II*, 2 FMSHRC at 2808). Although spills can occur quickly, accumulations of combustible material substantial enough to cause or propagate a fire are prohibited, even if recent. *See Black Beauty Coal Co. v. Fed. Mine Safety & Health Review Comm'n*, 703 F.3d 553, 558–59 & n.6 (D.C. Cir. 2012) (rejecting operator argument regarding recency of spill); *Prabhu Deshetty*, 16 FMSHRC 1046, 1049 (May 1994) (rejecting a defense based on recentness of the spill). The Commission has consistently held that an inspector's observations alone may be sufficient to establish a violation of section 75.400. *See, e.g., Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1289-90 (Dec. 1998) (declining to engraft a laboratory testing requirement onto section 75.400).

B. Unwarrantable Failure

The Commission has determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (1987). It is characterized by "indifference," a "serious lack of reasonable care," "reckless disregard," or "intentional misconduct." *Id.* at 2003–04; *see also Buck Creek Coal*, 52 F.3d at 136 (approving the Commission's unwarrantable failure test). Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of a case to see if aggravating or mitigating factors exist. The Commission has identified several such factors, including: the length of time a violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious, whether the violation posed a high degree of danger, and the operator's knowledge of the existence of the violation. *See IO Coal Co.*, 31 FMSHRC 1346, 1350-51 (Dec. 2009). These factors are viewed in the context of the factual circumstances of each case. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). All relevant facts and circumstances of each case must be examined to determine whether an actor's conduct is aggravated or mitigating circumstances exist. *Id.*

V. ADDITIONAL FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

A. Further Findings of Fact

Respondent challenges two factual findings underlying the Secretary's argument. First, Big Laurel challenges the Secretary's assertion that the discovered black material was float coal. (Resp't Br. at 5–12, Resp't Reply at 4–7.) Second, Respondent argues that the cited conditions did not exist for more than a few hours. (Resp't Br. at 15–16.)

1. Whether the Material Was Float Coal Dust

Respondent claims the Secretary has not credibly established that the cited black material was float coal dust or another combustible material. (Resp't Br. at 5–12; Resp't Reply at 4–7.) Instead, Respondent contends that the discovered material was a combination of black mud, wet,

gray-colored rock dust, and gravel. (Resp't Br. at 5–7.) Additionally, Respondent claims that Inspector Garrett's testimony is unreliable. (*Id.* at 10–12.)

Inspector Garrett identified the black dust as float coal dust by both appearance and feel. (Sec'y Br. at 10.) Garrett testified that he touched the discovered accumulation to confirm the material was float coal dust. (Tr. 759:15–760:1.) Garrett testified unequivocally that the discovered material was black, like coal. (Tr. 771:4–21.) According to Garrett, the black dust covered the floor and the gob pile, extended over the ribs and roof, and coated the top of the belt, the chains and other parts of the belt hanging structure, and the bottoms of the belt rollers. (Tr. 757:14–20, Ex. GX–31(a), Ex. GX–31(b).) Garrett further testified that the cited area in the No. 31 crosscut stood out from the rest of the mine, which was covered with a light-colored rock dust. (Tr. 757:5–11, 779:14–780:18.) This same light-colored rock dust could be seen in patches underneath the black accumulations. (Tr. 776:6–13.) Photographs taken during the inspection show a large area frosted with black material, while neighboring areas are a consistent light color from being rock dusted. (Ex. GX–31(a), Ex. GX-31(b), Ex. 2R-13.)

Garrett also identified the likely source of the float coal dust as the coal belt exchange point at the No. 1 belt's head, located just one crosscut upwind from the affected area. (Tr. 785:18-787:7.) According to Garrett, the accumulation could not be gravel dust from a parallel entry, as the gob pile almost completely blocked the flow of air from the opposite side of the crosscut. (Tr. 798:7-799:11.) Finally, Garrett testified the material was not dark-colored rock dust, and that in his seven years in underground mines, including three years with MSHA, he had never seen a mine use black rock dust or dark gray rock dust that turned black when wet. (Tr. 799:12–21.)

Contrary to Respondent's assertions, I find Garrett's testimony to be credible.[4] Garrett identified the material as float coal dust by both sight and touch, and he provided a logical source for the float coal. Photographs of the area support Garrett's explanation, lending credence to his testimony.

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[4] Respondent attacks Garrett's testimony on two grounds. (Resp't Br. at 7–12; Resp't Reply at 7.) First, Big Laurel asserts that Garrett's testimony was inconsistent with the text of Order No. 8181919 and his contemporaneous notes from the inspection. (Resp't Br. at 11–12; Resp't Reply at 7.) Second, Big Laurel attacks Garrett's experience as a mine inspector and argues his testimony is unreliable because he did not cross the operational coal conveyor belt to closely examine the gob clogging the crosscut in question. (Resp't Br. at 7–9.) Both arguments fail. Although Garrett's testimony at hearing expanded beyond the material in his inspection notes, nothing in Garrett's notes contradicts his testimony. Second, I recognize the extensive training that MSHA inspectors receive, as well as the fact that Garrett had worked in underground mines for a total of approximately seven years. *See Harlan Cumberland Coal*, 20 FMSHRC at 1289-90 (affirming an ALJ's reliance upon the testimony of an experienced inspector). Garrett had sufficient training and experience to ably identify float coal dust, one of the most dangerous elements in underground coal mining, by both sight and touch. Indeed, Garrett touched the black material on the roof and determined it was float coal dust. Respondent has not presented any evidence to contradict Garrett's testimony.

In contrast, Respondent asserts that the black material was a mixture of dark-colored rock dust and wet mud produced from regular re-graveling and re-grading a nearby travelway. (Resp't Reply at 4.) In support of its argument, Respondent points to the testimony of then-electrician Spears. (*Id.*) Spears testified that because the mine was dark, he could not identify the black material without crossing the coal conveyor belt to reach the gob pile and touch the material. (Tr. 859:7–860:10, 862:9–18, 866:1–14.) When Inspector Garrett stopped to examine the conditions at the No. 31 crosscut, Spears and Mine Foreman Dean crossed the belt line to get a closer look at the pile of gob. (Tr. 842:7–22.) Spears testified that he found "just mud and rock dust" at the gob pile. (Tr. 866:15–19). Spears claimed that Dean attempted to show the mud to Garrett, but that the inspector ignored the mine foreman. (Tr. 869:15-870:13.) Spears further testified that Mine No. 2 used dark grey rock dust that darkened further when wet. (Tr. 858:1-20.)

After examining the evidence, I find that Spears' testimony contains a number of shortcomings. Although Spears insisted Mine No. 2 regularly used dark grey rock dust, Spears—despite his fourteen years in the coal mining industry—was unable to recall any specific details about the darker rock dust. (Tr. 899:8-900:20.) Spears also failed to explain why the mine would haul in a small amount of this unorthodox, dark grey rock dust for use in a single crosscut, while the remainder of the belt entry and the nearby crosscuts were coated with a traditional, light-colored rock dust. Moreover, although Spears criticized Garrett's decision to ignore the material Dean showed him, Garrett did see Dean reach into the gob to grab wet mud, and not just dust from the surface. (Tr. 842:7-22.) Given these inconsistencies, I find that Spears's testimony on this matter is not credible.

Looking at the credible evidence before me, I therefore find that the accumulated material was float coal dust.

2. Duration of the Accumulation

Respondent also challenges the Secretary's assertion that the float coal accumulation had existed for at least two shifts. (Resp't Br. at 15.) Big Laurel notes that the No. 1 belt was checked and found clear of float coal accumulations at 12:00 midnight and again at 5:10 a.m., a few hours prior to Garrett's inspection. (*Id.*; Ex. 2R–14.) Conversely, Garrett believed that the amount of accumulated float coal dust and the lack of float coal dust suspended in the air suggested the accumulation had occurred at least two shifts prior to the inspection. (Tr. 797:18–798:6.) Garrett admitted, however, that conditions along a belt line can change. (Tr. 806:20–21, 826:2–10.) Spears also said that belt conditions can change rapidly between regular examinations. (Tr. 882:10–16.) Moreover, I note that Inspector Garrett did not issue a citation to Big Laurel for an improper examination. (Tr. 828:18–20.)

Considering these circumstances and the admitted potential for conditions along the belt line to change rapidly, I have doubts about the duration of the accumulation. Given the evidence before me, I determine that the Secretary has not established by a preponderance of the evidence that the float coal accumulation lasted for more than one shift. Accordingly, I find that the accumulation of float coal developed after the mine's last beltline examination at 5:10 a.m.

B. Analysis and Conclusions of Law

1. Violation of § 75.400

I have already found that the accumulated material discovered in the No. 31 crosscut was float coal dust, and that the area was "in active workings." 30 C.F.R. § 75.400. Float coal dust "is considered so dangerous that it is mentioned specifically in section 75.400 as a material that an operator must not permit to accumulate." *Twentymile Coal Co.*, 36 FMSHRC 1533, 1539 (June 2014). Garrett testified that very little float coal dust is needed to propagate an explosion, and that the accumulated quantities were sufficient to be dangerous. (Tr. 783:8–22.) In light of these facts, I determine that a reasonably prudent person, familiar with the mining industry and protective purposes of section 75.400, would have recognized these conditions as the type of hazardous conditions the regulation seeks to prevent. *See Old Ben II*, 2 FMSHRC at 2808 ("[T]hose masses of combustible materials which could cause or propagate a fire or explosion are what Congress intended to proscribe."). I therefore conclude that Big Laurel violated 30 C.F.R. § 75.400.

2. Gravity

The Secretary asserts that the float coal dust accumulation was unlikely to cause an injury, but if an incident did occur, it could be reasonably expected to result in injuries causing lost workdays or restricted duty to one miner. (Sec'y Br. at 11; Ex. GX–29 at 1.) Inspector Garrett testified that the lack of any heat source or methane, and the wetness of the area near the accumulation made a fire or explosion unlikely. (Tr. 781:1–13.) Garrett also testified that the violative conditions could result in injuries such as smoke inhalation and burns. (Tr. 784:3–15.) Finally, Garrett testified that only one person was working in the area of the accumulation.[5] (Tr. 785:10–17.) Although Big Laurel has not directly disputed the Secretary's allegations regarding gravity, I nevertheless determine the Secretary proved that the violation was unlikely to cause injury, that the injuries most likely to result would result in lost workdays or restricted duty, and that the conditions affected only one miner.

3. Negligence and Unwarrantable Failure

The Secretary has characterized Big Laurel's negligence as high and designated this violation as an unwarrantable failure. In support of his allegations, the Secretary points to the obviousness, extent, and duration of the violation. (Sec'y Br. at 13–14.) In addition, the Secretary asserts that Respondent made no effort to address the violation prior to the inspection despite being on notice that greater efforts were necessary to comply with section 75.400. (*Id.* at 14–15.)

Respondent contends that the Secretary's negligence and unwarrantable failure determinations are inappropriate. (Resp't Br. at 12.) Big Laurel asserts that the conditions were not extensive and that any accumulation of float coal dust did not pose a danger or hazard to miners. (*Id.* at 13–15.) Big Laurel further argues that it had no knowledge of the accumulation, the violation was not obvious, and the violation lasted for a short amount of time. (*Id.* at 15–17.)

[5] Big Laurel has not disputed the Secretary's allegations regarding gravity.

Respondent contends it was not on notice that it needed to improve its efforts to prevent float coal dust accumulations. (*Id.* at 17–21.) Finally, Respondent avers that it nevertheless had taken steps to prevent such accumulations and that it abated the violation rapidly and in good faith. (*Id.* at 21–22.)

Looking to the Commission's aggravating factors in the unwarrantable failure determination, two of the factors support the Secretary's argument. First, the condition was obvious. Inspector Garrett testified he had no difficulty seeing the condition and that the black dust stood out sorely from the surrounding area of the mine. (Tr. 799:22–800:7.) In addition, Garrett could reach up to touch the black dust without having to cross the belt and walk into the crosscut. (Tr. 759:20–760:9.) Second, Big Laurel's history of section 75.400 violations and repeated warnings from MSHA put the mine on notice that it needed to improve its efforts to prevent accumulations of combustible materials.[6]

The remaining factors do not conclusively weigh in favor of either party. First, because the conditions were obvious and Big Laurel was on high alert for such accumulations, I determine that the mine reasonably should have known of the accumulated float coal dust. Nevertheless, the Secretary has not presented any evidence suggesting that Big Laurel had actual knowledge of the conditions prior to the inspection. Second, because Big Laurel did not have actual knowledge of the accumulation, the mine operator made no efforts to abate the conditions. Although Respondent presented evidence that it regularly rock dusted the belt line and that the surrounding areas were well coated in rock dust, its regular rock dusting plan proved insufficient to catch and ameliorate this float coal accumulation.

Third, I have already determined that the accumulation occurred after the preshift examination at 5:10 a.m. The Secretary's unwarrantable failure determination was premised, in

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[6] Big Laurel contends that its past history of section 75.400 violations and MSHA's warnings served only to put the mine on "general notice," and not "on notice that greater compliance efforts were necessary or required with regards to alleged float coal dust on gob piles in crosscuts." (Resp't Br. at 18–20 (citing *Cumberland Coal Res., LP*, 31 FMSHRC 137 (Jan. 2009) (ALJ); *Highland Mining Co.*, 34 FMSHRC 3108 (Dec. 2012) (ALJ); *Big Ridge, Inc.*, 36 FMSHRC 1677 (June 2014) (ALJ)).) The decisions Respondent relies upon are from Commission Administrative Law Judges, and are neither Commission precedent nor binding on other Judges of the Commission. 29 C.F.R. § 2700.69(d). Moreover, the Commission has held that past violations of section 75.400 do not need to be "factually indistinguishable from the cited condition" to provide notice that greater efforts are necessary for compliance with the standard. *Big Ridge, Inc.*, 35 FMSHRC 1525, 1530 (June 2013). Although an operator may draw a distinction demonstrating an anomaly, it bears the burden of rebutting the Secretary's "contention that the prior violations did, in fact, put the operator on notice." *Twentymile Coal*, 36 FMSHRC at 1538–39. Big Laurel has not demonstrated such an anomaly to rebut the Secretary's contention in the case at hand, as the mine's past violations included citations for coal dust accumulations along belt lines. (*See* Ex. GX–32, Ex. GX–33.) Moreover, while section 75.400 may be a broad standard, it specifically mentions float coal dust as a type of material that cannot be permitted to accumulate. 30 C.F.R. § 75.400; *Twentymile Coal*, 36 FMSHRC at 1539. Accordingly, I determine that Respondent was on notice that greater efforts were necessary to comply with the regulation.

part, on the fact that Big Laurel conducted multiple examinations of the affected area and neglected to notice and address the accumulation. The Secretary's only credible evidence regarding the duration of the violation was testimony that the float coal dust was no longer in suspension. This evidence alone is insufficient to show the violation had existed for a long time. Given the low degree of danger that Inspector Garrett found this violation posed, I do not determine that the accumulation's existence for a few hours constitutes aggravated behavior. *Cf. Midwest Material Co.*, 19 FMSHRC 30, 34-36 (Jan. 1997) (attributing violation to operator's unwarrantable failure where the duration was only a period of a few minutes because it posed a high degree of danger, involved a foreman, and the violative condition may have continued but for occurrence of accident).

Fourth, the evidence regarding the extent of the violation is conflicting. Although Inspector Garrett testified that the float coal dust generally covered an area 20 feet long and five feet wide, the Secretary did not present substantial evidence regarding the depth of the accumulations or the pervasiveness of the coating of float coal dust. Furthermore, two miners were able to abate the conditions "fairly quickly" by hand-dusting and without an interruption to Big Laurel's operations, and Inspector Garret was able to terminate the order within 35 minutes of its issuance. (Tr. 802:15–803:1, Tr. 818:16–22.) Such rapid abatement suggests the violation was not extensive. *See Manalapan Mining Corp.*, 35 FMSHRC 289, 295 (Feb. 2013) (considering the time to abate the violative conditions when assessing the extent of a violation).

Finally, the evidence before me does not indicate the violation here was highly dangerous. As I have discussed in prior holdings, accumulations of float coal dust rank among the most dangerous conditions in an underground coal mine. *See Black Beauty Coal Co.*, 36 FMSHRC 2548, 2562 (Sep. 2014) (ALJ). Here, surprisingly, the Secretary has presented evidence that the conditions surrounding this violation lowered the threat posed by this accumulation. Indeed, it is telling that Inspector Garrett, despite issuing a withdrawal order, neither required the coal conveyor belt to be shut down nor the area evacuated while Dean and Spears rock dusted the affected area.

Nonetheless, I find it disturbing that Big Laurel failed to heed repeated warnings that its efforts at addressing accumulations were insufficient, and thus allowed a potentially explosive amount of float coal dust to accumulate in a well-traveled section of the mine. Yet notice and obviousness alone do not push Big Laurel's conduct into the realm of intentional misconduct, indifference, reckless disregard, or a serious lack of reasonable care. Where an MSHA inspector does not consider a violation sufficiently dangerous to enforce his own withdrawal order, I have difficulty giving credence to his justification for that order. In light of these facts and circumstances, I cannot conclude that the Secretary has met his burden of proving aggravated conduct amounting to an unwarrantable failure on the part of Respondent.

Although the Secretary has not shown that Respondent's actions amounted to an unwarrantable failure to comply with a mandatory safety standard, I still conclude the Secretary has met his burden of showing that Big Laurel was highly negligent.[7] Respondent failed its duty

[7] The Commission has recognized that a finding of high negligence *suggests* an unwarrantable failure. *San Juan Coal Co.*, 29 FMSHRC 125, 136 (Mar. 2007). Nevertheless, a

to ensure that float coal dust did not accumulate in the No. 2 Mine. The float coal accumulation, if exposed to an ignition source, posed the threat of a potentially catastrophic explosion, and yet abatement of the condition required only minimal effort. *Cf.*, *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947) (calculating negligence by comparing the potential harm to the expense of measures to prevent that harm). Although the Secretary has not provided evidence sufficient to support an unwarrantable failure determination, Big Laurel likewise has not provided evidence explaining its conduct. Big Laurel's rock dusting policies were insufficient to catch and address an obvious float coal dust accumulation. Despite the relatively short duration, the lack of suspended float coal dust suggests Respondent had ample time to find and remedy the problem prior to the inspection. Accordingly, I conclude that Respondent's negligence was high. *See* 30 C.F.R. § 100.3(d) at Table X (suggesting "high negligence" where the "operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.")

Based on the above, Order No. 8181919 is **MODIFIED** to remove the unwarrantable failure designation.

C. Penalty

Under section 110(i) of the Mine Act, I must consider six criteria in assessing a civil penalty, including the operator's history of previous violations; the appropriateness of the penalty relative to the size of the operator's business; the operator's negligence; the penalty's effect on the operator's ability to continue in business; the violation's gravity; and the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

The Secretary proposed a specially-assessed penalty of $6,300.00 for Order No. 8181919. The parties have stipulated that the proposed penalty would not infringe on Respondent's ability to remain in business. While I have affirmed the violation and the Secretary's negligence allegations, I have removed the unwarrantable failure designation. Respondent had 44 violations of section 75.400 in the two years prior to this violation. (Ex. R2–3.) Once this order was issued, nothing suggests that Respondent failed to make a good faith effort to achieve rapid compliance with the safety standard. Considering all of the facts and circumstances set forth above, I hereby assess a civil penalty of $3,000.00.

VI. ORDER

In light of the foregoing, it is hereby **ORDERED** that Order No. 8181919 is **MODIFIED** to a section 104(a) citation by removing the unwarrantable failure designation.

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finding of high negligence does not necessarily compel a finding of an unwarrantable failure. *E. Associated Coal Corp.*, 13 FMSHRC 178, 186–87 (Feb. 1991).

WHEREFORE, Respondent is **ORDERED** to pay a penalty of $3,000.00 within 40 days of this Decision.[8]

Alan G. Paez
Administrative Law Judge

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/lct

[8] Payment should be sent to: U.S. Department of Labor, MSHA, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include docket and A.C. numbers.