FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

June 30, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2008-737
Petitioner	:	A.C. No. 15-18267-144079
v.	:	
	:	
	:	
MANALAPAN MINING CO., INC.,	:	RB No. 10 Mine
Respondent	:	

DECISION

Appearances: Uche N. Egemonye, Esq., Carmen L. Alexander, Esq., Office of the Solicitor, U.S. Department of Labor, MSHA, Atlanta, Georgia, for the Petitioner; John M. Williams, Esq., Rajkovich, Williams, Kilpatrick & True Lexington, Kentucky, for the Respondent.

Before: Judge Feldman

This civil penalty proceeding concerns a Petition for the Assessment of Civil Penalty filed on May 15, 2008, pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 820(a), by the Secretary of Labor against the respondent, Manalapan Mining Company, Inc. ("Manalapan"). The petition initially sought to impose a total civil penalty of $833,600.00 for four alleged "flagrant" violations of the mandatory safety standard contained in section 75.400, 30 C.F.R. § 75.400, of the Secretary's regulations.[1] Section 75.400 prohibits accumulations of combustible coal dust and loose coal in active workings in underground coal mines. The violations were cited as a result of an October 2, 2007, mine inspection.

[1] Section 110(4)(b)(1) of the Mine Act as amended by the Mine Improvement and New Emergency Response Act of 2006 ("MINER Act"), 30 U.S.C. § 820(4)(b)(1), provides that a mine operator committing a violation deemed to be "flagrant" may be assessed a civil penalty of not more than $220,000. Section 110(4)(b)(1) defines "flagrant" as ". . . a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory safety or health standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury."

On November 3, 2009, the Secretary filed what I construe as an amendment to the May 15, 2008, civil penalty petition removing the "flagrant or reckless disregard" charge for the 104(d) citation and three 104(d) orders that are the subject of this proceeding. In addition, the Secretary reduced the total proposed penalty from $833,600.00 to $240,000.00 to conform with the maximum civil penalty of $60,000.00 for each of the four alleged combustible accumulation violations that the Secretary asserts is attributable to Manalapan's unwarrantable failure. (Letter from Dana L. Ferguson, Esq., to John M. Williams, Esq., October 30, 2009).

This matter was heard on January 12 and January 13, 2010, in Richmond, Kentucky. The parties' post-hearing briefs and replies are of record and have been considered in this disposition.

I. Statement of the Case

Manalapan's RB No. 10 mine, currently inactive, is an extremely wet underground coal mine. Consequently, mine floor conditions in October 2007 were unusually muddy. This matter concerns a combination of coal accumulations and mud, not well defined by the Secretary, along a series of four underground conveyor belts. The extracted material was transferred, in turn, from the No. 4 belt at the face to the No. 1 belt nearest the surface. The extracted material, consisted of approximately thirty percent coal and seventy percent rock and clay.

The material carried on the belts was extremely wet and muddy for several reasons. The primary reason was the pan on the continuous miner scooped mud from the mine floor and transferred the mud, along with the extracted material, to the belt haulage system. Water from dust suppression sprays at the face also progressively accumulated as the water was transferred from the head drive to the tailpiece of each belt. Thus, the material on, and the accumulations around, each belt became more diluted as the material was conveyed outby.

Consequently, although the accumulations were extensive in nature, they were predominantly a slurry mixture of coal and muddy clay, particularly as the material was carried outby from the No. 2 belt for transfer to the No. 1 belt. As a result, the combustible hazard posed by the cited accumulations was greater closer to the face and dissipated by way of dilution as the material was transported outby from belt to belt. For example, the issuing inspector considered the cited conditions along the No. 2 belt to be a "borderline" violation, and the accumulations along the No. 1 belt were so muddy that they could not be handled because they ran through the fingers. Accordingly, the 104(d) citation and three 104(d) orders in issue shall be affirmed, modified or vacated based upon the proximity of the cited conditions to the working face.

II. Findings of Fact

On October 2, 2007, Mine Safety and Health Administration ("MSHA") Coal Mine Inspector Dannie Lewis inspected Manalapan's RB No. 10 underground mine located in Pathfork, Kentucky. The mine had one production day shift that began at 6:00 a.m. and

ended at 4:00 p.m. (Tr. 320). There was no second shift after production ceased at 4:00 p.m. (Tr. 315). The third shift was a maintenance shift that operated from 9:00 p.m. until 5:00 a.m. (Tr. 320). Mining operations began in 2000 and continued until the mine was closed in 2008. (Tr. 222, 248). The coal seam height underground varied from approximately 5½ to 3½ feet. (Tr. 79-80). Coal was extracted from the working face by a continuous miner. (Tr. 54-55). The material extracted from the working face consisted of approximately seventy percent rock and clay and thirty percent coal. (Tr. 232). After extraction, the coal along with the extraneous material was loaded onto a series of conveyor belts designed to transport it to the surface.

In October 2007 there were four belts that conveyed the extracted material from the face to the surface totaling approximately 2,300 feet. (Resp. Ex. 6; Tr. 223). There were a total of approximately 400 top rollers and 200 bottom rollers on the four belts. (Tr. 223). A crawler system on wheels acted as a bridge that connected the belt on the continuous miner to the No. 4 "face" belt. (Tr. 36, 54-55, 323-25). The No. 3 belt, that received the extracted material from the No. 4 belt, dumped the material onto the No. 2 belt which, in turn, transferred the material to the No. 1 belt. The No. 1 belt transferred the coal outside the mine to a stacker belt on the surface. (Tr. 223).

At the time of the inspection, the RB No. 10 mine was extremely wet with pools of water that routinely collected at various locations. (Tr. 226-29). Water entered the mine through old works. (Tr. 228-29). In addition, water percolated through the mine floor. (Tr. 226-27). This resulted in substantial quantities of mud as the mine floor consisted of a soft shale known as "fireclay." (Tr. 230). Additional water accumulated from sprays at the working face. (Tr. 228, 335-36). Consequently, despite having water pumps at various locations, the water was never completely removed and the mine floor remained muddy at all times. (Tr. 316-17). The Secretary admits that it was difficult to control the water in the RB No. 10 mine. (Tr. 88-89).

The muddy mine floor adversely affected the consistency of the material on the belts. David Partin, Manalapan's operations manager, explained, without contradiction, that mud and water on the fireclay mine floor accumulated in the pan located beneath the continuous miner as the miner was trammed. (Tr. 229-31). This muddy material was transferred from the pan to the continuous miner belt system, and, ultimately to the haulage belts. (Tr. 231). Lewis conceded there was mud on the belt line. (Tr. 153). The wet and muddy conditions worsened from belt to belt as the material was transported outby. (Tr. 91, 144, 150, 337). This is because the mud from the mine floor, and water from dust suppression sprays at the working face, accumulated at the head drive and tailpiece of each belt as the extracted material was dumped at the transfer point. (Tr. 59, 74, 76, 77, 189, 228, 231, 323; Resp. Ex. 11).

At approximately 9:00 a.m. on the morning of October 2, 2007, Lewis began an inspection of the RB No. 10 mine. Initially, Lewis reviewed the preshift and onshift examination books. Before beginning his inspection, Lewis observed notations entered from August 30 through October 2, 2007, that, as a general matter, reflected wet and muddy conditions on a daily basis along the Nos. 1, 2, 3 and 4 belts. (Resp. Ex. 7). The books noted "working on" and "shoveling" as actions taken to correct the conditions. *Id*.

Lewis entered the mine. He was accompanied by Mine Superintendent Joseph Miniard and Timothy Carter, an MSHA inspector in training. (Tr. 51). The mine had been producing coal for approximately two to three hours prior to the beginning of the inspection. (Tr. 318). Lewis began his inspection by traveling with Miniard to the working face. (Tr. 317-18). After completing his inspection of the face, Lewis traveled outby the conveyor belt entry to inspect the belts. The inspection occurred prior to Miniard's onshift examination when coal had been carried on the belts for approximately two to three hours prior to Lewis' arrival on the section. (Tr. 318). At that time, four men were assigned to work on the beltline concentrating on the conveyor head drives where water and mud had accumulated. (Tr. 329).

Upon completing his examination of the belts, Lewis traveled to the surface whereupon he telephoned his supervisor Jim Langley at the Barbourville office. After consulting with Langley, Lewis issued 104(d)(1) Citation No. 7511467 (No. 4 Belt) as well as 104(d)(1) Order Nos. 7511472 (No. 3 Belt), 7511478 (No. 2 Belt), and 7511479 (No. 1 Belt) for violations of the mandatory safety standard in section 75.400, 30 C.F.R § 75.400. Lewis designated the cited violations as significant and substantial and attributable to Manalapan's unwarrantable failure.[2] [3]

As justification for the unwarrantable failure for all four of the cited violations, Lewis noted that Manalapan had been cited for approximately 27 violations of section 75.400 during the preceding fifteen months. (Gov. Exs. 1-4). The MSHA Mine Data Retrieval records reflect that Manalapan was cited for 28 violations of section 75.400 during the 24 months preceding Lewis' October 2007 inspection. **(**Gov. Ex. 8). The records also reflect that 11 of the 28 previous violations were designated as non-significant and substantial. *Id.* Although the data retrieval records proffered by the Secretary do not contain the proposed civil penalty for each violation, the information on MSHA's web site reflects the assessed civil penalties ranged from $60.00 to $6,062.00. Only one of the previous 28 combustible material violations was attributable to Manalapan's unwarrantable failure. The penalty proposed by the Secretary for this violation was $4,800.00.

Section 75.400, the cited mandatory standard, states:

> Coal dust, including float 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 electrical equipment therein.

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[2] Generally speaking, a violation is S&S if it is reasonably likely that the hazard contributed to by the violation will result in an accident causing serious injury. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (Apr. 1981).

[3] A violation of a mandatory safety standard is unwarrantable when the actions of the mine operator that resulted in the violation constitute more than ordinary negligence. *Emery Mining Corp*., 9 FMSHRC 1997, 2001 (Dec. 1987).

III. Case Law and Statutory Framework

A. Significant and Substantial

As a general proposition, a violation is properly designated as significant and substantial ("S&S") in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, 3 FMSHRC at 825. In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission explained:

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

Id. at 3-4; *see also Austin Power Inc., v. Sec'y of Labor,* 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). With respect to the third element of *Mathies*, a significant and substantial finding requires a determination that the violation contributes significantly and substantially to the cause and effect of a hazard. *U.S. Steel Mining Co., Inc*., 6 FMSHRC 1866, 1868 (Aug. 1984) (emphasis in original).

Resolution of whether a particular violation of a mandatory standard is S&S in nature must be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). Thus, consideration must be given to both the time frame that a violative condition existed prior to the issuance of a citation, and the time that it would have existed if normal mining operations had continued. *Bellefonte Lime Co.*, 20 FMSHRC 1250 (Nov. 1998); *Halfway, Inc.*, 8 FMSHRC 8, 12 (Jan. 1986).

B. Unwarrantable Failure

The elements of unwarrantable conduct are well settled. The Commission has determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining,* 9 FMSHRC at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." Id. at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-194 (Feb. 1991); *see also Buck Creek Coal*, 52 F.3d 133, 135-36 (7th Cir. 1995) (approving the Commission's unwarrantable failure test).

The Commission examines various factors in determining whether a violation is unwarrantable, including the magnitude of a violative condition, the length of time that it has existed, whether the violation is obvious, whether the violation poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's compliance efforts made prior to the issuance of the citation or order. *Enlow Fork Mining Co.*, 19 FMSHRC at 11-12, 17; *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp*., 6 FMSHRC 1596, 1603 (July 1984). Repeated similar violations may be relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Peabody*, 14 FMSHRC at 1263-64.

C. Statutory Civil Penalty Criteria

The statutory civil penalty criteria are set forth in section 110(i) of the Act, 30 U.S.C. § 820(i). In determining the appropriate civil penalty to be assessed, section 110(i) provides, in pertinent part:

> the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

The Commission has noted that the *de novo* assessment of civil penalties by the administrative law judge does not require "that equal weight must be assigned to each of the penalty assessment criteria." *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Rather, the judge must qualitatively analyze each of the penalty criteria to determine the appropriate civil penalty to be assessed. *Cantera Green*, 22 FMSHRC 616, 625-26 (May 2000).

IV. Further Findings and Conclusions

A. 104(d)(1) Citation No. 7511467 (No. 4 Belt)

As previously noted, the first belt Lewis observed was the No. 4 belt that received the face material from the continuous miner via the crawler system. (Tr. 54, 58). The approximate dimensions of the No. 4 belt were 600 feet long, 4 to 5 feet wide, and, 44 inches above the ground. (Tr. 68, 70, 85, 327). The belt entry was 18 to 20 feet wide. (Tr. 67). Facing in an inby direction, the right rib was approximately 2½ to 3 feet to the right of the belt. (Tr. 67). The distance from the left rib to the belt varied between 6 and 10 feet. This area to the left of the belt served as a travelway. (Tr. 67, 68).

Lewis testified that the material on the No. 4 belt was the driest of the four belts. (Tr. 83, 87, 337). In this regard, Lewis estimated that sixty to seventy percent of the belt material was dry. (Tr. 59). Lewis explained that the wettest conditions on the No. 4 belt existed outby the face where the head drive of the No. 4 belt dumped onto the tailpiece of the No. 3 belt. (Tr. 59, 189, 323). As noted, the water on the belts accumulated at the transfer points between the head drives and tailpieces as the material was dumped outby from belt to belt as it was conveyed to the surface. (Tr. 59, 74, 76, 231; Resp. Ex. 6).

Lewis observed loose coal and float dust accumulations underneath, along the side, and on the structure of the No. 4 belt. (Tr. 55, 59). The accumulations extended from underneath the belt to approximately one foot on each side. The accumulations continued along the entire length of the belt. (Tr. 66; Gov. Ex. 1). Using a ruler, Lewis determined that the accumulations ranged from one to eight inches in depth. (Tr. 69, 74).

Lewis observed at least ten bottom rollers on the No. 4 belt turning in coal fines. (Tr. 55, 328). These fines contacted the bottom rollers, which are approximately two to six inches off the floor. (Tr. 55, 73). Lewis testified that a few of the rollers were so immersed in the coal fines that they could hardly be seen. (Tr. 73, 263). Lewis noted that there were locations where the accumulations were rubbing against the bottom belt drying the coal and causing it change to a reddish gray color. (Tr. 55, 59, 60, 131).

Miniard conceded that the No. 4 Belt had dry accumulations and he saw rollers turning in these accumulations. (Tr. 352). Specifically, Miniard described accumulations that had fallen off the No. 4 belt near the face where the bridge dumped the extracted material from the continuous miner onto the tailpiece. (Tr. 325). In terms of the magnitude of the spillage, Miniard admitted to four areas of accumulations that were six to eight inches in depth and approximately three feet in diameter. (Tr. 327). Brummett also admitted there were areas of coal spillage in the vicinity of the tailpiece of the No. 4 belt. (Tr. 258). With respect to accumulations in proximity to rollers, Miniard recalled "a couple of rollers" near the face that were turning in coal and a couple of rollers further outby that were turning in mud. (Tr. 328).

As a result of his observations Lewis issued 104(d)(1) Citation No. 7511467. This citation states:

> Loose coal and float coal dust has been allowed to accumulate along side and underneath the #4 conveyor belt. When checked these coal accumulations are observed to be 1 to 8 inches in depth and extend throughout the entire length of this # 4 conveyor belt line. At least 10 bottom rollers are observed to be turning in the accumulations. Also the bottom belt is observed rubbing these accumulations in various locations along this belt. This condition is oblivious [sic] and has been allowed to exist for at least several shifts. These coal accumulations are observed to be black and gray in color. According to the mine access data base this standard has been cited 27 times at the mine in the previous

15 months. The mine operator has engaged in aggravated conduct by not taking corrective action to prevent accumulations of this severity. This violation is an unwarrantable failure to comply with the mandatory standard.

(Gov. Ex. 1).

1. Fact of Violation and S&S

Section 75.400 prohibits coal dust, including float coal dust, and loose coal from accumulating in active workings. This mandatory standard seeks to remove the hazard of combustible accumulations fueling or propagating an explosion. Although Miniard and Brummett admitted that there were areas of dry coal accumulations along the No. 4 belt, the Commission has determined that even wet coal accumulations are prohibited by section 75.400 because they can dry out in a mine fire and ignite. *Utah Power & Light Co.*, 12 FMSHRC 965, 968-69 (May 1990) citing *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1120-21 (Aug. 1985). Moreover, the preshift and onshift books reflect that these accumulations had existed for at least several shifts. Consequently, it is clear that the nature and extent of the accumulations observed by Lewis along the No. 4 belt constitute a violation of section 75.400.

With respect to the issue of S&S, as previously noted, resolution of whether a particular violation of a mandatory standard is S&S must be made assuming continued normal mining operations. *U.S. Steel Mining*, 7 FMSHRC at 1130. Thus, the degree of hazard caused by the cited violation must be evaluated based on the time the violation existed prior to the issuance of the citation as well as the time it would have continued to exist if normal mining operations had continued.

The essence of an S&S violation is whether it is reasonably likely that the hazard contributed to by the violation will result in an event in which there are serious or fatal injuries. The Commission, as well as Congress, has recognized that accumulations of combustible materials constitute hazardous conditions, as any combustible material, when placed in suspension, can propagate an explosion. *Enlow Fork*, 19 FMSHRC at 14, citing S. Rep. No. 411, 91st Cong., 1st, Sess. 65 (1969), *reprinted in* Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 191 (1975). The Sago Mine and Upper Big Branch Mine tragedies in West Virginia are evidence of the tragic consequences of explosions in underground mines.

The accumulations observed by Lewis can ignite if the bearings on the No. 4 rollers malfunctioned. In addition, Lewis observed that a 480 volt cable near the No. 4 belt was a possible source of ignition because the cable did not have a stress clamp or bushing. (Tr. 109). The cited accumulations could also propagate an explosion if there was an ignition in another area of the mine. In either event, it is reasonably likely that a fire or explosion will result in serious or fatal injuries. Therefore, the cited violation of section 75.400 in 104(d)(1) Citation No. 7511467 is properly designated as S&S.

2. Unwarrantable Failure

As noted, an unwarrantable determination requires an analysis of the magnitude of a violative condition, the length of time that it has existed, whether the violation is obvious, whether the violation poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's compliance efforts made prior to the issuance of the citation or order. The obviousness and magnitude of the accumulations along the entire length of the No. 4 belt, the repeated reference to accumulations, albeit muddy, in the preshift and onshift books, and the history of Manalapan's previous accumulation violations, are aggravating factors. However, these and all other relevant factors must be viewed in the context of the factual circumstances of this case and all material facts and circumstances must be examined to determine if a mine operator's negligence is mitigated. *Consolidated Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000)**.**

I am cognizant that the accumulations cited by Lewis were extensive. Miniard testified that it took a whole crew of men, fifteen or eighteen, to clean up the accumulations for the entire belt system. (Tr. 346-47, 365). Moreover, the abatement activities were conducted for two shifts. (Tr. 347-48). However, the analysis does not stop there. Although extensive in magnitude, this case presents the dilemma of distinguishing the nature and extent of combustible accumulations at each belt from the totality of accumulations that included significant accumulations of inert muddy material. In other words, while damp or wet coal is considered combustible, the concentration of coal in a puddle of water, or, in a muddy suspension, must be great enough to constitute a combustible hazard.

Thus, resolving the unwarrantable failure issue is a matter of degree. Namely, to what extent were the accumulations observed by Lewis at the No. 4 belt combustible in that they posed a high degree of danger that warranted a greater standard of care. Significantly, corroborating Lewis' testimony, both Miniard and Brummett concede that there were dry accumulations of coal near the tailpiece of the No. 4 belt. Moreover, Miniard admits that there were at least several bottom rollers turning in dry coal. With respect to wet coal accumulations, on balance, the evidence reflects that the significant concentrations of coal, even if wet, posed a high degree of danger because the coal deposits could dry out in a mine fire and ignite. *Utah Power & Light*, 12 FMSHRC at 968-69.

When viewed in the context of continuing mining operations, dry combustible accumulations in proximity to potential sources of ignition if rollers were to malfunction pose a high degree of danger. This conclusion is further supported by the propagation hazard posed by these accumulations that can easily be put in suspension by moving belts and rollers. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988). Thus, on balance, the Secretary has satisfied her burden of demonstrating that the nature, extent and duration of the prohibited dry combustible coal accumulations, and the discrete wet accumulations of coal, along the No. 4 belt were attributable to at least a high degree of negligence evidencing an unwarrantable failure.

3. Civil Penalty

Manalapan is a large mine operator and it has not been contended that the imposition of the civil penalties proposed in this matter will effect its ability to continue in business. While the history of violations may be viewed as an aggravating factor, and the cited condition is serious in gravity, one must not lose sight of the extremely wet mining environment at Manalapan's RB No. 10 mine. In this regard, the liquid conditions on the belt, as well as on the mine floor, are a mitigating circumstance with respect to the maintenance difficulty of cleaning muddy conditions around belts caused by chronic spillover to the extremely wet mine floor below. Nevertheless, in the final analysis, Manalapan remains responsible for preventing combustible accumulations. The Secretary proposes a civil penalty of $60,000.00. In recognition of the muddy conditions as a mitigating factor, **a civil penalty of $20,000.00 shall be imposed for 104(d)(1) Citation No. 7511467**.

B. 104(d)(1) Order No. 7511472 (No. 3 Belt)

The head drive of the No. 4 belt dumps onto the tailpiece of the No. 3 belt. The No. 3 belt was approximately 400 feet long. (Tr. 86). After observing the No. 3 belt and consulting with his supervisor at the Barbourville office, Lewis issued 104(d)(1) Order No. 7511472 stating:

> Loose coal and float coal dust has been allowed to accumulate along side and underneath the # 3 conveyor belt. *These accumulations* are observed to be 1 to 9 inches in depth and extending the entire length of the # 3 conveyor belt. At least 20 bottom rollers are observed turning in *these accumulations* and the bottom belt is observed rubbing *these accumulations* in various locations. According to the mine access data base this standard has been cited 27 times during the previous 15 months at this mine. This condition is obvious and has existed for at least several shifts. This violation is an unwarrantable failure to comply with a mandatory standard.

(Gov. Ex. 2). (Emphasis added).

1. Fact of Violation and S&S

The rub in this case is the term "these accumulations" noted by Lewis in the subject 104(d)(1) orders. Although the testimony supports significant discrete, dry accumulations along the No. 4 belt, the distinction between combustible accumulations and mud becomes progressively less clear with regard to the No. 3, No. 2 and No. 1 belts. This is because the testimony reflects that increasingly significant amounts of mud and water were transferred from the head drive of each belt to the tailpiece of the next belt as the material, which was only thirty percent coal, was being conveyed to the surface.

Although 104(d)(1) Order No. 7511472 implies that there was "[l]oose coal and float dust" extending along the entire length of the No. 3 belt, the record testimony is, at best, equivocal. Miniard characterized the conditions on and along the side of the No. 3 belt as wet and muddy. (Tr. 336). In this regard, Miniard testified that there were no dry areas along the belt and that the only material along the belt was the mud and water typical of this mine. (Tr. 336). Kevin Daniels, a Manalapan belt man, who cleaned up the accumulations to abate the subject citation and orders, corroborated Miniard's testimony. (Tr. 406). Specifically, he characterized the conditions at the No. 3 belt as "wet, muddy and nasty." (Tr. 406). He saw no dry coal along the belt. (Tr. 406). Daniels stated that the accumulations were so wet and muddy that they could not be shoveled. (Tr. 407). Photographs taken in this area clearly depict extensive areas of mud. (Gov. Ex. 6, photos 085 and 086).

On the other hand, Lewis' testimony, which the Secretary must rely on to satisfy her burden of proof, was contradictory. Lewis initially admitted the No. 3 belt was "somewhat wetter" than the No. 4 belt. (Tr. 87). However, Lewis later was reticent to admit that the conditions at the No. 3 belt were wet and muddy. He initially admitted that the conditions were muddy, but denied that the conditions were wet. (Tr. 153). However, at his deposition Lewis stated there was a lot of water on the belt. (Tr. 152-54). Lewis initially denied the area along the No. 3 belt was wet and slippery. (Tr. 155). However, he ultimately conceded that there was enough water on the belt line to make walking difficult. (Tr. 155-56). Finally, Lewis admitted that the belt line was covered in mud, water and rock. (Tr. 153-56). Lewis opined that although the "No. 2 [belt] was borderline, No. 3 was not. No. 3 was combustible enough to cite." (Tr. 150).

In sum, although the evidence and photographic exhibits reflect that numerous bottom rollers were turning in a liquid mixture, it is difficult to discern the concentration of combustible material contacting the rollers. What is clear is that the areas surrounding the belts became progressively wetter as the material was conveyed outby from the No. 4 belt to the No. 1 belt for conveyance to the surface. Section 75.400 requires a mine operator to promptly clean and remove combustible materials in active workings. The preshift and onshift books reflect that the material surrounding the bottom rollers was present for at least several shifts. Although this material was wetter than the material along the No. 4 belt, the testimony supports the conclusion that there were sufficient areas of combustible coal accumulations, even if they were wet or damp, to constitute a violation of section 75.400.

With respect to the S&S issue, the considerations regarding the S&S nature of the combustible accumulations discussed above with respect to the No. 4 belt are incorporated by reference. Having concluded that there was sufficient combustible materials to constitute a violation, despite the wet conditions, these accumulations could dry out in the event of a mine fire and provide additional fuel for the propagation of an explosion. *Utah Power & Light*, 12 FMSHRC at 968-69. In such an event, it is reasonably likely that serious or fatal injuries will occur. Consequently, the cited violation in 104(d)(1) Order No. 7511472 was properly designated as S&S.

2. Unwarrantable Failure

The testimony, preshift and onshift books reflect the accumulations along the No. 3 belt were present for several shifts, extensive, and contacting numerous rollers. However, it is significant that, although the examination books reflect the duration of the accumulations was at least several shifts, the accumulations are described as "wet and muddy" rather than accumulations of coal. (Gov. Ex 7). Thus, the extent to which these references refer to combustible accumulations is unclear in that the wet and muddy description accurately describes the mine conditions articulated by the witnesses.

What is clear is that the rollers were turning in a muddy mixture that should have been promptly cleaned to maintain proper operation of the rollers. Although the Secretary has been given the benefit of the doubt that this muddy composition contained sufficient combustible material to warrant a violation of section 75.400, combustible accumulation violations are not *per se* unwarrantable. Given the equivocal nature of Lewis' testimony, the evidence is insufficient to demonstrate that this muddy mixture posed the requisite high degree of danger to justify unwarrantable failure findings in this case. In other words, the extremely muddy nature of the accumulations is a mitigating factor. Consequently, the failure to promptly remove these accumulations does not rise to the level of aggravated conduct.

In addition, the Secretary relies on the history of 27 violations as an aggravating factor. However, forty percent of these violations were designated as non-S&S in nature. Moreover, with respect to the issue of notice that greater belt cleanup efforts were required, not all of these accumulation violations concerned conveyor belts. For example, several violations concerned float coal dust on electrical boxes and coal dust on a roof bolting machine.[4] This history of violations, alone, particularly in light of the cited predominantly wet and muddy accumulations due to adverse mining conditions, does not provide an adequate basis for an unwarrantable failure.

Although the negligence attributable to Manalapan is moderate to high, Manalapan's conduct is not sufficiently aggravated or unjustified to warrant an unwarrantable failure. Accordingly, 104(d)(1) Order No. 7511472 shall be modified to a 104(a) citation.

[4] I reach this conclusion from copies of citations issued for section 75.400 violations during the relevant 24 month period provided by the Secretary to Manalapan in response to an interrogatory request. Although not admitted as exhibits, these documents have probative value as they are official records of the Secretary.

3. Civil Penalty

As a general matter, application of the facts in this case to section 110(i) has been discussed above with respect to the No. 4 belt. The Secretary proposes a civil penalty of $60,000.00. Given the modification of the 104(d)(1) order to a 104(a) citation reflecting that Manalapan's conduct was not unwarrantable, and, in view of the muddy conditions as a mitigating circumstance, **a civil penalty of $12,000.00 shall be imposed for 104(a) Citation No. 7511472**.

C. 104(d)(1) Order No. 7511478 (No. 2 Belt)

The head drive of the No. 3 belt dumps onto the tailpiece of the No. 2 belt. The No. 2 belt was approximately 500 feet long. (Tr. 86). After observing the No. 2 belt and consulting with his supervisor at the Barbourville office, Lewis issued 104(d)(1) Order No. 7511478 stating:

> Loose coal and float coal dust has been allowed to accumulate along side and underneath the # 2 conveyor belt. *These accumulations* are observed to be 1 to 12 inches in depth and extending the entire length of the # 2 conveyor belt. At least 10 bottom rollers are observed turning in *these accumulations* and the bottom belt is observed rubbing *these accumulations* in various locations. According to the mine access data base this standard has been cited 27 times during the previous 15 months at this mine. This condition is obvious and has existed for at least several shifts. This violation is an unwarrantable failure to comply with a mandatory standard.

(Gov. Ex. 3). (Emphasis added).

1. Fact of Violation and S&S

Once again the narrative in the 104(d)(1) order is not as it seems. Although 104(d)(1) Order No. 7511478 implies that there was "[l]oose coal and float dust" extending along the entire length of the No. 2 belt, Lewis admitted there were areas along the No. 2 belt that were "wet and muddy." (Tr. 144). The uncontradicted testimony is that the No. 2 belt was wetter than either the No. 4 or No. 3 belts. (Tr. 91, 144, 337). Despite using essentially the same language in the citation and orders to describe the conditions at the No. 2, No. 3 and No. 4 belts, at trial Lewis admitted the conditions along the No. 2 belt were so wet and muddy that they constituted a "borderline situation" as far as a violation was concerned. (Tr. 150-52).

The conclusion that the conditions along the No. 2 belt were wet and muddy is further supported by the testimony of Manalapan's witnesses. Miniard testified that there was no spillage or piles of coal along the No. 2 belt. (Tr. 337). Stephan Cantrell, a crawler operator who worked on the clean up to abate the citations, described the material along the belt as brown in color and "pure water and mud." (Tr. 387-88). Cantrell testified the consistency of the material on the mine floor was so liquid that it was removed by collecting the material in a bucket and dumping the contents onto the No. 2 belt. (Tr. 388). Cantrell's testimony was corroborated by Daniels who also cleaned up the No. 2 and No. 3 belts. Daniels testified that the material on the No. 2 belt was so runny that it could not be shoveled. (Tr. 409).

Consistent with the testimony of Cantrell and Daniels, Brummett testified he did not see any dry material along the No. 2 belt. (Tr. 265). Contemporaneous photographs of the area depict a wet, soupy mixture of mud and water. (Res. Ex. 9). Finally, even Lewis admitted that he had never seen a fire caused by the wet conditions he observed at the No. 2 belt. (Tr. 189).

The Secretary has the burden of proving all elements of a cited violation. *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989). I am cognizant of Manalapan's assertion that the concentration of coal accumulations was diluted as the conditions on and around the belts became progressively more wet and muddy. However, on balance, Lewis' testimony, as well as the entries in the preshift and onshift books, provide an adequate basis for concluding there was sufficient combustible accumulations, although extremely wet, to constitute a violation of section 75.400.

Having concluded a violation occurred, the focus shifts to the question of S&S. Lewis testified the violation was at best "borderline." Moreover, Lewis conceded that it was unlikely given the degree of wetness and mud, that the cited conditions could cause or contribute to a fire or explosion. Thus, the evidence reflects that the hazard posed by this condition is not likely to contribute to an event that will cause serious injury. Consequently, the S&S designation shall be deleted.

2. Unwarrantable Failure

Having concluded that the cited condition is not S&S in nature, the muddy conditions did not pose a high degree of danger that would warrant a higher degree of care. The Secretary's assertion that the violation is attributable to aggravated or unjustifiable conduct is inconsistent with Lewis' testimony of a "borderline" violation and his concession that the condition was unlikely to contribute to a fire. Rather, the evidence reflects no more than a moderate degree of negligence. Accordingly, the evidence does not support an unwarrantable failure. Consequently, 104(d)(1) Order No. 7511478 is modified to a 104(a) citation to reflect that the cited violation is non-S&S in nature and not attributable to an unwarrantable failure.

3. Civil Penalty

As noted, the penalty criteria in section 110(i) has been discussed above. The Secretary proposes a civil penalty of $60,000.00. Given the modification of the 104(d)(1) order to reflect that the conditions along the No. 2 belt were neither S&S in nature nor attributable to Manalapan's unwarrantable failure, **a civil penalty of $4,000.00 shall be assessed for 104(a) Citation No. 7511478**.

D. 104(d)(1) Order No. 7511479 (No. 1 Belt)

The head drive of the No. 2 belt dumps onto the tailpiece of the No. 1 belt. The No. 1 belt was approximately 400 feet long. (Tr. 91). After observing the No. 1 belt and consulting with his supervisor at the Barbourville office, Lewis issued 104(d)(1) Order No. 7511479. Once again, using the one size fits all approach, 104(d)(1) Order No. 7511479 states:

> Loose coal and float coal dust has been allowed to accumulate along side and underneath the # 1 conveyor belt. *These accumulations* are observed to be 1 to 15 inches in depth and extending the entire length of the # 1 conveyor belt. At least 5 bottom rollers are observed turning in *these accumulations* and the bottom belt is observed rubbing *these accumulations* in various locations. According to the mine access data base this standard has been cited 27 times during the previous 15 months at this mine. This condition is obvious and has existed for at least several shifts. This violation is an unwarrantable failure to comply with a mandatory standard.

(Gov. Ex. 4). (Emphasis added).

1. Fact of Violation

Although the conditions around the No. 1 belt were the wettest, Lewis' narrative description of the alleged violative conditions at the No. 1 belt was essentially the same as his narrative descriptions for the areas surrounding the No. 2, No. 3 and No. 4 belts. Although 104(d)(1) Order No. 7511479 implies that there was "[l]oose coal and float dust" extending along the entire length of the No. 1 belt, at trial, Lewis conceded the cited accumulations were wet and soupy in nature. Moreover, Lewis admitted that the cited material was incapable of being handled because the material ran through the fingers. (Tr. 142-44).

On cross-examination, when pressed for why he cited the No. 1 belt given the degree of wetness and mud, Lewis, for the first time, asserted that there were "hundreds or thousands of blocks of coal" at the tailpiece that the belt was running in. (Tr. 134-35). Lewis described these blocks as the size of small stones that measured one inch by one inch. (Tr. 136). However, Lewis admitted these "blocks" of coal were not noted in 104(d)(1) Order No. 7511479, or, in his contemporaneous notes taken during the inspection. (Tr. 136-38; Gov. Ex. 5, p.11).

Miniard testified that Lewis did not express any concerns about the conditions around the tailpiece of the No. 1 belt. (Tr. 339). To rebut Lewis' recollection of "blocks" of coal at the tailpiece, both Miniard and Cantrell testified that the area around the tailpiece cannot be seen from the travelway. (Tr. 339, 387). The only way the tailpiece can be observed is by climbing over the belt. (Tr. 387). However, the No. 1 belt was operating at the time of Lewis' inspection. (Tr. 184-85). Finally, although Lewis expressed concern about these small blocks of coal catching fire, at the trial, Lewis admitted he did not know of any wet conditions comparable to those existing at the No. 1 belt ever causing a fire. (Tr. 142-44, 189).

Lewis' belated testimony regarding small blocks of coal at the tailpiece are not corroborated by his description of the alleged violative conditions in 104(d)(1) Order No. 7511479, or in his contemporaneous inspection notes. The absence of any relevant references in the order and notes supports Miniard's testimony that Lewis did not express any concern about the conditions at the tailpiece during the inspection. Thus, Lewis' testimony concerning hazardous combustible material at the tailpiece can be given very little weight.

Lewis' admissions that the wet and muddy accumulations along the No. 1 belt were so liquid that they were incapable of being handled, and, that the accumulations were unlikely to catch fire, undermine the Secretary's alleged section 75.400 violation. If the conditions at the No. 2 belt constituted no more than a "borderline" violation, the conditions at the No. 1 belt, where even more water and mud had spilled from the belt to the mine floor, did not rise to the level of a section 75.400 violation. Accordingly, 104(d)(1) Order No. 7511479 shall be vacated.

ORDER

Consistent with this Decision, **IT IS ORDERED** that 104(d)(1) Citation No. 7511467 (No. 4 Belt) **IS AFFIRMED**.

IT IS FURTHER ORDERED that 104(d)(1) Order No. 7511472 (No. 3 Belt) **IS MODIFIED** to a 104(a) citation.

IT IS FURTHER ORDERED that 104(d)(1) Order No. 7511478 (No. 2 Belt) **IS MODIFIED** to a 104(a) citation, and, that the significant and substantial designation for the cited violative condition **IS DELETED**.

IT IS FURTHER ORDERED that 104(d)(1) Order No. 7511479 (No. 1 Belt) **IS VACATED**.

IT IS FURTHER ORDERED that Manalapan Mining Company, Inc., shall pay, **within 40 days of the date of this decision, a total civil penalty of $36,000.00** in satisfaction of 104(d)(1) Citation No. 7511467 (No. 4 Belt), 104(a) Citation No. 7511472 (No. 3 Belt), and 104(a) Citation No. 7511478 (No. 2 Belt). Upon receipt of timely payment, **IT IS ORDERED** that the civil penalty proceeding in KENT 2008-737 **IS DISMISSED**.

Jerold Feldman
Administrative Law Judge

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