FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE N.W., SUITE 9500
WASHINGTON, D.C. 20001
(202) 434-9950

December 29, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. LAKE 2009-36
Petitioner	:	A.C. No. 12-02010-162898
	:	
v.	:	
	:	
BLACK BEAUTY COAL COMPANY,	:	Mine: Air Quality #1 Mine
Respondent	:	

DECISION

Appearances: Barbara M. Villalobos, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Petitioner
Arthur Wolfson, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for the Respondent

Before: Judge Weisberger

Statement of the Case

This case is before me[1] based upon a petition for assessment of civil penalty filed by the Secretary of Labor ("Secretary") alleging violations by Black Beauty Coal Company ("Black Beauty"), of various mandatory standards set forth in Title 30 of the Code of Federal Regulations. The parties reached a settlement regarding five citations at issue, and a hearing was held in St. Louis, Missouri, on two orders issued under Section 104(d) of the Federal Mine Safety and Health Act of 1977 ("the Act").[2]

Subsequent to the hearing, Respondent filed proposed filings of fact and a brief. The Secretary filed a brief. Respondent filed a reply brief. To date, the Secretary has not filed either objections or a reply brief.

[1] This case was originally assigned to Judge Paez and was reassigned to me.

[2] The parties stipulated that the citations underlying these orders are "paid and final violation[s]." (Joint Stipulations, Pars. 9-12).

I. Citation numbers 6672417, 6672495, 6678086, 6678088, and 6681014

The Secretary filed a motion, and an amended motion, to approve settlement of these citations. The original assessment for these citations was $79,886.00 and the parties reached a settlement in the amount of $14,153.00. I have considered the representations and documentation submitted. Most significant are the Secretary's representations that "upon review" the levels of negligence, and gravity were reduced respectively in two citations, and one citation was changed to "non S&S". Also significant is the Secretary's representation that "upon information learned in preparation of this case for hearing, and a further review by the Agency, the Agency hereby vacates [two] citations (sic)."

I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. Therefore, the motion for approval of settlement is **GRANTED**.

II. Order No. 6671205 (violation of 30 CFR §77.1103(d)[3])

A. The Secretary's testimony

On October 15, 2007, Johnny L. Moore, an MSHA inspector, inspected Black Beauty's containment area. The containment area was made out of concrete slabs, approximately nine inches high, and covered an area of approximately fifteen by twenty-five feet. Moore indicated that the purpose of the area was to catch spills from three cylindrical storage tanks. Two tanks, five feet long and three and one-half feet in diameter, had a capacity of 400 gallons and contained waste oil. A third tank, five feet in diameter and ten feet long, contained diesel fuel. It had a capacity of one thousand gallons. All the tanks were in a horizontal position.

Moore indicated that he observed cellophane, plastic items, gloves, and other trash hanging over the edge of the containment area. He indicated that the containment area was a "slurry of mixed oil and fuel" (Tr. 23), and that he could see dried oil caked on the tanks. He also observed trash through some grating that was on top of the containment area. In addition, after the liquid in the containment had been pumped out to abate the violation, Moore observed jugs, cardboard, paper, cracked leather, cans of soda, plastic soda bottles, lids to five gallon plastic buckets, and pieces of six by six wooden crib ties that were eight to eleven inches long. According to Moore, these items "had become saturated and fully sunk." (Tr. 29). Moore indicated that a hazard was created because combustible material was near flammable storage tanks. He found the violative condition not to be significant and substantial because the gravity was "unlikely" in that there were not any ignition sources present. He indicated that if an accident should occur there would be resultant burns, smoke or inhalation injuries to one person

[3] Section 77.1103(d) provides as follows: "areas surrounding flammable liquid storage tanks and electrical substations and transformers shall be kept free from grass (dry), weeds, underbrush, and other combustible materials such as trash, rubbish, leaves and paper for at least 25 feet in all directions."

who would probably be able to get away from the area. Moore issued an order under Section 104 (d) of the Act alleging a violation of 30 CFR §77.1103(d).

According to Moore, the violation was the result of the operator's unwarrantable failure because the trash was very obvious, and extensive. He indicated that the cited area was in a "high traffic area" as persons traveled by it to go to and from a training center, an underground portal, and a storage warehouse. Also, he indicated that Jim Streepy, Respondent's plant manager, observed the condition with him along with another MSHA employee, Quintin Hastings, and they both said that it was a "shame and uncalled for . . . [it] to be in this condition." (Tr. 32).

The inspector opined that, based on the way the condition looked, it had been in existence for "at least a couple of weeks to three weeks." (Tr. 35-36). Moore testified that he was told that it took thirty-four man-hours to abate the violative condition. Moore indicated that the items he cited were extensive.

Moore testified that, after he cited the operator, he met with Guy Campbell, the underground mine manager, and asked him who was responsible for the cited area. According to Moore, Campbell told him that the containment was Alan Pancake's responsibility, but he was on vacation. Moore said that Streepy said he (Streepy) was not responsible for the containment area; Streepy was not sure who was. According to Moore, after talking to Streepy and Campbell for approximately two hours, the latter told him that "[he would], take responsibility for it . . .we are going to turn it over to the surface, but Alan hasn't made it back off vacation to do that yet (sic)." (Tr. 34-35).

B. Respondent's testimony

John A. Burke, a yardman who loaded and unloaded trucks at the site in issue in October 2007, testified that he works around the containment area, and therefore he saw it daily. He indicated that it was common for the containment area to contain liquid from rain and/or spillage. According to Burke, the company gets rid of the liquid by pumping it out. In addition, it hired Kentucky Petroleum to remove the liquid from the containment area "as needed", (Tr. 71). Burke indicated that after liquid is pumped out of the area "we would have to shovel the extraneous material into barrels." (Tr. 73). He indicated that he would do it immediately after the pumping "if I was told to do it." (Tr. 74). According to Burke, Kentucky Petroleum had removed oil and water from the area on October 11, 2007.

Jim Streepy, was the plant manager at Respondent's Wheatland site[4] in October 2007. He was with the inspector on October 15. He indicated that there was liquid in the containment area which was mostly water but there was "some oil on top of it." (Tr. 90).

Alan Pancake was the plant supervisor of the preparation plant at issue. He testified that he was on vacation on October 15, but came to the mine after he was called by Hastings who

[4] This site is approximately seven miles from the cited area.

informed him that an inspector was at the site. Pancake indicated that his area of responsibilities did not include the containment area.

C. Discussion

1. Violation of section 77.1103(d), *supra*

Section 77.1103(d), *supra*, requires, in pertinent part, as follows: "areas surrounding flammable liquid storage tanks and electric substations and transformers shall be kept free from grass (dry), weeds, underbrush, and other combustible materials such as trash, rubbish, leaves and paper for at least 25ft in all directions." 30 CFR §77.1103(d).

It is Respondent's position that it did not violate section 77.1103(d), *supra*, arguing that: (1) the containment was part of the storage tank itself and not covered under section 77.1103(d) *supra*, and (2) that the cited material was not combustible.

a. The containment as subject to section 77.1103(d), *supra*

Respondent maintains that the cited containment area is part of the storage area itself and thus is not subject to section 77.1103(d), *supra*. Respondent argues as follows:

> The containment itself acts as a type of storage facility for waste oil and kerosene. It is designed to catch waste oil spillage and retain the liquid until it can be pumped and properly disposed of. It is not the area surrounding the flammable liquid storage tanks, but is part of the storage tank facility itself. The containment is therefore a flammable storage unit and not subject to the above standard.

(Respondent's Post Hearing Br. 3) (citations omitted).

I have considered this argument, but find that it is not persuasive, as it is contrary to the plain meaning of section 77.1103(d), *supra*. The mandatory requirements of this section apply to "areas surrounding flammable liquid storage tanks".[5] Thus, storage tanks themselves are not within the scope of section 77.1103(d), *supra*, but the surrounding areas are. Since the cited containment is adjacent to three storage tanks, (Exs. R-1 (a)(c)(e)(f), and (g)), it clearly falls within the purview of section 77.1103(d), *supra*.

b. The cited materials as being combustible

The Respondent further argues that it has not been established by the Secretary that the material cited was combustible, and hence there was not any violation. In support of its argument, Respondent cites *Marty Corp*., 7 FMSHRC 50 (January 1985) (ALJ). In *Marty, supra*, the judge found that because the cited bales of straw were thoroughly soaked, they may

[5] A "storage tank" is a "circular steel tank." *Dictionary of Mining Minerals and Related Terms* ("DMMRT").

not have been combustible and therefore there was not any violation of section 77.1103(d), *supra*. I note, initially, that *Marty*, *supra* was decided by a fellow commission judge and hence I am not bound by it. Also, the case at bar is factually distinguished from *Marty, supra*; in *Marty*, the bales of hay were soaked in water, not oil, and therefore the bales may not have been combustible. In contrast, in the case at bar, I note that Respondent did not either impeach or contradict the testimony of Moore, that the plastic and leather items that he cited were in a "slurry of mixed oil and fuel" (Tr. 23)[6] (emphasis added).

Further, it is significant to note that Moore testified that the lids that he cited were combustible as "[t]he plastic will burn." (Tr. 39). Respondent did not impeach or contradict this testimony.

Moreover, "trash" is one of the specifically enumerated "combustible materials" set forth in section 77.1103(d), *supra*. In this context, I note the existence of plastic lids, cans, and leather items observed in the containment area, as well as the following items observed after it had been pumped out: pieces of a wooden crib ties, cardboard, rubber, and Saran wrap. These items were clearly "trash," as that term is commonly understood, i.e., junk, rubbish. *See Webster's Third New International Dictionary* (1993 Edition).

For all the above reasons, I conclude that it has been established that Respondent violated section 77.1103(d,) *supra*.

2. Unwarrantable Failure.

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.,* 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* 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, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. MSHA,* 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

The Commission has recognized that whether conduct is "aggravated" in the context of unwarrantable failure is determined by considering the facts and circumstances of each case to determine if any aggravating or mitigating circumstances exist. Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been place on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation. *See I.O. Coal* 31 FMSHRC 1346 (Dec. 2009) *Consolidation Coal Co.,* 22 FMSHRC 340, 252 (Mar. 2000) (*"Consol"*); *Cyprus Emerald Res. Corp.,* 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on*

[6]Indeed even Respondent's witness, Streepy, who indicated that the area "was mostly water," testified further as follows: "There was some oil on top of it." (Tr. 90).

other grounds, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.,* 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.,* 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.,* 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.,* 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.,* 10 FMSHRC 705, 709 (June 1988).

a. Aggravating factors

The Secretary argues, in essence, that no one was assigned the responsibility of ensuring the containment area was kept clean. The Secretary concludes that this fact should be considered an aggravating factor for the purpose of determining unwarrantable failure. I note that the Secretary's argument finds support in the testimony of Moore that neither Streepy, Pancake, nor Campbell was responsible for the containment area. This testimony was not impeached or contradicted, nor did Respondent adduce any evidence to establish who was responsible for the cited area. As such, the lack of responsibility for the containment was an aggravating factor.

b. Extent

According to Moore, the containment area was approximately fifteen feet by twenty feet. He said that when he looked through the cracks in the grating that was on it, he saw trash "wherever you looked hard enough." (Tr. 25). After the area was pumped, he observed more trash. These observations were not impeached or contradicted.

He further testified that it took thirty-four man-hours to abate the violative condition. This testimony was not impeached or rebutted.

Based on all the above, I conclude the violation was extensive.

c. The length of time that the violative condition existed

I note the Secretary's argument that the cited conditions had existed for a significant period of time "as evidenced by the trash discovered at the bottom of the containment area, saturated with oil." (Secretary's Post Trial Br. at 12). In this connection Moore testified that after the cited area had been pumped, he observed various items that "had become saturated and fully sunk (sic)." (Tr. 29). The inspector opined that "based on the way it looked" (Tr. 36), the conditions had existed for two to three weeks. The inspector did not set forth in detail the basis for his opinion. There was not any evidence adduced as to the length of time for the cited materials to have become "saturated." Also, there was not any evidence adduced, aside from his opinion, regarding the length of time for these items to have "fully sunk" in a "slurry" of oil and water. (Tr.23).

I therefore find that it has not been established that the violation had existed for a significant period of time.[7]

d. Whether the operator was on notice that greater efforts were necessary for compliance

There is not any evidence that MSHA had any discussions with the operator, prior to the issuance of the citation at issue concerning a problem with combustible materials in the containment area, or in other areas covered by section 77.1103(d*)*, *supra,* i.e., those surrounding flammable liquid storage tanks, electric substations, and transformers. Nor is there any evidence that the operator had actual knowledge of the violative conditions. Therefore, I conclude that it has not been established that the operator was on notice that greater efforts were necessary for compliance.

e. Whether the violation posed a high degree of danger

The inspector indicated that a hazard was created because of the presence of combustible material near flammable storage tanks. The inspector therefore indicated that the violation of §77.1103(d) created some degree of danger. However, as set forth in *IO Coal Co.*, *supra*, "the Commission has relied on the high degree of danger posed by a violation to support an unwarrantable finding." *See BethEnergy Mines, Inc.,* 14 FMSHRC at 1243-1244 (emphasis added). In this context, I note that it is significant that the inspector found the violative conditions not to be significant and substantial due to the absence of an ignition source. I thus find that there was not a high degree of danger.

f. The operator's efforts in abating the violative condition

The Commission, discussing this factor in *IO Coal, supra*, indicated that "[t]he focus on the operator's abatement efforts is on those efforts made prior to the citation or order. *Id.* (emphasis added). In this connection, the inspector indicated that when he arrived on the site he did not observe any workers cleaning up the combustible materials before he orally advised Black Beauty that he was going to issue a citation. On the other hand, Burke indicated that usually, if he observes bad conditions in the containment area, he will tell management to call Kentucky Petroleum, who is regularly called by the company to remove oil and water. Indeed, Kentucky Petroleum removed "oily water" from the area four days prior to its being cited. (Ex. R-2). It would appear that the company made some efforts to abate the violative conditions prior to the issuance of the order.

g. Obviousness of the cited conditions

[7] Indeed, based on Moore's observation of trash being blown from a nearby dumpster towards the cited area, it might be inferred that some of the trash in the containment area might have been of recent origin.

According to the inspector, when he approached the area, he observed cellophane hanging over the edge, lids sticking out of the sludge, as well as gloves and other trash. He saw trash through the cracks in the grating on the containment area. This testimony was not impeached or contradicted. Therefore, I find that these materials were obvious. However, according to Moore, some of the materials he cited consisted also of trash revealed after the area was pumped. I find that this trash was not obvious.

h. Conclusion

Weighing all the above, and placing significant weight on the lack of notice of the necessity for greater compliance, the lack of proof of the length of time the conditions had existed, the lack of a high degree of danger posed by the violative condition, and the lack of obviousness of some of the materials, I find that the existence of the cited conditions were not as a result of the operators' aggravated conduct, and thus did not constitute an unwarrantable failure. *See, Emery, supra*.

3. Penalty

In determining the amount of the penalty to be assessed, I must consider the following factors: the operator's history of previous violations, the size of the operator's business, any negligence on the part of the operator, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator in abating the violative condition. Section 110(i) of the Act.

I find that the operator acted in good faith in abating the violative condition. Neither party adduced any evidence that justifies either an increase or decrease in penalty based on the operator's size or history of violations. The parties stipulated that the proposed penalty will not affect Black Beauty's ability to continue in business. For the reasons set forth above (II)(C)(2), *infra*, I find that the operator's negligence was moderate, but that it did not reach the level of aggravated conduct. I find the evidence establishes the presence of combustible material, i.e., plastic and leather items near flammable storage tanks. Should these items have ignited, it is possible a fire could have resulted which could have led to injuries. I find that the level of gravity to have been moderate.

Based on all the above, I find that a penalty of $500 is appropriate for the violation of section 77.1103(d), *supra*.

III. Order No. 6672696 (violation of 30 CFR §75.400.[8])

[8] Section 75.400 provides as follows: "coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not permitted to accumulate in active workings, or on diesel-powered and electric equipment therein."

A. The Secretary's testimony

On May 1, 2008, Sylvester Di Lorenzo, an MSHA inspector, inspected the No. 2 underground unit, along with Tom Burnett, mine manager for Black Beauty. According to Di Lorenzo, he observed combustible material on four different parts of the No. 18 roof bolter. He indicated that oil and oil soaked coal to an estimated depth of one-half to three inches, covered the entire area of the following locations: the surface of the right boom, (approximately two feet by fourteen inches); the hydraulic pump motor compartment, (approximately three feet by three feet); the floor of the operator's compartment, (approximately three feet by three feet); and the center section area, (two feet by three feet). Di Lorenzo indicated that the material could ignite if an ignition source was present. He found that the gravity was unlikely; if an accident would occur it would result, at a minimum, in lost workdays due to smoke inhalation, carbon monoxide inhalation or burns, and would affect a minimum of one person. Based on all the above, Di Lorenzo issued an order under Section 104(d)(2) of the Act alleging a violation of 30 CFR § 75.400.

Di Lorenzo opined that the violative conditions resulted from the operator's unwarrantable failure. (Tr. 127-128). He indicated that the "extensive" accumulations were ". . . obvious to the most casual observer ... you could just walk by it and see them." Di Lorenzo opined that the accumulations had existed for at least four to six shifts. He concluded that the section foreman should have been aware of the violative conditions. Di Lorenzo noted that when he first arrived on the section, he did not observe any work being performed to remove the accumulations.

Further, Di Lorenzo indicated that he had put the operator on notice of the need for further efforts regarding accumulations. He testified that on March 31, 2008, he had met with the general mine manager, Burt Hall, and told him that the mine "was put on notice for 75.400 accumulations of combustible materials on equipment, belt lines, and inby the loading points." (Tr. 131). According to Di Lorenzo, he also told Hall that it had received 319 of such citations in the last two years, and 46 citations in the quarter ending March 31, 2008. Di Lorenzo stated that he told Hall that improvement would have to be seen, or the level of negligence would be increased on the citations.

According to Di Lorenzo, on April 1, 2008, he met with Ron Madlem, the safety director and told him that what he had told Hall the previous day. On April 8, 2008, Di Lorenzo told Rick Carey, the mine manager, the same thing that he had told the other managers previously. On April 15, 2008, he spoke with Madlem again and Dave Wininger and told them of the severity of the section 75.400 conditions, and that negligence will be " ratcheted up" if there is not any improvement. (Tr. 137).

On April 16, 2008, Di Lorenzo met with Bill Schaefer, a mine manager, and told him that they had to start improving and that "we weren't seeing any signs of improvement... on the accumulation issues inby the loading points and on equipment." (Tr. 138).

According to Di Lorenzo, on April 22, 2008, he spoke with Terry Courtney, Mine

Manager, and told him that MSHA has not seen improvement and that the operator has to start to take action regarding cleanup "on all three areas." (Tr. 139). On April 25, 2008, Di Lorenzo spoke with Gary Campbell, a superintendent, regarding the problems with section 75.400, and told him that MSHA was not seeing improvement regarding equipment, belt lines, "and inby the loading point." (Tr. 140).

B. The Respondent's testimony

Randall Lee Hammond was the section foreman of the section at issue when it was cited, but he was not at work that day. Instead, an hourly employee had filled in for him as foreman.

Hammond indicated that he (Hammond) was responsible for each of the three shifts. He indicated that each shift (A, B, and C) was responsible for cleaning different equipment once a week. The C shift (midnight shift) was responsible for cleaning the bolters. He indicated that the floor of the bolter cab was "supposed" to be monitored on a daily basis and was washed "as needed." (Tr. 171).

The Section Foreman's Report for the C shift, dated April 24, 2008, indicates as follows: "washed. 18rb." According to Hammond, the notation "18 rb" refers to the bolter at issue.

According to Hammond, Black Beauty reviewed its data base of citations and orders it had received for the period of January 1, 2008 through April 30, 2008. He indicated that in January equipment was cited eight times, and in February nine times. However, in March and April, Black Beauty received only two and three citations/orders, respectively, for section 75.400 violations on equipment.

C. Discussion

1. Violation of section 75.400, *supra*

Section 75.400, *supra*, provides in pertinent part, as follows: "coal dust, including float coal dust ... and other combustible materials, shall be cleaned up and not permitted to accumulate in active workings, or on diesel-powered and electric equipment therein."

It is Respondent's position, in essence, that operators are provided a reasonable time to clean up spillage which is a result of normal mining, and not considered an accumulation.[9]

[9] The clear language of Section 75.400, *supra*, does not allow for any reasonable time to clean up "spillage." In *Utah Power and Light*, 951 F.2d 292 (10th Cir. 1991) the court rejected such an argument as follows: "While everyone knows that loose coal is generated by mining in a coal mine, the regulation plainly prohibits permitting it to accumulate; hence it must be cleaned up with reasonable promptness, with all convenient speed." (*Id* at 295, Fn 11); *see also Old Ben Coal Co.*, 1 FMSHRC 1954, 1958 (Dec. 1979) (recognizing that some spillage may be inevitable, but holding that whether it is an accumulation is a question at least in part of size and amount. It was held that the vast spillage cited by the inspector, which was not disputed by the

Respondent asserts the bolter at issue had been washed on the midnight shift on April 24, a week before it was cited. According to Hammond, the C shift "was responsible" for washing it once a week. (Tr. 170). Hence, it is argued that "in the normal course of business, it would have been washed close to the time when the order was issued." (Respondent's Post-Hearing Br. at 14)

I do not find much merit in Respondent's position. Respondent did not adduce the testimony of any person with personal knowledge of the washing on April 24. Thus, in the absence of such evidence there is not any basis in the record to conclude that the washing was done effectively, i.e., that it removed all combustible materials that had accumulated. Further, it is mere conjecture to conclude that the bolter "would" have been washed on April 1 based only upon testimony that the "C" shift was responsible for washing at that time. There is clearly a lack of reasonable probability that it actually would have been done on time and effectively. I thus find Respondent's evidence to be insufficient weight to rebut the detailed testimony of Di Lorenzo, which was not impeached or contradicted, regarding his observations of accumulations of oil and oil soaked coal on four areas of the roof bolter.

Further, since Respondent did not adduce any evidence, based on personal knowledge, that all the cited materials had been cleaned prior to the inspection, I find that Di Lorenzo's opinion that the cited materials had existed for four to six shifts has not been effectively rebutted.

Based on all the above, especially Lorenzo's uncontradicted testimony regarding the extent of the cited materials, I find that a preponderance of the evidence establishes the existence of accumulations of combustible oil and oil soaked coal. Accordingly, I find that it has been established that Respondent violated section 75.400, *supra*.

2. Unwarrantable Failure.

As discussed above, (II)(C)(2), *infra*, for the purposes of determining unwarrantable failure, aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been place on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation. *See, e.g., I.O. Coal*, 31 FMSHRC 1346.

a. Extent of the violative condition and the length of time it had existed

i. Extensive

Di Lorenzo opined that the accumulations were extensive. In this connection, he testified that they were between one-half to three inches deep, and covered the entire area of the following locations on the bolter: the right front boom, (two feet by fourteen inches); the

operator's witness, constituted an accumulation.)

hydraulic motor compartment, (three feet by three feet); the floor of the operator's compartment, (three feet by three feet); and the center section (two feet by three feet). This testimony was not impeached.[10] Nor did Black Beauty adduce any evidence to contradict Di Lorenzo's testimony regarding the dimensions of the areas covered by the accumulations, and the range of their depth. I therefore find that the accumulations were extensive.

ii. Length of the time

According to the testimony of Di Lorenzo, based on his experience, the accumulations had lasted four to six shifts. This testimony was not impeached on cross-examination.

I take cognition of Respondent's argument that the cited condition was not extensive or of long duration. Respondent relies on Hammond's testimony that the "C" shift "is responsible" for washing the entire bolter, (Tr. 170), and that the floor of the cab is monitored on a daily basis and washed "as needed." (Tr. 171). Further, Respondent did not adduce any testimony by any persons having personal knowledge that the subject bolter was actually cleaned or washed the previous four to six shifts prior to Di Lorenzo's inspection, and that such cleaning had removed all accumulations.

Within this framework and for the reasons set forth above in (III)(c)(1), *infra*, I find, based on Di Lorenzo's testimony that the cited accumulations had existed for approximately four to six shifts.

b. Whether the operator was placed on notice that greater efforts were necessary for compliance

It appears to be the argument of Respondent that a finding of unwarrantable failure should not be based on a history of violations of Section 75.400 without breaking it down to violations similar to those at issue, i.e., equipment inby the loading point.[11] The Commission has considered and rejected such an argument. *See Enlow Fork Mining Co.*, 19 FMSHRC 1, 5 (Jan. 1997); *Peabody Coal Co.*, 14 FMSHRC 1258 (Aug. 1992) (Commission did not confirm the operator's contention that commission precedent reveals that only past citations of the same standard in the same area may be considered in determining whether a violation is unwarrantable); *IO Coal*, 31 FMSHRC at 1354 (*citing*, *San Juan Coal Co.*, 29 FMSHRC 125,

[10] On cross-examination, Di Lorenzo admitted that he did not know how much of the material was three inches deep.

[11] Respondent relies on data from its own mine data bank which indicates only eight citations for accumulations on equipment in January 2008, nine in February 2008, only two in March 2008, and three in April 2008. Respondent argues that it has shown "significant improvement in rectifying issues with accumulations on equipment" (Respondent's Post-Hearing Br. at 19) I note that Respondent did not introduce any evidence of specific improvements it made to reduce accumulations on equipment. Hence not much weight was accorded this argument.

131-132); *Consolidation Coal*, 23 FMSHRC 588 (June 2001).

Further, it is most significant to note that on seven occasions in the approximate 30-day period prior to the issuance of the order at issue on May 1, 2008, the inspector met with various mine officials and expressed concern about (1) "[section] 75.400 accumulations on the belt lines, equipment, and inby the loading points" (Tr. 134) (emphasis added), and (2) the fact that MSHA had not seen improvement. The Commission has recognized that such discussions serve to put an operator on heightened scrutiny that it must increase its efforts to comply with section 75.400, *supra*. (*San Juan*, 29 FMSHRC at 131; *Consolidation Coal*, 23 FMSHRC at 6).

For all of these reasons, I find that Respondent had been put on notice that greater efforts were necessary for compliance.

c. Whether the violation posed a high degree of danger

Di Lorenzo testified, in essence, that in the presence of ignition sources the accumulations could burn, producing the hazard of smoke inhalation, or burns affecting only one person, and causing, at a minimum, loss of work days. He conceded that there were not any ignition sources present. For all these reasons I find that although a hazard was created, there was not "high" degree of danger posed by the violation.

d. The operator's effort in abating the violative condition

According to Di Lorenzo, in spite of numerous conversations with management, there was not increased compliance with section 75.400. Black Beauty adduced evidence that its records indicate that in the four months immediately preceding Di Lorenzo's inspection, it received only eight citations in January 2008, and nine in February in 2008 for 75.400 violations on equipment, but only two in March and three in April. Thus it is argued that Black Beauty made significant efforts in abating the violative condition prior to its being cited by Di Lorenzo. However, Respondent did not adduce evidence of any specific efforts it had taken prior to the May 1 inspection to reduce or eliminate accumulations, i.e., to abate the violative conditions. *See I.O. Coal*, 31 FMSHRC 1346; *Enlow Fork*, 14 FMSHRC 1; *New Warwick Mining Co.*, 18 FMSHRC 1568, 1574 (Sept. 1996).

For all these reasons, I find that there is not sufficient evidence adduced by Black Beauty to establish any additional specific actions it took to improve its compliance with section 75.400, *supra*. Thus, I find the Respondent has not established that it made any significant efforts to abate the violative condition.

e. The operator's knowledge of the existence of the violation and whether the violation was obvious

According to Di Lorenzo, the cited accumulations were obvious and would have been readily apparent to anyone walking by. In this connection I note that the bolter is used on an

active working section. Respondent did not impeach this testimony. Nor did it adduce testimony or other evidence to contradict Di Lorenzo's testimony that the accumulations were obvious. Further, Respondent did not present the testimony of any persons regarding lack of knowledge of their existence nor did it establish that it reasonably could not have known of the existence of the accumulations.

Based on all the above, along with the extent of the cited accumulations, I find that Black Beauty should have reasonably known of their existence.

f. Conclusion

Taking into account all of the above, and placing significant weight on the operator's prior notice of the need for greater efforts for compliance, I find that it has been established that the violation was as a result of its aggravated conduct and hence, constituted an unwarrantable failure.

3. Penalty

For the reasons set forth above, I find that the operator's negligence reached the level of aggravated conduct. I find that the gravity was moderate. After the conditions were cited, they were abated by the operator in good faith. The remaining factors set forth in Section 110(i) of the Act were discussed above, (II)(C)(3), *infra*.

Within the above context, and based on Section 110(a)(3)(B) of the Act, I find that a penalty of $4,000 is required, as the violation was the result of the operator's "unwarrantable failure."

ORDER

It is ordered that, within 30 days of this decision, Respondent shall pay a total civil penalty of $18,653.00.

Avram Weisberger
Administrative Law Judge

Distribution (Via Certified Mail Returned Receipt Requested):

Barbara M. Villalobos, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, 60601

Arthur Wolfson, Esq., Jackson Kelly PLLC, 3 Gateway Center, Suite 1340, 401 Liberty Avenue, Pittsburgh, PA 15222-1000
/cmj