

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, NW, SUITE 9500
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November 22, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING:
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2008-1825
Petitioner,	:	A. C. No. 46-08436-150504
	:	
v.	:	
	:	Upper Big Branch-South
PERFORMANCE COAL COMPANY	:	
Respondent	:	

DECISION

Appearances: Patrick M. Dalin, Esq.; Linda M. Henry, Esq., U.S. Department of Labor, Philadelphia, PA on behalf of the Secretary

Carol Ann Maunich, Esq., Dinsmore & Shohl, LLP, Morgantown, West Virginia, on behalf of Performance Coal Company

Before: Judge David F. Barbour

This case is before me upon a Petition for Civil Penalty filed by the Secretary of Labor (Secretary) on behalf of her Mine Safety and Health Administration (MSHA) against Performance Coal Company (Performance or the company) pursuant to section 105(d) (30 U.S.C. §815(d)) of the Federal Mine Safety and Health Act of 1977 (the “Act”). 30 U.S.C. §801, *et seq.* The Secretary alleges that in four instances Performance violated mandatory safety standards for underground coal mines at its Upper Big Branch mine, a bituminous coal mine located in Raleigh County, West Virginia. In addition to making allegations regarding the gravity and negligence of each of the violations, the Secretary alleges that each was a significant and substantial contribution to a mine safety hazard (S&S). The Secretary proposes assessing Performance a total of \$10,260 for the violations. Performance denies all of the Secretary’s allegations.

Pursuant to an order directing the parties to confer, counsels agreed to settle all issues relating to three of the four alleged violations. The Secretary then moved for approval of the partial settlement, and on November 23, 2009, I granted the motion. *Performance Coal Company*, Decision Approving Partial Settlement (November 23, 2009). Counsels advised me they remained irreconcilably at odds over the Secretary’s allegations regarding Citation No. 7279729, in which the Secretary alleges the company violated mandatory safety standard 30

C.F.R. §74.400, and that a trial would be necessary.¹ As a result, the case was heard in Beckley, West Virginia.

STIPULATIONS

_____ At the commencement of the hearing the parties stipulated as follows:

1. [C]oal mine inspector, Keith Sigmon . . . was acting as a representative of the Secretary . . . when he issued Citation [No.] 7279729.
2. Citation [No.] 7279729 was properly served . . . upon the agents of [Performance] at the date, time, and place stated . . . on the citation.
3. [A] true copy of Citation [No.] 7279729 was served upon . . . [Performance] or its agents as required by the Mine Act.
4. [T]he imposition of the proposed civil penalty of \$4,329 will have no effect upon . . . [Performance's] ability to remain in business.
5. [T]he appropriateness of the penalty, if any, to the size of . . . [Performance's] business should be based on the fact that in 2007 [Performance] . . . mined 576,672 tons of coal from the Upper Big Branch-South [m]ine and that in 2007 Massey Energy Company, the controller of . . . [the mine], mined in excess of ten million tons of coal.
6. [Performance] was assessed the total of one hundred forty nine citations based on two hundred twenty two inspection days in the fifteen month period preceding

¹ Section 75.400 states:

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 electrical equipment therein.

the issuance of Citation [No.] 7279729.

7. [A]n authentic copy of . . . [Citation No. 7279729] may be admitted into evidence for the purpose of establishing its issuance.
8. [On the date Citation No. 7279729 was issued] the power center at issue in this case . . . was in an area where miners were normally required to work or travel.
9. [T]he . . . power center is electrical equipment as described in . . . [section]75.400.

THE TESTIMONY

THE SECRETARY'S WITNESSES

MSHA Inspector Keith Sigmon issued Citation No. 7279729. In addition to being an inspector, Sigmon also is an agency ventilation specialist. At the time of the hearing Sigmon had been with MSHA for three and one half years. Before that, he worked for Consolidation Coal Company, during which he held a wide range of positions, “[e]verything from utility work to supervision.” Tr. 14. Once with MSHA, Sigmon conducted inspections at many different mines. Sigmon was trained to recognize combustible materials such as coal dust, float coal dust and float coal dust mixtures. Tr. 15-16.

Prior to February 11, 2008, Sigmon had inspected the Upper Big Branch-South mine “on numerous occasions”. Tr. 16. On February 11, he arrived at the mine at 6:00 a.m. Tr. 19. Sigmon, accompanied by mine foreman William “Bill” Harless, went underground and he and Harless traveled to the one north main conveyor belt. Tr. 18-19. A production shift was in progress. Tr. 18. Sigmon inspected the belt. He also inspected the cross cut in which the belt’s high voltage power center was located.² The power center supplied power to the one north main conveyor belt’s drive and hydraulic take up unit. Tr. 27. The power center was located at the point where the one north main conveyor belt discharged onto the one south main conveyor belt. Tr. 20, 27. (The discharge point is also known as the transfer point. *Id.*). At the transfer point, the coal dropped four or five feet from the north to the south belt. Tr. 28. The power center was approximately twenty feet from the transfer point. *Id.*

Sigmon testified that “float coal dust . . . had accumulated in the cross cut where the power center was located and [that the] float coal dust [was] on top of the power center as well as

² 12,470 volts of electricity ran to the power center. Tr. 18.

inside the power center on the electrical components, the leads, insulators and exposed leads.”³ Tr. 19. There also was coal dust and float coal dust outside the power center on the floor, ribs and roof of the cross cut. Tr. 21. The float coal dust ranged from “paper thin” to an eighth of an inch deep. *Id.*, Tr. 84. Around the power center’s cat heads the float coal dust was a little deeper than one eighth of an inch. Tr. 21.

Sigmon acknowledged that the float coal dust on the floor and ribs was deposited on top of rock dust. Despite this, the float coal dust was black in color. The float coal dust in and on the power center also was black. Tr. 22-23. The color signified to Sigmon that the coal dust had not mixed with the rock dust. *Id.*, Tr. 194.

In Sigmon’s opinion, the float coal dust was dangerous. He testified that, “the blacker the coal dust . . . the more combustible it would be.” Tr. 22. Sigmon also explained that the power center had a “sight glass,” that is, a plexiglass window that allowed a person to look into the power center and see the busbars of the high voltage circuits.⁴ Looking through the window he could see that the coal dust “covered the electrical components, the insulators, [and] the bare wires.” Tr. 24. He was certain that much of what he saw was float coal dust. He testified that the dust, “[W]as a fine powder.” Tr. 24. He stated, “I took my fingers across the power center and [the coal dust] went up in suspension. It was dry. It wasn’t . . . stick[ing] together. It was a very dry powder.” *Id.* No fire suppression system was installed over the power center or in the crosscut. Tr. 32.

Sigmon believed the float coal dust accumulated because a valve that controlled the water sprays at the discharge point of the subject conveyor belt was broken and coal dust was not being suppressed.⁵ Tr. 26. Sigmon stated that even with the sprays working, during the transfer of the coal from one belt to another, the vibration of the belts and the impact of the falling coal “pulverized” the coal, which became “fine and . . . powdery and [began] to be

³ It was the company’s safety director, Michael Vaught, who explained how the coal dust could enter the power center. Air to ventilate the center came into the box enclosing the center through louvered vents on the box’s lower sides. A “chimney effect” pulled the air through the lower vents and out through similar vents near the top of the box. Coal dust traveled on the air into and through the box, and some of the coal dust was deposited on the interior surfaces of the power center. According to Vaught, some rock dust also was deposited inside the box in this way. Tr. 150-151, 166.

⁴ A busbar is defined as a “heavy conductor, often made of copper in the shape of a bar, used to collect, carry and distribute powerful electrical currents.” [Hiip://dictionary.reference.com/browse/busbar](http://dictionary.reference.com/browse/busbar).

⁵ Sigmon and Harless found the broken valve after Sigmon inspected to the power center and cross cut. *Id.*

suspended in the air and the air current then [took] it to different areas of the mine and [laid] it down.” Tr. 27. With the sprays not working, the amount of coal dust generated at the transfer point increased significantly. According to Sigmon, the float coal dust entered the power center through the center’s ventilation vents. Once inside the power center, it settled on the center’s interior components. Tr. 27-28, 51-52.

Sigmon testified that in the case of the subject power center, there was a stopping which should have prevented much dust-laden air from reaching the center. However, there were holes in the stopping and even though there were pieces of curtain placed over the stopping, the air still traveled through the stopping and the coal dust accumulated at, on and in the power center. Tr. 37. None the less, he recognized the curtain somewhat limited the amount of dust that reached the center. Tr. 75.

Sigmon reviewed the pre-shift report for the belt conveyors. Tr. 38; Gov’t Exh. 2. The shift before his inspection was the February 11 owl shift. Tr. 39. He noticed that the pre-shift examiner indicated that both the number one south mains belt and the number one north mains belt needed dusting “from head to tail.” *Id.*, Gov’t Exh. 2 at 3. This indicated to Sigmon that the area had “become settled with float coal dust and need[ed to be] rock dusted.” Tr. 39-40. This was consistent with what he later found. Tr. 41.

Sigmon thought that the conditions at the power center reflected conditions on both belts. The air flowing from the one north main belt carried the float coal dust around and into the power center. Tr. 43. The pre-shift examiner reported by telephone at 6:30 a.m. Gov’t Exh. 2 at 3. Sigmon was at the power center at 11:20 a.m., approximately 5 hours later. Tr. 43. Based on his experience, Sigmon believed that the accumulations at the power center existed between “two or three shifts . . . at least.” Tr. 44. Five hours was not enough time to accumulate that amount of float coal dust that he saw. Tr. 46. He also stated that at 11:20 a.m. there was not a great amount of float coal dust suspended in the air. He implied from all of this that it took up to three days for the float coal dust to accumulate in the amounts he observed. *Id.*

As a result of what he saw in and around the power center, Sigmon issued Citation No. 7279729 to the company.⁶ Tr. 47; Gov’t Exh. 3. The citation charges that the accumulations of float coal dust violated section 75.400. Tr. 47. In addition, Sigmon found that the violation of section 75.400 was reasonably likely to result in a fire or ignition. Gov’t Exh. 3. He explained:

because of the float coal dust being inside the power center where there [were] exposed electrical connections. You [had] a transformer that produce[d] heat inside the power center. You [had] relays and contacts that [were] being made.

⁶ Sigmon served the citation on Rick Hodge, the mine superintendent. According to Sigmon, neither Hodge nor any one else disputed the citation. Tr. 54.

Also, . . . there [would be] arcing that occurs when those [electrical] relays [were] . . . made . . . [a]nd . . . heat[.] Tr. 48.

He testified that the circuit breakers arced each time they were set (turned off and turned on), that they were set on the maintenance shift in order to allow work to be performed on the belts and that they were set each time there was an electrical overload. Tr. 48. He estimated the breakers were turned off and on at least three times a shift. Tr. 49. When they were set, no defects were required in the power center for arcing to occur. He believed that the arcing “would propagate a fire or ignition of the float coal dust and . . . [if] the float coal dust was in suspension . . . that could cause an explosion.” Tr. 51. If an explosion occurred, Sigmon believed it reasonably likely that the explosion would spread via suspended dust to the north and south main conveyor belts where other coal dust had accumulated. Tr. 52.

In addition, there were exposed and energized electrical wires in the power center and Sigmon could plainly see through the sight glass that coal dust had accumulated on the wires. Tr. 49-50. Further, Sigmon believed it was possible that the circuit breakers themselves could fail, which would result in “[a] lot of charring, burning, [and] melting of . . . metal.” *Id.* In sum, Sigmon believed a fire or explosion was reasonably likely to occur because of “the electrical components being exposed, the heat of the . . . transformer, the breaker arcing, and the float coal dust being present in the power center and outside.” Tr. 51.

Sigmon testified that if an ignition and explosion occurred, numerous miners could be affected: the fire boss could be in the area conducting an inspection, maintenance shift personnel could be in the area servicing the belts, in addition, six miners were observed by Sigmon cleaning the south main belt on the day he issued the citation. Tr. 52-53.

He also found that the company was moderately negligent. He testified the company should have known float coal dust had accumulated at the power center and in the crosscut and should have cleaned the areas. According to Sigmon, Earl Halls, the midnight shift foreman described the power center as a “problem area” because float coal dust tended to accumulate there. Tr. 56. He also told Sigmon that he had to frequently clean the area. Tr. 82.

On cross examination Sigmon agreed that the violation concerned only float coal dust, not coal fines and not loose coal. Although he was concerned about the possibility of a fire, Sigmon did not know the flash point of float coal dust. Tr. 60. He agreed that for float coal dust to catch on fire, a specific concentration of dust had to be present, but he did not know what that concentration was.⁷ Tr. 63-64. Further, he did not know if the power center’s transformer could “rise to the level of the heat flash point necessary to catch any of [the] float coal dust” on fire. Tr. 66-67. There was no visual indication of any improper arcing or sparking when he was at the

⁷ None the less he stated, “The more confined float coal dust is, the less you have to have and the greater [is the] likelihood of [an] explosion.” Tr. 72.

power center, and he observed no defective components at the power station. Tr. 71. Further, fire extinguishers and rock dust were in the area. Tr. 65.

Larry Cook is an electrical engineer and an MSHA employee. He supervises a group of electrical specialists who conduct electrical inspections and investigate mine accidents. Tr. 110. Cook has been an MSHA supervisor for the past ten years. Cook, stated that he is familiar with underground power centers supplying power to belt drives. Tr. 112. Inside such power centers are sources capable of igniting accumulated coal dust and float coal dust. Circuit breakers arc when they open and close. In fact, each time a circuit breaker trips, an arc occurs. Tr. 113. In addition, bare, high voltage connections are common throughout a power center. Tr. 114.

Cook also stated that if a fire for some reason began inside a power center, the flame could travel outside the center through the center's side vents. Tr. 114. He had seen this, and he knew of instances where circuit breakers inside a power center had arced and caused a fire. Tr. 115-116, *see also* Tr. 130. However, Cook agreed that he had no knowledge as to the particular conditions of the power center in question, since he never saw the subject power center.

THE COMPANY'S WITNESS

In February, 2008, Michael Vaught was the Safety Director of Performance. Prior to becoming the safety director, he had been involved in mining for approximately nine years, seven of them in the coal industry. Vaught was not an electrician, but as the safety director, he was familiar with the safety hazards associated with power centers and coal dust. Tr. 136-138, 190.

In Vaught's opinion, the concentration of coal dust inside and outside the cited power center was not high enough to pose an explosion hazard. Tr. 139. Vaught explained that sometimes when there is dust in the air, it is not all coal dust. Rock dust often mixes with the coal dust, and rock dust is not combustible. *Id.*, Tr. 141. The company tried to ensure that all areas of the mine were rock dusted at least every five days. Tr. 142. Vaught stated that management instructed "electricians and fire bosses and people to keep an eye out for float coal dust . . . in order to control . . . accumulations." Tr. 142-143.

Vaught was not present when Inspector Sigmon found the cited conditions, but after the citation was issued, he looked at the area, including the power center. He forthrightly stated, "I did observe float coal dust on the power center, and I did observe float coal dust in the area. It was . . . paper thin[.]" Tr. 144-145. However, Vaught did not believe there was enough coal dust present to create a fire or explosion hazard.⁸ Tr. 149.

⁸ Vaught stated,

In my experience as a coal miner when I look at dust that's as thin as a sheet of paper laying on rock dusted

In addition, he did not believe the power center constituted an ignition hazard. He maintained:

If everything . . . is working properly . . . the settings are set properly, everything is insulated and hooked up the way it should, you shouldn't have any major arcs or sparks or problems[.]
Tr. 161.

Even if there was a fire or an explosion, Vaught believed that miners who worked out by the power center would "get outside pretty quickly." Tr. 177. Moreover, they had self contained self rescue devices. Tr. 177-178.

Finally, if there was a violation of section 75.400, it was not due to the company's moderate negligence, because the fire boss:

indicated that we did have some float coal dust in and around the belt head area, which . . . includes the power center area. They did report it in the preshift book. They did report it to mine management and we were making arrangements to have the area cleaned and dusted.
Tr. 178-179.

THE ISSUES

The issues are whether section 74.400 was violated and, if so, whether the violation was S&S. If a violation is found, also at issue are the gravity of the violation, the negligence of the company and the amount of the civil penalty that must be assessed taking into account the statutory civil penalty criteria.

THE VIOLATION

For almost as long as the Commission has existed, it has been accepted that section 75.400 "is violated when an accumulation of combustible materials exists" (*Old Ben Coal Company*, 1 FMSHRC 1954, 1958 (December 1979)) and that a violative "accumulation" exists

areas or in and around a power center that doesn't have any problems, that's operating normally, there's no extremely high temperatures, then I'm not . . . alarmed to take immediate action to correct or terminate this condition. I am going to make [a] note . . . that the area needs clean[ing], [and] needs rock dust[ing].
Tr. 185-186.

“where the quantity of combustible materials is such that, in the judgement of the [inspector,] it likely could cause a fire or explosion if an ignition source were present.” *Old Ben Coal Company*, 2 FMSHRC 2806, 2808 (October 1980). Since some combustible material is inevitable in mining operations, the inspector’s judgement as to what constitutes a mass of combustible materials which could cause or propagate a fire or explosion is subject to challenge before a Commission administrative law judge (*Old Ben*, 2 FMSHRC at 2808, n.7), and the judge is required to review the inspector’s judgement by applying the objective test 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. *UP&L*, 12 FMSHRC 965, 968 (May 1990); *aff’d* 591 F.2d 292 (10th Circ. 1991).

In this case, I find that the citation reflects the reasonable exercise of Inspector Sigmon’s judgement. He testified as to the existence of the float coal dust both on and inside the power center, on the catheads at the power center, and in the crosscut. Tr. 19-21, 51, 84. He testified that the float coal dust’s depth ranged from “paper thin” to one eighth inch or more. Tr. 21. He described the dust as black, which signified to him that it had not mixed with rock dust. Tr. 22-23. At the power center he touched the float coal dust and easily put it into suspension. As a result he believably described the float coal dust as dry. Tr. 24.

Safety Director Vaught, who was not with Sigmon when the inspector observed the accumulation, saw the float coal dust later and did not disagree that it was present when Sigmon found it. Rather, he thought that the coal dust did not exist in a concentration sufficient to create a fire or explosion hazard. Tr. 149. Vaught also thought that a lot of the float coal dust was mixed with rock dust. He described the dust as charcoal colored, a lighter color than Sigmon described. Tr. 171. However, Vaught’s testimony was tentative. It lacked the specificity and certitude that characterized Sigmon’s testimony, and I therefore fully credit the inspector’s description of the existence, quantity, and quality of the float coal dust that he observed.

Moreover, I fully credit Sigmon’s belief that the float coal dust was dangerous and posed a fire and/or explosion hazard. Black, dry, float coal dust not only can burn, it also can trigger a self propagating explosion when an ignition puts it into suspension. Sigmon was trained to recognize float coal dust and to prevent such a hazard from occurring, and I fully credit his belief that if an arc or spark occurred inside the box, the accumulated dust could catch on fire and/or explode.

The Commission has repeatedly held that violations of section 75.400 can be established by an inspector’s observations, and here, where I credit inspector Sigmon’s description of the existence, amount, quantity and quality of the float coal dust and the danger it posed, I find that the company violated the standard. *See e.g. Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1290 (December 1998).

S&S AND GRAVITY

Inspector Sigmon found that the violation was S&S. An S&S violation is described in section 104(d)(1) of the Act, 30 U.S.C. §814(d)(1), as a violation of “such nature as could significantly and substantially contribute to the cause and effect of a coal . . . mine safety or health hazard.” A violation is properly designed as S&S “if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Division, National Gypsum Co.* 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission enumerated four criteria that must be met for a violation to be S&S. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F. 2d 99, 103-104 (5th Cir. 1988), *aff’g Austin Power, Inc.*, 9 FMSHRC 2015, 2012 (December 1987) (approving *Mathies* criteria). Evaluation of the criteria is made in terms of “continued normal mining operations.” *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.* 10 FMSHRC 498 (April 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (December 1987).

In order to prove a violation is S&S, the Secretary must establish: (1) a violation of a safety standard; (2) a distinct safety hazard contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3-4.

I have found a violation of the cited safety standard. I further find that the accumulated float coal dust contributed to a distinct safety hazard, i.e., that the accumulation served as the source of a fire and/or the source and propagator of an explosion. I have credited the testimony of Inspector Sigmon regarding the presence, quantity and quality of the float coal dust. In so doing I have rejected Safety Director Vaught’s suggestions that the coal dust may have been sufficiently inerted by rock dust to make the accumulation nonhazardous. It should go without saying that float coal dust can burn and, worse, can explode and propagate an explosion. Further, the inspector, a person who had been trained to recognize combustible materials (Tr. 15-16), credibly believed the float coal dust he saw could burn and/or explode.

The question then is whether there was a “confluence of factors” that made an injury producing fire and/or explosion reasonably likely, and I conclude that there was. *Utah Power & Light Col.*, 12 FMSHRC 965, 970-971 (May 1990); *Texasgulf*, 10 FMSHRC at 500-503; *Enlow Fork Mining Co.*, 19 FMSHRC 5, 9 (January 1997). I have accepted Sigmon’s testimony that the quantity and quality of the float coal dust was such that it could catch fire or explode and/or propagate an explosion. Further, Sigmon credibly described ignition sources that were present and that could have caused just such a fire and/or explosion. In fact, in this instance it is enough that ignitable float coal dust was present inside the confines of the power center where, as Sigmon explained, there were “exposed electrical connections” and where “arcing occur[ed] when . . . [electrical] relays [were] . . . made” and when breakers were reset approximately three

times each shift. Tr. 48, 49; *see also* Tr. 113-114 (testimony of MSHA supervisory engineer, Larry Cook). With 12,470 volts of electricity being delivered to the power center (Tr. 102-103), Vaught's opinion that even if everything in the power center was working properly, there would be no "major" arcs or sparks was inapposite to the issue. Tr. 161. I accept Cook's knowledgeable statement that each time a circuit breaker tripped, an arc resulted. (Tr. 113), and I conclude that as normal mining continued the presence of a triggering arc or spark, whether "major" or not, inside the power center and immediately adjacent to the combustible accumulations of float coal dust made it reasonably likely that a fire and/or explosion would occur.

Moreover, it is clear from the record that miners worked outby the power center and that occasionally miners traveled into the crosscut where the power center was located. Stip. 8. Miners at the power center and those outby were subject to burn injuries, smoke inhalation and/or concussive type injuries, any of which were reasonably likely to be serious, even fatal.

The S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the "focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSRHC 1541, 1550 (September 1996). Here, the "effect of the hazard" if it occurred would have been gave indeed, up to and including a fatality or fatalities. This was a serious violation.

NEGLIGENCE

Negligence is the failure to meet the standard of care required by the circumstances, and I agree with Inspector Sigmon that the company was moderately negligent. Within the context of this case, the most reasonable interpretation of Sigmon's testimony that the company placed curtains across the holes in the stopping near the power center is that the company knew there was a problem with coal dust traveling to the power center and that it was trying to alleviate the problem. Tr. 75. The company's knowledge that float coal dust was a problem at the power center and crosscut was confirmed by Earl Halls who he told Sigmon about the problem and about the frequent need to clean the area. Tr. 56, 82. Moreover, as Sigmon also testified, the preshift reports indicated that for the three shifts prior to his inspection the one north main belt needed to be extensively rock dusted. This indicated to Sigmon that coal dust had accumulated on and around the belt. Tr. 44-46. As Sigmon also noted, the mine's ventilation system carried float coal dust from the belt into the crosscut where the power center was located. Thus, Sigmon's belief that the float coal dust he saw in the crosscut and in and on the power center took up to three days to accumulate was perfectly consistent with the preshift reports for the one main north belt and with his visual observations during the inspection. Tr. 54.

I do not doubt Vaught's testimony that the company was trying to have all areas of the mine rock dusted at least every five days. Tr. 147. Nor do I doubt that some rock dust had been applied to the crosscut where the power center was located. However, I do not find the fact that

the preshift examiner for the shift on which the condition was observed found that the crosscut was “okay” to be indicative of a lack of negligence on the company’s part. *See* Tr. 171. Rather, given the amount of float coal dust found by Sigmon, I conclude the preshift examiner misreported the condition of the crosscut and the power center. Knowing that the cited area was a “problem,” the company should have taken more aggressive steps to make sure that it was kept clean. It did not do so. As a result, float coal dust accumulated in violation of the standard. Because the company did not exhibit the care required by the circumstances, I affirm Inspector Sigmon’s negligence finding.

CIVIL PENALTY ASSESSMENT

I have found that the violation was serious and was the result of the company’s moderate negligence. The parties have stipulated that the proposed penalty of \$4,329 will not effect the company’s ability to continue in business. Stip. 4. Further, they have stipulated that mine and its controlling entity are large in size, as is the mine’s history of prior violations. Stips. 5 and 6. I find further that the company exhibited good faith in abating the violation. Given these criteria, I conclude the Secretary’s proposal is appropriate, and I assess a civil penalty of \$4,329.

ORDER

Within 40 days of the date of this decision, Performance Coal Co. **IS ORDERED** to pay a civil penalty fo \$4,329 for the violation of section 75.400 set forth in Citation No. 7279729. Upon payment of the penalty, this proceeding **IS DISMISSED**.

David F. Barbour
Administrative Law Judge

Distribution: (Certified Mail)

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