FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE N. W., SUITE 9500
WASHINGTON, D.C. 20001

November 18, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 2007-712
Petitioner	:	A.C. No. 46-01433-121119
	:	
	:	Docket No. WEVA 2008-308
v.	:	A.C. No. 46-01433-132560
	:	
	:	Docket No. WEVA 2008-1536
	:	A. C. No. 46-01433-155218
	:	
CONSOLIDATION COAL COMPANY,	:	Loveridge No. 22 Mine
Respondent	:	

DECISION

Appearances: John Strawn, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, on behalf of the Petitioner;
Rebecca Oblak, Esq., Bowles, Rice, McDavid Graff & Love, LLP, Morgantown, West Virginia, on behalf of the Respondent.

Before: Judge Melick

These cases are before me upon petitions for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," charging Respondent Consolidation Coal Company (Consol) with multiple violations of mandatory standards and proposing civil penalties for those violations. The general issue before me is whether Consol violated the cited standards as charged and, if so, what is the appropriate civil penalty for those violations. Additional specific issues are addressed as noted. Decisions approving partial settlements of a number of charging documents have been issued in these proceedings so that only the four charging documents discussed herein remain for decision.

Order Number 7100826

This order, issued pursuant to Section 104(d)(2) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.400 and charges as follows:[1] [2]

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[1] Section 104(d) of the Act provides, in relevant part, as follows:

(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard,

> Combustible material in the form of damp loose coal and coal fines is being allowed to accumulate under he 10-D Section, 065-0 MMU, coal conveyor belt from 14 ½ block to 15 ½ block for a distance of 140 feet. The accumulation is up to 10 inches in depth under the bottom belt and is rubbing the bottom of the belt and accumulating to the extent at which it is pushing the bottom belt up into the belt structure. Several bottom rollers in the cited area are completely covered in coal fines. There is one stuck roller located at 15 block within the area. The mine operator has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard.

The cited standard provides that "[c]oal, dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein."

Jeremy Ross, an inspector for the Department of Labor's Mine Safety and Health Administration (MSHA), has a degree in mechanical engineering from the West Virginia University and several years of industry experience. On May 29, 2007, Ross was conducting an inspection at the Loveridge No. 22 mine as part of a regular quarterly inspection and a five day spot inspection for methane. Inspector Ross was accompanied by MSHA trainee Chad Currance, Respondent's safety representative Jeff Taylor, and by United Mine Workers of America (UMWA) Safety

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> and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those person referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.
> (2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine disclosed no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

[2] There is no dispute that the precedential orders required by Section 104(d)(2) existed.

Committee representative Richard Harrison.[3] The inspection party traveled to the 10-D Section, 065-0 MMU. The purpose of the section was to develop a longwall panel and Respondent was behind schedule at the time of the inspection.

The inspection party traveled to the face of the 10-D section and then proceeded outby through the belt entry. Respondent was utilizing a continuous haulage system in the section consisting of a mobile belt called a flexible conveyor train (FCT) and a stationary belt called a "dynamic move up" (DMU). The FCT was 570 feet long and operated immediately behind the continuous miner. The FCT transferred coal from the continuous miner to the stationary DMU belt. The DMU belt was 760 feet long and transferred the coal in turn onto the permanent section belt. The outby end of the FCT was connected to the DMU and rode back and forth on rails on top of the DMU belt. As the miner trammed forward or backward, the FCT rode forward and backward in unison. When the section belt was advanced, the FCT would be secured on top of the DMU. The DMU would then propel the tandem forward and pull the section belt along behind.

According to Inspector Ross, there was an accumulation of combustible material stretching over 140 feet from 14 ½ block to the 15 ½ block under the DMU conveyor. He testified that loose coal and coal fines extended the width of the belt (approximately 60 inches), and varied from two to ten inches in depth. He found that the coal was deepest at the outby end near the DMU drive unit but that it was also up 10 inches deep inby at several other locations. The coal was black in color and most of it was dry.

The belt was running when the inspectors first observed it some time between 10:22 a.m. and 11:15 a.m. but no coal was loaded on the belt. After the belt was shut down Inspector Ross examined the accumulation with his walking stick and discovered at least three buried rollers. The inspectors testified that after the violation had been abated and the accumulation had been removed, they discovered additional rollers which had been buried and hidden from view. In the deepest part of the accumulation they found that the coal had pushed the lower belt up so that it was no longer in contact with the rollers. The belt was riding in the coal and rubbing against the belt structure at that location.

Inspector Ross opined, based on his observations and discussion with Respondent's Project Engineer/Foreman, Brooks Barker, that the accumulation had been created by carry-back spillage. The scrapers on the belt were not removing all the particles of coal from the DMU belt where it dumped onto the permanent section belt. As a result, some of the coal was sticking to the underside of the lower belt and it was carried back inby until it fell off the belt onto the mine floor.

The credible observations of Inspector Ross were also corroborated, in significant respects, by Inspector Currance and by UMWA safety representative Harrison and their testimony clearly supports a violation as charged. In reaching this conclusion I have not disregarded Respondent's

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[3] At the time of hearings Trainee Currance had become a qualified MSHA inspector (Tr. 505).

arguments that the accumulation did not consist of coal but rather of incombustible rock from the mine floor. However, I find the Secretary's evidence to the contrary to be more credible. The Secretary's witnesses found that the accumulation was black while the bottom rock on the mine floor was gray.

They squeezed the material and it crumbled like coal. It did not "ball-up"like other material or mud would have. They also found that the coal also reflected light differently than rock would have and concluded from its weight and texture that it was coal rather than rock. Even Respondent's witness, Brooks Barker, admitted that the bottom rock was easily distinguishable from coal. Under the circumstances and considering the credible testimony of Inspector Ross, corroborated in all significant respects by Inspector Currance and UMWA representative Harrison, I have no difficulty finding that, indeed, the cited accumulation consisted of coal.

Respondent argued alternatively that, even if the accumulation was coal, it was created by rib sloughage rather than created over time by carry-back spillage. The credible testimony is, however, that there were not large pieces of coal in the accumulation, thus indicating that the coal had been mined by the continuous miner and had not fallen in larger pieces from the rib.

The Secretary alleges that the violation was "significant and substantial". A violation is properly designated as "significant and substantial" if, based on 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, 3-4 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory standard is significant and substantial under *National Gypsum* the Secretary 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 will result in injury and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria).

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury. *U.S. Steel Mining Co.,* 6 FMSHRC 1834, 1836 (August 1984), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. *U.S. Steel Mining Co., Inc.,* 6 FMSHRC 1573, 1574 (July 1984); *See also Halfway, Inc.,* 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-917 (June 1991).

I have found that the first element has been established i.e. that there was an extensive

accumulation of combustible material in violation of 30 C.F.R. § 75.400. Based on the credible testimony I also find that the accumulation contributed to a discrete safety hazard by creating a fire danger to miners working or traveling in the belt entry. The second element is therefore also established. I also find that the credible testimony establishes a reasonable likelihood of a belt fire occurring because the loose coal accumulation was extensive and ignition sources were present. A number of rollers and the belt were running in the coal and had begun heating and drying the coal. The belt was also rubbing the belt structure itself. The inspectors observed the coal crusting over where the rollers and belt had been running in the accumulation evidencing that the resulting friction had already begun heating the coal. The credible evidence also shows that, in addition to being black and dry, the coal was also made of small particles which are easier to ignite and make a fire that much more likely.

The existence of these factors clearly establishes the third element under the *Mathies* criteria. See *Mid-Continent Resources*, 16 FMSHRC 1218, 1222 (June 1994) and *Amax Coal Company*, 19 FMSHRC 846, 849 (May 1997). The fourth element of the *Mathies* test requires the Secretary to establish that the injury will be of a reasonably serious nature. The credible evidence establishes that the injuries to the miners would include smoke inhalation, carbon monoxide poisoning, and burns. These are of a serious nature and accordingly I find that the Secretary has met her burden of proving that the violation was "significant and substantial" and of high gravity.

I also find that the violation was the result of high negligence and "unwarrantable failure" to comply with the cited standard. Unwarrantable failure is "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987). 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, 193-94 (February 1991); *see also Rock of Ages Corp. v. Secretary of Labor*, 170 F.3d 148, 157 (2d Cir. 1999); *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). Moreover, the Commission has examined the conduct of supervisory personnel in determining unwarrantable failure and recognized that a heightened standard of care is required of such individuals. *See Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011 (December 1987), *S&H Mining, Inc.*, 17 FMSHRC 1918, 1923 (November 1995).

This Commission, in determining unwarrantable failure, has considered whether an operator's conduct was aggravated by looking at all the facts and circumstances to see if any aggravating factors exist, such as the length of time that the violation existed, the extent of the violative condition, whether the operator was placed 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. *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001). The credible testimony establishes in this case that the coal accumulation was obvious and extensive. The loose coal and coal fines extended over 140 feet and even lifted the belt off some rollers. Moreover it took ten miners working for over six hours to remove the coal. The accumulation also exposed the miners

who worked and traveled in the belt entry to a belt fire in a gassy mine with ignition sources. This evidence, alone, is sufficient to establish high negligence and unwarrantable failure.

I also find, however, from the credible testimony of the inspectors and UMWA safety representative Harrison, that the accumulation had existed over multiple shifts. The frictional heating by the belt and rollers had dried out and crusted over the accumulation. The credible testimony shows that this would have taken more than one shift, since the coal spillage from the belt is initially wet due to belt sprays designed to keep the dust down. In addition, the accumulation was formed by carry-back spillage and would have taken several shifts to cover the 140 foot area. Respondents's records also show that the accumulation had existed for several days without attention. Respondent's production records indicate that only 155 tons of coal were produced and carried on the DMU belt on the midnight shift prior to the inspection on Tuesday, May 29, 2007. The credible record shows that this would have been insufficient to create the 140 foot accumulation observed by the inspectors. The belt had been idle for three days prior to the inspection because of Memorial Day weekend May 26, 27, and 28, 2007. On Friday, May 25, 2009, Respondent produced more than ten times the amount it did on the midnight shift May 29, 2007 (Govt. Exh. 5 at pp. 5, 6 of 13). Over 1,600 tons of coal had been produced which could have created sufficient carry-back spillage to result in the condition observed by Inspector Ross. This evidence, alone, is sufficient to establish high negligence and unwarrantable failure.

I further find that Respondent was on notice that greater efforts were required to comply with the cited standard. Inspector Ross cited the same DMU belt twice within the prior two months for other serious accumulations. He issued Order No. 7100729 on March 30, 2007 and Citation No. 7100732 on April 9, 2007 (Gov't Exhs. 6 and7). Mr. Barker was in charge of the DMU through this period. Ross held a meeting with mine management, including the superintendent, mine foreman, and safety director, on April 3, 2007, prior to the subject quarterly inspection and emphasized the need to keep the DMU conveyor unit clean and to prevent accumulation of coal. In addition, Respondent received 104 citations and orders for violations of 30 C.F.R. § 75.400 in the fifteen months prior to the subject order (Gov't Exh 15). This evidence, alone, is sufficient to establish high negligence and unwarrantable failure.

Finally, it is apparent that Respondent's Project Engineer/Foreman, Brooks Barker, had actual knowledge of the cited accumulation under the DMU belt. Barker told the inspectors that the DMU conveyor belt was having ongoing spillage problems because the belt scrapers were not removing the smaller particles of coal from the belt. He stated that he had therefore removed the belt scraper (10 days earlier, on May 19, 2007) and sent it to an outside contractor for modification. When the inspectors asked where the scraper had been positioned before it had been removed, Barker stated that it was located where the accumulation was. Significantly, Barker had just arrived on the section and had not yet arrived at the cited area. Despite his awareness of the spillage problem, Barker allowed production to continue while waiting for the scraper to return from the contractor. Indeed, Barker stated that the spillage problem pre-dated the first two citations Respondent received on the DMU on May 30, 2007, and April 9, 2007. This evidence is sufficient to independently establish high negligence and unwarrantable failure. Under the circumstances it

is clear that the Secretary has sustained her burden of proving that the violation at bar was the result of high negligence and unwarrantable failure.

Citation Number 7100823

This citation, issued by Inspector Ross on May 29, 2007, under Section 104(a) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.1722(a) and charges as follows:

> The return wire rope pulley for the miner cable tensioner on the 10-D Section DMU coal conveyor unit is not provided with a guard to prevent persons from coming in contact with the pulley. The pulley is 14 inches in diameter, 24 inches off of the mine floor, and directly along the side the 10-D Section belt travelway. The travelway is 36 inches wide at this location. Miners are required to walk the belt each shift to conduct an examination.

The cited standard provides that "[g]ears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings, shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded."

During his inspection on May 29, 2007, Inspector Ross observed that the return wire rope pulley on the DMU coal conveyor unit was unguarded. There is no dispute that the pulley had never been guarded and that it was provided by the manufacturer without guarding. The pulley was located alongside the walkway where miners travel and the walkway was about thirty-six inches wide at this point. This walkway was also muddy and slippery thereby, according to inspector Ross, increasing the risk that miners could slip and fall into the pulley (Govt. Exh. 4 p.3of 8 and Gov't Exh. 8).

Within this framework of credible evidence it is readily apparent that the cited pulley "may be contacted by persons and which may cause injury to persons" thereby requiring guarding. I do not find, however, that the violation was "significant and substantial" or was the result of high negligence. I find that the Secretary has failed to sustain her burden of proving that there was a reasonable likelihood that the hazard contributed to would result in an injury and a reasonable likelihood that the injury in question would be of a reasonably serious nature. In this regard, it is undisputed that the cited pulley is generally stationary and when it moves it travels very slowly i.e. .85 miles per hour. There is also credible evidence that some protection was provided by the design and location of the troughs. Finally, there is evidence that MSHA inspectors including Inspector Ross had examined the section at issue on five occasions between March 30, 2007, and May 29, 2007, and failed to find any violation regarding the subject pulley. If, indeed, there had been such a serious hazard at this location it is unlikely that it would have repeatedly been overlooked by experienced MSHA inspection teams. Indeed, another violation was cited at the very same location on April 26, 2007,(Citation number 6604312) which required guarding along the DMU and past the location of the pulley in question.

As previously noted, I also find that the violation was the result of low to moderate negligence. Respondent relied in part on the fact that the manufacturer did not provide any guarding at the cited pulley, and the fact that some guarding had been provided by the design and location of the troughs located in front of the pulley. In addition, MSHA inspectors themselves during five recent prior inspections, including one at the very same location of the DMU conveyor unit, had not seen fit to have cited or even warned the Respondent of what has now been deemed by the Secretary to have been a "significant and substantial" violation. The violation alleged in Citation Number 7100823 and the penalty proposed by the Secretary for that citation must accordingly be modified.

Order Number 7100827

This order, issued on May 29, 2007, under Section 104(d)(2) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.360(a)(1) based on the findings of Inspector Ross that the preshift examination for the day shift on May 29, 2000, was inadequate because there was a failure to record two hazardous conditions, namely, the unguarded return wire rope pulley on the DMU coal conveyor unit (Citation Number 7100823) and the accumulation of combustible material existing over 140 feet from the 14 ½ block to the 15 ½ block under the DMU conveyor (Order No. 7100826).

The cited standard provides in part as follows:

> Except as provided in paragraph (a)(2) of this section, a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground. No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval. The operator must establish 8-hour intervals of time subject to the required preshift examinations.

As previously discussed in connection with the underlying order (No. 7100826), the coal accumulation was extensive and Consol had been cited twice before within a two month period for serious accumulations at the same locations (Govt. Exh. 6 and 7). In addition, Inspector Ross had met with Consol management on April 3, 2007, prior to the subject inspection and emphasized the need to keep the DMU conveyor unit clean to prevent the accumulation of coal. Finally, as previously discussed, Respondent's own project engineer/foreman, Brooks Barker, had actual knowledge of the accumulation but did not ensure that it was recorded and/or addressed. Under the circumstances, it is clear that the Secretary has met her burden of proving the violation herein.

For this same reasons that the underlying violation was found to be "significant and substantial" the instant violation was also "significant and substantial". The failure to report and correct such significant and hazardous violations is likewise a "significant and substantial" violation. The violation herein was also the result of high operator negligence and "unwarrantable failure" to comply with the cited standard. The Respondent's mine examiners are agents of the operator and their failure to report the extensive coal accumulation is properly imputed to the Respondent.

Rochester and Pittsburgh Coal Company 13 FMSHRC189, 195-196 (February 1991). For the reasons previously stated with respect to the underlying violation, failure to report that violation was also the result of high operator negligence and "unwarrantable failure".

Order Number 7100548

This order, issued on February 27, 2007, under Section 104(d)(2) of the Act, alleges another "significant and substantial" violation of the standard at 30 C.F.R. § 75.360(a)(1) and charges as follows:

> The pre-shift examination for methane and hazardous conditions that was conducted on 02/27/2007 for the day shift crew on the8-D longwall, 062-0 MMU section is inadequate in that the hazardous conditions described in violation #7100547 were not reported in the operators records of examinations and had not been corrected at the time of this inspection. The following conditions were obvious to this inspector as soon as he entered the effected [sic] areas. The record book indicates that only condition that exist [sic] is the area from #53 block to #50 block needs dusted, this condition has been entered in the record book for the past 9 shifts. The listed conditions would be obvious to any prudent person especially examiner's charged with the responsibility of conducting an examination of the mine. The mine operator was previously put on notice for the same type of conditions. The mine operator has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard.

MSHA inspector Ronald Postalwait testified that on February 27, 2007, he inspected the 8-D longwall belt, 062-0 MMU section at the mine as a part of a regular quarterly inspection and five day spot inspection for methane. Postalwait was accompanied on his inspection by UMWA safety representative Samuel Woody and Respondent's safety representative John Larry. The longwall belt transfers large amounts of coal from the longwall to the surface.

Postalwait observed what he considered to be large accumulations of loose coal and coal dust along the belt stretching over 3,500 feet. On the basis of these accumulation, he issued Order No. 7100547 for a violation of 30 C.F.R. § 75.400. This order was settled prior to trial and is now a final order of the Commission. The facts underlying Order No. 7100547 are therefore established for purposes of these proceedings and cannot now be challenged. *Peabody Coal Co.*, 11 FMSHRC 2068, 2092 (October 1989); *Ranger Fuel Corp*, 10 FMSHRC 612, 617-619 (May 1988). In any event, an independent review of the facts supports the violation herein as charged.

Inspector Postalwait issued Order No. 7100547 for a Section 104(d)(2) violation of 30 C.F.R. § 75.360(a)(1) because the hazardous belt accumulations were not recorded in the day shift preshift examination report. The preshift was performed between 5:00 a.m. and 7:00 a.m. that morning by Michael Fleece. Postalwait discovered the accumulations at approximately 11:15 a.m. According to the credible testimony of Postalwait, the accumulations he observed were extensive. Loose coal and coal fines extended from the 64 block to the 62 block and from the 53 block to the 48 block.

The accumulations were on both sides of the belt and measured from two inches to five inches deep. The combined width of the accumulations varied from one foot to three feet. Coal dust accumulations stretched from the 64 1/4 block to the 57 block, from the 53 block to the 48 block, and from the 42 block to the 39 block. Both the loose coal and coal dust accumulations were black in color and powder dry. UMWA representative Woody agreed with his description of the accumulations. Woody's contemporaneous notes further corroborate the testimony.

Based on the credible and corroborated testimony, I find that the accumulations cited were obvious. The coal dust accumulations stood out because they completely blackened the previously rock-dusted surfaces in the entry including the mine floor, ribs, belt structure, water line, and roof supports straps. There were also footprints in the coal dust in the walkway which were in plain view. Woody agreed with the inspector and testified that the conditions were very obvious.

Postalwait opined that the accumulations had existed for more than a shift and should have been observed and reported by the preshift examiner. He concluded that the loose coal accumulations had been formed by belt spillage. He noted that coal from the belt is wet because of the water sprayed at points along its length used to keep dust down. However, when he examined the accumulations by hand he found that they were dry throughout. According to the credible testimony by Postalwait it would have taken more than one shift for the loose coal to have dried out to the extent he observed. Furthermore, he observed that the air flow in the belt entry was low (approximately 70 feet per minute) and he concluded therefore that it would have taken more than one shift for this air flow to dry the accumulations. He opined moreover that it would have taken more than one shift for this air flow to have spread the coal dust over the 3,500 foot area. Woody agreed that the accumulations had existed prior to the preshift examination and that the examiner should have observed and reported them.

The credible evidence also shows that the accumulations has been created some time before and had been left uncorrected. According to Postalwait, when he observed the accumulations, no spillage was being created by the belt. Mr. Woody agreed and testified that the belt was running true during the inspection. According to the credible evidence there were no defects that were creating coal dust at the time either. In addition, the bearings that had fallen out of five defective rollers cited by Postalwait had been completely covered by coal dust. The loose coal accumulations had also been covered with coal dust. Therefore the accumulations and defective rollers had not been created simultaneously. The loose coal accumulation and defective rollers had occurred even earlier than the coal dust accumulation. Within this framework of credible evidence, it is clear that the accumulation had existed well before the day shift preshift examination of February 27, 2007, that the conditions were obvious and accordingly, that the violation is proven as charged. Indeed, Respondent's safety representative, Mr. Larry, acknowledged during the inspection that the conditions cited by the inspector were a violation and should have been reported by the examiner. For the reasons cited in the Secretary's post hearing brief I can give Mr. Larry's exculpatory testimony at hearings but little weight.

I also find that the violation was "significant and substantial" and of high gravity. Respondent's failure to report the accumulations in the longwall belt entry clearly exposed miners to serious hazards. Five belt rollers from the 60 block to the 57 block were missing bearings in the midst of one of the cited coal dust accumulations. The bearings had failed and fallen out of the rollers. The rollers were turning metal-on-metal on the inner shaft and both the shaft and the rollers had turned a bluish color from the frictional heating. Indeed, Respondent's examiner, Mike Fleece, agreed at trial that a blue color indicated that the metal had been heated. Inspector Postalwait has seen rollers in this condition produce sparks and ignite coal. Sparks from the rollers would likely also have ignited the coal dust on the mine floor below and on the belt structure. Furthermore the rollers would likely also heat up the belt and ignite the coal dust on the belt structure. UMWA representative Woody also agreed that the rollers presented an ignition source to the coal dust around them.

The conditions in the mine made the likelihood of a fire great. This is a gassy mine and the presence of methane could exacerbate any belt fire. Postalwait measured 0.45% methane at the 63 block in the longwall belt entry. The coal dust accumulations below and around the defective rollers presented an enhanced risk of fire. The evidence confirms that these smaller particles of coal are easier to ignite and, once started, can ignite larger pieces of coal.

The credible evidence also establishes that a number of miners would have been exposed to serious injury from a belt fire. Examiners, belt cleaners, maintenance crew and other miners travel and work on the belt. The stage loader operator was also just inby the accumulations and would also have been affected by a fire. Finally, if a fire affected a ventilation control, the smoke from the fire could travel to the face and endanger the face crew and miners fighting a fire would also have been exposed to injury. Miners would likely sustain burns, smoke inhalation, and carbon monoxide poisoning. While I have not disregarded the exculpatory testimony of Mr. Larry, again, for the reasons stated in the Secretary's brief, I can give that testimony but little weight.

I also find that the violation was the result of high negligence and "unwarrantable failure". The credible evidence is that the accumulations were extensive and obvious. The loose coal and` coal dust accumulations extended from block to block over the 3,500 foot total length of the area. The loose coal was up to three feet wide including both sides of the belt and were up to five inches deep. Furthermore, the cleanup required eight miners working for almost four hours.

The credible evidence also establishes that the accumulations had existed for more than a shift, had not been addressed and that they posed a high degree of danger to miners. Moreover, Respondent had previously been placed on notice concerning problems with accumulations and with inadequate preshifts. Inspector Postalwait credibly testified that he specifically discussed the issues with the mine management including the superintendent during the previous two quarterly inspections. In addition, the Respondent had received 16 citations/orders for violations of 30 C.F.R. 75.360(a)(1) and 114 for violations of 30 C.F.R. 75.400 in the fifteen months prior to the issuance of the subject order.

Civil Penalties

Under Section 110(i) of the Act, the Commission and its judges must consider the following factors in assessing a civil penalty: the history of violations, the negligence of the operator in committing the violation, the size of the operator, the gravity of the violation, whether the violation was abated in good faith and whether the penalties would affect the operator's ability to continue in business.

The parties have stipulated to four of the six penalty criteria i.e. the size of the business, the history of previous violations, the good faith of the operator in obtaining compliance after the issuance of the charging documents at issue, and the effect of the penalties on Respondent's ability to continue in business. Respondent produced 67,404,718 coal in 2006 including 6,383,219 tons at the subject mine. Respondent is accordingly a large mine. Respondent has been assessed for a total of 851 charging documents based upon 689 inspection days in the 15 months immediately preceding the issuance of charging documents Nos. 7100823, 7100826 and 7100827. Respondent received a total of 973 charging documents based on 762 inspection days in the 24 months immediately preceding the issuance of Order No. 7100548. There is no dispute that Respondent demonstrated good faith in obtaining compliance after the issuance of the charging documents at issue herein. Respondent does not contend that even the proposed penalties would affect its ability to continue in business. The negligence and gravity of the violations at issue have been discussed herein.

ORDER

Order Numbers 7100826, 7100827 and 7100548 are affirmed as written with civil penalties of $60,000.00, $20,300.00, and $7,000.00 respectively. Citation Number 7100823 is hereby modified to delete the "significant and substantial" findings but is otherwise affirmed with a civil penalty of $300.00. The noted penalties, totaling $87,600.00, shall be paid within 40 days of the date of this decision.

Gary Melick
Administrative Law Judge
202-434-9977

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