# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 17, 1995

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDINGS |
| | : | Docket No. KENT 94-1001 |
| | : | A.C. No. 15-13920-03846 |
| v. | : | |
| | : | Docket No. KENT 94-1002 |
| COSTAIN COAL, INC., Respondent | : | A.C. No. 15-13920-03849 |
| | : | |
| | : | Docket No. KENT 94-1056 |
| | : | A.C. No. 15-13920-03848 |
| | : | |
| | : | Mine: Wheatcroft |

## DECISION

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
Carl B. Boyd, Jr., Esq., Henderson, Kentucky, for Respondent.

Before: Judge Amchan

At the outset of the hearing on January 4, 1995, the outstanding civil penalty petitions in Docket Nos. KENT 94-1001 and KENT 94-1056 were settled in their entirety. In Docket No. KENT 94-1001, Respondent agreed to pay the $50 penalties proposed for Citation Nos. 4067084 and 3862290. A settlement of two other items in this docket was previously approved by the undersigned.

In Docket No. KENT 94-1056, Respondent agreed to pay the $288 penalty proposed for Citation No. 3859202. With regard to the other item in the docket, Citation No. 4067314, the parties agreed to modify the citation to a non-significant and substantial violation and that Respondent would pay a $50 penalty, rather than the $235 originally proposed[1].

[1]The terms of the settlement of Docket No. KENT 94-1056 are not accurately reflected in the transcript (Tr. 6). The terms of the settlement herein are taken from the undersigned's trial

The settlement of one of the contested penalties in Docket No. KENT 94-1002 has been previously approved by the undersigned. Remaining in the petition is Citation No. 3859192, with a proposed civil penalty of $4,600, which was originally issued as a section 104(d)(2) order on February 3, 1994. This citation was modified to allege a non-significant and substantial violation. The Secretary has withdrawn its allegation that the violation was due to Respondent's "unwarrantable failure" to comply with the Act (Tr. 34). The issues before the undersigned are whether a violation occurred, and if so, the degree of Respondent's negligence and the civil penalty to be assessed.

## Citation No. 3859192: Coal and Coal Dust Accumulations in the longwall belt entry

In early January, 1994, MSHA representative Donald Milburn began inspecting the 11-C conveyor belt at Respondent's Wheatcroft Mine in western Kentucky (Tr. 18-19). This belt transports as much as 6,000 tons of coal per shift from Wheatcroft's longwall mining unit and operates 24 hours a day (Tr. 20). In reviewing Respondent's examination records for the period of December 28, 1993 through January 11, 1994, Milburn noticed that Respondent was having a recurring problem with coal spillage on the belt, particularly between crosscuts 2 - 4, where the entry went downhill and then uphill following the coal seam (this area is referred to as "the swag") (Tr. 19).

On January 11, Inspector Milburn found isolated piles of coal and coal dust, marginally adequate rock dusting and numerous broken rollers on the conveyor in the 11-C belt entry (Tr. 21-22). He discussed these conditions with Respondent's supervisory personnel and told them that they needed to pay closer attention to the recurring coal spillage problem (Tr. 23-24).

During January, 1994, Milburn also cited Respondent for a violation of 30 C.F.R. ' 75.1725 on the 11-C belt entry. This citation was issued because he found three broken top rollers and 30 broken bottom rollers on the conveyor belt (Tr. 25).

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notes and have been confirmed with counsel.

Some of these broken rollers were turning in isolated piles of coal dust.[2]

MSHA Inspector Troy Davis issued Respondent another citation for coal and coal dust accumulations on the 11-C beltline on January 31, 1994 (Exh. R-3). He found accumulations of between 7 to 15 inches between crosscuts 2 and 4, the area of the swag, or hill, in the beltline (Tr. 82).

Milburn returned to the 11-C beltline entry on February 2, 1994, to determine whether Respondent had corrected the conditions cited by Davis (Tr. 27-28). He determined that the accumulations had been cleaned up on January 31 and February 1, but he found that coal spillage of up to 15 inches had reoccurred in the same area (Tr. 28-29, Exh. R-3, page 2, Exh. R-4). Milburn therefore issued Respondent another citation.

On February 3, 1994, Milburn issued Order No. 3859192, which is at issue in this proceeding. The order, now amended to a section 104(a) citation, alleges a violation of 30 C.F.R. ' 75.400 in that coal dust and loose coal up to four inches in depth had accumulated on previously rockdusted areas between crosscut 8 and crosscut 19 in the 11-C belt entry (Exh. P-1)[3].

The area covered by Citation No. 3859192 began about 360 feet inby the swag area at crosscut 4 and extended approximately 1,000 feet in the direction of the longwall

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[2]Milburn's testimony as to when he issued this citation is somewhat confusing (Tr. 23-26). It is unclear whether it was issued on January 13, or January 31. I find that it was issued sometime in the month of January.

[3]The standard requires that loose coal, coal dust, including float coal dust deposited on rock-dusted surfaces, and other combustible materials be cleaned up and that they not be permitted to accumulate in active workings, or on electrical equipment, therein.

face (Tr. 18, 51-52). At hearing, Milburn described the coal and coal dust spillage between crosscuts 8 and 19 as being between 0 to 4 inches in depth (Tr. 52-53).

Inspector Milburn concedes that some spillage is normal on a high volume conveyor belt such as belt 11-C (Tr. 60). He was equivocal as to whether the spillage he found on February 3 was greater than what one would expect to find on a longwall belt (Tr. 61-63).

The Secretary contends that Respondent was highly negligent because of the constant recurrences of coal spillage on the 11-C beltline (Tr. 58). Inspector Milburn also noted that on February 3, 1994, only one miner was assigned to shoveling coal spillage on this belt and opined that this is insufficient (Tr. 67).

Respondent's contentions

Respondent denies that any violation of section 75.400 existed on February 3, 1994, and argues that, even if it did, a characterization of high negligence is unwarranted. First of all, I find, as stated by miner Arden Gentry, that the accumulations found by Inspector Milburn were not present at the end of the day shift on February 2, 1994, the day prior to the instant alleged violation (Tr. 96-97).

Due to the imprecision of Milburn's testimony about the amount of coal dust present in the cited area, I credit the testimony of Respondent's maintenance foreman, Daniel Menser[4], that a light film of rock dust and coal dust was on the floor of the 11-C belt entry between crosscuts 8 and 19 on the morning of February 3, 1994, except for the unspecified number of locations at which Milburn measured four inches of coal dust (Tr. 107-114).

[4]Menser's last name is incorrectly spelled "Mense" in the transcript.

The Secretary failed to establish a violation of '75.400

In Old Ben Coal Company, 1 FMSHRC 1954 (December 1979), the Commission held that the existence of any accumulation of combustible materials establishes a violation of 30 C.F.R. ' 75.400. However, whether coal spillage constitutes an accumulation under the standard depends on the size and amount of the spillage. Indeed, the Commission noted that "the Secretary does not contend that the merest deposit of combustible material constitutes a violation of the standard." 1 FMSHRC 1954, at 1958 and n. 8.

Subsequently, the Commission has held that an "accumulation" exists where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary, it likely could cause or propagate a fire or explosion if an ignition source is present. Old Ben Coal Co., 2 FMSHRC 2806, 2808 (October 1980). The inspector's judgment in this regard is reviewed to determine whether a reasonably prudent person familiar with the industry and purposes of the regulation, would have recognized the cited conditions as hazardous. Utah Power and Light Co., 12 FMSHRC 965, 968 (May 1990).

I find that the Secretary's evidence is insufficient to establish that the spillage between crosscuts 8 and 19 on February 3, 1994, was an "accumulation" within the meaning of the standard. In this regard, the undersigned asked Inspector Milburn whether the spillage he observed on February 3 was unusual compared to what he would normally expect to find on a conveyor belt of that size and volume. He answered as follows:

> I don't know how I can really answer that, Your Honor, because he [Respondent's counsel] pointed out a belt record book a few minutes ago that some days there was no spillage on the belt, so to say it is a common occurrer out some of the record books that there was no spillage on this belt, so I can't really say that it was a non- occurrer so it is out of the ordinary. It is abnormal. (Tr. 61-62)

When asked again by Respondent's counsel whether the spillage he saw was more than normal, Milburn responded, "I would characterize it as that" (Tr. 62). I interpret the inspector's responses as indicating that he regards any amount of coal spillage to violate ' 75.400. I conclude, on the basis of the Old Ben decisions cited above, that he is incorrect to do so.

The question remains, regardless of what I deem to be Inspector Milburn's erroneous interpretation of the law, whether the record establishes that the spillage cited was of sufficient size and amount to constitute an accumulation under the standard. The inspector did not describe the size and amount of spillage he saw on February 3, other than to state that at some places he measured a depth of 4 inches (Tr. 16-18, 52-55). There is nothing in the record that indicates the extent of four-inch piles of spillage or the duration of their existence.

Inspector Milburn's testimony indicates that he issued the instant citation largely because he had found coal spillage on a recurring basis on the 11-C belt, rather than because the size and amount of coal spillage on February 3 was sufficient to constitute an "accumulation" (Tr. 33-34).

On the other hand, maintenance foreman Menser, described the cited coal spillage as a little film of dust (Tr. 113-14). The record, as a whole, is insufficient to establish that a reasonably prudent person would have regarded the cited coal spillage as likely to propagate a fire or explosion. I therefore find that the Secretary has not established that the cited spillage constituted an accumulation of combustible materials within the meaning of the standard and I vacate the citation and proposed penalty.

## Even Assuming that the record establishes a violation, the Secretary has not established high negligence on the part of Respondent

Given the possibility that this decision may be reviewed and that the Commission could take a different view of whether a violation was established, I deem it appropriate to address the issue of Respondent's negligence to avoid an unnecessary delay in the ultimate disposition of this case. Respondent was experiencing recurring coal spillage on the 11-C belt in the month prior to the instant inspection. However, most of these spillages occurred in the swag area between crosscut 2 and 4, not in the area covered by the instant citation.

Respondent's evidence indicates that the recurring coal spillage problems between crosscuts 2 and 4 were caused by water flowing backwards on the belt in the swag when the amount of coal mined at the longwall was less than its maximum capacity (Tr. 117-18). Nothing in this record indicates any want of care on the part of Respondent in preventing coal spillage on the 11-C belt. Although Inspector Milburn suggested that Respondent should have had additional personnel shoveling coal spillage on the 11-C belt, there is no evidence that indicates that it was highly negligent in not doing so.

Assuming that this record does establish a violation of ' 75.400 by virtue of the fact that Inspector Milburn measured coal spillage of up to four inches at some points along the 11-C belt, I would find that the violation was due to the ordinary negligence of Respondent. I would assess a $100 penalty pursuant to the criteria set forth in section 110(i) of the Act. The violation was modified to non-significant and substantial, thus its gravity could not have been high. There is no dispute that Respondent quickly abated the citation (Tr. 32, 69-70). Although Respondent had received several section 75.400 citations on the 11-C belt just prior to the instant citation, the lack of convincing evidence as to how Respondent could have prevented these spillages persuades me that a higher penalty is not warranted for Costain's prior history.

## ORDER

I conclude that the terms of the settlements in Docket Nos. KENT 94-1001 and KENT 94-1056 are consistent with the criteria in section 110(i) of the Act. Wherefore, the motion for approval of the settlement terms is **GRANTED.** Respondent shall pay the agreed upon amounts within 30 days of this decision.

Citation No. 3859192 in Docket No. KENT 94-1002 and the penalty proposed therefor are hereby **VACATED**.

Arthur J. Amchan
Administrative Law Judge

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