FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, Suite 1000
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

September 26, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. KENT 95-303
	:	A.C. No. 15-14074-03674
v.	:	
	:	Docket No. KENT 95-364
PEABODY COAL COMPANY, Respondent	:	A.C. No. 15-14074-03676
	:	
	:	Docket No. KENT 95-423
	:	A.C. No. 15-14074-03678
	:	
	:	Martwick UG Mine
	:	
	:	Docket No. KENT 95-316
	:	A.C. No. 15-08357-03786
	:	
	:	Docket No. KENT 95-337
	:	A.C. No. 15-08357-03787
	:	
	:	Docket No. KENT 95-414
	:	A.C. No. 15-08357-03788
	:	
	:	Camp #11 Mine

DECISION

Appearances: Donna E. Sonner, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee and Arthur J. Parks, Conference and Litigation Representative, Mine Safety and Health Administration for Petitioner;
Carl B. Boyd, Jr., Esq., Myer, Hutchinson Hanes and Boyd, Henderson, Kentucky for Respondent.

Before: Judge Melick

These consolidated cases are before me upon the 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 AAct,@ charging the Peabody Coal Company (Peabody) with multiple violations under the Act and

proposing civil penalties for those violations. Settlement motions were considered at hearing as to all violations except those charged in Citation Nos. 3861812 and 3861813. With respect to the settlement the Secretary has proposed certain modifications in the citations and a reduction in penalty from $2,970 to $1,753. I have considered the representations and documentation submitted in these cases and I conclude that the proffered settlement is acceptable under the criteria set forth in Section 110(i) of the Act. An order directing payment of the agreed amount will accordingly be incorporated in this decision.

As noted, two citations remain at issue. They were issued fifteen minutes apart on November 1, 1994, by Inspector Darrold Gamblin of the Mine Safety and Health Administration (MSHA). Citation No. 3861812, issued pursuant to Section 104(d)(1) of the Act,[1] alleges a violation of the standard at 30 C.F.R. ' 75.402

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[1] Section 104(d)(1) of the Act provides as follows:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that

and charges as follows:

> there has been a violation of any mandatory health or safety standard 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 persons 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.

Rock dusting on the No. 2 Section MMU 00-5-0 in the 1st East panel entries was not maintained to within 40 feet of the working faces, the roof and floors of the No. 7 entry was [sic] not rock dusted for 69 feet from the face outby, the roof and floor of the connect crosscut between the Nos. 6 and 7 entries had no rock dust applied to the roof and floor being 70 feet outby the working faces of Nos. 6 and 7 entries, the No. 6 entry floor and roof had no rock dust applied for a distance of 71 feet outby the working face, the No. 5 entry had no rock dust applied to the floor and roof for a distance of 95 feet. No. 3 entry had no rock dust applied to the roof and floor for a distance of 134 feet, the connecting crosscuts from No. 1 entry to No. 5 entry had no rock dust applied to the roof or floors for a distance of 190 feet.

The cited standard, 30 C.F.R. ' 75.402, provides as follows:

All underground areas of a coal mine except those areas in which the dust is too wet or too high in incombustible content to propagate an explosion shall be rock dusted to within 40 feet of all working faces, unless such areas are inaccessible or unsafe to enter or unless the Secretary or his authorized representative permits an exception upon his finding that such exception will not pose a hazard to the miners. All crosscuts that are less than 40 feet from a working face shall also be rock dusted.

Citation No. 3861813 alleges a violation of the mandatory standard at 30 C.F.R. ' 75.403 and charges as follows:

A violation observed on the No. 2 Section MMU 005-0 in the 1st East entries where rock dust was required to be applied to the top, floor and sides was not being maintained in such quantities that the incombustible content combined with coal dust is not being maintained to the required minimum. Spot samples were collected at four (4) locations. No. 1 Sample No. 7 entry 60 feet outby face, No. 2 sample in the connecting cross between Nos. 6 and 7 entry 70 feet outby the working faces, No. 3 sample 60 feet outby No. 6 entry working face, No. 4 sample collected 100 feet outby No. 3 entry working face.

The cited standard provides as follows:

Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all

> underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than 65 per centum, but the incombustible content in the return aircourses shall be no less than 80 per centum. Where methane is present in any ventilating current, the per centum of incombustible content of such combined dusts shall be increased 1.0 and 0.4 per centum for each 0.1 per centum of methane where 65 and 80 per centum, respectively, of incombustibles are required.

It is, in fact, clear that the areas in which the latter violation (Citation No. 3861813) was charged were physically located within the larger area in which the former violation (Citation No. 3861812) was charged (See Appendix A). It is also undisputed that the alleged violations coexisted in time. The latter charges were based upon specific spot band samples taken at four locations within the area of the former charges and were purportedly confirmed by laboratory analysis of those samples showing incombustible content below that required by both standards.

Respondent argues that the charges in these two citations are, in fact, therefore duplicative. It maintains that the lesser included violation charged in Citation No. 3861813 is not a separate and distinct violation but merges with the greater violation charged in Citation No. 3861812 and should accordingly be vacated. The Secretary rejects the contention as Awithout merit@ claiming that the charges involve separate areas of the mine. The Secretary=s claim in this regard is directly contradicted, however, by the mine map submitted by the Secretary himself. (See Appendix A).

Section 110(a) of the Act provides that Aeach occurrence of a violation . . . may constitute a separate offense@. However, where the Secretary elects to charge in one citation a violation that is located within the same described area and is coextensive in time and nature with a violation charged in another citation, the charges are duplicative and the lesser included offense merges within the greater offense and must be dismissed. This conclusion is bottomed not on Constitutional double jeopardy protections which are applicable only to criminal proceedings but under similar standards of Constitutional due process and under the Commission=s general authority to review actions by the Secretary that are an abuse of discretion. See *W-P Coal Company*, 16 FMSHRC 1407 (June 1994); *Bulk Transportation Services, Inc.*, 13 FMSHRC, 1354, 1360 (September 1991); and *Consolidation Coal Company*, 11 FMSHRC 1439, 1443 (August 1989).

Moreover, in finding that the charges merge, it is noted that the standard at 30 C.F.R. ' 75.403 merely sets the specific standard of incombustible content to be maintained in the areas required by 30 C.F.R. ' 75.402 to be rock dusted. Thus, in order for there to be a violation of 30 C.F.R. ' 75.402 the area cited must have an incombustible content less than that specified in 30 C.F.R. ' 75.403. It is clearly redundant to charge inadequate rock dusting in one citation and then charge again in another citation inadequate rock dusting within the same area based on specific tests. Essentially the only difference is that in one case specified tests were performed to verify the same violation. Moreover the two standards here cited do not impose separate and distinct duties upon the operator.

This case is therefore clearly distinguishable from *Cypress Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (March 1993). There the Commission found the two citations at issue were not, in fact, duplicative even though emanating from the same events because the two standards (30 C.F.R. '' 56.3200 and 56.3130) imposed separate and distinct duties upon an operator. See also *Peabody Coal Company*, 1 FMSHRC 1494, Dissenting and Concurring Opinions at 1497-1498 (October 1979).

Under the circumstances of this case I therefore conclude that the charges in Citation No. 3861813 are indeed duplicative of charges in Citation No. 3861812 and must therefore be merged and vacated as a lesser included violation.

Evidence taken at hearing on Citation NO. 3861813 is accordingly relevant to the violation alleged in Citation No. 3861812 and will be considered herein. Notice of this was provided before hearings (Tr. 5). In this regard MSHA Inspector Darrold Gamblin testified that on November 1, 1994, around 2:00 a.m., he began a ASection 103(i)@ spot inspection accompanied by miners= representative Joe Wiles and Foreman Dorman Ross. Gamblin observed in the No. 2 section that some locations were not rock dusted and that other areas were inadequately rock dusted. He observed that Foreman Eldon Stanley was then in the process of rock dusting by hand in areas where there was already some light rock dust. According to Gamblin 80 to 100, 50-pound-bags of rock dust would have been necessary to adequately rock dust the area. He noted that a rock dusting machine is ordinarily used on the No. 2 unit and the entire area could have been properly rock dusted within one to one-and-one- half hours using the machine.

Inspector Gamblin also testified that he took spot band

samples at four locations within the cited area as noted on the face of Citation No. 3861813 and submitted those to the MSHA laboratory for analysis. The results of the analysis showed 34.1%, 56.2%, 52% and, in the No. 7 return entry, 43.8% incombustible content. This evidence along with the inspector=s credible expert testimony clearly supports the cited violation.

In any event Joe Ed Wiles, a utilityman and union safety committeeman who accompanied Gamblin on this inspection, corroborated Gamblin with respect to the inadequate rock dusting, the fact that trailing cables had been run over and that Foreman Stanley was observed rock dusting by hand. Wiles further confirmed that there had been no rock dusting at all in some of the cited areas and noted an ignition potential from the roof bolting operations. Wiles also testified that on September 8, 1994, he had received complaints from other employees about the lack of rock dusting and that he reported these complaints to management. Wiles denied that the area from which the samples were taken by Inspector Gamblin were damp.

Gamblin also concluded that the violation was Asignificant and substantial@ because of the surrounding conditions, including the fact that energized electrical cables were being run over, thereby a potential source for the phase wires to connect and cause an explosion and/or an ignition of coal dust. Gamblin also observed that there were other ignition sources, including cutting and welding performed on the maintenance shift and prior splices on an electrical cable.

More particularly, Gamblin=s conclusion that the violation was Asignificant and substantial@ was based on the following testimony at hearing:

Q. And how did you determine that this was a significant and substantial violation? In other words, what was the safety hazard involved?

A. Well, coal dust is combustible. When rock dust is not applied to it, it is a combustible material.

Q. Could this contribute to a fire or explosion?

A. Yes.

Q. You indicated this was reasonably likely to occur?

A. Yes.

Q. If the condition had continued unabated?

A. Yes.

Q. What type of injury would result?

A. Burns or fatal accidents.

Q. And you indicated that 14 people were potentially affected?

A. Yes.

I agree that the violation was Asignificant and substantial@ and of high gravity based on the credible testimony of Inspector Gamblin corroborated by the credible testimony of Joe Wiles.

> A violation is properly designated as Asignificant 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 (1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (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 an injury, and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.
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> See also *Austin Power Co.* v. *Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff=g* 9 FMSHRC 2015, 2021 (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 (1984), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. *U.S. Steel Mining Co., Inc.*, FMSHRC 1473, 1574 (1984); see also *Halfway, Inc.*, 8 FMSHRC 8, 12 (1986) and *Southern Oil Coal*

Co., 13 FMSHRC 912, 916-17 (1991).

Gamblin also concluded that the violation resulted from the operator=s high negligence and the Secretary argues this also constituted Aunwarrantable failure@. His testimony on this issue is set forth in the following colloquy:

> Q. Under Anegligence,@ you indicated that the level of negligence was high?
>
> A. Yes.
>
> Q. What did you base this determination on?
>
> A. That the Operator knew the conditions and wasn=t doing anything to correct it.
>
> Q. And how did you determine that the Operator knew of the conditions?
>
> A. By the preshift examination and by the nature of the Operator being present in the faces trying to apply dust.
>
> Q. Who was that person that you observed trying to apply dust?
>
> A. Eldon Stanley.
> Q. And what is his position with the Company?
>
> A. He=s a foreman, a third-shift foreman, who looks after belt moves and the face work.

As further explained, the Secretary=s rationale here is that since Foreman Stanley had a clearly insufficient supply of rock dust for the area needing rock dusting, his efforts showed both knowledge of the violative conditions and a seriously inadequate effort to abate those conditions. To further aggravate this negligence Stanley had assigned other miners to extend the beltline rather than help abate these conditions. Inspector Gamblin further credibly opined that these violative conditions had existed on the two prior production shifts as well as for a few hours on the third shift.

The Secretary further notes that prior incidents and warnings at the mine should have placed the operator on heightened notice of a problem with inadequate rock dusting.

Gamblin had talked to the operator=s representatives several times regarding this same type of violation, and other citations and orders had been issued for similar violations including several on the same working section as cited in the instant case.

In addition, Safety Committeeman Wiles testified that he had received complaints from roof bolters regarding the previous lack of rock dust and had reported those concerns to management. The union safety committee issued findings to Peabody officials as a result of an inspection on September 8, 1994, which included a finding that rock dusting was inadequate on the same unit cited herein and that several crosscuts had not been rock dusted or cleaned. According to Wiles the conditions were corrected for a while but then recurred. Wiles then complained to MSHA Inspector Gamblin.

I agree that this evidence supports a finding of a high degree of negligence and Aunwarrantable failure@. AUnwarrantable failure@ has been defined as conduct that is Anot justifiable@ or is Ainexcusable.@ It is aggravated conduct by a mine operator constituting more than ordinary negligence. *Youghiogheny and Ohio Coal Company*, 9 FMSHRC 2007 (1987); *Emery Mining Corp.*, 9 FMSHRC 1997 (1987).

In reaching my conclusion herein I have not disregarded the testimony of Steven Little, Peabody=s Martwick Mine Compliance Manager. I find, however, that this testimony only further corroborates Gamblin=s negligence conclusions. Little testified that it was the practice at the Martwick Mine, where they have three shifts, to use the first two shifts for production and the third shift for maintenance. According to Little, hand dusting was performed on the first two production shifts and the third shift was reserved for additional clean-up and machine rock dusting. Little acknowledged that he was not present on November 1 when the citation was issued. He also conceded that Foreman Stanley told him that, in fact, the mine roof had not been rock dusted in the cited area. Little also admitted that cables had been run over in the area of the coal feeder, 200 to 300 feet outby the working face.

Little maintained that Gamblin told him in late 1992 that it was acceptable not to dust the roof during production shifts so long as it was done on the maintenance shift. Little failed to note however that this exception was limited by Inpector Gamblin to circumstances where the roof consisted of rock and was wet from natural moisture.

Considering the relevant criteria under Section 110(i) of

the Act, I find that a civil penalty of $3,000 is appropriate for the violation charged in Citation No. 3861812.

ORDER

Citation No. 3861813 is vacated. Citation No. 3861812 is affirmed and Peabody Coal Company is hereby directed to pay a civil penalty of $3,000 within 30 days of the date of this decision for the violation therein. In accordance with the settlement agreement approved at hearing Peabody Coal Company is further directed to pay an additional civil penalty of $1,753 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge
703-756-6261

Distribution:

Donna E. Sonner, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215-2862 (Certified Mail)

Mr. Arthur J. Parks, Conference and Litigation Representative, U.S. Dept. of Labor, Mine Safety and Health Administration, 100 YMCA Drive, Madisonville, KY 42431-9019 (Certified Mail)

Carl B. Boyd, Jr., Esq., Peabody Coal Company, 120 North Ingram, Suite A, Henderson, KY 42420

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