FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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June 15, 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 97-302
Petitioner	:	A.C. No. 15-16478-03602
v.	:	
	:	Hubb No. 5
HUBB CORPORATION,	:	
Respondent	:	

DECISION

Appearances: MaryBeth Bernui, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, and Ronnie R. Russell, Conference and Litigation Representative, Mine Safety and Health Administration, Barbourville, Kentucky for the Petitioner;
Gene Smallwood, Esq., Polly & Smallwood, Whitesburg, Kentucky for the Respondent.

Before: Judge Weisberger

STATEMENT OF THE CASE

This case is before me based upon a petition for assessment of civil penalty filed by the Secretary of Labor (ASecretary@) alleging that Hubb Corporation (AHubb@) violated various mandatory safety standards set forth in Title 30 of the Code of Federal Regulations.[1] Pursuant to notice, the case was heard on March 10-11, 1998. The parties filed post hearing briefs on May 29, 1998.

[1]/ At the hearing, Hubb agreed to pay the full assessed penalties of $2,016 for the following citations: Nos. 4483650, 4483653, 4483654, 4483657, 4483659, 4483660, and 4483705. I have reviewed the documentation concerning these citations, and find that the agreement is consistent with the Federal Mine Safety and Health Act of 1977, and is approved.

FINDINGS OF FACT AND DISCUSSION

I. Citation No. 4582462.

On November 7, 1996, Lawrence Rigney, an MSHA inspector, inspected the 005 section at Hubb=s No. 5 Mine. He observed the operation of a 21 SC Joy shuttle car that is used to transport coal from the face to the dump. It is provided with two operator=s seats, one inby, and the other outby. The car also has two sets of foot pedal controls, one outby, and the other inby. The tram pedal controls the speed of the car, and the brake pedal is used to stop the car.[2] In normal operations, when driving inby the operator sits in the chair facing inby and controls the shuttle car by using the outby set of foot pedals. When traveling outby, the operator sits in the seat facing outby, and controls the vehicle with the inby set of foot pedals.

According to the inspector, he observed that the outby brake and tram pedals were missing. The inspector testified that when he observed the shuttle car it was heading outby, and the operator was sitting in the inby seat facing inby, but looking over his shoulder. The inspector issued a citation, which, as amended on January 23, 1997, alleges a violation of 30 C.F.R. ' 75.1725(a). Section 75.1725(a), supra, provides, as pertinent, that mobile equipment A. . . shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.@

In essence, according to the inspector, because the outby pedals were missing, the operator was required, when traveling outby, to face inby and look over his shoulder to see where he was going. The inspector indicated that he saw the operator with his upper torso out of the cab, which subjected him to the danger of being caught between the shuttle car and the rib, and being injured. He also indicated that an operator driving outby and looking over his shoulder would have a blind spot to his left, which could possibly cause him not to see a person in the area and possibly injure that person.

According to the inspector, it was not possible for the operator to sit facing the direction of travel, and operate the foot pedals. However, on cross-examination, it was elicited that the operator could use a hand lever to tram the shuttle car, and could reach to activate the brake to stop the car.

Danny Whitaker, Hubb=s superintendent, opined that the shuttle car was maintained in safe condition and indicated that an operator can turn backwards to face the direction of travel, and still operate the foot pedals.

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[2]/ The car is also provided with an emergency brake operated by a hand lever.

In essence, it is the gravamen of the Secretary=s position that the shuttle car was not in safe operating condition because, driving outby, the operator could activate the inby pedals only by sitting facing inby, and looking over his shoulder in the direction of travel, which would place him outside the protection of the cab, and expose him to various hazards. However, the inspector did not provide any detailed explanation to support his opinion that, in traveling outby, the operator would physically be unable to sit facing outby, and operate the inby foot pedals. No evidence was adduced regarding the spatial relationship between the outby seat, and the inby pedals. Although the shuttle car operator might have been subjected to various hazards when traveling outby and looking over his shoulder, no citation was issued for this practice.

In order for the Secretary to prevail under section 75.1725(a), supra, it must be established that the missing foot pedals caused the shuttle car not to be in safe operating condition. I find that, for the above reasons, the Secretary has not met her burden in this regard. Hence, I find that it has not been established that Hubb violated section 75.1725(a), supra, and accordingly Citation No. 4582462 shall be dismissed.

II. Order No. 4582535.

A. Violation of the Ventilation Plan

William R. Johnson, an MSHA inspector, testified that when he inspected the 005 Section on November 7, 1996, the deflector curtain in the No. 7 heading was 66 feet outby the deepest point of penetration. He issued a citation alleging a violation of 30 C.F.R. ' 75.370(a)(1) which, in essence, requires a mine operator to develop and follow its ventilation plan. The ventilation plan in effect in November 1996, provided that the maximum distance from the end of the line curtain to the point of deepest penetration of the working face should be 40 feet. Hubb does not dispute the violation. Based on Johnson=s testimony, that I found credible, I find that Hubb did violate its ventilation plan, and hence did violate section 75.370(a)(1), supra.

B. Significant and Substantial

According to Johnson, the purpose of the deflector curtain is to remove the noxious gases and respirable dust from the face. He indicated that if the curtain is not within 40 feet of the point of deepest penetration, then the noxious gases and dust produced would not be diluted at the face. According to Johnson, as he continued inby beyond the deflector curtain, at a point toward the end of the last set of rib supports, approximately 40 feet from the point of deepest penetration, he could not sense any ventilation. He opined that, since the deflector curtain was more than 25 feet outby where it should have been, and there was no ventilation at the face to dilute dust or methane, the violation should be considered significant and substantial.

He explained that his opinion was based on these factors, and also the mine=s history of liberating methane,[3] and the possibility of an explosion resulting from the miner=s bits creating sparks when they strike the roof. He indicated that in the event of an explosion seven miners working downwind of the deflector curtain could suffer burns. He also stated that the respirable dust not being ventilated could cause black lung disease.

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. ' 814(d)(l). A violation is properly designated significant and substantial "if based upon the particular facts surrounding the 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 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum* the Secretary of Labor 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.

In, *United States Steel Mining Company, Inc.*, 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

> We have explained further that 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). We have emphasized that, in accordance

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[3]/ On cross-examination, Johnson noted that he did not find any methane present in this or any of the other eight headings on the section. He also noted that the miner in the section is provided with a methane monitor which would cut off power to the miner if methane would be present at 2 percent, which is less than the explosive range of between 5 and 15 percent. He also acknowledged that the miner has a scrubber to remove coal dust.

with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U. S. Steel Mining Company, Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U. S. Steel Mining Company, Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

Hubb presented the testimony of the day shift foreman Scott Day, and Doyle Cornett, a miner=s helper on the first shift. Neither of the witnesses contradicted Johnson=s testimony relating to the distance of the reflector curtain to point of the deepest penetration, the lack of ventilation in the areas of the working face, the presence of ignition sources, and the mine=s history of liberating methane.

Inasmuch as Johnson=s testimony was not impeached or contradicted, I accept it. I find that within the framework of his testimony, it has been established that the violation was significant and substantial.

C. Unwarrantable Failure

According to Johnson, when he arrived after the start of the second shift, the section was producing coal. Johnson testified that when he first arrived on the unit A. . . the curtain was so far behind the deepest point of penetration that I detected it immediately.@ (Tr. 202) (Emphasis added.) He indicated that he did not have to measure it to know that the curtain was more than 40 feet from the point of deepest penetration.

Day indicated that he started the pre-shift examination approximately 7:30 a.m., on November 7. He inspected the curtain in the No. 7 heading, and it was within 40 feet of the point of deepest penetration.

According to Day, at the commencement of the shift on November 7, the face at the No. 7 heading contained gob that extended approximately 25 to 30 feet outby. He instructed the miner operator, Russell Dixon, and the miner helper, Doyle Cornett, to load the gob and then move the curtain inby. Day indicated that in removing the gob the curtain had to be moved Aback from where it was hung@ (Tr. 236) because Athe miner would have torn it down@ (Tr. 236). He said that at approximately 9:15 a.m., he inspected what they were doing, and they were loading gob.

According to Day, he was not aware that mining had commenced in the No. 7 hearing before the curtain was moved inby. Day indicated that at 4:00 p.m., on November 7, he first became aware that a citation had been issued for the placement of the curtain.

Day explained that it is mine policy to move the curtain inby along with the advance of mining, and that he tells miners at safety meetings that the curtain has to be within 40 feet of the face.

Cornett testified that on the morning of November 7, the curtain was at the edge of the gob 40 feet from the point of deepest penetration. He and Dixon removed the curtain in order to get the miner close to the rib in order to remove the gob. Cornett left the area to check curtains

in other headings intending to return to replace the curtain. When he left the area, Dixon was still removing the gob. According to Cornett, when he returned, the miner was not in operation, the gob had not been removed, and the curtain had been hung within 40 feet of the face.

Based on the uncontradicted testimony of Hubb=s witnesses, I find that the curtain was placed at point more than 40 feet outby the deepest penetration, sometime between 9:15 a.m. and 10:45 a.m. Hence, Hubb was in violation of the ventilation plan for less then 2 hours when cited by Johnson. However, since the curtain had been hung more than 26 feet beyond the 40 foot minimum distance from the point of deepest penetration, it is clear that it would have been obvious that Hubb was not in compliance with its ventilation plan. Accordingly, the level of its negligence was more than moderate. However, the Secretary did not rebut, impeach, or contradict Day=s testimony that he told Cornett and Dixon to move the curtain inby, that he was not aware that mining had commenced and the curtain had not been moved up to its proper position, and that in safety meetings he makes his men aware that the curtain has to be within 40 feet of the deepest penetration. Within this context, I find that although Hubb was negligent to a more than moderate degree, the level of negligence did not reach aggravated conduct. Hence I conclude that it has not been established that the violation was as a result of Hubb=s unwarrantable failure. (cf. *Emery Mining Corp.*, 9 FMSHRC 1997 (1987)). I find that the section 104(d)(1) order at issue should be reduced to a section 104(a) citation that is significant and substantial.

D. Penalty

I find that the violation was of a high degree of gravity in that it could have resulted in miners suffering serious burns or suffocation. For the reasons noted above, I find that the level Hubb=s negligence was more than moderate. Also, taking into account Hubb=s history of violations, I find a penalty of $4, 000 is appropriate.

III. Order No. 4582536.

According to Johnson, he observed two areas of loose ribs in the No. 6 entry. He described the first one as a block of coal that was loose from the rest of the rib. He said that the block was 1 foot thick, 15 feet long and 6 feet high, and was located just inby the last open crosscut. Also, Johnson observed a 1 foot thick, 12 feet long, and 4 feet wide block of coal just inby the next to the last open crosscut. He issued a section 104(d)(1) order alleging a violation of 30 C.F.R. ' 75.202(a) which provides that the roof of areas where persons work or travel shall be supported or controlled to protect persons from hazards related to falls of the ribs. Hubb did not contest the fact of the violation. Based upon Johnson=s testimony, I find that Hubb did violate section 75.202, supra.

Johnson opined that the violation was significant and substantial. He noted that the cited areas were loose because there were A. . . four to five inches of crack between the block of coal and the solid rib@ (Tr. 303) (sic). The crack ran the length of each block. Johnson opined that it was reasonably likely that the cited rib areas would fall. According to Johnson, all miners in the unit pass through the cited areas in shuttle cars . It was Johnson=s opinion that although these cars are equipped with canopies, should the cited rib areas loosen and fall, menã in the cars could

be injured as the sides of the cars are open. He noted that he has investigated accidents where ribs have fallen and caused fatalities.

According to Day, he Abelieved@ that he saw the cited blocks removed by a scoop after they were cited. Day testified that the bucket on the scoop hit the cited material three or four times A[r]eal hard@ (Tr. 332), and that the operator A. . . had to take the bucket and move it up and down and pull it to break it loose@ (Tr. 332).

Although the cited material may not have been in imminent danger of falling, the presence of cracks, as noted by Johnson and Day, running the length of the cited blocks, as described by Johnson and not contradicted by Day, supports Days opinion that the cited blocks were loose. I therefore accept his opinion.

Neither Day nor Denny Whitaker, Hubb=s superintendent, contradicted or impeached Johnson=s testimony regarding the exposure of miners to the hazard contributed to by the violation at issue. Thus, within the framework of Johnson=s testimony, I find that it has been established that the violation was significant and substantial. (See, *Mathies*, supra).

According to Johnson, the violation was Areal obvious@ when he came to the section. He said that AI saw it immediately when I walked by it@ (Tr. 309). He also noted that there was evidence of rock dust in the cracks of the cited areas. He opined that if the cited area had broken loose, they would have been clean and black. Johnson concluded that the conditions should have been found on the pre-shift and on-shift examinations, but that there were no notations to this effect in the pre-shift examination book.

On cross-examination, Johnson indicated that breaks in the ribs are usually caused by overhead pressure, and this could happen suddenly. Day indicated that in his inspection of the entry prior to the start of the shift on November 7, he did not see any loose ribs outby the last open crosscut, or behind the curtain inby the No. 6 entry. According to Day, prior to 10:45 a.m., on November 7, he was not aware of any loose ribs inby or the outby the last open crosscut. Day examined the areas at issue after they were cited. He noted that they were separated from the wall by an inch or 2 inches. He testified that the separations were not present when he had made his inspections earlier that morning. He could not recall if he saw rock dust in the separations.

Whitaker indicated that prior to the issuance of the citation at issue, he was not aware of any loose ribs inby or outby the last open crosscut.

Johnson=s testimony that there was rock dust in the cracks of the cited areas would appear to be some evidence that the cracks occurred prior to the time the ribs were rock dusted.[4] In this connection, I note Day=s testimony that he did not order the entry at issue to be rock dusted the morning of the inspection. On the other hand, I observed Day=s demeanor and found his

[4]/ Johnson=s testimony was not impeached or contradicted by Hubb. Day testified that he did not recall if he saw rock dust in the separations, and Whitaker did not specifically testify that he examined the cracks and did not see any rock dust. I therefore accept Johnson=s version.

testimony credible that, subsequent to the issuance of the instant citation, when he examined the areas cited, the cracks that he observed had not been present when he had made his inspection earlier that morning. He also had testified that he did not find any loose ribs when he made his inspection earlier on the morning of November 7. In this connection I note Johnson=s testimony on cross-examination that cracks and breaks in the ribs could occur suddenly due to overhead pressure. I conclude that the eyewitness testimony of the conditions in existence in the morning on November 7, that I find credible, outweighs Johnson=s opinion regarding the time of the occurrence of the cited conditions. I thus conclude that it has not been established that the level of Hubb=s negligence rose to aggravated conduct. I thus find that it has not been established that the violation resulted from its unwarrantable failure. (see *Emery*, supra). Hence, the order at issue should be amended to a section 104(a) citation that was significant and substantial.

I find that the violation was of a high level gravity inasmuch as it could have resulted in a fatality. I find that any negligence on Hubb=s part was not more than moderate. I find that a penalty of $4,000 is appropriate.

IV. Order No. 3822739.

On November 13, 1996, MSHA Inspector Darlas Day inspected the one right section, a nonproduction section consisting of old works. He tested the air movement with an anemometer and smoke tube, and did not see any air movement or methane in any of the five headings in the fifth and fourth set of headings.[5] In the No. 4 heading of the third set of headings, he noted no air movement, but 6/10 of a percent of methane. He issued an order alleging a violation of 30 C.F.R. ' 75.321(a)(1) which in essence requires that the velocity of air should be sufficient to dilute harmful gases. Hubb did not contest the violation. Based upon Day=s testimony, I find that Hubb did violate section 75.321(a)(1).

According to Day, the violation was significant and substantial. He explained that although miners are normally not in the cited areas, they do go there weekly in order to examine them. He indicated that due to the buildup of methane an explosion could have occurred resulting in a fatality or serious injuries to the miners present. He noted that rocks in the bottom and top of the headings in the area could fall and cause sparks which could lead to an ignition. In this connection he noted the presence of loose rocks in the third set of headings. Further, Day indicated that since methane replaces oxygen in the air, in the absence of air movement miners could suffocate. He opined that for all the above reasons, severe injuries or an explosion were highly likely to have occurred as a result of the violative conditions.

On cross-examination Day conceded that the mine is equipped with methane detectors, that the highest methane reading that he had observed was 6/10 of a percent which is below the explosive range or between 5 to 15 percent, and that not all rocks cause sparks.

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[5]/ Each set of headings consists of five headings.

I find that the weight of the evidence establishes that there was a lack of air movement in the cited area, and methane and a source for sparks were present which could have caused an ignition. Also, given continued mining operations, miners would be present in the area performing examinations. Given this combination of factors, I find that it has been established that the violations were significant and substantial. (see, *Mathies*, supra).

According to Day, the violation was as a result of Hubb=s unwarrantable failure. In this connection, he testified that Awhen this condition was found@ (Tr. 387), Bran Whitaker, Hubb=s agent who was present, told him that he knew where the problem was. Whitaker took Day to another area where a curtain was nailed to the roof and ribs, and secured to the bottom to make it air tight in order to block the air from going to the section at issue, and to send it to the No. 6 section.

Hubb=s president, James Hubbard, indicated that prior to the issuance of the order at issue he did not know that a curtain had been placed to block air from going to the section at issue. Once he was informed of the issuance of the instant citation, he investigated the matter. He indicated that he ascertained that Hubb=s former superintendent, Johnny Littrell, who subsequently quit, had directed that a curtain be installed A. . . to improve air movement on the working section@ (Tr. 419). He also indicated that Whitaker knew that this had been done, and that he was subsequently terminated by Hubb in January 1997. Hubbard indicated that it was Hubb=s policy to vent air to the old works, and that Littrell should have removed the curtain.

I find that Lettrell=s actions, as superintendent at the time, are the actions of Hubb. I find therefore that since Hubb did intentionally prevent air from going to the old works, and thus caused the violation at issue, its actions reached the level of aggravated conduct. Thus, I find that the violation resulted from its unwarrantable failure. (see, *Emery*, supra).

I find that the order at issue shall be affirmed as written. I find that the level of gravity was high inasmuch as a fatality could have resulted. Similarly, the level of Hubb=s negligence was high for the reasons set forth above. I find that a penalty of $5,000 is appropriate.

V. Citation Nos. 4483651, 4483652, 4483655, and 4483658.

Between close to midnight April 6, 1996, and approximately 7:30 a.m., April 7, 1996, Larry Bush, an MSHA inspector, inspected four underground power centers at Hubb=s Mine No. 5. He said that the power centers were 10 to 12 feet long, 5 to 6 feet wide, and 28 to 32 inches high. They were provided with a window of clear glass, approximately 1 foot by 6 inches. A 7,200 volt cable led into the power center on one side. The other side contained reciprocals for utility plugs and provided 480 volts.

According to Bush, all four power centers had accumulations of float coal and rock dust on them. He noted that the No. 8 power center, which located the furthest inby, had float coal dust that was darker and more concentrated than the power centers Nos. 4 and 6 which were further outby.

Bush shined his cap light through the window of the power centers and saw accumulations on the interior components. He did not measure the depth of the accumulations, nor did he test the composition of the accumulations. Bush issued one citation for each of the power centers. Each citation alleges a violation of 30 C.F.R. ' 75.400 which provides in essence, that Acoal dust . . . and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on . . . electrical equipment therein.@

On the third shift the day after the power boxes has been cited, Hubbard took photographs of each box. According to Hubbard, he removed the accumulated material from inside of each box and placed it in a separate bottle for each box with the exception of the material inside power box No. 4 which he stated was not enough to sample. Later on that week, Hubbard took the samples to Blue Diamond Laboratories. (ABlue Diamond@). The person who tested the material Hubbard had removed from the power centers was not called by Hubb to testify. However, Hubb introduced into evidence a deposition of Nancy Stidman, a supervisor at Blue Diamond, who had tested the sample, and concluded that the material was not coal, coal dust or combustible material.

In order to establish that Hubb violated section 75.400, supra, the Secretary has the burden of proving that the material in the power centers consisted of Acoal dust, . . . and other combustible materials . . . .@ The inspector testified that he saw float coal dust and coal dust on all the power centers, and in the interior of the power centers, with higher concentrations of float coal dust in the inby power centers. However, he did not explain with any detail the basis for his conclusion that the materials consisted of float coal dust. He did not touch nor test the materials. On the other hand, photographs taken of the interiors of the power centers one day after the citations had been issued and before any abatement had occurred, do not appear to depict any accumulations black in color. Further, the deposition of Stidman indicates that the materials that were tested were found to be not combustible.

Within the above framework, I find that since the totality of Hubb=s evidence contains the basically uncorroborated hearsay deposition of Stidamn, it is insufficient to affirmatively establish that the accumulated materials were not combustible. (see, *Midcontinent Resources, Inc*., 6 FMSHRC 1132 at 1136-1137 (1984)). However, considering the fact that the Secretary=s witness did not provide a basis for his opinion, nor was it supported by testing or close examination of the material inside the power box, I find that the totality of Hubb=s evidence is sufficient to rebut the Secretary=s evidence. I thus conclude that the Secretary has failed to meet its burden of proving that the accumulated materials consisted of float coal dust and other combustible materials. For these reasons, I find that these citations shall be dismissed.

VI. Citation No. 4483656.

On April 7, 1996, MSHA Inspector Larry Bush inspected the 7,200 volt cable leading to the No. 7 power center. The cable consisted of an insulated outer jacket, three insulated leads, one insulated ground, and two ground leads that were not insulated, all contained under the outer insulated jacket. Bush observed an area of the cable, approximately 2 inches long, that was broken, and torn to a width of approximately 1/8 to 1/4 inch. He indicated that only the outer

jacket had been damaged. However, he was able to see one lead through the tear. He issued a citation alleging a violation of 30 C.F.R. ' 75.517 which requires that cables Ashall be insulated adequately and fully protected.@

Hubbard examined the cable on the evening of day after it had been cited, and before the violation had been abated. He took pictures of the cable which do not appear to indicate any cut in the cable. Hubbard testified that he saw a Amarred@ (Tr. 527, 529) area on the cable that was about 2 inches long, but that A[b]arely@(Tr. 530) penetrated below the surface. He estimated that the penetration below the surface was approximately 1/10 of the total depth of outer jacket. Hubbard testified that no internal leads were exposed.

In evaluating the condition of the cable, I place more weight on the live testimony of eyewitnesses rather on the photographs which are not that clear. I observed Bush=s demeanor and found his testimony credible regarding his observations. Also, Hubbard conceded that a cut in the outer insulation of the cable approximately 2 inches long penetrated below the surface. I thus find that it has been established that the cable was not Aadequately and fully protected.@ (emphasis added). Accordingly, I conclude that Hubb did violate section 75.517 supra.

According to Bush, the cable is subject to pre-shift examination and weekly checks. He opined that those persons who check the cable would possibly be subject to shock and burns in contacting the not fully insulated cable. He also indicated that this condition could lead to a fire. However, since, even according to Bush=s testimony the cut extended only 2 inches, and the leads under the outer insulation were fully and adequately protected, I find that it has not been established that the violation was significant and substantial. (see, *Mathies*, supra).

I find that the violation was of a moderately serious level inasmuch as it could have led to a fire or serious injuries. According to Bush, since the cable should be checked weekly and since the operator has to check it daily for hazards, any inspection of the cable should have revealed that it was not Afully protected.@ However, there is no evidence in the record as to when the violative condition occurred. I thus find that it has not been established that the Respondent=s negligence was more moderate. I find that a penalty of $50 is appropriate for this violation.

VII. Citation Nos. 4483701 and 4483703.

On April 7, 1997, while inspecting the 005 Section, Bush observed an accumulation of oil, oil soaked oil, and coal dust on a roof drill. He said that the oil soaked coal around the blower motor was 1 to 2 inches deep, and contained lumps of coal and dust. He also observed oil that he described as clear hydraulic oil, oil soaked dust, dust black in color, lumps that looked Agreasey black@ (Tr. 566), and gray rock dusted material on a pump motor. He issued a citation for each of these motors. Each citation alleges a violation of section 75.400 supra.

Respondent did not impeach the credibility of the inspector=s testimony. Nor did it present any testimony of any eyewitnesses to contradict or rebut Bush=s testimony regarding the conditions he observed. I therefore accept his testimony and find that the conditions described by

him did exist, and that accordingly Hubb did violate section 75.400, supra, as set forth in the two citations at issue.

Bush opined that both these citations were significant and substantial. He referred to the fact that oil is a source of fire, and oil soaked coal is volatile, and Aextremely@ hard to extinguish (Tr. 556). He also set forth various ignition sources such as electrical motors and components which he termed Acommon source(s) of failure@ (Tr 557). He indicated that these items and the couplers and belts are friction sources should they fail. He noted that the couplers Acan . . . throw sparks . . . not sparks but hot metal off when they fail@ (Tr. 557). He also noted that the belts Ashould they stall or burn . . . heat real quick and can cause fire@ (Tr. 557) (sic).

Hubb did not present any eyewitness testimony to discredit, impeach, or contradict Bush=s testimony regarding the existence of these conditions. Thus, I accept his testimony and his opinions, and conclude that the violations were significant and substantial. (See, *Mathies*, supra).

Inasmuch as the violations could have resulted in a fire which could have caused serious injuries, I find that the violations were of a high level of gravity. Bush opined that the areas cited are required to be visually checked prior to the start of the shift, and that electrical equipment are to be checked weekly for hazards. He therefore opined that Hubb should have been aware of the volative conditions. Hubbard testified that in general it is Hubb=s policy to clear accumulations of coal, dust, and oil prior to every shift, and that miners are so informed in meetings. He said that this policy is enforced by the mine superintendent. There is no evidence regarding how long the accumulations had existed prior to being cited. I thus find that the level of Hubb=s negligence was less than moderate. I find that a penalty of $175 for each of these citations is appropriate.

VIII. Citation No. 4483704.

Bush testified that in the course of his April 7, 1997, inspection he noted that the hose on the fire suppression system on the shuttle car on the 005 section was loose. He cited Hubb alleging a violation of 30 C.F.R. ' 75.1107 which, in essence, requires that fire suppression devices be installed on unattended underground equipment. Respondent did not present any witnesses to rebut, impeach or contradict Bush=s testimony regarding his observations. I thus find that although the shuttle car was provided with a fire suppression system it was not installed properly because the hose was not affixed adequately as it was loose. I thus find that it has been established that Hubb did violate section 75.1107, supra.

Bush indicated that the fire suppression system is the first source of fire fighting capability in the event of a fire. He noted that the subject shuttle car had been cited for an accumulation of oil and coal dust. Hubb did not present any eyewitness testimony to impeach or contradict these observations. I thus find the violation was significant and substantial. (see, *Mathies*, supra).

Bush indicated that Hubb is required to check all equipment prior to the start-up at each shift, and examine the equipment weekly for hazards. However, there is no evidence how long a period the hose was loose prior to its being cited by Bush. I thus find that Hubb=s negligence was less than moderate. I find that a penalty of $200 is appropriate.

ORDER

It is **ORDERED** that:

(1) Citation Nos. 4582462, 4483651, 4483652, 4483655, and 4483658 be **DISMISSED**;

(2) Order Nos. 4582535 and 4582536 each be **AMENDED** to a section 104(a) citation that is significant and substantial;

(3) Order No. 3822739 and Citation Nos. 4483701, 4483703, and 4483704 be **AFFIRMED** as written;

(4) Citation No. 4483656 be **AMENDED** to cite a nonsignificant and substantial violation; and

(5) Hubb pay a total penalty of $15,616 within 30 days of this decision.

Avram Weisberger
Administrative Law Judge

Distribution:

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