FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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January 19, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 99-129
Petitioner	:	A. C. No. 15-16666-03539
v.	:	
	:	Mine No. 3
WILLIAMS BROTHERS COAL CO., INC.,	:	
Respondent	:	

DECISION

Appearances: J. Phillip Giannikas, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
Hufford Williams, President, Williams Brothers Coal Company, Inc., Mouthcard, Kentucky, *Pro Se*.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Williams Brothers Coal Company, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges eight violations of the Secretary's mandatory health and safety standards and seeks a penalty of $642.00. A hearing was held in Pikeville, Kentucky. For the reasons set forth below, I modify four citations, affirm all of the citations and assess a penalty of $561.00.

Background

The No. 3 Mine is a small, underground coal mine operated by Williams Brothers Coal Company in Pike County, Kentucky. Coal is mined by continuous miner and is removed from the mine by a 6,000 foot conveyor belt-line. The height of the coal seam, and thus the height of the mine, is approximately 35 inches.

On Monday, September 21, 1998, MSHA Inspector, and electrical specialist, Kedrick Sanders began a quarterly inspection of the No. 3 mine. On that day, Sanders observed what he considered to be two violations of the Secretary's regulations. One concerned the failure to properly ground a battery charging system for the mine personnel carrier and the other dealt with

a failure to keep records of inspections of surface electrical installations. However, rather than issue citations, Sanders merely advised Hufford Williams what he should do to comply with the regulations.

Sanders returned to the mine on Thursday, September 24, to continue the inspection. He determined that neither of the electrical violations had been corrected and issued a citation for the battery charger. Sanders then accompanied Terry Williams, the mine foreman and Hufford Williams' nephew, underground. On arriving at the working section, Sanders noticed an employee lying in the conveyor boom of a continuous miner. Concluding that the continuous miner had not been properly de-energized, Sanders informed Terry Williams that he was issuing a citation for the violation. A heated conversation followed, the result of which was that Terry Williams refused to give the inspector a ride out of the mine, forcing him to have to crawl along the entire belt-line to the mine's surface.

When the MSHA Sub-District Manager learned of the tensions developing at the mine, he sent MSHA Electrical Engineer and Inspector Mark Bartley to attempt to defuse the situation. One of the first things that he did was to send Sanders home for the day.

On Friday, Sanders, MSHA Inspector Tommy Caudill and MSHA Supervisor Sam Harris returned to the mine to continue the inspection. Sanders and Caudill again inspected the belt-line. At the end of the day, Sanders issued citations for the failure to record examinations of surface electrical installations that he had observed the day before, for failure to properly maintain the No. 1 belt-line, for accumulations along the entire belt-line, which he had observed while crawling out the day before, and for a guarding violation at the No. 3 belt head drive. Caudill issued citations for failure to have an up-to-date mine map and for a non-functioning fire sensory system.

A total of eight citations were issued by Sanders and Caudill. The Respondent has contested all of them. They will be discussed *seriatim* in this decision.

Findings of Fact and Conclusions of Law

Citation No. 4515012

This citation alleges a violation of section 77.701 of the Secretary's regulations, 30 C.F.R. § 77.701, because: "Suitable frame grounding is not being provided for the Damascus Pneumatics Corp. personnel carrier. No frame grounding conductor is connected from the metallic frame of the unit to the 110 VAC 1-phase battery charger while the batteries are being charged." (Govt. Exs. 2 & 3.) Section 77.701 requires that: "Metallic frames, casings, and other enclosures of electric equipment that can become 'alive' through failure of insulation or by contact with energized parts shall be grounded by methods approved by an authorized representative of the Secretary."

Inspector Sanders testified, as set out in the citation, that there was no frame grounding extending from the battery charger to the personnel carrier. He stated that this grounding was necessary "because in case of a fault condition, the metallic frame can become alive. In other

words, it can be energized. The person who would come in contact with that metallic frame could receive electric shock and could be seriously injured." (Tr. 222.) His opinion was corroborated by Inspector Bartley.

It is the Respondent's position that no additional grounding was necessary. Mr. Williams argues that the battery charger is "protected by the manufacturer's safeguards . . . [and] [t]here is no safety hazard present in using this charger in it's original condition." (Resp. Br. at 1.)

There is no dispute that there was no frame grounding between the charger and the carrier. As to whether the grounding is required by the regulation, I accept the opinions of Inspector Sanders, who has a bachelor's degree in Industrial Education with a specialization in industrial electricity and who is an electrical specialist, and Inspector Bartley, who has a degree in Electrical Engineering, that it is, over the opinion of Mr. Williams.[1] Accordingly, I conclude that the company violated the regulation as alleged.

Citation No. 4515013

This citation charges a violation of section 75.1725(c), 30 C.F.R. § 75.1725(c), since: "A person was observed working on the water sprays in the throat of the Joy continuous miner. The person was lying in the conveyor. The conveyor was not blocked against motion and the power to the unit was not de-energized and disconnected from the section power center." (Govt. Ex. 4.) Section 75.1725(c) provides that: "Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments."

The facts surrounding this violation are not disputed. A miner was lying in the conveyor of the continuous miner working on the water sprays. The circuit breaker on board the continuous miner was in the "off" position, but the power cable for the continuous miner had not been disconnected from the power center. The inspector testified that the regulation requires "that the power be de-energized with a visible disconnect at the section power center." (Tr. 275.) The Respondent argues that when the circuit breaker is in the "off" position, the power is "off."

Inspector Sanders testified that a circuit breaker is not a suitable means of disconnecting power "[b]ecause you cannot visibly see the contacts. The lever could . . . be in the off position, but the contacts could still be in the closed position." (Tr. 277-78.) Inspector Bartley concurred in this assessment and added that "carbon tracking" from repetitive use could occur, which could conduct electricity. (Tr. 295.) Further, this has been the position of the Secretary since at least April 1990 as evidenced by the statement in MSHA's *Program Policy Manual* that: "The

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[1] In support of his opinion, the Respondent submitted a copy of a January 2, 1979, letter from the Administrator for Coal Mine Safety and Health to J. and R. Manufacturing, Inc. (Resp's Ex. A.) However, since the letter concerns the propriety of using the connector housing between male and female battery connectors for grounding purposes, it is not relevant. Moreover, to the extent that it deals at all with grounding between the charger and the carrier, the diagram on page 4 indicates that there should be a "[g]rounding conductor from the battery charger frame to battery tray(s)." (*Id.*)

trailing cable shall be disconnected from the source of power before repairs are made on portable or mobile equipment, except when the equipment must be operated for making adjustments." Department of Labor, Mine Safety and Health Administration, *Program Policy Manual*, Vol. 5, 159 (04/01/90) (Govt. Ex. 7.)

A circuit breaker is: "An overload protective device installed in the positive circuit to interrupt the flow of electric current when it becomes excessive or merely exceeds a predetermined value." Bureau of Mines, U.S. Department of Interior, *Dictionary of Mining, Mineral and Related Terms*, 210 (1968). Since a circuit breaker is designed to interrupt the flow of *excessive* current, it is apparent that it is not designed to be an "on/off" switch under normal conditions. Thus, the inspectors' testimony that the contacts in the circuit breaker could still be in the closed position, and conduct normal current, even when it is set in the "off" position, is not inconsistent with the purpose of a circuit breaker. Indeed, even Mr. Williams admitted that in his 33 years in mining, he had seen "circuit breakers burn in." (Tr. 301.)

Therefore, I accept the inspectors' opinion, which is corroborated by the *Program Policy Manual*, that the only way to be sure that the power is off is to disconnect it at the power source. Since the Respondent did not do this, I conclude that it violated section 75.1725(c) as alleged.

Significant and Substantial

The Inspector found this violation to be "significant and substantial." A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the 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." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out four criteria that have to be met for a violation to be S&S. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987)(approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

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

Inspector Sanders testified that he believed that the violation was S&S because "with the position that this person was on the continuous miner, should there be a failure of a circuit breaker and should a person inadvertently hit the start switch on this or should a fault occur in the start switch, this conveyor could be started, the man could be crushed to death." (Tr. 282.) It is apparent that a confluence of factors would have to occur before this violation could result in a serious injury.

The Secretary did not present any evidence that the circuit breaker was faulty. In fact, in checking the continuous miner for permissibility the next day, the inspector was satisfied for his own safety when only the circuit breaker was placed in the off position; he did not disconnect the trailing cable from the power source. (Tr. 304.) In addition, while the miner, who was the continuous miner operator, was working on the sprays, the remote control for the continuous miner had been disconnected from his cap light battery, the circuit breaker had been placed in the "off" position and the machines headlights had gone out. All of this indicated that the continuous miner was not powered. Finally, Inspector Bartley testified that the motor on the machine would "typically not" start under the circumstances apparently present at the time of the inspection. (Tr. 297-98.)

Turning to the second factor suggested by the inspector, that someone could inadvertently hit the start switch, it is apparent from the picture of a continuous miner submitted by the Secretary, that the operator was not working anywhere near the start switch. (Govt. Ex. 6 at 3.) Thus, it is unlikely that he would inadvertently hit it. According to the evidence, the only other people present while these repairs were taking place were the inspector and the section foreman accompanying him. They were not likely to accidentally hit it. Likewise, the Secretary did not present any evidence that the start switch was faulty.

Based on the Secretary's evidence, I find that it is unlikely that the circuit breaker had a fault in it, it is unlikely that someone would inadvertently hit the start switch and it is unlikely that the start switch had a fault. I find it even more unlikely that all of these problems would occur in such a way as to start the continuous miner. Consequently, I conclude that the violation was not "significant and substantial" and will modify the citation accordingly.

Citation No. 4515014

This citation presents a violation of section 75.400, 30 C.F.R. § 75.400, stating:

> Based on conditions observed 09-24-98, combustible material in the form of loose coal, coal fines and coal dust is present in numerous intermittent locations along side, and under the conveyor belts nos. one through no. 4. The accumulation is present in depths from ½ inch to approximately 6 inches. The accumulation apparently occurred over a period of time. The material is dry and dusty in some locations.

(Govt. Ex. 11.) Section 75.400 provides that: "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein."

Inspector Sanders testified that he first observed these accumulations while crawling the length of the belt-line on September 24. Then he and Inspector Caudill traveled the entire belt-line from the outside on the next day. They both testified that the accumulations were worst along the No. 1 belt, in some instances being so high that the belt rollers were turning in the accumulations. They agreed that there were accumulations situated at various locations along the remaining belt-lines, so that approximately 50 percent of the belt-lines, other than No. 1, had accumulations along them.

The operator did not present any evidence that there were no accumulations. Its only witness, Mr. Williams, testified that he did not travel any of the belt-lines. In fact, the company's main defense is that the accumulations were too wet to burn.

This defense, in turn, is based on a laboratory analysis of four buckets of material that the company submitted to Standard Laboratories, Inc. The lab report states that: "The following analysis does not indicate that this particular coal sample is a fire hazard, due to high moisture & ash content & low BTU value." (Resp. Ex. B.) It is apparent, however, that the sample did not present the accumulations as they existed when observed by the inspectors. Mr. Williams testified that to clean up the accumulations, he turned off the belts and had his miners shovel the accumulations onto the belts. Then he had the belts started and he took a sample of the material that was on each belt, four in all, and placed it in a bucket.

As noted by the Secretary, this method of collecting samples made the samples unrepresentative because, "it is clear that any dry coal accumulations--dry accumulations that both Inspectors Sanders and Caudill testified existed in the midst of predominately moist accumulations--would have been mixed with the wet accumulations such that they would lose their distinct identities as dry materials." (Sec. Br. at 10.) Thus, I find that this evidence fails to refute the testimony of the inspectors that at least some of the accumulations were dry.

The Commission has held that a construction of section 75.400 "that excludes loose coal that is wet or that allows accumulations of loose coal mixed with noncombustible materials, defeats Congress' intent to remove fuel sources from mines and permits potentially dangerous conditions to exist." *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1121 (August 1985). Accordingly, I conclude that Williams Brothers violated section 75.400.

Significant and Substantial

Over the objection of the Respondent, I granted the Secretary's motion to amend this citation to allege that the violation was "significant and substantial."[2] As is usual in S&S cases,

[2] Mr. Williams admitted that he would not have presented any different evidence than he did, if the citation had originally alleged that the violation was S&S. (Tr. 189.) As the

the issue is whether a reasonably serious injury would be reasonably likely to result from this violation. For this citation, the specific issue is whether the accumulations were combustible.

Both inspectors testified that there were several rollers in the No. 1 belt-line that were stuck and would not turn. They contended that the friction of the belt passing over the stuck rollers would create enough heat to ignite the accumulations, particularly in those areas where the rollers were actually in the accumulation. As noted above, they also testified that there were areas where the accumulations were dry enough to ignite.

While some of the accumulations were dry and combustible, most of the accumulations were wet. However, the fact that some of the coal accumulations were wet is not determinative of whether the violation is S&S, because "damp coal dries in the presence of fire." *Utah Power & Light Co.*, 12 FMSHRC 965, 970 (May 1990). Therefore, taking into consideration the ignition source from the rollers, the fact that in some places the rollers were actually in the coal accumulations, the extent of the accumulations and the fact that some of them were dry, I conclude that this violation was "significant and substantial."

Citation No. 4515015

A violation of section 77.502-2, 30 C.F.R. § 77.502-2, is alleged in this citation, which states: "The operator has no record of having made an examination of the surface electrical installations within the past month." (Govt. Ex. 1.) Section 77.502-2 requires that: "The examinations and tests required under the provision of this § 77.502 shall be conducted at least monthly." Section 77.502, 30 C.F.R. § 77.502, provides that: "Electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such examinations shall be kept."

Inspector Sanders testified that when he asked the Respondent to show him the electrical inspection records, he was shown a book which contained records of the monthly examinations of the high-voltage circuit breakers located on the mine surface. He stated that he advised Mr. Williams that the regulations also required examinations of other electrical equipment such as belt drives, stacker belts, charging stations, pump station facilities and other electrical facilities on the surface. The inspector related that he told Williams that a lot of operators were unaware of the requirement, so he was putting him on notice so he could start keeping the records.

Sanders said that when he returned three days later, the company had not recorded any examinations and Mr. Williams told him that he did not think that he was required to. As a consequence, the inspector issued the citation in question.

At the hearing, Mr. Williams reiterated his position that examination of the circuit breakers is all that he is required to do. (Tr. 214-18.) However, his argument is not persuasive.

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company clearly suffered no prejudice by amending the citation, I granted the motion. *Cyprus Empire Corporation,* 12 FMSHRC 911, 916 (May 1990).

Sections 77.800-1 and 77.800-2, 30 C.F.R. §§ 77.800-1 and 77.800-2, set out a specific requirement for examining circuit breakers and keeping a record of those examinations.[3] Plainly, section 77.502-2 is a different requirement. Accordingly, I conclude that the company violated the regulation by not having a record of the monthly examinations of the other surface electrical installations.

Citation No. 4515016

This citation alleges a violation of section 75.1725(a), 30 C.F.R. § 75.1725(a), because:

> Approximately 20 conveyor idler assemblies are defective on the No. 1 belt flight. There are approximately 30 individual idlers stuck and they are worn from the conveyor belt rubbing them. Damp coal and coal dust is deposited around the return idlers. The operator removed the belts from service.

(Govt. Ex. 10.) Section 75.1725(a) provides that: "Mobile and stationary equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

As note in the discussion concerning Citation No. 4515014, *supra*, Inspectors Sanders and Caudill traveled the length of the No. 1 belt-line. Inspector Sanders was on the "off" side of the belt and Inspector Caudill was on the "travel" side. They testified that they counted 30 rollers on the belt that would not turn and that some of the rollers had a flat space worn into them from the rubbing of the belt.

Mr. Williams testified that he did not examine the belt-line. (Tr. 183.) He did, however, offer two pages from the belt examiner's book which showed that on September 22 and September 25, the belt examiner noted that the No. 1 belt "needs structure replaced" and "needs structure changed."[4] (Resp's Ex. D.) No one else from the company testified.

Based on the evidence, I conclude that the Respondent violated section 75.1725(a) by not maintaining the No. 1 belt in safe operating condition.

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[3] Section 77.800-1 requires, in pertinent part, that: "(a) Circuit breakers and their auxiliary devices protecting high-voltage circuits to portable or mobile equipment shall be tested and examined at least once each month . . . ." Section 77.800-2 provides that: "The operator shall maintain a written record of each test, examination, repair, or adjustment of all circuit breakers protecting high-voltage circuits. Such record shall be kept in a book approved by the Secretary."

[4] The operator questions whether as many rollers as claimed by the inspectors were defective. He never asserted, however, that none were defective, and the examination book pages, as well as his testimony, indicate that the company was aware that some were bad. The exact number makes no difference in whether this was a violation.

Significant and Substantial

The inspector found this violation to be "significant and substantial." For the reasons enumerated in finding the violation in Citation No. 4515014 S&S, *supra*, I conclude that this violation was "significant and substantial."

Citation No. 4515017

This citation charges a violation of section 75.1722(a), 30 C.F.R. § 75.1722(a), because:

> Suitable mechanical guarding is not being provided at the No. 3 belt head drive. A hole approximately 2 inches by 18 inches is present where the sprocket chain has worn through the existing guarding. A hole approximately 4 inches in diameter is present in the gear covers where a person can come in contact with moving mechanical parts. The cover is missing from the coupling between the motor and speed reducer.

(Govt. Ex. 13.) Section 75.1722(a) requires that: "Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings, shafts; sawblades; fan inlets; and similar exposed machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded."

Inspector Sanders testified that in inspecting the guarding around the No. 3 belt's head drive, he observed that there was a hole in the guarding approximately 18 inches long and two inches high. The hole had apparently been worn through by the sprocket chain. He stated that there was another hole on the other side of the guard that measured approximately four inches in diameter. He believed that the holes were large enough that a miner could inadvertently slip his hand through them and come in contact with the moving machinery. Inspector Caudill corroborated this testimony.

The company did not present any evidence on this citation. It relies on an ambiguous comment of MSHA Supervisor Sam Harris, in a statement he made prior to the hearing, to show that there was no violation. Mr. Williams asked him "regarding Citation number 4545017--about measuring a hole at the No. 3 belt," if that was a violation in his opinion. (Jt. Ex. 1 at 7.) Harris responded: "If there is a pinch point they are regulated [*sic*] to guard it. Couldn't get a finger let alone a hand through the opening." (*Id.*)

I accept the testimony of Inspectors Sanders and Caudill on this citation. Based on their description of the size of the two holes, it is apparent that a miner's hand could fit through the openings. If the Respondent believed that the holes were not as large as described by the inspectors, it should have measured the holes or otherwise presented evidence to rebut the inspectors' testimony. Mr. Harris' statement fails to do that. In the first place, he only mentions one opening. In the second place, it is not clear whether he is talking about the holes in the guard or the guard that was missing from the coupling that connected the electric motor to the speed reducer. Finally, he provided no description of the openings.

With respect to the missing coupling cover, the Secretary's evidence is not sufficient to establish that this was a violation. However, since the two holes in the guarding are clearly violations, I conclude that the company violated section 75.1722(a).

Significant and Substantial

Both inspectors testified that the area around the head drive was wet and slippery, that the drive required daily maintenance, necessitating someone to be in close proximity to it every day, and that a slip, fall or stumble could result in a hand going through the opening and being seriously injured by being caught in the moving machinery. On the other hand, as pointed out by the Respondent, the miners in this mine are working in "low coal" and both of the holes in the guarding are small. This means that the miners are working on their hands and knees, or their backs, and are, therefore, not as likely to slip and fall as someone working on his feet. In addition, while a hand could fit through the holes in the guarding, the chances of sticking a hand directly through the hole by inadvertence appears improbable.

Accordingly, I find that there was not a reasonable likelihood that a serious injury could result to a miner, in the normal course of mining, from this violation and that the violation is, therefore, not "significant and substantial." The citation will be modified appropriately.

Citation No. 7349834

This citation charges a violation of section 75.1200, 30 C.F.R. § 75.1200, because: "The 75-1200 mine map that was posted in the mine office for the purpose of showing the active workings, ventilation controls, and worked out areas, was not accurate. This was due to the certified map did not show pillared out areas, nor approved mp's. on this map." (Govt. Ex. 8.) Section 75.1200 requires, in pertinent part, that:

> The operator of a coal mine shall have in a fireproof repository located in an area on the surface of the mine chosen by the mine operator to minimize the danger of destruction by fire or other hazard, an accurate and up-to-date map of such mine drawn on scale. Such map shall show:
>
> (a) The active workings;
>
> (b) All pillared, worked out, and abandoned areas . . . .

Inspector Caudill testified that when he asked Mr. Williams to show him on the mine map hanging on the mine office wall where the active section was, Mr. Williams pointed to an area that was not marked on the map. He related that Mr. Williams showed him three different maps and not one of them accurately reflected where the active mining was taking place or reflected areas where pillaring had been completed.

Mr. Williams admitted that the top map did not show all of the areas in which pillaring had been completed. He testified that: "[I]n replacing this map to satisfy the state, I had to get a new map to put up and the map — it took a certain amount of time to have the map printed up

and so on. And so we pulled some pillars during that time which were not shown on the map, which I would have had to have marked on myself." (Tr. 339-40.)

Finding that the Respondent did not have an "up-to-date" mine map as required by the regulation, I conclude that the company violated section 75.1200.

Citation No. 7349838

This citation alleges a violation of section 75.1103-1, 30 C.F.R. § 75.1103-1, because: "The fire sensor system that was provided for the company — 1, 2, 3, and 4 belt lines would not work when tested." (Govt. Ex. 12.) Section 75.1103-1 requires that: "A fire sensor system shall be installed on each underground belt conveyor. Sensors so installed shall be of a type which will (a) give warning automatically when a fire occurs on or near such belt; (b) provide both audible and visual signals that permit rapid location of the fire."

Inspectors Caudill and Sanders testified that Caudill tested the fire sensor system several times by placing a magnet on the sensor mechanism at the No. 2 belt head drive. Nothing happened. No warning signal occurred at their location and no telephone or other communication was received from the surface to alert them to the danger.[5]

Both inspectors reported seeing wires on the floor of the mine, which they believed to be part of the system, that had been severed in several places. Inspector Caudill also testified that when he arrived at the surface, he observed that the key to the sensor system was "turned off." (Tr. 113.)

The Respondent contends that wires are frequently severed in the mine and are replaced, but not removed, and that there was an active wire for the system. He also maintains that the key that Caudill observed to be off, does not turn off the system, but only turns off the sirens.

Inherent in section 75.1103-1 is a requirement that the system be functional. *Cf. Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 998 (June 1997) (requirement that conveyor belt be equipped with slippage and sequence switches means *functional* switches); *Fluor Daniel, Inc.*, 18 FMSHRC 1143, 1145-46 (July 1996) (requirement that self-propelled mobile equipment be equipped with a service brake system means *functioning* system); *Mettiki Coal Corp.*, 14

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[5] Section 75.1103-5, 30 C.F.R. § 75.1103-5, provides, in pertinent part, that:

> (a) Automatic fire sensor and warning device systems shall upon activation provide an effective warning signal at either of the following locations:
>
> (1) At all work locations where men may be endangered from a fire at the belt flight; or
>
> (2) At a manned location where personnel have an assigned post of duty and have telephone or equivalent communication with all men who may be endangered.

FMSHRC 760, 768 (May 1991) ("switches to be used to lock out electrical equipment must be equipped with *functioning* lockout devices") (emphasis added). For whatever reason, when tested, the system did not function.

Consequently, I conclude that the Respondent violated section 75.1103-1.

Significant and Substantial

The inspector found this violation to be "significant and substantial." Considering the accumulations along the belt lines and the ignition sources present, it takes little imagination to find that this violation was reasonably likely to result in a serious injury, in the normal course of mining. Therefore, I conclude that the violation was "significant and substantial."

Civil Penalty Assessment

The Secretary has proposed a penalty of $642.00 for these violations. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with the civil penalty criteria, the parties have stipulated, and I so find, that: (1) The Respondent "demonstrated good faith in abating" the violations; (2) "Reasonable penalties will not affect the ability of [the company] to remain in business;" (3) The "No. 3 Mine is a small size coal mine;" and (4) "Williams Brothers Coal Company is a small size mine operator." (Jt. Ex. 3.) Based on the Respondent's Assessed Violation History Report, (Jt. Ex. 2), I find that the Respondent has a good previous violation history.

I agree with the inspectors that the operator's negligence for all of the violations was "moderate," with the exception of Citation No. 7349834, the mine map violation, where I find that it was "low." With regard to gravity, I find that the gravity of Citation Nos. 4515014, 4515016 and 7349838 was serious and with regard to the remaining citations it was not so serious.

Taking all of these criteria into consideration, I assess a civil penalty of $561.00, broken down as follows:

Citation No.	Penalty
4515012	$ 55.00
4515013	$ 55.00
4515014	$ 97.00
4515015	$ 55.00
4515016	$ 97.00
4515017	$ 55.00

7349834		$ 50.00
7349838		$ 97.00
	Total	$561.00

Order

Citation Nos. 4515012, 4515015, 4515016 and 7349838 are **AFFIRMED**; Citation No. 4515014 is **MODIFIED**, in accordance with the motion of the Secretary granted at the hearing, in section 10, to state that an injury is "reasonably likely" and that the violation is "significant and substantial" and is **AFFIRMED** as modified; Citation Nos. 4515013 and 4515017 are **MODIFIED** by deleting the "significant and substantial" designations and are **AFFIRMED** as modified; and Citation No. 7349834 is **MODIFIED** by reducing the level of negligence from "moderate" to "low" and is **AFFIRMED** as modified.

Williams Brothers Coal Co., Inc., is **ORDERED TO PAY** a civil penalty of **$561.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

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