

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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November 29, 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 95-178
Petitioner : A.C. No. 01-01247-04185
v. :
: Docket No. SE 95-185
JIM WALTERS RESOURCES, INC., : A.C. No. 01-01247-04159
Respondent :
: No. 4 Mine
:
: Docket No. SE 95-256
: A.C. No. 01-01401-04071
:
: No. 7 Mine

DECISION

Appearances: Carla J. Gunnin, Esq., Office of the Solicitor,
U.S. Department of Labor, Birmingham, Alabama,
for the Petitioner;
R. Stanley Morrow, Esq., Jim Walter Resources,
Inc., Brookwood, Alabama, for the Respondent.

Before: Judge Feldman

These matters are before me as a result of petitions for civil penalties filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq., (the Act). The hearing in these proceedings was conducted on October 18, 1995, in Hoover, Alabama. Pertinent stipulations concerning jurisdiction and statutory civil penalty criteria are of record.

At the hearing, the parties moved to settle the citations associated with Docket Nos. SE 95-178¹ and SE 95-185 in their entirety. Remaining Docket No. SE 95-256 concerns 18 citations

¹ Docket No. SE 95-178 only concerns 104(d)(2) Order No. 3183836. Two other unrelated citations were erroneously included in the proposed assessment and were subsequently deleted.

issued under 104(a) of the Act, and, 104(d)(2) Order No. 3184069. The parties moved to settle all 18 of the citations issued in Docket No. SE 95-256. However, the parties failed to reach agreement on Order No. 3184069. (Tr. 10-19).

The parties' settlement motions were presented and approved on the record after the settlement terms were determined to be consistent with the civil penalty criteria in section 110(i) of the Act, 30 U.S.C. ' 820(i). A summary of the approved settlement terms is incorporated in this decision.

The only matter heard was 104(d)(2) Order No. 3184069. At the conclusion of the hearing, the parties elected to make closing statements in lieu of filing post-hearing briefs. This decision formalizes the bench decision issued at the conclusion of the parties' closing presentations.

Order No. 3184069 was issued on August 31, 1994, by Mine Safety and Health Administration (MSHA) Inspector John Terpo. Terpo issued the Order as a result of a 103(g) complaint by Keith Plylar who is the UMWA Chairman of the Health and Safety Committee at the respondent's No. 7 Mine.² The Order was issued after Terpo, consistent with Plylar's complaint, observed extensive coal dust accumulations at the West B belt header extending inby approximately 7,000 feet in violation of the mandatory safety standard in section 75.400, 30 C.F.R. ' 75.400. This mandatory standard provides:

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 electric equipment therein.

At trial, the respondent stipulated to the fact of occurrence of the cited section 75.400 violation. (Tr. 100-01). Therefore, the outstanding issues are whether the violative condition was properly designated as significant and substantial, and, whether the violation was attributable to the respondent's unwarrantable failure.

² Section 103(g)(2) of the Act, 30 U.S.C. ' 813(g)(2), authorizes any miner, or, a miner's representative, to provide written notification of an alleged violation of a mandatory safety standard to an MSHA inspector prior to or during an inspection.

The essential facts are not in dispute and can be briefly stated. For approximately one month prior to the August 31, 1994, issuance of the subject Order, Plylar complained to mine officials including foreman Larry Morgan, and deputy manager Charlie Beasley, about malfunctions in the West B belt. The malfunctions consisted of misalignments in the beltline that caused the belt to cut into the belt structure resulting in significant coal dust accumulations and float coal dust. Plylar testified mine management ignored his verbal complaints despite acknowledging that the beltline was defective. The safety committee subsequently performed its bi-monthly inspection on August 18, 1994, at which time committee members provided each shift foreman and the deputy mine manager with a written inspection report that noted the West B belt malfunctions and coal dust accumulations.

Plylar's testimony was corroborated by the preshift examination book. Pertinent coal dust accumulations were repeatedly noted in the preshift examination book prior to Terpo's inspection during the period from August 25 through August 31, 1994. (Ex. R-1). For example, the preshift book reflects the following number of people were assigned to clean the West B belt on the days preceding Terpo's inspection: two people on August 25, 1994; five people on August 26, 1994; five people on August 28, 1994; four people on August 30, 1994; and five people on August 31, 1994. The evening preshift notation reflects 39 people were assigned to clean the West B belt for eight hours on August 31, 1994, after Terpo issued Order No. 3184069. Id.

On the morning of August 31, 1994, Terpo arrived at the respondent's No. 7 mine to conduct a routine inspection. Terpo was approached by Plylar and given a written complaint concerning hazardous accumulations along the West B belt. Terpo provided copies of Plylar's complaint to mine management and proceeded to inspect the subject area in the presence of Plylar, day shift foreman Paul Phillips and deputy mine manager Beasley. They began at the West B belt discharge point and walked the entire 7,000 feet length of the belt from the header to the tail.

The West B belt is located in the No. 3 entry. The No. 3 entry is 24 feet wide from the left to right rib. The West B belt is 54 inches wide and runs on lower rollers that vary in height from four to 12 inches from the surface depending upon the pitch of the mine floor. The back side of the West B belt is between 24 and 36 inches away from the left rib. The front side of the belt is approximately four feet from the No. 3 track and 10 to 12 feet from the right rib. (Joint Ex. 1). Thus, dust

accumulations are more accessible, for cleaning purposes, on the front side rather than the back side of the belt. In this regard, accumulations can be shoveled from the front side without deenergizing the belt. In contrast, cleanup of accumulations under the back side of the belt requires deenergizing the belt.

As a general proposition, Terpo testified the majority of the cited accumulations were located under the back side of the belt. Terpo observed coal dust and float coal dust accumulations approximately 24 inches in depth at the discharge point. Terpo also observed airborne float coal dust traveling approximately 350 feet downwind (in intake air) from the discharge point. The airborne float coal dust was created by bottom rows of rollers at the discharge point that were turning in coal dust. Terpo noted this float coal dust was accumulating on the belt drive motor and transmission case. The transmission case was extremely hot to the touch.

Terpo proceeded inby and at the No. 59 brattice where he observed two bottom rollers in coal dust 12 inches deep for a distance of 20 feet. These accumulations were under the back side of the belt. These rollers created very fine airborne float coal dust transported inby via the intake air. Terpo continued down the belt and noted four bottom rollers in accumulations 16 inches deep for 40 feet at the "F" track location between the 59th and 75th brattice. Further along the beltline, at the 75th brattice, Terpo observed four rollers in accumulations 14 inches in depth. One of these rollers was locked up which generated significant heat from the friction of the belt sliding on the stationary roller. (Tr. 130-31).

Terpo continued down the belt and observed four bottom rollers turning in 12 inches of accumulations for a distance of 40 feet at the G drop belt area; three bottom rollers turning in coal dust between the 80th and 81st brattices; two bad (stationary) rollers in coal dust 12 inches in depth for a distance of 60 feet between the 82nd and 83rd brattices; four rollers turning in ten inch deep coal dust for a distance of 40 feet at the 84th brattice; three rollers in 12 inches of coal for 30 feet at the 87th brattice; four rollers in 14 inches of coal dust for a distance of 100 feet at the 88th brattice; three rollers in 12 inches of coal for 20 feet at the 93rd brattice; and nine rollers in ten to 16 inches of coal dust for 100 feet two crosscuts inby the No. 2 belt discharge point.

Terpo testified that he considered the hot transmission box, and the locked up rollers, as significant ignition sources. Terpo also stated the numerous rollers turning in coal dust ground the coal dust into very fine particles which became

airborne by the intake air. The suspension of float coal dust traveled down the entire length of the belt along the air course as it split to the working sections. Terpo characterized the violative coal dust accumulations as significant and substantial in nature because of the likelihood of combustion due to the suspended float coal dust and combustible accumulations in the presence of multiple ignition sources along the entire length of the intake belt entry. In the event of fire, Terpo opined that the 21 persons who worked in the two working sections ventilated by the West B belt entry would be exposed to significant fire or smoke inhalation hazards.

Terpo issued 104(d)(2) Order No. 3184069 for the loose coal, coal dust and float coal dust accumulations that were present from the West B belt header inby approximately 7,000 feet. The Order noted these accumulations were previously noted in the preshift examination book.

Day shift assistant mine foreman Paul Phillips, who accompanied Terpo during his inspection, estimated coal accumulations over a total length of between 800 and 900 feet along the West B belt in addition to approximately 20 rollers that were turning in coal. (Tr. 196-97). Phillips and Terpo stated the accumulations were located primarily under back rollers and along the back side of the belt. Phillips testified 25 or 26 people were assigned to clean the West B belt from 8:50 a.m. until 11:00 p.m. on August 31, 1994, to abate Order No. 3184069. As noted above, the preshift examination book reflects 39 people were assigned to clean the West B belt for eight hours on August 31, 1994. The cleanup occurred while the belt was deenergized.

Based upon the testimony and exhibits in this matter, I issued the following bench decision which is edited with non-substantive changes:

The issues in this proceeding concern a violation of section 75.400 which prohibits the accumulation of combustible coal dust. Section 75.400 provides: "Coal dust, including float coal dust deposited on rock dusted surfaces, loose coal dust and other combustible materials shall be cleaned up and not be permitted to accumulate in active workings or on electrical equipment therein."

Thus, the dispositive issue is whether the respondent permitted the coal dust to accumulate. Mr. Morrow has stipulated to the fact of occurrence of the section 75.400 violation. Thus, the remaining questions are whether the violation was significant and substantial in nature, whether it was attributable to Jim Walter Resources= unwarrantable failure, and, the appropriate civil penalty to be assessed.

Addressing the first issue, to prevail on the significant and substantial question, the Commission's decision in Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), requires the Secretary to establish a reasonable likelihood that the hazard contributed to by the violation will result in an event in which there is a

serious injury. This issue must be viewed in the context of continued mining operations in the face of these continued violative accumulations. Halfway Incorporated, 8 FMSHRC 8, 13 (January 1986). Viewing this issue in its component parts, the hazard contributed to by the violation is the danger of combustion and the event is explosion and fire. The initial question is whether there was a reasonable likelihood that the violation would result in the event, i.e., fire.

The elements of combustion are suspension, fuel, oxygen and an ignition source. Here, there was significant airborne float coal dust (suspension) created by a combination of the numerous rollers operating in coal dust accumulations (fuel) and the intake air (oxygen) carrying the float coal dust suspension along the West B belt entry. With respect to the remaining element of an ignition source, the evidence reflects the coal suspensions and accumulated coal were in close proximity to heat generated from the belt cutting into the structure, as well as heat generated from the transmission box and tailpiece motor. In addition, these accumulations were also present near heat caused by belt movement over locked up rollers and heat resulting from completely worn bearings in inoperable rollers. When viewed in the context of continued mining operations, there was a reasonable likelihood that the presence of combustible fuel in contact with sources of heat along the West B beltline would result in an explosion or fire.

Having determined there was a reasonable likelihood of the occurrence of an explosion or fire as a result of this violation, we turn to whether it was reasonably likely that this event would cause serious injury. I credit Inspector Terpo's testimony that, in the event of fire, considering the amount of accumulations along the entire belt and the significant amounts of airborne float coal dust, the fire would spread very rapidly, particularly because it would be fed with high velocity intake air. The flames and smoke would follow the intake air path down the beltline and then split to the continuous mining and longwall working sections. In such an event, it is reasonably likely that personnel in these working sections would sustain serious smoke inhalation or burn injuries. Consequently, the evidence demonstrates that the cited violation was properly characterized as significant and substantial.

With regard to the next issue, an unwarrantable failure is evidenced by aggravated conduct that is unjustifiable or inexcusable, as distinguished from ordinary negligence which is characterized by inattentiveness or carelessness. Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007, 2010 (December 1987). The Commission's leading case on the question of unwarrantable failure as it applies to a section 75.400 infraction for violative coal dust accumulations is Peabody Coal Company, 14 FMSHRC 1258 (August 1992).

In Peabody, the Commission set forth four tests for resolving the unwarrantable failure issue. These tests are: (1) the extent of the violative condition; (2) the length of time that it has existed; (3) whether the operator had been placed on notice that greater efforts were necessary for compliance; and (4) the adequacy of the operator's efforts in abating the violative condition after the operator's awareness of the problem. 14 FMSHRC at 1261.

It is evident that all of the Peabody criteria establish an unwarrantable failure in this case. With respect to the first element, while denying accumulations existed along the entire 7,000 foot beltline, even assistant mine foreman Phillips, who accompanied Terpo during the inspection, admitted the accumulations totaled a distance of approximately 900 feet along the beltline in addition to 20 rollers that were turning in coal. Such accumulations can only be described as extensive.

The second test in Peabody addresses the length of time the accumulations existed. The preshift examination book reflects notations of this condition at the West B belt for the six days that preceded Terpo's August 31, 1994, inspection. These preshift entries confirm the testimony of safety committeeman Plylar that he provided written notice of the condition to mine management on August 18, 1994, during his bimonthly safety inspection. These facts, as well as the extent of the accumulations, manifest by the 25 to 39 people required to clean for up to 14 hours in order to abate the 104(d)(2) Order, support Plylar's testimony that the condition existed for at least one month.

The third Peabody element concerns whether the operator had notice of the violation. Once again, the evidence supports Plylar's reported repeated complaints to mine management over a period of at least one month. The respondent's awareness of the problem is further demonstrated by its inadequate efforts to clean the area by assigning only several people to clean the track side of the belt while beltline operations continued. Thus, the third test in Peabody is clearly satisfied.

Having been aware of the condition, the final Peabody criterion relates to the respondent's efforts to remedy the problem. As previously noted, mine management responded by assigning an inadequate number of people to address the problem by cleaning only the track side of the belt while the beltline continued to operate. For example, the preshift entries reflect that several people were assigned to clean the West B belt on several occasions during the period August 25 through August 30, 1994. This cleaning did not address the accumulations under the back side of the belt, between the belt and the rib, that could only be accessed if mine production was interrupted and the beltline was deenergized. The inadequacy of the respondent's efforts is reflected by the 25 people reported by Phillips, or, the 39 people noted in the preshift book, that were required to work approximately 14 hours, while the beltline was inoperable, to clean the cited violative accumulations. There was also unrefuted testimony from Plylar that the West B belt structure was ultimately repaired to correct the alignment of the belt.

Thus, it is obvious that the respondent's efforts to address the problem were woefully inadequate. Consequently, applying the Peabody criteria, it is clear that the respondent's conduct in this matter was aggravated in nature justifying the Secretary's assertion that the cited condition was attributable to the respondent's unwarrantable failure. Accordingly 104(d)(2) Order No. 3184069 is affirmed.

Finally, with respect to the appropriate penalty to be assessed, the Secretary seeks to impose a civil penalty of \$9,500. In considering the appropriate penalty, I note that even Inspector Terpo conceded the respondent was conscientious enough to adequately clean the more readily accessible front side of the belt. This is a mitigating factor in favor of the respondent. On the other hand, the respondent was not diligent enough to shut down the belt to clean under the back rollers which would result in an interruption of production. This is an unfavorable factor in considering the penalty.

I am also mindful that this 7,000 foot beltline is approximately 1 1/2 miles long with very large numbers of rollers. Thus, the accumulations in this matter, while clearly extensive, must be kept in perspective.

Accordingly, on balance, I have concluded that \$6,500 is the appropriate penalty considering the degree of negligence, gravity and other pertinent statutory penalty criteria in section 110(i) of the Act. (Tr. 252-68).

The penalty assessment decided on the merits for Order No. 3184069 as well as the civil penalties provided in the parties' settlement of the other citations in these proceedings are as follows:

DOCKET NO. SE 95-178

<u>Citation Or Order No.</u>	<u>Proposed Assessment</u>	<u>Settlement</u>	<u>Modification</u>
3183836	\$5,500.00	\$3,500.00	

DOCKET NO. SE 95-185

<u>Citation Or Order No.</u>	<u>Proposed Assessment</u>	<u>Settlement</u>	<u>Modification</u>
3184179	\$8,000.00	\$1,000.00	104(d) to 104(a)

<u>Citation Or Order No.</u>	<u>Proposed Assessment</u>	<u>Settlement</u>	<u>Modification</u>
3184069	\$9,500.00	\$6,500.00 ³	
3184051	\$1,155.00	\$ 150.00	Delete S&S
3183877	\$ 362.00	\$ 150.00	Delete S&S
4484467	\$ 50.00	\$ 50.00	
3194259	\$ 50.00	\$ 50.00	
4484542	\$ 903.00	\$ Vacated	
4484301	\$ 362.00	\$ 362.00	
4484275	\$ 362.00	\$ 362.00	
4484737	\$ 506.00	\$ 506.00	
4484738	\$ 50.00	\$ 50.00	
4484739	\$ 50.00	\$ 50.00	
4484280	\$ 506.00	\$ 125.00	Delete S&S
4476181	\$ 309.00	\$ 309.00	
4476182	\$ 50.00	\$ 50.00	
4476183	\$ 362.00	\$ 362.00	
4476185	\$ 362.00	\$ 100.00	Delete S&S
4476187	\$ 309.00	\$ 309.00	
4476189	\$ 50.00	\$ 50.00	
2807519	\$ 235.00	\$ 235.00	
Subtotal	\$15,533.00	\$9,770.00	
Total	\$29,033.00	\$14,270.00	

ORDER

This decision formalizes the bench decision with respect to Order No. 3184069 and constitutes the approval of the parties' settlement motions with respect to the remaining citations and orders in issue. Accordingly, 104(d)(2) Order No. 3184069 **IS AFFIRMED**. The respondent **SHALL PAY** a total civil penalty of \$14,270 within 30 days of the date of this decision. This total penalty consists of the \$6,500 penalty for Order No. 3184069, in

³ As reflected in this decision, 104(d)(2) Order No. 3184069 was affirmed and assessed a civil penalty of \$6,500. All other penalties noted above are the settlement amounts agreed upon by the parties.

addition to the \$7,770 agreed upon total settlement for all of the other matters in issue. Upon timely receipt of payment, Docket Nos. SE 95-178, SE 95-185, and SE 95-256 **ARE DISMISSED**.

Jerold Feldman
Administrative Law Judge

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