

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

June 14, 1996

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. SE 95-459  
Petitioner : A.C. No. 01-01401-04102  
v. :  
: No. 7 Mine  
JIM WALTER RESOURCES, INC., :  
Respondent :

## DECISION

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

Before: Judge Fauver

This is a civil penalty case under ' 105(d) of the Federal  
Mine Safety and health Act of 1977, 30 U.S.C. ' 801, et seq.

The central issues are the validity of a ' 104(d)(2) order  
and the appropriate civil penalty if a violation is found. The  
order alleges accumulations of combustible materials in a 3,500  
foot belt entry and charges a significant and substantial  
violation of 30 C.F.R. ' 75.400 and an unwarrantable failure to  
comply with the standard.

Having considered the hearing evidence and the record as a  
whole, I find that a preponderance of the substantial, reliable,  
and probative evidence establishes the Findings of Fact and  
further findings in the Discussion below:

## FINDINGS OF FACT

1. Respondent operates No. 7 mine, which produces coal for

sales in or substantially affecting interstate commerce.

2. On June 8, 1995, MSHA Inspector John Terpo inspected the West A belt line of the No. 7 mine. Inspector Terpo observed substantial accumulations of loose coal, coal dust and float coal dust. At least 32 rollers were turning in combustible accumulations, and 12 of them were totally submerged in coal dust. Three other rollers were locked up and extremely hot to the touch. Tr. 96-99. At the section's 7th discharge point, the accumulations averaged 2 feet deep for about 300 feet. The bottom belt was running on top of the accumulations at this location. Two bottom rollers were missing between the No. 26 and No. 28 brattices, allowing the belt to run on the belt's metal structure, which was extremely hot with the [accumulations] present. Tr. 96-99.

3. Inspector Terpo observed that no one was doing cleaning work on the belt line and the book entries for the pre-shift examination stated that the belt line was clear for work. The two previous pre-shift entries indicated that the area needed cleaning and rock-dusting.

4. Inspector Terpo issued four citations for accumulations of combustible material on the two section belts that dumped onto the West A belt, for failing to maintain the West A belt line in safe operating condition, and for failing to conduct an adequate pre-shift examination. Govt. Exhibits 1, 2, 3, and 6.

5. The four citations are final. In a settlement, the citations in Exhibits 1 and 3 were modified to reflect that four persons were affected by the violative conditions.

6. Inspector Terpo also issued Order No. 3194917, under ' 104(d)(2) of the Act, charging a violation of 30 C.F.R. ' 75.400 for extensive combustible accumulations in the West A belt entry and preventing operation of the West A belt line until the cited violative condition was abated. Respondent assigned about 20 miners to clean up the accumulations. The abatement work was completed in about seven hours and the order was terminated.

#### DISCUSSION WITH FURTHER FINDINGS, AND CONCLUSIONS

Respondent called no witnesses, and offered no exhibits.

There is no dispute of the violative accumulations of combustible materials at the cited locations in the West A belt line entry. The case turns on the sufficiency of the government's evidence to prove that the accumulations constituted a significant and substantial violation and an unwarrantable failure to comply with ' 75.400 within the meaning of ' 104(d) of the Act.

The safety standard involved, 30 C.F.R. ' 75.400, is a reprint of a statutory standard, which 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.

As the Commission has recognized, this standard was enacted to prevent the well-recognized hazards of accumulations of combustible materials in coal mines:

\*\*\*The goal of reducing the hazard of fire or explosions in a mine by eliminating fuel sources is effected by prohibiting the accumulation of materials that could be the originating sources of explosions or fires and by also prohibiting the accumulation of those materials that could feed a fire originating elsewhere in the mine.

Black Diamond Coal Co., 7 FMSHRC 1117, 1120 (1985) (citing Old Ben Coal Co., 1 FMSHRC 1954, 1957 (1979); and Old Ben Coal Co., 2 FMSHRC 2806, 2808 (1980)). The hazards associated with mine fires and explosions are well documented and actually precipitated the enactment of the Mine Act. See H.R. Rep. No. 95-312, 95th Cong., 1st Sess. 6 (1977), reprinted in Legislative History at 361362; and S.Rep. No. 95-181, 95th cong., 1st Sess. (1977), reprinted in Legislative History at 592.

#### A Significant and Substantial Violation

The Commission has held that a significant and substantial violation, as used ' 104(d) of the Act, is a violation that presents a reasonable likelihood that the hazard contributed to will result in an injury of a reasonably serious nature.

Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981); Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984).

Respondent contends that, since there is no evidence of an injury resulting from a belt fire at this mine, the violation was not Asignificant and substantial.@ However, the Secretary is not required to prove an actual injury. AReasonable likelihood@ of injury is sufficient, and this is satisfied by the Acommon sense conclusion that a fire burning in an underground coal mine would present a serious risk of smoke and gas inhalation to miners who are present.@ Buck Creek Coal, Inc. v. Secretary of Labor, 52 F.3d 133, 135 (7th Cir. 1995). The Secretary is not required to show that a mine fire was probable, but need only show that the violation provided substantial fuel to propagate a mine fire or explosion should one occur and that such propagation would be Areasonably likely@ to result in injury. The uncontested evidence shows substantial combustible accumulations that could propagate a mine fire or explosion and cause death or serious injury. In addition, the evidence of ignition sources, such as hot rollers and hot rubbing points against a steel structure, shows that if the violative conditions continued unabated they were reasonably likely to result in a fire and injury. For both reasons, I find that the accumulations constituted a Asignificant and substantial@ violation.

#### An Unwarrantable Violation

The Commission has held that an Anwarrantable@ violation, as used in ' 104(d) of the Act, is a violation due to Aaggravated conduct constituting more than ordinary negligence.@ Emery Mining Corp., 9 FMSHRC 1977 (1987). Relevant issues include such factors as Athe extent of a violative condition, or the length of time that it existed, whether an operator has been placed on notice that greater efforts are necessary for compliance, and the operator's efforts in abating the violative condition.@ Peabody Coal Company, 14 FMSHRC 1258, 1261 (1992).

Inspector Terpo identified in the order and in his notes the numerous areas in which he observed combustible accumulations along the 3,500 foot belt line. At one location, the accumulations averaged about 2 feet deep for 300 feet, with 32 rollers turning in coal dust and 12 of those rollers being totally submerged in coal dust. The bottom belt was rubbing on

the top of the accumulations and the bottom rollers were running totally submerged in coal dust. The accumulations cited can only be described as extensive, and obvious to anyone concerned with safety.

Inspector Terpo and UMWA Safety Committee Chairman Phylar testified that the accumulations were so extensive that they probably existed for at least several shifts. Respondent offered no evidence disputing their testimony, which is supported by the extent of work needed to abate the violation, i.e., about 20 miners doing clean up work for 7 hours.

The abatement work was prompt, but this must be considered in relation to the withdrawal order, which stopped the belt line until the accumulations were removed. There was no evidence of clean up work at the time the order was issued.

Respondent had received repeated notices that greater efforts were necessary to comply with ' 75.400. In numerous contacts with Respondent, MSHA had discussed the continuing problem of its failure to comply with ' 75.400. Many of those discussions had occurred in the same quarter in which the subject order was issued. The UMWA, as well, brought the continuing problem of accumulations to management's attention. The repeated prior notices of violations of '75.400 are also shown by Respondent's compliance history, which shows that in the two years preceding the subject order Respondent was issued 291 citations and orders charging violations of ' 75.400. As of March 27, 1996, nearly all of the citations and orders had become final (by payment of the penalties or by becoming uncontested, final penalty orders).

The facts fully sustain the inspector's finding of an Unwarrantable failure to comply with ' 75.400.

#### Civil Penalty

Section 110(i) of the Act provides the following six criteria for assessing civil penalties:

(1) Operator's history of previous violations

The No. 7 mine has a very poor record of violations of

'75.400. Its two year history prior to the subject order indicates that violations of ' 75.400 actually increased. From June 8, 1993, through June 7, 1994, Respondent was issued 123 citations and orders charging violations of ' 75.400. The number of charges increased to 168 for the subsequent year. In nearly all of the cases, the charging citations and order have become final.

Respondent's repeated violations of ' 75.400 is consistent with its overall compliance history under the Mine Act, which is very poor.

(2) Whether the operator was negligent

Respondent's repeated violations of ' 75.400, the numerous complaints and bi-monthly reports made by the UMWA to management regarding the belt lines, the frequent discussions MSHA had with mine management prior to issuing the subject order, and the on-going litigation resulting from violations on the belt lines should have engendered in the operator a heightened awareness of a continuing accumulation problem. @ Mid-Continent Resources, Inc., 16 FMSHRC 1226, 1232 (1994). Instead, Respondent showed no improvement.

The accumulations in the instant case were obvious, extensive, and dangerous and no one was working on the violative conditions at the time the inspector examined the area. I find that Respondent's negligence was high, and demonstrates a serious disregard for the safety of its miners.

(3) The gravity of the violation

The seriousness of the violation is underscored by the fact that 32 rollers were turning in coal dust accumulations up to two feet deep. Twelve of the 12 rollers were totally submerged in the accumulations. Three rollers were locked up creating friction sources, and in places the conveyor belt was rubbing against the steel belt structure. The stuck rollers and rubbing points on the structure were extremely hot to the touch. I find that the gravity of the violation was high.

Assessment of a Penalty

Respondent's prior history and the instant violation demonstrate a serious disregard for the safety requirement to prevent combustible accumulations in an underground coal mine. Respondent's repeated violations of ' 75.400 indicate that there has been no deterrent effect from prior civil penalties.

Considering Respondent's very poor compliance history, the need for an effective deterrent, and the six statutory criteria as a whole, I find that a civil penalty significantly greater than the \$7,000 proposed by the Secretary should be assessed. Accordingly, I find that a civil penalty of \$15,000 is appropriate for the violation proved in this case.

CONCLUSIONS OF LAW

1. Respondent's No. 7 mine is subject to the Act.
2. Respondent violated 30 C.F.R. ' 75.400 as charged in Order No. 3194917.

ORDER

1. Order No. 3194917 is AFFIRMED.
2. Respondent shall pay a civil penalty of \$15,000 within 30 days of this Decision.

William Fauver  
Administrative Law Judge

Distribution:

William Lawson, Esq., U.S. Department of Labor, Office of the Solicitor, Suite 150, Chambers Building, High Point Office Center, 100 Centerview Drive, Birmingham, AL 35216 (Certified Mail)

R. Stanley Morrow, Esq., Jim Walter Resources, Inc., Mining Division, P.O. Box 830079, Birmingham, AL 35283-0079 (Certified Mail)

nt