FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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February 26, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 97-33
Petitioner	:	A.C. No. 44-04946-03603
v.	:	
	:	McClure No. 2 Mine
CLINCHFIELD COAL COMPANY,:		
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 98-17
Petitioner	:	A. C. No. 44-04946-03608 A
v.	:	
	:	McClure No. 2 Mine
JACK WHITTEN BALL, Employed by	:	
CLINCHFIELD COAL COMPANY,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 98-18
Petitioner	:	A. C. No. 44-04946-03609 A
v.	:	
	:	McClure No. 2 Mine
ROY NELSON MUSICK, Employed by	:	
CLINCHFIELD COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Daniel M. Barish, Esquire, Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for the Petitioner;
David J. Hardy, Esquire, Jackson & Kelly, Charleston, West Virginia and Vaughn R. Groves, Esq. Lebanon, Virginia for the Respondents.

Before: Judge Barbour

These consolidated civil penalty cases arise under sections 105(d) and 110(c) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. '815(d), 820(c)) (AMine Act@ or AAct@). The Secretary of Labor (ASecretary@), on behalf of her Mine Safety and Health Administration (AMSHA@), seeks the assessment of civil penalties against Clinchfield Coal Corporation (AClinchfield@ or the Acompany@) and two of its agents for an alleged violation of section 75.400 (30 C.F.R. '75.400), a mandatory safety standard for underground coal mines. The standard prohibits the accumulation of coal dust, loose coal, and other combustible materials in the active workings of an underground mine.

The Secretary alleges that on January 22, 1997, coal dust and loose coal were allowed to accumulate under the return rollers of a conveyor belt system at Clinchfield=s McClure No. 2 Mine, an underground bituminous coal mine located in Dickenson County, Virginia. She also alleges that float coal dust was allowed to accumulate inby the portal of the conveyor belt entry. In addition to being a violation of the standard, the Secretary charges the accumulations were a significant and substantial contribution to a mine safety hazard (AS&S@) and the result of Clinchfield=s unwarrantable failure to comply with section 75.400. Finally, she alleges that the agents knowingly ordered, authorized, or carried out the violation.

Clinchfield denies it violated section 75.400; and argues alternatively that if a violation is found, the inspector=s findings with regard to the gravity of the violation, the violation=s S&S nature, and Clinchfield=s unwarrantable failure are not valid. The agents also deny the existence of the violation, and argue alternatively that if it existed it was not because of their knowing conduct.

The cases were consolidated for hearing and decision. They were tried in Big Stone Gap, Virginia. Counsels submitted helpful briefs.

THE ISSUES

The principal issues are the existence of the violation, its S&S and unwarrantable nature, whether the agents knowingly violated the standard, and the amounts of any civil penalties that must be assessed, taking into consideration the statutory civil penalty set forth in section 110(i) of the Act (30 U.S.C. '820(i)).

STIPULATIONS

At the commencement of the hearing the parties stipulated that:

> 1. The Administrative Law Judge and the . . . Commission have jurisdiction to hear and decide th[e] civil penalty proceeding[s].
>
> 2. Clinchfield . . . is the owner and operator of the McClure

[No. 2] Mine.

3. Clinchfield . . . [has] the overall responsibility of running the . . . [m]ine.

4. The maximum penalty which can be assessed [against Clinchfield] . . . will not affect the ability of . . . Clinchfield to remain in business.

5. The copy of Citation No. 7293555 is authentic and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

6. MSHA Inspector Lester Watson was acting in his official capacity . . . when he issued Citation No. 7293555.

7. Citation No. 7293555 was properly served to [Clinchfield=s] agents.

8. MSHA=s Proposed Assessment Data Sheet . . . accurately sets forth . . . the number of assessed violations charged to the . . . [m]ine for the period shown and . . . the number of inspection days per month for the period shown.

9. MSHA=s R-17 Assessed Violation History Report may be used in determining appropriate civil penalty assessments for the alleged violations.

10. Clinchfield . . . was a corporation in November of 1996, and has continued to be a corporation up through the present time.

11. Musick was the superintendent of the . . . [m]ine from at least November 1, 1996, through January 23, 1997.

12. Musick was an agent of Clinchfield . . . from at least November 1, 1996, through January 23, 1997[,] within the meaning of [s]ection 3(e) of the Mine Act.

13. Ball was the mine foreman . . . mine from at least November 1, 1996, through January 23, 1997.[[1]]

[1]At the time of the hearing Ball, who then was 49 years old, no longer was employed by

14. Ball was an agent of Clinchfield . . . from at least November 1, 1996, through January 23, 1997, within the meaning of [s]ection 3(e) of the Mine Act (Tr. 23-24; See also Joint Exh. 1).

THE FACTS

The Mine

The McClure No. 2 Mine is a bituminous coal mine that extends underground for approximately four and one half miles and contains approximately four and one half miles of conveyor beltlines. Coal is cut by continuous mining machines and is transported out of the mine on the belts. The mine consisted of two active sections **C** the Main Section and the Three Left Section. The Main Section is the primary section. On the Main Section coal is produced during two shifts each production day (Tr. 885-887). The coal producing shifts are the evening shift and the night or Aowl@ shift (Tr. 858). Maintenance work is done on the day shift (Tr. 859). The Three Left Section is a Aspare unit@ that is operated when the Main Section is Adown@ (Tr. 856).

There are eleven conveyor belts on the Main Section and two on the Three Left Section (Tr. 855). The structures on which the Main Section belts run have top rollers positioned at five foot intervals and bottom rollers positioned at 10 foot intervals. The Mains No. 1 belt is one of the conveyor belts serving the Main Section. From the portal to the tailpiece, the belt extends for 3,000 feet in the Mains No. 1 belt entry. The Mains No. 1 belt structure contains approximately 600 top rollers and 300 bottom rollers (Tr. 865-867).

The belt drive for the Mains No. 1 belt is on the surface in the head house. The head house is located just outside the portal (Tr. 861). From the portal the Mains No. 1 belt runs inby for approximately 450 feet to a point (the AY@) where the belt entry merges with the track entry (Tr. 867). Air in the Mains No. 1 belt entry travels at a high velocity, especially after the entry merges with the track entry (Tr. 864, 879,1073). The miners enter the mine in on-track personnel carriers. The track is located approximately 6 feet from the belt (Tr. 868).

Seventy eight miners work at the mine (Tr. 860). Sixty three are wage workers. Eleven of the wage workers are Agrademen.@ Grademen do maintenance and cleanup work on the belts (Tr. 881). In addition to the grademen, there were four wage employees who work as belt

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Clinchfield. He had retired due to Anerve . . . and knee problems@ (Tr. 1203). He had received Social Security disability payments, and he had applied to Clinchfield for a disability pension. He did not believe he would be able to return to work (Tr. 1202-04).

examiners. The belt examiners also perform maintenance and cleanup work on the belts (Tr. 882). Besides the grademen and the belt examiners, miners who work at the face sometimes are called in to clean belts on their days off (Tr. 958).

The January 22 Inspection, The Alleged Violation, and Section 104(d)

On January 22, 1997, MSHA inspector Lester Watson conducted an inspection at the mine. Watson estimated he spend a total of four hours underground (Tr. 396). He entered the mine sometime around 9:00 a.m. and came out around 1:00 p.m. (Tr. 397-398).

When Watson arrived at the mine he had a miner telephone mine foreman, Jack Ball. The miner told Ball that Watson would inspect and travel along the Mains No. 1 belt (Tr. 42-43). Watson started at the portal and walked approximately 450 feet inby to the Y (Tr. 399). At the Y he turned and walked back to within approximately 100 feet of the portal (Tr. 43-44, 405). He then turned and walked approximately 2900 feet to the tailpiece (Tr. 407). As he proceeded, he examined the belt, the belt structure, and the areas adjacent to the belt (Tr. 399-400). During the inspection he usually was two to three feet away from the belt (Tr. 81-82).

From the belt entry portal to the Y Watson observed dry float coal dust that had accumulated on the belt structure, on the roof, on the floor, and on the ribs (Tr. 60). Most of the dust was on the structure (Tr. 44, 456). He described the dust as a Aheavy skim@ Tr. 453). He attempted to measure the float coal dust with his ruler. It was thin, and he could not determine its exact depth, but he guessed that it measured less than 1/16th inch (Tr. 45).

All along the beltline Watson also noticed accumulations beside and under the belt (Tr. 43). These accumulations consisted of loose coal and coal dust and, in some areas, rock dust was mixed with the other materials (Tr. 488-490). In addition to visually inspecting the accumulations, he picked up some to determine their content and squeezed some to determine their consistency (Tr. 408-409).[2] He measured the loose coal and coal dust and found it to be 4 inches to 22 inches deep (Tr. 45, 445). He took between 8 and 12 measurement (Tr. 443).

From the Y inby for approximately 2,250 feet the accumulations were dry (Tr. 63-64,79). When he squeezed them they didn=t Aball up.@ Rather, they Afell back into dust@ when he opened his hand (Tr. 79). For the next 225 to 325 feet inby approximately 75% of the accumulations

[2]Watson testified he conducted the Asqueeze tests@ Anot [at] every location, but the majority of locations . . . enough to give me a good impression of what exist[ed]@ (Tr. 400-401). He squeezed the accumulations in order to Aensure [him]self that the accumulations were either damp, wet or whether they were dry@ (Tr. 401).

were damp (Tr. 63-64, 80, 450-451). For the last 75 feet to the tailpiece the accumulations were wet (Tr. 63-64, 80), and the closer he got to the tailpiece the wetter they became (Tr. 451).

Watson also saw at least 37 places along the beltline where belt rollers were missing, stuck, or misaligned and where misaligned rollers were causing the belt to rub the belt structure. In addition, there were places where the accumulations reached the rollers and the rollers were turning in them (Tr. 48, 53-54, 460, see also Tr. 446-448)).[3] In these areas tooWatson felt the accumulations to gauge whether they were dry, damp, or wet, as well as to determine if they were warm (Tr. 409-410). Further, there were places where the rollers were stuck and the belt was rubbing the belt structure. He also felt the rollers and the structure (Id., 411). The belt was running while he preformed these tests (Tr. 411).

The area from inby the Y to the tailpiece had been freshly rock dusted (Tr. 443-444). However, in Watson=s opinion the rock dust did not rendered the accumulations of loose coal and coal dust incombustible (Tr. 483-486).

Watson also noted that approximately 50 feet inby the Y, the waterline that ran along the beltline was broken (Tr. 52, 132). Ball later told Watson water to the line had been turned off because of the break (Tr. 131). Watson believed this was true because water was not coming out of the line at the break (Tr. 131). Because of the break, Watson thought no water was available for fire fighting purposes for 450 feet from the portal to the Y and for 50 feet inby (Tr. 52, 132-134, 359). He acknowledged that there was a small fire extinguisher and a rock duster at the portal. He did not know if other fire fighting equipment was available along the beltline.[4]

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[3]Watson described the 37 rollers as being Ain various locations along the entire 3,000 [feet] of the belt,@ beginning inby the belt portal and extending Aall the way to the tailpiece@ (Tr. 385).

[4]In fact, the testimony revealed that other fire fighting equipment was available. Five hundred feet of hose was stored at the portal and another 500 was feet stored at the Y (Tr. 972, 1270). The hoses had access to water, and, according to mine superintendent, Musick, it would have taken about 5 minutes to hook the hoses to the water sources (Tr. 972, 1073). Also, the

Watson did not observe any efforts being made to remove the accumulations or otherwise to render them harmless. (Tr. 366, 485). Because the float coal dust, coal dust, and loose coal existed in active workings of the mine, Watson found the accumulations constituted a violation of section 75.400. Watson told Ball he was going to issue a citation for the violation under section 104(d)(1) of the Act because he believed the accumulations were S&S and the result of Clinchfield=s unwarrantable failure.

With regard to the S&S nature of the violation, Watson stated, AIt only takes one frictional source to ignite coal dust,@ and an ignition could come from any of the many frictional sources he had seen (Tr. 47, 54, 95-96, 112-113). Further, he believed the air velocity in the entry would have fanned an ignition and helped propagate a fire (Tr. 56-58). Because the belt air was ventilating the working faces, smoke from an explosion or fire would have travel directly to where miners were working. At a minimum, eight miners inby the accumulations would have been affected (Tr. 101-102). Further, because the belt and track were adjacent to one another, miners who traveling along the track also would have been endangered (Tr. 96-97).

With regard to unwarrantable failure, Watson told Ball that given the amount of accumulated coal and coal dust, he believed the accumulations had been present for Asome time@ (Tr. 51). In addition, Watson had been told about a November, 1996, conversation that his supervisor, James Pointer and an MSHA inspector, Gary Roberts, had with Musick. As Watson understood it, they warned Musick that Clinchfield needed to do a better job in preventing accumulations along the beltlines. In view of the conversation, Watson Afelt that . . . Musick showed aggravated conduct by not . . . taking action to correct the condition@ (Tr. 108, see also Tr. 113). Further, Watson relied on the mine=s belt examination book (Tr. 289-291). He had reviewed the book before the inspection, and he believed the conditions he observed on January 22 had been reported since January 8 (Tr. 142-144, 461-462). Watson had noted that on many shifts between January 8 and January 22, the belt examiners had written of the Mains No. 1 belt, things like Aneeds some cleaning,@ Aneeds a few rollers,@ Afloat coal dust inby the head house@ (Tr. 142). Usually, the examination book was countersigned by mine management, and he thought that Clinchfield=s management Ahad to be aware there were accumulations on [the] beltline@ (Tr. 144).

Ball=s Response To The Conditions, Issuance of the Citation,

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rock duster could have been used to spread rock dust to help smother a fire (Tr. 361). However, it is questionable whether the rock dust would have been very effective (Tr. 362) and whether rock dust released in the portal area would travel all the way to the Y (Tr. 465).

and
Musick=s Post-Citation Actions

After completing the inspection, Watson met Ball. Watson told Ball about the conditions he had observed along the beltline (Tr. 51). He stated he had looked at the belt examination book and had seen notations in the book that the beltline needed cleaning. Watson asked Ball if he wanted to travel the entire beltline with him so that Ball could assure himself the accumulations were there. Watson testified Ball replied, AI know what=s there . . . I don=t need to go back, I don=t need to look at it@ (Tr. 51, see also Tr. 294).[5] Watson interpreted this as an indication Athat ...[Ball] knew there [were] accumulations on the belt@ (Tr. 299).

Watson then issued the citation. It states:

> Loose coal and coal dust was allowed to accumulate under the return rollers of the Mains #1 Conveyor Belt System. The accumulations began at the Belt Entry Portal and extended inby to the tailpiece which is a distance of approximately three thousand feet. Depth ranged from four to twenty four inches. Float coal dust was allowed to accumulate in the belt entry from the Belt Entry Portal to . . . where the Belt and Track Entries merge. This is a distance of approximately four hundred fifty feet. These accumulations were one sixteenth of an inch and less in depth. There were at least thirty seven location[s] along the belt where the rollers were either running in the accumulation or the rollers were stuck or misaligned. There were at least eleven locations where the rollers were missing [and] the belt was rubbing the frame of the roller stands. These location[s] were warm to the touch (Gov. Exh. 2).

After the citation was issued Musick looked at the conditions (Tr. 985). Musick road a personnel carrier to the Y. At the Y he left and walked back to the portal. Musick saw miners cleaning the cited areas. He testified that they were using slate bars because the material was frozen (Tr. 905). There were two wipers on the belt outby the portal. Normally, the wipers knock off loose material that was on the belt. However, when the temperature was below freezing, the wipers tended to freeze and the loose material was carried into the mine and fell to the mine floor (Tr. 918-919). Because of this, there were more accumulations along the beltlines during the winter (Tr. 1281). Musick maintained it was this frozen material that he observed the miners cleaning between the portal and the Y. He described the material as Achucks of ice . . .

[5]Although Ball first testified he could not recall the exchange with Watson, on cross examination he testified it might have occurred (Tr. 1260, 1294).

under the return rollers@ (Tr. 1051).

Musick also traveled is the personnel carrier to the tailpiece. Approximately 200 feet outby the tailpiece he saw a spillage of coal. The area was Aextremely wet@ (Tr. 907), so wet, in fact, that he did not think any of the material could burn (Tr. 1049). He saw no other accumulations (Tr. 907, 1042); nor did he notice any missing rollers (Tr. 914).

Abatement

After the citation was issued, Ball assigned three or four miners, including himself to clean the accumulations (Tr. 1287). Further, when the oncoming shift arrived, and members of the crew were told they too were going to help with the clean up (Tr. 699).

Ball described the accumulations as a combination of ice, rock dust, and coal (Tr. 1262). In his opinion, the material was too wet and too frozen to be combustible (Tr. 1264). Ralph O=quinn, a miner who helped with the cleanup just inby the portal, testified the accumulations consisted of coal, rock dust, and chucks of black and white ice (Tr. 1124-25) and that they were Areal frozen solid hard stuff@ (Tr. 1105). Another miner who helped, Herbert Short, cleaned up further inby the portal. Short testified that some of the accumulations were wet and some were frozen, but that the frozen accumulations Aweren=t . . . real solid@ (Tr. 1148). In fact, the ice was in the form of paper thin flakes that fell from the belt (Tr. 1159).

When Watson returned to the mine on January 23, he found the accumulations had been cleaned up and rock dusted from the portal of the belt entry to the tailpiece (Tr. 125).

THE VIOLATION

Of the many safety standards for underground coal mines, section 75.400 is among the most frequently cited and well known. Its parameters were outlined in one of the Commission=s first decisions, and the fundamental interpretation the Commission there enunciated has been applied since. In Old Ben Coal Co., 1 FMSHRC 1954, 1956 (December 1979) (Old Ben I), the Commission stated that section 75.400 is violated Awhen an accumulation of combustible materials exists.@ The Commission noted that the standard is Adirected at preventing accumulations in the first instance, not at cleaning up the materials within a reasonable period of time after they have accumulated@ and that the standard Amakes accumulations impermissible@ (1 FMSHRC at 1957). The Commission distinguished between Aaccumulations@ and Aspillage@ and recognized that while some spillage of combustible materials may be inevitable in mining operations, the question of whether spillage is an accumulation depends, at lest in part, on its size and amount (1 FMSHRC at 1958).

Shortly after deciding Old Ben I, the Commission revisited section 75.400 and stated that it was the presence of combustible materials that could cause or propagate a fire or an explosion that the standard sought to proscribe. The Commission stressed the importance of the inspector=s

judgement in determining whether the combustible materials could in fact cause or propagate a fire or explosion if an ignition source were present (Old Ben Coal Co., 2 FMSHRC 2806, 2802 (October 1980) (Old Ben II). The burden was on the Secretary to establish the presence of the alleged accumulation, and the fact that the material could cause or propagate a fire or explosion.

Here, the Secretary met the burden. Watson testified at length about the nature and extent of the accumulations. He described what he saw, what he pick up, and what he measured. His testimony was persuasive and it was clear.

Watson examined the entire beltline. He was usually two to three feet away from the belt (Tr. 81-83, 363-364). This meant he was virtually Aon top@ of the accumulated material. From the portal to the Y, a distance of approximately 450 feet, he saw float coal dust on the roof, the floor, and on the belt structure, with the majority of the float coal dust being on the structure (Tr. 44, 60, 456). The dust coated the structure like a Aheavy skim@ (Tr. 453). He tried to measure its depth. He was not successful, but, as I have noted, he estimated that float coal dust was somewhat less than 1/16th of a inch deep (Tr. 45).

He testified that the float coal dust easily could have been ignited by heat or fire produced by friction (Tr.54), and it is common knowledge that once ignited float coal dust can propagate an explosion. These facts alone are enough to bring the accumulation within the perimeters of Old Ben II and to establish the violation of section 75.400 (see Black Diamond Coal Mining Company 5 FMSHRC 764, 778 (April 1983 (ALJ Koutras) (aff=d 7 FMSHRC 1117 (August 1985)).

Watson=s testimony also established the presence of loose coal and coal dust along and under the belt. (Tr. 43). As he walked the beltline, he stopped and looked at these accumulations, he touched them, he picked them up, he squeezed them, and he measured them (Tr. 45, 59, 445). Although the accumulations became wetter as he walked toward the tailpiece, there were points where the accumulations were dry. They crumbled in his hand (Tr. 450-451). The depth of the loose coal and coal dust ranged from 4 inches to 22 inches (Tr. 45, 445). He also observed places where rock dust mixed with the coal and coal dust (Tr.488-490).

I fully credit Watson=s observations. He walked the beltline. In so doing he placed himself in the best position to see what lay under and alongside it. Moreover, he verified what he saw by handling and measuring the accumulated material. Clinchfield did not offer testimony that persuasively undermined Watkins=s first-hand observations regarding the loose coal and coal dust. For example, Musick testified that although he saw spillage at one point between the Y and the tailpiece, he did not see any other accumulations (Tr. 907, 1042), but Musick viewed the area after Watson decided to issue the citation, and Music did not walk beside much of the belt. Rather, he rode on a mantrip, a mode of travel that placed him further from the beltline than Watson and that required him to pass along the beltline at a great speed (Tr. 1043). Moreover, even Musick agreed there was some coal spillage along the beltline that needed to be cleaned up (Tr. 914).

Finally, those engaged in the clean up efforts consistently testified that although the cited material included rock dust and chunks of ice, it also included loose coal (e.g., Tr. 1124-25 see also Tr. 1172, 1262). Accumulations of loose coal are prohibited by the standard.

Based on the extent of the coal and coal dust, which existed all the way along the beltline -- a distance of approximately 3,000 feet -- and the depth of the accumulations, which ranged from 4 to 22 inches, I find that the coal and coal dust was much more than Aspillage,@ that is, it was more than a mere deposit of combustible materials. Moreover, although the consistency of the material ranged from dry to damp to wet, I find that enough of it could have ignited and caused or propagated a fire to meet the requirements of Old Ben II. In this regard I especially note the dry coal and coal dust, could have served as an originating source for an explosion or fire or could have feed fire originating elsewhere. It is also true that the damp, wet, and frozen accumulated coal and coal dust, could have dried out or defrosted and burned if the coal and coal dust became involved in a fire. Finally, the fact that rock dust was mixed with the coal and coal dust does not negate the violation. As the Commission has stated, AA construction of [section 75.400] that excludes loose coal that is wet or allows accumulations of loose coal mixed with noncombustible materials, defeats Congress= intent to remove fuel sources from the

mine and permits potentially dangerous conditions to exist@ (Black Diamond, 7 FMSHRC at 1121).

S&S AND GRAVITY

A violation is significant and substantial, if based on 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 (Arch of Kentucky, 20 FMSHRC 1321, 1329 (December 18, 1998); Cyprus Emerald Resources, Inc., 20 FMSHRC 790, 816 (August 1998); National Gypsum Co., 3 FMSHRC 822, 825 (April 1981)). In Mathies Coal Co., 6 FMSHRC 1 (January 1984), the Commission held that in order to establish a S&S violation of a mandatory standard the Secretary must prove: (1) the existence of an underlying violation; (2) a discrete safety hazard **C** 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 the injury in question will be of a reasonable serious nature.

The first requirement is met because there was a violation. The second requirement is met also because that violation contributed to the danger of a mine fire or explosion. As with most instances involving the validity of an S&S finding, the critical question is whether the Secretary established the third element. In other words, did the Secretary prove there was a reasonable likelihood the accumulated material would catch fire or explode and injure a miner?

Watson testified that he saw locations where rollers were turning in the accumulations and places where stuck or misaligned rollers caused the belt to rub against the belt structure (Tr. 48, 53). The rollers that were turning in the accumulations and the belt that was running over the

stationary rollers and against the structure were sources of friction and hence of heat, a fact that Watson confirmed by touching some of the rollers, the accumulations, and the areas of the belt structure (Tr. 49, see also Tr. 409-415). Watson=s testimony was delivered it in an entirely believable manner, and it also has the singular advantage of conforming to an invariable law of physics **C** rubbing produces friction and friction generates heat.[6]

As I have noted, some of the accumulations of loose coal and coal dust were dry, and the heat could have served as a reasonably likely ignition source for the dry accumulations (Tr. 450). Further, while many of the accumulations ranged from damp to wet, there were places where the belt was rubbing in the damp to wet accumulations, which meant that heat was being produced and therefore the accumulations were drying. This too meant that as mining continued, it was reasonable likely that even some of the damp to wet accumulations could have ignited.

Finally, there was the highly explosive float coal dust that lay on the belt structure from the portal to the Y (Tr. 44, 456). As mining continued, the places where the belt was as malfunctioning could have generated heat sufficient to touched off an ignition (Tr. 47). As Watson aptly noted, AIt only takes one frictional source to ignite coal dust@ (Tr. 54). Once there was an ignition, the float coal dust could have propagated an explosion along the beltline.

Miners were exposed to the hazard. The mantrip moved adjacent to the belt when it took miners to the working section (Tr. 96-97, 868). In the event of an explosion or fire, all of the miners on the mantrip easily could have been affected. Moreover, the air in the belt entry traveled toward the working section, and at a minimum eight miners worked inby the accumulations. They too could have been affected by an explosion or fire (Tr. 101-102).

Injuries which reasonably could have been expected were burns and/or those injuries caused by smoke inhalation. Such injuries are of a reasonably serious nature. For all of these reasons I conclude the violation was S&S.

Also, the violation was serious. The focus of the civil penalty gravity criterion is not necessarily on the reasonable likelihood of serious injury, but rather on the effect of the hazard if it occurs (Consolidation Coal Company 18 FMSHRC 1541, 1550 (September 1996); citing to

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[6]Roberts laconic observation that touching the stuck rollers while the belt was moving was Anot the best practice in the world@ was certainly an understatement, and Watson=s actions in this regard may warrant counseling by his supervisors (Tr. 587). However, in my view the fact that his testimony may have been adverse to his own interests enhances rather than lessens his credibility.

Quinland Coals, Inc., 9 FMSHRC 1614, 1622 n.11 (September 1987) (Agravity@ penalty criterion and special finding of S&S not identical although frequently based on same or similar factual circumstances)). As a practical matter this means that analysis of the violation's gravity concentrates on what could have happened if a fire or explosion occurred. As I have found, the proximity of the track to the belt entry and the fact that the working section was inby the violation meant that had the accumulations caught fire and/or had the float coal dust propagated an explosion, the effect on the miners traveling in the proximity of the accumulations or working inby the accumulations could have been disastrous (Tr. 465).

UNWARRANTABLE FAILURE AND NEGLIGENCE

The Commission has defined unwarrantable failure as aggravated conduct constitution more than ordinary negligence (Emery Mining Corp., 9 FMSHRC 1997, 2001 (December 1987). The Commission also has stated that unwarrantable failure is conduct that is characterized by reckless disregard, intentional misconduct, indifference or a serious lack of reasonable care (Emery, 9 FMSHRC at 2003-04; Rochester & Pittsburgh Coal Co., 13 FMSHRC 189, 194 (February 1991)).

Several factors must be considered in analyzing whether a violation resulted from unwarrantable failure: among these are Athe extensiveness of the violation, the length of time that the violative condition has existed, the operator=s efforts to eliminate the . . . condition, and whether [the] operator has been placed on notice that greater efforts are necessary for compliance@ (Mullins and Sons Coal Co., 16 FMSHRC 192, 195 (February 1994)). The culpability determination required for a finding of unwarrantable failure is similar to gross negligence or recklessness. It is more than a Aknew or should have known@ test (Virginia Crews Coal Co., 15 FMSHRC 2103, 2107 (October 1993)). The burden of proof is on the Secretary.

The question of whether the Secretary met her burden by proving the violative conditions were the result of reckless disregard or indifference requires consideration of whether the violative accumulations resulted from Clinchfield's failing to meet a heightened standard of more than ordinary care, a standard required by the company having been put on notice, directly or indirectly, that such care was needed to prevent the violation. Indices the standard was required might be that the company had an inordinate number of accumulations violations prior to January 22; or, that the company was advised by MSHA that the agency believed greater efforts were necessary to prevent violative accumulations; or, that the company otherwise was warned that an inordinate number of accumulations existed; or, that the conditions themselves were so extensive and dangerous they required the company=s immediate attention.

Although the Secretary argues the evidence establishes that in November 1996, and into mid-December, the company had an on-going problem with violative accumulations and that the problem required it to adopt a heightened standard of more than ordinary care, I do not agree. Roberts testified that in mid-November 1996, prior to going to the mine, he reviewed records at the MSHA office and found that Athere were several 75.400 violations and citations, about six

months prior@ (Tr. 566). He guessed the number was between 14 or 15 (Tr. 568). The company argued that to be put on notice, the violations had to involve accumulations along the beltlines, but in my view, a significant number of section 75.400 violations anywhere in the mine would have been sufficient. However, to establish that a certain number of prior violations was a basis for unwarrantable failure, the Secretary had to offer testimony as to what the number was and why the number was meaningful. I cannot find that 14 or 15 accumulations violations over six months should have signaled that the company had a more than an ordinary problem with compliance. There was no testimony by Roberts or by others why such numbers should have alerted the company to greater compliance efforts, and standing alone the numbers do not speak for themselves. Further, I find nothing extraordinary in Roberts testimony that out of the nine citations he issued on November 18, three were for violations of section 75.400 (Tr. 526). Again, the numbers do not speak for themselves.

I recognize Watson testified that on December 16, 1996, he also issued seven citations for violations of section 75.400, and that they involved accumulations of coal and coal dust along seven of the beltlines at the mine (Tr. 159-167; Gov. Exhs. P7-P13). This may or may not be a meaningful number of violations of the same standard. I cannot tell because once again the testimony was presented without a necessary gauge by which to judge the numbers.

Further, there is evidence in the record which suggests (although not conclusively) that whatever Clinchfield's past history with regard to violations of section 75.400, at the end of December 30 and into the first part of January, the company was meeting the standard of care required of it. Watson testified he was at the mine on December 30 and January 8, 1997. On both occasions he rode in a mantrip along the beltlines, and he saw no violative accumulations (Tr. 229, 239, 243-44, 254, 263). The Secretary argues that Watson=s failure to note any accumulations is unimportant because he was than at the mine for purposes other than to inspect the beltlines, and because he was riding not walking alongside the lines. However, as Watson himself agreed, regardless of the purpose of the visit, he would have cited any accumulation violation he observed, and although it was more difficult to see accumulations along the beltlines while riding in the mantrip, it was not impossible.

For these reasons I do not believe the Secretary proved that the company=s past violations of section 75.400 put it on notice that a higher standard of care was required. The question then is if he proved that MSHA gave the company actual notice?

The parties dispute whether or not MSHA warned Clinchfield in mid-November that it needed to take a more aggressive approach to guard against accumulations violations. At issue is the discussion between Musick, Pointer, and Roberts. Pointer did not testify. The Secretary=s version of the discussion was detailed through what others heard Pointer and Roberts say about the discussion and through Roberts' testimony regarding what Pointer and he said to Musick.

According to Watson, in December, Pointer told him that about a month earlier he (Pointer) and Musick had discussed the Aexceptional number of section 75.400 violations and the

conditions of the conveyor beltlines@ (Tr. 107, 373). The discussion took place at the MSHA office. Roberts, who testified he was present at the November discussion, stated that Pointer told Musick that Amore extreme measures@ would have to be taken if the situation with regard to the beltlines did not improve (Tr. 548). Roberts also believed that he told Musick essentially the same thing (Tr. 541, 558).

Musick emphatically denied that the statements were made to him (Tr. 965-966, 1027-28). He was sure that nothing was said about MSHA taking Amore extreme measures,@ such as future enforcement actions under section 104(d) of the Act for violations of section 75.400 (Tr. 569). Musick noted that Shelley Branhan, the union local president and chairman of the union safety committee, arrived during the meeting with Pointer and Roberts, that Musick introduced Branhan to Roberts, and that Musick then left the room. Musick speculated that Roberts might have told Branhan that MSHA intended to intensify its enforcement actions at the mine, and that Roberts might have confused Branhan for Musick (Tr. 1027). (Prior to the meeting Roberts never had met Musick or Branah).

This conflicting testimony does not support finding that Musick was warned about Amore extreme@ enforcement measures. As I have noted, Pointer did not testify, and while Roberts Athought@ he gave Musick Aa kind of verbal warning that perhaps more extreme measures would be forthcoming,@ in the face of Musick=s denial the Secretary needed first-hand confirmation (Tr. 548). She offered Branham=s testimony, but Branham=s recollection was highly suspect. Branham had met with Roberts and the Secretary=s counsel two days prior to the hearing. At the meeting Roberts Amentioned@ what he and Pointer had said to Musick (Tr. 606). Branham had no independent recollection of the conversation until this meeting (Tr. 760-761; 768-769).

Musick=s and Roberts' different recollections of what was said at the November meeting do not mean that the witnesses were disingenuous. Not infrequently speakers recall in good faith what they think they should have said, and listeners recall in good faith what they think they should have heard. This is especially so when, as here, the words recalled were uttered more than a year and one half before.

Much of the rest of the Secretary=s aggravated conduct allegation is premised on the entries that Clinchfield=s belt examiners made in the belt examination book and in Clinchfield=s response to those entries. The testimony and the exhibits establish that the belt examiners repeatedly entered notations in the book regarding the presence of accumulations that needed Asome cleaning@ along the Mains No. 1 belt. An examination of copies of the book that were admitted as evidence indicates that a notation the belt Aneeds some cleaning@ was made over and over during December 1996 and January 1997. Further, the specific entries with regard to possible accumulations for January 11, January 18, January 19, January 20, and January 21 all stated, AFloat dust inby the head house@ (Tr. 629-634; Gov. Exh. P-5). Many also stated that the beltline needed rollers (See Gov. Exh. P-5).

Musick, in what most charitably can be termed an understatement, agreed the notations

were Apretty common@ (Tr. 924). However, Clinchfield maintained that a notation stating a belt needed Asome cleaning@ did not necessarily mean there was a violation of section 75.400, because when a belt examiner usually believed there was a violation, the examiner would leave a note for Musick or for Ball about the condition or tell one or both about the condition. No notes were left and no oral reports were made from January 8 to January 22 (Tr. 925, 927-930, 1207-08).

While I agree with Clinchfield that a notation the belt needed cleaning did not necessarily indicate there was a violation, I believe it should have alerted Clinchfield to the possibility a hazardous condition existed, one that needed to be checked and possibly corrected. This was especially true when the notation was accompanied by an entry signaling the need to replace or repair rollers, since malfunctioning rollers could cause coal and coal dust to fall from the belt and also could serve as an ignition source. Ball seemed to recognize this. He testified, AThe purpose of [the belt examination book] is to let us know of any hazard[ous] conditions or anything that we need to look at or address@ (Tr. 1277). I credit this assessment of the book=s purpose because it corresponds with Ball=s practice of looking at the book at the start of the shift to see if any hazardous conditions were reported (Tr. 1207).

To accept Clinchfield=s contention that only notes or oral reports from the belt examiners alerted it to hazards significant enough to constitute violations would be to render almost meaningless the notations in the book. Surely the company would not have its examiners make and its mine foreman review meaningless entries.

Thus, although Ball maintained nothing in the belt examination book from January 8 to January 22 gave him any indication there was a violation of section 75.400 along the Mains No. 1 belt, that is not the point (Tr. 1253-54). As Ball himself stated, the purpose of making entries in the book was not to report violations but rather to report conditions that needed attention and correction. Clinchfield was responsible for following up on the reports in the book by examining the reported conditions and correcting them so that hazardous conditions were eliminated and violations did not develop as mining continued. Clinchfield totally failed to meet its responsibilities in this regard.

In almost every entry between January 8 and January 22, notations were made indicating that some part of the Mains No. 1 belt needed cleaning, and relatively few notations were made showing that cleaning was done (Tr. 142; see Gov. Exh. 5). Carson Lowe testified that when he wrote the belt needed cleaning over those several days in January, it was because there were accumulations along part or all of the belt and because based on his examination he did not believed the accumulations had been cleaned (Tr. 635-636). The repeated entries in the belt examination book and the extent of the accumulated materials along the beltline supports a reasonable inference that Lowe was right, and that the accumulations had existed for several days.[7] The inference is buttressed by Watson=s testimony that when he told Ball it looked as

[7] The same inference cannot be made with regard to the float coal dust that accumulated from the portal to the Y. The testimony established it could have accumulated in a very short time, that Clinchfield recognized this fact, and that Clinchfield made it a practice frequently to

though the accumulations had existed for Asome time@ and offered Ball the chance view the beltline with him, Ball declined and stated he knew what was there (Tr. 51, see also Tr. 294). Since Ball also stated that during the course of a day it was his practice to visit every beltline (Tr. 1209), the most reasonable interpretation of his response to Watson is that Ball knew the accumulations existed.

Clinchfield=s excuse for allowing the loose coal and coal dust to accumulate along the Mains No. 1 beltline essentially was that the entry was too cold to keep clean when winter temperatures went below freezing. According to Musick, in January miners sometimes were assigned to clean along the Mains No. 1 belt for 30 minutes and then were moved to locations where it was warmer or where it at least felt warmer (Tr. 1062). Ball testified he assigned men to clean the belt on January 17, but that it got so cold he sent the men to shovel another belt (Tr. 1212-16). Because of the cold, Musick guessed it had been two and one half to three weeks since a crew was assigned to clean the belt for an entire shift. Rather, than assign an adequate number of miners to clean along the beltline, Clinchfied seems to have relied on intermittent cleaning by the belt examiners (Tr. 1067-68). The problem with this, as belt examiner O=quinn observed with respect to himself, was that if the belt needed cleaning along its entire length, there was not time to do it (Tr. 1122).

The testimony and evidence establishes that temperatures had been below freezing the week before the citation was issued but that they had begun to warm by January 22. Given the warming trend, Clinchfield maintains that had mining continued the accumulations would have been cleaned by the end of the January 22 shifts. Musick stated, AWe hadn=t had no one on the belt because it had been so cold and it was beginning to warm up. We was going to clean on that belt@ (Tr. 1065, see also Tr. 1214).

The intention to clean when it was warmer is not an acceptable reason for allowing the accumulation. Ball credibly testified that there tended to be more accumulations along the beltlines in the winter (Tr. 1281). Moreover, the mine was drier in the winter, making the accumulations more readily combustible. Acceptance of the company=s excuse would mean that during the winter, when temperatures were below freezing, accumulations would be inevitable and miners would be subject to working under the continual hazard of a mine fire or explosion. Compliance is not dependent upon the weather, and Clinchfield cannot be allowed to wait until the weather changes to give its miners the protection envisioned by section 75.400.

Rather than dance to the temperature's tune, it was the company=s responsibility to find a way to keep its beltline free of violative accumulations. How it met its responsibility was for Clinchfield to determine. If it could not operate in the winter without running afoul of section 75.400, it could have applied for a variance (see 30 U.S.C. '811(c)). There is no suggestion in the record that the company considered such a step.

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rock dust the area (Tr. 931-934, 949).

Given the extensiveness of the accumulated loose coal and coal dust, the length of time the accumulations existed, the fact that the belt examiners, through their book notations advised mine management the accumulations needed cleaning, and the lack of any effective action to clean up the accumulations, prior to the issuance of the citation, I conclude the violation was due to more than ordinary negligence on Clinchfield=s part and that the company unwarrantably failed to prevent the violation.

This finding is equivalent to a finding of high negligence on Clinchfield=s part.

KNOWING VIOLATIONS

Section 110(c) of the Act provides for the assessment of a civil penalty when an agent of a corporation Aknowingly [has] authorized, ordered, or carried out@ a violation of a mandatory health or safety standard (30 U.S.C. '820(c)). The parties have stipulated that at all times relevant to the cases Clinchfield was a corporation (Stip. 10). In addition, at all times relevant the superintendent (Musick) and the mine foreman (Ball) were agents of the corporation (Strips. 12, 14). Thus, they may be held personally liable if they knowingly violated section 75.400.

The Commission has approved the description of Aknowingly@ found in U.S. v. Sweet Briar, Inc., 92 F. Supp. 777 (W.D.S.C. 1950), wherein the court stated that the word:

> Adoes not have any meaning of bad faith or evil purpose of criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence (92 F. Supp. At 780).

The Commission has found that this interpretation Ais consistent with both the statutory language and the remedial intent of the . . . Act@ (Kenny Richardson, 3 FMSHRC 8, 16 (January 1981) (aff=d on other grounds, 689 F.2d 623 (6th Cir. 1982), cert denied, 461 U.S. 928 (1983)). The Commission has explained:

> If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute (Kenny Richardson, 3 FMSHRC at 16).

In addition, the Commission has held that to violate section 110(c), the person=s conduct must be Aaggravated@, i.e., it must involve more than ordinary negligence (Wyoming Fuel Co., 16

FMSHRC 1618, 1630 (August 1994); Beth Energy Mines, Inc., 14 FMSHRC 1232, 1245 (August 1992)).

I conclude that the cited accumulation was due to more than ordinary negligence on the part of Musick and of Ball and that they knowingly violated the standard. As Musick stated, he was the person Ain charge of the overall . . . health and safety of the employees [and] production@ (Tr. 853), and Ball was his principal deputy (Tr. 1049). Moreover, Ball was the management official particularly responsible for keeping the belts clean (Id., 1049, 1080). Both men knew that accumulations of loose coal and coal dust along the beltlines were more common in the winter when the outside wipers froze, the loose material on the belt froze, and the frozen material was carried inside the mine where it tended to fall under and alongside the belt (Tr. 918-919, 1281).

This meant that during the winter Clinchfield=s agents should have exercised heightened care to prevent accumulations along the beltlines. Neither did. As O=quinn testified, no one miner was assigned full time to keep the Mains No. 1 belt clean from the portal to the tailpiece. Rather, Musick and Ball primarily relied on the belt examiners, and O=quinn persuasively testified that if the belt required cleaning along its entire length, he, as a belt examiner, did not have the time to clean it (Tr. 1118, 1112). This was echoed by Lowe who also felt that insufficient personnel were relied upon by the agents to keep the belt clean (Tr. 639, 640).

As importantly, although the agents knew that in the winter they might not be able to keep miners cleaning the beltline for more than 30 minutes at a time due to the cold, they did nothing otherwise to ensure compliance. Or, if circumstances in the mine made compliance impossible in the winter, they did nothing to initiate steps to provide for a legal alternative to compliance.

Musick explained, AWe hadn=t had no one on the belt because it had been so cold@ (Tr. 1065, see also Tr. 121),@ and Musick speculated that because of the cold it had been two and one half to three weeks since he and Ball had assigned a crew to clean the beltline (Tr. 1067-68). Ball too maintained the cold affected his ability to keep the beltline clean in that he had removed miners from cleaning the belt on January 17 and had sent them elsewhere because it had been so cold (Tr. 1212-16). Rather than rotate cleanup crews, or assign enough miners to clean the entire line in a time that avoided the problems caused by the cold, the record permits the inference the agents chose to operate as usual, and, as I have already found, to make compliance contingent upon the weather (Tr. 1065).

In so doing both men fell short of the heightened standard of care required by the circumstances. Their negligence was aggravated, and they are liable for the violation under section 110(c).

CIVIL PENALTY ASSESSMENTS

CLINCHFIELD

The violation while serious was not as serious as the Secretary contended in that much of the accumulated material was damp to wet which meant than an ignition was less likely than if all of the accumulations had been dry. Further, the violation was not as serious as Watson initially believed in that some fire fighting protection was available from the portal to the Y and immediately inby the Y (see n.4 supra). The violation was due to the company=s high negligence. Clinchfield is a large operator with a large history of relevant previous violations. The violation was abated with good faith and in a reasonable time.

The Secretary has proposed a civil penalty of $3,200 for the violation. Because of the lessened gravity of the violation, I conclude a penalty of $2,500 is appropriate.

MUSICK AND BALL

For the same reasons as set forth above, I find that the violation while serious, was not as serious as the Secretary contended and as Watson believed, and that the violation was abated in good faith (Sunny Ridge Mining Co., Inc., 19 FMSHRC 254, 272 (February 1997) (findings on gravity and good faith abatement in section 110(c) cases may be made on same record used in assessing operator=s penalty)). I also find that Musick and Ball exhibited more than ordinary negligence in failing to make sure the loose coal and coal dust along the Mains No.1 belt was cleaned up and the accumulation prevented. Neither Musick nor Ball offered evidence as to their income and net worth, and I therefore assume the size of the penalty will have no affect on their ability to meet their financial obligations.

There is no indication in the record that either Musick or Ball previously engaged in knowing violations. Indeed, the record contains statements by rank and file miners regarding the care and concern they usually exhibited toward the safety and the well being of the miners whom they supervised (Tr. 658, 751-752, 1198-99, 1093, 1153). Given the somewhat lessened gravity of violations, the agents' lack of a prior history of knowing violations, and being mindful of the Commission=s admonition that Ainordinately high penalties should not be assessed against individuals under sections 110(c)@ (Sunny Ridge, 19 FMSHRC at 272), I find that significant reductions in the penalties proposed by the Secretary are warranted. In addition, in assessing a penalty against Ball, I note that he is disabled and seems unlikely to return to work as a miner (see n.1 supra).

The Secretary has proposed that Musick and Ball respectively be assessed civil penalties of $1,400 and $1,000. For the reasons set forth above, I conclude Musick should be assessed $800 and Ball should be assessed $200.

ORDER

DOCKET NO. VA-33

Citation No.	Date	30 C.F.R. '	Proposed Assessment	Assessment

7293555	1/22/97	75.400	$3,200	$2,500

The citation is AFFIRMED and Clinchfield is ORDERED to pay a civil penalty of $2,500 within 30 days of the date of this decision.

DOCKET NO. VA 98-17

Citation No.	Date	30 C.F.R. '	Proposed Assessment	Assessment
7293555	1/22/97	75.400	$1,000	$200

Ball is ORDERED to pay a civil penalty of $200 within 30 days of the date of this decision.

DOCKET NO. VA 98-18

Citation No.	Date	30 C.F.R. '	Proposed Assessment	Assessment
7293555	1/22/97	75.400	$1,400	$800

Musick is **ORDERED** to pay a civil penalty to $800 within 30 days of the date of this decision.

Upon receipt of the payments, Dockets No. VA 97-33, VA 98-17, and VA 98-18 are **DISMISSED**.

David F. Barbour
Administrative Law Judge

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