FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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February 27, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 94-19
	:	A.C. No. 46-01452-03957
v.	:	Arkwright No. 1
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: Robert Wilson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
Elizabeth S. Chamberlin, Esq., Consol Inc., Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Fauver

This is an action for civil penalties for three alleged violations of safety standards, under ' 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 **et seq**.

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

FINDINGS OF FACT

Order No. 3118662

1. Inspector Richard McDorman issued ' 104(d)(2) Order No. 3118662 on April 7, 1993, charging a violation of 30 C.F.R. ' 75.340(a). The inspector found that water pump No. 68 was in a crosscut in an intake escapeway on the 2 South section and was not in a noncombustible enclosure or equipped with a fire suppression system, and the air ventilating the water pump was not coursed into the return air entry but was used to ventilate the working section.

2. The pump was placed there to pump water out of an abandoned section of the mine adjacent to the 2 South section. The pump was 14 to 16 inches high, 18 to 20 inches wide, and 6 feet long. It weighed 300 to 350 pounds. The pump was energized and ready to be operated. It was located about 20 crosscuts from the working face and 1800 feet from the loading point. It was not moved as the working section advanced or retreated.

Order No. 3118671

3. Inspector McDorman issued ' 104(d)(2) Order No. 3118671 on April 21, 1993, charging a violation of 30 C.F.R.' 75.400.

4. Accumulations of fine coal, coal dust and float dust were found on and around the 3 Right section belt line pony drive. A pony drive is an auxiliary drive that helps to drive a long belt line. As the conveyor belt comes to the pony drive, it dumps the coal onto a lower part of the belt, wraps around the pony drive, and comes back out where the coal is dumped back onto the upper belt. The belt goes to the mouth of the section where it dumps onto a main belt and then returns to the working section.

5. A scraper on the pony drive was installed to prevent coal from spilling off the belt. However, there was substantial spillage. The inspector found accumulations from 1/4 to 2 inches deep. They were packed under the belt, which was rubbing against the accumulations. He found other accumulations where coal had fallen off a pan under the belt. These accumulations were 6 to 12 inches deep. Other accumulations were near the end of the pan, measuring 8 inches deep.

6. To abate the cited condition, seven or eight men worked about two hours to remove the combustible accumulations from the area. About three tons of combustible materials were cleaned up to abate the condition.

Order No. 3122509

7. Section 104(d)(2) Order No. 3122509 was issued by Inspector Jerry Vance on April 20, 1993, for a violation of 30 C.F.R. ' 75.370(a)(1).

8. Inspector Vance was traveling outby in the tailgate entry on the 3 Right longwall section, moving toward the mouth of the section, when he observed that the operator had erected a stopping across the tailgate entry. When he went through the

door in the stopping, he took a smoke tube reading and found there was no air movement. His methane detector sounded an alarm and showed over one percent methane. There was no air movement for about 600 feet in this entry.

DISCUSSION WITH FURTHER FINDINGS, CONCLUSIONS

Order No. 3118662

This order was issued because a pump in an intake escapeway was not enclosed in a noncombustible enclosure and the air ventilating the pump was not coursed into a return entry. The inspector cited a violation of 30 C.F.R. ' 75.340(a), which provides:

> Underground transformer stations, battery charging stations, substations, rectifiers, and water pumps shall be located in noncombustible structures or areas equipped with a fire suppression system meeting the requirements of ' 75.1107-3 through ' 75.1107-16. This equipment also shall be ----
>
> (1) ventilated by intake air that is coursed into a return air course or to the surface and that is not used to ventilate working places ***.

Section 75.340(a) is a part of new ventilation regulations that took effect in November 1992. Its predecessor,' 75.1105, required that certain electrical equipment, including "permanent pumps," be housed in fireproof structures or areas, and that air ventilating them be coursed into the return air entry. The new regulations delete the reference to "permanent" pumps and apply to all pumps unless they come under an exemption in' 75.340(b).

Respondent contends that its pump was exempt from ' 75.340(a) under either ' 75.340(b)(4) or (6), which provide:

> This section does not apply to *** (4) pumps located on or near the section and that are moved as the working section advances or retreats; *** [or] (6) small portable pumps.

The preamble to ' 75.340(b) states that "[s]mall portable pumps are easily relocated without the aid of mechanized equipment; capable of being moved frequently; and installed in such a manner to facilitate such movement."

I find that the pump, which weighed 300 to 350 pounds, was not a "small portable pump" within the meaning of' 75.340(b)(6).

I also find that the pump was not "moved as the working section advances or retreats" within the meaning of ' 75.340(b)(6). The term "working section" is defined as "All areas of the coal mine from the loading point of the section to and including the working faces." 30 C.F.R.' 75.2. The pump was about 1800 feet outby the loading point and did not advance with the working section.

The pump was nonexempt and therefore in violation of ' 75.340(a).

The inspector found that the pump was in good condition at the time the order was issued and was not likely to catch on fire. For those reasons, he cited the violation as not "significant and substantial" within the meaning of' 104(d) of the Act. However, this was still a serious violation. In the event of a fire reaching the pump's fuel tank, the resulting smoke would have contaminated the intake entry and escapeway with a reasonable likelihood of serious injuries.

The inspector found that the violation was due to high negligence and therefore was an "unwarrantable" violation within the meaning of ' 104(d) of the Act. The Commission has defined an unwarrantable violation as one due to "aggravated conduct, constituting more than ordinary negligence" (Emery Mining Corp., 9 FMSHRC 1997 (1987)).

Respondent contends that the violation was not unwarrantable because Respondent held a good faith belief that the pump was in compliance with the regulations. To be a mitigating factor, the operator's belief must be reasonable. Wyoming Fuel, 16 FMSHRC 1618, 1628 (1994). I do not find that the exemptions claimed by Respondent were reasonable grounds for assuming, without first inquiring into MSHA's enforcement position, that the pump qualified for an exemption. The pump was too heavy to lift to be considered a "small portable pump," and since it was not moved as the working section advanced or retreated, it could not reasonably be considered exempt under ' 75.340(b)(6).

Moreover, the operator's claims of exemption under ' 75.340(b)(4) and (6) appear to be after-the-fact litigation positions, not the actual reason for the operator's contention that the pump was not covered by ' 75.340(a). The actual reason appears to be the contention that the pump was not a "permanent" pump within the meaning of the old regulation. Thus, Respondent's safety compliance representative, Michael Jackson,

testified that at the time of the order he believed the pump "met the criterion of law of . . . not being a permanent pump." Tr. 84. This indicates that Respondent did not keep up with the change in the law.

Respondent is responsible for knowing the change in the safety standard after its publication in the Federal Register, which occurred about five months before the violation. The importance of safety standards places a high duty on an operator to keep abreast of the law and to be sure that it complies with all changes in safety standards that are duly published. "Ignorance of the law" does not lower the operator's negligence from high to ordinary in this case. The evidence sustains the inspector's allegation of an "unwarrantable" violation.

Order No. 3118671

This order was issued for a violation of 30 C.F.R.' 75.400. Respondent concedes that this was a "significant and substantial" violation, but challenges the inspector's findings of high negligence and an unwarrantable violation.

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 electric equipment therein." Order No. 3118671 was issued because fine coal, coal dust and float dust had been allowed to accumulate on and around the 3 Right section belt line pony drive. A pony drive is an auxiliary drive that helps to drive a long belt line. As the belt comes to the pony drive, it dumps the coal onto a lower part of the belt, wraps around the drive, and comes back out where the coal is dumped back onto the upper belt. The belt goes to the mouth of the section where it dumps onto a main belt.

A scraper was installed on the pony drive to scrape coal off the bottom belt. However, there was substantial spillage. Some of the accumulations measured 1/4 to 2 inches deep. The accumulations were packed between the pan and the belt and the belt was rubbing against the accumulations. Other accumulations were on the mine floor, where combustible material had fallen off the pan. The accumulations under the pan were 6 to 12 inches deep. Other accumulations were found near the end of the pan, measuring 8 inches deep.

To abate the violation, it took seven or eight men up to two hours to remove the combustible accumulations from the area. Inspector McDorman testified that he and the company

representative, Clifford Cutlib, agreed that about three tons of coal were cleaned up to abate the violation. This figure is reflected in Inspector McDorman's notes. Company witnesses disputed this figure. However, in addition to Inspector McDorman's notes, it is reflected in the order itself, and Mr. Cutlib said nothing about that to Inspector McDorman when the order was issued. On balance, I credit the Inspector's testimony and his notes as the locations and quantities of the accumulations.

After some abatement efforts were made, the mine superintendent asked the inspector to terminate the order. The inspector refused to terminate the order until all the accumulations had been removed. The mine superintendent stated that the order had shut down a million dollar piece of equipment which the company needed to get running. This is consistent with the inspector's opinion that the company practice was to clean up accumulations only partially, just so that the belt would not rub against combustible accumulations.

The company's preshift and onshift reports for March 21 to April 21, 1993, show 43 reports of coal spillage at the location where Order No. 3118671 was issued. Also, the mine history shows seven citations for violative accumulations along belt lines from April 1992 through April 1993. Two of those citations were issued for accumulations at the pony drive on the 2 Right section.

Section 75.400 is "directed at preventing accumulations in the first instance, not at cleaning up the materials within a reasonable period of time after they have accumulated" Old Ben Coal Company, 1 FMSHRC 1954 (1979)). The primary Congressional intent in passing the Mine Act was to prevent mine explosions and fires and ' 75.400 is central to that purpose. Black Diamond Coal Company, 7 FMSHRC 1117 (1985).

The inspector's findings of high negligence and an unwarrantable violation are amply supported by the evidence. Respondent knew that it had major spillage problems but did not correct them. The preshift and onshift reports showed repeated entries of spillage at the cited location. Also, Respondent had a number of prior citations for violative accumulations, including two at the cited pony drive. Despite this notice that there was a persistent problem of combustible accumulations, Respondent did not assign anyone to this area to prevent violative accumulations. The operator's primary concern appears to have been production rather than preventing combustible

accumulations. The evidence shows aggravated conduct beyond ordinary negligence.

Order No. 3122509

This order was issued for a violation of 30 C.F.R. ' 75.370(a)(1), which requires the operator to develop and comply with a ventilation plan approved by the Secretary. Once the operator's ventilation plan is approved, its provisions and revisions are enforceable as mandatory standards. See, UMWA v. Dole, 870 F.2d 662, 671 (D.C. Cir. 1989); and Jim Walter Resources, 9 FMSHRC 903, 907 (1987).

Respondent's ventilation plan provides that the "mine is constantly patrolled by fire bosses to insure that no dead areas or areas of no air movement occur." Exhibit G-16, p.2. Order No. 3122509 was issued because there was no air movement for about 600 feet in the tailgate entry of a longwall section.

Inspector Vance was traveling the tailgate entry on the 3 Right longwall section from the face toward the mouth of the section when he encountered the violation. He was traveling with a company representative, Bobby Gross, and a miner's representative, Alex Petrosky. The operator had erected a stopping across the tailgate entry. Outby that point, there was no air movement for about 600 feet. When the inspector went through the door in the stopping, he took a smoke tube reading. There was no air movement. His methane alarm went off, indicating over one percent methane. He took smoke tube readings at various locations in the entry. All readings showed no air movement.

The dead air space was caused by the stopping across the tailgate entry. With the stopping there, the air in the tailgate entry had nowhere to go.

Respondent contends that the dead air space was caused by "certain changes that occur in mine conditions and that they occurred between the time of the last examination and the time that the Inspector wrote the Order." Tr. 234. However, there is no evidence of any specific changes that would have accounted for the dead air after the stopping had been erected. The reliable evidence indicates that the dead air space was caused by the stopping across the tailgate entry, which had been erected about four weeks before the order was issued.

Since this entry is required to be walked by a fireboss weekly, this condition should have been detected and corrected by the operator prior to Inspector Vance's inspection. Also, when

the stopping was installed, the operator should have made sure that there was positive air movement in the entry. It was obvious to Inspector Vance when he reviewed the mine map that the stopping presented a problem. It should have been just as obvious to the operator.

Finally, the violation was the direct result of actions taken by management. The stopping across the tailgate entry was installed at the direction of management, which has a duty to evaluate the consequences of its actions. The company's failure to prevent, detect, and correct the violation of its ventilation plan constitutes more than ordinary negligence. I find that the evidence supports the inspector's findings of high negligence and an unwarrantable violation.

Although the violation was not designated "significant and substantial," it was a serious violation. As a direct result of the violation, there was a build up of more than one percent methane in the tailgate entry.

Civil Penalties

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

> The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

Respondent is a large operator. After notification of the violations involved, Respondent made a good faith effort to achieve rapid compliance. The factors of gravity and negligence have been discussed as to each violation.

Considering all of the criteria in ' 110(i), I find that the following civil penalties are appropriate:

Order	Civil Penalty
No. 3118662	$ 2,400
No. 3122509	$ 2,400
No. 3118671	$ 4,800
	$ 9,600

CONCLUSIONS OF LAW

1. The judge had jurisdiction.

2. Respondent violated the safety standards as alleged in Orders Nos. 3118662, 3122509 and 3118671.

ORDER

WHEREFORE IT IS ORDERED that:

1. Order Nos. 3118662, 3122509 and 3118671 are AFFIRMED.

2. Respondent shall pay civil penalties of $9,600 within 30 days of this Decision.

William Fauver
Administrative Law Judge

Distribution:

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