

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 2, 2004

MOUNTAIN COAL COMPANY, LLC,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEST 2004-10-R
v.	:	Order No. 7629370; 9/09/2003
	:	
SECRETARY OF LABOR,	:	West Elk Mine
MINE SAFETY AND HEALTH	:	Mine Id. 05-03672
ADMINISTRATION, (MSHA),	:	
Respondent	:	
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2004-305
Petitioner	:	A.C. No. 05-03672-24602
	:	
v.	:	
	:	West Elk Mine
MOUNTAIN COAL COMPANY, LLC,	:	
Respondent	:	

DECISION

Appearances: Jennifer A. Casey, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Secretary of Labor;
Laura E. Beverage, Esq., Jackson Kelly, PLLC, Denver, Colorado, for Mountain Coal Company, LLC.

Before: Judge Manning

These cases are before me on a notice of contest filed by Mountain Coal Company, LLC, (“Mountain Coal”) and a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 *et seq.* (the “Mine Act”). A hearing was held in Delta, Colorado. The parties presented testimony and documentary evidence and filed post-hearing briefs.

These cases concern Order of Withdrawal No. 7629370, issued under section 104(d)(1) of the Mine Act on September 9, 2003. The order alleges a violation of 30 C.F.R. § 75.400, which requires that “coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.” The Secretary proposes a penalty of \$11,500.00 for the alleged violation.

The body of the order, as corrected for spelling errors, states:

Excessive/dangerous accumulations of loose coal, coal dust, dry coal float dust, and coal fines were allowed to accumulate on the 17 H.G. Longwall. The excessive dangerous accumulations began at shield #10 and extended to the last shield #165. The back walkway had excessive dry-damp loose coal chunks, coal dust, coal fines and float dust deposited on the walkway of the shields. There was dry black coal float dust deposited on the back of the walkway shield structure and on the metal floor walkway, on the shield control boxes, high pressure hose attachments, electrical cords and electrical control boxes. There was excessive dry-damp packed coal fines and coal dust observed in the control hoses behind the shield legs. The excessive dry-damp packed coal fines and coal dust was observed in the lemniscate back area. Also there was excessive coal fines and coal dust allowed to accumulate and packed in the front of the shield legs. These accumulations measured from approximately ½ inch to 12 inches in depth at different locations on the longwall. The shields were totally black in color. The longwall foreman stated to the writer they had mined between 6 and 7 passes prior. There was no one observed washing down the shields when the inspectors arrived on the longwall. This mine has been cited over 75 times for violations of 75.400 since March 28, 2001. Meetings have been held with management on numerous occasions addressing the recurring problems of violating 75.400. The writer discussed this cleaning on the shields 3 days ago. Management has been put on prior notice in the past that greater efforts need to be implemented to prevent accumulations from occurring at this mine. Spot samples were collected to substantiate the combustibility of the coal accumulations. Also, samples of the dry coal float dust were collected. This mine is on a 5-day methane spot inspection. This type of dangerous condition could result in a major mine explosion or fire.

I. SUMMARY OF THE EVIDENCE

A. Background

Mountain Coal operates the West Elk Mine, an underground coal mine near Somerset in Gunnison County, Colorado. At the time the order was issued, Mountain Coal was operating two continuous mining sections and one longwall section. The order was issued on the longwall section. Mountain Coal has used a longwall at its mine for about 10 years. The longwall uses 165 numbered shields for roof support starting with Shield No. 1 on the headgate side to Shield No. 165 on the tailgate side. The shearer consists of two 7-foot drums that cut coal by traveling back and forth along the working face. The face is 1000 feet long. During the mining cycle, the shearer cuts about seven feet of coal from the face when moving toward the headgate in what is called the main or headgate pass. On this pass, the shearer normally moves about 35 to 40 feet per minute. After this pass, about three or four feet of coal remains on the bottom which is cut on the tailgate pass. The shearer moves about 60 to 70 feet per minute on this pass.

The panline is pushed forward on the tailgate pass by the relay bars connected to each shield. The headgate shearer or a jack setter activates the relay bars to push the panline closer to the face. The shields are pulled forward about 40 inches on the headgate pass starting at Shield No. 165. The movement of each shield is controlled by a computer called the "PM-4," mounted on each shield. First, the hydraulic leg cylinders lower the shield's canopy from the mine roof about six to eight inches. Next, the base lift cylinder rises, allowing the shield's pontoons to lift up over material on the floor. After the shield has been pulled about 40 inches toward the face, the canopy is extended back against the roof with a force of about 600 tons. Side shields are extended from both sides of each canopy so the space between each shield is minimized.

Miners travel along the longwall by walking between the panline and the leg cylinders of the shields. At the hearing, this area was called the "front walkway." Miners can also access the area behind the leg cylinders for maintenance. Although this area was called the "back walkway" at the hearing, miners would not enter the area except to perform repairs or to replace a hydraulic hose. Even a small individual would have difficulty walking along this "back walkway."

The canopy on each shield supports the roof and protects miners from falling rock. A caving shield is behind each canopy. These caving shields are supported by two hinged beams, known as the "lemniscate," which are behind the back walkway. The configuration of the canopies is illustrated in Joint Exhibit 12-2.

A longwall crew usually consists of five miners and one supervisor. On this longwall there was a headgate operator, a headgate shearer operator, a tailgate shearer operator, two jack setters, and a production supervisor. In addition, there are two mechanics and a maintenance supervisor assigned to each longwall production shift. There were a total of four crews for the longwall, three production shifts and one maintenance shift.

The longwall is kept clean of coal dust, coal fines, loose coal and other combustible material through the use of water sprays. One water line is used for the shields and another water line is used for the shearer. About 200 gallons of water is used per minute. There are six water sprays on the body of the shearer that spray toward the face and there are also sprays on the cutting drums. (Joint Ex. 12-4). There is a wide-angle water spray mounted on the shearer near the tailgate drum that sprays toward the shields. This spray, known as the PM-4 spray, keeps the infrared light on each shield computer clean so that it can function properly and it helps keep the shields clean. As the shearer travels up and down the longwall face, the tailgate shearer operator washes the shields with either the hose on the shearer or with the high-pressure hoses on the shields. The tailgate operator would typically wash the front walkway, the toes of the hydraulic leg cylinders, the valve banks, and the PM-4s on the faster tailgate pass. On the slower headgate pass, the tailgate shearer operator spends more time washing the back walkways and the lemniscate. High-pressure hoses on the shields are located on every tenth shield. Washing must be performed continuously throughout the shift to keep the longwall free of accumulations. The jacksetters, as well as supervisors, may spot-clean areas with hoses as the need arises. Miners generally do not clean downwind of the shearer when it is cutting because of the potential increased exposure to respirable dust. These cleaning methods, which are in its cleanup plan under section 75.400-2, have been used at the West Elk Mine for years.

Loose coal and coal dust, including float coal dust, are produced during the mining process. Although coal dust is created by the cutting of coal, most of that dust is suppressed by the water sprays on the body of the shearer. Any remaining coal dust would be deposited along the front walkway, on the front of the leg cylinders, and on the PM-4s. Most of the loose coal and coal dust observed on September 9 was produced by the movement of the shields. When the shields are pulled forward on the headgate pass, the material above the canopy falls onto the shield components because the force of the canopy against the roof pulverizes the roof immediately above it. Loose coal, coal dust, and debris are deposited along the back walkway, on hoses, and other shield components each time the shields are pulled forward. The amount and nature of the material that falls depends on the composition of the mine roof above the shields. Mountain Coal's witnesses credibly testified that, on September 9, 2003, the roof above the shields was mostly comprised of coal. (Tr. 721-25, 940-41, 802, 1018-19). Because the shields are moved forward soon after the back walkway area is cleaned on the headgate pass, new material falls into that area coating the wet equipment with loose coal and coal dust. The tailgate shearer operator cannot hose down the back walkway area after the shields move because it would place him downwind of the shearer and increase his potential exposure to respirable dust.

B. MSHA's Inspection Activities

MSHA has inspected the longwall section of the West Elk Mine many times. On September 7, 2003, Inspector Kenneth Wilson was at the mine to conduct a 5-day methane spot inspection. During this inspection, Inspector Wilson observed accumulations of loose coal and coal dust on the back walkway and on several shield structures. In some places the material was three to four inches deep. (Tr. 44-45, 50-51, 240, 562, 1055). He believed that these

accumulations were more than what is typical on the longwall. Inspector Wilson testified that he discussed his concerns with Gaylon McDaniel, a longwall production supervisor, and Darrell Green, another longwall production supervisor. He pointed out areas of concern and advised them that Mountain Coal needs to do a better job of cleaning the longwall because material is accumulating faster than the company can clean it. McDaniel testified that he understood that Inspector Wilson's primary concern was the accumulations in the back walkway. (Tr. 1036-38, 1051, 1055). Inspector Wilson did not issue any citations for the accumulations because Mountain Coal employees were washing the shields at the time of his inspections. Wilson advised management that he would examine accumulations on the longwall on subsequent inspections.

On September 9, 2003, Inspector Wilson returned to the West Elk Mine accompanied by Supervisory Inspector Larry Ramey. After reviewing pre-shift and on-shift record books, they proceeded to the longwall section. When they arrived on the section, the longwall was not in operation. They were told that the shearer had completed about six or seven passes before it was shut down to repair a water spray boom on the shearer. Inspectors Wilson and Ramey spent about three hours inspecting the longwall face. They separately traveled from the headgate to the tailate stopping along the way to observe conditions and to take samples. The inspectors testified that they observed coal dust, float coal dust, coal fines, and loose coal at various places along the longwall shields, including on the back walkway, on the shield structures, on hydraulic hoses, on power boxes, on electrical cables, and in leg cylinder pockets. Inspector Ramey collected 18 samples of the material at random locations from shield 10 to shield 165.

Inspector Wilson testified that it appeared to him that no washing had occurred since his September 7th inspection or that washing had been totally ineffective. (Tr. 61-62, 75, 110, 117, 239, 241-42). He described the accumulations as obvious and extensive. Wilson testified that the accumulations were particularly extensive along the back walkway, where he measured the depth to be between ½ inch and 12 inches, with a few areas as deep as 18 inches. The depth and type of material varied greatly between shield 10 and shield 165. Inspector Wilson testified that the conditions he observed were "unbelievable" and "filthy" and that the accumulations were the "worst I've ever seen [on] that longwall." (Tr. 60, 72, 117, 818). Supervisory Inspector Ramey testified that the accumulations he observed were the most he had ever seen on any longwall. (Tr. 263). He testified that the accumulations were extensive and obvious. (Tr. 348).

Based on the conditions observed, Inspector Wilson issued the subject order at about 3:05 p.m. As discussed in more detail below, Mountain Coal maintains that the accumulations observed on September 9 were typical for the longwall section and that the accumulations were incidental to normal longwall operations. As a consequence, Mountain Coal management ceased all clean-up operations and called the MSHA District Office in Denver to request that a district official travel to the West Elk Mine to review the conditions observed by the inspectors. Bob Cornett, assistant district manager for technical operations, traveled to the mine to observe the conditions on the longwall. Mr. Cornett arrived at 1:00 a.m. the following morning and the entire inspection team returned to the longwall section with Cornett. They examined the

longwall from the headgate to the tailgate and back. Cornett spent more than two hours observing the conditions and checking them against the language in the order. He also spoke privately with Inspector Wilson about the conditions.

Cornett testified that he observed conditions that concerned Inspector Wilson. He stated that most of the shields had some type of float dust or coal dust on them. (Tr. 567). The accumulations appeared worse as he traveled from the headgate to the tailgate. (Tr. 568). Cornett was especially concerned about the surfaces along the back walkway. He stated that material was packed in and around the deck plates along the back walkway. In areas where these deck plates were missing, loose coal was wedged in between the hoses, electrical components, and the shield structure. Smaller material was packed around the hoses and the loose coal. Cornett believes that this material was so packed in at some locations along the back walkway that spraying the area with water would not remove the material. (Tr. 569). He observed the back walkway by leaning over and looking in. Cornett testified that the accumulations he observed were consistent with what Inspector Wilson described in the order. Following his tour of the longwall section, Cornett concluded that the accumulations were in violation of section 75.400. He testified that these accumulations were not incidental to normal longwall operations and that, “with prudent washdown and cleanup, it is not something that would have occurred over a shift.” (Tr. 571). Mr. Cornett advised mine management that he was not going to modify the order of withdrawal following his examination of the longwall section.

In order to abate the cited condition, Mountain Coal assigned 12 miners to clean the longwall shields. Inspector Wilson required Mountain Coal to clean the longwall shields “to bare metal.” (Tr. 580, 911-12). As a consequence, the crew removed the deck plates along the back walkway, washed under these plates with water hoses, cleaned out the leg cylinder pockets, and washed down the entire area. As part of the abatement process, more water hoses were attached to the longwall shields to facilitate the washing process. Prior to September 9, 2003, there was a hose located at every tenth shield but when abatement was completed there was a hose every fifth shield. Mountain Coal estimates that it took the crew about 31½ hours to abate the conditions cited in the order. The order was terminated on September 11, 2003.

II. SUMMARY OF THE PARTIES’ ARGUMENTS

A. Secretary of Labor

The Secretary maintains that Mountain Coal permitted dangerous accumulations of loose coal, coal dust, float coal dust, and coal fines to accumulate on the longwall section in violation of section 75.400. The Commission has long held that, while some spillage of combustible material is inevitable in mining operations, a violation exists “where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary, it likely could cause or propagate a fire or explosion if an ignition source were present.” *Old Ben Coal Co.*, 2 FMSHRC 2806, 2808 (Oct. 1980) (*Old Ben II*). The Secretary contends that the combustible accumulations were widespread and were likely to cause or propagate a fire or

explosion. She points out that multiple ignition sources were present along the longwall. The inspectors' determinations were confirmed by a second independent review by an assistant district manager. The Secretary contends that the evidence establishes that the violation was of a significant and substantial nature ("S&S") and that Mountain Coal unwarrantably failed to comply with the requirements of the safety standard.

B. Mountain Coal

The washing practices that Mountain Coal has always used are effective in preventing accumulations of combustible materials on the longwall during the mining process. The longwall mining process, by its very nature, continuously deposits dust and debris on the shields and shield components. No MSHA inspector has ever suggested that Mountain Coal's cleaning procedure on the longwall is inadequate or ineffective. Indeed, Inspector Wilson testified that Mountain Coal keeps its longwall clean. On the morning of September 9, 2003, the longwall was toured by senior management of Arch Coal, Inc., Mountain Coal's parent company. Mine crews took extra efforts to clean the longwall on the shift preceding the tour by senior Arch management. The conditions on the longwall at the time of the inspection on September 9 reflected normal spillage and deposits incidental to the longwall mining cycle. There were no accumulations of 12 inches or more. Mountain Coal submits that the only thing that changed on September 9, 2003, was the MSHA inspectors' opinion of how clean the longwall needed to be maintained during the mining cycle. Mountain Coal contends that the order was issued for conditions that had previously been accepted by MSHA as complying with section 75.400.

The longwall had been cleaned many times using Mountain Coal's normal practices after Inspector Wilson's September 7 inspection. The inspector's belief that the accumulations he observed on September 7 were still there on September 9 is incorrect. The Secretary simply changed her requirements for compliance with the safety standard and failed to provide Mountain Coal with fair notice of the change. In addition, by issuing the order, the Secretary violated the guidelines set forth in her Program Policy Manual ("PPM"). Finally, assuming that a violation was established, the Secretary failed to prove that the violation was S&S and was caused by Mountain Coal's unwarrantable failure to comply with the standard.

III. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Violation of Section 75.400.

1. Findings of Fact Concerning Accumulations of Combustible Material.

The parties present opposing views of the evidence in this case. The Secretary believes that the accumulations were especially egregious and they presented an extremely hazardous condition. Although Mountain Coal disputes some of the testimony presented by the Secretary, such as the depth of the accumulations at certain locations, its primary argument is that the

conditions observed by Inspectors Wilson and Ramey were representative of the accumulations that always develop during the mining cycle. As the mining cycle progresses, accumulations are washed away and new accumulations develop as the shields are moved forward. Mountain Coal contends that what the inspectors observed was the accumulations that had developed during the normal mining cycle.

Mountain Coal believes that MSHA, acting through Supervisory Inspector Ramey, changed its policy as to the amount of accumulations that will be permitted on a longwall section under the standard. Mountain Coal argues that it was using its normal procedures for keeping the longwall clean which had not been questioned by MSHA in the past. Mountain Coal maintains that MSHA inspectors have observed conditions similar to those found on the longwall on September 9 during previous inspections and no citations were issued. It states that when Ramey and Wilson arrived at the mine on September 9 they did not follow the standard inspection procedure. Typically, MSHA inspectors begin their inspection at the portal and proceed inby to the working sections. In this instance, the inspectors prepared combustible material sample bags on the surface and proceeded directly to the longwall without checking the roof, ribs, or any equipment along the way. Mountain Coal believes that these actions establish that they were planning to cite the longwall under section 75.400 when they arrived at the mine based on their new interpretation of the standard.

For the reasons set forth below, I find that the Secretary established a violation of section 75.400. The Commission has grappled with the elements of a violation of the safety standard. “[T]he language of the standard makes accumulations impermissible.” *Old Ben Coal Co.*, 1 FMSHRC 1954, 1957 (Dec. 1979) (*Old Ben I*). This standard is “directed at preventing accumulations in the first instance, not cleaning up the materials within a reasonable period of time after they have accumulated.” *Id.* The Commission held that “a violation of . . . 30 C.F.R. 75.400 occurs when an accumulation of combustible materials exists.” *Id.* at 1958. The Commission went on to state that it accepts the fact that “some spillage of combustible materials may be inevitable in mining operations” but that whether such “spillage constitutes an accumulation under the standard is a question, at least in part, of size and amount.” *Id.*

When the Secretary seeks to establish a violation of section 75.400, “the absence of evidence of depth and extent of the combustible materials will not, in and of itself, be cause for vacating a citation. . . .” *Old Ben II*, 2 FMSHRC at 2807. The Commission went on to state:

We have recognized that some spillage of combustible materials may be inevitable in mining operations. However, it is clear that those masses of combustible materials which could cause or propagate a fire or explosion are what Congress intended to proscribe. Thus, we hold that an accumulation exists where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary, it likely could cause or propagate a fire or explosion if an ignition source were present.

Id. at 2808 (footnotes omitted). The Commission recognized that the validity of the inspector's judgment is subject to challenge by the mine operator at the hearing. *Id.* at note 7. The Commission subsequently explained that "the inspector's judgment will be reviewed judicially by reference to an objective test of whether a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized the hazardous condition that the regulation seeks to prevent." *Utah Power & Light Co.*, 12 FMSHRC 965, 968 (May 1990) (citation omitted); *aff'd* 951 F.2d 292 (10th Cir. 1991).

The Commission has also addressed the interplay between a mine operator's cleanup plan required under section 75.400-2 and the requirements of section 75.400. The Commission held that "an operator cannot avoid a finding of a violation of section 75.400 by arguing that it was merely following a section 75.400-2 cleanup plan that it established." *Id.* at 969. The 10th Circuit specifically affirmed the Commission's holding on this issue. 951 F.2d at 295. The court held that the cleanup plan provision in section 75.400-2 "is simply pedagogical or prophylactic, designed to bring the mandate of [75.400] more emphatically to the attention of mine managers." *Id.* (footnote omitted).

There is no bright line between acceptable accumulations of combustible materials and accumulations that violate section 75.400. The principal issue is whether a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized the hazardous condition that the safety standard seeks to prevent.

I credit the evidence presented by Mountain Coal that it cleaned the longwall the same way it always has using water sprays and hoses, as set forth in its cleanup plan. (Tr. 694-95 ; Ex. C-2). I also credit its evidence that, except as discussed below, the accumulations that Inspector Wilson observed on September 7, 2003, had been washed away prior to the inspection on September 9. I find that much of the combustible material observed by Inspectors Wilson and Ramey accumulated when the shields were moved forward, especially the material in and around the back walkway. I credit the evidence presented by Mountain Coal that, if the roof is composed of coal, the pressure of the canopy on the roof pulverizes the coal and this pulverized coal falls between the canopies as the shields move forward during normal mining operations. This pulverized coal falls onto the lower structural components of the shields and falling coal dust adheres to this equipment because it is wet from the water sprays. As a consequence, large amounts of combustible materials accumulate on each move of the shields that must be removed to comply with the safety standard.

It is not possible to maintain the longwall shields completely free of loose coal, coal dust, and float coal dust. Inspector Wilson testified that the longwall at the mine is "usually pretty clean." The key factual dispute is whether the conditions on September 9 were typical or whether the longwall was unusually dirty. As stated above, Inspector Wilson testified that the accumulations were the worst he had ever observed on the West Elk longwall. Inspector Ramey testified that the longwall contained the "most accumulations" he had ever observed at any longwall mine during his 34 years of mining experience. (Tr. 263-64, 348). Mountain Coal's

witnesses, on the other hand, testified that the accumulations on September 9 were well within the normal range observed over the past several years. For example, Peter Wyckoff, the operations manager, testified that the accumulations on the longwall on September 9 at the time of the inspection were neither excessive nor dangerous. (Tr. 908-09). Billy Towles, the longwall maintenance coordinator, testified the cited accumulations “were [the mine’s] normal operating conditions.” (Tr. 735). Steven O’Connell, a maintenance trainer, was the company walkaround representative during the September 9 inspection. He testified that he did not observe any excessive accumulations. (Tr. 1000). All of the company witnesses testified that the accumulations were not as extensive or deep as set forth in the order of withdrawal.

Mr. Wyckoff took several rolls of photographs shortly after the order was issued. (Ex. C-1). Although some washing occurred before the photos were taken (Tr. 989), I find that they illustrate some of the conditions observed by the inspectors on September 9. Wyckoff took another group of photographs after the longwall was thoroughly cleaned. (Ex. C-3). The “before” photographs show varying degrees of accumulations on the shields. The photos of the areas along the front walkway show light to moderate accumulations of coal dust on the equipment. (Ex. C-1, Bates pgs. 29, 32, 39, 44, 53, 54). Some of the leg cylinder pockets are full of small pieces of loose coal and coal dust. (*Id.* at pgs. 29, 37, 54). These photos can be contrasted with the “after” photos of the same areas in which very little loose coal or coal dust is visible. (Ex. C-3, Bates pgs. 76, 77, 79, 82-85, 88-91).

The “before” photos of the back walkway show extensive accumulations of loose coal, coal dust, and float coal dust in some areas. (Ex. C-1, Bates pgs. 30, 36, 38, 42, 46, 47, 49). In the photos taken after cleanup, these same areas are quite clean. (Ex. C-3, Bates pgs. 78, 81-83, 86, 88, 91, 92, 94, 108). It is this back walkway, including the lemniscate, that were of particular concern to Inspectors Wilson and Ramey. I find that, although some of the shields contained accumulations that may not have independently violated the standard if viewed in isolation, large areas were packed with loose coal, coal dust, coal fines, and also contained float coal dust.¹ The accumulations illustrated in these photographs supported the testimony of Inspectors Wilson and Ramey and the testimony of Mr. Cornett. I credit their testimony concerning the conditions along the back walkway.

I find that the accumulations of coal dust, loose coal, coal fines, and float coal dust discovered during the September 9 inspection violate section 75.400. The depth of the accumulations from shield 10 to 165 varied greatly, but large areas contained excessive accumulations. I find that a reasonably prudent person, familiar with the mining industry and the

¹ The following photographs in Exhibit C-1 illustrate the areas of extensive accumulations: photo 3-3 on pg. 30; photos 5-0 and 5-1 on pg. 36; photo 5-5 on pg. 38; photo 5-11 on pg. 41; photo 1-6 on pg. 46; photos 1-11 and 1-12 on pg. 49. Photos 1-6, 1-11, 1-12 and 3-2 show coal dust coating the hoses and the electrical boxes and cables. They also show loose coal and coal dust covering the metal deck plates. Photo 5-0 and 5-11 show loose coal under some deck plates. I base my findings on the testimony of MSHA officials but the photographs help illustrate the conditions.

protective purpose of the standard, would have recognized that the excessive accumulations presented a hazardous condition that the safety standard seeks to prevent.

I base my finding on the conditions found along the back walkway. The coal dust on the PM-4s and other equipment along the front walkway had been present for only a short period of time. The water sprays on the shearer and the hoses used by the miners would clean the dust off the equipment rather easily. At the time of the inspection, the water to the shearer and to the shields had been shut off to repair both the spray boom and the water hose fitting at Shield 89. The shearer had stopped at Shield 130 while making a headgate pass. Thus, the shields had been pulled forward from Shield 165 to about Shield 130 leaving considerable debris. If the inspection party had not arrived, any coal dust along the front walkway would have been cleaned once the repair was made and production resumed. In addition, much of the surface dust along the back walkway would have been removed by the tailgate shearer operator as mining progressed.

The accumulations along the back walkway were much more extensive, as discussed above. I credit Mr. Cornett's testimony that much of the combustible material that he observed in the back walkway had been there for some time. "[W]hat I saw, in my opinion, at that time was not something that was incidental, it was not something that had just occurred, it was not something that occurred after one pass [of the shearer], . . . it was not something that would have occurred over a shift." (Tr. 571). He testified that he observed accumulations along the back walkway that were between ½ inch and 12 inches in depth. He stated that the worst accumulations "were in areas where you didn't have deck plates and all you had was hoses there, where larger material could get wedged in the hoses, get stuck, where if you would hit it with water, it didn't really move it because the hoses held it in place [and] smaller stuff would pack around it. . . ." (Tr. 569, 590-91). Although the coal dust along the front walkway may have been recently deposited, I find that the combustible material along the back walkway was not all deposited on September 9 and that much of the material had accumulated over a considerable length of time. Combustible material had become wedged in the equipment to such an extent that washing the area with a hose as the shearer passed was not sufficient to remove the material. Indeed, in order to abate the order, Mountain Coal employees had to spend about 31 hours washing and cleaning the back walkway. The deck plates were removed in order to clean out combustible material that had accumulated under them.

Mr. Cornett returned to the mine on September 14-15, 2003, after the order had been terminated, to observe the mine's cleaning process on the longwall. Cornett testified that there was a "night and day difference" between the conditions he observed in the early morning of September 10 and the conditions on September 15. The crew was able to keep the shields and back walkway clean while keeping pace with the shearer. Additional hoses had been added, which made it easier to keep the back walkway clean.²

² Cornett testified that it appeared that, on September 9, some of the dirtiest shields along the back walkway were in areas where water hoses were not as readily available. (Tr. 598-99).

In conclusion, I find that the Secretary established a violation of section 75.400 because of the extensive accumulations on the shields in the longwall section.³ Although Mountain Coal was following its usual procedure to keep the area clean, circumstances may arise when more extensive cleaning is required to protect the safety of miners. When the longwall is passing through an area in which the shields are pulverizing the coal roof, Mountain Coal may be required to spend more time cleaning the back walkway to comply with section 75.400.

2. Fair Notice Issues

Mountain Coal contends that MSHA changed its interpretation of the safety standard without providing the company with fair notice of the change. It bases this argument on the fact MSHA inspectors have never suggested that its cleaning practices needed to be changed. In addition, Mountain Coal maintains that because it had never received citations for similar accumulations on the longwall in the past, it reasonably believed that such accumulations did not violate the safety standard. I have already found that at least some of the cited accumulations were not incidental to normal mining operations but had existed for a significant period of time. All three of the MSHA officials testified that the conditions were especially egregious on September 9 and, as a consequence, the conditions were not typical. My findings on that issue undercut Mountain Coal's notice arguments.

Mountain Coal relies on the Commission's decision in *Alan Lee Good*, 23 FMSHRC 995, 1004 (Sept. 2001), to support its position that it did not receive fair notice of the Secretary's new interpretation of the safety standard. In that case, the Commission held that prior inconsistent enforcement may be a defense to a citation issued under a vague or ambiguous safety standard. In general, if a standard is ambiguous because it is broadly worded, a judge should defer to the Secretary's interpretation of the standard as long it is reasonable, consistent with statutory purpose, and not in conflict with the statute's plain language. *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (DC Cir. 1989); *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (DC Cir. 1994). If the Secretary has enforced an ambiguous safety standard in a particular way at a mine, she cannot change her interpretation without giving fair notice to the mine operator. See *Higman Sand & Gravel, Inc.*, 24 FMSHRC 87, 94 (Jan 2002) (ALJ). The Secretary contends that she has not changed her interpretation of 75.400 to fit the circumstances in this case. As discussed above, the Secretary believes that the cited accumulations were worse than had been previously observed along the longwall and the order was issued as a result of these accumulations in accordance with her consistent interpretation of the standard.

As stated above, I find that the combustible materials had accumulated along the back walkway over a significant period of time. The material did not all accumulate during a normal mining shift. I agree with the Secretary that there has been no showing that she has changed her

³ The incombustible content of the grab samples taken during the September 9 inspection ranged from 9.4 percent to 27.9 percent, with an average incombustible content of 15.5 percent. (Ex. G-7). Thus, the material was highly combustible.

interpretation of the standard in this case. Consequently, Mountain Coal had fair notice of the requirements of section 75.400.

3. Consistency with the Secretary's Program Policy Manual (PPM)

The Secretary's PPM provides, in part, as referenced by Mountain Coal:

There may be times when the inspector's interpretation of what is an accumulation of float coal dust, loose coal and coal dust and/or other combustible materials will differ with the opinion of others. However, the inspector should base his decision upon the facts surrounding each occurrence, and document such facts as the dimensions, type, specific location, and all other related factors. The inspector's decision as to what is an accumulation must be an objective one based on the facts or circumstances surrounding each occurrence.

Mountain Coal contends that Inspectors Wilson and Ramey failed to adhere to this portion of the PPM. It maintains that neither Inspector Wilson nor Inspector Ramey could identify which shields along the longwall contained the deepest accumulations. Mountain Coal argues that the inspectors failed to "document such facts as the dimension, type, specific location, and all other related factors" as required by the PPM. (M.C. Br. 25-26). It states that the inspectors failed to take the kind of detailed notes of the conditions along the longwall that could provide an objective basis for reviewing their conclusions. An accurate description was essential "in order to evaluate the material in the overall context of the circumstances required by the PPM." *Id.* at 28. Finally, Mountain Coal argues that the Secretary "has the burden of establishing that the extent of the material observed exceeded that which is deposited on the shields in the normal mining cycle under those conditions existing at the time the order was issued." *Id.*

I agree that the Secretary has the burden to prove that the size and amount of the accumulation is more than incidental spillage and that the accumulation presents a hazard of propagating a fire or explosion. But I do not agree that the Secretary must prove that the combustible material observed exceeded the amount deposited on the shields in the normal mining cycle. The standard is directed at cleaning up accumulations as they develop. A mine operator cannot permit accumulations to pile up, as occurred along the back walkway in this case, even if the material was deposited in a relatively short period of time. It is important to remember that the accumulations in this case occurred on a working section at the face, not along an isolated belt or in an area that is only traveled by a miner once a shift. Moreover, as stated above, I find that some of the combustible material along the back walkway accumulated over a period of more than one shift.

I also find that Inspector Wilson's description of the conditions he observed is sufficiently specific to comply with the safety standard and is consistent with the language of the PPM.⁴ The order sets forth the dimensions, type, and specific location of the accumulations. I find that it was not necessary for the inspector to describe, in either the order or in his notes, the specific condition of each individual shield, from shield 10 to shield 165. Although the amount of the accumulations varied along the longwall, Inspector Wilson believed that, taken together, the accumulations from shield 10 to shield 165 violated section 75.400. It is clear the Inspectors Wilson and Ramey considered the totality of the circumstances along the longwall. As a consequence, Inspector Wilson wrote a single order of withdrawal for the accumulations that extended for about 945 feet along the longwall. Some shields might not have independently been in violation of the standard if considered in isolation, but taken together the entire area contained excessive accumulations of combustible material. Looking at the entire area as a single violation does not violate the safety standard, Commission case law, or the PPM.

Mountain Coal also contends that MSHA did not fully investigate the situation on the longwall before the order was issued. During the inspection, neither inspector asked about the mining conditions that day, the cleaning practices on the longwall, the amount of coal produced or for any other information concerning the conditions that created the accumulations. They simply saw the conditions along the back walkway and assumed that no cleaning had occurred for several shifts. Significantly, it maintains that neither inspector had any knowledge of the amount of combustible materials that accumulate along the longwall during a single shift, assuming that no cleanup occurs. As a consequence, Mountain Coal contends that Inspector Wilson issued the order based on an incorrect understanding of what he observed. Mountain Coal believes that the inspection by Wilson and Ramey was cursory, their conclusions were subjective, and the order was issued in "dereliction of their inspection responsibilities outlined in [the] PPM." (M.C. Br. 24). The inspectors assumed that material had accumulated over at least several days and that little or no cleanup activities had taken place.

I agree that the inspectors did not obtain sufficient information to get a complete picture of what was occurring on the longwall. They observed the accumulations and took samples, but they did not ask any questions. Although it may benefit an inspector to ask questions, the answer to such questions were not necessary to establish a violation in this case. I find that the accumulations of combustible materials violated the safety standard.

Mountain Coal also contends that Inspector Wilson misinterpreted the safety standard because he testified that an accumulation of "any degree of dust" on equipment violates section 75.400. (Tr. 169). However, I find that Wilson clarified his testimony to state that, in order to operate the mine, "there will be some accumulations." *Id.* He went on to state that, on September 9, there were "too much accumulations, too many, the coal dust, the float coal dust, and there was no reason for it, it should have been cleaned up." *Id.*

⁴ I do not credit the sentence in the order of withdrawal which states that the "shields were totally black in color." This statement is not supported by the evidence and is stricken.

During cross-examination, Inspector Ramey was unable to specify which shields had more accumulations than the others. Ramey contended that it didn't matter which shields were worse than others because the order applied to all shields from shield 10 to shield 165. During this testimony, Ramey stated that "the law says you are not allowed to have accumulations." (Tr. 352). He further testified that a mine operator cannot "pile or layer" accumulations of combustible material but it must clean these accumulations. (Tr. 353). Finally, he testified that a fine layer of float coal dust would violate the safety standard. (Tr. 355). From this testimony, Mountain Coal contends that Ramey was misinformed about the requirements of the standard because in other cases the Secretary has agreed that "the merest deposit of combustible material" does not violate section 75.400. (M.C. Br. 21, *quoting Old Ben I*, n.8). Mountain Coal argues that the Secretary's application of section 75.400 in this case is an impermissible interpretation of the standard "because it renders the standard incapable of compliance." (M.C. Br. 22). Requiring Mountain Coal to remove the deck plates along the back walkway to clean under them "was the height of capriciousness since the deck plates are seldom removed except to access hoses for maintenance or to move the longwall to another location." (M.C. Br. 23).

Mountain Coal's argument is not convincing. Inspector Ramey made clear that a large section of the longwall was cited, not just these areas with "the merest" deposits of coal dust. The conditions were viewed as a whole, not in isolation or shield by shield. Put into context, Ramey was stating that mine operators are required to clean the longwall as the coal is cut and that combustible materials cannot be allowed to accumulate in piles or layers. His testimony was all based on his belief that much of the combustible material he observed on September 9 had not simply accumulated on that shift but had been there for some time. I do not read his testimony to be inconsistent with the PPM or Commission case law.

In conclusion, I find that the Secretary established that a reasonably prudent person familiar with the mining industry and the protective purposes of the standard, would have recognized that the quantity of combustible accumulations along the longwall was likely to cause or propagate a fire or explosion. The fact that deck plates had to be removed and that it took 31 hours to abate the condition demonstrates the extent of the accumulations. The evidence tends to validate the testimony of Mr. Cornett that water sprays alone were not sufficient to clean the back walkway on September 9. Depending on the composition of the roof in a particular area, Mountain Coal may need to more thoroughly clean the back walkway from time to time to comply with section 75.400. Cornett and Wilson noted that, after the back walkway was cleaned of accumulations, miners on the section were able to keep it clean with water hoses.

B. Significant and Substantial Violation

I find that the Secretary established that the violation was S&S. An S&S violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." A violation is properly designated S&S "if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an

injury or illness of a reasonably serious nature.” *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming “continued normal mining operations.” *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988). The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, a measure of danger to safety, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. The Secretary is not required to show that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

The violation clearly contributed to a discrete safety hazard. The issue is whether there was a reasonable likelihood that the hazard contributed to would result in an injury. The order was issued because there were excessive combustible accumulations along the shields in the active longwall section. Ignition sources were present on this section. The mine experiences rock spars during the mining process which can create sparks when struck by the shearer. Most of the equipment on the longwall section is metal, which creates a potential for sparks to be created or heat to develop in moving parts. In addition, electrical equipment is present which, if damaged, can emit a spark. The West Elk Mine is quite gassy. It liberates over one million cubic feet of methane in a 24 hour period which subjects it to five day MSHA spot inspections. Indeed, the mine actually liberates about 25 million cubic feet of methane per day. Finally, the extraction of coal results in the release of liquid hydrocarbons, which are highly flammable. Hydrocarbons, which are similar to crude oil or diesel fuel, can contribute to the propagation of a fire or explosion. See *Plateau Mining Corp.*, 25 FMSHRC 738, 739-40 (Dec. 2003) (ALJ).

I find that the Secretary established that there was a reasonable likelihood that the hazard contributed to by the violation would result in an injury of a reasonably serious nature. Although the accumulations along the front of the shields would have been cleaned up once the boom for the water sprays was repaired and the section returned to production, most of the accumulations along the back walkway would have remained. As stated above, the Secretary established that most of the combustible material along the back walkway had accumulated over a period of time because the washing process was not removing all of it.

C. Unwarrantable Failure Designation

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987). Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991).

I find that the Secretary did not establish that the violation was caused by Mountain Coal's unwarrantable failure to comply with section 75.400. First, it is important to understand that Inspectors Wilson and Ramey were under the mistaken impression that little or no cleaning had occurred between the September 7 inspection and September 9. In fact, the mine had been following its usual cleanup plan during that time. I credit the testimony of Mountain Coal witnesses that it made sure that the longwall was clean when executives of Arch Coal toured the morning of September 9, except I do not credit this testimony with respect to the back walkway. (Tr. 1032-33). The order of withdrawal states that nobody was washing the shields at the time of the inspection. Although that statement is true, washing was not occurring because the section was shut down. Indeed, Mountain Coal shut down production to fix the boom for the water sprays and a water hose fitting that are used to suppress dust and clean the area. This conduct does not suggest "reckless disregard" or "indifference" to the safety of miners on the section.

The order states that the mine had been cited over 75 times for violations of section 75.400 since March 28, 2001. The order also states that MSHA had held meetings with management of Mountain Coal "addressing recurrent the problems of violating section 75.400." Finally the order states that "[m]anagement had been put on prior notice in the past that greater efforts need to be implemented to prevent accumulations from occurring at this mine."

Although these statements are generally correct, they fail to take into account that all of these prior warning and discussions concerned areas of the mine other than the longwall face. The evidence establishes that Mountain Coal received numerous citations for violations of section 75.400 in other areas of the mine. (Ex. S-9). It had only received one citation for a violation of that standard on the longwall face. The meetings mentioned in the order, which were generally closeout conferences, addressed problems of combustible accumulations in other areas of the mine.

A number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure, such as the extensiveness of the violation, the length of time that the violative condition has existed, the operator's efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999).

In this case, the violation was extensive. The accumulations along the back walkway would not necessarily be obvious to someone working at the face in the front walkway, but they would be rather obvious to anyone looking into the back walkway, including crew members who were responsible for cleaning that area. Mountain Coal had followed its usual method to eliminate accumulations. The section was not in production because a water spray boom and water hose fitting were being repaired. It is not clear how long the accumulations along the back walkway had existed, but I find that they were present for longer than one shift. I find, however, that Mountain Coal had not been put on notice that greater efforts were necessary to keep the back walkway clean of combustible material. The method of cleaning the longwall shields is

quite different from the efforts necessary to clean up such conditions as coal fines and oil on diesel equipment, coal spills from a belt, loose coal on a continuous miner section, and float coal dust on rock dusted surfaces. With the exception of Wilson's inspection on September 7, Mountain Coal had never been put on notice that greater efforts were necessary to keep the longwall shields clean. Indeed, Inspector Wilson and Inspector David L. Head testified that Mountain Coal had done a good job of keeping the longwall shields clean of accumulations in the past. (Tr. 45, 53, 67, 531-32).

In evaluating evidence of prior warnings that greater cleanup efforts are necessary to meet the requirements of section 75.400, the Commission has generally not required that the previous conditions involve situations identical to those involved in the violation at issue. *Peabody Coal Co.*, 14 FMSHRC 1258, 1263 (Aug. 1992); *Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997). In this case, however, I find that the meetings and advisories that greater cleanup efforts were necessary in other parts of the mine did not put Mountain Coal on notice that greater efforts were required on the longwall shields. The longwall is a mechanized, highly automated method of mining coal that involves a rather unique cleanup protocol. MSHA officials had given Mountain Coal the impression, during previous inspections, that its cleanup plan for the longwall shields was adequate to meet the safety standard as long as the plan was followed. The Secretary is being inconsistent when her witnesses testify that Mountain Coal had previously kept the longwall shields quite clean by following the cleanup plan and, at the same time, she argues that the accumulations on the shields were the result of the Mountain Coal's aggravated conduct because it had been warned that it needed to do a better job of cleaning the shields.

Although Inspector Wilson's inspection on September 7 provided some notice to Mountain Coal that it was not adequately cleaning the shields, mine management genuinely believed that the areas that concerned the inspector had been addressed. On cross-examination, Inspector Wilson admitted that he did not tell mine management that it needed to assign more people to help clean the longwall or that the mine's cleaning procedures on the longwall needed to be changed. (Tr. 158). Darrell Green testified that, following Inspector Wilson's inspection of the longwall on September 7, Inspector Wilson told him that "there were several areas on the face that he could have cited" but that he did not issue a citation because people were "washing there." (Tr. 1035). Green further testified that Inspector Wilson did not identify any particular shields that needed additional cleaning. (Tr. 1036). Wilson testified that he told Green that Mountain Coal needed to do "a better job washing" because Wilson believed that the company was not washing when inspectors were not around. (Tr. 44-45). Green further testified that Inspector Wilson told him that he was not sure how to "enforce cleanup" on the back walkway, but that Supervisory Inspector Ramey would tell him how to enforce it. *Id.*

Gaylon McDaniel testified that he traveled the longwall face with Inspector Wilson on September 7 and that Wilson did not point out any specific accumulations that needed to be cleaned. (Tr. 1051). He testified that, after the inspection, Inspector Wilson told him, along with Green, that there were "a few areas where the shields were dirty." *Id.* McDaniel did not understand Wilson to be saying that the company needed to do more than what was in the

cleanup plan to keep the shields clean. (Tr. 1052-53). McDaniel also testified that Wilson told them that he was going to check with Ramey about how the standard should be enforced. (Tr. 1053-54).

Although I have taken into consideration MSHA's discussions with mine management about accumulations in other areas of the mine, I find that Mountain Coal believed that it was doing all that was necessary to comply with the standard on the longwall shields. Other than Inspector Wilson's discussion on September 7, there had been no indication from MSHA that Mountain Coal was not doing enough to keep its longwall shields clean.⁵ (Tr. 405, 541).

In conclusion, I find that the Secretary did not establish that Mountain Coal engaged in aggravated conduct constituting more than ordinary negligence when it violated section 75.400 along the longwall shields on September 9, 2003. Consequently, the unwarrantable failure designation is stricken from Order No. 7629370 and the order is modified to a section 104(a) citation.

IV. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. The record shows that Mountain Coal had 491 paid violations at the West Elk Mine during the two years preceding September 9, 2003. (Ex. G-1). Mountain Coal is a large mine operator as is Mountain Coal's parent company, Arch Coal, Inc. The violation was abated in good faith. The penalty assessed in this decision will not have an adverse effect on Mountain Coal's ability to continue in business. The violation was serious and Mountain Coal's negligence was moderate. Based on the penalty criteria, I find that a penalty of \$6,000.00 is appropriate.

⁵ Apparently, Mr. Green also had some discussions with Inspector Wilson about washing on the longwall shields in August 2003, but the extent and nature of the conversations are not clear. (Tr. 1040-41).

V. ORDER

For the reasons set forth above, Order No. 7629370 is **MODIFIED** to a section 104(a) citation with a moderate negligence finding. Except as noted in this decision, the citation is **AFFIRMED** in all other respects. Mountain Coal Company is **ORDERED TO PAY** the Secretary of Labor the sum of \$6,000.00 within 30 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

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