FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 25, 2008

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2007-132
Petitioner	:	A. C. No. 46-01437-99999-01
v.	:	
	:	
MCELROY COAL COMPANY,	:	McElroy Mine
Respondent	:	

DECISION

Appearances: Judson H.P. Dean, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia, Pennsylvania,
for the Petitioner;
R. Henry Moore, Esq., Jackson Kelly PLLC,
Pittsburgh, Pennsylvania, for the Respondent;

Before: Judge Feldman

This civil penalty proceeding concerns a Petition for the Assessment of Civil Penalty filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 820(a), by the Secretary of Labor against the respondent, McElroy Coal Company ("McElroy"). The petition seeks to impose a total civil penalty of $27,348.00 for 20 alleged violations of mandatory safety standards contained in 30 C.F.R. Parts 70 and 75 of the Secretary's regulations governing underground coal mines.

This matter was heard on October 16, 2007, in Fairmont, West Virginia. The parties' post-hearing briefs and replies are of record. At trial, the parties advised that they had reached a settlement agreement with respect to all but one of the cited violations that are the subject of this proceeding. The record was left open for the parties to submit the terms of their agreement in writing. The parties' Motion for Approval of Partial Settlement with respect to 19 citations and orders was filed on March 3, 2008. McElroy has agreed to pay a total civil penalty of $12,576.50 for the 19 settled citations and orders rather than the $20,748.00 civil penalty initially proposed by the Secretary.[1] The parties' settlement agreement is discussed below and approved herein.

[1] The proposed $12,576.50 settlement is based on the Corrected Motion to Approve Partial Settlement filed by the Secretary on March 6, 2008.

The only order adjudicated is 104(d)(2) Order No. 7149765 for which the Secretary proposes a $6,600.00 civil penalty. As 104(d)(2) Order No. 7149765 as well as the Secretary's proposed civil penalty shall be affirmed, a total civil penalty of $19,176.50 shall be assessed for the 20 cited violative conditions.

I. Statement of the Case

At issue is the proposed $6,600.00 civil penalty for 104(d)(2) Order No. 7149765 issued on January 11, 2006, for an alleged significant and substantial ("S&S") violation of the Secretary's mandatory safety standard in 30 C.F.R. § 75.400.[2] This mandatory safety regulation requires that coal dust and other combustible material must be cleaned up in a timely manner rather than being permitted to accumulate in active workings. The order was issued after extensive coal dust accumulations were observed along an active longwall belt. The condition was attributed to McElroy's unwarrantable failure because the accumulations were recorded during preshift and onshift examinations for 18 consecutive shifts (five days) without any meaningful remedial action.

McElroy has stipulated to the fact of the section 75.400 violation. (Joint Stip. 7). However, McElroy disputes both the S&S characterization of the violation,[3] and that the violation was unwarrantable.[4] Although the parties' disagreement on the exact measurements of the accumulations is a matter of degree, the evidence reflects that they were widespread and significant in depth. McElroy's contest of the S&S and unwarrantable issues primarily is based on its assertion that the cited accumulations were not in contact with any potential ignition source (not contacting rollers), and, therefore, the accumulations were not serious in gravity, or in need of expeditious removal.

With respect to the issue of S&S, it is well settled that the seriousness of violations should be evaluated in the context of continued mining operations assuming that the cited condition will remain unabated. *See, e.g., Mid-Continent Resources*, 16 FMSHRC 1218, 1221 (June 1994) (citing *U.S. Steel Mining Co., Inc.*, 7 FMSHRC at 1125, 1130 (Aug. 1985)). For the reasons discussed below, given the migrating nature of coal accumulations, the propagation

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[2] McElroy concedes that 104(d)(2) Order No. 7124999 issued on October 26, 2005, is the predicate order for 104(d)(2) Order No. 7149765 issued on January 11, 2006, as an intervening "clean" inspection had not occurred. (Joint Stip. 8).

[3] Generally speaking, a violation is S&S if it is reasonably likely that the hazard contributed to by the violation will result in an accident causing serious injury. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (Apr. 1981).

[4] A violation of a mandatory safety standard is unwarrantable when the actions of the mine operator that resulted in the violation constitute more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987).

hazard they present, and the ever-present potential ignition source caused by worn rollers, the Secretary's S&S designation, and her contention that the violation is attributable to an unwarrantable failure, shall be affirmed. Consequently, McElroy has failed to demonstrate an adequate basis for disturbing the Secretary's proposed $6,600.00 penalty.

II. Findings of Fact

This matter concerns coal accumulations that were observed along the conveyor belt for the three-Left, five-South longwall section during a January 11, 2006, inspection at the McElroy Mine. At that time, the longwall's production was approximately 10,000 tons of coal per shift. (Tr. 386). Extracted coal is transported from the three-Left, five-South longwall face on a longwall belt that carries coal from the face to the main belt at the mouth of the section. (Tr. 84). The longwall belt comprises approximately 5,000 feet of the approximate 22 miles of conveyor belt that is operating at the mine. (Tr. 84-5, 151). The crosscuts along the belt entry are approximately 16 feet wide. (Tr. 98). The crosscuts are separated by large and small blocks of coal. The large blocks of coal are 275 feet long. The smaller blocks of coal are approximately 137½ feet long. (Tr. 103; Gov. Ex. 5A). On January 11, 2006, the longwall face was located inby the 36 crosscut. (Gov. Ex. 5A).

The longwall belt, which is 54 inches wide, is supported by a metal structure that is four feet high. (Tr. 84, 397). The entire structure, including the side rails, is approximately 72 inches wide. (Tr. 397). The belt and side rails are supported above the ground by metal stands, which are located about 10 feet apart. (Tr. 90). There are sets of top rollers and bottom or "idler" rollers in each cradle. (Tr. 84). The bottom rollers are approximately 12 to 14 inches above the ground and are attached to the belt stands. (Tr. 90, 129-30). The drive is located near the outby end of the belt. (Tr. 90; Gov. Ex. 5). Along the belt near the drive, there is a "box check" and a separate regulator used to regulate air in the belt entry. (Tr. 88).

Mine Safety and Health Administration ("MSHA") Inspector Jason Rinehart arrived at the McElroy Mine at approximately 7:15 a.m. on January 11, 2006. Prior to going underground, Rinehart reviewed the preshift and onshift book for the three-Left, five-South longwall section. (Tr. 27). Rinehart noted repeated examination book entries describing the locations of numerous accumulations in the belt entry that required cleaning during the period beginning with the preshift examination that was completed at 7:00 a.m. for the day shift on January 5, 2006, through the preshift examination that was completed at 7:00 a.m. for the current January 11, 2006, day shift. The exact dimensions with respect to length and depth of the accumulations were not entered by the preshift or onshift examiners. (Gov. Ex. 3). Specifically, the relevant McElroy examination book notations reflect:

> Accumulations between the 38 and 31 blocks were reported for 18 consecutive shifts (5 days) (accumulations between the 38 and 35 blocks apparently were only reported from January 5 through January 9, 2006, because the longwall face had

retreated from the 38 block to the 35 block during this time). (Tr 33-64, 68-70; *see* Gov. Ex. 3, at 1, 35).

Accumulations between the 17 and 22 blocks were reported for 18 consecutive shifts (5 days) from 7:00 a.m. on January 5, 2006, until the preshift examination at 7:00 a.m. on January 11, 2006. (Tr 33-64, 68-70; *see* Gov. Ex. 3, at 1, 35).

Accumulations between the 9 and 11 blocks were reported for 18 consecutive shifts (5 days) from 7:00 a.m. on January 5, 2006, until the preshift examination at 7:00 a.m. on January 11, 2006. (Tr. 33-64, 73; *see* Gov. Ex. 3, at 1, 35).

Accumulations at the "ALC" ("Belt A/L" or "A/L") were reported for 18 consecutive shifts (5 days) from 7:00 a.m. on January 5, 2006, until the preshift examination at 7:00 a.m. on January 11, 2006. (Tr. 33-64; *see* Gov. Ex. 3, at 1, 35).

Accumulations between the 5 block and the airlock were reported for 15 consecutive shifts (4 days) from 3:00 p.m. on January 6, 2006, until the preshift examination at 7:00 a.m. on January 11, 2006. (Tr. 33-64, 72; *see* Gov. Ex. 3, at 9, 35)

After reviewing the findings of the preshift and onshift examiners, Rinehart went to the three-Left, five-South section to compare the condition of the belt entry to the notations in the examination book. Rinehart was accompanied by McElroy's safety representative Charles Bradley Racer and miners' representative Tom Stern. (Tr. 74). Racer accompanied Rinehart for the entire belt inspection. (Tr. 168). Although Rinehart believed that the belt was running at the time of inspection, Racer testified the belt was shut down to perform the routine maintenance that is required at the beginning of each shift, such as checking pressures on the sheer spray arms and drums. (Tr. 92, 319-21).

Rinehart took measurements of the accumulations along the beltline and announced the results of his measurements to Racer and Stern. They did not express any disagreement with Rinehart's measurements at that time. (Tr. 118-119). Rinehart stated the accumulations consisted of black float coal dust that he described as dry, fine, and powdery. The accumulations had not been rock dusted. (Tr. 122-23). Rinehart testified that the accumulations were obvious to anyone walking along the conveyor belt, and, that no one was cleaning the accumulations at the time of his inspection. (Tr. 123-24).

Bottom rollers are located approximately 12 to 14 inches above the mine floor. (Tr. 129-30). Rinehart noted that there were two bottom rollers in contact with accumulations that were 14 inches in depth between the 10 and 11 blocks, and that there was one roller in contact with accumulations that were 14 inches in depth between the 9 and 10 blocks. (Tr. 128-29; Gov. Ex. 5A). Although bearings in rollers can wear over time, causing friction-related heat, Rinehart did not detect any heat from the three bottom rollers in proximity to the coal dust accumulations. (Tr. 130-31).

Rinehart also determined that 12 top rollers located between the 9 to 13 blocks had recently been replaced during the afternoon shift on January 6, 2006.[5] (Tr. 55-57, Gov. Ex. 3 at 12). In addition, Rinehart observed two frozen top rollers[6] between the 26 and 28 blocks, a bad top roller between the 13 and 14 blocks, and a bad bottom roller between the 12 and 13 blocks.[7] (Tr. 107, 129, 133-34). Finally, Rinehart observed that the conveyor belt was cutting into the stands in the vicinity of the No. 18 crosscut (No. 18 block). (Tr. 124; Gov. Ex. 5A).

As a result of his review of the examination book and his observations of the conditions in the belt entry, Rinehart issued 104(d)(2) Order No. 7149765 at 9:13 a.m. on January 11, 2006, citing a violation of the mandatory standard in section 75.400. As previously noted, this safety standard requires combustible materials such as coal dust, float coal dust and loose coal to be cleaned up to prevent their accumulation in active workings. Order No. 7149765 states:

> An accumulation of loose coal, coal fines, and float coal dust exists on the 3-Left, 5-South longwall belt at the following locations: No. 34-33 block loose coal and coal fines up to 8 inches deep at various locations; No. 33-32 block loose coal up to 5 inches deep at various locations; No. 32-31 block loose coal up to 11 inches deep at various locations; No. 30-29 block loose coal up to 7 inches at various locations; No. 29-28 block loose coal up to 7 inches deep at various locations; No. 28-27 block loose coal up to 9 inches deep at various locations; No. 26-25 block loose coal 14 feet long 37 inches wide and up to 16 inches deep on both sides of the belt; No. 9-11 block loose coal 64 inches wide in places and up to 14 inches deep. There were two rollers in contact with the accumulations between 10-11 block and one roller in contact with accumulations between 9-10 block. Also, there were dry coal fines and float coal dust extending between No. 5 block and

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[5] It is undisputed that top rollers were replaced on January 6, 2006. References in the transcript that the top rollers were replaced on January 6, 2005, are erroneous. (Tr. 55-57). The error occurred because the examination book entry "Replaced 12 Tops 9-13 Brk" erroneously reflects the examination occurred on January 6, 2005, instead of January 6, 2006, as the examiner apparently forgot to record the arrival of the new year. (Gov. Ex. 3 at 12).

[6] A "frozen" roller is one that does not spin. (Tr.133).

[7] A "bad" roller is one that has bearings that are beginning to fail. (Tr. 133).

> the box check. The float coal dust extended in the belt regulator. 0.45% methane was detected on this belt. The following conditions were listed in the preshift examination books for 18 shifts with no corrective action taken: Airlock to 5 wall needs cleaned [sic], 17-22 and 31-35 block needs cleaned [sic] and 9-11 block spillage.

(Gov. Ex. 1). Although inadvertently not cited in Order No. 7149765, Rinehart noted accumulations at the 19 to 20 block that were 30 feet long and 6 to 8 inches in depth. (Tr. 65; Gov. Ex. 2).[8]

Rinehart designated the violation as S&S because the frozen top roller, bad bottom roller, belt contact with the metal stand, and a potential bearing failure in the rollers contacting the coal dust, were all potential sources of heat that could ignite the combustible coal accumulations. (Tr. 131-36). Rinehart was also concerned with the propagation hazard of float coal dust that could be suspended in air, providing additional fuel in the event of an explosion. (Tr. 137).

Rinehart attributed the accumulations to an unwarrantable failure because the hazardous accumulations were extensive and obvious. Moreover, the accumulations were permitted to exist for five days despite being repeatedly noted by examiners as a condition needing corrective action. (Tr. 146-47).

The 104(d)(2) Order No. 7149765 was terminated at 2:15 p.m. on January 11, 2006, five hours after it was issued. It took at least ten miners several hours to remove the cited accumulations. (Tr. 140-41, 252-53; Resp. Reply Br. at 3).

Ryan Carmen is currently employed by MSHA as an inspector-in-training. In January 2006, Carmen was employed as a foreman at the McElroy Mine. At that time, Carmen was the foreman for the three-Left, five-South longwall section. (Tr. 203-04, 211-12). Carmen testified that the accumulations noted in the examination book from January 5 to January 11, 2006, between the 31 to 38 blocks, the 17 to 22 blocks and the 9 to 11 blocks were the same accumulations cited by Rinehart in Order No. 7149765. (Tr. 231-32). In fact, Carmen personally entered several of the notations concerning the cited accumulations in the examination book. (Tr. 210-15). Carmen stated that conditions requiring corrective action were not always immediately addressed at the McElroy Mine due to other priorities and personnel shortages. (Tr. 245-46). In this regard, Carmen testified that from January 5, 2006, until Rinehart's January 11, 2006, inspection, McElroy did not assign any miners to clean the accumulations noted by the preshift examiners. (Tr. 246-47).

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[8] The testimony concerning Rinehart's observations of the accumulations between blocks 19 and 20 was allowed as relevant evidence concerning whether the accumulations observed by Rinehart were the accumulations noted by examiners from January 5 through January 11, 2006. However, any attempt by the Secretary to modify the citation to include the accumulations between blocks 19 and 20 was denied. (Tr. 66).

Rinehart testified that there was an 8 inch hole in the middle of the conveyor belt. (Tr. 171-72; Gov. Ex. 2). As the conveyor belt traveled, the hole was a source of spillage anywhere along a significant length of the three-Left, five-South beltline. (Tr. 172). Racer corroborated Rinehart's testimony concerning the hole in the middle of the belt. Racer estimated the size of the hole was approximately 12 inches by 6 inches. (Tr. 335). Racer speculated about the path of the spillage after it passed through the hole in the belt. Racer opined:

> Oh, if there's a hole in the belt as its moving, the coal's going to fall through that hole. And as it falls through that hole, its going to hit the bottom belt, which is traveling in the opposite direction and kick it, or kick it around, or have it hit a stand and come off on the side of the belt.

(Tr. 335).

Timothy T. Underwood, McElroy's Assistant Superintendent, similarly opined that most of the cited accumulations came from the hole in the belt, stating that "it doesn't take very long . . . to get an accumulation on the beltline with a hole in it." (Tr. 375, 396).

After the 104(d) order was issued, Underwood asked Rinehart what action was necessary to restart the conveyor. Underwood stated that Rinehart responded that the accumulations had to be cleaned before the order could be terminated. Underwood testified that Rinehart did not tell him that any of the accumulations were contacting rollers. (Tr. 367-68).

Although Racer and Underwood admit the hole in the belt provided the means for coal dust to accumulate quickly, McElroy disputes the extent and depth of the accumulations. Racer testified that the accumulations were no more than twelve inches deep, and that twelve inch depths only existed near the stands supporting the belt structure. Specifically, Racer testified the most extensive areas where there was spillage from stand to stand was between the 9 to 11 blocks, the 25 to 26 blocks and the 31 to 34 blocks. Furthermore, Racer conceded the accumulations were as much as twelve inches in depth between the 9 to 11 blocks and between the 25 to 26 blocks. (Tr. 327).

Contrary to Rinehart's testimony that accumulations were situated under the belt in proximity to several bottom rollers, Racer stated the accumulations were in narrow bands, no more than six inches in width, that were located at the side of the belt, between the waterline and belt structure. (Tr. 332-34). In this regard, Racer denies that Rinehart showed him any rollers that were contacting coal. (Tr. 324-25). When asked whether Rinehart pointed out any bad rollers, or, whether he observed any bad rollers while he accompanied Rinehart during his inspection, Racer answered, "Not that I recall." (Tr. 325). Similarly, Underwood testified that Rinehart did not tell him that rollers were contacting coal when Rinehart described what he observed during his inspection. (Tr. 367-68).

III. Further Findings and Conclusions

McElroy has stipulated that it violated section 75.400 in that the cited coal dust accumulations were permitted to accumulate in active workings rather than being cleaned up in a timely manner. (Joint Stip. 7). However, McElroy disputes the S&S designation and the Secretary's claim that the accumulations were attributable to its unwarrantable failure.

As a threshold matter, it is significant to note that S&S and unwarrantable issues are mutually independent. Although the degree of danger posed by a violation is a relevant consideration in determining whether an unwarrantable failure has occurred, a violation does not have to be S&S to support an unwarrantable failure. *Youghiogheny & Ohio Coal Company*, 10 FMSHRC 603, 609 (May 1988) (an S&S finding is not a prerequisite for issuance of a 104(d)(1) order).

a. Significant and Substantial Issue

As a general proposition, a violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, 3 FMSHRC at 825. In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to [by the violation] will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

6 FMSHRC at 3-4; *see also Austin Power Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC at 1129, the Commission explained its *Mathies* criteria as follows:

> We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Company Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984) (emphasis in original).

The Commission subsequently reasserted its prior determinations that as part of any S&S finding, the Secretary must prove the reasonable likelihood of an injury occurring as a result of the hazard contributed to by the cited violative condition or practice. *Peabody Coal Company*, 17 FMSHRC 508 (April 1995); *Jim Walter Resources, Inc.*, 18 FMSHRC 508 (April 1996).

Resolution of whether a particular violation of a mandatory standard is S&S in nature must be made assuming continued normal mining operations. *U.S. Steel Mining*, 7 FMSHRC at 1130. Thus, consideration must be given to both the time frame that a violative condition existed prior to the issuance of a citation, and the time that it would have existed if normal mining operations had continued. *Bellefonte Lime Co.*, 20 FMSHRC 1250 (Nov. 1998); *Halfway, Inc.*, 8 FMSHRC 8, 12 (Jan. 1986).

Viewing the evidence in a light most favorable to McElroy, Racer's description of the subject accumulations, from stand to stand between several blocks, as much as 12 inches in depth, clearly supports the Secretary's assertion that the accumulations were extensive. However, the thrust of McElroy's opposition to the S&S designation appears to be its assertion that the cited accumulations were alongside the beltline rather than under the belt in proximity to bottom rollers.

Assuming, arguendo, that the accumulations were not contacting any rollers, coal dust accumulations, including float dust and coal fines, are migratory by nature. Thus, there is little evidentiary significance to McElroy's claim that, at the time of Rinehart's inspection, the prohibited combustible accumulations were located alongside the belt next to the rollers rather than under the belt in contact with bottom rollers. I am unaware of any Commission precedent that establishes contact with belt rollers as a prerequisite to an S&S determination for proscribed accumulations in a belt entry. Moreover, such a conclusion would ignore the significant propagation hazard posed by the extensive accumulations that are present in this case.[9]

Turning to a more traditional discussion of the S&S issue, with regard to the first element of *Mathies* -- violation of a mandatory standard -- McElroy has stipulated that the accumulations cited in 104(d)(2) Order No. 7149765 constitute impermissible combustible accumulations prohibited by section 75.400. (Joint Stip. 7).

With respect to the second element of *Mathies*, i.e., a discrete safety hazard contributed to by the violation, longstanding Commission precedent has recognized that combustible accumulations create significant explosion and propagation hazards. *Old Ben Coal Co.*, 1 FMSHRC 1954, 1957 (Dec. 1979) (ignitions and explosions are major causes of death and injury to miners); *Utah Power & Light Co.*, 12 FMSHRC 965, 970 (May 1990) (recognizing

[9] "Propagation" occurs when coal dust provides the fuel that transmits "the flame of an explosion . . . over considerable areas of a mine in such manner as might result in loss of life of workers in a mine." *See* Am. Geological Inst., *Dictionary of Mining, Mineral, and Related Terms* 429 (2nd ed. 1997).

Congressional concern regarding loose coal propagation and explosion hazards); *Enlow Fork Mining Co.*, 19 FMSHRC 5, 14 (Jan. 1997) (combustible accumulations are hazardous because, when placed in suspension, they will propagate an explosion). As coal dust is combustible, if combustion were to occur, i.e., fire or explosion, there obviously is a reasonable likelihood that miners will be exposed to serious injury or death. Thus, the fourth element of *Mathies* is also satisfied -- a reasonable likelihood of serious injury if the hazard posed by the violation results in a fire or contributes to an explosion.

The remaining element of *Mathies* requires the Secretary to demonstrate that it is reasonably likely that the combustible accumulations violation will result in an event -- a fire or explosion -- that is reasonably likely to result in serious or fatal injury. Thus, it is the likelihood of a fire or explosion that is the dispositive question in resolving the S&S issue.

Although I have concluded that contact with conveyor rollers is not necessary to support an S&S designation, on balance, the evidence supports Rinehart's testimony that two bottom rollers were contacting accumulations between the 10 and 11 blocks, and that one roller was contacting accumulations between the 9 and 10 blocks. Rinehart's recollection is supported by his contemporaneous field notes. (Gov. Ex. 2, at 5). In addition, Rinehart's testimony, also supported by his notes, that there was a bad bottom roller between the 12 and 13 blocks, has not adequately been rebutted. *Id.* I reach this conclusion because Racer's testimony that he did not recall whether Rinehart pointed out any bad rollers, or, whether he observed any bad rollers when he accompanied Rinehart, is unconvincing. (Tr. 325). Underwood's testimony that Rinehart did not tell him that accumulations were contacting bottom rollers when they discussed abatement of the 104(d) order is entitled to little weight, as Underwood, unlike Racer, lacked personal knowledge of the cited conditions because he was not present during the inspection.

In the final analysis, it is undisputed that rollers are a potential ignition source by virtue of friction caused by the deterioration of their bearings. In fact, McElroy had replaced numerous top rollers several days before Rinehart's inspection. Moreover, Rinehart's observation of the conveyor belt cutting into the stands in the vicinity of the 18 block is evidence of an additional potential ignition source. (Gov. Ex. 2 at 4).

When viewed in the context of continuing mining operations, there are sufficient potential sources of ignition from malfunctioning rollers and belt contact with the metal frame that are in proximity to combustible accumulations to warrant the conclusion that a fire or explosion is reasonably likely to satisfy the third element of *Mathies*. This conclusion is further supported by the propagation hazard posed by this combustible material that can easily be put in suspension by moving belts and rollers. *See Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988) (finding that combustible fuel, capable of suspension, in the presence of ignition sources constitutes a "confluence of factors" necessary to support an S&S violation).

Notwithstanding the ignition hazard posed by rollers, McElroy attempts to diminish the fire and explosion threat by relying on its carbon monoxide ("CO") monitoring system. Carbon monoxide is a by-product of combustion. CO sensors are designed to detect carbon monoxide at very low levels before flames are present. In so doing, McElroy relies on an early detection system to warn miners, and to allow it to quickly extinguish fires, to support its assertion that a significant fire or explosion is not reasonably likely.

McElroy's reliance on its early detection system must be rejected. As a general proposition, detection systems, such as methane monitors, do not diminish the seriousness of the violation of other mandatory safety standards, such as the failure to ensure that electric face equipment is permissible. 30 C.F.R. § 75.500. In fact, in *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995), the Court, in addressing the S&S issue, rejected the mine operator's reliance on fire suppression equipment, such as CO monitors and water sprays, to mitigate an accumulation hazard. The Court stated the presence of such safety measures "does not mean that fires do not pose a serious safety risk to miners." *Id.* The Court further noted the operator's position "defies common sense" because such "precautions are presumably in place . . . precisely because of the significant dangers associated with coal mine fires." *Id.*; *see also AMAX Coal Company*, 19 FMSHRC 846, 850 (May 1997) (holding that the presence of fire detection equipment and fire fighting equipment does not negate the serious safety risk posed by fires).

Finally, McElroy relies on an MSHA report concerning underground belt entry fires to support its contention that serious injury is not a likely consequence of a belt fire.[10] MSHA, *Reducing Belt Entry Fires in Underground Coal Mines*, (2007) (Resp. Ex. 53). Specifically, the report notes that there have been no fatalities or reportable lost time injuries as a result of the 63 reportable belt entry fires that occurred in the 25 year period from 1980 to 2005. (*Id.* at 6).

While this MSHA report concluded there had been no reportable lost time injuries as a result of belt fires through 2005, it cannot be seriously contended that the report supports the proposition that serious injury or death is not a reasonably likely result of a fire in an underground mine. In fact, the Aracoma ROI tragically dispels any such notion. The Aracoma disaster involved a longwall belt fire that caused the death of two miners. The fire started as a

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[10] This "belt entry fire report" was not provided by the respondent to the Secretary's counsel prior to the hearing. Nor did the respondent proffer any testimony concerning the report's contents. The record was left open to provide the Secretary an opportunity to respond to the report, and to take additional testimony if necessary. In response to MSHA's "belt entry fire report," on November 19, 2007, the Secretary filed the MSHA Report of Investigation of a January 19, 2006, fatal underground coal mine fire at the Aracoma Alma Mine #1. MSHA, *Report of Investigation of the January 19, 2006, Fatal Underground Coal Mine Fire at the Aracoma Alma Mine #1* (2007) ("Aracoma ROI"). The record with respect to the MSHA reports was closed after the parties elected to address the MSHA reports in their briefs rather than provide additional testimony or documentation.

result of frictional heating caused by the misalignment of the longwall belt and the belt of the headgate take-up storage unit. (Aracoma ROI at 2). The fire ignited accumulations which increased the intensity and extent of the mine fire. *Id.*

McElroy asserts that the Secretary's reliance on the Aracoma fire is misplaced because, in Aracoma, the belt fire originated at the headgate take-up drive rather than at a belt entry conveyor. (Resp. Br. at 14). The original situs of a fire is little solace to a burn victim. Rather, the risk of injury or death is determined by the intensity of a fire or explosion -- not the location of the initial ignition. McElroy has proffered a distinction without a difference that must be rejected.

In addition, McElroy seeks to distance itself from the Aracoma fire because the fatalities were attributable "to a host of conditions" including noncompliance with ventilation requirements and inadequate escapeways. (*Id.* at 14-15). This distinction is also unavailing. The exercise of precaution, or the lack thereof, does not affect the S&S nature of a violation. *Eagle Nest, Inc.*, 14 FMSHRC 1119, 1123 (July 1992) (an S&S violation continues to exist "regardless of whether caution is exercised").

Finally, the Aracoma disaster notwithstanding, the Commission previously has rejected the identical argument that a section 75.400 violation due to accumulations in belt entries is not S&S because very few belt fires have resulted in injuries. *AMAX Coal Company*, 19 FMSHRC at 849. The Commission determined that the fact that injuries have been avoided in the past in connection with a particular violation is fortuitous, and it is not determinative of an S&S finding. *Id.* (citations omitted).

In sum, it is reasonably likely that the continued presence of this uncorrected combustible material violation in proximity to potential ignition sources during continuing mining operations will result in, or contribute to, a fire or explosion event that will cause serious or fatal injuries. Consequently, the evidence reflects this violation of section 75.400 is properly designated as significant and substantial in nature.

b. Unwarrantable Failure Issue

The elements of unwarrantable conduct are well settled. The Commission has determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining,* 9 FMSHRC at 2001. 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, 193-194 (Feb. 1991); *see also Buck Creek Coal,* 52 F.3d at 135-36 (approving the Commission's unwarrantable failure test).

The Commission examines various factors in determining whether a violation is unwarrantable, including the magnitude of a violative condition, the length of time that it has existed, whether the violation is obvious, whether the violation poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's compliance efforts made prior to the issuance of the citation or order. *Enlow Fork Mining Co.*, 19 FMSHRC at 11-12, 17; *Mullins & Sons Coal Co.,* 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.,* 14 FMSHRC 1258, 1261 (August 1992); *Quinland Coals*, *Inc.,* 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.,* 6 FMSHRC 1596, 1603 (July 1984). Repeated similar violations may be relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Peabody*, 14 FMSHRC at 1263-64.

Here, McElroy permitted combustible material to accumulate over a considerable period of time. The Commission, as well as Congress, has recognized that accumulations of combustible materials constitute hazardous conditions, as any combustible material when placed in suspension will enter into and propagate an explosion. *Enlow Fork*, 19 FMSHRC at 14, citing S. Rep. No. 411, 91st Cong., 1st, Sess. 65 (1969), *reprinted* in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 191 (1975).

As previously discussed, the accumulations were numerous and extensive in size and depth. As an example of one of the many accumulations cited in 104(d)(2) Order No. 7149765, accumulations that were located on both sides of the belt between the 25 and 26 blocks were cited that were 14 feet long, 37 inches wide, and up to 16 inches in depth. These accumulations alone are of significant magnitude to warrant a finding that they were extensive. In this regard, even McElroy concedes portions of the cited accumulations were as much as 12 inches deep. Finally, Carmen recalled it took as many as 20 miners four hours to remove the cited accumulations. (Tr. 252-53). Even McElroy acknowledges the cleanup took approximately ten miners three hours, from after 10: 00 a.m. until 1:20 p.m., to complete. (Resp. Reply Br. at 3). Consequently, the evidence clearly reflects the cited accumulations were extensive.

That the cited accumulations were readily apparent is evidenced by the repeated entries by preshift and onshift examiners calling for corrective cleanup action during a five day period encompassing 18 shifts beginning on January 5, 2006. The preshift examination "is of fundamental importance in assuring a safe working environment underground." *Enlow Fork,* 19 FMSHRC at 15 (quoting *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995)). Thus, a mine operator is required to perform preshift examinations to identify hazardous conditions. *Enlow Fork*, 19 FMSHRC at 14 (citing 30 C.F.R. § 75.360(b)). Yet, Carmen testified the preshift examiners' repeated requests for corrective action went unheeded. (Tr. 246-47).

McElroy suggests there is insufficient evidence that the accumulations recorded over these 18 shifts are the same accumulations observed by Rinehart on January 11, 2006, because, although the examination book entries describe the accumulations by location, they do not contain the dimensions of the accumulations. The Commission has held that the fact that a violative condition was not noted in a preshift examination is not evidence that the violation did not exist, or that it was of short duration. *Peabody*, 14 FMSHRC at 1262. Rather, the fact that an examiner failed to record an accumulation does not bar an unwarrantable failure finding. *Id.* So too, McElroy's inadequate description of the accumulations in its examination book does not give rise to a claim that there is insufficient evidence that the accumulations observed by Rinehart, at the identical locations noted during preshift examinations, are the same accumulations recorded by the examiners.

With respect to whether McElroy's conduct was so egregious as to be unwarrantable, it is important to consider the underlying facts surrounding the violation. The accumulations existed for as long as 18 shifts. McElroy has conceded that a hole in the belt was a significant, if not primary, source of the violative accumulations. (Tr. 375). Consequently, it is reasonable to conclude that the hole in the belt also existed for at least 18 shifts. *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984) (reasonable inferences are permissible if there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred).

It is axiomatic that "[t]he risk to be perceived defines the duty to be owed." *Palsgraf v. Long Island R.R.*, 248 N.Y. 339 (1928). A hole in the middle of a conveyor belt defeats the purpose. As Underwood admitted, "it doesn't take very long . . . to get an accumulation on the beltline with a hole in it." (Tr. 375). Given the repeated notations of significant accumulations along the beltline, McElroy knew, or should have known, of the hole's existence. Yet it continued to convey coal on the belt despite this source of significant combustible accumulations.[11] Thus, the fact that the accumulations were caused by a hole in the conveyer belt is an aggravating circumstance. Consequently, McElroy's continued operation of the defective belt constitutes more than ordinary negligence.

In sum, the evidence unequivocally establishes the cited accumulations are attributable to at least a high degree of negligence. The Court has concluded that extensive accumulations that were present at least *one shift* and not removed after *one preshift examination* provided an adequate basis to establish an unwarrantable failure. *Buck Creek*, 52 F.3d at 136. Here, McElroy's nonfeasance was far greater than the unwarrantable conduct in *Buck Creek*. The obvious and extensive accumulations were of five days duration, and known to McElroy, as

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[11] I am cognizant that the 6 by 12 inch hole in the belt described by Racer must be viewed in the context of the approximate 5,000 feet length of the longwall belt. (Tr. 335). However, the documented extensive accumulations during a period of 18 shifts should have heightened McElroy's awareness of a potential defect in the beltline as a source of the accumulations. The hole should have been discovered when the belt was de-energized during routine belt maintenance performed at the beginning of each shift. (Tr. 319-21).

shown by the repeated entries in its preshift examination book. The accumulations were dangerous, as they posed a serious fire or explosion hazard. *Enlow Fork,* 19 FMSHRC at 14*; see also Black Diamond Coal Mining Co.*, 7 FMSHRC 1117,1121 (Aug. 1985) (discussing the combustibility of coal, and noting that "ignitions and explosions are major causes of death and injury to miners"). McElroy was on notice that greater cleanup efforts were required by virtue of the fact that it had been cited for 245 section 75.400 violations during the two year period preceding the issuance of the subject 104(d)(2) order. (Tr. 148-49). Finally, McElroy made no effort to remedy the violative accumulations prior to Rinehart's inspection. *See San Juan Coal Co.*, 29 FMSHRC 125, 134-35 **(**Mar. 2007) (noting that "an operator's failure to clean up accumulations at the time of inspection . . . may support an unwarrantable failure finding"). In short, all of the necessary elements are present to support the conclusion that the cited accumulations are attributable to McElroy's unwarrantable failure.

c. Civil Penalty

The statutory civil penalty criteria are set forth in section 110(i) of the Act, 30 U.S.C. § 820(i). In determining the appropriate civil penalty to be assessed, section 110(i) provides, in pertinent part:

> 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.

McElroy is a large mine operator that is subject to the jurisdiction of the Mine Act. The proposed penalty will not affect McElroy's ongoing business operations and McElroy promptly abated the cited violation after the subject 104(d) withdrawal order was issued. While the history of 245 section 75.400 violations in the two year period preceding this violation should be viewed in the context of the 22 miles of beltline in the McElroy Mine, such a history cannot be viewed as a mitigating factor.

With respect to negligence, I have given McElroy the benefit of the doubt that its failure to address the corrective action repeatedly requested by its preshift examiners evidenced only a high degree of negligence, rather than a reckless or conscious disregard. I reach this conclusion because of the absence of defective rollers in close proximity to the cited coal accumulations. Finally, as previously discussed, extensive combustible accumulations along a beltline is a violation that is serious in gravity. Consequently, there is no basis for disturbing the civil penalty initially proposed by the Secretary. Accordingly, consistent with the statutory penalty criteria, a civil penalty of $6,600.00 shall be assessed for 104(d)(2) Order No. 7149765.

d. Settlement Terms

As noted, the Secretary has filed a motion to approve a settlement agreement with respect to the 19 remaining citations and orders in this proceeding. A reduction in civil penalty for these 19 cited violations, from $20,748.00 to $12,576.50, is proposed. The settlement terms include deleting the S&S designation from Citation Nos. 7135325, 7135329, 7135696, 7135331, 7135697, 7135703 and 7135706, and vacating Citation Nos. 7135695 and 7148008. The parties also have agreed to modify Citation No. 7135959 by deleting the S&S designation, and by amending the citation to reflect that the violated mandatory standard was 30 C.F.R. § 75. 517 rather than 30 C.F.R. § 75. 604(b).

I have considered the representations and documentation submitted in support of the Secretary's motion and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. Accordingly, the parties' settlement terms shall be approved.

ORDER

Consistent with this Decision, **IT IS ORDERED** that 104(d)(2) Order No. 7149765 **IS AFFIRMED**.

IT IS FURTHER ORDERED that McElroy Coal Company shall pay a civil penalty of $6,600.00 in satisfaction of 104(d)(2) Order No. 7149765.

Consistent with the parties' settlement terms, **IT IS FURTHER ORDERED** that McElroy Coal Company shall pay a civil penalty of $12,576.50 for the remaining 19 citations and orders in issue in this proceeding.

Consistent with this decision and the parties' settlement terms, **IT IS ORDERED that McElroy Coal Company shall, within 30 days of the date of this decision, pay a total civil penalty of $19,176.50** in satisfaction of the 20 citations and orders that are the subject of this matter. Upon receipt of timely payment, the civil penalty proceeding in WEVA 2007-132 **IS DISMISSED**.

Jerold Feldman
Administrative Law Judge

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