FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

May 26, 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. KENT 92-549
PRABHU DESHETTY, employed by ISLAND CREEK COAL COMPANY	:	

BEFORE: Backley, Doyle and Holen, Commissioners[1]

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"). The issue is whether Prabhu Deshetty, employed by Island Creek Coal Company ("Island Creek"), knowingly authorized a violation of a mandatory standard (30 C.F.R. § 75.400)[2] and, thus, is individually liable under section 110(c) of

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[1] Chairman Jordan has elected not to participate in this matter. She assumed office after this case had been considered at a Commission decisional meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. Commissioner Nelson participated in the consideration of this case but passed away before the decision was issued. Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves a panel of three members to exercise the powers of the Commission.

[2] Section 75.400 provides:

> Accumulation of combustible materials.
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> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

the Mine Act, 30 U.S.C. § 820(c).[3] Administrative Law Judge Gary Melick concluded that a violation of section 75.400 occurred and that Deshetty was individually liable for it under section 110(c) of the Act. 15 FMSHRC 830 (May 1993)(ALJ). He assessed a $1,500 civil penalty. Id. at 835. Deshetty filed a petition for discretionary review challenging the judge's liability and penalty findings. For the reasons set forth below, we affirm the judge's decision.

I.

Factual and Procedural Background

Island Creek operates the Hamilton No. 2 Mine, an underground coal mine in Union County, Kentucky. On January 15, 1991, Inspector Harold Gamblin of the Department of Labor's Mine Safety and Health Administration ("MSHA"), observed a black area near the header of the No. 1 belt drive, consisting of fine coal and float coal dust 100 to 125 feet in length. I Tr. 41-42.[4] Inspector Gamblin also observed another pile of fine coal and coal dust 36 inches in height near the belt takeup. 15 FMSHRC at 831-32; I Tr. 42-43. The inspector saw additional substantial accumulations along the belt, which he determined had been there for a week or longer. 15 FMSHRC at 831, 832, 834; I Tr. 43, 45-47, 56-58.

The inspector orally ordered the closing of the belt and issued an order, pursuant to section 104(d)(2) of the Mine Act, 30 U.S.C. § 814(d)(2), alleging a violation of section 75.400. In the belt examiners' books from January 7, 1991, through the date of the inspection, he found 12 entries noting that the No. 1 belt needed cleaning. 15 FMSHRC at 834; G. Ex. 3. The inspector determined that Island Creek's negligence was aggravated. MSHA

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[3] Section 110(c) provides:

> Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this [Act] or any order incorporated in a final decision issued under this [Act], except an order incorporated in a decision issued under subsection (a) of this section or section [105(c)] ..., any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) of this section.

30 U.S.C. § 820(c) .

[4] A hearing in this matter was held on November 18-19, 1992. "I Tr." refers to the transcript for November 18; "II Tr." refers to the transcript for November 19.

conducted a special investigation into the circumstances surrounding the alleged violation and brought section 110(c) civil penalty proceedings against Prabhu Deshetty, the general mine foreman, and other supervisory personnel.[5]

At the hearing, Deshetty defended on the grounds that no violation had occurred and that, even if a violation had occurred, he had not been responsible for it within the meaning of section 110(c).[6] The judge found that significant loose coal and coal dust accumulations existed along the No. 1 belt in violation of section 75.400. 15 FMSHRC at 832. Id. The judge determined that Deshetty knowingly authorized, ordered or carried out the violation of section 75.400, and was therefore liable under section 110(c) of the Mine Act. Id. at 833-35. In assessing a $1,500 civil penalty against Deshetty, the judge found both high gravity and high negligence. Id. at 835.

II.

Disposition

Section 110(c) of the Mine Act provides that, whenever a corporate operator violates a safety or health standard, an agent of the corporate operator who "knowingly authorized, ordered, or carried out such violation" shall be subject to individual civil penalty under the Act. Deshetty contends on review that no violation of section 75.400 occurred. He contends alternatively that, if the finding of violation is affirmed, he had not knowingly authorized, ordered, or carried it out. Deshetty also argues that the civil penalty is excessive because the judge's findings of high gravity and negligence are not supported by substantial evidence and are contrary to law. The Secretary responds that substantial evidence supports the judge's findings that an accumulation violation occurred and Deshetty knowingly authorized, ordered, or carried out that violation.

A. Section 110(c) Liability

1. Violation of section 75.400

Deshetty raises both legal and evidentiary objections to the judge's finding of violation. He asserts that the cited coal accumulations were wet and, therefore, were incombustible material not subject to section 75.400.

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[5] The Secretary also brought section 110(c) penalty proceedings against Curtis Crick, mine shift foreman, James Bo Jones, shift belt foreman, and Charles Wright, mine foreman, which were consolidated before Judge Melick. The judge dismissed the proceedings against Crick, Jones and Wright because the Secretary failed to file the penalty petitions within the 45-day time limit set forth in former Commission Procedural Rule 27(a), 29 C.F.R. § 2700.27(a)(1992)(penalty proposal). 15 FMSHRC 735 (April 1993) (ALJ).

[6] The Secretary also proceeded against Island Creek for the alleged violation. Island Creek Coal Co., Docket No. KENT 92-1034-A. Upon the request of the parties, that proceeding was stayed by Judge Melick in October 1993, pending resolution of the present matter.

However, the Commission has held, as the judge noted, that material consisting of wet or damp coal falls within the prohibition of section 75.400 because such material may, when it dries out, ignite or propagate a mine fire.[7] See Black Diamond Coal Mining Co., 7 FMSHRC 1117, 1120-21 (August 1985); Utah Power & Light Co., Mining Division, 12 FMSHRC 965, 969 (May 1990), aff'd, 951 F.2d 292 (10th Cir. 1991)("UP&L").

Deshetty also argues that a violation of section 75.400 occurs only when an accumulation of combustible materials has built up over a period of time and that the spillage in question had not been present long enough to qualify as an accumulation. He contends that the cited coal material was merely the type of spillage that is inevitable in mining operations.

We reject Deshetty's assertions. Congress intended to proscribe "masses of combustible materials which could cause or propagate a fire or explosion." UP&L, 12 FMSHRC at 968, quoting Old Ben Coal Co., 2 FMSHRC 2806, 2808 (October 1980). We conclude that the accumulations in question, which were substantial, were prohibited within the meaning of the standard.

Further, the inspector, whose testimony was credited by the judge, testified that a 36-inch high accumulation near the belt takeup had been there for some time and that the operator was aware of it because it had been rockdusted at least twice. 15 FMSHRC at 831-32; I Tr. 41-45; G. Ex. 4. Island Creek witness Stan Bealmar, who had accompanied the inspector, conceded this accumulation and testified that it probably had developed over two or three shifts. 15 FMSHRC at 832; II Tr. 207. Both Deshetty and shuttle car driver James Hill acknowledged the existence of a pile of coal near the header. 15 FMSHRC at 831-32; II Tr. 88-89, 219.

The inspector also discovered various other accumulations along 800 feet of belt, ranging from 4 to 36 inches in depth and including a black area consisting of fine coal and float coal dust that extended 100 to 125 feet. I Tr. 41-49. The inspector determined that these accumulations had also been there for some time because they consisted of fine coal and coal dust. I Tr. 46-47. According to the inspector, a new spillage would consist of "large lumps of coal." I Tr. 47. The evidence of long-standing accumulations is corroborated by the belt examiners' reports, which indicated that the No. 1

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[7] We also note that, as Inspector Gamblin explained, there was a likelihood under the circumstances that the cited coal accumulations would dry out:

> We were in the winter alert which was from October through March. We're about to mid-point in it in January. That's at the time when the [dry air] enters the mine ventilation system traveling through the mines ... causing very dry and hazardous conditions, if the combustible materials are allowed to accumulate and not be cleaned up.

Tr. 73.

belt was dirty or needed cleaning on 12 out of the 13 shifts immediately preceding the order. G. Ex. 3.

We conclude that substantial evidence[8] supports the judge's determination that the cited accumulations violated section 75.400 and, therefore, we affirm it.[9]

2. Deshetty's liability under section 110(c)

On both legal and evidentiary bases, Deshetty challenges the judge's conclusion that he knowingly authorized, ordered, or carried out the violation. Deshetty raises arguments concerning the proper interpretation and scope of section 110(c). See D. Br. 17-33. Based on Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), he asks the Commission to revisit its interpretation of the term "knowingly" in Kenny Richardson, 3 FMSHRC 8 (January 1981), aff'd on other grounds, 689 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983), and to redefine the level of awareness or conduct sufficient to subject a corporate agent to individual liability. Deshetty proposes that "knowingly" in section 110(c) signifies actual knowledge or "egregious conduct, not ... mere negligence." See D. Br. 21. We do not reach these issues. Substantial evidence supports the judge's conclusion that Deshetty possessed actual knowledge of the accumulation problem along the No. 1 beltline. His failure to address that ongoing problem was a knowing authorization of the violation within the meaning of section 110(c).

During the time in question, Deshetty, as general mine foreman, was in charge of the day-to-day operations of the mine. II Tr. 52. He was familiar with the workings and maintenance of the belt, and he reviewed and countersigned the belt examiners' reports for every shift. II Tr. 62, 73-78. Those reports revealed that the No. 1 belt was "dirty" or "need[ed] cleaning" every working day from January 7 to January 15, the day of the inspection. G. Ex. 3. Deshetty testified that, when he read a report indicating the belt

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[8] The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing factual determination in an administrative law judge's decision. 30 U.S.C. § 823(d)(2)(A)(ii)(I). The term "substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (November 1989), quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

[9] Deshetty also contends that the inspector possessed a faulty recollection of what he had written in his order. Although the inspector did not remember the exact locations of the accumulations, he recalled the 36-inch pile as well as the existence of other coal piles and their overall characteristics. The inspector's notes, written contemporaneously with his inspection, support the inspector's testimony at the hearing. G. Ex. 2. The notes indicated that loose fine coal and coal dust had been found along approximately 800 feet of the belt. Id. The order similarly described the accumulations. G. Ex. 4.

"need[ed] cleaning" or was "dirty," he understood that a violative or hazardous accumulation was present. II Tr. 131, 133-34. Thus, he had actual knowledge of the specific accumulation problem along the No. 1 beltline. He acknowledged that he knew he was "supposed to verify that corrective action was taken with respect to each and every entry [of] violation or hazard reported by the belt examiner," but that, in fact, he did not know whether those conditions had been corrected. II Tr. 131, 132, 152.

Deshetty also reviewed all citations for the mine. II Tr. 129. During the preceding year, the mine was cited 45 times for accumulations of combustible materials. 15 FMSHRC at 833; G. Ex. 1. Inspector Gamblin testified that he had discussed with Deshetty the large number of violations and had recently warned him that the mine needed to "take a closer look" at the accumulation problem. I Tr. 33-34. Deshetty admitted that he knew of these prior violations as a result of his review of the mine's citations. 15 FMSHRC at 833; II Tr. 129, 140. The record thus supports the judge's finding that Deshetty was placed on "specific notice of problems regarding combustible accumulations at this mine." 15 FMSHRC at 833. This notice should have engendered in Deshetty a heightened awareness of a serious accumulation problem. Cf. Peabody Coal Co., 14 FMSHRC 1258, 1264 (August 1992)(for purposes of determining whether a violation resulted from an operator's unwarrantable failure to comply with a standard (see 30 U.S.C. § 814(d)(1)), a "history of similar violations at a mine may put an operator on notice that it has a recurring safety problem").

Deshetty was aware of the ongoing spillage problem along the No. 1 beltline that ultimately resulted in the citation, but failed to take measures to remedy the problem. Such inaction by the responsible supervisor, placed on actual notice by MSHA of the problem, constituted a knowing authorization of the violation.

In defense, Deshetty argues that, although he was aware that spillage existed along the No. 1 beltline, he was not aware of its extent and, thus, of whether it was a prohibited accumulation. See II Tr. 133.[10] In Warren Steen Construction, Inc. and Warren Steen, 14 FMSHRC 1125 (July 1992), the Commission explained: "In order to establish section 110(c) liability, the Secretary must prove only that an individual knowingly acted, not that the individual knowingly violated the law." 14 FMSHRC at 1131. Thus, Deshetty's claim of ignorance fails.

Deshetty also asserts that he relied on his foremen to remedy the accumulations and asks the Commission to assess his liability in light of Roy Glenn, 6 FMSHRC 1583 (July 1984). As noted, however, Deshetty admitted that it was his responsibility to verify that the foremen took corrective action on the belts and that he only assumed the foremen had done so. See II Tr. 131-32. In Roy Glenn, the Commission said that supervisors "could not close their eyes to violations, and then assert lack of responsibility for those

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[10] As the judge found, Deshetty believed that, to be violative, an accumulation must touch a frictional area and be of a very substantial mass. 15 FMSHRC at 832; II Tr. 139, 163.

violations because of self-induced ignorance." 6 FMSHRC at 1587. Deshetty ignored the specific warnings from MSHA about the large number of accumulation violations at the mine and disregarded the repeated entries in the belt examiners' reports indicating that the No. 1 belt was in serious need of cleaning. Therefore, we affirm the judge's determination that Deshetty knowingly authorized the violation of section 75.400.

B. Penalty

Deshetty challenges the judge's penalty assessment, contending that the judge's findings of high gravity and high negligence are not supported by the record and are contrary to law. The Commission has stated: "When a judge's penalty assessment is at issue on review, the Commission must determine whether the penalty is supported by substantial evidence and is consistent with the statutory penalty criteria set forth in section 110(i) of the Mine Act, 30 U.S.C. § 820(i)." Warren Steen, 14 FMSHRC at 1131.[11]

With respect to gravity, the judge determined that the violation was very serious because of the long-standing nature of the accumulations and because, in places, the belt rollers were in physical contact with the accumulations. 15 FMSHRC at 834-35. Deshetty takes issue with the finding that the rollers were actually in the coal and Island Creek witnesses did not recall seeing them there. Although Inspector Gamblin could not identify the exact locations where the accumulations touched the rollers, he testified that such contact occurred. I Tr. 55-56; II Tr. 354-55. The judge credited and accorded great weight to this testimony. 15 FMSHRC at 834. A "judge's credibility findings ... should not be overturned lightly." Quinland Coals, Inc., 9 FMSHRC 1614, 1618 (September 1987), quoting Robinette v. United Castle Coal Co., 3 FMSHRC 803, 813 (April 1981). The fact that the inspector did not recall the specific areas where the coal touched the rollers is not a sufficient basis on which to overturn the judge's credibility determinations. Deshetty also asserts that the accumulations posed no grave danger because the coal was damp. For the reasons set forth above, we reject this argument. Accordingly, we affirm the judge's gravity finding.

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[11] Section 110(i) sets forth six criteria for assessment of penalties under the Act:

> In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

Deshetty argues that a finding of high negligence was not appropriate under the Secretary's penalty regulations at 30 C.F.R. Part 100 because he had no actual knowledge of the prohibited accumulations and because there were other mitigating circumstances. It is well settled that the Secretary's Part 100 regulations apply only to the Secretary's penalty proposals and that the Commission exercises independent authority to assess penalties pursuant to the six statutory criteria set forth in section 110(i). Sellersburg Stone Co., 5 FMSHRC 287, 291 (March 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984). We have concluded that Deshetty had actual knowledge of the accumulations along the No. 1 belt and that he failed to remedy the conditions, thereby displaying a high degree of negligence.

We conclude that the findings relied upon by the judge in assessing a $1,500 penalty are supported by substantial evidence and that the penalty is consistent with the statutory penalty criteria. Therefore, we affirm the judge's penalty assessment.

III.

Conclusion

For the reasons set forth above, we affirm the judge's decision.

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Joyce A. Doyle, Commissioner

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