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CONSOLIDATION COAL V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

CONSOLIDATION COAL COMPANY, CONTESTANT	CONTEST PROCEEDINGS
	Docket No. WEVA 86-180-R Order No. 2710945; 2/4/86
v.	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Docket No. WEVA 86-181-R Order No. 2710946; 2/4/86
	Docket No. WEVA 86-182-R Order No. 2710948; 2/4/86
	Docket No. WEVA 86-183-R Order No. 2710949; 2/4/86
	Docket No. WEVA 86-184-R Order No. 2710951; 2/4/86
	Docket No. WEVA 86-185-R Order No. 2710952; 2/4/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. WEVA 86-257 A.C. No. 46-01867-03677
v.	Blacksville No. 1 Mine
CONSOLIDATION COAL COMPANY, RESPONDENT	

DECISION

Appearances: Michael R. Peelish, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Contestant/Respondent;
Linda M. Henry, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent/Petitioner.

Before: Judge Maurer

STATEMENT OF THE CASE

Contestant Consolidation Coal Company (Consol) has filed notices of contest challenging the issuance of six separate orders which were all issued on February 4, 1986, at its

Blacksville No. 1 Mine. The Secretary of Labor (Secretary) has filed a petition seeking civil penalties in the total amount of $3,500 for the violations charged in the six contested orders. The proceedings have been consolidated for purposes of hearing and decision.

Pursuant to notice, the cases were heard in Morgantown, West Virginia, on August 12 and 13, 1986.

The general issues before me concerning each of the individual orders and its accompanying civil penalty petition are whether there was a violation of the cited standard, and, if so, whether that violation was "significant and substantial" and caused by the "unwarrantable failure" of the mine operator to comply with that standard as well as the appropriate civil penalty to be assessed for the violation, should any be found.

Both parties have filed post-hearing proposed findings of fact and conclusions of law, which I have considered along with the entire record herein. I make the following decision.

STIPULATIONS

The parties have agreed to the following stipulations, which I accept (Tr. IÄ4, IÄ5):

1. The Federal Mine Safety and Health Review Commission and this Administrative Law Judge have jurisdiction to hear this case.

2. Blacksville No. 1 Mine is owned and operated by the respondent, Consolidation Coal Company.

3. The subject orders were properly issued upon the respondent by a duly authorized representative of the Secretary of Labor.

4. 1985 annual production for Consolidation Coal Company's Blacksville No. 1 Mine was 1,609,803 tons of coal.

5. Consolidation Coal Company has a history of 681 assessed violations for the two years preceding the issuance of the orders at issue.

6. Since the issuance of 104(d)(1) citation 2259064 on January 16, 1984, there has been no clean inspection at the Blacksville No. 1 Mine. Thus, this mine was still on a 104(d)(2) chain at the time of the issuance of the orders involved.

7. Payment of the civil penalties assessed in this matter will not affect the operator's ability to stay in business.

8. The operator has abated the conditions cited in good faith.

9. None of these conditions constituted an imminent danger. No imminent danger orders were issued at the time.

10. The exhibits to be entered into evidence in this case are authentic copies of the originals.

I. DOCKET NO. WEVA 86Ä180ÄR; ORDER NO. 2710945

Order No. 2710945, issued pursuant to section 104(d)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (the Act), alleges a violation of the regulatory standard at 30 C.F.R. 75.1403 (FOOTNOTE 1) and charges as follows:

> Beginning at a point approximately 60 feet outby the portal bus track switch on the portal bottom and extending into the portal bus track for approximately 37 feet the clearance space had become obstructed on the wire side with loose rock. This area had been heavily rockdusted several shifts earlier thus depositing such dust on the loose rock. This indicates this obstruction had existed several shifts. In addition equipment that had been passing in this area had plowed a deep groove through the accumulation making it very obvious with or without equipment being present. At a point 16" inches from the rails, the portal bus had grooved the material. This area is visited several times each day by managing officials who should have observed this condition.

FINDINGS OF FACT

1. The order was issued at 8:35 a.m. on February 4, 1986, by MSHA Inspector Joseph Migaiolo during an inspection of the Blacksville No. 1 Mine.

2. During this inspection, Inspector Migaiolo observed that beginning at a point approximately 60 feet outby the portal bus track switch on the portal bottom and extending along the portal bus track there were "obstructions" in the clearance space on the wire side for approximately 37 feet. These "obstructions" consisted of oil shale which had sloughed off from the rib adjacent to a curve in the portal bus track.

3. It is obvious that this loose material had been there for some time because several layers of rock dust had been intermingled in the accumulation of shale and track-mounted equipment had plowed a groove through the debris. Moreover, two of Consol's certified firebosses, Messrs. Turner and Casteel, had admittedly been watching the accumulation of sloughage, presumably patiently waiting for the proper time to clean it up. In fairness, they were of the considered opinion that the condition, as it existed on February 4, 1986, did not at that time constitute a hazard.

4. A notice to provide safeguards regarding clearance space on track haulage had been previously issued at this mine on November 4, 1977. This safeguard essentially stated that the clearance space on all track haulage should be kept free of loose rock, supplies and other loose materials.

5. Vehicles travel this stretch of haulage daily and conceivably there could be and are situations that arise which would cause miners to stop in this area and alight from their equipment. It is also likely that an individual walking in the area where these materials had accumulated could slip and fall and thus injure himself. However, the accumulation of loose material existed on the wire side or tight side of the track haulage, underneath the hot trolley wire. If a person were to alight from his vehicle and walk in this area, I find it most likely that because of the greater clearance available on the opposite side and in order to stay out from under the hot wire, he would walk on the clearance side of the haulage. I find the testimony of Mr. Gross in this regard to be completely credible and unrebutted.

CONCLUSIONS OF LAW

1. Consol is subject to the provisions of the Act in the operation of the subject mine and I have jurisdiction over the parties and subject matter of this proceeding. [This finding applies to all the orders considered in this proceeding.]

2. The evidence as found in the above Findings of Fact establishes the existence of a previously issued safeguard concerning the subject matter of the instant order and the failure of the operator to comply with same in that the clearance space on the wire or tight side of the track haulage in the affected area was not kept clear as required by the safeguard. Rather, an accumulation of oil shale sloughage was allowed to build up to the point where the equipment going by had admittedly been cutting a groove through the sloughage to pass. Clearly, the operator failed to comply with the issued safeguard and thereby violated 30 C.F.R. 75.1403.

3. The issue of whether or not the violation was of such a nature as could significantly and substantially contribute to the cause of a coal mine safety hazard presents a more difficult question.

The Commission has held that a violation is properly designated significant and substantial if, based on 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. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3Ä4 (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 will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

The Commission subsequently explained 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., 6 FMSHRC 1834, 1836 (August 1984).

In the instant case, it is established that a violation occurred, and that the violation contributed to a discrete safety hazard that could contribute to an injury if a miner would disembark in the accumulated loose material. It is the third element of the Mathies formula which the Secretary has failed to prove up. Although I agree that if

miners were required to disembark in such materials, it is reasonably likely that someone might sustain a slip and fall type injury, the Secretary has presented no credible evidence to support his conclusion that in those isolated instances where miners would be forced to disembark on this particular stretch of haulage, they would do so on the wire side rather than the patently more convenient, considerably wider, and obviously safer clearance side. In fact, as alluded to in Finding of Fact No. 5, the credible evidence is to the contrary. Accordingly, I cannot conclude that the Secretary has established that there was a reasonable likelihood that an accident or injury would occur. Therefore, the inspector's "significant and substantial" finding is vacated and the order is modified to reflect a "non-S & S" violation.

4. Nonetheless, I find that the violation was caused by the "unwarrantable failure" of the operator to comply with the standard.

In Zeigler Coal Company, 7 IBMA 280 (1977), the Interior Board of Mine Operations Appeals interpreted the term "unwarrantable failure" as follows:

> An inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of lack of due diligence, or because of indifference or lack of reasonable care.

The Commission has concurred with this definition to the extent that an unwarrantable failure to comply may be proven by a showing that the violative condition or practice was not corrected or remedied prior to the issuance of a citation or order, because of indifference, willful intent, or serious lack of reasonable care. United States Steel Corp. v. Secretary of Labor, 6 FMSHRC 1423 at 1437 (1984).

Herein, it is indisputable that knowledge of the violative condition as it existed at the time the order was issued had been within the knowledge of the operator for some time. Even if management didn't feel it was a particularly hazardous condition, the operator is still chargeable with the knowledge that it was a violative condition in light of the safeguard on record. Therefore, I find their inaction in cleaning up this debris to be a serious lack of reasonable care to see that the violative condition was abated in a timely fashion.

5. Considering the criteria in section 110(i) of the Act, I conclude that a penalty of $300 is appropriate.

II. DOCKET NO. WEVA 86Ä181ÄR; ORDER NO. 2710946

Order No. 2710946, issued pursuant to section 104(d)(2) of the Act alleges a violation of the regulatory standard at 30 C.F.R. 75.1403 and charges as follows:

> The north side crossover track switch shelter hole was not being maintained free of loose rock (pieces 12" x 8" x 3" and several pieces 7" x 11" x 2" and loose shale 6Ä8" in depth). In addition the depth of the hole was only 35" near its middle (height of the coal 4' wide x 5' in depth is required). A board 36" long x 4" wide x 5/8" was also in the shelter hole. This condition is obvious and as such has existed for several shifts. Management frequently passes this area and thereby should have had observed and recorded this shelter hole obstruction and construction.

FINDINGS OF FACT

1. The order was issued at 9:16 a.m. on February 4, 1986, by Inspector Joseph Migaiolo during an inspection of the Blacksville No. 1 Mine.

2. At this time, Inspector Migaiolo observed the north side crossover track switch shelter hole in a condition that did not meet the criteria for shelter holes contained in 30 C.F.R. 75.1403Ä9. That section provides, inter alia, that shelter holes should be at least 5 feet in depth, not more than 4 feet in width, and at least the height of the coal seam or 6 feet, whichever is less. It also provides that shelter holes should be kept free of refuse and other obstructions.

3. Inspector Migaiolo observed this particular shelter hole to be obstructed with 6 to 8 inches of loose rock on the floor. Most importantly, however, instead of the shelter hole being 5 feet deep, as required, it was only 34 inches deep in its center because of a protruding rock at the rear of the shelter hole. Even though Mr. Gross disputed the particular place the inspector took the measurement from in order to arrive at the 34 inch depth, he conceded during his direct examination that the condition of the shelter hole was in violation of the mandatory standard.

4. A notice to provide safeguards regarding shelter holes had been previously issued at this mine on November 21, 1984. This safeguard essentially stated that all switch throws should be provided with shelter holes. Implicit in that requirement is that all shelter holes provided in compliance with the safeguard should meet the criteria for shelter holes contained in the mandatory standard at 30 C.F.R. 75.1403Ä9.

5. Since this shelter hole is located at a track switch, the speed of track-mounted equipment past this area is relatively slow. However, track-mounted equipment can and does derail even if it is moving at a slow walking pace. Derailment of equipment which is carrying supplies or any other material could cause that material to become an airborne projectile with sufficient velocity to cause serious injury should someone be struck.

CONCLUSIONS OF LAW

1. On February 4, 1986, the operator violated 30 C.F.R. 75.1403 in that the north side crossover track switch shelter hole did not meet the criteria for a shelter hole contained in 30 C.F.R. 75.1403Ä9 as more fully set out in the Findings of Fact.

2. This violation was of such a nature as could significantly and substantially contribute to the cause and effect of a coal mine safety hazard. In order to make an "S & S" finding, the Secretary must prove a violation, a discrete safety hazard, a reasonable likelihood that the hazard will result in injury and that the injury will be of a reasonably serious nature. Mathies Coal Company, supra.

Herein, I have already found the violation. The safety hazard is that given the fact that shelter holes are designed to protect miners from derailed equipment and airborne projectiles off of that equipment, a shelter hole of insufficient depth [34 inches vice 5 feet] is a serious derogation of the protection a miner would have in the case of a nearby derailment. During such a derailment, it is reasonably likely that any material or supplies being carried by the rail-mounted equipment would become airborne debris traveling with sufficient velocity to cause serious injury if a miner should be struck. Further, it is much more likely that a miner would be struck by such debris if the shelter hole in which he had taken refuge was less than the required 5 foot depth, as here.

3. An "unwarrantable failure" exists where the evidence establishes the failure of an operator to abate

conditions constituting violations of a mandatory standard because of a lack of due diligence, indifference, or a serious lack of reasonable care. Zeigler Coal Co., supra; U.S. Steel Corp., supra.

In the instant case, management demonstrated a serious lack of reasonable care in locating this violative condition and abating it. The pre-shift examiner, Turner, testified that he may not have even glanced into this shelter hole on the morning of Inspector Migaiolo's visit. Furthermore, both he and Mr. Gross, a management employee, the safety supervisor in fact, testified to the effect that they look at a shelter hole with an eye toward determining if there is anything that would prevent somebody from getting into it or something which would cause somebody to be injured while in it. Mr. Turner further opined that he "didn't have any call to measure it."

Therefore, I find that the operator displayed indifference to the criteria required for shelter holes that is contained in the regulations and demonstrated a serious lack of reasonable care in discovering and abating this violation.

4. Considering the criteria in section 110(i) of the Act, I conclude that a penalty of $400 is appropriate.

III. DOCKET NO. WEVA 86Ä182ÄR; ORDER NO. 2710948

Order No. 2710948, issued pursuant to section 104(d)(2) of the Act, alleges a violation of 30 C.F.R. 75.1403 and charges as follows:

> Crosscuts being used as shelter holes in the south and north archways on the crossover track haulage were not being maintained free of loose rock for a distance of 15 feet and 4 feet wide (proper measurements at this mine). In this north side shelter hole, rib and roof sluffing had accumulated loose shale to a depth of 24 inches and a width of approximately 31 inches and length of approximately 15 feet. On this south side shelter hole, loose rock had distributed over the shelter hole floor for a distance of 15 feet depth. These two shelter holes had obvious conditions which should easily have been observed by management.

FINDINGS OF FACT

1. The order was issued at 10:40 a.m. on February 4, 1986, by MSHA Inspector Joseph Migaiolo during an inspection of the Blacksville No. 1 Mine.

2. There is a serious dispute between the parties as to whether the cited areas were in a crosscut being used as a shelter hole in the north and south archways on the crossover track haulage or were shelter holes that existed in the immediate area behind the cutout portions in the archways independently of the crosscut that happened to be behind them. The only significance this fact has in the final determination of whether a violation occurred is whether the area must be clear of obstructions for a depth of 15 feet in the case of a crosscut or only 5 feet in the more general case of a shelter hole.

3. The entire area in the proximity of the shelter holes was arched. The archway is constructed of steel arch straps with boards in between the straps that act as the walls of the archway. The dimensions of the cutout portions of the archway constituting the shelter hole entrances are 4 feet by 4 feet and the level of the shelter holes is about 10 to 12 inches above the level of the track entry. There indisputably was a crosscut behind the arches.

4. On June 6, 1972, a notice to provide safeguards was issued at the Blacksville No. 1 Mine requiring that all crosscuts being used as shelter holes be kept free of refuse and materials for a distance of 15 feet.

5. I specifically find that the area described in Government Exhibits Nos. 7 and 9 as the situs of the violative conditions is a crosscut within the meaning of the safeguard which is Government Exhibit No. 8, albeit a substantially modified crosscut which could cause reasonable men to differ as to the applicability of the instant safeguard.

6. At the time of Inspector Migaiolo's observation of the violative condition, rib and roof sloughage and loose shale had accumulated to a depth of 24 inches in an area approximately 31 inches wide and 15 feet deep into the north side shelter hole. Also the area through the arch, in the crosscut, was littered with materials such as spalling ribs and large rocks that had fallen from the roof cavity. Furthermore, large rocks which had fallen out of the roof cavity area more fully described in Government Exhibit No. 9 were lying loose on top of the arch across the archway. These rocks, of which there were several, were approximately 12 cubic feet in size. In the south side shelter hole, the walkway was littered with scattered debris.

7. Mr. Gross, the Safety Supervisor at the mine, acknowledges that the northside portion of the cited area

was in violation of the shelter hole criteria because the "manhole was not 4 foot wide and 5 foot deep". However, he disputes that this area is covered by the safeguard because the whole area is arched and is therefore no longer a crosscut within the meaning of the safeguard. Essentially then, Mr. Gross, on behalf of the operator, concedes that a violation occurred because the shelter hole was not cleaned out to a depth of 5 feet but disputes whether it should have been cleaned out 10 feet further back to a depth of 15 feet.

8. I find that since the safeguard applies to the shelter holes, by its terms, they must have been cleaned out to a depth of 15 feet in order to be in compliance with the mandatory standard.

9. The largest equipment that would be traveling through this entry is a 20Äton motor and it would be moving through this area at a relatively slow rate of speed. I find that in the event of a derailment in this area, it would be unlikely that the equipment itself would enter the shelter holes and injure individuals inside the arches. However, if the equipment crashed into the archway, debris such as the large rocks on top of the arch very likely would have fallen into the northside shelter hole. These rocks were of sufficient size to severely injure someone had they been struck. There likewise existed slip, trip, and fall hazards within the shelter holes because of floor debris.

CONCLUSIONS OF LAW

1. The evidence as found in the above Findings of Fact establishes the existence of a previously issued safeguard concerning the subject matter of the instant order and the failure of the operator to comply with the same in that the subject crosscut, being used as a shelter hole, was not kept clear of refuse and debris for a distance of 15 feet. Therefore, the operator failed to comply with the issued safeguard and thereby violated 30 C.F.R. 75.1403.

2. In the event of a derailment of track-mounted equipment in the proximity of this archway in the crosscut, I find that it is reasonably likely that if the archway were struck, even at a relatively slow speed, loose flying debris could seriously injure persons taking shelter in the crosscut/shelter hole. Therefore, I conclude that the violation contributed to a measure of danger to safety reasonably likely to result in serious injury to miners. Mathies Coal Co., supra. I therefore further conclude that the violation was significant and substantial.

3. The violation was not the result of Consol's unwarrantable failure to comply with the safeguard cited.

Consol's position with regard to the applicability of the cited safeguard is that the normal crosscut at this mine is approximately 13 1/2 to 15 feet wide, depending on the type of miner used to cut it. The crosscut herein involved was substantially modified by an archway down to two shelter hole entrances that are 4 feet by 4 feet. Their reasoning goes that the purpose for the safeguard is to protect miners against a derailed piece of equipment getting into the crosscut and therefore the shelter hole. Should this occur, it could be necessary to get 15 feet deep into the crosscut in order not to be struck by the equipment itself. Here, however, the equipment itself could not get into the crosscut because of the steel and wood archway. Therefore, they reasoned that the safeguard does not apply to these shelter holes in the archway and thus it follows that the shelter holes should not have to be kept clear of obstructions to a depth of 15 feet.

This is not an unreasonable position, but I have found it to be in error. The archway and shelter holes had existed in that configuration for at least 12 years. During this extended period of time, no one had ever before suggested that this particular safeguard applied to this configuration of crosscut/shelter hole. Nor had any other MSHA inspector ever required that it be kept clear of obstructions to a depth of 15 feet. In fact, on the day the order was issued, the testimony was to the effect that Inspector Migaiolo and his supervisor had some difficulty deciding themselves whether the area should be cleared of obstructions for 5 feet or 15 feet.

The Commission interprets the term "unwarrantable failure to comply" as being a violative condition which resulted from indifference, willful intent, or a serious lack of reasonable care. U.S. Steel Corp., supra. From the totality of evidence in this record, I cannot conclude that the instant violation resulted from Consol's indifference, willful intent, or a serious lack of reasonable care. Even though the rock found by the inspector in these shelter holes had obviously accumulated over a period of days or even weeks, the operator had a reasonable basis for disbelieving that the cited safeguard applied to this hybrid type of crosscut.

Therefore, I find that the instant order improperly concluded that the violation resulted from Consol's unwarrantable failure to comply with the mandatory standard, i.e., the safeguard issued on June 6, 1972, by Inspector Powers.

4. Considering the criteria in section 110(i) of the Act, I conclude that a penalty of $300 is appropriate.

IV. DOCKET NO. WEVA 86Ä183ÄR; ORDER NO. 2710949

Order No. 2710949, issued pursuant to section 104(d)(2) of the Act alleges a violation of the regulatory standard at 30 C.F.R. 75.1403 and charges as follows:

> On the south side of the crossover track haulage, shelter holes were not being maintained at least every 105 feet. Beginning at the first shelter inby the manway the next shelter hole was approximately 205 feet away. This area is traveled at least three times a day by management officials and as such should have been identified that shelter hole spacing was not proper. An overcast was present in the related area.

FINDINGS OF FACT

1. The order was issued at 11:10 a.m. on February 4, 1986, by Inspector Joseph Migaiolo during an inspection of the Blacksville No. 1 Mine.

2. Inspector Migaiolo observed, representatives of Consol essentially admitted, and I so find as a fact that shelter holes had not been provided every 105 feet in the crossover track haulage of the subject mine. More particularly, the inspector located an area, 205 feet in length, that did not contain a shelter hole.

3. On January 26, 1981, a notice to provide safeguards was issued for this mine concerning shelter holes. This safeguard essentially stated that shelter holes shall be provided on track haulage at intervals of not more than 105 feet.

4. Considering the fact that this condition had existed since at least January of 1981, management personnel at Consol are certainly chargeable with the knowledge that the condition co-existed with the safeguard that forbade it.

5. If equipment operating in this area were to derail, persons in the area would not have a shelter hole available and could be crushed by the equipment. Furthermore, the same reasoning as is contained in Finding of Fact No. 5 in Section II, supra, applies equally as well here where there is no shelter available.

CONCLUSIONS OF LAW

1. On February 4, 1986, the operator violated 30 C.F.R. 75.1403 in that the evidence of record establishes the

existence of a previously issued safeguard concerning the subject matter of the instant order and the failure of the operator to comply with the same in that there was no shelter hole for a length of 205 feet along the crossover track haulage of the subject mine. The safeguard required a shelter hole at least every 105 feet along the haulage. By failing to comply with the issued safeguard, the operator thereby violated 30 C.F.R. 75.1403.

2. I find the violation contributed a measure of danger to safety reasonably likely to result in serious injury to miners. The rationale contained in Conclusion of Law No. 2 in Section II, supra, applies equally to this order and violation.

3. I likewise find the violation was the result of Consol's unwarrantable failure to comply with the mandatory standard, i.e., the safeguard of January 26, 1981. Management personnel at Consol knew or should have known that the violative condition and the safeguard forbidding that condition had co-existed at this mine for more than 5 years at the time the order was written.

4. Considering the criteria in section 110(i) of the Act, I conclude that a penalty of $500 is appropriate.

V. DOCKET NO. WEVA 86Ä184ÄR; ORDER NO. 2710951

Order No. 2710951, issued pursuant to section 104(d)(2) of the Act, alleges a violation of the regulatory standard at 30 C.F.R. 75.202 2 and charges as follows:

> In a large roof cavity on the south side crossover an unsupported roof brow existed. On the north end of the cavity a brow approximately 24 inches thick, 30 inches wide, and 18 inches long was suspended over the walkway. This brow has come about due to roof sluffing around a conventional roof bolt. Three sides of this roof brow are exposed to air in that a roof strap was holding the fourth side together. This condition should have been observed easily due to location over the walkway and deteriorated form of roof unconsolidated shale. Management travels this area at least three times each day for examination and should have observed the condition.

FINDINGS OF FACT

1. The order was issued at 11:25 a.m. on February 4, 1986, by Inspector Joseph Migaiolo during an inspection of the Blacksville No. 1 Mine.

2. Inspector Migaiolo issued the instant order when he observed a roof brow approximately 24 inches in thickness to the main roof, 30 inches wide at the top and 18 inches at the base on the north end of the cavity at the south side crossover. The pillar of rock, consisting of oily shale type material is shown in a sketch admitted into evidence in this proceeding as Government Exhibit No. 15. The column of rock was at the end of an unsupported steel plank. The roof bolt on that end was no longer attached to the steel plank, having pulled through, and therefore the column of rock was lying on top of the plank on that end. The brow, consisting of unconsolidated oily shale, had deteriorated by erosion on three sides; only the right side was still attached to the main roof.

3. This eroded roof condition had existed for at least several days, if not weeks, as it takes this long for the roof to deteriorate to the point where Inspector Migaiolo found it on February 4. In fact, Messrs. Turner and Casteel had been watching this area for several weeks. Turner had tested the area by sounding it with a 7 foot roof bolt on the very morning the order was issued as part of his pre-shift examination. Company personnel considered the brow to be tight and adequately supported. I disagree. However, the one roof bolt that had popped out of the steel roof strap could have popped out at any time prior to Migaiolo's inspection.

4. Individuals regularly travel through this area for supplies, clean-up procedures, and pre-shift examinations at least once a shift, three times a day.

5. The condition was abated by removing the brow and installing two roof bolts.

CONCLUSIONS OF LAW

1. On February 4, 1986, the operator violated 30 C.F.R. 75.202 by its failure to either take down or adequately support this roof brow.

2. Whether that violation was "significant and substantial" depends on whether based on the facts surrounding the violation, there existed a reasonable likelihood that the hazard contributed to would have resulted in an injury of a reasonably serious nature. Cement Division, National

Gypsum Co., supra. Obviously, falls of roof material can result in serious or even fatal injuries. It is indisputable that roof falls are the leading cause of coal mining fatalities. In the instant situation, I find it to be reasonably likely that the fall of the relatively small area of unsupported roof brow could have caused a serious injury to a miner who would have happened to be walking underneath it, should it have come down at that time. I further find it to be reasonably likely that the unsupported roof brow as described in the record herein could have come down at any time. I fully credit the opinion testimony of Inspector Migaiolo in this regard.

3. The violation was not, however, the result of Consol's unwarrantable failure to comply with the mandatory standard. Inspector Migaiolo's own testimony on cross-examination effectively negates his own finding of unwarrantability. The following exchange, as pertinent to this finding, took place at Tr. IÄ147, 148:

> Q. You stated that the roof bolt straps, the one strap was, that the bolt had popped out of it, so to speak?
>
> A. Yeah, that's right.
>
> Q. . . . the fact that this could occur instantly, would that negate the unwarrantability of this condition?
>
> A. Yes.
>
> Q. Okay. And you did state that that could occur instantly, that the bolt could pop out?
>
> A. Yes.

Furthermore, responsible personnel at Consol testified that they were well aware of the deteriorated roof condition in this area and were testing it by attempting to pull it down and sounding it for looseness. They testified and I find their testimony credible to the extent that they found the roof to be tight and secure in their opinion. I disagree with their conclusion that the area was adequately supported and accordingly have found a violation of the standard cited, but I cannot conclude that the violation occurred as the result of Consol's "unwarrantable failure to comply" with that standard.

4. Considering the criteria in section 110(i) of the Act, I conclude that a penalty of $450 is appropriate.

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VI. DOCKET NO. WEVA 86Ä185ÄR; ORDER NO. 2710952

Order No. 2710952, issued pursuant to section 104(d)(2) of the Act, alleges a violation of the regulatory standard at 30 C.F.R. 75.303 (FOOTNOTE 3) and charges as follows:

> An inadequate preshift examination was performed of the portal bus spur located on the portal bottom and crossover track haulage north and south sides. Such examination was inadequate for all three shifts. Obvious conditions noted in these areas as issued are as follows: 104(d)(2) Orders on 2/4/86 (1) 2710945, (2) 2710946, (3) 2710948, (4) 2710949, (5) 2710951. Such conditions in sequence were (1) obstructed clearance space in portal bus spur on bottom, (2) obstructions and unsized shelter hole at north end crossover switch, (3) obstructions in crosscuts used as shelter holes on north and south sides of bottom crossover track haulage, (4) shelter holes not spaced every 105' on south side of crossover track haulage, (5) roof brow inadequately supported on south side of crossover track haulage. An adequate examination shall be performed and recorded.

FINDINGS OF FACT

1. The order was issued at 12:10 p.m. on February 4, 1986, by MSHA Inspector Joseph Migaiolo during an inspection of the Blacksville No. 1 Mine.

2. I find as a fact that the inadequate pre-shift violation charged in this order is duplicative of that previously charged in Order Nos. 2710945, 2710946, 2710948, 2710949, and 2710951 in the following respects:

a. Order No. 2710945 charged the operator, inter alia, with inadequate pre-shifting. The pertinent portion of that order stated: "This area is visited several times each day by managing officials who should have observed this condition."

b. Order No 2710946 charged the operator, inter alia, with inadequate pre-shifting. The pertinent portion of that order stated: "Management frequently passes this area and thereby should have had observed and recorded this shelter hole obstruction and construction."

c. Order No. 2710948 charged the operator, inter alia, with inadequate pre-shifting. The pertinent portion of that order stated: "These two shelter holes had obvious conditions which should easily have been observed by management."

d. Order No. 2710949 charged the operator, inter alia, with inadequate pre-shifting. The pertinent portion of that order stated: "This area is traveled at least three times a day by management officials and as such should have been identified that shelter hole spacing was not proper."

e. Order No. 2710951 charged the operator, inter alia, with inadequate pre-shifting. The pertinent portion of that order stated: "Management travels this area at least three times each day for examination and should have observed the condition."

3. In the previous five numbered sections of this decision I have discussed and made findings of fact and conclusions of law concerning all the facts alleged in the five previous orders and have found violations in each of the five. Additionally, I have made findings and conclusions concerning the seriousness of these violations, and unwarrantability and have considered all the statutory criteria in arriving at an appropriate civil penalty. As part and parcel of this process, I have necessarily considered and made findings concerning the operator's negligence in either failing to locate or failing to appreciate the seriousness

of the particular hazard involved. In essence the five previous orders charged the operator with failure to locate and abate certain violative conditions. I have considered those charges in their totality and have made the necessary findings which I feel are justified in the record.

Order No. 2710952 adds nothing to the case from a factual standpoint. The facts are exactly identical to those the operator is charged with in the five previous orders. The only new issue raised in the instant order is a violation of 30 C.F.R. 75.303 as a separate violation arising out of the same facts. Since these facts have already been adjudicated and appropriate penalties arrived at in the five previous sections, I find Order No. 2710952 to be multiplicative for purposes of findings and penalties.

CONCLUSIONS OF LAW

1. Because the factual allegations contained in Order No. 2710952 are duplicative of those charged earlier in Order Nos. 2710945, 2710946, 2710948, 2710949, and 2710951, and penalties have already been assessed herein for the violative conditions charged, Order No. 2710952 will be vacated.(FOOTNOTE 4)

DISCUSSION WITH FURTHER FINDINGS

Consol repeatedly raised the issue during the hearing that the (d)(2) orders which are the subject of this decision were somehow tainted by the fact that this same inspector, Migaiolo, or even other unnamed inspectors, on one or more prior occasions had walked right past these cited conditions without batting an eye, let alone writing a (d)(2) order. A second issue frequently raised was that Inspector Migaiolo's supervisor, one Paul Mitchell, was accompanying the inspector on this day and that but for his presence, Migaiolo would either not have written the violations at all or at least would not have characterized them as "unwarrantable." The first is a legal issue, the latter a factual allegation that simply fails of proof.

Consol's legal argument essentially amounts to some form of estoppel. The argument at the hearing was along the lines that if one inspector observed a certain condition and

didn't say anything about it one way or the other and the next day when basically the same condition existed, a second inspector wrote an unwarrantable violation order on it, that because of the operator's reliance on the first inspector, at least the unwarrantable portion of the order should not be upheld.

In their post-hearing brief, Consol has softened that position considerably and in fact provided the U.S. Court of Appeals citation in Emery Mining Corp. v. Secretary of Labor,(FOOTNOTE 5) which effectively negates the estoppel argument. Therein the court stated "courts invoke the doctrine of estoppel against the government with great reluctance." Further, quoting from Heckler v. Community Health Services, 104 S.Ct. 2218 (1984), at 2226 the court stated that as a general rule "those who deal with the Government are expected to know the law and may not rely on the conduct of government agents contrary to law."

Consol goes on to state that subjective interpretation of the regulations by inspectors is improper, and that allowing inconsistencies to exist in the interpretation of the rules and regulations from one inspection or inspector to the next defeats the purpose of the Act and makes it difficult if not impossible for operators to comply.

While I agree that an objective, if not absolutely identical, on the spot analysis of every factual condition and regulation would be an ideal situation, I don't think it is possible given the fact that MSHA inspectors are human and many of the regulations they are charged with enforcing are themselves subjective in nature.

I therefore find that each order must stand on its own. All the relevant facts surrounding the cited conditions and the circumstances of its issuance were admitted into the record and the parties given the opportunity to argue what inferences and conclusions should be drawn therefrom. The fact that another inspector, or even the same inspector, previously observed but did not cite a particular violation on a previous occasion is one of those relevant facts but is not by itself determinative of whether the order should be affirmed.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. Order No. 2710945, contested in Docket No. WEVA 86Ä180ÄR, IS AFFIRMED as a non-S & S violation of 30 C.F.R. 75.1403. Further, the order properly concluded that the

said violation resulted from Consol's unwarrantable failure to comply with the standard involved.

2. Order No. 2710946, contested in Docket No. WEVA 86Ä181ÄR, properly charged a violation of 30 C.F.R. 75.1403 and properly found that the violation was significant and substantial and resulted from Consol's unwarrantable failure to comply with the standard involved. Accordingly, Order No. 2710946 IS AFFIRMED.

3. Order No. 2710948, contested in Docket No. WEVA 86Ä182ÄR, properly charged a violation of 30 C.F.R. 75.1403 and properly found that the violation was significant and substantial. However, the contested order improperly concluded that the violation resulted from Consol's unwarrantable failure to comply with the mandatory safety standard involved. Therefore, the violation was not properly cited in a section 104(d)(2) order. Accordingly, Order No. 2710948 IS HEREBY MODIFIED to a 104(a) citation.

4. Order No. 2710949, contested in Docket No. WEVA 86Ä183ÄR, properly charged a violation of 30 C.F.R. 75.1403 and properly found that the violation was significant and substantial and resulted from Consol's unwarrantable failure to comply with the standard involved. Accordingly, Order No. 2710949 IS AFFIRMED.

5. Order No. 2710951, contested in Docket No. WEVA 86Ä184ÄR, properly charged a violation of 30 C.F.R. 75.202 and properly found that the violation was significant and substantial. However, the contested order improperly concluded that the violation resulted from Consol's unwarrantable failure to comply with the mandatory safety standard involved. Therefore, the violation was not properly cited in a section 104(d)(2) order. Accordingly, Order No. 2710951 IS HEREBY MODIFIED to a 104(a) citation.

6. Order No. 2710952, contested in Docket No. WEVA 86Ä185ÄR, IS VACATED.

7. The Consolidation Coal Company IS HEREBY ORDERED TO PAY a civil penalty of $1,950 within 30 days of the date of this decision.

Roy J. Maurer
Administrative Law Judge

FOOTNOTES START HERE-

1 30 C.F.R. 75.1403 provides as follows:
Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.

2 30 C.F.R. 75.202 provides in pertinent part:
Loose roof and overhanging or loose faces and ribs

shall be taken down or supported.

3 30 C.F.R. 75.303 provides in pertinent part:

(a) Within 3 hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative. Each such examiner shall examine . . . and test the roof, face, and rib conditions in such working section; examine active roadways, travelways, and belt conveyors on which men are carried . . . . Such mine examiner shall place his initials and the date and time at all places he examines. If such mine examiner finds a condition which constitutes a violation of a mandatory health or safety standard or any condition which is hazardous to persons who may enter or be in such area, he shall indicate such hazardous place by posting a "danger" sign conspicuously at all points which persons entering such hazardous place would be required to pass, and shall notify the operator of the mine . . . . Upon completing his examination, such mine examiner shall report the results of his examination to a person, designated by the operator to receive such reports at a designated station on the surface of the mine, before other persons enter the underground areas of such mine to work in such shift. Each such mine examiner shall also record the results of his examination . . . in a book approved by the Secretary kept for such purpose.

4 Conclusions of law concerning the violation of 30 C.F.R. 75.303, per se, were not made in the previous five numbered sections of this decision because a violation of that section was not formally charged in those orders, even though the language contained therein as set out in Finding of Fact No. 2 in fact did allege violations of that section as well as the substantive section actually specified.

5 3 MSHC 1585 (10th Cir.1984).