

CCASE:  
CONSOLIDATION COAL V. MSHA  
MSHA V. CONSOLIDATION COAL  
DDATE:  
19920310  
TTEXT:

CONSOLIDATION COAL COMPANY, : CONTEST PROCEEDINGS  
Contestant :  
v. : Docket No. WEVA 91-166-R  
: Citation No. 3105295; 2/4/91  
SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH : Docket No. WEVA 91-167-R  
ADMINISTRATION (MSHA), : Citation No. 3105296; 2/4/91  
Respondent :  
: Robinson Run No. 95 Mine  
:  
: Mine ID 46-01318  
:  
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEVA 92-177  
Petitioner : A.C. No. 46-01318-04022  
v. :  
: Robinson Run No. 95 Mine  
CONSOLIDATION COAL COMPANY, :  
Respondent :

PARTIAL DECISIONS  
and  
STAY ORDER

Appearances: Wanda M. Johnson, Esq., Office of the Solicitor,  
U.S. Department of Labor, Arlington, Virginia, for  
the Respondent/Petitioner.  
Walter J. Scheller, Esq., Consolidation Coal  
Company, Pittsburgh, Pennsylvania, for the  
Contestant/Respondent.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern Notices of Contest filed by the contestant Consolidation Coal Company (Consol), against the respondent (MSHA) pursuant to section 105(d) of the Federal Mine Safety and health Act of 1977, 30 U.S.C. 815(d), challenging the legality of two section 104(a) non-"S&S" citations issued on February 4, 1991, charging Consol with alleged violations of the mandatory accident reporting requirements found in 30 C.F.R. 50.10 and 50.12. The civil

~437

penalty case concerns MSHA's proposed civil penalty assessments of \$2,000 for the alleged violations, and a proposed civil penalty assessment of \$157, for one additional alleged violation of 30 C.F.R. 75.400, as noted in a section 104(a) citation issued on August 22, 1991. A hearing was held in Morgantown, West Virginia, and the parties waived the filing of briefs. However, I have considered their oral arguments made in the course of the hearing in my adjudication of these matters.

#### Issues

The issues presented in these proceedings are as follows:

1. Whether Consol violated the cited mandatory regulatory standards, and if so, the appropriate civil penalties to be assessed for those violations based on the criteria found in section 110(i) of the Act.
2. Whether the incident or "event" of February 1, 1991, which gave rise to the issuance of the two contested alleged reporting violations was in fact an "ignition" (accident) which was required to be reported to MSHA pursuant to 30 C.F.R. 50.10.
3. Whether Consol violated the provisions of 30 C.F.R. 50.12, by continuing mining on February 1, 1991, after its investigation concluded that a reportable ignition had not occurred.
4. Additional issues raised by the parties are identified and disposed of in the course of these decisions.

#### Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. 801 et seq.
2. Commission Rules, 20 C.F.R. 2700.1 et seq.
3. Mandatory reporting standards 30 C.F.R. 50.10 and 50.12; and mandatory safety standard 30 C.F.R. 75.400.

#### Stipulations

The parties stipulated to the following (Tr. 6-7):

1. The presiding judge has jurisdiction to hear and decide these cases.
2. Inspector James Young was acting in his official capacity as an MSHA inspector when the contested citations were issued on February 4, 1991.

3. Inspector Ronald Tulanowski was acting in his official capacity as an MSHA inspector when he conducted the accident investigation on February 4, 1991 (Exhibit C-1).
4. The "event" which occurred on February 1, 1991, at the Robinson Run No. 95 Mine was not a planned event.
5. Consol never notified MSHA of the February 1, 1991, "event" prior to the issuance of the citations.
6. The imposition of any maximum penalties that may be assessed in these proceedings pursuant to the Act will not affect Consol's ability to continue in business.
7. The alleged violations were abated in good faith.
8. Consol may be considered a large mine operator for purposes of any civil penalty assessments.
9. The presiding judge may take judicial notice of the fact that February 1, 1991, the date on which the "event" in question occurred, was a Friday, and the investigation conducted by MSHA on February 4, 1991, was conducted on Monday.

#### Bench Ruling

The parties advised me that Citation No. 3103343, issued on August 22, 1991, for an alleged violation of 30 C.F.R. 75.400, is a citation which includes an issue concerning MSHA's "excessive violation history" civil penalty assessment policy. Under the circumstances, the parties jointly moved for a stay of this citation, and the motion was granted from the bench (Tr. 5). Subsequently, on February 4, 1992, I issued an order reaffirming the bench ruling and staying the adjudication of the citation.

#### Discussion

The record in this case reflects that on Friday, February 1, 1991, at approximately 10:30 a.m., an "incident" or an "event" occurred on the 11 Left (087-0) working section of Consol's Robinson Run No. 95 Mine. It is MSHA's position that the "event" was in fact an unplanned frictional coal dust ignition which occurred 30 feet outby the face of the No. 1 Entry, and which should have immediately been reported. It is Consol's position that the alleged ignition did not occur, or if it did, it was something other than an "ignition" within the reporting requirements of 30 C.F.R. 50.10.

The alleged ignition was reported to MSHA through an anonymous telephone call, and MSHA Inspectors Ronald T. Tulanowski and James A. Young were dispatched to the mine site on

~439

Monday, February 4, 1991, to conduct an investigation. They conducted the investigation (MSHA Exhibit #3), and issued the two contested citations, which are as follows:

Section 104(a) non-"S&S" Citation No. 3105295, issued on February 4, 1991, cites an alleged violation of 30 C.F.R. 50.10, and the condition or practice is described as follows

Based on information obtained during an investigation to determine if a face ignition occurred, the company officials did not report or contact MSHA after their own investigation of this condition. A dust ignition set off by miner bits in sulfur at the face of the #1 entry on the 11 left 087 working section according to crew members did occur at 10:35 a.m. on 2-1-91. Six members of the crew and two foremen witnessed this ignition. The company did not contact MSHA to report this occurrence or to obtain information to see if they should report this occurrence.

Section 104(a) non-"S&S" Citation No. 3105296, issued on February 4, 1991, cites an alleged violation of 30 C.F.R. 50.12, and the condition or practice states as follows

No permission was granted to disturb or change an area where a face ignition occurred. MSHA was not contacted or notified that a face ignition occurred in the #1 face of the 11 left 087 working section. The ignition occurred at 10:35 a.m. on 2-1-91 and the section resumed production at 1:00 p.m. after conducting their investigation. The area was washed down with water, the miner was moved after advancing 80 feet past where the ignition occurred, and the miner has had extensive maintenance performed since 2-1-91. The area was inspected by MSHA on 2-4-91 and found to be cleaned and rock dusted.

#### MSHA's Testimony and Evidence

MSHA Inspector James A. Young testified that he has been so employed for six years, and he confirmed that he and Inspector Ron Tulanowski went to the mine on February 4, 1991, to investigate an ignition which had been reported to the MSHA office. Mr. Young stated that the section crew was initially questioned on the surface, and after they dressed and went underground, additional conversations were held with the same individuals underground, and he identified some of the individuals, including foremen, and several mine management people who were present during the conversations (Tr. 15-17).

Inspector Young explained and described the conversations with the crew members as follows at (Tr. 17-18).

A. In essence, what we tried to determine by the questions that Mr. Tulanowski was asking was did the individuals see sparks or did they see a flame of any duration and maybe the color of it.

Each individual categorically stated that they had witnessed a flame. They gave a dimension to it. They gave a color to it. They gave how long it lasted.

At the end of this, talking with each crew member one-on-one, there was a kind of a consensus question asked. This is what was said. Does anyone disagree or does everyone agree? At that time no one spoke up in disagreement with what we had heard in that room.

Q. You said that the crew mentioned the dimension of the flame. Do you recall what the dimensions were?

A. Almost man for man, everyone said it was approximately three foot by six foot. It was orange in color. It lasted for a very short period of time, and that time frame was arrived at by kind of taking a happy medium. One guy would say five to ten seconds, and one would say three to five. So we split the difference and made it a three-to-five-second duration.

Q. Do you recall how the employees told you they reacted to this flame?

A. They seemed to be very upset. A couple of them made it very clear that they were scared, that they heard a noise. One of them said that he actually felt the heat and that it was kind of an upsetting experience.

Mr. Young stated that after speaking with the employees, he inspected the area where the alleged ignition occurred and found that it had been cleaned and rock dusted, and the miner had been advanced approximately 80 feet from the entry where the event took place. He then returned to the surface and discussed the matter with management, and advised them that the citations would be issued. Mr. Young confirmed that he issued the two citations and he explained the findings that he made. He confirmed that he considered the violations to be non-"S&S", and the reporting citation was marked "high negligence" because he believed that management should have at least made an effort to contact MSHA for information or to report the incident. Abatement was achieved through a meeting with the crew and management to explain the importance of reporting such matters to MSHA (Tr. 20-25).

Mr. Young identified a copy of an accident report which he prepared and he confirmed that he agreed with the findings in the

~441

report (MSHA Exhibit #3). He also confirmed that the conclusions in the report and the decision to issue the citations were based on the information he received from Consol's employees, and that the conclusion that the ignition was caused "when heat or sparks generated from the cutter bits ignited with the coal dust" was based on "kind of a consensus opinion of all of us involved" (Tr. 26-27).

On cross-examination, Mr. Young stated that mine management makes "a decent effort" to address any safety problems and has been cooperative with him during his prior inspections of the mine, and he considered mine superintendent David Tonkin to be a truthful person. Mr. Young stated that on February 4, 1991, he was made aware of the fact that management had conducted an investigation of the event in question, but he could not state whether he believed that Mr. Tonkin would have reported the incident if he thought that an ignition had occurred (Tr. 30). Mr. Young confirmed that Mr. Tonkin told him that he had conducted an investigation, and in "general terms said he did not find any soot on the roof". After the MSHA investigation was completed, Mr. Tonkin told him that he did not believe there was a reportable accident but that he nonetheless assumed the responsibility for the matter (Tr. 31).

Mr. Young stated that the investigative interviews with the crew on the surface were conducted as a group in the same room, and not individually. Inspector Tulanowski was asking the questions and Mr. Young was taking notes and jotting down some things that were said. The first person questioned was James Parker, and Mr. Young was not aware that he was chairman of the mine safety committee. Mr. Young stated that "their stories were not the same. They were not habitual. One guy did not copy what the other man said... he gave his testimony in different terminology. They did not sound alike". The "testimony" was not taken under oath, and the one room was used because that is where mine management summoned the crew and made the room available. During the subsequent meeting in the underground dinner hole, the crew came in groups of two or three, and "it ended up that there was about five in there plus a couple of management men" and several people were walking in and out (Tr. 34-35).

Mr. Young was of the opinion that an ignition "would have to have a flame", and that the duration would be "a pop, which is referred to in the mining industry. A pop is methane, based more on myself, in the mine. A pop would be similar to a firecracker" (Tr. 35). In response to a question as to whether or not the term "ignition" is defined in MSHA's regulations, Mr. Young responded as follows (Tr. 35-36):

Q. Are you aware of anywhere in the regulations where the term "ignition" is defined?

A. I haven't researched that, no.

Q. So you are not aware of whether or not it is defined?

A. There is a definition in there somewhere, I'm sure. It could be our manual or policy manual or something. I haven't looked it up. The part that I play in this is not talking about technical terms of an ignition or an explosion or whatever. The only thing that I'm basing -- and my name is on this citation -- for is the fact that Consolidation Coal Company is to report to us anything, regardless of what it was.

Mr. Young confirmed that no one said anything during the investigation that would lead him to believe that methane had ignited and he stated that "we were not speaking in terms of methane. We were talking of coal dust" (Tr. 38). He also stated that information was received that indicated that bit lugs were off the miner and that enough sulfur was present at the bottom of the coal seam to cause an ignition when coming in contact with the bits. He confirmed that he was told that the ventilation was good and that the methane checks which were made did not indicate the presence of any methane (Tr. 38).

Mr. Young confirmed that he does not have the technical background which would enable him to determine what it takes to ignite coal dust, but that "we have classes on that, but you don't retain much of it" (Tr. 38). He further confirmed that he and Mr. Tulanowski only prepared part of the report of investigation. They wrote the abstract which appears at Section E, at page one, and the description of the accident which appears on pgs. 2-3. The rest of the report "was put together and compiled by other people in MSHA up the ladder from us, which is a lot of it is just--if you will read the general information, that was put together by someone else. I did not do that." (Tr. 39).

Mr. Young stated that he was told that the flame was of short duration and self-extinguishing, and that "the flame appeared and it went out". He confirmed that he had not previously conducted investigations of ignitions, but that he has had his hair burned and eyebrows singed from methane ignitions, but there were no "telltale" signs of any soot (Tr. 40). According to the testimony of the people during his investigation, coal dust ignited. Something was also said about Mr. Parker's water supply, and that several miner head bits were reportedly missing, but he could not recall what was said about the water supply, and he did not believe that anyone knew when the bits had last been set (Tr. 42).

Mr. Young stated that the other individuals who contributed to the report of investigation were supervisors who had to clear



~443

the reports for terminology, grammar, and punctuation, and he did not know who signed the reports for him and Mr. Tulanowski. It was his understanding that the striking out of the words "methane ignition" on page 3 of the report, and the insertion of "frictional dust" was to cure a typographical error or misprint (Tr. 43). Mr. Young confirmed that notes were taken during the investigation, and that they were turned in with his report. MSHA's counsel stated that the whereabouts of the notes is not known, and she confirmed my bench comment that "God knows what happened to them" (Tr. 44). Counsel also confirmed that tape recorders were not used to record the employee interviews (Tr. 44).

James W. Parker, Jr., testified that he has been employed with Consol for 19 years, and was working as a continuous miner operator on February 1, 1991. He described the work that he was performing that evening and he stated as follows at (Tr. 51-52):

I sheared it down that one time, and I scooted it over about probably eight to ten inches. Then I sumped it in another 12 inches at the top again. When I sheared it down the second time, that's when my bolter operator hollered and screamed. That's when I felt the flame coming from the left-hand side of the miner.

Q. When you said you felt the flame, what color was the flame?

A. Orange and yellow.

Q. Was it a big flame or was it just a little spark?

A. It started out at the head. It went up, and as it went up it widened out from probably -- it went probably 5 or 6 feet high, and it went probably in an area of 7-1/2 feet wide. As it went to the top, it started rolling back. As it hit the arch, it started rolling back toward us.

That's when I looked down. I couldn't turn my sprays on all the way. By this time my bolter operator had done grabbed the washdown hose and somebody on the other side had the other washdown hose.

I had looked down to see where my fire suppression was because that was the only thing I had left. As soon as I looked and seen my control handle, I looked back up and it was gone.

Q. At the time this flame rolled towards you, what did you do? What was your reaction?

~444

A. It scared me real bad. That's the first time I've ever been in one of them. I knew if we didn't get it out that it could have just did (sic) the whole mines up.

Q. You said you had been mining for at least 19 years. You have seen a spark before, have you not?

A. Yes, Ma'am.

Q. Was this a spark?

A. No, ma'am. It was a flame. It went from the end of the cab clear over to the trim chain and off the rib. After it hit the arch it was rolling back toward me. It felt like somebody had a torch shooting at me.

Mr. Parker stated that he was seated on the right side of the machine, and that the ignition occurred on the left side of the machine head. After he shut down the machine, day shift foreman Gary Graham called for Mr. Tonkin and mine foreman Ray Oldaker to come to the scene. Mr. Parker stated that Mr. Graham stated that he saw the smoke from the flame, and that when Mr. Oldaker arrived he stated "Yes, I see a little bits of soot in the air" (Tr. 55).

Mr. Parker stated that he suggested that Mr. Tonkin and Mr. Oldaker summon "the safety committee and Federal and State, and get it over with", but that they took the position that they had to conduct an initial investigation before calling anyone. Mr. Tonkin and Mr. Oldaker gathered the crew together and questioned them, and Mr. Parker stated that "We all agreed that we had an ignition and it went up the left-side of the miner, out the rib, and rolled back toward the miner" (Tr. 56). The crew was then instructed to go eat, and a mechanic came to the area and said that two or three bits had broken off the miner. The water sprays were cleaned, some work was done on a loose monitor box, and the crew was then instructed to continue working. Most of the work performed on the miner can normally be done at the start of the shift, but broken bits and plugged sprays can be taken care of on-shift (Tr. 57).

Mr. Parker stated that after eating, and after the work was completed on the miner, he asked Mr. Tonkin and Mr. Oldaker if anyone was going to be called, and they told him that "We don't have to call them". Mr. Spencer then remarked "Okay, but I'm telling you I don't want any trouble in this later on" and he proceeded to continue slabbing the place "where I had finished from where I had the flash" (Tr. 59). He continued seeing sparks from "a real thick stream of sulfur" and "it was throwing sparks as I was hitting in sulfur" (Tr. 59).

Mr. Parker stated that after meeting with management on Friday, February 1, 1991, the crew was not contacted again until the MSHA inspectors came to the mine on Monday, February 4, 1991, to conduct their investigation. Management summoned the crew together at the safety office to meet with the inspectors (Tr. 61). The statement he gave to the inspectors was essentially the same as it was on Friday, and he explained that the inspectors questioned the crew as a group but asked questions of each individual, took notes of the answers given, and read the notes back and asked each individual if their statements were correct. Mr. Parker stated that he was not sworn, did not sign any statement, and he was not given a copy of what was said (Tr. 69-71).

On cross-examination, Mr. Parker testified that the ventilation was good on the evening in question, and he marked up a sketch showing where he was operating his miner, the ventilation air direction, where he was seated, the location where the ignition originated and its point of travel, and the location of a fan (Exhibits C-1 and C-2, Tr. 78-82). He confirmed that he checked the miner bits at the start of the shift, and he set 8 bits and replaced the ones that were bad. He also cleaned the water sprays, and the mechanic told him that two or three bits were knocked off where they struck the sulfur which is hard enough to sometimes break bits (Tr. 83). He confirmed that he cut the water sprays back because he did not want to create a mud hole and mire the miner (Tr. 84). After the incident in question, he continued to use full water pressure and that "it was just throwing sparks where it was hitting hard" (Tr. 85). He confirmed that the methane monitor was "picking nothing up but one-tenth" (Tr. 87).

Referring to notes that he made on February 1, 1991, after the ignition, Mr. Parker confirmed that the notes do not mention "flames rolling back", but that "it says a ball of fire on the left side that lasted three to five seconds" (Tr. 88). He stated that "the way it rolled back it looked like a ball of fire. The flames rolled back at me". He further conceded that his notes do not say anything about his feeling any heat, or that he felt like someone had pointed a torch at him, or that anyone said anything about seeing smoke (Tr. 88-89). He stated that he made the notes 5 to 10 minutes after the miner was shut down, and that the notes contain an accurate description of the way he remembered the incident five minutes after it happened (Tr. 89).

Mr. Parker stated that he was serving on the mine committee on February 1, 1991, and that he was fairly familiar with the union contract. He believed that he cannot refuse to work because of an unsafe condition, but that he could work under protest and request his foreman to summon a safety committeeman to be present. He confirmed that he did not invoke his individual safety rights or state that he did not wish to operate

~446

the miner after the ignition occurred (Tr. 91). He was not aware of the fact that an individual miner could request a section 103(g) inspection, and believed that this could only be done by a safety committeeman (Tr. 93).

Mr. Parker did not believe that the area where he was working was too dusty, and he confirmed that the return was white after he placed two bags of rock dust into the fan before he started mining. The return looked the same after the incident (Tr. 95). He confirmed that when Mr. Tonkin was at the scene during his initial investigation "everybody" agreed that an ignition had occurred, but management decided not to report it (Tr. 96).

Gary L. Hayes, roof bolter operator, testified that he was working with miner operator Parker on Friday, February 1, 1991, and after checking the face for methane and finding one-tenth of one-percent, he advised Mr. Parker that it was safe to begin cutting coal. He explained that Mr. Parker proceeded to cut and trim the coal face. Mr. Hayes was standing to the front of Mr. Parker, approximately 12 feet from the miner head, when he saw a flame come over the head of the miner. The flame traveled straight to the roof top and widened out for a distance of four to five feet, and then rolled back from a corner of the roof. Mr. Hayes screamed and grabbed a wash-down hose and aimed it at the flame. However, the flame extinguished itself and only lasted for four to five seconds.

Mr. Hayes stated that foremen Carter and Wolfe were present and they notified mine management about the flame. Mr. Hayes confirmed that he was standing closer to the flame than anyone else, that he was scared, and that this was the first time he ever saw a flame come off a mining machine head in his 18 years in the mines, and he described what he observed as follows at (Tr. 104, 106, 110):

Q. When you first saw this flame, you said it rolled up. Would you say, sir, it was almost the arch?

A. Yes, I'd say that. It came up like the face where it sumped in and cut down. It come up that face. When it hit the mine roof where that miner sumped in it had kind of a roll to it, that made the flame go around because it had to come back out, see. That's what caused it to like roll back towards us.

It didn't really come back to us, but it just rolled back there as far as we was sumped in and rolled back. If it had come back any farther, I think it would have went down the return.

Q. Everyone characterized it as a flame or fire?

A. Everyone said it was a flame. The flame came up and then it rolled up. Some of them got a ball or fire out of that because it rolled out. It was a flame that went up off of the head of the miner and went up to the top.

If you could cup your hand like that and take something -- see, it curved like this (indicating). It just went up there. Well, it would have went straight up, but when it hit that curve, it made it roll out.

\* \* \* \* \*

It pretty well consumed itself mainly right at the face and the head of the miner, right in that area. It didn't really come back out and go down a return or anything.

Mr. Hayes stated that after the flame extinguished, day shift foreman Gary Graham and dust sampler Sandy Eastman arrived at the area and they stated "they could smell the smoke where the flame came up" (Tr. 105). Mine superintendent David Tonkin and mine foreman Greg Oldaker then arrived and conducted an investigation. After checking the machine and checking for methane, they allowed work to continue. Mr. Hayes stated that the crew was questioned and that they explained to Mr. Tonkin "that we had a flame come up. It was orange yellow, bright orange and orange mixed flame that came up". Mr. Hayes stated that the crew also informed Mr. Tonkin that they were in agreement that "it was set off by dust and not methane. It was the dust from the miner. The sulfur and the sparks set the dust off or whatever. That's how the flame got started, that we felt it got started" (Tr. 108). Mr. Hayes further stated that Mr. Tonkin and Mr. Oldaker were not present to see what had occurred, but that "they agreed that, yes, there was a flame. That's what we seen" (Tr. 108).

Mr. Hayes stated that Mr. Tonkin and Mr. Oldaker informed the crew that in view of the fact that so many ignitions had previously occurred in the 12 Left section they had an agreement "with the Federal" that if management investigated such incidents and both management and the union were satisfied as to the cause of the ignition, work could resume (Tr. 109). The area was in "good shape" when work resumed (Tr. 110). Mr. Hayes confirmed that he has observed sparks at the face in the past, and he stated that "We've mined in sulfur, and there's a lot of times that there's sparks and stuff like that. But this was a flame of fire" (Tr. 111).

Mr. Hayes confirmed that the inspectors interviewed the crew on Monday, February 4, 1991, and that management was present. Each individual at the meeting stated what they had observed, and

~448

their statements were read back to them, and they all agreed to what they had observed and made no changes in their statements (Tr. 112).

On cross-examination, Mr. Hayes stated that there was no appreciable methane present during the work shift, that there was "a good bit of air" ventilating the face and keeping the methane out, and that the dust was "no more" than what he had seen on prior occasions. He believed that Mr. Parker did not have the miner water sprays all the way on (Tr. 115). He further believed that none of the crew had ever previously observed an ignition, and he confirmed that when the inspectors spoke to the crew everyone was in the room together (Tr. 118).

David Allen Moore, testified that he has worked for Consol for 18 years, and was a roof bolter on February 1, 1991. The mining machine area was dusty and he stuck his head around the corner of the entry to get some fresh air, and when he next turned around he saw a flame travel up the rib from the bottom head of the miner. He was scared, and he screamed and grabbed the water hose, but the flame went out. He stated that the flame extended three to four feet from the miner head up to the roof arch for a distance of five or six feet and that "the heat from that thing just felt like it could singe the hair on your face, and it was real bright yellow and orange. It just scared me to death" (Tr. 122-123). Shift foreman Gary Graham and dust person Sandy Eastham heard the screams and came to the area and Mr. Graham stated he could smell the smoke, and Mr. Moore said that he showed Mr. Graham "a little bit of soot" where he said he could "smell where it burned" (Tr. 123-124).

Mr. Moore stated that Mr. Tonkin and Mr. Oldaker were called to the scene, and spoke to each person, and they each stated and agreed that they had seen a flame (Tr. 125). Mr. Moore stated that Jimmy Parker, Dave Moore, Gary Hayes, Roy Sailor, and Kevin Carter were present, but that Bob Wolfe was not. However, Mr. Wolfe had previously agreed that there was an ignition, but he was allowed to go home after dinner. Mr. Tonkin asked everyone whether there was an agreement as to what had happened and Mr. Moore stated that "we said yes" (Tr. 125).

Mr. Moore stated that management had on previous occasions called "the Federal out" when there were prior ignitions, but that someone stated that the only time they were to be called was in the event of a gas ignition. Mr. Moore stated that "we all agreed" that what occurred on February 1, 1991, was a dust ignition and "it ignited and caught the dust at the face on fire which caused the flame. It made us scream" (Tr. 127). He confirmed that after dinner, they continued mining (Tr. 128).

Mr. Moore stated that when he next returned to work on Monday, February 4, 1991, he and the crew met with the inspectors. Inspector Tulanowski asked the questions, and Inspector Young "wrote them down" (Tr. 128). The statements were read back, and "they all agreed that this is what happened" (Tr. 129). Mine management representatives, including Mr. Graham, Sandy Eastham, and foreman Kevin Carter were also present (Tr. 130). Mr. Moore was not sure what Mr. Carter may have said, and he could not recall that Mr. Wolfe was present (Tr. 131).

On cross-examination. Mr. Moore described where he was standing when he observed the flame, and he confirmed that it was the first time he had seen anything like it (Tr. 132-134). He also testified as to the use of the water sprays by Mr. Parker, and he confirmed that while Mr. Parker was cutting at the face after the incident with the water sprays fully on "it made sparks all the time" (Tr. 137).

#### Respondent's Testimony and Evidence

Kevin B. Carter, Longwall Foreman, stated that he has worked as a foreman for 12 years and that he holds a B.S. degree in technical mine engineering from Fairmont State and that he was the day shift section boss on the 11 Left section on February 1, 1990. He fire-bossed the section that day and found no more than two-tenths of one percent methane.

Mr. Carter stated that soon after mining began he heard everyone yelling and foreman Bob Wolfe was running to the water hose. Mr. Carter stated that in response to the yelling he was turning "a lot of different ways and looking everywhere at once because I wasn't sure what was going on", and that "whatever I saw, I saw very briefly because I was turned the other way from the people, just a glow near the bits". He explained that he saw "a glow near the bits on the left side, above the bits. It was just gone almost immediately as I looked." (Tr. 143). He stated that he saw no flame or smoke.

Mr. Carter could not remember Mr. Parker telling him that he saw anything, and he stated that Dave Moore and Gary Hayes told him that they "saw something on the left side of the miner" but he did not remember that they said they saw flames rolling back toward them. Mr. Carter stated that Mr. Moore and Mr. Hayes told him that they saw "like a ring of fire near the bits, a glow near the bits, up above between the bits and roof" (Tr. 143-144).

Mr. Carter explained his understanding of "a ring of fire" as follows at (Tr. 145):

~450

A. In my experience, when someone refers to it, they refer to it when they're in sulfur. When you're cutting a lot of it, you'll see a lot of sparks off the head. The head moves pretty quickly, and you'll see a lot of -- it's called a ring of fire.

Q. Does it create an illusion of a ring of fire? Does everything look orange?

A. It's almost like holding metal against a grinder. It's the same thing.

Mr. Carter confirmed that management conducted an investigation of the incident and that Mr. Tonkin spoke to everyone and stated "are we in agreement that we hit sulfur with the bits and you saw a ring of fire around the bits? We know what it was, and we know what caused it". Mr. Carter stated that everyone responded "yes" and no one stated that they had seen flames (Tr. 146).

Mr. Carter stated that "it was not real dusty" on February 1, and that the air flow was good and the fan was running. He also stated that he was looking back toward the boom of the miner and was also watching the cables. He confirmed that he was present during the MSHA investigation of February 4, and that the statements made to the inspectors "seemed to have escalated a little bit" from the statements previously given to Mr. Tonkin. The employees told the inspectors that they saw fire above the miner bits and when asked if he recalled that they said they saw flames he responded "I think they did" (Tr. 148).

On cross-examination, Mr. Carter stated that he never made any statement that he saw flames. (In response to a question from the bench, Inspector Young stated that during the investigation interviews he recalled that Mr. Carter "used the terminology "fire" and not flame (Tr. 153)).

Mr. Carter confirmed that he did not actually observe the event when it happened and that he was "at the rear of the miner, facing the rear of the mine, facing away from the face" (Tr. 155). However, as he turned around he briefly saw a glow on the left side of the miner, and that "I caught the tail end of whatever it was, enough for me to have noticed there was something there" (Tr. 156). He stated that at the time of the event he asked Mr. Moore and Mr. Hayes what they saw and that they told him they saw fire on the left side of the miner at the bits and they did not characterize what they saw as a "ring of fire" (Tr. 159).

Mr. Carter confirmed that most of the crew members had long years of experience in the mines and that "they saw something more than they had seen before or they wouldn't have been



~451

panicked. We do hit a lot of sulfur. You see a lot of sparks, a lot of glow around the bits" (Tr. 160-161).

Robert Wolfe, section foreman, stated that he holds a BS degree in mining engineering and an AS degree in mechanical engineering from Fairmont State. He has served as an hourly loading machine and miner operator, roof bolter, shear operator, and shieldman, and on February 1, 1991, he stayed over from his night shift to work the day shift and help slab the No. 1 entry (Tr. 165). He explained the work he performed, and he confirmed that he checked for methane and found two-tenths of one percent "which is common on that area" (Tr. 167).

Mr. Wolfe stated that Mr. Parker cut the miner water sprays back 80 percent when he sheared the bottom of the face, and that "there was a ball where the bits were coming into contact with the iron pyrite. It's sparks, we had a lot of sulfur gas sparks" (Tr. 168). Mr. Wolfe stated that he grabbed a washdown hose used to wash dust off the miner to put additional water on the sparks and that he did not see any flames. He did not remember making any statements to anyone that he saw flames (Tr. 168). He did not see or smell any smoke. In his opinion, the crew became excited because "they seen more sparks off the iron pyrite than they was used to seeing because the water was cut back on the miner", and that "there wasn't that much dust" (Tr. 169).

Mr. Wolfe confirmed that he was present during the investigation conducted by Mr. Tonkin and Mr. Oldaker, and he explained as follows at (Tr. 170-171):

Q. Do you recall Mr. Tonkin asking the crew members if they had seen flames or had an ignition?

A. Yes. Everyone there was present.

Q. Do you recall what the answers were?

A. The best I can remember, everyone determined that hadn't been that. That hadn't happened.

JUDGE KOUTRAS: Do you remember him asking everybody individually whether they saw a flame?

THE WITNESS: He asked them as a group.

JUDGE KOUTRAS: What did he say? Did anybody see flames?

THE WITNESS: I don't recall what he said exactly, but it was in that line. He said, "Did anyone see flames? Everyone was standing in a semi-circle around him as he was speaking.

JUDGE KOUTRAS: He specifically asked the group whether they saw a flame?

THE WITNESS: Yes.

BY MR. SCHELLER:

Q. Their answers at that point were that they had not?

A. Yes, the best I can remember. I by this time had been in there a lot of hours.

On cross-examination, Mr. Wolfe stated that the crew screamed when they saw sparks and that he already had the water hose on and pointed in the direction of the miner head because it was a common occurrence. He was following his normal procedure and would have the water on regardless of any sparks in order to cut down the dust (Tr. 172-174).

David C. Tonkin, Assistant Mine Superintendent, stated that he was serving as the acting superintendent on February 1, 1991, and has 23 years of mining experience (Tr. 185). He confirmed that he has investigated ignitions on several occasions and that he looks for physical evidence such as soot, cinders, and ash and that he has visited areas after an ignition and could still smell smoke. He confirmed that he was summoned to the section by Gary Graham who informed him "they might have had an ignition at the No. 1 heading". Mr. Graham further informed him that "they had stopped mining and I left everything be" (Tr. 186).

Mr. Tonkin confirmed that he investigated the area where the event took place and found no physical evidence of soot or ash and smelled no smoke. He found nothing that would have led him to believe that an ignition had occurred (Tr. 187). He then called the crew together to question the individuals about what they had seen and he explained as follow at (Tr. 187-189):

A. I don't remember exactly the order I talked to them. Mr. Hayes said he was standing on the right side of the miner. He had been checking for methane in the face area. He said he saw a small fireball at the bits of the miner. He turned to get the hose, to get the hose there, turned the water on and it was gone.

I talked to Mr. Moore. He said he was standing near the corner. He was not looking at the miner. He said he heard somebody holler, and he looked around. He said he saw a fireball at the bits of the miner. He saw people grab the water hose and it was gone.

I talked to Jimmy Parker. I asked him what he was doing. He described the motions he went through as far as making

~453

one sump, making the second sump. He said he was making the second sump and as the miner head was being dropped, which is a common practice for miner operators, they usually reach down and turn the water nearly off or down. He said he was reaching down to turn the water down, and he heard somebody holler. He said he reached back up and looked. He saw a ball and it was gone.

\* \* \* \* I told them we were going to make the investigation. I questioned them. I went back over it. I said that from you all are telling me, we saw a fireball at the bits of the miner. I questioned them about a blue flame. There's no blue flame. It's a fireball at the bit of the miner. It was contained around the bits of the miner. I said, "Do you all agree with that?" They said yes.

Q. Did anyone tell you they saw any flames?

A. No, there was no mention of flames.

Mr. Tonkin stated that if anyone had told him they saw flames or that the flames went to the roof it would have been a reportable event and he would have reported it as he has done in the past. However, after speaking to all of the employees he concluded that while dropping the miner, Mr. Parker hit a sulfur ball as the water was turned off or nearly turned off and that "this would bring a larger than normal amount of light to the area . . . he was cutting through this sulfur ball with his water off and greatly amplified the light. The people were not used to it, and they were afraid" (Tr. 189).

Mr. Tonkin stated that he made the decision that the event was not reportable and that "I asked everybody if they agreed with me with what we saw, and they all agreed what we saw. That was a fireball near the bits on the side of the miner". He explained that the "fireball" he was referring to was the "Ring of Sparks" which is "low on the pyrites" (Tr. 190).

Mr. Tonkin confirmed that he was present during the MSHA investigation of February 4, 1991, and that the events as relayed by the crew to the inspectors were not the same as they were relayed to him on February 1, immediately after the occurrence. He believed the sparks were enhanced by the lack of water on the miner and that it cut through the pyrite with the water turned off or nearly turned off. There was no doubt in his mind that an ignition did not occur (Tr. 191).

On cross-examination, Mr. Tonkin stated that the employees told him they saw a fireball on the left side of the miner near the bit area, and that it was contained around the bits. They did not state that it rolled up the arch (Tr. 192). He confirmed

~454

that the employees told the inspectors that there were flames, but he did not know that they stated that it was an ignition.

Mr. Tonkin stated that he was not told anything about any flames by the crew when he spoke to them on Friday, February 1, and that "the story today was even more so than the story that we had that day" (Tr. 192). Mr. Tonkin stated that he reported what he believed happened to his superiors, and that his decision with respect to the lack of a reportable incident was based on physical evidence and what the men had reported to him. The presence of flames and an ignition was not reported to him as such, and he believed the men saw "a ball of fire", which he defined as the "result of the bits hitting the sulfur, and it was amplified by the lack of water" (Tr. 194).

He further explained as follows at (Tr. 194):

Q. You have heard these men testify today how that flame or that ball of fire rolled toward them. Then you said that was never reported.

A. Yes. They told me that it was a flame and came towards them, yes. The day that you're talking about in the safety office, there was no mention of a large ball of fire going up against the arch and rolling back to them. That was not even mentioned that day, but they did say that day there were flames.

Q. Just based on your own opinion, you would not call a ball of fire an ignition?

A. My terminology of ball of fire has to do with hitting sulfur and a ball of fire, large sparking around the bits, my terminology of a ball of fire.

Q. But you always have sparking around bits in large streaks and things like that, correct?

A. Yes.

Q. It does not result in a ball of fire. It's just streaks.

A. If the water is turned on, I'd say, no, it wouldn't.

Mr. Tonkin stated that at the time of the MSHA investigation he told Inspector Young that the story relayed to him by the crew was not the same as what he heard underground on February 1, (Tr. 196). Mr. Tonkin stated that he told Mr. Parker that in the event management concluded that there was no ignition it would not be reported to MSHA and that mining would continue.

~455

Mr. Tonkin believed that his relations with the miners and the inspector were good (Tr. 197).

Mr. Tonkin stated that since he did not believe there was an ignition, mining was allowed to continue. If an ignition that he thought was reportable had occurred, the evidence would not have been destroyed and "we would have let it be" (Tr. 198). He believed that management did the right thing and that foreman Graham told the crew not to disturb anything until he (Tonkin) reached the area. Mr. Tonkin conceded that Mr. Parker may have seen a flame, and he stated that "he did not tell me he saw a flame. That's what I had to go on. I'm not denying he saw flames, I'm just telling you what they reported to me" (Tr. 199). Mr. Tonkin was of the opinion that if dust had engaged an ignition and rolled to the roof, there would surely be soot on the roof. He speculated that the miners may have embellished their story because management and the safety committee were not on good terms and the union may have pressured them (Tr. 199-200).

Mr. Tonkin stated that he prepared no notes or report of his investigation and saw no harm in notifying MSHA of the event (Tr. 200-201). He explained that he has in the past participated in ignition investigations with MSHA, but that in this case he did not feel the need to call MSHA if he believed there was no ignition (Tr. 201). He stated that after questioning everyone they agreed that there was a ball of fire in and around the bits and that no one spoke up and said that they saw more than a ball of fire and saw flames rolling up over the roof (Tr. 202-203).

Greg Oldaker stated that he has 20 years of mining experience and that he was the underground mine foreman on February 1, 1991. He confirmed that he was summoned to the section by phone and that "they said they had a possible ignition" (Tr. 204). He confirmed that he checked the miner and found no evidence of soot, ash, or soot streamers, and did not smell smoke. He saw nothing that would indicate that an ignition had occurred. He found 30,000 cubic feet of air going across the miner, and one-tenth of one-percent methane (Tr. 205).

Mr. Oldaker confirmed that he was present "the majority of the time" during the management investigation and that "as a whole, to me, everybody was more or less agreeing that had a ball or fire" (Tr. 206). He described a "ball of fire" as "like when you're in sulfur and you've got a lot of sparks from the sulfur coming around the head of the miner they'll refer to it as a ball of fire. That's more or less what it is" (Tr. 206). He stated that he never heard anyone say anything about flames, and that the crew basically agreed that what they had seen was a ball of fire around the bits. He "was more or less in agreement with them because I didn't see evidence of an ignition myself when I looked at it" (Tr. 207). He confirmed that he may have been in

~456

or out of the room during MSHA's interviews with the employees but he did not sit in on any of the testimony (Tr. 207).

In response to further questions, Mr. Oldaker stated that he has observed balls of fire from cutting sulfur, and the size of the ball would depend on the amount of sulfur present. Although there may be a big glow "like a shower of sparks", he did not believe it would roll up the face and he has never observed this happen. Although he believed that such sparking could probably ignite methane, he did not know if it would ignite coal dust (Tr. 209).

Inspector Young was recalled by the Court and he explained that any statements made during the investigation with respect to "a ball of fire rolling up the coal and all that" would not appear in his report of investigation. He further explained that it "would not be the terminology that you put in there. I've never seen one of these come close to that kind of description" (Tr. 210). When asked if he would include in his report any statements by Mr. Wolfe and Mr. Carter (if in fact made to him) that they saw a ball of fire, Mr. Young responded "a ball of five, maybe, but you were saying rolling up the coal and all. We would not have put that in there, no" (Tr. 210).

When asked if he would have included in his report any statements (if in fact made) that flames were rolling back toward the mine operator, Mr. Young stated that he would have put that in his notes "but I would not have worded it that way in this accident report, no. I've never seen one with terminology like that" (Tr. 220).

Mr. Young confirmed that during his investigation on February 4, Mr. Tonkin stated "if I had heard what you just heard the other day on the section, I would have reported it" (Tr. 211). Mr. Tonkin told him that the statements made by the miners during the interviews were not the same statements made to him (Tonkin) during his investigation (Tr. 219).

Mr. Young confirmed that he based his citation for the failure by the respondent to preserve the evidence on the testimony of the employees which led him to conclude that there was an ignition, and that if there was an ignition, MSHA should have been afforded the opportunity to investigate it. However, since the area was cleaned up and repairs made to the miner, any investigation would have been fruitless (Tr. 212). Conceding that the respondent had the right to investigate in order to decide whether a reportable accident had occurred, and that there would be nothing to preserve if it was concluded that the incident was not reportable, Mr. Young nonetheless stated that "the testimony was so overwhelming that we had no choice. We

~457

didn't hear anything contrary to an ignition. Nobody told us a maybe, an if, or what for. It was all dead straight forward".

When asked if the testimony he heard during the hearing in this case was like the testimony he heard during his investigation, Mr. Young responded "I don't know if any words agreed" (Tr. 212). Mr. Young stated that Mr. Parker's testimony that "it went all the way to the ceiling and rolled back on him" was the same as what he stated during the investigation, and that the hearing testimony of the other miners was also consistent with their prior statements (Tr. 213).

When asked if he disagreed with the testimony about the appearance of a "ball of fire" or "a ring of fire", Mr. Young stated that there were 8 or 9 people in the room during his interviews and that "it seemed that we had one faction over here that wanted to agree on this is what it is and one faction over here that wanted to agree on something else" (Tr. 216). Mr. Young stated that he has seen "a ring of flames" around a miner bit when dust and methane are ignited, and that he has also observed "sparks go round and round bit lugs" and that there is a distinct difference in the two. The response he received was "that it was a fire and it had a flame. It was this color and it did this" (Tr. 217).

Mr. Young stated that Mr. Tonkin and Mr. Oldaker were not asked any questions during his interviews with the other miners. Mr. Young also confirmed that Gary Graham was present "out in the hall", but that he was not questioned. The questioning was limited to "the people that was right around the continuous miner that saw what went on" (Tr. 217). Mr. Young stated that he distinctly remembered that Mr. Wolfe stated he saw fire, but that Mr. Carter "was hesitant" and that "he always looked down. He didn't look up. He didn't want to give me a direct answer" (Tr. 218). Mr. Young stated further at (Tr. 219):

THE WITNESS: My position was in the middle somewhere. I had more than one person categorically tell me, "We had a fire and ignition or ball." Then I had another guy saying, "James, I didn't see it." I wasn't told the same thing you were.

JUDGE KOUTRAS: Was there any inquiry made of these miners as to what they may have told Mr. Tonkin.

THE WITNESS: There was remarks made in the room by other people about "Wait a minute. I didn't hear that the other day." They would make an explanation to them but not directed at me.

Mr. Young agreed that the testimony of the miners during the hearing in this case was more than what he heard

~458

during his investigation and he attributed this to the kinds of direct questions asked by counsel which were not the same questions asked during the investigation interviews (Tr. 220). He stated that the responses to the questions asked during the investigation were straight-forward and that no one was "wishy-washy" about what was said (Tr. 221). He stated that "the testimony given to me did not say anything about a small ball. Just categorically, we had a flame and a fire, and that's what we based it on".

Mr. Young stated that in view of some statements by some of the respondent's representatives who were present during his interviews with respect to the term "ball of fire", he specifically asked for clarification as to whether there was "a flame of fire of orange color" or "a ring of sparks". The statements by the crew that "flames were rolling back on the roof" led him to conclude that there was an ignition (Tr. 223).

David Allen Moore was recalled by the Court, and he stated that when Mr. Tonkin spoke with the crew during his investigation he told Mr. Tonkin that "I seen the flame shoot up there. It was hot. It scared me" (Tr. 226). When asked if he specifically used the word "flame", Mr. Moore responded "Yes, fire. Flame, fire. I'd say flame. I can't remember exactly, but it was either fire or flame. I think fire and flame is the same thing, isn't it? I'd say flame because he asked me how big it was and the color of it" (Tr. 226). Mr. Moore further stated that he told Mr. Tonkin that it was "three foot high and five to six foot wide, and it was kind of yellow and orange and real bright. It was hot" (Tr. 227).

Mr. Moore stated that he heard "ball of fire" discussed and that "it just rolled like a ball of fire there, but it was three foot high at the miner head where it was cutting". He stated that everyone agreed that they saw "a flame shooting up the rib, three foot high and five foot long "(Tr. 220).

Gary Lee Hayes was recalled by the Court, and he stated that when Mr. Tonkin spoke with the crew during his investigation Mr. Tonkin was told that "we had an ignition, that we had flame, we explained to him how it came off the miner and how it rolled back. I think that's how he got to the point of a ball of fire and everything. We didn't really know. This was the first time we ever experienced anything like this" (Tr. 229). In response to a question as to how he concluded that an ignition occurred, Mr. Hayes responded as follows (Tr. 229-230):

JUDGE KOUTRAS: Let me ask you this. How did you come to the conclusion that this was an ignition?

THE WITNESS: This is what we've been told, that any time that you've got fire like that in the face area, it's



~459

called an ignition. That's the reason we come out with this point was the flame that happened in the face that was set off. We believe it was set off by the dust. This was we called it, an ignition.

If it wasn't an ignition, the only thing I can say is it was a flame of fire that came off the head of the miner to the top. This is the way we reported it. I said ignition, but that's my own opinion of what an ignition is, a fire at the face of a working section. That's why I've come to the point of an ignition.

JUDGE KOUTRAS: What does ring of fire mean to you?

THE WITNESS: A ring of fire is like miner bits hitting sulfur and being going around the head of the miner. I've seen this happen. I didn't feel that was a reportable thing. I've seen it many a time in my years of coal mining experience. I've seen the bits keep hitting it. It followed the miner hitting around. It's them bits set on an order where they just keep hitting it, and it makes it look like a ring of fire. But we had flame. It was a flame.

JUDGE KOUTRAS: That ring of fire that you have described, would that be an ignition?

THE WITNESS: No, I didn't say that an ignition, no.

JUDGE KOUTRAS: Did you remember specifically telling Mr. Tonkin that what you saw was flame?

THE WITNESS: Yes, sir.

James W. Parker, Jr. was recalled by the Court, and he stated that when Mr. Tonkin came to the scene on February 1, he told Mr. Tonkin that "it was a flame going up the left-hand side of the miner, up to the top, and rolled back from the arch over the top toward us" (Tr. 232). Mr. Parker stated that he never referred to the flame as a "ring of fire". He confirmed that during the MSHA investigation of February 4, the statements made to the inspectors were "pretty much" the same statements made to Mr. Tonkin and he did not recall anyone refer to the flame as a "ring of fire" (Tr. 233).

Consol's Expert Witness

Dr. Pramod C. Thakur, testified that he is employed by Consol and is responsible for degasification of all of its mines, control of respirable dust, and the prevention of methane and dust ignitions. He received his early mining education in India and holds BS, MS, and PHD degrees in mining engineering from Penn State University and has an MS degree in applied Mathematics. He

~460

is a certified mine manager, has conducted research in methane and dust ignitions and mine ventilation, and has been involved in investigations of ignitions (Tr. 234-237).

Dr. Thakur agreed with Inspector Young's statement that "when you have a visible flame, it's an ignition, ignition of something" (Tr. 237). He stated that methane and air mixtures will ignite, and that coal dust and air mixtures will ignite. In order for these mixtures to ignite there are three ingredients that must be present, namely, (a) the right concentration, (b) the right temperature for all ignition temperatures, and (c) the right energy input (Tr. 238).

Dr. Thakur confirmed that based on the testimony of all of the witnesses, which he heard in the course of the hearing, he agreed with MSHA that no methane ignition took place on February 1, 1991 (Tr. 239). He was also of the opinion that it was impossible to ignite coal dust under the circumstances described by the witnesses. He explained that based on the published literature by the U.S. Bureau of Mines one would have to have a thousand times more dust at the face than what was present at the time of the event in question, and that the dust would have to be ignited by an explosive charge. No mechanical friction of any sort can ever ignite coal dust, and that based on all of the literature on the subject "it is impossible to ignite coal dust and air mixtures with mechanical friction" (Tr. 241).

Dr. Thakur stated that sparking caused by friction will ignite a mixture of methane and air, with a resulting flame which is bluish in color. Depending on the volume, "you will hear a pop", and the flame "will rise, go to the roof". He further stated that "there's no way you can have a sustaining visible flame to qualify as an ignition and go away in three seconds" (Tr. 241).

In addition to the lack of sufficient coal dust, and the impossibility of igniting coal with a frictional emission, Dr. Thakur stated that a "great powerful source" of energy, which is 10 to 100 times more than what is necessary to ignite a mixture of methane and air, must be present to ignite coal dust. He also indicated that a coal dust explosion may be ignited if there was an initial methane explosion which has sufficient momentum to "kick up" the dust from the mine floor, ribs, and roof at 700 degrees centigrade or higher (Tr. 242).

Dr. Thakur stated that based on the testimony he heard in this case from all of the witnesses he was of the opinion that what occurred was the creation of light by the bits of the mining machine striking quartzite or pyrite. Quartzite will oxidize very rapidly, creating a light, and pyrite creates more light because it oxidizes very rapidly and dissipates faster and gives off a "more orange light". The resulting sparks, or "ring of

~461

fire", is pyrite oxidizing very rapidly, and there will be more sparking when the water is cut down. There is no ignition, no fire, or any flame, and to anyone standing 10 to 30 feet away it would appear to be a "ball of fire" (Tr. 245). Once the machine is stopped, the sparks will end, and if the machine is started again, it will happen again. He believed it was impossible to have a coal dust ignition given the amount of methane present (Tr. 245).

On cross-examination, Dr. Thakur stated that based on scientific opinion and research, it was his opinion that it is impossible to ignite coal dust by mechanical friction, and he explained what is necessary to ignite an airborne mass of coal dust (Tr. 246-248). He further stated as follows at (Tr. 249):

Q. You mean to tell me then that it is your position, when you heard these employees testify, that it was just some kind of sparks.

A. There was all this sparking and because of a lack of water it became a very -- what should I say -- large number of particles were created. They were all oxidizing very rapidly and they glowed. They created a source of light. As I said, this was the mechanism they used in army days to light the mines. The people used to work in the light of the sparking wheels.

Q. I know what you are saying about sparks and so forth. These people said they saw a flame.

A. You also realize -- I don't want to put them down -- they had never seen a real ignition before.

Q. But they have seen a flame before, have they not? I have seen a flame.

A. Yes. But what they thought was a flame, in my opinion, was not a flame.

Dr. Thakur acknowledged that sparking is a potential source of ignition, and he cited a fatal incident in Nova Scotia caused by frictional ignition. However, he believed that the real ignition source in that event was the presence of a lot of methane and using mechanical means to cut the coal (Tr. 251). He believed that if there is no methane there will be no coal dust explosions, and he stated that "the only way they ever have coal dust explosion is if they were shooting coal or there was a freak of several methane explosions" (Tr. 253). Dr. Thakur concluded his testimony as follows at (Tr. 258-259):

THE WITNESS: The only thing I would submit, Your Honor, to you is that if a mechanism is creating so-called

~462

sparks, as soon as you stop that mechanism the sparks stop. That's not an ignition.

For an ignition to be called an ignition, something has to be ignited, something which would sustain a visible flame for some duration of time, even it is five or ten seconds.

I respectfully submit to you that what they saw was a big mechanical wheel cutting into pyrite, creating fine particles, and creating a lot of heat which oxidized those particles. They glowed, and they glowed like a ball of fire.

The moment you stopped that machine the phenomenon ended. There was nothing ignited, and, therefore, there was no ignition. I would have taken the same action as Mr. Dave Tonkin did if I were the mine superintendent. It was not a reportable accident.

#### Findings and Conclusions

Fact of Violation. Citation No. 3105295, 30 C.F.R. 50.10

Consol is charged with a violation of 30 C.F.R. 50.10, for failing to report the alleged ignition which the inspector believed occurred on February 1, 1991. Section 50.10 provides as follows:

#### 50.19 Immediate notification

If an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine. If an operator cannot contact the appropriate MSHA District or Subdistrict Office it shall immediately contact the MSHA Headquarters Office in Washington, DC by telephone, toll free (202) 783-5582.

I take note of the fact that the citation issued by Inspector Young contains language which suggests that Consol was required to report the results of its investigation of the incident of February 1, 1991, to MSHA, and that it also failed to contact MSHA to obtain information to determine whether "the occurrence" needed to be reported. During the course of the hearing, Mr. Young testified that Consol was obliged to report "anything, regardless of what it was" (Tr. 36). However, contrary to the inspector's belief, Consol's only legal obligation pursuant to section 50.10, was to immediately report an "accident". The definition of an "accident" found at section 50.2(h)(5), includes an unplanned ignition or explosion of gas or dust. The citation alleges that a dust ignition occurred on the 11 left working section on February 1, 1991, and the issue presented is whether a coal dust ignition in fact occurred, or

whether the occurrence in question was something other than a reportable ignition.

Neither the Act nor the regulations further define ignition. However, the Dictionary of Mining, Mineral, and Related Terms, U.S. Department of the Interior, 1968 Edition, provides the following relevant definitions:

Ignition . . . . . The act of igniting, or the state of being ignited; An outburst or fire or an explosion. (Pg. 569).

Coal mine ignition . . . . . The burning of gas and/or dust without evidence of violence from expansion of gases. (Pg. 225).

Webster's Third New International Dictionary (Unabridged), provides the following relevant definitions:

Ignite . . . . . To subject to fire or intense heat; to heat up; to catch fire; to begin to glow; become luminescent. (Pg. 1125).

Ignition . . . . . The act or action of igniting; subjection to the action of fire or intense heat; setting fire. (Pg. 1125).

Luminescence. . . . . An emission of light that is not ascribable directly to incandescence and therefore occurs at low temperatures, that is produced by . . . friction, . . . by certain bodies while crystallizing. (Pg. 1345). (Similarly defined by the Mining Dictionary, at pgs. 662-663).

Luminous . . . . . full of light; emitting or seeming to emit a steady suffused light that is reflected or produced from within. (Pg. 1345). Radiating or emitting light; bright; clear. (Mining Dictionary, at pg. 663).

In support of its conclusion that an ignition in fact occurred on February 1, 1991, MSHA relies on the testimony of Inspector Young, including his report of investigation, and the testimony of the miners who witnessed the February 1, 1991, event and who were subpoenaed to testify at the hearing in this case. With regard to the investigation conducted by Mr. Young and Mr. Tulanowski, and the report which they prepared are concerned, as I noted in the course of the hearing, the investigation and the report leave much to be desired and are of little credible or evidentiary value (Tr. 43-47; 76-78; 150-153; 175-180).

The record reflects that the "statements" purportedly given to the inspectors during their investigation were in fact verbal summaries of the questions asked by Inspector Tulanowski and the responses recorded by Inspector Young as part of his investigative notes. However, the notes were not produced at the hearing and they are apparently lost and not available. Further, it would appear that none of the miner "statements" were reduced to writing or signed by the miners who purportedly gave them, they were not sworn, and I take note of the fact that the miners were interviewed in groups rather than individually and in private. One potentially critical witness (Foreman Gary Graham), who reportedly commented on February 1, 1991, that he smelled smoke when he arrived at the scene was not called to testify at the hearing, and although Mr. Graham was present during the interviews of February 4, 1991, Inspector Young confirmed that he was asked no questions (Tr. 217).

Mr. Young confirmed that he and Inspector Tulanowski only prepared part of the report of investigation, and that the rest of the report was prepared by other unidentified MSHA officials. Mr. Young acknowledged that he and Mr. Tulanowski did not sign the report, and he could not state who initialed and signed the report over their typewritten names. Although the name "David N. Wolfe" appears over Mr. Young's typed name, Mr. Young confirmed that he did not know Mr. Wolfe (Tr. 43). Mr. Young also did not know who changed pg. 3 of the report by scratching through the word "methane" and inserting "frictional dust", and he believed the change was made to correct a typographical error.

Three eyewitnesses to the incident of February 1, 1991, gave rather graphic and detailed sworn testimony as to what they observed. Continuous miner operator Parker, who has worked for Consol for 19 years, and roof bolter Hayes, with 18 years of experience in the mines, testified that they observed a flame from the miner machine head travel up to the roof and roll back over the machine before it extinguished itself. Mr. Parker was operating the machine and Mr. Hayes was standing to the front of Mr. Parker, approximately 12 feet from the miner head. Mr. Parker recorded his observation in his personal notes made 5 or 10 minutes after the event, and while the notes do not mention any "flames rolling back" they do mention an "orange and yellow ball of fire" lasting 3 to 5 seconds, and Mr. Parker explained that the flames he saw resembled a "ball of fire" as they rolled back and that is why he characterized it as such in his notes. Further, Mr. Parker and Mr. Hayes, both of whom had previously observed sparks and sparking in their mining experience, denied that what they actually saw were sparks, and they were rather emphatic that they observed a flame, and their testimony in this regard remained consistent when later recalled by the court in the course of the hearing.

Roof bolter David Moore, with 18 years of mining experience, testified consistently on direct and on recall by the court that after sticking his head around the corner of the entry to get some fresh air he turned around and saw a flame travel up the coal rib from the head of the miner machine, and he described the flame as bright orange and yellow. He also stated that he could feel the heat. Mr. Moore, Mr. Parker, and Mr. Hayes all insisted that during management's inquiry on February 1, 1991, they told Mr. Tonkin that they had seen a flame. Mr. Tonkin confirmed that he made no notes of the discussions with the crew and he apparently did not prepare any report of his inquiry. He testified that the three miners told him they saw "a fireball" near the bits of the miner machine, and he confirmed that the three miners told the MSHA inspectors on February 4, 1991, that they had seen flames (Tr. 194).

In support of its conclusion that what the miners actually saw on February 1, 1991, was not a flame or an ignition, but sparking which often occurs when the bits of the miner machine strike sulfur or pyrite while mining with insufficient water in the machine, Consol relies on the eyewitness testimony of longwall foreman Kevin Carter, section foreman Robert Wolfe, and its expert witness and employee Dr. Thakur. Consol also relies on the testimony of Mr. Tonkin and Mr. Oldaker, the management officials who conducted the inquiry of February 1, 1991.

Mr. Carter testified that he saw "just a glow near the bits" of the miner machine, but he acknowledged that "whatever" he saw was brief, that he was looking in several different directions in response to the yelling by crew members, and that he was positioned at the rear of the miner looking away from the face, and that he did not actually see what had happened. Mr. Carter also confirmed that at the time of the incident, Mr. Hayes and Mr. Moore told him that they saw fire on the left side of the miner at the bits, and he believed that the miners told the MSHA inspectors that they saw flames. Mr. Carter acknowledged that given their long years of experience in the mines, and the fact that sparking and glowing is not particularly unusual, the miners saw "something more than they had seen before or they would not have panicked" (Tr. 159).

Mr. Wolfe testified that he saw no flames, and it was his opinion that what the crew actually saw was an unusual sparking event caused by the miner bits striking pyrite. He believed that the lack of water in the machine caused unusual sparking which he characterized as "a ball of sulphur gas sparks" (Tr. 168). Mr. Wolfe further testified that at the time Mr. Tonkin spoke with the crew on February 1, 1991, no one said anything about seeing any flame. Mr. Wolfe denied that he ever made any statements to anyone that he saw flames. However, in response to a question from the court concerning the information at page 3 of the MSHA report of investigation which states that he "observed

~466

an orange flame measuring approximately 3 feet tall and 6 feet wide, at the miner ripper head", Mr. Wolfe stated that based on his own mining terminology, an orange flame is the same as a spark (Tr. 176).

Mr. Tonkin did not witness the event of February 1, 1991. Mr. Tonkin was summoned to the area by Mr. Graham who told him that "they might have had an ignition". Upon arriving at the scene, Mr. Tonkin found no physical evidence such as soot, cinders, or ash. Based on his discussions with the crew, including statements by Mr. Hayes and Mr. Moore that they saw "a fireball at the bits of the miner", Mr. Tonkin concluded that an ignition had not occurred, and that the crew had only observed "a ball of fire". Mr. Tonkin conceded that Mr. Parker may have seen a flame, but he insisted that none of the miners told him that they saw any flames. Mr. Tonkin stated that he would consider a flame to be an ignition, but that based on the terminology that he is used to, a ball of fire that is caused by sulfur is not classified as an ignition (Tr. 195).

Mr. Oldaker did not witness the event, and he was summoned to the area by a telephone caller who informed him of "a possible ignition". Mr. Oldaker saw no evidence of any ignition, and while he was present during the MSHA interviews with the crew, he confirmed that he did not sit in on any of the "testimony " and may have been in and out of the room. He denied hearing anyone say anything about the presence of flames, and his conclusion that everyone saw "a ball of fire" was based "more or less" on what he believed was a consensus view of the crew.

Dr. Thakur agreed that a visible flame would indicate that an ignition has occurred, and he confirmed that given the right concentration, temperature, and energy input, a mixture of coal dust and air will ignite. However, based on the testimony of the witnesses, he did not believe that an ignition occurred. He concluded that the employees saw sparks or a ball of fire created by the miner bits cutting into pyrite. This produced a lot of heat which oxidized the fine pyrite particles, and which resulted in a glow and the creation of a source of light. Dr. Thakur further concluded that it was impossible to ignite coal dust and air mixtures with mechanical friction.

Although it may be true that the subpoenaed miners who testified under oath during the hearing disclosed more than what they may have previously stated to Mr. Tonkin, I find no reason for disbelieving their testimony. Mr. Tonkin confirmed that he got along well with the miners, and although he suggested that the union safety committee may have put pressure on them to embellish their stories because the committee did not get along with management, I find no credible evidence to support any such conclusion.



Although Mr. Tonkin impressed me as a candid and credible individual, and Inspector Young believed him to be a truthful person, it would appear to me that the "investigation" conducted by Mr. Tonkin on February 1, 1991, was more of a group discussion and rather cursory, and he took no notes and prepared no written report of what may have been said. Under the circumstances, I do not find it unusual that critical facts remain unresolved and undocumented, and that individual perceptions and recollections as what may have been said has changed over time. Nor do I find it unusual that miners subjected to a management inquiry, and in the presence of foreman and other management officials, sometimes have a tendency to remain noncommittal, particularly when they are not placed under oath and are not called upon to testify in a formal hearing away from their working mine environment.

After careful review and consideration of all of the testimony in this case, and having viewed all of the witnesses during the course of the hearing, I conclude and find that Mr. Parker, Mr. Hayes, and Mr. Moore are credible witnesses and I believe their testimony that they observed a flame of rather short duration coming from the miner machine bits at the head of the machine and rolling up and over the machine. Their description of the flame is consistent with the aforementioned dictionary definitions of the terms "ignite" and "ignition", and I do not find their testimony to be in conflict with the testimony of Mr. Tonkin, who confirmed that the presence of a flame is in fact an ignition, and the testimony of Dr. Thakur, who testified that a visible flame would indicate that an ignition has occurred.

Although I find Dr. Thakur to be a knowledgeable and credible individual, his opinion that an ignition did not occur was based on his belief that what the miner eyewitnesses saw was "some kind of sparks" which they thought was a flame, rather than on his personal observation of the same event. Dr. Thakur acknowledged that a spark was a potential source of ignition, and his testimony that sparking caused by rapid oxidizing and a lack of water would create a "source of light", or heat, and a glow which would appear "like a ball of fire" are characteristics similar in some respects to those found in the dictionary definitions of an ignition.

Although Dr. Thakur initially stated that it was impossible to ignite coal dust by mechanical friction, he later confirmed that he was familiar with accidents and explosions that have occurred because of frictional dust ignitions (Tr. 251). Further, although Dr. Thakur stated that "there's no way you can have a sustaining visible flame to qualify as an ignition and go away in three seconds" (Tr. 241), he later testified that "for an ignition to be called an ignition, something has to be ignited, something which would sustain a visible flame for some duration of time, even if it is five or ten seconds" (Tr. 259). Under all

~468

of these circumstances, I remain unconvinced that frictional coal dust ignitions are impossible under any and all circumstances. In any event, the issue here is whether or not the testimony of the eyewitness miners is credible and supports any reasonable conclusion that what they saw of February 1, 1991, was a flame, and whether or not that flame was a coal dust ignition which was required to be immediately reported to MSHA pursuant to 30 C.F.R.

50.10. I have concluded and found that what the miner observed was a flame. I further conclude and find that the flame which they observed constituted an unplanned coal dust ignition which was required to be immediately reported. Accordingly, since it was not reported to MSHA, a violation has been established and the citation IS AFFIRMED.

Fact of Violation. Citation No. 3105296, 30 C.F.R. 50.12.

Consol is charged here with a violation of section 50.12, because it permitted mining to continue after the occurrence of the ignition on February 1, 1991, and failed to obtain MSHA's permission before disturbing or changing the area where the ignition occurred. Section 50.12, provides as follows:

50.12 Preservation of evidence.

Unless granted permission by a MSHA District Manager or Subdistrict Manager, no operator may alter an accident site or an accident related area until completion of all investigations pertaining to the accident except to the extent necessary to rescue or recover an individual, prevent or eliminate an imminent danger, or prevent destruction of mining equipment.

Consol does not dispute the fact that after the conclusion of Mr. Tonkin's inquiry on February 1, 1991, mining was allowed to continue and the miner machine was advanced past the area where the ignition had occurred and the area was cleaned up and rock dusted. The record reflects that when foreman Graham initially arrived at the scene, he ordered all mining to cease and that nothing be disturbed until Mr. Tonkin arrived. Mr. Tonkin subsequently permitted mining to continue after he concluded from his discussions with the crew that an ignition did not occur. Mr. Tonkin maintained that no one initially mentioned that they had seen any flame, and coupled with the lack of any physical evidence of any ignition, he made the decision that a reportable accident (unplanned coal dust ignition) did not occur and that the incident was not required to be reported. Under these circumstances, he allowed mining to continue.

In view of my finding that a reportable accident (unplanned coal dust ignition) occurred and was not immediately reported to MSHA, I further conclude that Consol's continuation of mining, which resulted in the alteration of the scene of the ignition

without MSHA's permission, constitutes a violation of section 50.12. Although it is true that foreman Graham acted promptly by discontinuing any further mining and preserving the scene until Mr. Tonkin's arrival, and Mr. Tonkin may have in good faith believed that an ignition had not occurred, I conclude that these factors may be considered in mitigation of the violation, but may not serve as an absolute defense to the violation. Under the circumstances, I conclude and find that a violation has been established, and the citation IS AFFIRMED.

#### Size of Business and Effect of Civil Penalty Assessments on the Respondent's Ability to Continue in Business

I adopt as my findings the stipulations by the parties that Consol is a large mine operator and that the payment of civil penalty assessments for the violations in question will not adversely affect its ability to continue in business.

#### History of Prior Violations

An MSHA computer print-out listing Consol's history of prior violations for the period August 23, 1989, through August 22, 1991, reflects civil penalty payments in the amount of \$221, 247, for 797 violations. One prior single penalty assessment of \$20 for a violation of 30 C.F.R. 50.10, issued on September 19, 1989, is included in this history. MSHA's pleadings reflect that Consol's overall annual coal production for civil penalty assessment purposes was 49,368,060 tons, and that the Robinson Run No. 95 Mine had an annual production of 1,856,689 tons. Although I cannot conclude that Consol's history of prior violations is particularly good, for an operation of its size, I cannot conclude that additional increases in the civil penalty assessments that I have made for the two violations which have been affirmed, are warranted. However, I have considered the history, as well as the other penalty criteria, in assessing the penalties for the violations.

#### Good Faith Compliance

The parties stipulated that Consol abated the violations in good faith. The record reflects that corrective action was immediately taken and that the inspector terminated the citations within an hour after they were issued. Under the circumstances, I conclude and find that Consol exercised rapid good faith compliance in correcting the cited conditions and I have taken this into consideration.

#### Gravity

The inspector found that both violations were not significant and substantial. The evidence establishes that no significant amounts of methane were present and that the area

where mining was taking place was in good condition. Further, the flame in question only lasted for approximately three seconds and there were no injuries. Although these factors concerning the prevailing mining conditions mitigate the gravity of the violations, I nonetheless conclude that the failure to report an ignition and to allow mining to continue without notice to MSHA and without its approval are serious violations.

#### Negligence

The inspector found that the violations resulted from a "high" degree of negligence, and he based these findings on his belief that mine management made no effort to contact MSHA for the purpose of reporting the incident or seeking information as to how to proceed further (Tr. 22-23).

Taking into account Mr. Tonkin's denials that the miners specifically told him that they had seen flames when he initially spoke to them on February 1, 1991, I nonetheless find that all of the indicia of a reportable ignition were present when Mr. Tonkin came to the opposite conclusion. Mr. Tonkin conceded that the miners told him that they had seen a ball of fire. Foreman Carter confirmed that at the time of the incident he was told by miners Hayes and Moore that they saw fire at the left side of the miner machine bits, and Mr. Carter himself testified that he had briefly observed a glow. Foreman Wolfe, who claimed that what the crew saw was sparks, was of the view that a spark was the same thing as a flame, and he did not deny the statement attributed to him in MSHA's accident report which indicates that he saw an "orange flame". Mr. Tonkin agreed that if a flame were indeed present, an ignition occurred. Under all of these circumstances, I conclude that Mr. Tonkin acted less than reasonable when he based his conclusion that an ignition had not occurred solely on the fact that the miners may not have specifically informed him that they had observed a flame. I further conclude and find that the failure by mine management to immediately report the matter to MSHA and to preserve the scene until MSHA could look into the situation supports the inspector's high negligence findings and they ARE AFFIRMED.

#### Civil Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that the following civil penalty assessments are reasonable and appropriate for the violations which have been affirmed:

Citation No.	Date	30 C.F.R. Section	Assessment
3105295	2/4/91	50.10	\$500
3105296	2/4/91	50.12	\$350

~471

ORDER

Docket Nos. WEVA 91-166-R and WEVA 91-167-R

Consol's contests are DENIED and DISMISSED.

Docket No. WEVA 92-177

Consol IS ORDERED to pay civil penalty assessments in the amounts shown above for the two citations which have been affirmed. Payment is to be made to MSHA within thirty (30) days of the date of this decision and order.

My previous Stay Order of February 4, 1992, staying excessive history section 104(a) Citation No. 3102243, August 22, 1991, 30 C.F.R. 75.400, remains in effect and the citation IS STAYED pending the Commission's decisions in Drummond Coal Co., Inc., 13 FMSHRC 339, and 13 FMSHRC 356 (March 1991), and Zeigler Coal Company, 13 FMSHRC 367 (March 1991).

George A. Koutras  
Administrative Law Judge

Distribution:

Walter J. Scheller, Esq., Consolidation Coal Company,  
1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

Wanda M. Johnson, Esq., Office of the Solicitor, U.S. Department  
of Labor, Suite 516, Ballston Towers #3, 4015 Wilson Boulevard,  
Arlington, VA 22203 (Certified Mail)

/ml