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SOL (MSHA) V. CONSOLIDATION COAL
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEVA 92-917
	:	A.C. No. 46-01455-03887
	:	
	:	Docket No. WEVA 92-918
v.	:	A.C. No. 46-01455-03888
	:	
CONSOLIDATION COAL COMPANY, Respondent	:	Docket No. WEVA 92-933
	:	A.C. No. 46-01455-03889
	:	
	:	Docket No. WEVA 92-988
	:	A.C. No. 46-01455-03891
	:	
	:	Osage No. 3 Mine
	:	
	:	Docket No. WEVA 92-921
	:	A.C. No. 46-01453-04007
	:	
	:	Docket No. WEVA 92-932
	:	A.C. No. 46-01453-04011
	:	
	:	Docket No. WEVA 92-994
	:	A.C. No. 46-01453-04016
	:	
	:	Humphrey No. 7 Mine

DECISION

Appearances: Caryl L. Casden, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Daniel E. Rogers, Esq., Consol,Incorporated, Pittsburgh, Pennsylvania for Respondent.

Before: Judge Barbour

STATEMENT OF THE CASE

In these proceedings the Secretary of Labor ("Secretary") on behalf of the Mine Safety and Health Administration ("MSHA") charges the Respondent, Consolidation Coal Company ("Consol"), with violating safety regulations promulgated pursuant to the Federal Mine Safety and Health of 1977, 30 U.S.C. 801 et seq., (The "Mine Act" of "Act"). In addition, the Secretary alleges that certain of the violations constituted significant and substantial contributions to mine safety hazards ("S&S" violations) and that certain were the result of Consol's

unwarrantable failure to comply with the cited standards.

A hearing on the merits was conducted in Morgantown, West Virginia, and counsels have submitted helpful post-hearing briefs. At the commencement of the hearing counsel for the Secretary announced that several of the violations had been settled. (In some instances the settlements disposed of the entire case at hand.) At my request, counsel stated on the record the facts pertaining to the settlement agreements and I explained that I would consider the settlements and if I found them warranted under the Act, I would approve them in my decision.

THE SETTLEMENT AGREEMENTS

DOCKET NO. WEVA 92-917

There are two violations alleged in this case, both of which the parties have agreed to settle.

Citation/Order No.	Date	30 C.F.R. Section	Assessment	Settlement
3307656	11/28/90	75.305	$ 276	$ 166
3716059	10/16/91	75.503	$1100	$ 660

Counsel for the Secretary explained that Citation No. 3707656 was issued for the failure of Consol to properly conduct a required weekly examination for hazardous conditions in the cited area of the mine. Counsel further explained that although the manner in which the company was conducting the examination was not correct technically, it was an effective and safe way to examine. Therefore, counsel proposed the citation be modified to delete the S&S designation and that the penalty be assessed as shown above. Tr. 7.

Counsel further explained that Section 104(d)(2) Order No. 3716059 was issued for the company's failure to properly secure an electrical junction box on a loading machine. Upon inquiring into the facts surrounding the violation, counsel discovered that although two of four bolts were missing and the other two were damaged, the box cables were taut so that the box could not readily move. Therefore, in MSHA's opinion, it was unlikely that the box would be damaged due to the missing and defective bolts. Counsel proposed the order be modified by deleting the S&S designation and that a civil penalty assessed be as shown. Tr. 8.

DOCKET NO. WEVA 92-118

There is one violation alleged in this case which the parties have agreed to settle.

Citation No.	Date	30 C.F.R. Section	Assessment	Settlement
3716332	03/25/92	75.1105	$431	$ 50

Counsel stated that subsequent to being issued, the citation was modified by MSHA to delete the S&S finding, but that the assessment erroneously did not take into account the modification. Had the citation been assessed as modified, the civil penalty proposed would have been $50 and counsel suggested a civil penalty be assessed in that amount. Tr. 9.

DOCKET NO. WEVA 92-933

There are four violations alleged in this case, two of which the parties have agreed to settle.

Citation No.	Date	30 C.F.R. Section	Assessment	Settlement
3718138	12/18/91	75.1725(a)	$1000	$1000
3715916	01/08/92	75.400	$ 800	
3715920	01/13/92	75.400	$1200	
3718210	04/20/92	75.601-1	$ 362	$ 362

Counsel stated that Consol had agreed to pay in full the penalties proposed for Order No. 3718138 and Citation No. 3718210. Tr. 9-10.

DOCKET NO. WEVA 92-988

There are five violations alleged in this case, four of which the parties have agreed to settle.

Citation/Order No.	Date	30 C.F.R. Section	Assessment	Settlement
3715905	12/30/91	75.807	$241	$145
3715909	01/06/92	75.1105	$178	$178
3718483	01/22/92	75.503	$241	$145
3718486	01/22/92	75.202(a)	$227	
3718488	12/03/92	75.202(a)	$178	$178

Citation No. 3715905 was issued for Consol's failure to properly place and guard a high voltage transmission cable. In addition to the alleged violation, the inspector found the violation to be S&S. Counsel stated the cable had numerous protective features to interrupt the power in the event the cable was damaged and that should such damage occur there would be

little likelihood of injury to miners. Accordingly, counsel proposed the S&S finding be deleted and a civil penalty be assessed as shown. Tr. 11-12.

Citation No. 3718483 was cited for Consol's failure to maintain a roof bolting machine in permissible condition. In addition, the inspector found the violation to be S&S. The impermissible openings constituting the violations were of minimal dimensions (one in excess of .006 of an inch and one in excess of .007 of an inch). Counsel maintained that any hazard resulting from the violation was unlikely to occur, and counsel proposed the S&S finding be deleted and a civil penalty be assessed as shown. Tr. 12.

Counsel also stated that Consol had agreed to pay in full the civil penalties proposed for Citation No. 3715909 and for Citation No. 3718488. Tr. 12-3.

DOCKET NO. WEVA 92-932

There are two violations alleged in this docket, both of which the parties have agreed to settle.

Order No.	Date	30 C.F.R. Section	Assessment	Settlement
3108769	01/30/92	75.1003(a)	$800	$400
3108741	02/04/92	75.1101-8(c)	$800	$400

Section 104(d)(2) Order No. 3108769 was issued for Consol's failure to adequately guard a trolley wire that ran above the supply track. The inspector further found that the violation was S&S and resulted from Consol's unwarrantable failure to comply with the cited standard. Counsel stated that upon investing the facts surrounding the violation MSHA had concluded the evidence would not support the inspector's unwarrantable failure determination. Counsel proposed the unwarrantable finding be deleted, the order of withdrawal be modified to a Section 104(a) citation and a civil penalty be assessed as shown.

Section 104(d)(2) Order No. 3108741 was issued for Consol's failure to maintain an adequate discharge rate on a belt drive sprinkler system. However, counsel stated that further investigation into the facts surrounding the violation revealed the system had been inspected 3 hours previously by Consol and had been found to be fully functional at that time. Therefore, MSHA did not believe the inspector's unwarrantable determination could be supported at trial. Counsel therefore proposed the order be modified to a section 104(a) citation by deleting the finding of unwarrantable failure and that a civil penalty be assessed as shown. Tr. 13-14.

DOCKET NO. WEVA 92-994

Order No.	Date	30 C.F.R. Section	Assessment	Settlement
3116513	06/17/91	75.220	$1200	$1200

Counsel stated that Consol had agreed to pay in full the proposed penalty. Tr. 14-15.

In addition to the statements of counsel, the record contains information relating to the six statutory penalty criteria found in Section 110(i) of the Act, 30 U.S.C. 820(i).

APPROVAL OF THE SETTLEMENTS

I have considered all of this information and I find that approval of the penalties upon which the parties have agreed is warranted and reasonable and in the public interest. I further find that counsel for the Secretary has stated adequate grounds for the modifications of the citations and orders that the parties have made a part of the settlements.

Accordingly, the settlements are approved. I will order the appropriate payments and modifications at the end of this decision.

CONTESTED CASES

STIPULATIONS

At the commencement of the hearing regarding the contested cases that parties stipulated as follows:

1. Consol is the owner and operator of mines in which the subject citations and orders of withdrawal were issued;

2. The operations of Consol are subject to the jurisdiction of the Mine Act;

3. The Federal Mine Safety and Health Review ommission and the Administrative Law Judge have jurisdiction over these proceeding pursuant to Section 105 and 113 of the Mine Act, 30 U.S.C. 815 and 823;

4. The individuals who issued the contested citations and orders were acting in their official capacity as authorized representatives of the Secretary when the citations and orders were issued;

5. True copies of each of the citations and orders at issue were served on Consol as required by the Act;

6. The total proposed penalty for the violations alleged in the citations and orders contested by Consol will not effect Consol's ability to continue in business;

7. The citations and orders that will be submitted as exhibits are authentic copies of the citations and orders that are at issue;

8. The proposed assessment forms that will be submitted as exhibits set forth accurately Consol's size, production, hours worked per year and the total number of assessed violations in the 24 months preceding the date of the alleged violations.

See Tr. 17-18.

DOCKET NO. WEVA 92-933

ORDER NO. 3715916, 01/08/92, 30 C.F.R. 75.400

MODIFICATION OF THE ORDER

MSHA Inspector Lynn Workley when issuing this order of withdraw found the alleged violation of section 75.400 to be S&S. Subsequently, the order was the subject of a conference between MSHA and Consol. As a result of the conference the order was modified to delete the S&S finding. In a letter dated December 2, 1992, counsel for the Secretary stated to counsel for Consol that this modification was an error. Further, she stated that she had advised Consol's counsel of this error during a December 1, 1992 telephone conversation. Finally, she stated that she intended to present evidence regarding the alleged S&S nature of the violation at the December 8, 1992 hearing.

Prior to presenting her case, counsel for the Secretary moved to amend the order to include an S&S finding. Tr. 18-19. Consol's counsel objected, expressing his belief that Consol should be able to rely on what was done at the conference. Tr. 20. Counsel for the Secretary responded that such an amendment is permissible, provided the operator is not prejudiced. Tr. 21.

I note that in order to grant the motion I must find not only a lack of prejudice, but also that the moving party is not guilty of bad faith, See Wyoming Fuels Corp., 14 FMSHRC 1282, 1289-90 (August 1992). Counsel for Consol candidly stated Consol was not prejudiced. Tr. 21. Further, far from exhibiting bad faith, counsel for the Secretary seasonably advised Consol's counsel of how she intended to proceed. Accordingly, the motion is granted and the inspector's S&S finding is restored to Order No. 3715916.

THE VIOLATION

THE EVIDENCE

The order states:

> Combustible material had been permitted to accumulate on the 2 left belt, in that a pile of fine dry coal dust up to 6 inches deep was under the belt at the first low bottom roller and there was a layer of dry float coal dust on the transfer structure, water line, and belt structure, from the transfer inby for 30 feet on the 2 left belt. The float coal dust was dry, black and powdery and varied from 1/16 to 1/4 inch deep.

Exh. P-2.(Footnote 1)

Inspector Workley stated that when he inspected the Osage No. 3 Mine on January l3, l992, he was accompanied by the representative of miners and by Consol's safety escort, Norm Hill. Tr. I 28. Workley was familiar with the mine in that he had inspected it in its entirety on several prior occasions. Tr. I 27. The inspection party approached the 2 Left section belt transfer, the point at which the 2 Left belt dumps onto the main belt, and Workley observed accumulations of coal dust on the top of the transfer structure, on the bearing box for the transfer roller, and on the water line above the 2 Left section belt and the belt structure. The dust was black in color and extended a total distance of approximately 30 feet. To gage the depth of the dust Workley ran his finger through it and found that it ranged for l/l6 to l/4 inch deep. Tr. I 29.

Under the bottom belt of the 2 Left section belt Workley also observed fine coal and coal dust. The material was in a pile and Workley placed his hand in the pile and determined that the coal and coal dust was dry. Also, he measured the pile with a ruler and found it to be approximately six inches deep and three feet square. Tr. I 29-30.

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1 30 C.F.R. 75.400 provides:

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

Workley explained that due to the amount of coal dust present he was of the opinion the accumulation had existed for several days. Further, he explained that the area of the 2 Left section belt transfer must be examined once each shift and that miners are at times required to shovel the belt. Thus, it was his opinion that the area of the 2 Left section belt transfer constituted active workings. ("Active workings" is defined as "any place in a coal mine where miners are normally required to work or travel. 30 C.F.R. 75.2(g)(4).) Because section 75.400 prohibits the accumulation of float coal dust and coal dust in active workings, Workley believed that the condition constituted a violation of the regulation.

Consol's chief safety inspector, Earl Kennedy, stated that he was at the mine on January 8, and that approximately one hour before Workley cited the violation, he, Kennedy, had walked past the 2 Left section belt transfer area looking for hazards on the belt line. When asked what he had observed, Kennedy responded:

I seen an area that was well rock dusted. I seen an area that was properly ventilated. I seen an area where there was no ignition sources. I seen an area that had fire suppression, heat sensors, belt scrapers, no rubbing, nothing hot, proper walkways, [and] dates where the fire bosses had been . . . recently. I seen an area that I would have been proud of.

Tr. I 81. When asked whether he had noticed accumulations of coal dust Kennedy replied, "I saw what I just described." Id. Kennedy stated that when he heard that an order had been written on conditions in the area he "almost fell down." Id. However, Kennedy added that the 2 Left section belt transfer had two levels -- an upper and a lower level -- and that he could not have seen the area cited by Workley for accumulations of float coal dust, an area visible from the upper level, because he, Kennedy, was on the lower level. Tr. I 82-84.

After passing the 2 Left section belt transfer, Kennedy traveled to other areas of the mine, but he returned to the area of the 2 Left section belt transfer after hearing that the subject order had been issued. He arrived while the alleged accumulations were being cleaned up. Kennedy maintained that if there was an accumulation of anything in the area it was a pile of rust and dirt, reddish brown in color, under the belt. This material had been scraped from the belt by the belt scrapers and had fallen under the belt. Tr. I 85. Kennedy believed that the heavier particles of rust and dirt fell to the floor, particularly under the bottom roller scraper, and the finer

particles were put into airborne suspension and as dust ended up on the belt structure. Although he admitted that "there was some coal dust" on the belt structure, most of what was on the belt structure, was of the fine, reddish brown rust and dirt particles. Tr. I 86-87.

William Kun also testified for Consol. Kun has been the safety superintendent at the mine since May l985. Kun stated that 3 days before the order was issued he traveled to the area of the 2 Left section belt transfer and noticed brownish/black material -- "muck, water, whatever" -- under the belt. Kun was certain that whatever the material was, it was not float coal dust or spilled coal. Tr. I 113.

EXISTENCE OF THE VIOLATION

Workley, an experienced mine inspector, was a cogent and credible witness. He described in detail the float coal dust, coal dust and loose coal that he had observed. He determined its depth. He estimated and measured its extent. He further determined through a hands-on approach that the accumulation under the belt was dry. Kennedy did none of this and I fully credit Workley's testimony regarding what he observed under the belt.

With regard to the float coal dust on the transfer structure, the belt structure and the water line, I note Kennedy's admission that he could not see the structure on the upper level during his first visit to the area. Kennedy only viewed the area after abatement had begun, and I credit Workley's testimony that when Kennedy arrived some float coal dust had not yet been removed and still was present. Workley had remained in the 2 Left section belt transfer area after issuing the order and he was monitoring the abatement procedure. Therefore, I find the weight of the evidence established that the accumulations existed as described by Workley.

Loose coal and coal dust is combustible, and Consol does not contend that the area of the 2 Left section belt transfer was an inactive working. Accordingly, I conclude the violation of section 75.400 has been proven as charged.

S&S AND GRAVITY

Workley stated that he considered the violation to be of a S&S nature because coal dust once ignited can go into suspension and propagate a mine fire or an explosion. In his opinion, such a result is reasonably likely to occur when accumulations are

adjacent to potential ignition sources. Tr. I 40-41. As Workley put it:

> When you permit combustible material to accumulate in the coal mine, all that is necessary . . . is an ignition source. Rollers on belt lines go bad frequently. We have difficulties with electrical cables, rocks fall on them can split them open. There is sparking potential. If an ignition source occur[s] and the float dust or dry coal dust is present you have a fire. In a coal mine a fire can be a disaster in no time.

Tr. I 41.

Turning from the general to the specific, Workley described several potential ignition sources that he believed made the cited accumulations a fire or an explosion waiting to happen. He noted that there were bearings on both sides of the transfer roller and that all of the belt rollers had bearings. Workley maintained that there were approximately 20 roller bearings for every 10 feet of belt. Tr. I 41-42. He stated that when a bearing "freezes" metal rubs on metal as the roller turns and the roller shaft can become red hot from the friction in "just a short period of time." Tr. I 42. Workley stated that he had been told by mine management that as many as a dozen rollers previously had gone bad on one belt in one shift. Tr. I 44.

In addition, Workley explained the way a bearing could freeze -- dust and dirt could enter the bearing and create excessive friction and heat. "Once the bearing starts deteriorating it just melts." Id.

A further potential ignition source was the bottom belt which could shift while it was running and could cut into the belt structure. The resulting heat from the friction could start a fire or an explosion. Tr. I 44-46.

Finally, Workley stated that a layer of float coal dust thinner than a ordinary sheet of paper would propagate an explosion. When asked if, in his opinion, there was enough float coal dust present in the left belt transfer area to propagate an explosion, Workley replied, "Dozens of times. More than enough." Tr. I 46.

If a fire were to occur Workley believed that one or more miners would probably suffer burns or smoke inhalation attempting to extinguish the fire. If an explosion were to occur, not only would miners in the vicinity of the 2 Left section belt transfer

area be subject to concussive injuries but miners in other entries could be injured by flying concrete blocks blown out of stoppings. Tr. I 49-50.

Workley admitted that the walkways, the roof and the ribs surrounding the accumulations were well rock dusted and he agreed that if there were an ignition and rock dust were blown into the air by the ignition, the rock dust could prevent propagation of the explosion. Tr. I 59-60. He also agreed that fire prevention devices such as a carbon dioxide monitoring system and a fire suppression system were installed along the belt line, Tr. I 66-67, and he acknowledged that at the time he issued the subject order, no defective bearings were present in the 2 Left section belt transfer area. Tr. I 68.

Kennedy, testifying on Consol's behalf, he stated that the bearings on the transfer rollers were self-greased and thus were not as subject to failure from dust or dirt getting into their mechanisms. Tr. I 95. On the other hand, the bearings for the belt rollers were not self-greased and he agreed that they periodically "go bad." Tr. I 97. According to Kennedy, when this happened the top rollers rarely got hot enough to cause a fire.

Although Kennedy admitted, "I do know of situations where belts cutting have caused belt fires," he maintained that the subject belt structure was of a new design that prevented the belt from ever cutting into the structure. Tr. I 97-98. Kennedy also maintained that if the area of coal dust cited by Workley had been present, it would have presented a "serious problem" only if it had been "completely around the area . . . [and had been] dry float dust, just like gunpowder," which it was not. Tr. I 101.

The Commission has held that a violation is "significant and substantial" if, based on the particular facts surrounding the violation, there exists a "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, 3-4 (January 1984), the Commission further explained:

> In order to establish that a violationof 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.

I have concluded that the accumulations existed as described by Workley and that they constituted a violation of section 75.400. Further, there certainly was a measure of danger contributed to by the violation. Obviously, loose coal can burn. In addition, float coal dust and coal dust can burn and, if put into suspension, can propagate an explosion. Moreover, multiple ignition sources were present. Even if I were to find that Kennedy was right about the belt not being able to cut into the belt structure and that the self-greasing roller bearings were less likely to fail (and I have no reason to disbelieve his statements in this regard) there remain the many non-self-greasing roller bearings, which as both Workley and Kennedy agreed, were subject to failure and overheating. The fact that the bottom non-self greasing rollers were more likely to fail does not mean that those for the top belt did not occasionally fail as well and, in any event, the pile of coal dust and loose coal under the bottom belt was adjacent to the bottom rollers. Exh. P-1.

I believe the evidence establishes that if normal mining operations had continued stuck roller bearings would have resulted and an actual ignition source would have been present. Thus, the hazard contributed to by the violation, a fire or explosion in the active workings in question, was reasonably likely to occur and posed a reasonable likelihood of injury to miners working in the area of the 2 Left section belt transfer. Obviously, any injuries resulting from such a fire or explosion would be of a reasonably serious nature.

In sum, I agree with Workley that the violation was S&S. I also conclude that it was a serious violation. In assessing the gravity of the violation, both the potential hazard to the safety of miners and the probability of the hazard occurring must be analyzed. Here the potential hazard was grave. Underground fires and/or explosions present a very real threat of death or serious injury. Moreover, as I have found, had normal mining operations continued, a frozen roller bearing reasonably could have been expected and an actual ignition source would have been present.

UNWARRANTABLE FAILURE AND NEGLIGENCE

Workley testified that a certified person must examine the area of the 2 Left section belt transfer at least one time each shift. Tr. I 50. Given the quantity of the accumulations, he estimated that it had taken up to three days for them to reach the state he had observed. Further, given the location of the

accumulations and the fact that they were "easily observable," Workley believed that Consol's failure to detect and correct the condition was the result of unwarrantable failure.(Footnote 2) Tr. I 50-51.

In Emery Mining Corp., 9 FMSHRC 1997, 2000-04 (December 1987), and Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1087), the Commission held that "unwarrantable failure means aggravated conduct, constituting more than ordinary negligence, by an operator in relation to a violation of the Act." The Commission stated that while negligence is conduct that is "inadvertent," or "inattentive," conduct constituting an unwarrantable failure is conduct that is "not justifiable" or "inexcusable". Emery, supra

As previously stated, Workley was a cogent and credible witness. His estimates of the length of time the accumulations had existed and his opinion that the accumulations should have been easily detected by the preshift examiners are worthy of belief. For example, as noted below, Workley stated that he could see the float coal dust from 50 feet away, and I accept this to be a statement of fact. Moreover, the pile of coal dust and loose coal under the belt was visually obvious.

Thus, in view of the size and extent of the accumulations and the fact that it took several shifts for the accumulations to reach the point at which Workley found them, I hold that the repeated failure of Consol to detect the accumulations and to remove or to neutralize them was the result of Consol's unwarrantable failure to comply with section 75.400.

I further conclude that Consol exhibited high negligence in overlooking the prohibited accumulations for the several shifts that they existed.

SECTION 104(d)(2) ORDER NO. 37l5920, 1/13/92, 30 C.F.R. 75.400

Order No. 37l5920 states:

> Combustible material in the form of dry loose coal and coal dust had accumulated between and beside the rails of the old ll North Spur from roof and rib sloughage and from spillage off of loads parked there. The loose coal has been ground into fine dry black powder where the wheels of loaded coal cars travel, and is laying against the rails

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2 Workley testified that he could see the black float coal dust from 50 feet away. Tr. I 50-51.

> which are the return conductors of the 300 volt D.C. trolley system. The combustible [material has] accumulated mostly in the last 400 feet of the spur. The most recent date board was 11/25/91 on a crib near the end of the spur.

Exh P-7. The order alleges a S&S violation of section 75.400.

Workley testified that he inspected the 11 north spur, a side track running off of the main track where empty and/or unneeded mine cars regularly were parked. The mine cars were backed into and pulled out of the spur by a locomotive that derived its power from the track trolley wire. Tr. I 131-132. Workley described the spur as extending approximately 1,000 feet off of the main track. Tr. I 124-127.(Footnote 3) The trolley wire ran along the main track and extended about 30 feet into the spur. Tr. I 146. At the end of the spur there was a crib on which there was a date board. The most recent date on the board was November 25, 1991. Tr. I 147.

Workley testified that on January 13, he commenced his inspection of the spur at its mouth -- i.e., the point where the spur joined the main track. Mine cars were parked in the spur and Workley had to walk between the rib and the cars to inspect the area. Tr. I 149. In the back 400 feet of the spur he observed accumulations of dry, loose coal and coal dust along the track and between the rails. Workley stated that the coal and coal dust came from small chunks of coal that had fallen from the mine roof and ribs. He also indicated that he believed there was some spillage from the mine cars. Tr. I 125, 128. Adjacent to the rail the coal had been finely ground. It was black in color and Workley picked some up and described it as having the consistency of "facial powder." Tr. I 128.

The coal and coal dust became more extensive as Workley neared the end of the spur. The entry was approximately 13 feet wide. Toward the back of the entry the accumulations extended from rib to rib. Tr. I 128. The coal and coal dust varied in thickness from one inch to six or seven inches, and, according to Workley, all of it was extremely dry. Tr. 128-129.

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3 According to Workley, a full trip of mine cars contains about 35 cars. If such were parked in the spur, the cars would extend from the mouth of the spur nearly to its end . Tr. I 147.

EXISTENCE OF THE VIOLATION

Consol did not offer testimony to counter Workley's description of the condition of the spur. Kun, the only witness to testify for Consol regarding the alleged violation, had nothing to say concerning the existence of the coal and coal dust. Accordingly, I find that the conditions described by Workley in fact existed.

In defining a prohibited "accumulation" for section 75.400 purposes, the Commission has noted that while "some spillage of combustible materials may be inevitable in mining operations. . . it is clear that those masses of combustible materials that could cause or propagate a fire or explosion are what Congress intended to proscribe." Old Ben Coal Co. 2 FMSHRC 2808 (October 1980). As I will describe when discussing the issue of S&S, Workley credibly testified that given the extent and nature of the coal and coal dust and its location next to potential ignition sources, the accumulations not only could cause a mine fire, it was reasonably likely that they would. Tr. I 131-132. I therefore conclude that the Secretary has proven that the cited conditions constituted a violation of section 75.400.

S&S AND GRAVITY

Workley believed the accumulations constituted a S&S contribution to a mine safety hazard. He noted the extremely dry, finely ground coal dust and loose coal lay approximate to the rails and adjacent to the wheels of the mine cars. Workley explained that the locomotive pulling the cars drew up to 2,000 amps of direct current and that the current passed through the cars to the wheels and then to the rails and then to a rectifier to complete a circuit. Tr. I 131-132. If there was a gap between the wheels and the rail or a gap between the track joints, arcing could occur. Tr. I 134. Workley stated that such arcing was not unusual and that he had observed it almost every time he has seen mine cars being moved by a locomotive. ("I've seen sparks and small arcs come off the wheels of mine cars almost every time that I'm alongside the haulage and the trip goes past with the motor applying power." Tr. I 135.) Workley noted that if a locomotive were moving a full trip of cars into or out of the spur, the arcing and sparking could occur almost to the end of the spur. He believed that the coal and fine dry coal dust near the track could be "very easily ignited" and that given the extent of the accumulated material a fire could "get out of hand very quickly." Tr. I 137.

Workley also remarked upon the absence of heat sensors and fire suppression devices in the spur and stated that while the locomotive operator would be immediately subject to the dangers of smoke inhalation and burn injuries, if smoke got into the main line haulage entry, all miners working along the haulage or

traveling it would be endangered. Tr. I 138-139, 140.
However, Workley also observed that the spur is ventilated by air that passes from the main line haulage into the spur and travels to the end of the spur before exiting into the return. Tr. 150. Thus, should a fire occur in the spur, in the course of normal mining operations the only person who would be inby the smoke would be the examiner who must walk and examine the spur and the returns. Tr. I 151.

Consol offered no testimony refuting Workley's contentions regarding the ignition source presented by the mine cars. Although Kun testified that he never had observed sparks caused by moving cars in the spur, he also stated that he had never been in the spur when cars were being moved. Tr I 174. Moreover, he agreed that he had seen sparks when he had seen cars being moved in other areas of the mine. Tr. I 186.

I conclude that the Secretary has established the S&S nature of the violation. The violation existed as charged. The accumulated coal and coal dust was located in an area that was required to be preshift examined, as Workley and Kun agreed.
Tr. I 141, 171. Thus, miners were exposed to the hazard. The mass of coal and coal dust that could have burned was large. Therefore, a "measure of danger to safety" was presented by the cited accumulation.

Kun stated that 95 to 98 percent of the time he had been in the spur he found it to be full of coal cars. Tr. I 185. I accept this and conclude that there was a great deal of coal car movement into and out of the spur. Given the fact that arcing and sparking would most likely occur in the immediate vicinity of the loose coal and coal dust whenever cars were moved, I find that had normal mining operations continued there was a reasonable likelihood of fire.

Moreover, such a fire was reasonably likely to cause injury to the locomotive operator or to any certified person from Consol who was examining the spur or the return air courses that ventilated by air that had passed through the spur. Finally, and as Workley noted, such persons would be subject to burns and smoke inhalation, injuries that would be of a reasonably serious nature.

In assessing the gravity of the violation, I note that the potential hazard was grave. Smoke inhalation and burns can severely injure miners. Given the extent of the accumulations, their close proximity to the tracks, the probably frequency of arcing or sparking along the tracks and the regular presence of miners proximate to the hazards, I conclude that this was a very serious violation.

UNWARRANTABLE FAILURE AND NEGLIGENCE

Workley believed that the coal and coal dust "took days or weeks or maybe even a month" to accumulate. Tr. I 141. He further stated, as already noted, that a certified person is required to examine the spur, and he added that any person who walked to the end of the spur could have seen the accumulations. Tr. I 141-142. To Workley, the presence of the accumulations signaled the failure of the preshift examination process. Tr. I 142.

Kun emphasized the difficulty of making the required examination. He testified that the entry had been cut with a borer. As a result, the ribs sloped from the roof. Since mine cars usually were in the entry the examiner had to walk between the sides of the cars and the ribs and there was very little clearance. Tr. I 166-167. In addition, although the spur was six feet high for its first 150 feet, it decreased to 4 feet after that point. Tr. I 165. Thus, the preshift examiner not only had to bend as he traveled the entry, he also had to drop one shoulder as he walked. Tr. I 165-166, 168. Further, because the coal and coal dust was compacted, it was difficult for the preshift examiner to see under the mine cars, there being about one to one and a half inches of clearance between the top of the compacted material and the bottom of the mine cars. Tr. 169-170, 182. However, Kun subsequently admitted that there was approximately 24 inches of space between each mine car and that it was possible to see the mine floor between the cars. Tr. I 185.

I accept Kun's testimony concerning the inconveniences and complications involved in examining the spur, nevertheless whatever the difficulties the area is required to be examined so that hazardous conditions are reported and corrected. There was no testimony offered to refute Workley's belief that the accumulations had existed for some days at least, and I agree with Workley that the extent of the accumulations and the length of time they existed makes it clear that the preshift examination was wholly inadequate. Moreover, while it may well have been virtually impossible to look beneath the cars, the accumulations should have been readily apparent between the cars. Therefore, I also agree with Workley that in allowing the violation to exist, Consol's preshift examiner or examiners exhibited conduct that was not justifiable or inexcusable, and I conclude that the violation was indeed due to Consol's unwarrantable failure to comply with section 75.400.

I further conclude that Consol exhibited high negligence in overlooking the prohibited accumulations for the several shifts that they existed.

WEVA 92-988

SECTION l04(a) CITATION NO. 37l8466, 12/3/92

30 C.F.R. 75.202(a)

Citation No. 37l8466 states:

> There is an area of inadequately supported roof in the 2 left return aircourse. At 60 feet outby spad 818 there is a slip outby a roof bolt and a 1/2 inch crack extends into the rock at a 45 [degree] angle. The top is sagging and drummy outby the slip and the bolt is 48 inches away.

Exh P-1A. The citation alleges a S&S violation of section 75.202(a).(Footnote 4)

Workley testified that on December 3, 1992, he was inspecting the 2 Left return aircourse near the mouth of the section when he observed a crack in the mine roof 1/2 inch to 3/4 inch wide. The crack was approximately 5 feet long and ran across the entry. The roof was approximately 6 1/2 to 7 feet high. One side of the crack was "hanging" about an inch below the other side. Tr. 190-191. Workley stated that he measured the depth of the crack with a ruler and found it to be 18 inches. The crack extended into the roof on an angle of approximately 45 degrees. Tr. I 191.

Workley believed that the crack indicated a vertical fault in the roof strata. He explained that such faults are especially dangerous because the roof can slip and fall without warning along the fault line. Tr. 192-193. Because of this and because

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30 C.F.R. 75.202(a) states:

> The roof face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rack bursts.

the crack was in the middle of an entry that was daily traveled by miners, Workley believed that the condition violated section 75.202(a).(Footnote 5)

EXISTENCE OF THE VIOLATION

Consol did not challenge the fact that miners at the Osage No. 3 Mine worked and traveled the entry directly beneath the cited slip. Thus, the question is whether the roof was supported or otherwise controlled on December 3 to protect those persons from a roof fall?

Kun testified that approximately two weeks after the violation was abated he traveled the entry. While he observed posts that had been set to abate the condition, he was unaware that a citation had been written for the condition and he was curious as to why the posts had been set. Tr. I 206.(Footnote 6) After he found out that a citation had been issued, he went back to look more closely at the condition. He also had looked at the condition a week before the hearing. According to Kun, when he observed the roof the week before the hearing its condition was unchanged from when he had seen it after learning about the citation. Tr I 207-207. Kun stated that the posts did not appear to be taking any weight and wedges at the top of the posts were not squeezed-out, as they would have been if the roof were sagging on the posts. Tr. I 210-211. In addition, the crack had not widened. Tr. I 211.

Kun measured the spacing to the roof bolts and found them to be approximately 48 inches apart in the area of the crack.
Tr. 212. (Workley did not measure the roof bolt spacing, but had testified that the roof control plan required bolts to be installed on five foot centers and that the crack developed in an area between the bolts. Tr. I 192. Since Kun actually measured the spacing -- and since the bolts were not repositioned between the time Workley cited the violation and Kun measured -- I accept

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5 Workley testified that miners would "drag" the entry and would do so at least daily. Tr. I 195. (He described dragging as follows: "a piece of brattice cloth is usually attaches to a board or a stick. The miners drag that along behind them down the aircourse. As it drags on the mine floor it turns [the] coal dust down into the rock dust." Id.) In his opinion other miners who would be subject to the roof fall hazard were persons examining the return air course, persons rock fall hazard were persons examining the return air course, persons rock dusting it and any mine who might use the aircourse for "sanitary purposes." Tr. I 199.

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6 Workley had testified that given the height of the entry and the fact that one side of the crack overhung the other by about one inch, it would not have been unusual for someone examining the entry to have missed seeing the crack. "If he didn't look up at just the right location as he was passing under it, he would miss the crack." Tr. I 203.

Kun's testimony that the roof bolts in the area of the crack were approximately one foot closer together than required by the plan.) In addition, Kun testified that a plank had been installed at one end of the crack and that the back portion of the crack was supported by the plank. Tr. I 210. (Workley could not recall if the plank had been in place on December 3, and I accept Kun's testimony in this regard. Tr. I 210.)

Kun believed that when roof bolts had been installed in the entry, the weakness in the roof had been detected by Consol, the spacing of the roof bolts had been accordingly reduced and the plank had been installed. Given the reduced spacing of the roof bolts and the presence of the plank, he did not believe that roof would have fallen. Tr. I 209-210, 212-213. However, he also stated that "it's possible additional posts should have been set . . . [i]t's a judgement thing that everybody has to make." Tr. I 219.

I am persuaded that the Secretary has established the existence of the violation. Workley's testimony regarding the inherent danger of a verticle fracture in the plane of the roof strata is compelling. As Workley explained, a verticle fracture in the Pittsburgh coal seam is particularly likely to produce unpredicted falls between the roof bolts. Tr. I 197-198. Moreover, while Kun testified that the posts set to abate the violation did not appear to be taking any undue weight and while I fully credit his testimony, I do not find it relevant to whether or not on December 3 the roof was supported to protect persons from roof falls. The posts had been set to abate the violation and all that I can conclude from Kun's testimony is that they were doing their job.

Moreover, Consol does not dispute Workley's testimony that the 2 Left return aircourse is required to be traveled weekly by a person examining the aircourse and that it at least occasionally has to be rock dusted.

I therefore hold that on December 3, the area cited was an area where persons were required to work and travel and the roof was not supported to protect those persons from falls.

S&S AND GRAVITY

The evidence establishes a violation of the cited standard. There was a measure of danger contributed to by the failure to support the roof to protect those working and traveling under it from the danger of a roof fall, in that the lack of adequate support, a roof fall could occur at any moment and without warning. Further, during the course of continued normal mining operations, miners were required to travel and work under the cited area, and given the propensity of the roof to fall along the fault line, I conclude it was reasonably likely that had normal mining operations continued the roof would have fallen and struck a miner. Finally, as Workley stated, the fall of a rock

weighing at least one half of a ton and falling from six and one half feet on an unsuspecting miner would seriously disable, if not kill outright, the person struck. Tr. I 199. Thus, the S&S designation was appropriate and is affirmed.

Also, I conclude that this was a serious violation. As I have found, the potential hazard to miners was at least one of disabling injury. Because the entry was not traveled or worked in during every shift, there was a somewhat reduced likelihood of a miner being injured. Thus, what might otherwise have been found to constitute an extremely serious violation is found to be serious instead.

NEGLIGENCE

At the time he cited the violation, Workley believed that it was due to Consol's "low" negligence. See Exh. P-1A. This assessment of negligence, made contemporaneously with the citation of the violation, was confirmed by Workley's testimony. Workley persuasively explained how the crack would have been easy for the someone examining the return aircourse to miss. The examiner would have had to "look up at just the right location as he passed under it." Tr. I 203. Even an experienced mine examiner easily could have walked by the area and not have detected the crack. Tr. I 201. Therefore, I agree with Workley and find that the violation existed due to a low degree of negligence on Consol's part.

WEVA 92-921

SECTION 104(d)(2) ORDER NO. 3315335, 7/29/9l, 30 C.F.R. 75.515

Order No. 3315335 states:

> On the 6 South West Longwall at the power center a properly assembled entrance was not provided for the shearer circuit trailing cable plug. Bolts were missing from the back of the cable plug assembly thereby not providing proper strain relief. Mine management was told on July 25, 1991 that this needed to be repaired before starting load coal with the longwall. Two passes were mined. Bill Rice was the responsible official.

Exh. P-3(B). The order alleges an S&S violation of section 75.515 and that the violation was the result of Consol's unwarrantable failure to comply with the cited standard.(Footnote 7)

Michael Kalich, an electrical inspector for MSHA, testified on behalf of the Secretary. Kalich explained that on July 25, 1991, he conducted a compliance assistance inspection of the 6 southwest longwall of Consol's Humphrey No. 7 Mine. The longwall was in the process of being set up and consequently was not yet in operation. The inspection began at the longwall power center. Tr. II 13. (The power center was located on intake air at the track heading. At the power center incoming 7200 high voltage power was transformed to the 995 voltage power that was utilized on the longwall. Tr II 13-14.)

Kalich stated that the power center had four cables that went from the center to the longwall master control boxes. The cables were attached to the center by a cable coupler. The case of the coupler was metal. He explained that the coupler consisted of two parts: one part was bolted to the power center itself, the other part was in essence a plug that terminated the cable and that plugged onto the part of the coupler attached to the power center. Kalich drew an analogy, "[I]t's a large version of a plug that you would use in your house. It just has more connection points." Tr. II 16.

Upon inspecting the cables, Kalich found that one had a coupler (also known as a strain clamp) that was missing a bolt. Tr. II 14.

Kalich identified a picture of a coupler similar to the one that he had observed. Exh. P-1(B). Kalich testified that the cable that terminated in the coupler was about two and one half inches in diameter. The coupler was approximately l8 inches long and 10 to 12 inches wide. At the point where the cable entered the coupler, a bolted cable clamp helped to hold the cable in place. Tr. II 16-17, see also Exh P-l(B)(part "I" of bottom diagram). The purpose of the clamp was to prevent strain on the cable as it entered the coupler. Tr. II 17.

Kalich stated that during his inspection on July 25, he found missing one of the bolts that secured the clamp to the cable. When he returned on July 29 and conducted a regular inspection of the longwall, the bolt was still missing and he issued the subject order of withdrawal. Tr. II 17. Kalich

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7 Section 75.515 states in pertinent part:

> Cables shall enter metal frames of motors, splice boxes, and electric compartments only through proper fittings.

maintained that because the clamp was loose, the cable was loose where it entered the coupler and that the cable could be moved. Kalich stated that had the bolt been present the cable could not have been moved. Tr. II 35-36.

Kalich further stated that by not having the clamp tightened around the cable, when the cable was pulled it would place a strain on the internal connections inside the coupler. If the internal connections, which are not insulated, were pulled loose the wires could move around inside the coupler housing, they could contact other wires and create an electrical fault inside the coupler. Tr. II 25. In turn, this could burn a hole in the metal case of the coupler and cause a fire. In addition, any person then in contact with the coupler would be subject to a shock and burn hazard. Tr. II 26-27.

Stanley Brozik, the safety supervisor at the mine, testified on behalf of Consol. Brozik traveled with Kalich on July 29 and the subject withdrawal order was issued to him. Brozik stated that the cited clamp was secured around the cable with two bolts. He agreed that on July 29, one of the bolts was present and one was missing. He further agreed that Kalich was able to wiggle the cable because the clamp was not tightened on one side. Tr. II 71-72, 75.

EXISTENCE OF THE VIOLATION

The evidence establishes that the cable entered the metal frame of the cable coupler through a fitting that was loose due to the missing bolt on the strain clamp. A loose fitting is not a proper fitting and I conclude that the violation of section 75.515 existed as charged.

S&S AND GRAVITY

There was a violation of the underlying safety standard. The discrete safety hazard contributed to by the violation was described by Kalich:

> There would have to be some way that sufficient strain or movement would be applied to the cable to cause the connections to become loose or to be pulled out inside the coupler. . . [T]hen you would have a bare wire flopping about inside the coupler . . . [and if phase to phase contact occurred] you would have arcing, burning, and the possibility of a fire.

Tr. II 53. As noted, Kalich also believed that in the event of phase to phase contact, a shock hazard would exist for anyone handing the coupler. Tr. II 27. Further, Kalich testified that during the course of normal mining operations the cable would be pulled when miners picked up and moved the cable and that over time, the movement of the cable would loosen the connections. Tr. II 48-50. This testimony was not disputed by Brozik. I conclude therefore that the evidence established the loose clamp contributed to the possibility of a fire endangering those in the immediate area of the power center or working inby and of a shock endangering anyone handing the coupler at the moment phase to phase contact occurred and thus that the second element of the Mathies test has been satisfied. Further, because any resulting injury from burns, smoke inhalation or shock would be of a reasonably serious nature, the fourth element likewise has been satisfied.

As is frequently the case when the Secretary alleges that a violation is S&S, the question is whether the Secretary has established a reasonable likelihood that the hazard will result in an injury. In other words, had normal mining operations continued on the longwall, would there have been a reasonable likelihood of "an event in which there [would have been] an injury?" U.S. Steel Mining Co., 6 FMSHRC 1834,1836 (August 1984).

Here, I conclude the answer is "no." Kalich stated that in order for there to be a fire or shock hazard, the connectors inside the coupler would have had to contact one another. In order to do this the cable and the coupler would have had to be subject to repeated movement. The only way the cable and coupler would be moved, according to Kalich, was manually or by using a winch. Kalich believed that a person pulling once on the cable would not be able to loosen the connections, that the movements would have to take place over time, but he did not know how much movement would be required. Tr. II 48. Nor was he able to testify that he had ever seen internal coupler connectors that made contact under circumstances similar to those that he cited. Tr. II 58. Further, he admitted that in order for the winch to move the cable in such a way as to put any strain on the coupler, the winch would have to have been used incorrectly. Given these factors, I cannot conclude that the Secretary has established that had normal mining operations continued on the longwall it

was reasonably likely that the connectors inside the coupler would have become detached and touched one another leading to a fire or to a shock injury.(Footnote 8)

Even though I do no find that the violation of section 75.515 was S&S, I still conclude that it was of a serious nature. A potential hazard to miners from burns, smoke inhalation and/or shock injuries existed as did the possibility that the violation could cause such hazards to occur. In my view the fact that the hazards were not reasonably likely to occur reduces what would have been a very serious violation to one that was serious.

UNWARRANTABLE FAILURE AND NEGLIGENCE

I also conclude that the Secretary has failed to establish that the violation was due to Consol's unwarrantable failure to comply with section 75.515. Kalich's unwarrantable failure finding was based upon his compliance assistance inspection of July 25. As Kalich put it: "I had pointed the [missing bolts] out on July 25 . . . [and had] told mine management that they needed [to be] fixed before the 29th and found that they hadn't been corrected. [I]n my mind it left me no choice but to issue a [section l04](d)(2) order with high negligence." Tr. II 36-37. When asked whether he believed Consol had consciously disregarded the requirements of the standard Kalich stated: "Seeing as how I pointed it out, that's the conclusion that I c[a]me to."
Tr II 43, See also Tr. II 45.

Brozik testified that the bolt had not been purposefully left off of the coupler clamp. Although, Brozik was not present on the section on July 25, he explained that he got his information about conditions on July 25 from talking with the company safety escort and "everybody on the site." Tr. II 73, 74-75. Brozik believed that on July 25 the bolt was available but that the nut to secure it was missing, and that on July 29, the nut was on the section but the mechanic had not yet attached the bolt and nut to the clamp. Tr. II 68, 70-71, 73. If the bolt was there, Brozik did not know why it had not been secured to the clamp. Tr. II 83.

The fact that the missing bolt was pointed out to Consol during the compliance assistance inspection does not, in and of

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8 In concluding that the violation was not S&S, I have not considered the fact that should the connectors contact one another, the circuit breaker would have tripped because I accept Kalich's testimony that even if the circuit breaker worked as it was supposed to there would still have been an electrical arc before power was cut off. Tr. II 53. Rather, I am relying on what seems to me to be a dearth of evidence that the cable and coupler would be subjected to the repetitive movements necessary to cause an electrical malfunction.

itself, establish unwarrantable failure. It proves knowledge of the violative condition, but such knowledge is not a sole prerequisite for unwarrantable failure. There must be other factors that allow a conclusion of inexcusable conduct on Consol's part. Here, those factors are lacking.

It is helpful to recall that the compliance assistance inspection came at a time when production had not yet begun on the longwall and when Consol was attempting to make certain that prior to production all was "kosher" on the section. Other potential violations of regulations were pointed out to Consol. In the scope of the impending startup of the longwall, the fact that one bolt was missing from a clamp for the cable coupler on one of the cables at the power center might reasonably have been viewed by Consol as a relatively minor problem, especially since, as I have found, the condition did not pose a reasonable likelihood of producing a fire or shock accident once mining began. In this context, I conclude that it was not the kind of condition whose failure to correct would automatically rise to the level of inexcusable conduct, and this is so regardless of whether or not Brozik was right in believing that Consol had secured the missing nut but had inadvertently failed to install it.(Footnote 9)

Rather than an unwarrantable failure, I conclude that the fact that the missing bolt was not installed on July 29 was likely due to inattention or inadvertence and thus that in allowing the violation Consol was negligent.

OTHER CIVIL PENALTY CRITERIA

As revealed by the proposed assessment forms contained in each docket and which the parties have stipulated accurately set forth Consol's size, the company is large. In addition, and as also stipulated by the parties, the size of any penalties assessed for the subject violations will not affect Consol's ability to continue in business. Further, I find that in each instance where a violation has been found or where the parties have sought my approval of a settlement, Consol demonstrated good faith in abating the violations. Finally, I find that Consol's history of previous violations at the mines involved is not such as should otherwise increase the penalties assessed or agreed to by the parties.

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9 The mischief of automatically finding unwarrantable failure based solely upon conditions that have been pointed out during a compliance assistance inspection was remarked upon by counsel for Consol. Tr. II 90. I agree with him that such automatic unwarrantable findings can go far to lessen the effectiveness of the compliance assistance program, a program that has proven of great value in furthering the goals of the Act.

CIVIL PENALTY ASSESSMENTS FOR CONTESTED VIOLATIONS

DOCKET NO. WEVA 92-933

ORDER NO. 3715916, 1/8/92, 30 C.F.R. 75.400

The Secretary has proposed a civil penalty of $800. Noting especially that Consol is a large operator and that the violation is serious and the result of a high degree of negligence on Consol's part, I conclude that a civil penalty of $l,000 is appropriate.

ORDER NO. 3715920, 1/13/92, 30 C.F.R. 75.400

The Secretary has proposed a civil penalty of $1200. For the same reasons as those set forth above, I conclude that a civil penalty of $1,000 is appropriate.

DOCKET NO. WEVA 92-988

CITATION NO. 3718486, 12/3/92 30 C.F.R. 75.202(a)

The Secretary has proposed a civil penalty of $227. The violation is without question serious, the low degree of negligence on Consol's part is a significant factor mitigating what would otherwise have been a much more substantial civil penalty. I conclude that a civil penalty of $300 is appropriate.

DOCKET NO. WEVA 92-921

ORDER NO. 3315335, 7/29/91, 30 C.F.R. 75.515

The Secretary has proposed a civil penalty of $1,000. Although this was a serious violation and although Consol is a large operator, I believe that given the fact that the violation was due to Consol's inadvertence or inattention rather than to
its purposeful disregard of the requirements of the standard or to its inexcusable failure to comply, the proposal is excessive. I conclude that a civil penalty of $400 is appropriate.

ORDER

Consol is ORDERED to pay civil penalties in the settlement amounts shown above in satisfaction of the violations in questions. Further, Consol is ORDERED to pay civil penalties in the assessed amounts shown above in satisfaction of the contested violations in question.

With respect to the settled cases, the Secretary is ORDERED to modify Citation No. 3307656 and Order No. 3716059 by deleting the S&S designations. The Secretary is ORDERED to modify Citation No. 3715905 and Citation No. 3718483 by deleting the

S&S designations. The Secretary is ORDERED to modify Order No. 3108769 and Order No. 3108741 to citations issued pursuant to section 104(a) after having deleted the unwarrantable failure designations.

With respect to the contested case, the Secretary is ORDERED to modify Order No. 3315335 by deleting the S&S designation and the unwarrantable designation. Further, the Secretary is ORDERED to modify Order No. 33l5335 to a citation issued pursuant to section 104(a) of the Act. 30 U.S.C. 814(a).

Payment by Consol is to be made to the Secretary within thirty (30) days of the date of this decision, and upon receipt of payment, these matters are dismissed.

David F. Barbour
Administrative Law Judge

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