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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 92-992
	:	A.C. No. 46-01453-04013
v.	:	
	:	Docket No. WEVA 92-993
CONSOLIDATION COAL COMPANY, Respondent	:	A.C. No. 46-01453-04014
	:	Docket No. WEVA 92-1042
	:	A.C. No. 46-01453-04020
	:	
	:	Humphrey No. 7 Mine

PARTIAL DECISION PENDING FINAL ORDER

Appearances: Charles M. Jackson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Daniel E. Rogers, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Barbour

STATEMENT OF THE CASE

In these civil penalty proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (the "Mine Act" or "Act"), the Secretary of Labor ("Secretary"), on behalf of the Mine Safety and Health Administration ("MSHA"), charges Consolidation Coal Company ("Consol") with violating various safety regulations for underground coal mines, promulgated by the Secretary at Title 30, Part 75 of the Code of Federal Regulations ("C.F.R."). In addition, the Secretary charges that certain of the violations constituted significant and substantial contributions to mine safety hazards ("S&S" violations) and that one was the result of Consol's unwarrantable failure to comply with the cited regulation.

A hearing on the merits was conducted in Morgantown, West Virginia. At the commencement of the hearing, counsels advised me they had agreed to stipulations applicable to all of the violations they would try. Tr. 9. They advised me further they had agreed to settle one of the violations at issue and they requested a stay in the contest of another citation pending the then forthcoming decision of another Commission administrative law judge. They added that they would resolve their differences with respect to the stayed contest based upon that judge's

decision. Tr. 13-14. In response, I requested the parties read

their stipulations into the record. I also indicated that I would entertain on the record a motion to approve the settlement and would rule upon the motion in this decision. Finally, I indicated that I would grant the stay. Tr. 13-15.

STIPULATIONS

The parties stipulated as follows:

> l. Consol is the owner and operator of the Humphrey No. 7 Mine;
>
> 2. Operations of Consol are subject to the jurisdiction of the Mine Act;
>
> 3. This case is under the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated administrative law judge pursuant to sections 105 and 113 of the Mine Act;
>
> 4. The individual whose signature appears on the citations at issue, Thomas W. May, Sr., was acting in his official capacity as an authorized representative of the Secretary of Labor when each of the citations was issued;
>
> 5. True copies of each of the citations at issue in this case were served on Consol or its agent as required by the Mine Act;
>
> 6. The total proposed penalty for the citations contested by Consol in this case will not affect Consol's ability to continue in business.

See Tr. 9-10.

THE SETTLEMENT

Docket NO. WEVA 92-992

Citation No.	Date	30 C.F.R. Section	Assessment	Settlement
3108615	2/3/92	77.402	$20	$20

The citation was issued because a Black & Decker hand-held drill did not have controls requiring constant hand or finger

pressure to activate. Rather, the drill was equipped with a lock on its trigger switch. Thus, the drill had a safety device, but not the kind of protective device required by the standard. The inspector found that the violation was not S&S and was due to Consol's moderate negligence. The inspector also indicated it was unlikely the drill operator would have been injured due to the violation. The parties stated that the had agreed that Consol would pay the proposed civil penalty.

Considering the fact that the drill was protected from accidental activation by a safety device and taking account of the inspector's low assessment of gravity and his finding of moderate negligence, as well as the other civil penalty criteria set forth at the close of this decision, I conclude that the proposed settlement is warranted and I approve it. Subsequently, I will order Consol to pay the agreed amount.

THE STAY

DOCKET NO. WEVA 92-992

Citation No.	Date	30 C.F.R. Section	Assessment
3108613	1/28/92	75.1003(c)	$206

Counsel for the Secretary stated the parties' request that the contest of the penalty proposed for this alleged violation be stayed pending a decision by Commission Administrative Law Judge Avram Weisberger. He further stated that the parties expected to resolve their differences regarding this violation based upon that decision. I granted the parties' request.

Judge Weisberger's decision was issued subsequent to the hearing on this matter. Consolidation Coal Co., 15 FMRHRC 436 (March 1993). The parties have yet to advise me that they have resolved their differences. Therefore, at the close of this decision I will order the parties to file their settlement agreement and to move for my approval of said agreement. This decision will not become final until all issues concerning Citation No. 3108613 have been resolved.

CONTESTED CITATIONS AND ORDER

ORDER OF PROCEEDING

I will discuss and decide the contests in the sequence in which the parties chose to try them: Docket No. WEVA 92-993, Docket No. WEVA 92-992 and Docket No. WEVA 92-1042.

DOCKET NO. WEVA 92-993

Section 104(a) Citation No. 3108745, 2/6/92, 30 C.F.R. 75.305

The citation states:

> The weekly examination for hazardous conditions conducted on 2/3/92 by R. Calonero was not adequate. The examination was of the 12 East return aircourse. There was damage to one stopping and a 1/2 block out of another stopping that was not listed in the record book.

G. Exh. 5. The citation charged that the condition constituted a violation of section 75.305 and that the violation was S&S.(Footnote 1)

THE TESTIMONY

THOMAS W. MAY

Thomas W. May, an inspector employed by MSHA, was the sole witness for the Secretary. May stated that on February 6, 1992, he arrived at Consol's Humphrey No. 7 Mine at approximately 7:45 a.m. He was at the mine to conduct a regular inspection. Tr. 28-29. Shortly after arriving, May went underground accompanied by Stanley Brozik, Consol's safety supervisor, and by the representative of miners, Sam Woody. Tr. 29. As the inspection party traveled the 12 east return aircourse, May noted two defects in stoppings located between the number three and number four entries.

One of the defects was "a place in the stoppings where half a block had been left out." Tr. 29. (May described the "place" as a hole approximately eight inches square. Id.) May explained that such a hole normally is made to permit the hose from a rock

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1 30 C.F.R 75.305 which was in effect when the subject citation was issued and which subsequently has been revised effective August 16,1992, 57 FR 20914 (March 15, 1992), required in pertinent part, that in addition to preshift and daily examinations, examinations for hazardous conditions be made at least once each week by a certified person designated by the operator at certain specified areas and that if any hazardous condition is found it shall be reported to the operator promptly and that a record of the examinations shall be kept in a book on the surface by the operator and open to inspection by interested persons. Section 75.305 was replaced by 30 C.F.R. 75.364.

dusting machine to pass through the stopping. After rock dusting has been completed, the hose is withdrawn and the hole is patched. In this case, although the hose was no longer there, no one had repaired the stopping. Tr. 29-30.

Also, May observed another stopping that was being crushed due to "heaving" of the floor. (May described "heaving" as "where the bottom actually goes into an arch. The pressure on the coal pillars shoves down and the bottom in the open entries then comes up." Tr. 31.) May testified that the crushing of the stopping created gaps in the stopping around the frame of its man door and May said he could hear air leaking through the gaps. Tr. 33.

Plastic had been placed over the stopping in what May speculated was an attempt to stop the air from leaking. According to May, this was not successful and the "plastic was flapping [in the leaking air] and making all kinds of noise."
Tr. 37. The plastic was on the intake side of the stopping, and May was walking the return side. Nonetheless, May could see the plastic through the holes and could hear it flapping. He believed that Robert Calonero, who had conducted a weekly examination for hazardous conditions on February 3, and who had walked the return entry as part of that examination, likewise could have seen and heard the plastic. Tr. 51-52.

With regard to the hazards presented by the crushed stopping, May noted that the air was leaking from the intake entry into the return entry and he was fearful the leaking air would cause a short-circuit of the ventilation of the working section, which in turn would result in a velocity of air at the face that was inadequate to render harmless and carry away methane and respirable dust. Tr. 34. In addition, the hole in the first stopping would contribute to the recirculation.

May explained that he believed the hole in the first stopping was purposefully cut to allow the hose from the rock dusting machine to pass through the stopping. Although he did not know exactly when this had happened, he had observed a person's footprints on the rock dusted floor of the return entry and he believed that the footprints were made by Calonero when he examined for hazardous conditions on May 3. Tr. 30. May also explained that he believed the second stopping had been subjected to heaving pressures for a long time and that the condition of the stopping had deteriorated progressively until it had reached the stage in which he found it.

Upon returning to the surface, May inspected the book in which the reports of the weekly examination for hazardous conditions were kept. He noted that not only was the examination report for February 3 missing a reference to the condition of the stoppings, but also that there was no reference to the condition in the report of the examination conducted previous to

February 3. Tr. 36-37, 43-44. May found the failure to report the condition of the stoppings to be a violation of section 75.305. Tr. 40.

May also found that the violation was S&S. He stated that the mine liberates methane at the rate of more than one million cubic feet every twenty-four hours. Tr. 40. Had the condition of the stoppings been allowed to continue unabated during normal mining operations, he believed that ventilation in the return entry would have been short circuited to the extent that it was reasonably likely an explosive concentration of methane would have accumulated and an ignition or an explosion ignited by friction from the bits on the continuous mining machine cutting into rock at the face would have occurred. Tr. 41, 62. He explained that without the condition of the stoppings being recorded, the stoppings probably would not have been repaired, and it was reasonably likely that the stopping that was being crushed would have collapsed completely and short-circuited the air. Tr. 62-63. In May's opinion, by recording the condition of the stoppings in the examination book, "the mine foreman can address the situation, get it corrected in a timely manner and eliminate the hazard." Id. (However, May also confirmed that at the time he observed the condition of the stoppings there was 27,450 cfm at the face of the affected section -- three times more than the required minimum and that he had found point-one percent (.1%) methane in the return air, as low a reading as he could obtain using his methane detector. Tr. 57-58, 61-62.)

Further, May believed Consol was negligent in failing to note the condition in the weekly examination book. May testified that the foreman, Earl Hagedorn, had told him that he did not want such conditions put in the book and that he preferred miners write descriptions of conditions needing correction on slips of paper and give him the slips. Tr. 44-45. May told Brozik what Hagedorn had said and Brozik told Hagedorn that the conditions "had to be put in the book." Tr. 45.

May also testified he believed that Calonero should have been aware of his failure to perform an adequate examination on February 3. Tr. 47. May testified that he believed the footprints in the rock dust on the floor of the return entry were Calonero's and were made after the hole for the rock dusting machine's hose had been cut in the stopping. He believed this because the footprints went straight up the entry the way an examiner would have walked, rather than back and forth across it, the way a miner rock dusting the entry would have traveled. Tr. 54-55, 83-84. Moreover, and in May's opinion, the stopping that was being crushed-out had deteriorated gradually and thus should have been readily observable on February 3. Tr.87-88.

When asked by counsel whether the violation cited was for failing to record the condition of the stoppings or for failing to notice the conditions during the weekly examination, May replied, "It would be one and the same . . . If he did not record them, then the only thing that I can assume is that he didn't notice them or did not do his exam properly as the regulation requires." Tr. 48. May added, "He failed to report the stopping damage, so the only thing that you can assume from that was that he was unaware [of the condition of the stoppings] because he wasn't doing the job that was required by section 75.305."
Tr. 50.

Finally, May stated that the ventilation plan for the Humphrey No. 7 Mine required the stoppings to be reasonably air tight and that the conditions he found on February 3 violated the plan. Nonetheless, he wrote the citation solely "for the examination." Tr. 56, 61.

ELDON HAGEDORN

Eldon Hagedorn, the mine foreman at Humphrey No. 7 Mine, was the first witness to testify for Consol. Not surprisingly, Hagedorn had a different view of the conversation in which he told May that he wanted conditions requiring correction to be written down and the written reports to be given to him. He stated the practice at the mine was for the shift foremen to advise him of conditions that were not yet hazardous but which had the potential for so becoming. He wanted to be advised of the conditions in order to make certain they were taken care of. Tr. 94-95. He stated that he had never given instructions that hazardous conditions should not be entered in the weekly examination book because, "It would be my job." Tr. 95. Calonero, he added, had not told him about the condition of the subject stoppings nor ever given him a written slip of paper referring to it. Tr. 95-96.

STANLEY BROZIK

Stanley Brozik, safety supervisor at the Humphrey No. 7 Mine, was Consol's last witness. He accompanied May when May issued the citation, and he agreed that the stoppings were basically as described by May. Tr. 100-101. Further, he stated that if the stopping that was being crushed had failed completely there would have been a significant reduction of ventilation at the face. He explained that the intake air would have leaked directly into the return entry at the crushed stopping, robbing the face of ventilation. Tr. 101-102. He noted, however, that had normal mining operations continued at the face, the continuous mining machine was equipped with a methane monitor which would have "knock[ed] the power" long before the methane content of air at the face would have reached an explosive level. Tr. 102. He also noted that the continuous mining machine

operator had to check for methane every twenty minutes and that the section foreman had to check every two hours. Tr. 102-103.

Brozik speculated that the crushed stopping would not have collapsed the next day or the following day. He stated that it might have lasted "over a period of years" but he admitted this was "only . . . speculation." Tr. 106.

THE VIOLATION

Consol is charged with an inadequate weekly examination for hazardous conditions. There is no serious dispute that the stoppings were in the condition described by May. There is likewise no dispute that the condition of the stoppings was not entered in the weekly examination book. Section 75.305 requires hazardous conditions found by the examiner during the course of the weekly examination of a return aircourse to be reported promptly and a record of the examinations to be recorded in a book kept on the surface. As May testified, and as common sense indicates, a main purpose of the recording requirement is to alert miners to the hazardous conditions and to facilitate their correction, an action also required by the regulation.

Because the condition of the stoppings was not recorded, the question is whether the condition was hazardous? I fully credit May's testimony regarding the danger presented by the defective stoppings, and I note that May was not alone in recognizing the hazard. Brozik too agreed that had the second stopping been crushed-out, air reduction at the face would have been significant. I conclude that the condition of the stoppings created the potential for a serious mine accident and I find that the condition was hazardous.

I also conclude that the condition existed on February 3 when the weekly examination was conducted. I am fully persuaded by May's explanation that the footprints he observed in the entry were most likely those of Calonero. Certainly, none of Consol's witnesses offered as plausible an explanation. Moreover, the weight of the evidence establishes that the hole in the first stopping was purposefully made to accommodate the hose of the rock dusting machine. Obviously, the entry had to have been rockdusted before Calonero's footprints could have appeared in the dust. Thus, I infer that the hole existed when Calonero passed it.

With respect to the crushed stopping, May's testimony that such a condition happens over time is persuasive and was not refuted. While the stopping may not have been as badly crushed on February 3 as when May saw it three days later, I conclude that it was nonetheless in a noticeably deteriorated state and its condition should have been recorded.

I therefore agree with May that Consol's failure to record the condition of the subject stoppings in the surface examination book establishes that the weekly examination for hazardous conditions conducted on February 3 was inadequate and that the Secretary has proved a violation of section 75.305.

S&S

In Mathies Coal Co., 6 FMSHRC 1 (January 1984), the Commission set forth the four elements of a "significant and substantial" violation. The Commission explained that to find a violation S&S, the Secretary has the burden of proving an underlying violation of a mandatory safety standard, a discrete safety hazard (a measure of danger to safety) contributed to by the violation, a reasonable likelihood that the hazard contributed to will result in an injury, and a reasonable likelihood that the injury in question will be of a reasonably serious nature. In U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984),the Commission amplified the meaning of the third element of the Mathies test, explaining it "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury."

Here, I have found that there indeed was a properly cited violation of section 75.305. Moreover, I agree with May that the failure to adequately inspect for hazardous conditions contributed to a discrete safety hazard -- a failure to fix the stoppings and the resulting danger of inadequate ventilation at the face leading to the buildup of methane and the exposure of miners at the face and on the section to an ignition and explosion hazard. I further agree with May that had there been an ignition and explosion the incident would have resulted in reasonably serious, even fatal, injuries to miners.

The question is whether the Secretary has established a reasonable likelihood that the failure to repair the stoppings would have resulted in an event in which there would have been an injury? I conclude that he has. I note the Commission's admonition that the likelihood of injury must be evaluated in terms of continued normal mining operations, U.S. Steel Mining Co., 6 FMSHRC 1573, 1574 (July 1984), and further that the operative time frame for determining if a reasonable likelihood of injury exists includes the time the violations would have existed if normal mining operations had continued. Halfway, Inc., 8 FMSHRC 8,12 (August 1986), U.S. Steel Mining Co. 7 FMSHRC 1125, 1130 (August 1985).

In essence, Brozik agreed with May that had normal mining continued, the stopping that was being crushed would have collapsed and that this would have led to a loss of ventilation at the face. Their fears were warranted in view of the nature of

the pressures to which the stopping was being subjected and in my view establish the reasonable likelihood that face ventilation would have been disrupted and given the gassy nature of the of the mine, that methane would have accumulated to explosive levels. I come to this conclusion because the testimony establishes that the pressure on the stopping was continuous and that the resulting deterioration of the stopping was ongoing. In addition, the area in which the stoppings existed was not inspected on a daily basis and one of the premises of the standard's requirement to record reported hazardous conditions obviously is that the recording will serve as a signal for correction. In short, the failure to adequately comply with section 75.305 on February 3, was causally linked with the condition of the stoppings on February 6, and would have remained so linked had normal mining operations continued.

GRAVITY AND NEGLIGENCE

This was a serious violation. The importance of adequate compliance with the cited regulation was pointed out by May and is implicate in the standard itself. As I have noted, the recording of hazardous conditions can be fundamental to their correction and, in my opinion, is especially important when the hazard relates to something so central to safety as the ventilation of the face in a gassy mine.

The fact that the condition of the stoppings was visually obvious and was not entered in the weekly examination book, in and of itself establishes Consol's negligence. The regulations requires such recording and in failing to comply Consol failed to meet the standard of care required by the regulation.(Footnote 2)

Section 104(a) Citation No. 3108748, 2/12/92, 30 C.F.R. 75.503

The citation states:

> The Joy continuous miner on the 12 East section is not maintained in permissible condition. The continuous miner is in the face of the [No.] l entry and there are two headlights that are not securely mounted on the equipment. The headlight[s] are at the roof bolting station opposite the operator. One headlight is loose and the other has one bolt missing.

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2 I am not persuaded, however, that Hagedorn instructed miners to disregard section 75.305's requirement to record hazardous conditions. He denied it, and as he said, such instructions would have been cause for his dismissal. Moreover, in the context of running a productive mine, Hagedorn's explanation that he wanted to be advised in writing about conditions that were not yet hazardous but that could deteriorate to that level is both pragmatic and plausible.

G. Exh. 6. The citation charges that the condition constituted a violation of section 75.503 and that the violation was S&S.(Footnote 3)

THE TESTIMONY

THOMAS W. MAY

May testified that on February 12, 1992, he conducted an inspection at the Humphrey No. 7 Mine in the company of Consol safety escort, Robert Smith, and miners' representative, Sam Woody. While visiting the l2 east section, May checked the continuous mining machine to determine whether it was maintained in permissible condition. Tr. 113-114. On the left side of the machine May observed two headlights. Each light had two bolts that attached the light to the frame. The bolts holding one of the headlights to the frame were loose. The other headlight also had a bolt missing and May described its second bolt as "extremely loose." Tr. 115. According to May only "a couple of threads" held the second bolt to the frame. The nut that should have secured the bolt to the frame had fallen off. Tr. 116.

May stated that when he observed the continuous mining machine it was inby the last open crosscut. The machine was energized but was not mining. If it had been mining, the headlights would have been approximately ten feet from the face. Tr. 117. May could not say for certain whether the continuous mining machine had been in use prior to his arrival on the section, but he believed that if it had not been, it was ready to start mining. Tr. 180-181. (May testified that he asked the mining machine operator if he were ready to begin and the operator answered, "Yeah." Tr. 178.) May stated that when he called the condition of the headlights to Smith's attention, Smith summoned a mechanic who replaced the missing bolts and nut and who then tightened the headlights to the frame. Tr. 117.

May was asked his opinion as to whether the condition of the headlights violated a mandatory safety standard? He stated that section 75.503 requires electric face equipment taken into or used inby the last open crosscut to be maintained in permissible

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Section 75.503 states:

> The operator of each coal mine shall maintain in permissible condition all electric face equipment required by 75.500, 75.501, 75.504 to be permissible which is taken into or used inby the last open crosscut of any such mine.

Consol does not challenge the Secretary's contention that the cited continuous mining machine is "electric face equipment."

condition. According to May, "permissible condition" means that such equipment be maintained as approved by MSHA. May stated that the regulations setting forth the standards for approval are found at 30 C.F.R. Part 18. In particular, he noted that section 18.46(b) requires headlights to be protected from damage by guarding. Tr. 119-120, 145-147.(Footnote 4)

Regarding the hazard presented by the violation, May stated that had the mining machine continued in operation, the vibration of the machine could have caused the headlights to fall from the machine. In fact, in his opinion, the headlight that was missing one bolt altogether and had the nut missing from the other bolt would have fallen during the course of the shift on which the violation was cited. Tr. 123. Further, the other headlight would have continued to loosen during ongoing mining, and it too ultimately would have fallen, although perhaps not during the course of the ongoing shift. Tr. 157.

Had one or both of the lights fallen from the frame they would have pulled their conductors loose, which in turn would have exposed bare, uninsulated wires. If the exposed wires had contacted a person (and May noted the miner installing roof bolts at the face usually worked within one foot of the lights) the person could have been seriously shocked or even electrocuted. Or, had the uninsulated conductors touched one another, they could have sparked and become an ignition source for methane or coal dust at the face. Tr. 124-127. In addition, any arc or spark could have ignited the lubricant used to grease the mining machine's ripper heads. Tr. 157-158. In May's opinion, the situation created by the condition of the headlights was "very dangerous." Tr. 129.

May believed it reasonably likely that a miner would have been shocked had one of the headlights become detached from the machine. He noted that the roof bolter's proximity to the light and the fact that the miner installing the roof bolts would have had his back to the machine while he was working and would have been unable to see the condition of the headlights. Tr. 129-130.

May also believed it "real likely" an instantaneous arc or spark sufficient to ignite methane or coal dust at the face or to ignite the lubricant on the machine would have occurred when a headlight fell from the machine. Tr. 131. May acknowledged that the machine had short circuit protection, however he stated that

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Section 18.46(b) states:

> Headlights shall be mounted to provide illumination where it will be effective. They shall be protected from damage by guarding or location.

power to the machine would not have deactivated necessarily if the conductors touched. Tr. 150-151.

May was of the opinion that Consol management should have been advised of the condition of the headlights through having been told by the continuous mining machine operator or the miner installing roof bolts. Or, management should have known of their condition through the foreman's on-site observation. Tr. 136-140. May emphasized that the condition of one of the lights was visually obvious because due to the missing and loose bolts the light was not "sitting square." Tr. 141. In fact, its out of kilter position had alerted May to check the condition of both headlights. Tr. 144.

ROBERT SMITH

Company safety escort Smith agreed with May that the headlights were loose. Tr. 166. However, he did not recall whether one of the lights was missing a bolt. Tr. 169. Smith stated that the continuous mining machine operator would have checked the headlights before he started to mine. Although the fan was on and the section was ventilated, Smith did not believe mining had actually started when the inspection party arrived on the section. Tr. 170-171. Smith admitted that the party had not arrived on the shift until two hours after the shift had commenced and he acknowledged that this would have been a late time to have begun mining, however, he explained the late start by speculating, "things . . . break down." Tr. 172. Smith reviewed notes he had written after the violation had been cited. They indicated that "the people on the section had not had time yet to make the checks on the miner. At the time of the inspection, the crew had not started mining." Tr. 174. Smith stated that although he did not recall May asking the foreman if he was ready to start mining, it would not have surprised him if May had done so. Tr. 175.

THE VIOLATION

I conclude that May properly cited Consol for a violation of section 75.503. That regulation requires to be in permissible condition all electric face equipment taken into or used inby the last open crosscut. There is no doubt, and I find, that the headlights were loose as described by May. Nor is there any doubt but that the continuous mining machine is electric face equipment and that when it was observed by May it was inby the last open crosscut. Indeed, it had been backed but a little distance away from the face in order to bring it under supported roof. Tr. 179. The question is whether the condition of the lights meant that the continuous mining machine was no longer in permissible condition?

May and counsel for the Secretary believe that the missing and loose bolts and the resulting loose nature of the lights establish they were not adequately protected from damage by guarding or location and thus were not permissible pursuant to section 18.46(b). See Tr. 191. I disagree with this rationale. It seems to me that when section 18.46(b) refers to protection from damage by "guarding or location" it references the design of the equipment, not defects in the implementation of the design. Moreover, as I read the testimony, there is no basis for concluding the "location" of the headlights failed to protect them, and May was clear in his belief that the headlights did not require a guard.

In any event, I need not rule on the adequacy of the Secretary's permissibility theory because there is another well established basis for finding the headlights were not maintained in permissible condition. Section 75.506, 30 C.F.R. 75.506, sets forth the requirements for permissibility. Section 75.506(a), 30 C.F.R. 506(a), states that permissibility is dependent upon two criteria: (1) equipment must be built according to Schedule 2G or a modification thereof, and (2) it must be maintained according to schedule 2G or a modification thereof. Schedule 2G contains the substantive prerequisites of permissibility for, among other things, continuous mining machines. Appendix II of Schedule 2G lists various conditions that must be satisfied to retain permissibility, and one of the conditions is that "all bolts, nuts, screws and other means of fastening . . . shall be in place, properly tightened and screwed." Nor should this requirement come as a surprise to either Consol or the Secretary, for it has long been recognized. See Kaiser Steel Corporation, l MSHC 1229, 1233 (December 24, 1974).

As I have found, all bolts and nuts on the two lights were not in place and properly tightened. Therefore, the violation existed as charged.

S&S

I conclude that the Secretary also has established the S&S nature of the violation. May was specific in describing the potential hazards presented to miners, both in terms of a shock hazard and in terms of an explosion and fire hazard, and I find that both discrete safety hazards were established by his testimony. It makes sense, given the missing and loose bolts and the vibration of the lights caused by the operation of the continuous mining machine that, as May testified, one of the lights would have fallen during the shift on which the violation was cited, and it makes equal sense that the falling light would have pulled the conductors loose and exposed the bare wires, either touching them to the frame of the machine or to each other. (There was, afterall, nothing to restrain the lights

should they have started to fall from the frame.) The fact that the continuous mining machine had short-circuit protection, while lessening the chances of a shock injury, did not defeat it because, as May testified, such protection could have failed. Moreover, an arc or spark sufficient to serve as an ignition source in the gassy mine would have occurred almost instantaneously upon the conductors contacting the frame or one another and before the short-circuit protection could have "kicked in." Further, May's testimony clearly establishes, the presence in the immediate vicinity of the lights of at least two miners -- the continuous mining machine operator and the miner installing roof bolts -- who would have been subjected to the hazards had mining continued.

In my view, the testimony also establishes the reasonable likelihood that a shock injury or a methane explosion or fire would have occurred. I credit May's statement that he was told mining was about to begin on the section. While Smith's notes indicated there had not yet been time to check the continuous mining machine, the shift was already two hours old and there is no indication that the lights would have been checked and their condition detected and corrected before mining. In addition, while there was no testimony regarding the presence of methane on the section or coal dust or combustible lubricants on the machine when the violation was cited, all could have accumulated as mining progressed during the course of the shift and this is especially so of methane, given the fact that the Humphrey No 7 Mine is a gassy mine. See U.S. Steel Mining Co., 6 FMSHRC 1866,1868-69 (August 1984).

Finally, I credit May's belief that had a miner been shocked or subject to an ignition or explosion, the resulting injuries in all likelihood would have been of a reasonably serious nature. Indeed, had the hazard occurred the continuous mining machine operator and/or the miner installing roof bolts would have been lucky to have been only seriously injured.

GRAVITY AND NEGLIGENCE

This was a serious violation. The magnitude of the injuries that could have been triggered by the violation and the fact that miners on the section were exposed to hazards that were reasonably likely to occur establishes its grave nature.

Moreover, the violation was the result of negligence on Consol's part. As May noted, one of the lights was obviously skewed due to its missing and loose bolts, and this visual clue led May to check both headlights and to detect the violation. When he found that both headlights were loose, miners had been on the section for over two hours. Mining may not have commenced, but there were miners in the immediate vicinity of the continuous mining machine and they were ready to begin mining. Therefore, I

agree with May that the section foreman should have detected the condition and should have had it corrected.

DOCKET NO. WEVA 92-992

Section 104(a) Citation No. 3108607, 1/28/92, 30 C.F.R. 75.1722(b)

The citation states:

> The guard on the stationery dolly takeup pulley is not guarded for a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley. The guard is 33 inches wide and 20 inches high. It is 11 inches from the end of the guard to the pulley. There is another guard that has been removed from this area that is against the coal rib. There has been no shoveling done in the area of the guard that would have constituted removal of the guard when the belt was out of service. This condition is on the 5 Northwest section belt.

G. Exh. 10. The citation charges that the condition constituted a violation of section 75.1722(b) and that the condition was S&S.(Footnote 5)

THE TESTIMONY

THOMS W. MAY

May testified that on January 28,1992, he conducted an inspection of the Humphrey No. 7 Mine in the company of Smith and Sam Woody, the miners' safety representative. The inspection party proceeded to the Five Northwest Section conveyor belt drive. The drive mechanism powered the conveyor carrying coal from the longwall face. Tr. 235. Upon arriving at the drive May

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5 Section 1722(b) states:

> Guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley.

saw that the guard over the top of the drive pulley had been removed and placed against the rib. Tr. 206. The pulley itself was stationary, and as May acknowledged, guided the belt but did not drive it. Still, in his view the stationary pulley was part of the belt drive unit and thus was a "conveyor-drive pulley" as that term is used in section 75.1722. Tr. 233-234. As May stated, "You can have pulleys in your drive unit that do not have power going to them." Tr. 234. (He explained that the pulley helped to keep tension on the belt so that the belt would not slip. Without the pulley the conveyor belt drive mechanism could not drive the belt. Tr. 233.)

May described the removed guard as being approximately 4 by 6 feet in size. The guard had been fastened to the belt structure and had hung down over the point where the conveyor belt passed the drive pulley. Tr. 207. In place of this larger guard a smaller guard had been installed, it being about 30 inches wide by 20 inches high. According to May, the smaller guard left a gap of approximately 11 inches between the end of the guard and the pinch point. Tr. 206-207. Further, the rib was about 24 inches from the guard. Tr. 209. The area between the rib and the belt structure was used as a walkway. Tr. 210. Although usually the belt was positioned in the middle of the entry (Tr. 262), in this instance it was off to one side (the right hand side when facing outby) and thus a wider walkway existed on the left side of the belt than on the right side. May agreed that there was screening all along the left side of the belt to prevent access to the belt. Tr. 235-236 and 238. In addition, there were crossovers and crossunders at intervals along the belt to provide access to the narrow side of the belt to those walking the right side and vise versa. Tr. 238. In fact, there was a crossunder just outby the subject belt drive unit. Id. According to May the narrow walkway on the right side (the walkway between the rib and the belt drive pulley guard) was used by preshift examiners on alternate shifts during their examinations of the belt. (In other words, preshift examiners walked both sides of the belt on an alternate basis.) According to May the narrower walkway also was used by miners assigned to clean the belt and by miners who were required to travel to the regulator. Tr. 210-212.

In May's opinion the smaller guard was inadequate because the 11 inch gap would have allowed a miner to reach in and become caught in the pinch point between the belt and the pulley.
Tr. 208.

May also testified that the area involved had an "area guard," which purportedly guarded the entire area containing the conveyor belt drive mechanism. The area guard consisted of pieces of screen secured to the belt structure and extending to the right side ribs at both ends of the drive mechanism. One screen was located approximately 10 to 15 feet from the area

where the belt drive pulley guard was in place and the second screen was located at the other end of the belt drive belt mechanism. May could not recall how far that was from the pulley, but estimated that it might have been 200 feet. Tr. 238-241, 250-252. According to May, the screen nearest the pulley was not locked or fastened in any way and to enter the area that had been screened-off all that was necessary was to push the screen back. Tr. 214. May could not recall whether there were any warning signs on or near the screen. Tr. 215.

May had first seen this area guard during an inspection on January 15. Smith was with him then and Smith told May that MSHA had accepted area guards as satisfactory to guard the entire area they enclosed. Tr. 213. May had never observed area guarding before and he advised Smith that he would discuss it with his supervisor and fellow inspectors. Tr. 213. May went back to his office (the MSHA office located in Fairmont, West Virginia) where he was advised that when the Humphrey No. 7 Mine had been transferred for inspection purposes to the Fairmont office from the Morgantown, West Virginia MSHA office in April 1991, another MSHA inspector, one of the first from the Fairmont office to inspect the mine, had told mine management that area guarding was not acceptable to MSHA and that although the area guarding could be left in place the individual drive pulleys also would have to be guarded to meet the requirements of section 75.1722(b). Tr. 217. (May testified that he did not know what MSHA policy was with respect to area guarding when the mine had been inspected out of the Morgantown office. Tr. 245.)

On January 27, a meeting was conducted involving various officials from mine management, including Smith, Brozik, and mine foreman Eldon Hagedorn. MSHA officials involved including May and Fairmont MSHA office supervisor, Cecil Branham. Union representatives also participated. Tr. 219. Area guarding was among the subjects discussed. May believed that prior to the January 27 meeting Branham had already told Brozik in a telephone conversation that MSHA would not accept area guarding as complying with section 75.1722 and, according to May, Branham reiterated this position at the January 27 meeting. May testified that Branham stated that he would accompany May to the mine to see for himself whether Consol was complying with the guarding regulations by guarding the actual pulleys rather than the area around the pulleys. Tr. 220.

May was shown and identified the section from MSHA's Program Policy Manual ("PPM") that relates to section 1722. G. Exh 11.(Footnote 6)

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6 The PPM states in pertinent part:

75.1722 Mechanical Equipment Guards

Citing to item 4 of the policy, May stated: "The guard that was installed that day was not of adequate size to prevent anyone from reaching in or slipping, tripping and falling in, and their arm from coming in contact with this pinch point." Tr. 221. May rejected the idea that the screens between the belt structure and rib met the requirements of the standard. He noted that section 75.1722 "doesn't say anything about area guarding" and he observed that the screen nearest the pulley was not secured to prevent anyone from walking through it. Tr. 222-224.

May explained that in order for an individual to have had his or her hand go through the guard opening and be caught in the pulley's pinch point, the person would have had to fall or slip to come in contact with the point, or would have had to reach purposefully through the opening. Injuries likely to have resulted from such an accident ranged from dismemberment to death. Tr. 225-226.

May believed it was reasonably likely that a miner would have been caught in the pinch point due to the inadequate guard. This was because the area between the rib and the guard was narrow and thus miners who had to travel past the guard when conducting required inspections were in close proximity to the pinch point. Tr. 227. (May stated that miners had to travel and examine the right side of the belt in order to check for belt spillage and accumulations of coal dust. Tr. 253.) May testified that from his discussions with miners who worked on the belt he was sure that the area inside the screens was traveled by preshift examiners. Tr. 229. In addition, May testified the miners had told him that they were required to enter the area to shovel coal spillage from underneath the belt. Tr. 242-243. (As May remembered it, Smith had been present during these conversations. However, May later stated that he could have been

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> Guards installed to prevent contact with moving parts of machinery shall:
>
> 1. Be of substantial construction;
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> 2. Be of such construction that openings in the guard are too small to admit a person's hand;
>
> 3. Be firmly bolted or otherwise installed in a stationary position; and
>
> 4. Be of sufficient size to enclose the moving parts and exclude the possibility of any part of a person's body from contacting the moving parts while such equipment is in motion.

G. Exh 11.

mistaken in believing Smith was there. Tr. 272.) In addition, May believed that miners were assigned to "sweep or drag" the narrow side of the belt to mix the coal dust with rock dust. Tr. 253.

Because of normal sloughage from the belt, coal would be on the floor of the walkway in the vicinity of the pulley which would make slipping and tripping likely. Tr. 227. In May's view the coal on the floor would have made it "very easy" for miners to slip. Tr. 228.

In addition, miners frequently would have had to enter the guarded area to pull debris off the belt, and the gap in the guard would have made it tempting for them to do this without first shutting down the belt. Tr. 228. Had the regular guard (the guard May observed sitting against the rib) been in place, miners could not have gained access to the pinch point either inadvertently or purposefully. Tr. 242.

With regard to Consol's negligence in allowing the violation to exist, May stated that the inadequate guard was attached on the midnight shift (the prior shift). May was not certain whether the larger guard had been taken off before or after the preshift examination for the shift on which he observed the condition had been completed, but in either event the violation should have been observed. If the larger, adequate guard had been removed prior to the preshift examination, the preshift examiner should have noted the remaining inadequate guard. If not, the section foreman should have observed it. Tr. 230-231. (May maintained that because miners were working in the vicinity of the drive pulley, the section foreman "would have had to have walked right past [the inadequate guard]." Tr. 231.)

STANLEY BROZIK

Brozik described how the entire left side (the wide side) of the belt drive area was guarded by screening. Tr. 255-256. (Once outside the drive area the rest of the belt was not guarded.) He further explained the history of guarding at the mine -- how in the face of repeated guarding violations he had asked two MSHA supervisors, including Branham, if he could cure the problem by putting gates at the front end of the drive mechanism and at the stationary pulley and how he also proposed bolting "on and off" switches for the belt on each side of the belt at the crossovers and crossunders nearest the mechanism, as well as installing signs at both ends of the drive mechanism saying "do not enter while belt is running." Tr. 257-258. Brozik indicated that MSHA officials in Morgantown approved this arrangement.

According to Brozik, area guarding had been employed first at Humphrey No. 7 Mine at some time during the mid to late 1980s.

Tr. 258, 260. (Brozik could not recall the exact year.) However, in 1991, when inspection of the mine was transferred to Fairmont, Consol was advised that its prior arrangements were no longer acceptable and that the pulleys themselves would have to be guarded. Tr. 258. At that point, guards were put on the pulleys. Nonetheless, the area guards were left in place. Id.

Brozik also stated that after the January 27 meeting, in which Consol was told that area guarding was not acceptable, he had advised someone, he believed it was Hagedorn, that he wanted to make certain the pulleys were guarded. The large guard that May found against the rib was the result of this instruction.
Tr. 259. As to why the smaller guard had been installed, Brozik simply stated, "someone though that [the larger guard] was inadequate so they put a smaller one there." Tr. 259. The condition was corrected by welding the larger guard over the smaller guard. Tr. 260-261.

With regard to the hazard presented by the supposedly inadequate guard, Brozik stated that he never had been informed that anyone was ever in the area of the pulleys while the belt was running and that he never had observed a miner in that position. Tr. 260, 265. Brozik agreed that it was a practice at the mine for examiners to walk both sides of the belt. The belt was not shut off when they conducted their inspections. Tr. 262-263. However, if the belt was running and an examiner came to an area guard, the examiner would not go inside the guard but would cross at the crossover or crossunder. Tr. 264-265. Brozik emphasized that it was Consol's policy that no person go inside the area guards while the belt was running. Tr. 263-265.

ROBERT SMITH

Smith, who accompanied May, testified that the screens used as area guards had signs hung on them stating "Do Not Enter When Belt Is Running", or words to that effect. Tr. 268. Smith did not believe that the guard May found inadequate could have been circumvented easily. Tr. 269. Nor did Smith believe the situation posed a reasonably likely chance of injury because no person "should have been . . . inside the area guard." Tr. 270.

THE VIOLATION

Section 75.1722(b) requires guards at conveyor-drive pulleys sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley. Consol argues that the pulley involved was a takeup pulley, a type of pulley not mentioned in subsection (b) and one that, according to Consol, does not come within the regulation. Tr. 284. The Secretary's position is that the conveyor drive would not have worked without the pulley and therefore "the stationary dolly take-up pulley was a conveyor drive pulley." Tr. 278. In my

view the subject pulley was a "conveyor-drive pulley" and thus came within the scope of the regulation.

A "drive pulley" is defined as a "pulley or drum driven through gearing by some source of power and which, through contact friction, drives a conveyor belt." U.S. Department of the Interior, A Dictionary of Mining, Mineral and Related Terms (1968) at 354. A "takeup pulley" is defined as "[a]n idler pulley so mounted that its position is adjustable to accommodate changes in the length of the belt as may be necessary to maintain proper belt tension." Id. at 1118. The subject pulley does not seem to fit squarely within either definition in that it was not driven by a source of power but rather turned as the belt passed over it and was not adjustable but rather was stationary, although it did serve to keep tension on the belt. Tr. 233-234.

It cannot be expected that those who write safety and health regulations can specifically incorporate every technological variation into a regulation. Nor can it be expected that every objective situation faced by an inspector will fit neatly within the wording of a pertinent regulation. Thus, when faced with a hybrid situation such as this, the inspector must take into account the words of the standard, keep its intent in mind and apply a rule of reason.

Here, it seems to me that May did just that. Under a reasonable interpretation of section 75.1722(b) the standard is broad enough to incorporate the subject pulley. As May noted, the pulley, while not having power going to it to drive the belt, was nonetheless a part of the drive unit. Tr. 234. The belt drive would not have operated correctly without it. I conclude therefore that in that broad yet reasonable sense the pulley was a conveyor-drive pulley, and as such it was required to be guarded to prevent a person from reaching behind and becoming caught between the belt and the pulley.

Consol does not dispute that the 11 inch gap upon which May based the citation existed as described by May. However, it maintains that area guarding prevented persons from going into the vicinity of the pulley and thus that persons could not become caught between the pulley and the belt despite the presence of the gap.

The regulation requires the pulleys to be guarded. While the area guards were sufficient to restrict access to the area adjacent to the pulley drive mechanism, they did not guard the cited specific pulley. Much as the use of chains to rail off access to walkways and travelways over moving machine parts and the presence of signs to warn against entry cannot, in my view, be regarded as compliance with the guarding regulations for surface metal and nonmetal mines -- Overland Sand & Gravel Co., 14 FMSHRC 1337, 1342, (August 1992), see also P P M, Vol V

at 55(a) (6/18/91) -- so here the area guards fail to conform to what the regulation requires.(Footnote 7) Rather than excuse the violation, the presence of the area guards and warning signs may mitigate the potential gravity of the violation and impact whether it is of a S&S nature.

Because the 11 inch gap was sufficiently large for a person's hand and/or arm to enter and become caught between the belt and pulley, I find that the violation existed as charged.

S&S

There are, in my opinion, several factors that warrant deletion of the inspector's S&S finding. I agree with Consol that the evidence does not establish a reasonable likelihood of a miner having a hand and/or arm caught between the pulley and the belt. In the first place, the testimony does not establish that it was a practice for miners to work or to travel immediately adjacent to the pulley while the belt was running. Although the belt was inspected from the walkway adjacent to the pulley and while miners might occasionally have had to clean up the walkway or clean up under the belt next to the pulley, there was no confirmation that any of these activities regularly occurred while the belt was running. May was told by an unidentified miner that miners had worked adjacent to the pulley while the belt was in operation, and I do not doubt the conversation took place and that, in fact, such occasionally happened, but I also do not doubt that Consol had a strict policy of barring access to the area of the belt drive while the belt was operating. The presence of the warning signs, whose existence I credit, and the presence of the area guards, corroborate the testimony of Brozik and Smith that such was the case. I also find credible Brozik's testimony that he had never been told about miners being in the area of the pulleys while the belt was running and never had seen them in that position and I conclude from this that it was rare indeed when such an incident occurred.

Moreover, while it would have been possible for a miner to ignore the policy and to walk through the screens used as area guards and to have traveled or worked adjacent to the subject pulley, there was no testimony that the floor next to the pulley was slippery or uneven or that coal spillage from the belt habitually littered the walkway floor next to the pulley and I conclude from this that if a slipping or tripping hazard existed, it was infrequent.

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7 I note parenthetically that even had I held that area guarding could satisfy the regulation's mandate, the testimony of May that the screening had not been secured to the rib and could have been easily walked through would have lead me to the conclusion that the guarding was inadequate.

Further, even if a miner had slipped or tripped and fallen toward the pulley while the belt was running, the miner's hand and/or arm would have had to be positioned so that the guard that was in place was missed and the gap was "hit," and it should be recalled that although the guard was inadequate, it covered a good deal more space than the gap. I therefore conclude that the Secretary did not establish a reasonable likelihood that the failure to adequately guard the pulley would have resulted in a miner's hand or arm becoming caught in the pulley's pinch point, and I find that the violation was not S&S.

GRAVITY AND NEGLIGENCE

In assessing the gravity of the violation, both the potential hazard to the safety of miners and the probability of such hazard occurring must be analyzed. Clearly, the potential hazard was grave, a severe injury, even dismemberment could have been expected. However, such an accident was decidedly less than likely given the presence of the signs, the area guarding, Consol's policy of barring entry to the subject area while the belt was running and the presence of the pulley guard, inadequate though it was. I conclude, therefore, that although the potential injuries resulting from the violation were extremely serious, the likelihood of them occurring was so remote as to make this a non-serious violation.

I also conclude that Consol was negligent in allowing the violation to exist. The presence of the inadequate guard was visually obvious, especially so given the fact that the larger, adequate guard was leaning against the rib and, in effect, drawing attention to the condition of the pulley it no longer guarded. May's testimony that the inadequate guard was attached on the midnight shift was not refuted. Nor was his observation that the inadequate guard should have been observed either by the preshift examiner or the foreman supervising miners working in the area of the belt drive. Thus, Consol knew or should have known of the violation.

WEVA 92-1042

Section 104(d)(2)Order No. 3108651, 3/17/92/, 30 C.F.R. 75.303

The order states:

> The preshift examination record on the 12 East, 13 East and 14 East section does not contain all areas that are required to be examine[d]. The following conditions were found: 12 East preshift record: 03-16-92, day shift, no record of the section track inby the mouth to the section. 03-16-92, afternoon shift, no

> record of the section track inby the mouth to the section. 03-17-92, midnight shift, no record of the section track inby the mouth.
>
> 13 East preshift record: 03-16-92, midnight shift, no record of the belt line from 40 block to the tailpiece at 70 block. 03-16-92 midnight shift, no record of the section track. 03-16-92 afternoon shift, no record of the section track. 03-16-92 afternoon shift, no record of the section belt from 41 block to the track at 70 block.
>
> 14 East preshift record: The preshift of the 7 North belt is maintained in this record book. 03-16-92, day shift and afternoon shift, no record of the 7 North belt from 13 East to the [car] loading point. This is 6,600 feet as measured on the mine map.
>
> The preshift examination records at this mine have been cited several times for no record of examined areas that are required, therefore the operator's negligence is high. The records have also been countersigned by the mine foreman. If these conditions were allowed to exist and the required examinations were not made, a condition would exist that would cause a lost workdays or restricted duty accident. I believe that this is unlikely because I assume that this is only record keeping, but the operator can not verify by the records that the examinations were made.
>
> Conferences with Robert Smith, Mr. Smith agrees with the gravity but disagrees with the action and the negligence because old habits are hard to break.

G. Exh. 15. The order charges a violation of section 75.303 and that the condition was the result of Consol's unwarrantable failure to comply with the standard.(Footnote 8)

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8 Section 75.303 requires in pertinent part:

> (a) Within 3 hours immediately proceeding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator shall examine

THE TESTIMONY

THOMAS W. MAY

May testified that he went to Humphrey No. 7 Mine on March 17, 1992 to conduct a regular inspection. One of the first things he did after arriving at the mine was to examine the preshift examination records. Tr. 297. The records were kept in the foreman's office, and it was there that May reviewed them. With May at the time were Smith and Janet Todd, a representative of miners. May testified that upon reviewing the records he found several areas of the mine that were required to be examined and for which there were no records of a preshift examination having been performed. Tr. 298. May therefore issued the order in question for Consol's failure to record the examinations. Tr. 299. (There is no question but that Consol performed the required examinations. As May stated, "[A]ll of the areas had been covered but just not recorded." Tr. 311.)

May explained that section 75.303 requires the examiner to report the results of the examination to a designated person on the surface and that this usually is done by calling out the reports on the mine telephone. The reports are then recorded and the mine examiner must countersign the reports when he comes out of the mine to make sure that what he has reported has been recorded accurately. Tr. 300, 302.

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8...CONT

> such workings and any other underground area of the mine designated by the Secretary or his authorized representative.

The regulation goes on to require the examination of every working section, other specified areas and the conducting of tests for gases and air velocity at designated places. The examiner is also required to examine for other hazards and violations of the mandatory safety and health standards. The regulation concludes:

> Upon completing his examination, such mine examiner shall report the results of his examination to persons authorized by the operator to receive such reports at a designated station on the surface of the mine, before other persons enter the underground areas of such mine to work in such shift. Each such mine examiner shall also record the results of his examination with ink or indelible pencil in a book approved by the Secretary kept for such purpose in an area on the surface of the mine . . . and the record shall be open for inspection by interested persons.

May was asked what he believed to be the purpose of the reporting and recording requirements? He replied that the results of the examination have "to be called out so that the oncoming shift knows that the mine is safe so they can enter the underground area of the mine to go to work" and that recording the results of all areas examined is required so that the oncoming shift and mine management will be aware of any hazardous conditions they will encounter. Tr. 301. He described the recording requirement as "very important" because it assures that "problems are addressed and taken care of immediately." Id., see also Tr. 310-311.

According to May, the problem was that Consol was not recording that areas specified in section 75.303 had been inspected and found safe, but rather was recording that larger sections of the mine that included the specific areas had been found safe and it was doing so by writing the phrase "section safe." Tr. 303-304. May maintained that writing the phrase "section safe" to indicate preshift examiners had detected no hazards did not comply with the recording requirements because the regulation itself does not refer to the examination of a "section" but rather to various parts of working areas -- "working sections," and specific areas within the working sections, as well as "belt conveyors on which coal is carried," etc. Tr. 323-328, 333, 335-336. May objected to the "second safe" approach to compliance not only because it did not conform to the wording of section 75.303 but also because preshift examinations of all of the specified areas might not be done by the same person and the miner countersigning "section safe" might not know for certain that no hazardous conditions had been detected in the specified areas. May stated that Humphrey No. 7 Mine was the only mine he had inspected where preshift examinations were recorded using the phrase "section safe."

May maintained that this was not a new problem at the mine and he identified two citations that he had issued previously, on January 23, 1992 and February 18, 1992 (G. Exhs. 18 and 17), for the same violation. Tr. 306-308. May claimed when he issued the January and February citations he had spoken with Smith about the company's failure to specifically record the results of the preshift examinations but did not get any explanation from Smith about why the practice existed. Tr. 306. In addition, he had at least three conversations with various examiners prior to issuing the order in which he explained the inadequacy of recording "section safe." Tr. 258-9. Nonetheless, he believed that Smith had tired to instruct mine foremen in order to ensure the preshift examinations were properly recorded. Tr. 309.

May believed that the violations of January and February were the result of Consol's "moderate negligence." However, due to the number of unrecorded areas that he found on March 17, the fact that the recording deficiencies existed for all three of

that day's preshift examinations and due to his previous efforts to have the practice eliminated, May reached the conclusion that the failure to properly record the preshift examinations of March 17 was the result of Consol's unwarrantable failure to comply with the cited standard. Tr. 310. May testified that he was offered no explanation for the existence of the violation other than that Smith told him, "[O]ld habits are hard to break." Tr. 313.

STANLEY BROZIK

Stanley Brozik testified that when the word "section" was used at the mine, it was generally understood to mean the area from the mouth all the way to the working face and that this area included the belt and the track. Tr. 339-340. Brozik maintained that state examiners had accepted the "section safe" designation as adequate. Tr. 340.

ELDON HAGEDORN

Hagedorn testified that he first assumed foreman's duties at the mine in 1969 and that in 1976 he was appointed mine manager, a position he has since held. During all of this time, the word "section" has meant the area "from the mouth of the section where you get the supply track to the face." Whenever Hagedorn saw the term "section safe" recorded it meant to him "that [the] section from the mouth and all the faces . . . belts, track, wire, were safe." Tr. 353.

THE VIOLATION

I conclude that the violation existed as charged. The regulation requires that "the results of [th]e examination" be reported and that the "results of [the] examination" be recorded. The required "examination" is described in detail in the regulation, both with respect to the observations and tests that should be made during the examination and with resect to the areas where they should be made.

I agree with May that a purpose of recording the results of the preshift examination is to appraise the oncoming shift of hazards and violations they may encounter so that they may correct the conditions and so that they may avoid the hazards before they can be corrected. Clearly, another purpose is to apprise "interested persons", e.g., state and federal inspectors and representatives of miners, of the same information, information that may alert such persons to compliance problems at the mine.

May's view that the standard requires the recording of the results of the examinations of the areas it specifies and his collateral view that a blanket recording of "section safe" is not

acceptable are, in my opinion, reasonable interpretations of the recording requirement set forth in section 75.303(a) in that they further the purposes of the requirement. His logic that a person reviewing a blanket recording -- even a person familiar with the interpretation of the word "section" at the mine -- would not always be able to determine for certain whether the required examinations had been conducted seems irrefutable, and the lack of certain knowledge that required examinations had been conducted would mean the person would likewise lack certain knowledge of possible hazards to correct and/or to avoid. I find therefore that Consol failed to record the results of preshift examinations as stated in Order No. 3108651 and in so doing violated section 75.303(a).

GRAVITY

This was not a serious violation. It bears repeating that although the preshift examinations were not properly recorded, they were conducted. Moreover, although use of the phrase "section safe" would not convey with certainty that the specified areas had in fact been inspected and found safe, it is clear from the testimony of Brozik and Hagedorn that the phrase was common parlance at the mine and might also at times accurately indicate that the "section" had been examined and that the area from the mouth of the section to its face was hazard free.

As I have found, this does not excuse Consol's failure properly to record the preshift examinations, but it does lessen the likelihood of injury or illness as a result of the violation.

UNWARRANTABLE FAILURE AND NEGLIGENCE

Whether the violation was the result of the "unwarrantable failure" of Consol to comply with the section 75.303(a) depends upon whether it was the result of aggravated conduct constituting more than ordinary negligence. Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987). See also, Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1987). In Emery the Commission compared ordinary negligence (conduct that is inadvertent, thoughtless, or inattentive) with conduct that is not justifiable or inexcusable.

I cannot find that the failure of Consol to properly record the cited preshift examinations of March 17 was the result of unjustifiable or inexcusable conduct. While I fully credit May's testimony that following issuance of the January and February citations he discussed with Smith the way to properly record the examinations, I am also struck by the fact that May believed that Smith, by instructing the appropriate foremen, had tried to ensure that the examinations were recorded correctly. Tr. 309.

In addition, although I credit May's testimony that on at least three occasions he discussed with Consol foremen the way in which to properly record the examinations, I note as well Brozik's testimony that state inspectors had accepted the "safe section" designation as adequate. From all that appears on the face of this record, I conclude that it was not until May raised the issue in January that Consol became aware that the way in which it had been recording the results of preshift examinations was not acceptable to MSHA.

Further, I credit May's testimony that Smith explained the violation with the statement that "old habits are hard to break" and it appears to me that Smith's observation was right on the money. Tr. 313. Consol personnel were used to employing the "section safe" method of recording the results of its preshift examinations. Smith was trying to bring the practice into compliance with the regulation. This proved difficult, not because those recording the results were inexcusably negligent, but because they were in the habit of doing it the "old way" and through inadvertence or inattention continued in the habit. I would add that I do not find this surprising due to the fact that the violation was not serious and thus did not signal an immediately urgent need to comply. Tr. 313.

Given the conclusion that Consol's failure was the result of inattention or inadvertence, I find that Consol was negligent in allowing the violation to exist but not guilty of an unwarrantable failure to comply. Thus, the section 104(d)(2) order must be modified to a section 104(a) citation, and the inspector's designation of "high" negligence must be modified to one of "moderate" negligence.

OTHER CIVIL PENALTY CRITERIA

As revealed by the proposed assessment forms contained in each docket, the Humphrey No. 7 Mine is a large mine and Consol is a large operator.

The parties have stipulated that the penalties proposed will not affect Consol's ability to continue in business. Because of this and because of the fact that Consol is a large operator, I find that any penalties I assess for the subject violations will likewise have no affect upon Consol's ability to continue in business.

In each instance where a violation has been found Consol demonstrated its good faith in abating the violations.

The history of previous violations contained in the MSHA Office of Assessments print-out reveals that in the 24 months prior to the date of the first violation in this case a total of 750 violations were cited at the Humphrey No. 7 Mine, of these

there were 7 violations of section 75.305, 23 violations of section 75.503, 2 violations of section 75.1722(b), and 15 violations of 75.303. While the other violations do not have a history warranting an increase in penalties that might otherwise be assessed, I conclude that the history of previous violations of section 75.503 is such that the penalty should be moderately increased.

CIVIL PENALTY ASSESSMENTS FOR CONTESTED VIOLATIONS

DOCKET NO. WEVA 92-992

Section 104(a) Citation No. 3108607, 1/30/92, 30 C.F.R. 75.1722(b

The Secretary has proposed a civil penalty of $206. As I have found, this was a non-serious violation and Consol was negligent in allowing the violation to exist. Noting especially that Consol is a large operator and taking into account the other civil penalty criteria, I conclude that a civil penalty of $250 is appropriate.

DOCKET NO. WEVA 92-993

Section 104(a) Citation 3108745, 2/6/92, 30 C.F.R. 75.305

The Secretary has proposed a civil penalty of $206. As I have found, this was a serious violation and Consol was negligent in allowing the violation to exist. Noting especially that Consol is a large operator and taking into account the other civil penalty criteria, I conclude a civil penalty of $400 is appropriate.

Section l04(a) Citation No. 3108748, 2/12/92, 30 C.F.R. 75.503

The Secretary has proposed a civil penalty of $206. As I have found, this was a serious violation and Consol was negligent in allowing the violation to exist. Noting especially that Consol is a large operator, that its history of previous violations of the cited standards warrants a moderate increase in the civil penalty that should otherwise be assessed and taking into account the other civil penalty criteria, I conclude that a civil penalty of $500 is appropriate.

DOCKET NO. WEVA 92-1042

Section 104(d)(2) Order No. 3108651, 3/17/92, 30 C.F.R. 75.303

The Secretary has proposed a civil penalty of $1,200. As I have found, this was a non-serious violation and Consol was negligent in allowing the violation to exist. Noting especially that Consol is a large operator and taking into account the other

civil penalty criteria, I conclude that a civil penalty of $250 is appropriate.

ORDER

Consol is ORDERED to pay a civil penalty in the approved settlement amount shown above in satisfaction of the violation in question: Citation No. 3108615, 2/3/92, 77.402 (Docket No. WEVA 92-992). Further, Consol is ORDERED to pay civil penalties in the assessed amounts shown above in satisfaction of the contested violations in questions.

The Secretary is ORDERED to modify section 104(a) Citation No. 318607 by deleting the inspector's S&S designation. The Secretary is ORDERED to modify Section 104(d)(2) Order 3108651 to a section 104(a) citation and to delete the inspector's finding of "high" negligence and to substitute a finding of "moderate" negligence.

The parties are ORDERED to advise me within ten (10) days of the date of this decision of their settlement agreement with regard to Citation No. 3108613, 1/28/92, 30 C.F.R. 75.1003(c) (Docket No. WEVA 92-992) in light of Judge Weisberger's decision in Consolidation Coal Co., 15 FMSHRC 436 (March 1993), and to move for my approval of same.

I retain jurisdiction in this matter until all issues with respect to Citation No. 3108613 have been resolved. Until such time, my decision in this matter is not final. Payment of approved and assessed civil penalties and modification of the citation and order are held in abeyance pending a final dispositive order.

David F. Barbour
Administrative Law Judge
(703) 756-5232

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