CCASE:
SOL (MSHA) V. BETH ENERGY MINES
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 92-587
Petitioner	:	A.C. No. 36-00840-03814
	:	
v.	:	Mine No. 33
	:	
BETH ENERGY MINES INC.,	:	
Respondent	:	

DECISION

Appearances: Pamela W. McKee, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Steven C. Smith, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Barbour

In this case the Secretary of Labor, pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq. ("Mine Act" or "Act"), charges Beth Energy Mines, Incorporated ("Beth Energy") with four violations of mandatory safety standards for underground coal mines found at 30 C.F.R. Part 75 and proposes the assessment of civil penalties for the violations. Two of the alleged violations are contained in citations issued by the Secretary pursuant to section 104(a) of the Act. 30 U.S.C. 814(a). One is contained in a citation issued pursuant to section 104(d)(1) of the Act and one is contained in an order of withdrawal issued pursuant to section 104(d)(1) of the Act. 30 U.S.C. 814(d)(1). In addition to alleging violations of the standards, the section 104(d)(1) citation and order also allege that the violations constituted significant and substantial contributions to mine safety hazards (an "S&S" violation) and were caused by Beth Energy's unwarrantable failure to comply with the cited standards (an "unwarrantable" violation).

Beth Energy denied the alleged violations and the S&S and unwarrantable allegations, and a hearing on the merits was held in Pittsburgh, Pennsylvania. The general issues to be tried were whether Beth Energy violated the cited standards and, if so, whether the Secretary could prove the special findings of S&S and unwarrantable failure. In addition, and in accordance with Section 110(i) of the Act, if violations were established appropriate civil penalties would have to be assessed.

SETTLEMENTS

Shortly before the commencement of the hearing the parties advised me that they had agreed to settle three of the four alleged violations. It was decided that counsel for the Secretary would state on the record the nature of the settlements and I indicated if I found the settlements to be appropriate I would approve them and order payment of the settlement amounts in my decision on the remaining contested violation.

Citation No.	Date	Section 30 C.F.R.	Assessment	Settlement
03705551	11/4/91	75.316	$400	$98

The citation alleged that the approved ventilation system and methane and dust control plan for the mine was not complied with in that a check curtain had been installed in an entry where the plan indicated a wall with a hole in it should have been. Counsel for the Secretary stated that the inspector who issued the violation believed that it was unlikely that an illness or injury would have occurred as a result of the violation and that no miners were affected by the violation. Counsel further stated that Beth Energy demonstrated its good faith by removing the check curtain upon the request of the inspector. Finally, counsel stated if the violation had been assessed on the basis of these facts the proposed penalty would have been $98 rather than $400. Tr. 14-15.

Citation No.	Date	Section 30 C.F.R.	Assessment	Settlement
03705552	11/4/91	75.1202	$400	$98

The citation alleged that the mine map was not kept up-to-date in that the aforementioned check curtain was not shown on the map. Counsel for the Secretary again noted that the inspector believed an injury or illness resulting from the violation was unlikely and that no miners were affected by the violation. She further stated that the check curtain was not shown on the map because it was viewed by Beth Energy as a temporary feature. Finally, counsel stated if the violation had been assessed on the basis of these facts the proposed penalty would have been $98 rather than $400. Tr. 15-16.

Order No.	Date	Section 30 C.F.R.	Assessment	Settlement
03705422	12/12/91	75.400	$700	$700

The order alleged that hydraulic oil 3/4 inch deep had accumulated in the right rear area of a roof bolting machine adjacent to an hydraulic pump. The machine was energized and there also was an accumulation of oil in the machine's rear tramming compartment, as well as an accumulation of coal and coal

dust mixed with oil on the machines's right and left front bolting arms and an accumulation of coal and coal dust mixed with oil under the machine's right rear corner. Counsel for the Secretary noted the inspector's finding that the violation was S&S and that the operator's negligence was "high". (Indeed, as previously stated, the inspector cited the violation in a section 104(d)(1) order, thus finding that the violation was the result of Beth Energy's unwarrantable failure.) Counsel also noted that Beth Energy had agreed to pay in full the proposed civil penalty of $700.

In addition to addressing the above recited facts pertaining to the settled violations, counsel for the Secretary stated on the record information pertaining to the size of Beth Energy, the relevant history of previous violations at the Cambria Slope Mine No. 33 ("Mine No. 33") and the agreed fact that payment of assessed amounts would not affect Beth Energy's ability to continue in business. Tr. 17-18.

Having considered the Secretary's representations, I find that approval of the proposed settlements is reasonable and in the public interest, and pursuant to 30 C.F.R. 2700.30 counsel for the Secretary's motion to approve the settlements is GRANTED. I will order payment of the settlement amounts at the close of this decision.

CONTESTED VIOLATION

Citation No.	Date	Section 30 C.F.R.	Assessment
03705626	12/9/91	75.1722(b)	$600

Section 104(d)(1) citation No. 3705626 states in pertinent:

> The guard provided on the inby end tight side of the #2 E East belt drive was not adequate to keep person [sic] from traveling along this tight side w[h]ere exposed drive rollers existed [.] This was a fence type guard and consisted of one turnbuckle and one strut leg in a cross manner that any person traveling along the tight side could step over. This area was wet and slippery. The belt was operating at the time observed.

Gov. Exh. B. As previously mentioned, the citation contains the inspector's S&S and unwarrantable findings. Finally, the citation states that it was issued at 9:45 a.m. on

December 9, 1991, and was abated at 11:30 a.m. on the same day when "A wire fence was installed to guard this location." Id.

On December 9, 1991, at 11:45 p.m. the citation was modified to state:

> Due to information received in a discussion with Jim Pablic (Shift Foreman) Citation No. 3705626 is hereby modified . . . [add]ing the statement[:] This inadequate guard was installed by Jim Pablic (Shift Foreman) and would be very easy to recognize as a violation of the Health and Safety standards.

Gov. Exh. B 2. In addition, the assessment of negligence was modified from "low" to "high" and the section of the Act under which the citation issued was modified from section 104(a) to section 104(d)(1). Id.

PARTIES' CONTENTIONS

In her opening statement, counsel for the Secretary asserted she would establish the belt was inadequately guarded as charged, that a miner was reasonably likely to have been seriously or fatally injured due to the inadequate guard and that the foreman who erected the inadequate guard knew it did not meet the standard's requirements yet nonetheless decided to wait until his next shift -- some 16 hours later -- to install an adequate guard. Tr. 20-21.

Counsel for Beth Energy responded that Beth Energy did not deny it had violated section 75.1722(b). Tr. 21. Rather, he argued that a miner was not reasonably likely to be injured due to the violation because the guard in place was adequate to deter miners from traveling down the tight side of the belt and a sign warning miners of the dangers posed by a sump located in the vicinity of the guard would have deterred miners from trying to pass the area.(Footnote 1) Moreover, counsel stated he would establish that the foreman had noticed the unguarded area on an idle day (a Sunday), had installed a temporary guard to apprise miners that the area was not guarded and, knowing that he would be returning on the third shift on Monday reasonably concluded it would be
appropriate to install a permanent guard then. Tr. 21-22.

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"Sump" is defined generally as "[a]ny excavation in a mine for collecting or storing water." U.S. Department of the Interior, A Dictionary of Mining, Mineral, and Related Terms (1968) at 1102 ("DMMRT").

SECRETARY'S WITNESSES

GENE RAY

Federal Coal Miner Inspector Gene Ray was the Secretary's first witness. Ray stated that he had been inspecting mines for the Secretary's Mining Enforcement and Safety Administration ("MSHA") for 14 years. Prior to working for MSHA, Ray had worked as an underground contract coal miner and as a salaried section foreman. Tr. 26-27.

On December 9, 1991, Ray conducted an inspection of Mine No. 33. Ray identified Citation No. 3705626 as a citation he issued during that inspection. Tr. 29-30. Ray stated that on December 9, he inspected the E East Belts, beginning with an inspection of the number one belt and concluding with an inspector of the number two belt and its drive (the No. E-2 belt drive).(Footnote 2) To reach the belt drive Ray had traveled down the clearance side (wide side) of the number one belt. Thus he arrived at the No. E-2 belt drive from the clearance side.
Tr. 33-37.

Ray explained that the clearance side of the No. E-2 belt drive was guarded by a chain link-type guard that screened the entire side of the belt drive and prevented miners from falling into or otherwise contacting the belt drive rollers. Tr. 37. (The rollers are depicted on R. Exh. 1 and include a discharge or tail roller on the outby end of the drive, a movable take up roller in the middle of the drive and a stationary takeup roller on the left of the drive. Tr. 38.) The clearance side fence measured 4 feet from the floor to the top of the guard, and it was hung perpendicular to the belt and extended from the discharge roller at one end to the takeup roller at the other end. Id. The sump was immediately adjacent to the stationary takeup roller and, according to Ray, at the time of the inspection the clearance side guard extended "a few feet" past the takeup roller toward the sump. Tr. 39.

Ray concluded that the clearance side of the No. E-2 belt drive was properly guarded and, as was his usual practice, he crossed to the other side of the belt drive (the "tight side") to continue the inspection. Because there was no crossover at the of the belt drive, Ray pulled a stop/start cord and crossed the

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According to Ray, a new longwall had been installed on the section and Pablic was examining the belts to make certain everything was "O.K." before production started at midnight, December 9. Tr. 75, 99-100.

belt inby the belt drive and after the belt had stopped. Tr. 40. Once across, he restarted the belt by pulling the cord.(Footnote 3)

As Ray proceeded outby toward the belt drive, he encountered a metal strut approximately 5 feet in length. The strut was crossed by a turnbuckle of approximately the same length. The strut and turnbuckle crisscrossed each other each other on the diagonal (a St. Andrew's cross) between the rib and the belt drive structure. Tr. 40-41.

Ray believed that the height of the entry was approximately 6 feet and that the crux of the cross was approximately 2 feet from the mine floor. Tr. 49. Although Ray did not recall the distance from the rib to the belt, he testified it was normally 42 to 48 inches. Tr. 50. (Ray admitted that he had taken no measurements and that his estimates were just that. Tr. 81.) Ray stated that he stepped over the cross, and took a few paces outby. Tr. 41. Ray maintained that the floor of the tight side walkway outby the crossed pieces was wet, muddy and slippery, and that he had to watch his footing so that he would not fall.
Tr. 43, 54. When he looked up, he realized that he was standing next to the exposed stationary tail roller at the inby end of the belt drive. The roller was not guarded. Tr. 43.

Ray was taken by surprise to find himself at the tail roller. At Mine No. 33, the tight side of a belt drive usually was guarded by an area guard -- a fence or a piece of belt that blocked the approach to the belt drive in the tight side entry. Ray had expected to come across such a fence prior to reaching the belt drive. Tr. 54, 124. Realizing where he was, Ray maintained that he was "a little concerned for himself" so he turned, moved back inby the roller and stepped back over the crossed strut and turnbuckle. Tr. 43, 55.

Once over the strut and turnbuckle, Ray examined them again. He described what he saw: "To the best of my recollection it was a cross, and it was tied. One side was tied to the belt rope on the top . . . and I don't believe it was tied on the bottom . . . They was just laying on the bottom in a crossed fashion." Tr. 44, 109. According to Ray, the cross was 5 to 10 feet inby the stationary tail roller. Tr. 45; See also Resp. Exh. 1 (blue "X").

When Ray found that the crossed pieces were tied he concluded that they were being used as a "guard" of some sort, although he had never seen such a guard before and did not believe miners would have recognized the pieces as a guard. Tr. 51, 62, 82. Usually, according to Ray, belt drives are

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Ray testified that when he arrived in the area the belt was running and continued to run when he left. Tr. 111.

guarded by wiring or nailing a piece of at least 4 feet high chain link fence, between the rib and the belt. Tr. 51. He stated, "They fence that side off so you can't get in beyond there and get in where the exposed rollers are at." Tr. 52.(Footnote 4)
To pass by a fence type guard, miners loosened the wire, folded the fence up and moved it out of the entry. Tr. 53. In addition, the miners were trained to de-energize and stop the belt when in the vicinity of a belt drive. Tr. 62-63, 66.
In Ray's opinion, at Mine No. 33 a fence would have alerted miners not to enter the belt drive area before de-energizing the belt. Tr. 122. In Ray's opinion, miners could not go under, over or around a fence type guard.

Ray believed that the crossed strut and turnbuckle did not adequately guard the exposed tail roller and that this constituted a violation of section 75.1722(b).(Footnote 5) Tr. 56. He noted the standard required a guard at a conveyor-drive pulley to extend a distance sufficient to prevent a person from reaching behind and becoming caught between the belt and the pulley. The strut and turnbuckle did not fulfill this purpose because "you could step right over [them] and that would put you right in where . . . your whole body could come in contact with a roller." Tr. 57.

Ray identified a portion of MSHA's Program Policy Manual ("PPM") that he stated set forth MSHA's policy regarding acceptable guards. Gov. Exh. C. He recited the policy's requirement that guards "[b]e of such construction that openings in the guard are too small to admit a person's hand;" and stated that the crossed pieces did not meet this requirement because a miner could have stepped over the strut and turnbuckle and have gotten not only his hand but his entire body in the roller. Tr. 57-58. He also noted the policy's statement that a guard "[b]e of sufficient size to enclose the moving parts and exclude the possibility of any part of a person's body contacting the moving parts while the equipment is in motion;" and he testified that the strut and turnbuckle did not enclose any moving parts. Gov. Exh. C; Tr. 59. Further, Ray pointed out the policy's statement that "[i]nspector's should carefully examine each belt conveyor drive to determine whether all rollers are sufficiently

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Ray testified Beth Energy abated the subject violation by installing such a fence across the entry. Tr. 70.

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Section 75.1722(b) states:

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

guarded to prevent persons from becoming entangled between the rollers and the conveyor belt;" and explained that was what he had done. Id.

With respect to why a miner would have been in the area of the roller in the first place, Ray noted that operation of the conveyor belt produced coal dust that had to be cleaned up, that coal carried on the belt spilled from the belt and had to be cleaned up and that conveyor belts had to be replaced or repaired, as did supports for the roof above the belt drive or adjacent to it. Tr. 65. Miners would have had to enter the area to do these things. In addition, because of the amount of coal dust created at the drive, it frequently was necessary to spread rock dust and to hose the dust down. The sump was there to catch the residual when water was applied to the dust. Tr. 69. More important, on the same day Ray issued the subject citation, Ray also issued a citation for an accumulation of float coal dust in the belt drive area (or, as Ray put it, "at this very location") and miners would have had to enter the area to clean up the dust. Id.(Footnote 6)

When he wrote the subject section 104(d)(1) citation, Ray believed that either a miner who was cleaning the belt or one who was examining it would likely have been injured due to the violation. Tr. 99. Ray understood it was a policy at the mine for belt examiners normally to travel the wide side but to cross to the tight side whenever it was necessary to check on something. Tr. 119-120. Ray indicated the presence of a hazardous loose rib, defective roof supports and hanging roof, or hot rollers would cause a belt examiner to cross to the tight side and be adjacent to the belt drive. Tr. 120-121.

Ray also acknowledged that if a miner crossed from the wide side of the belt to the tight side to clean the belt, he or she would stop the belt to cross and would restart it once on the tight side. In addition, it was a policy at the mine to stop the belt whenever a miner was adjacent to the belt drive. Tr. 96.

Ray believed that in order for a miner to be injured due to the cited condition, the miner would have had to step over the crossed pieces and walk through the wet area to bring himself or herself adjacent to the roller. In addition, the belt drive would have had to be energized so that the belt was moving and the roller was turning. Tr. 91-92. Ray acknowledged that if a miner was next to the tail roller, the belt should have been de-energized. However, he maintained that without an adequate guard (a fence) a person intent on what he or she was doing and

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According to Ray, the accumulation existed on both the tight and wide sides of the belt and covered a distance 50 feet outby the belt drive and 400 feet inby the belt drive. Tr. 69-70.

therefore not concentrating on what lay ahead could "very easily "get into the area next to the roller, slip and become entangled in the turning roller. Tr. 67, 97, 124. If a miner slipped or fell, Ray believed it reasonably likely the miner would have been fatally injured.

Although the floor was slippery under and inby the pieces, there was no standing water immediately adjacent to the roller. Ray believed the sump did not cover the walkway on the tight side but was under the bottom belt. Tr. 84-85. Ray could not recall whether or not a sign stating "Danger Sump" was hung immediately inby the crossed pieces. Tr. 109. In any event, in Ray's view danger signs were not acceptable as guards because they did not prevent a person from contacting exposed rollers. Tr. 60.

After Ray observed the condition, he continued walking outby along the belt until he reached the end of the belt. There he met John Pauley, the assistant shift foreman. He told Pauley about the condition and stated that he was going to issue a citation. Tr. 68.

Later in the day, about 11:45 p.m., Ray was entering the mine as Jim Pablic, the shift foreman on the second shift (the 4:00 p.m. - 12:00 a.m. shift) was leaving. Ray stated that Pablic stopped him and asked if Ray had written the citation and, if so, why? Ray stated when he told Pablic crossed pieces were inadequate as a guard, a "pretty hefty discussion" ensued. Tr.72.

During the discussion Pablic told Ray that he, Pablic, had installed the crossed pieces the day before (Sunday, December 8) and that he had planed to install a fence on the just finishing second shift. Tr. 72. "[B]ut," Ray quoted him as saying "you got there before I did." Id. Because Pablic was the one responsible for erecting the crossed pieces and because Pablic had planned to leave them in place on December 9 on the midnight to 8:00 a.m. shift and the 8:00 a.m. to 4:00 p.m. shift, Ray told Pablic he was going to modify the citation to one issued pursuant to section 104(d)(1) of the Act. Tr. 72-73.

Ray stated, "[T]hat's what upset me the most because if you find something on a Sunday and there is no production going on and the belt is not in operation . . . there's no excuse to leave a condition half abated or half fixed . . . and have a hazard like that when the belts are in operation [on Monday]. . . I just can't understand why anybody would do something like that."

Tr. 73-74. In Ray's opinion the maximum amount of time needed to fix the condition would have been one half hour. Tr. 77.

ROBERT NOVAK

Robert Novak, a shuttle car operator, union safety representative and a miner with approximately twenty years of experience at Mine No. 33 was the Secretary's final witness.
Novak stated that he had occasion to travel various belt lines throughout the mine and was familiar with "tight side guarding." He testified that in his experience all of such guarding consisted of chain-link fencing, approximately 4 feet high and running from the rib to the belt drive. Tr. 131-132. The purpose of such fencing was to prevent inadvertent entrance to the belt drive area. Novak stated that he had never seen any other type of guarding used on the tight side. Tr. 133. Novak had not seen the crossed pieces erected by Pablic, but had he done so he would have thought "[i]t could have been a strut or something just laying there." Tr. 146.

Novak did not believe that the crossed pieces would have prevented him from entering the area. ("I would probably just step right over it." Tr. 134.) Nor would a "Danger Sump" sign have warned him of anything other than to look out for the sump. Tr. 136. Novak stated if miners were cleaning a coal spill on the tight side and they came to a fence and they wanted to go beyond the fence, the miners would have to take the fence down. If they wanted to go into the belt drive area they would then de-energize the belt drive. If a fence were not there, the miners "would probably continue on" and not de-energize the belt drive. Tr. 139.

On cross-examination, Novak was asked to look at a picture Beth Energy had taken of the strut and turnbuckle and the nearby roller. Resp. Exh. 3. (Beth Energy left the crossed pieces in place for some time after the citations was terminated and the picture was taken during this period.) Novak was then asked whether, in his opinion, if a miner had seen the crossed pieces and roller as depicted in the picture the miner would have realized he or she was approaching a belt drive? Novak responded he believed the miner would. Tr. 141. He also agreed that if a miner knew he or she was approaching a belt drive and stepped over the crossed pieces the miner would have known to turn off the belt drive. Tr. 142. Moreover, at Mine No. 33 the belt drives were lit by mercury-vapor lights. However, because the lights were located on the wide side, the tight side belt drive area would not have been as well lit as depicted in the picture. Tr. 144.

BETH ENERGY'S WITNESSES

JIM PABLIC

Jim Pablic, the shift foreman at Mine No. 33, was Beth Energy's first witness. He stated that he had started to work for Beth Energy in 1973 as a salaried employee. Subsequently, he earned his mine examiner's papers and began making underground examinations for the company. He then earned mine foreman's papers. Tr. 148-151.

Turning to the events of December 8, 1991, Pablic stated that on that date he was working the 12:00 a.m. to 8:00 a.m. shift as a foreman/mine examiner. Because is was Sunday, no coal was being produced and no other miners were working except another foreman and a miner who were supposed to check the pumps at the mine. Tr. 157. Three hours before the next shift, at approximately 5:00 a.m., Pablic began conducting a preshift examination for the oncoming shift. As part of that examination he examine the No. E-2 belt drive area. The belt drive was located in an area that he normally did not examine. However, he had been informed that he would be responsible for supervising the area the next day (Monday) so he stopped by the area to become familiar with it and to see if there was anything in need of correction. Tr. 158-159. The belt was not running. Tr. 163.

Pablic stated that he was on the wide side of the belt drive and that when he got to the sump he stooped and looked underneath the belt. He could not see a guard on the tight side. Tr. 162. Therefore, Pablic walked inby and crossed the belt about 30 feet from the belt drive. Pablic proceeded toward the belt drive expecting to find that the guard had been taken off and was somewhere in the area. It was not there and Pablic had no idea where it was. Tr. 163. Pablic stated that he looked for something he could use as a guard, but he found "absolutely nothing in the area." Id. Because it was Sunday he claimed that there was no way he could obtain a piece of chain link fence or a piece of belt to serve as a guard. Tr. 185. Therefore, he used materials he found on hand to build a "barricade." Tr. 164. The materials consisted of the strut and turnbuckle.

Pablic installed the pieces just inby the tail roller. Pablic testified that he secured both the top and bottom of the turnbuckle by hooking and wiring the top over steel rope and by tying the bottom with heavy gauge steel wire. He also tied the top of the strut to existing wire that was holding metal sheeting against the ribs. The bottom of the strut rested on the mine floor. Tr. 165-166, 170-171, 215. The distance from the floor to the roof in the entry was 5 1/2 feet, but steel beam roof supports extended down approximately 6 or 7 inches, so actual clearance was approximately 5 feet. Tr. 171-172.

Pablic maintained that he could not climb over the crossed pieces and because he wanted to check the guard at the other end of the belt drive he untied the strut and walk up the tight side. (Pablic stated that he is 6-feet-2-inches tall and has a 34 inch instep. Tr. 198.) Pablic retied the strut after examining the front guard and finding that it was in place. Tr. 184. Knowing that he could not step over the crossed pieces and had to untie the strut to go past, Pablic believed that anyone else coming up the tight side would have realized, since the pieces were wired in place, that the crossed pieces were "a barricade-type thing to keep somebody from physically going up through there." Tr. 184, 194-195.

According to Pablic, a plastic sign stating "Danger Sump" hung approximately 5 feet inby the crossed pieces. Tr. 173. (Pablic was certain it was there because he remembered cleaning float coal dust from it on Sunday. Id.) Pablic stated that as a practice Beth Energy did not install such signs at all sumps but that he had the sign installed when a previous belt drive was in the same area because he "felt that somebody coming up there could slip in that sump not realizing that there was a sump." Tr.183, 213-214.

Pablic believed that Ray remembered the crossed pieces to have been 5 feet further away from the tail roller than they actually were located. (In other words, Ray located them where the sign was hanging.) Pablic was sure Ray was wrong about the location of the pieces because he distinctly recalled wiring the top of the strut to the roof support leg inby the sign. Tr. 173-174. Pablic stated that approximately one week after the citation was issue he measured from the crossed pieces to the pinch point of the roller and found that the distance was over 36 inches. Tr. 175, 208. At that distance a miner could not reach through the crossed pieces and become caught in the roller. Tr. 174-175, 179. In addition, there was a metal pipe that was a part of the belt drive structure and that in combination with the crossed pieces would have inhibited a miner from contacting the roller. Tr. 175-176, 182. In Pablic's opinion, the roller was visible to anyone standing at the crossed pieces. Tr. 198. Also, the noise from the belt drive would have alerted someone that they were at a belt drive location. Tr. 198-199. The noise was different than the "hum" of belt rollers. Tr. 219.

Pablic was asked to describe the sump. He stated that it extended from rib to rib across the width of the entry. On the tight side the walkway was normally covered with "black, pasty, heavy, muddy material" from the sump. Tr. 177. In his opinion no person would have wanted to walk through the material. Tr. 200. In fact, a plank extended along the rib and when Pablic reached the sump he walked on the plank so as not to get his boots muddy. Tr. 230. However, the sump ceased at the belt roller and adjacent to the belt the tight side floor was cement.

(The belt drive mechanism rested on cement to facilitate cleaning it and the cement extended to the end roller and perhaps a bit beyond. Tr. 229.) Pablic did not recall "slipping or sliding or anything" when he walked adjacent to the tail roller. Id. Pablic testified he intended to return on Monday and install a permanent guard.

After erecting the crossed pieces, Pablic still had to finish this preshift examination, which he estimated required approximately one-half hour. 201. He acknowledged that there would have been two shifts loading coal before he had an opportunity to return. Tr. 185. Since the belts on E East Section would be his responsibility starting Monday, he knew that belt examiners and belt cleaners would be in the area. Each shift would have had one examiner in the area before he would have gotten back to the belt drive on Monday. Tr. 188-189.
Belt examinations were conducted from the clearance side and if the examiners had to cross the belt to the tight side they would have stopped the belt, done what they had to do, go back to the wide side and restarted the belt. Tr. 189. The start-stop wires ran the length of the belt on the clearance side. They could have been used from the tight side as well, but it would be "a little tougher." Tr. 190.

The belt was cleaned from the clearance side with hoses. Tr. 191. Belt cleaners hosed everything down toward the sump. They shoveled as little as possible, but there were times when shoveling had to be done. If miners had to cross to the tight side to shovel a heavy spill at the belt drive they would have shut down the belt, although in any area other then the belt drive the belt cleaners would have let the belt run. Tr. 192-193.

Pablic acknowledged that he did not leave a message for the oncoming shifts concerning the lack of an adequate guard. Tr. 203. He also stated when the citation was abated by installation of a chain link fence, the fence was put up immediately inby the crossed pieces. Tr. 209.

ROBERT ROLAND

Robert Roland, a mine inspector for Beth Energy, was the company's second and final witness. Roland, who taught MSHA approved safety courses and who was familiar with Beth Energy's policies and procedures, stated that belts were cleaned by water hose directed from the wide side with the residue being washed into a sump and pumped out. Tr. 239. In addition, belts were examined from the wide side. Tr. 240. Beth Energy trained its miners to de-energize the belt if they had to go guarding for any reason. Id.

Roland testified that after the citation was issued he saw the crossed pieces erected by Pablic. Roland believed miners would have recognized them as a barricade and concluded that someone was trying to block their entrance to the area. If someone had to travel beyond the crossed pieces for some reason, company policy required them to de-energize the belt. Tr. 242.

The crossed pieces were left in place following issuance of the citation so that Beth Energy could obtain measurements of the pieces and the distances involved and prepare the drawings the company introduced as exhibits. Tr. 244.

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.(Footnote 7) Beth Energy does not contest the violation (Tr. 21) and I find that it existed as charged. Indeed, there was no guard at the tail roller and whether or not a fence-type guard or "area guard" alone would have met the requirements of the standard, the crossed strut and turnbuckle were not acceptable. They could have been gotten over and a person could have become entangled in the roller's pinch point.(Footnote 8)

S&S and GRAVITY

The Commission has held that a violation is "significant and substantial" if, based on the particular facts surrounding the violation, there exists a "reasonable likelihood that the hazard

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A "pulley" is defined as, "A cylinder with a shaft for mounting so that it may rotate, used to change the direction or plane of belt travel." DMMRT at 875. Here, although the equipment requiring guarding was consistently referred to during the proceeding as a "roller" or "belt roller" or "tail roller," it is clear that its function was to change the direction of travel of the belt. Resp. Exh. 1.

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Previously, I have expressed the view that area guarding is incompatible with section 75.1722(b). Consolidation Coal Co., 15 FMSHRC ____, Docket No. WEVA 92-992, etc. (June 30, 1993) slip op. at 22-23. In that case MSHA's policy concerning whether or not area guarding was allowed had varied within the same MSHA administrative district depending upon the MSHA office responsible for inspecting the mine. The company had been advised first that such guarding was permissible and then, when jurisdiction over its mine changed to a different office, was told such guarding violated the standard. Here, in a case, arising in another MSHA administrative district, area guarding is permitted. While Emerson may have been right that foolish consistency is the hobgoblin of little minds, there is nothing foolish about uniform enforcement of government mandated regulations. Not only is such enforcement wise policy, it is required by the Act, a law that is, afterall, applicable to the nation as a whole.

contributed to will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (Ap[ril 1981). Further the Commission has offered guidance upon the interpretation of its National Gypsum definition by explaining four factors the Secretary must prove in order to establish that a violation is S&S.(Footnote 9)

In this case, there is an admitted violation of section 75.1722(b). Further, the violation posed a discrete safety hazard in that failure to adequately guard the tail roller subjected any person who worked or traveled adjacent to the roller to the danger of coming into contact with the roller and of being caught in its pinch point. It is also clear that if such an accident occurred death or dismemberment reasonably could have been expected. Thus, the record establishes three of the four factors the Secretary must prove.

As is frequently the case when the alleged S&S nature of a violation is challenged, the question is whether the Secretary also has established a reasonable likelihood that the hazard contributed to will result in an injury? Or, as the Commission has put it, whether the Secretary has established that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., Inc. 6 FMSHRC 1573, 1574 (July 1984); see also Halfway, Inc., 8 FMSHRC 12 (January 1986). The relevant time frame for determining whether a reasonable likelihood of injury exists includes both the time that the violative condition existed prior to citation and the time that it would have existed if normal mining operations had continued. Halfway, Inc., 8 FMSHRC at 12; U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985).

Beth Energy argues the Secretary has failed to prove that miners would have been exposed to injury by the violation had normal mining operations continued in that the evidence establishes that miners would have been unlikely to travel the tight side of the belt drive beyond the crossed pieces while the drive was operating. Beth Energy Br. 9.

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In Mathies the Commission stated:

> [T]o establish that a violation of a mandatory standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the violation of a mandatory safety standard; (2) a discrete safety hazard 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.

Mathies, 6 FMSHRC at 3-4.

The Secretary counters he has established that miners worked on the tight side of the belt to do various tasks that could have been required at any time had mining continued, that miners would not have recognized the crossed pieces as a guard and that, expecting a fence before coming to the belt drive, miners would have stepped over the crossed pieces and found themselves adjacent to the tail roller. Sec. Br. 8-11. Then, given the condition of the floor, they would have been reasonably likely to slip or fall and to have become entangled in the pinch point.

I find the Secretary has the better part of the argument. The Secretary is right in asserting the testimony establishes miners were required to work on the tight side of the belt. This is particularly true of those miners who had to clean up accumulated coal dust or coal spillage. Tr. 65. I note in this regard Ray's unrefuted testimony that he had cited Beth Energy for an accumulation of float coal dust in the area of the belt drive, including the tight side adjacent to the tail roller, on the same day and minutes prior to the time the subject violation was cited. Tr. 69, 139. While it is not clear from the record whether this accumulation could have been cleaned up by being hosed down from the wide side, it is certain, as Pablic admitted, that there were instances when clean up had to be done by shovel from both sides of the belt and I conclude that had normal mining operations continued, it would have been reasonably likely for a miner to have been assigned to work on the tight side of the belt drive to clean up accumulated coal dust or loose coal. Tr. 192-193

I also note that although the practice at the mine was for miners to shut off the belt while crossing, the belt was restarted once crossed and continued to operate while miners cleaned up accumulations and spills. Thus, I find that a miner assigned to clean up an accumulation or spill on the tight side of the belt would have done so while the belt was in operation.

I further note that it was a practice at the mine to guard belt drives with a fence-type guard. This being the case, I find persuasive Ray's and Novak's suggestion that miners would not have recognized the crossed pieces as a guard for the belt drive. I agree with Ray that miners would have been looking for a fence not a strut and turnbuckle. Further, I find entirely credible Ray's testimony that he was able to step over the crossed pieces, and whatever Pablic's problem that prevented him from doing so, I so no reason why other miners would have been impeded from following (almost literally) in Ray's footsteps. Thus, I conclude that any miner assigned to clean up an accumulation or a spill existing on the tight side both inby and outby the crossed pieces would have come to the crossed pieces and simply have gone over, them just as Ray did, placing himself or herself adjacent to the tail roller.

While it is true that Novak, when shown a photograph of the crossed pieces and the roller behind them (Resp. Exh. 3), agreed that a miner seeing them would have realized he or she was coming to the belt drive, it is not at all clear that the photograph depicts what a miner moving up the entry and assigned to a task would in fact have seen. Tr. 141. For one thing, the photograph was not established to have been taken in the same light as would have been available to a miner. Lights for the belt drive were positioned on the other side of the drive, and it is not certain that a miner on the tight side would have been able to discern the roller beyond the crossed pieces from the actual light available on the tight side. In addition, I believe it reasonable to assume that a miner assigned to clean up an accumulation or spill on the tight side would have been intent on his or her task and would not have been looking for components of the belt drive in the absence of a fence.

Nor do I find persuasive Pablic's testimony that the noise from the belt drive would have alerted an approaching miner to its presence. Rather, for me Ray's testimony that he did not realize the drive was there until he was virtually on top of it is more convincing -- and Ray had 22 years of underground mining experience. Ray was intent on watching his footing and I believe it reasonable to assume that a miner assigned to clean up duty would have been similarly intent on not slipping rather then on distinguishing the noise of the belt rollers from that of the belt drive.

Thus, I conclude that had normal mining operations continued it was reasonably likely that the miner would have been assigned to work on the tight side in the vicinity of the belt drive and that in carrying out his or her assignment would have proceeded over the crossed pieces and inadvertently placed himself or herself adjacent to the moving tail roller.

I also credit Ray's testimony that the floor in the vicinity of the roller was slippery and that a person could have fallen. Tr. 67. Pablic did not remember slipping or sliding, but whatever the condition of the floor immediately adjacent to the tail roller when the crossed pieces were erected and when the violation was cited, given the presence of the sump at the end of the tail roller and the fact that most accumulations were hosed to the sump, I conclude that had normal mining operations continued water from this clean up process would have made the footing next to the tail roller hazardous. In addition, a miner assigned to clean up an accumulation or spill and approaching the belt drive would have been concentrating on traversing the water, mud and muck of the sump area in addition to concentrating on his or her clean up duties. In other words, the condition of the floor would have contributed to the likelihood of a miner

becoming caught in the pinch point of the tail roller in two ways -- by distracting the miner so as to be unlikely to realize he or she was in the vicinity of the roller and by causing the miner to slip and to fall into the roller.

I therefore conclude the Secretary has established a reasonable likelihood that in the context of ongoing mining operations, a miner would have become caught in the pinch point of the tail roller.

In determining the gravity of the violation I must consider both the potential hazard to the safety of miners and the likelihood of the hazard occurring. As has been noted, the violation subjected the miners to possible death or dismemberment. In addition, the crossed pieces did not bar entry to the area adjacent to the tail roller and did not signal that the belt drive and tail roller lay beyond. Given the fact that miners were likely to be assigned to clean up accumulations and spillage on the tight side of the belt and that the floor adjacent to the tail roller was likely to be slippery, it was likely a miner could slip and become caught in the tail roller's pinch point. Therefore, I conclude the violation was serious.

UNWARRANTABLE FAILURE AND NEGLIGENCE

The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. Emery Mining Corp. 9. FMSHRC 1997, 2004 (December 1987); Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1987). The Commission has explained that this determination is derived, in part, from the ordinary meaning of the term "unwarrantable failure" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" ("the failure to use such care as a reasonably prudent careful person would use, characterized by "inadvertence," "thoughtlessness," and "inattention"). Eastern Associated Coal Corporation, 13 FMSHRC 178, 185 (February 1991); citing Emery, 9 FMSHRC at 2001.

Pablic testified that he intended to return and have a fence-type guard installed the following day. Tr. 185.
Beth Energy describes Pablic's actions as "excusable neglect," at most. Id.

The Secretary counters that Pablic recognized the condition violated section 75.1722(b), that he did not inform the oncoming shifts about the presence of the condition and that he planned to leave the condition for over two working shifts until he returned. According to the Secretary, Pablic's failure to notify the oncoming shifts of the lack of an adequate guard and his

decision to allow the violation to exist until he returned constituted more than mere negligence and "enter[ed] the realm of aggravated conduct." Sec. Br. 16.

I agree with the Secretary and conclude the record fully establishes his contentions. Pablic purposefully left the tail roller without the guard required by section 75.1722(b). He knew the device he installed was inadequate, as shown by his decision to return and to install a fence-type guard. Pablic testified that because fencing materials to block off the tight side entry were unavailable in the vicinity of the belt drive and because it was a Sunday, he was unable to obtain the materials needed to correct the condition. Tr. 185. This may be, but it is no excuse for failing to advise responsible officials on the oncoming shift of the inadequate guard so they could give warning to miners and install an adequate guard before miners were exposed to the potential hazard. Pablic knew that coal would be produced on two shifts before he planned to return. He also knew, or should have know, that accumulations of coal dust, loose coal or spilled coal were reasonably likely to occur during those shifts in the vicinity of the belt drive and that such accumulations could well require the presence of miners to clean them up. Such miners would have been exposed to the danger of the unguarded tail roller and Pablic's failure to communicate left them to their peril.

Thus, the record contains no indication that Pablic gave appropriate priority to the violative condition. Rather, he allowed it to continue despite the fact that he knew or should have known miners were likely to be exposed to the risk of serious injury. Pablic's failure to advise oncoming management personnel of the inadequately guarded tail roller was not inadvertent. He acknowledged that although he had not seen the oncoming shift foreman there were other ways he could have advised him of the situation. Tr. 203. Subjecting miners on the next two shifts to the hazards created by the violation was inexcusable conduct on Pablic's part and establishes Beth Energy's unwarrantable failure to comply with the standard.

It is clear, as well, that in failing to take measures to assure that the violative condition was corrected Pablic failed to use such care as a reasonably prudent and careful person in his situation and with his background would have used. Pablic was Beth Energy's foreman and his negligence is attributable to the company. Therefore, I conclude also that Beth Energy was negligent in allowing the violation to exist.

OTHER CIVIL PENALTY CRITERIA

The parties have stipulated that Beth Energy was assessed a total of 672 violations at Mine No. 33 in the two years preceding issuance of the subject citation. In addition, it is worth

noting that 25 violations of section 75.1722 were cited during this period. This is a large history of previous violations, both in total number and in the number of violations of the guarding standard. In addition, Beth Energy is a large operator with a stipulated annual production of 5,740,168 tons of coal and the mine has a large stipulated annual production of 1,699,856 tons of coal. The parties have also agreed that any civil penalty assessed will not affect Beth Energy's ability to continue in business. Further, I find that once the citation was issued Beth Energy exhibited good faith in installing the fence used to abate the violation.

ASSESSMENT OF CIVIL PENALTY

The Secretary has proposed a civil penalty of six hundred dollars ($600) for the violation of section 75.1722(b). Given the S&S nature of the violation and the unwarrantable failure of Beth Energy in allowing the violation to exist, as well as Beth Energy's large size and large history of previous violations, I find an increased amount to be appropriate, and I assess a civil penalty of eight hundred dollars ($800.)

ORDER

Beth Energy IS ORDERED to pay civil penalties in the settled amounts set forth above. In addition, Section 104(d)(1) Citation No. 3705626, 12/9/91, is AFFIRMED and Beth Energy IS ORDERED to pay a civil penalty of eight hundred dollars ($800) for the violation of section 75.1722(b) alleged therein. Payment of the settled and assessed amounts is to be made to MSHA within thirty (30) days of the date of this decision.

This proceeding IS DISMISSED.

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

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