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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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FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 93-5
Petitioner	:	A.C. No. 46-01452-03901
v.	:	
	:	Docket No. WEVA 93-92
CONSOLIDATION COAL COMPANY,	:	A.C. No. 46-01452-03916
Respondent	:	
	:	Docket No. WEVA 93-100
	:	A.C. No. 46-01452-03918
	:	
	:	Arkwright No. 1 Mine
	:	
	:	Docket No. WEVA 93-164
	:	A.C. No. 46-01968-04084
	:	
	:	Blacksville No. 2 Mine

DECISIONS

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

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments for several alleged violations of certain safety standards found in Part 75, Title 30, Code of Federal Regulations. The respondent filed timely answers and contests and hearings were conducted in Morgantown, West Virginia. The parties filed posthearing briefs, and I have considered their arguments in the course of my adjudication of these matters.

Issues

The issues presented in these cases are (1) whether the conditions or practices cited by the inspectors constitute violations of the cited mandatory safety standards, (2) whether

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the alleged violations were "Significant and Substantial" (S&S), (3) whether the alleged violations were the result of an unwarrantable failure by the respondent to comply with the cited standards, and (4) the appropriate civil penalties to be assessed for the violations, taking into account the civil penalty assessment criteria found in section 110(i) of the Act.

#### Stipulations

The parties stipulated as follows in these matters (Tr. 9-11).

1. The presiding judge has jurisdiction to hear and decide these cases.
2. The subject coal mine is owned and operated by the respondent, and the mine is subject to the Act.
3. The inspectors who issued the contested violations were acting in their official capacity as MSHA inspectors and representatives of the Secretary of Labor.
4. True copies of the orders were properly served to the respondent's agents.
5. Payment of the proposed civil penalty assessments will not adversely affect the respondent's ability to continue in business.
6. The citations and orders contained in the petitioner's initial civil penalty proposal pleadings, including all appropriate modifications and abatements, are true copies of the citations and orders issued in these proceedings.
7. The preliminary requirements for the issuance of the section 104(d) (2) orders, have been met, and the section 104(d) "chain" applies to the subject mine.

#### Discussion

Docket No. WEVA 93-100

This proceeding concerns a section 104(d)(2) non-"S&S" Order No. 3718918, issued by MSHA Inspector Robert Huggins on July 27, 1992, citing an alleged violation of mandatory safety standard 30 C.F.R. 75.514, and two section 104(d)(2) "S&S" orders (3720838 and 3718252), issued by MSHA Inspector Spencer A.

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Shriver on August 12, and September 4, 1992, citing alleged violations of mandatory safety section 75.400. The respondent admitted and conceded the fact of violations with respect to the August 12, and September 4, 1992, orders, but denied that it violated the cited section 75.514, as stated in the July 27, 1992 order (Tr. 11-12).

The contested section 104(d)(2) non-"S&S" Order No. 3718918, July 27, 1992, citing an alleged violation of 30 C.F.R. 75.514, states as follows:

The supply track on the 2 south section is not provided with mechanically and electrically efficient track bonding. The track is 350 feet long with no track bonds on any of the joints. The 300 volt D.C. trolley wire has been installed and is energized. There are man trips and supply cars on the track. At the end of the track the Galis D.C. roof bolter and the "Ako" D.C. rock duster is grounded to the track by ground clamps. The Galis roof bolter and the "Ako" rock duster is not energized at this time. When talking with the UMWA representative he informed me that the track had been laid for at least two months. Track motors use this track to place up supply cars on the section. The mine floor which the track is laid on is dry and rock dusted. A citation was also issued along with this order for inadequate preshift examination. The preshift examination book shows that the track had been examined and no violations were found or reported. The previous order which this order was written on is No. 3107321 dated 4-11-88.

#### Petitioner's Testimony and Evidence

MSHA Inspector Robert Huggins confirmed that he issued the violation and order after observing that none of the rail joints on the cited supply tracks were bonded. He stated that he asked company representative L.A. Smith, who accompanied him during his inspection, about the matter, and Mr. Smith stated that "they had messed up" (Tr. 20). Mr. Huggins stated that there were approximately fifteen 30-foot lengths of track rails over the cited 350 feet of rails which lacked track bonding (Tr. 21).

Mr. Huggins stated that he had no special training as an electrician, and he relied on MSHA's section 75.514, July 1, 1988, Program Policy Manual guidelines (Exhibit P-7), which state as follows (Tr. 23):

This section requires that conductors be joined together with clamps, connectors, track bonds or other suitable connectors to provide good electrical connections.

At least one rail on secondary track haulage rails shall be welded or bonded at every joint, and cross-bonds shall be installed at intervals of not more than two hundred feet.

Mr. Huggins confirmed that the cited supply track was secondary haulage and that there were no welds at any of the track joints and no cross bonding. He believed that the MSHA policy provision was readily available to the respondent. He confirmed that mantrips, a rock duster, and a roof bolter were on the supply track and that the ground clamps were connected to the rail at the end of the track with "alligator like clamps". The power supplied to the track was 300 volt D.C. current (Tr. 25-27). Mr. Huggins described the condition of the track rails, and he was told that they had been installed for over two months and some of them were "surface bent" (Tr. 28). The track rails were connected with fishplates, which are strips of metal that are attached rail-to-rail with bolts (Tr. 27-28).

Mr. Huggins described the hazards associated with the cited conditions, and he explained that he designated the violation as an "S&S" violation, but that this was later modified to a "non-S&S" violation by an MSHA conference officer" and that he (Huggins) was never notified of the conference or contacted by the conference officer (Tr. 28-32).

Mr. Huggins confirmed his "high negligence" and unwarrantable failure findings, and he stated that mine management knew about the cited conditions because the matter of track bonding was discussed during the first day of his inspection of the mine. He estimated that this was "probably right after the fourth of July. The fifth or sixth, somewhere in there" (Tr. 32-33). He also stated that preshift examiners at other mine locations had noted the absence of track bonding, that superintendent Terry Suder indicated that the track had been installed prior to the development of the section and that they forgot to go back in and bond it, and that L.A. Smith "said they screwed up. Not those exact words" (Tr. 34). Mr. Huggins also indicated that it was quite obvious that the required track bonds were not in place, and that anyone walking the track should have observed the conditions (Tr. 35). He confirmed that the preshift books for the specific cited track area did not reflect the missing track bonds, and that he issued a citation for an inadequate preshift examination which was paid and not contested by the respondent (Tr.36). He further confirmed that people would walk the track numerous times during the day and that the track was used on all three shifts. Preshift examiners would also have occasion to be in the area, and other management personnel would have occasion to pass by the area (Tr. 37-42).

On cross-examination, Mr. Huggins stated that he took a class in electricity for non-electrical inspectors. He confirmed

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that at the time he observed the cited track conditions nothing was moving on the track and he observed no arcing or sparking (Tr. 44). He observed no change in the operation of the jeep or jitney that he was riding on while traveling on the track, nor did he see any jeep lights go out or fade, and he did not feel any of the joints to determine if they were warm or hot. He confirmed that steel ties placed on wood were being used on the track in question (Tr. 45).

Mr. Huggins stated that the steel ties held the track sections together, but he did not consider the fishplates to be electrical connections between the rails. He confirmed if there were no efficient current return on the tracks, the equipment on the tracks would not have been able to operate. Since the equipment was able to operate, he agreed that current was moving through the track (Tr. 47-49).

Mr. Huggins stated that he could not identify any one specific individual who was highly negligent with respect to the violation, but that "a good number of management people had been up and down the track". He believed that one or two people, as well as the preshift examiners, should have seen the cited conditions. He conceded that the same preshift examiners are not used every day, and that an examiner could miss a condition. However, he considered the fact that nothing was done after he discussed track bonding with management when he began his mine inspection, and Mr. Smith's admission that the respondent "screwed up" (Tr. 54-55, 59).

Mr. Huggins stated that the steel ties he observed were used ones and that they are usually rusty and dirty when they are installed and that "common sense" would indicate that "you wouldn't have an effective ground anyway" (Tr. 63). He did not consider a steel tie to be a suitable cross-bond because MSHA has never considered them to be acceptable and the entire mine is cross-bonded with regular cross bonds welded to the mine rail (Tr. 64).

Mr. Huggins described a "track bond" as a piece of copper twisted together like a wire rope with ends that are pounded onto the edge of the bottom of the rail and welded and tacked to make an efficient bond (Tr. 64). Mr. Huggins stated that he has never been in a mine that did not use track bonds and he confirmed that they are used on the tracks throughout the respondent's mine. He had never before the hearing in this case heard management take the position that fishplates and cross-ties were electrically sufficient pursuant to section 75.514, and in his opinion, there were no other suitable electrical connectors on the supply track at the time of his inspection (Tr. 65).

Mr. Huggins admitted that he made no determination as to whether or not the use of fishplates as bonding rendered the

cited track less than mechanically or electrically efficient, and only knew that the normal type of copper wire bonding that he had observed in other areas of the mine was not being used. He concluded that the use of copper wires was the acceptable method of bonding, and that the method being used was unusual (Tr. 68-69).

Mr. Huggins was of the opinion that the use of a fishplate as a track bond is not a good electrical connection because two pieces of rusted steel put together cannot make good contact for electrical connections. He conceded that he did not conduct any test to determine whether the use of the fishplates was an electrically efficient connection (Tr. 76). Mr. Huggins stated that an acceptable definition of a track bond is a piece of copper that goes either in front of or behind the fishplate and is welded to both ends of the rail (Tr. 76). He stated that when he discussed track bonding with management he did not specifically discuss the cited supply track but only spoke generally about bonding (Tr. 87).

MSHA Inspector Spencer Shriver testified that he is an electrical engineer and has bachelor's and master's degrees in electrical engineering from the West Virginia University (Tr. 89). He stated that he was familiar with the mine and had conducted prior electrical inspections and spot inspections at the mine. He stated as follows with respect to the use of track bonds (Tr. 91-93):

- A. A track bond, it varies in length. It's about one and a half to two feet long. It has a metal clamp on the end which is pounded onto the flange of the rail, then welded in place. Then this piece of wire is welded across the track bond -- excuse me -- across the track joint to get an electrically efficient connection.
  
- Q. Now, is this term, track bond -- Well, first of all, is the term, track bond, an accepted term for this device in the mining industry?
  
- A. Yes, sir. I've never heard it called anything else, a track bond or bond, in the fifteen years I've been involved in it.
  
- Q. When the term, track bond or rail bond, is used in the mining industry, is there any doubt as to what the reference is to?
  
- A. Not in my opinion.

Mr. Shiver was of the opinion that the conditions cited by Inspector Huggins constituted a violation of section 75.514, and in particular, the sentence that states "all electrical connections or splices in conductors shall be mechanically and electrically efficient". He explained that the fishplates that hold the track rails together may be rusted or corroded and that "no matter how tight you get them, there is still some resistance in that connection" (Tr. 92).

Mr. Shiver explained the direct current circuitry used on the supply track in question and the application of MSHA's policy manual interpretation of section 75.514. He confirmed that in terms of compliance, MSHA considers the clamp and copper wire bond as the only acceptable means of insuring electrical and mechanical efficiency at all times (Tr. 95-102).

Mr. Shiver stated that he did not observe the cited track area because he was on the four right track conducting an inspection. He issued a citation at that track because two of the track joints had not been bonded. The track was connected with fishplates but was not bonded like all of the tracks in the mine. He confirmed that the track had been bonded to a point but personnel were called off that job and were dispatched to the track cited by Mr. Huggins (Tr. 105-107).

Mr. Shriver did not believe it likely that the use of fishplates provided electrically efficient connections because of the increased resistance caused by rusty rails. He confirmed that a voltage drop test can be conducted to determine the electrical efficiency of a conductor and that he has conducted such tests on several occasions at various mines. He stated that the hazards presented by the cited conditions included the possibility of electrocution, a fire due to hot joints, and a short circuit not being interrupted by reduced short circuit currents (Tr. 108-111). He further explained the injuries that could result from the hazards, and he believed that it was reasonably likely that a fatality could occur, irrespective of the MSHA conference officer's non S&S finding (Tr. 113-121).

On cross-examination, Mr. Shriver confirmed that he never observed the cited track before or during Mr. Huggins inspection and he did not conduct a voltage drop test on that track. When asked if the track connections in question were electrically inefficient, Mr. Shriver responded "not having been there and based on what I've been told, in my judgment, they would be electrically inefficient" (Tr. 124). He confirmed that he never observed the connections before they were bonded (Tr. 125).

Mr. Shriver stated that he was not familiar with the use of stud terminals to attach a rail bond to a track (Exhibit P-8), and that he has only seen welded connections. He confirmed that the inspection of track joints is not required during weekly



electrical examinations (Tr. 127). Mr. Shriver further explained the theory of track resistance, the hearing effects of welded bonding, and the application of MSHA's policy (Tr. 128-137).

#### Respondent's Testimony and Evidence

William Runyan, section foreman, confirmed that he escorted Mr. Huggins during his inspection and he described what occurred. He confirmed that there was a supply car, portal bus, two jeeps, a rock duster, and a roof bolter on the track in question, and that except for forty feet of the track which one could observe visually, the remaining portion was filled with the equipment he described. Mr. Runyan observed no evidence of any track heating, arcing, or sparking, and he stated that the roof bolter and rock duster were used on the section and operated efficiently and he had no reason to believe that there were any problems with the return electrical feed for these machines. He confirmed that Mr. Smith was not with the inspection party initially, but may have met it later at an intersection (Tr. 138-143).

Mr. Runyan confirmed that no tests were made to determine the efficiency of the connections on the cited supply track, and the respondent immediately responded to the order by bringing two people from the four right track section to begin bonding the rails in question (Tr. 144-145).

On cross-examination, Mr. Runyan stated that Mr. Smith was with inspector Shriver on the four right track section but he could not recall whether he met them underground or outside of the mine. Mr. Runyan believed that the track had been laid for at least four weeks prior to the inspection by Mr. Huggins, and he confirmed that he saw no track bonds on the cited section of supply track (Tr. 145-147).

In response to further questions, Mr. Runyan stated that the tracks in the mine are general bonded with the copper bonding device described by Mr. Huggins and Mr. Shriver. He confirmed that the cited tracks were connected with fishplates, and given the absence of water, the dry conditions, and the length of track that had been laid, he believed the use of fishplates was an acceptable bonding method. If more track had been laid, the fishplates may have presented a problem. Although it was hard to see under the cars on the track, he acknowledged that the people who laid the track would know it was not bonded. He did not know why the track was not bonded in the manner required by the inspectors (Tr. 148-154).

Robert L. Mabin testified that he was the section foreman on the two south section at the time of the inspection and had worked there for about a month. He confirmed that equipment had operated on the track without any indications of problems with the return circuit for the equipment. He never observed any

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track arcing or sparking, and saw no visual evidence of heated track joints (Tr. 155-159).

On cross-examination, Mr. Mabin stated that the roof bolter may have been used four or five times during a two-month period on his shift, and he assumed that the cited supply track was not bonded because it only covered 350 feet (Tr. 162-164).

Section 104(d)(2) "S&S" Order No. 3720838, issued on August 12, 1992, cites an alleged violation of 30 C.F.R. 75.400, and the condition or practice is described as follows

At 4 right transfer, coal has spilled on outby side of headroller and chute, accumulating 4 feet high and forcing back under bottom belt of Main South No. 2 Belt. This condition was reported in the preshift examination book, and this hazardous condition was not promptly corrected. Persons shoveling accumulation stated that accumulations occur once or twice a week, and review of preshift examination book disclosed that accumulation was listed about ten times in last three weeks. Violation therefore occurred due to failure of operator to correct the underlying condition which permitted the accumulations to repetitiously occur.

The violation was left uncorrected for three hours after being listed in preshift examination book. The violation is particularly serious, since there have been many belt fires from such accumulations, warranting increased attention from operator to correct it.

The violation was listed several times in preshift examination book, indicating an underlying problem. The operator knew of violation and failed to promptly correct it. Therefore, operator had high negligence, and a serious accident is reasonably likely to occur.

Petitioner's Testimony and Evidence - Order No. 3720838.

Inspector Shriver confirmed that he issued the contested order on August 12, 1992, for coal accumulations that he observed at the locations described in his order, and he explained what he observed. The section foreman informed him that "he had been broke down and had not dumped any coal at all". Based on this statement, Mr. Shriver concluded that the accumulations had been present at least during the previous shift (Tr. 186-189). Mr. Shriver stated that the cited coal spill was roughly waist deep, five or six feet wide, and probably ten feet long (Tr. 190).

Mr. Shriver had no knowledge of any fires or injuries caused by coal accumulations at the mine in question. He identified a summary report of fires at other mines during the past five years, and he described the hazards associated with the cited accumulations and the reasonable likelihood of injuries resulting from the hazards.

Mr. Shriver stated that three belt rollers were turning in the coal accumulations and that the belt was "massaging the coal". He believed it was reasonably likely that a fire would start from that source. He stated that it was not uncommon for a roller to break or stick, and the belt rubbing on the roller would generate enough heat to ignite coal. In the event of a fire, it could reasonably be expected that serious burns from an explosion, or smoke inhalation from a fire would result (Tr. 192, 197-199).

Mr. Shriver stated that mine management knew about the cited accumulations because coal spillage at the four right transfer point had been recorded "about ten times the previous few weeks" in the preshift books which were countersigned by several company officials. Accordingly, Mr. Shriver concluded that the recurrent accumulations problems should have been known to these individuals. He also indicated that there was "a rather obvious big hole" in the sideboard at the transfer point which should have been detected by the onshift and preshift examiners (Tr. 200).

Mr. Shriver reviewed the preshift books for August 12, 1992, and explained some of the entries. He believed that the recurring spillage was caused by coal falling through the hole in the side board (Tr. 203). Mr. Shriver stated that he returned to the area a few days after he issued the order and found that the condition had reoccurred. He issued a citation, and the hole was repaired and the spillage has become practically nonexistent (Tr. 204).

Mr. Shriver stated that he has had occasion to issue citations for coal accumulations along the belts four or five times prior to the issuance of his order, and it was his understanding that the sideboard hole had existed since it was cut out to install a belt scraper, "probably about six weeks" (Tr. 207).

In response to a question concerning the "aggravated conduct" by the respondent in support of his unwarrantable failure finding, Mr. Shriver stated as follows at (Tr. 211).

- A. The fact that it had been recorded, I think, about ten times. I leafed back through the

fire boss book and I observed about ten occasions when a problem had been reported.

And the comments of the two men who came to shovel up the problem that they would have to shovel it up once or twice a week. And the fact that the belt examiners -- the on-shift is done by the section foreman.

And several times, in my opinion, the on-shift examination disclosed this problem and they were able to clean it up before the next shift start, in which case it would not be entered in the fire boss book. So there were actually times when it was there, but not recorded.

And based on all these factors, but mainly the fact that the mine foreman and the superintendent had countersigned the fire boss book, the running of the coal appeared to me to be more important than to fix the problem that was causing the accumulations.

On cross-examination, Mr. Shriver reviewed the relevant preshift examination book and explained some of the entries, and he confirmed that each time the accumulations were noted in the book they were cleaned up every time (Tr. 219). He confirmed that he considered the violation to be an unwarrantable failure because the accumulations continued to repeatedly occur and not because they were not cleaned up (Tr. 219).

Mr. Shriver confirmed that he did not test for methane, and he identified the ignition sources as the three rollers turning in coal and the belt rubbing on coal. He observed no hot rollers, and he considered it reasonably likely that death or serious injury would have resulted from the cited conditions (Tr. 220). Mr. Shriver confirmed that he did not observe any of the coal spilling out of the chute at the location of the hole, but when he next returned to that location, there was no spillage there (Tr. 224).

Mr. Shriver conceded that his order does not mention that any belt rollers were turning in coal, and after referring to his notes he stated that they say nothing about rollers turning in coal, but do indicate that "coal worked under the belt" (Tr. 228-229). The shift reports reflect that the accumulations that were reported and recorded were cleaned up each time, but that on August 12, 1992, when he was there, the individuals assigned to clean up the cited accumulations had not reached that area before he did (Tr. 237).

Mr. Shriver estimated that the cited spillage accumulation had been present for half of the preceding midnight shift, and that "it would take it a couple of hours to accumulate that much coal spillage" (Tr. 238). He confirmed that he reviewed the preshift books (Exhibit P-12) for ninety-five shifts prior to his order, and that spillage was reported twelve times. He agreed there would be many shifts where no spillage was reported because "the on-shift people apparently cleaned it up before they had to call it out". He also stated that "there was spillage there and people were cleaning it up on-shift, but if they couldn't get it all, then they would call it out as an entry in the preshift book" (Tr. 240).

#### Respondent's Testimony and Evidence

John G. Blue, shift foreman, stated that he was present at the cited area after Mr. Shriver issued his order. He confirmed that he reviews the preshift reports from the prior shift in order to determine the number of people needed to correct any recorded violative conditions within a reasonable time (Tr. 243). He stated that he assigned two people to clean up the spillage at the cited four right transfer location because the foreman who conducted the preshift told him the chute had plugged, that he found it and cleared the plug, but that there was spillage on the floor and around the ribs. The two men in question stopped along the way to drag another belt that was more of a priority because of float dust, and the foreman told him that the spillage in question was not touching any belt or rollers, and that it was not an immediate problem, but needed to be cleaned up (Tr. 243-244).

Mr. Blue stated that the spillage entries shown in the preshift books were not for the same cited conditions and that there were six different areas where spillage may occur (Tr. 247). He confirmed that the coal spillage, as well as all of the coal on the section, is damp and that the transfer point is "extremely wet". He further stated that he observed no ignition sources in the cited area, and he found it highly unlikely that the wet coal could have ignited (Tr. 250).

Mr. Blue believed that the cited accumulations had existed for no more than two hours and ten minutes under "a worst case scenario" (Tr. 250). He explained that the preshift examiner found the spill and told him about it when he came outside. Mr. Blue believed the spill occurred between 6:30 and 7:00, and he stated that the two men who were dispatched to the area to clean up the spill stopped at another belt area on their way to the cited location. He made the clean up assignment at 8:00 a.m., at the beginning of the shift (Tr. 253).

On cross-examination, Mr. Blue agreed that the cited accumulations had existed for at least two hours. He confirmed

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that he met with the foreman of the prior night shift who informed him of the spillage and that he immediately assigned personnel to clean it up (Tr. 258). He agreed that there were accumulations at the cited location during the prior month, but he believed the cited accumulations may have been caused by a plugged chute (Tr. 260). However, he stated that "anything can cause spillage," that it was not uncommon, and that no rollers were turning in coal and no coal was in contact with the belt (Tr. 261, 269).

Robert C. Andersch, Jr., confirmed that he accompanied the inspector and that he was served with the order. He stated that the cited transfer point was "very wet" and that the spillage was caused by "some kind of a backup into the chute, some wet coal or muck" (Tr. 273). He did not notice any ignition sources, and although the belt was running, no coal had been mined prior to their arrival and there was no coal on the belt. He observed no belt rollers turning in coal or the belt touching and rubbing coal (Tr. 274).

Section 104(d)(2) Order No. 3718252, September 4, 1992, cites an alleged violation of 30 C.F.R. 75.400, and the cited condition and practice states as follows:

At Main Butts No. 1 drive there is accumulation of fine coal and dust under the bottom belt from the tail roller to the drive roller nearest tipple. There is accumulation of wet coal and dust under and around a piece of belt over the north drive motor, with dry coal and dust under the connection box and packed against motor. Heat from motor had dried this material out, possibly resulting in spontaneous combustion. On the frame between the two motors, fine coal was packed so tightly that a pick hammer was required to dig it loose. The 4/0 AWG cable serving the drive motor nearest tipple had the nut come loose from the fitting into the junction box, and the cable had pulled out of the box, leaving opening into connections. Substantial dust had accumulated in the box. When the motor junction boxes were opened, the pilot and ground conductors in both motors were connected to same stud. The possibility of a fire from friction and motor heat, fire or explosion from dust, and water in the motor junction box with opening, and improperly wired ground monitor circuits, make a lost workday accident reasonably likely.

The record of preshift examinations revealed that spillage was reported on this belt from the tail (piece) to tipple. Nobody was working at the drive, which is the most likely location for a fire to result

had high negligence in permitting these accumulations to exist.

Petitioner's Testimony and Evidence

MSHA Inspector Spencer A. Shriver testified that he was accompanied on his inspection of September 4, 1992, by the respondent's Safety inspector Fred Morgan. Mr. Shriver stated that an accidental spill had occurred two days earlier at another location and that he returned on September 4, to check on that cleanup and found the accumulations that he cited that day. He confirmed that the accumulations were all located in the same general location, but were different types of accumulations (Tr. 274-279).

Mr. Shriver described the locations and extent of the accumulations and stated that they ranged from damp to dry (Tr. 279-282). He believed the accumulations presented a fire hazard through spontaneous combustion at the location of the motors, and he described the hazards at the other locations (Tr. 282-285).

Mr. Shriver believed that the accumulations at the connection box had existed for "several days" or "several shifts" (Tr. 285-286). He believed that it was reasonably likely that an injury would result from the hazards presented by the accumulations, and he explained what could have occurred if normal mining operations were allowed to continue (Tr. 286-288).

Mr. Shriver stated that he based his "high negligence" finding on his belief that the accumulations between the motors had existed for several shifts and that he "had discussed this situation there with Mr. Cole couple of days earlier and he said that he would clean it up" (Tr. 288). Mr. Shriver also stated that the preshift examiner would travel the area each shift and should be looking for accumulations at the drives, tail pieces, and transfers, but that the location of the motors were not among the previous locations mentioned by mine foreman Cole (Tr. 289).

Mr. Shriver believed that the accumulations along the No. 1 belt drive rib had existed "over a period of time" and that it was cleaned up from the drive and left by the rib. The accumulation at the bottom belt had accumulated for "several days from normal accretion of dust and fine coal" (Tr. 291). He confirmed that none of the cited areas were the areas reported to him by Mr. Cole (Tr. 291-293). Mr. Shriver could not recall reviewing the preshift books to determine whether the cited accumulations had been recorded (Tr. 295). He also confirmed that he did not ask Mr. Cole about the cited accumulations (Tr. 296). He later remembered reviewing the preshift books and found that spillage was reported on the belt in question from the tailpiece to the tipple (Tr. 299).

On cross-examination, Mr. Shriver confirmed that the coal material packed against the motor was black and dry, that he did not sample it, and did not check for methane in the area (Tr. 306-307). He believed that the main ignition source was the junction box. He stated that the cable entered the box through a fitting that had "backed off" from the inside, but he saw no bare wires. The insulation was somewhat damaged, and with the continued vibration, he believed it would have cut through into the energized wires over several shifts. He confirmed that the area "was fairly damp" and was equipped with a sprinkler fire suppression system (Tr. 308). He confirmed that the material between the drive tipple was the result of a spill, and he conceded that he did not include the accumulations along the rib as part of his order (Tr. 309).

#### Respondent's Testimony and Evidence

Frederick D. Morgan, Sr., respirable dust foreman, confirmed that the spillage under the belt tailpiece and tipple had been reported and called out and two men and a foreman were working on it. The area was damp and well rock dusted (Tr. 312-316). Mr. Morgan confirmed the existence of the accumulations cited by the inspector (Tr. 317-323).

Robert L. Mabin, testified that he was the regular section foreman at the two south section on September 4, 1992. He confirmed that there was a large spill at the belt transfer point, that the section was idled, and that he assigned two men to work on the spillage that had been reported on the preshift (Tr. 327). He explained what work was done to address the spillage, and he stated that the area is always wet and is equipped with an operable fire suppression system (Tr. 329-330).

Docket No. WEVA 93-5

This proceeding concerns a section 104(d)(2) "S&S" Order No. 3121715, issued by Inspector Spencer A. Shriver on June 18, 1992, citing an alleged violation of 30 C.F.R. 75.400. The cited conditions are described as follows:

On 3 right section, ID No. 028, the tailpiece of the 3 right belt, the tail roller is turning in fine dry coal about 18 inches high and 18 inches long. Area was covered with red dust. Float dust had covered 4 inch water pipe and belt structure for about 35 feet outby to inby rib of next crosscut. Float dust became suspended in air when water pipe was patted.

Section foreman said he had made last check at 10:30 A.M., and due to problems with section equipment,



had only dumped half-dozen or less buggies of coal on belt. Accumulations of fine coal and dust had occurred at least during previous midnight shift, and probably much earlier.

Most belt fires are caused by rollers turning in coal. An accident is therefore reasonably likely. Such a fire would generate dense smoke which would affect persons working on belt. Accident would reasonably result in lost workdays. Section Foreman should have found and corrected violation between arrival on section at 8:30 a.m. and issuance of order at 11:50 a.m.

Assistant Mine Superintendent was on section for 20 minutes before inspector knowing authorized representative of secretary was heading for section. He and section foreman were at feeder, 20 feet from tailpiece, when violation was observed. Operator therefore had high negligence in permitting violation to exist.

The respondent's counsel conceded that the cited accumulations existed and constituted a violation of section 75.400, and that the crux of this case is the his dispute with the inspector's unwarrantable failure and "S&S" findings (Tr. 9-10).

#### Petitioner's Testimony and Evidence

Inspector Shriver stated that he conducted the inspection on June 18, 1992, and he explained what he found. He stated that there was a considerable amount of red coal dust on the ribs and belt structures and that "anytime I had seen that red dust in the past, it usually meant that a roller was turning in coal for some length of time". He believed that the dust had turned red because "it was slightly oxidized by the friction of the roller grinding in the coal" (Tr. 11-19). The accumulations next to the roller were dry and the area under the belt drive was wet (Tr. 26).

Mr. Shriver stated that the hazards associated with the violation included the roller turning in the coal and generating heat which turned the dust red, and the possibility of smoke inhalation exposure to people in the area. He was also concerned about a methane ignition on the section and believed that the face was two to three hundred feet from the accumulations (Tr. 30). He believed that an injury was reasonably likely, and that persons in the area would be exposed to smoke inhalation, or severe burns in the event of a float coal dust ignition

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(Tr. 31-32). He also believed that it was reasonably likely that a fire would have resulted if normal mining operations continued and the roller continued turning in the accumulations (Tr. 32).

Mr. Shriver believed that the accumulations under the roller existed for "several shifts" because the material "was more like it had been gradually dribbled down into this area, and it would have taken a few days to get to this point" (Tr. 33). He confirmed that only "a couple of buggies" of coal had been mined before he arrived, and he did not believe this was sufficient to have cause the accumulations in question.

Mr. Shriver stated that the cited area was required to be preshifted, and he checked the morning report and found that the conditions had not been reported. He estimated that the accumulations had existed for "several days", "fifteen or twenty shifts", or "six days" (Tr. 33-36). He further stated that it was difficult to determine how long the accumulations existed, but since little coal had been mined, "it would have had to have been accumulated during the previous midnight shift" (Tr. 37).

Mr. Shriver believed that the assistant mine superintendent should have known about the conditions because the conditions were obvious and he went into the section ahead of him for an inspection, and the section foreman told him that he had examined the area approximately an hour and twenty minutes earlier. Under the circumstances, Mr. Shriver concluded that "the company's agents did know about it" and that "combined with the length of time it had been in place", he believed that this constituted aggravated conduct (Tr. 39). Mr. Shriver conceded that he had no evidence that the superintendent and foreman actually saw the cited accumulations, and no one admitted going by the area and seeing the accumulations (Tr. 41-43).

Mr. Shriver explained the "aggravated factors" amounting to an "unwarrantable failure" violation as follows (Tr. 43-44):

- A. The fact that there was an accumulation there and, in my opinion, it had been there for a substantial length of time; the fact that the condition was obvious to a competent observer, such as a section foreman; that he told me he had made his check of the area at ten thirty; and also that the assistant superintendent was in the area. I felt at the time he should have observed it.
  
- Q. Now, during those preceding six days which you felt this accumulation had been present, was this an area that mine management would have passed through often?

- A. The section foreman on each section should have examined the area for the preshift examination for the following shift.
- Q. The preshift. Would any other members of mine management have been through this area during the preceding six days?
- A. It's difficult to say. They frequently do go through there, but to pinpoint any specific person at any specific time, I could not do that.

On cross-examination, Mr. Shriver stated that when he has found similar red dust conditions in the past "it is a condition that requires several shifts to achieve", and that "we would find it had been there for several shifts" (Tr. 49). He was not sure that the red dust was combustible, and he has never tested it (Tr. 49). The material contacting the belt "was not smoking and it was not on fire", and he did not test or feel it for heat content (Tr. 55).

Mr. Shriver stated that he made no methane checks and had no indication of any methane problems. He was satisfied that the section foreman checked for methane, and Mr. Shriver could not recall seeing any areas inby the crusher, feeder and belt tailpiece that were not adequately rock dusted (Tr. 57). He explained his "S&S" finding as follows at (Tr. 55-59):

- A. If there were an ignition of methane on the section and we have an accumulation of float dust like we had on the structures here as has happened in some other mines, the concussion of the methane ignition can suspend the float dust and cause a coal dust explosion which is very severe. As in, I believe it was the south mountain mine, we had several fatalities in that case.

\* \* \* \*

- A. Well, it's reasonably likely there would be a serious accident either from a methane ignition or from the roller turning in the coal, causing a fire.
- Q. Is that a second ignition source that you're hypothesizing here? It could start with a methane ignition somewhere up near the face, or it could come from an ignition of the coal being contacted by the roller?

A. That is right.

Q. But you did not see any indication of heat with respect to that roller turning in coal.

A. Other than the condition of the dust I observed.

Q. No smoke, though.

A. No.

Q. No smell of combustion.

A. No.

\* \* \* \*

Q. The second hypothetical source of ignition, the ignition of the coal by the roller, the friction between the coal and the roller, that wouldn't cause the kind of concussion that would mobilize float dust, would it?

A. I don't believe it would.

In response to further questions, Mr. Shriver stated that he detected no permissibility violations at the face that would constitute potential ignition sources, and saw no ventilation problems (Tr. 63-64). He conceded that when he makes an "S&S" determination, he considers "a worst case scenario" if mining were allowed to continue (Tr. 64).

Mr. Shriver stated that he checked the preshift book and found no recorded violative conditions, but he did not check the preshift books for the five or six days prior to his inspection (Tr. 67). When asked if the accumulations had not been cleaned up, and if mining were allowed to continue, whether the tail roller turning in the accumulations would have ignited the coal, he replied as follows at (Tr. 69):

A. I think it's reasonably likely that it would have ignited. I base that on conversations with people I work with up at the District. Most of them have been at least section foreman or mine foreman and they indicate that rollers turning in coal, if left for a long period of time, will frequently result in a fire.

Respondent's Testimony and Evidence

Leonard J. Lewandoski, section foreman, testified that he worked the midnight shift on June 18, 1992, and conducted the preshift examination of the belt and tailpiece, commencing at 5:15 a.m. Upon examination, he found that the tailpiece "was clean" (Tr. 71-72).

On cross-examination, Mr. Lewandoski stated that he saw no "red coal" when he traveled the area, and he observed no tail roller turning in fine, dry coal. He has served as section foreman since December, 1981, and has observed "a brownish red" dust that results from rusty belt rollers. He observed no accumulations of any kind when he conducted his examination (Tr. 72-77).

Robert C. Andersch, Jr., stated he served as the inspection escort for Mr. Shriver on June 18, 1992, when he conducted his electrical inspection. He confirmed that two accumulations were found at the tail roller of the three right section tailpiece, one on each side of the roller. He estimated the accumulations to be 12 inches high, with 3 to 5 inches submerged in water, and they were "brownish" in color (Tr. 79). Mr. Andersch described the materials as "residue coming off of the belt since our water sprays down at the drive were inoperative" (Tr. 80).

Mr. Andersch stated that he observed the tops of the accumulations "barely rubbing on the belt," but not onto the roller. He also observed accumulations and brown dust at a V-scraper located 10 feet outby the tail roller, and the tops were dry, but the bottoms were wet. He further stated that he has never seen any "red dust" as described by the inspector, and he would classify it as "brown" (Tr. 81-83).

John E. Godwin, stated that he was the assistant mine superintendent on June 18, 1992, and that between 9:30 and 10:00 A.M., the belt was reported as being dry (Tr. 84). Upon inspection of certain belt sprays he found that the belt was dry, and he described what occurs when the belt runs "off-center" (Tr. 86-89).

Mr. Godwin stated that the section had been moved two days prior to the inspector's arrival, and he believed the accumulations could not have been present for more than two days (Tr. 90). He believed that the "orangish brown dust" on each side of the v-scraper was caused by the black and orange colored rubber material used in the construction of the scraper and that it was "residue and belt deposits" from the dry running belt (Tr. 95-96).

Mr. Godwin conceded that accumulations were present, but he did not believe that a (d) order was justified because the pile was small and he observed no roller turning in the dust (Tr. 98-100). He attributed the brown color of the accumulations to the dry belt and not oxidation, and he believed that coal can accumulate in seconds with the belt running off at the tailpiece (Tr. 101).

Inspector Shriver was recalled by the presiding judge and stated in part as follows at (Tr. 109):

This type of dust that I observed in the area, I've found when I see that dust - I didn't go to the nearest tailpiece or what have you on the belt -- I usually find that there is coal there, the rollers turning in coal. That has been my experience.

Q. When you see red dust, the rollers are turning in coal?

A. Reddish dust. Whether it's brown or red -- I'm not that good at distinguishing colors, but I've found on several occasions that when I seen that color material in the area --

Q. Could it have been brownish or orange or brown?

A. Reddish brown.

On cross-examination, Mr. Shriver was of the opinion that the "reddish dust" was caused by the tail roller, and he explained as follows at (Tr. 113):

A. Turning in the coal and suspending the reddish dust into the air and depositing it on the ribs and bottom; primarily because on several occasions in by inspecting experience, I've found a similar type of dust, and when I got to the cause of it, it was a roller turning in dust -- or a roller turning in coal.

Mr. Shriver stated that the longer a roller turns in coal dust, the more dust is generated, and that a roller turning in dust for a half-hour to two hours could turn the dust brown. He confirmed that the cited dust accumulations consisted of "a light coating of the ribs" rather than piles of material, and in his opinion, they had existed "at least in the preceding shift and probably much longer". He confirmed that his unwarrantable failure finding was based on how long the condition existed and he fact that the section foreman told him he had examined the

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area (Tr. 116-120). Mr. Shriver believed that the foreman should have observed the condition, and in his opinion, the foreman didn't examine the area very closely (Tr. 124).

Mr. Shriver confirmed that he did not measure the accumulations in question and only "eyeballed it across the back of the tail roller". In his judgment it was "one and a half feet in length in the direction of the belt" (Tr. 125). He believed that it took 25 minutes for two men to clean it up with a shovel, but that they were doing other work as well (Tr. 127-128).

Docket No. WEVA 93-92

This proceeding concerns four (4) section 104(a) "S&S" citations issued by Inspector Spencer A. Shriver. Citation No. 3720837, issued on August 12, 1993, citing an alleged violation of 30 C.F.R. 75.400, was settled by the parties and the respondent agreed to pay the full amount of the proposed civil penalty assessment of \$506. The proposed settlement was approved from the bench, and my decision in this regard is herein reaffirmed (Tr. 131-132).

The three remaining contested citations are as follows:

Section 104(a) "S&S" Citation No. 3718250, issued on September 3, 1992, cites an alleged violation of 30 C.F.R. 75.701-3(a), and states as follows

At No. 45 pump on main haulage, the 250 volt DC fuse box does not have a frame grounding conductor. The conductors in and out of the fuse box are subject to vibration from passing locomotives, so possibility of abraded insulation and an energized box is reasonably likely. There have been several fatalities from contacting trolley in past year; however, area at fuse box was dry, so injury could reasonably be lost workdays. These boxes have been changed from AC to DC for over a year, and have had several weekly electrical examinations. This box has never had a frame-grounding conductor. Operator therefore had moderate negligence in permitting violation to exist.

Section 104(a) "S&S" Citation No. 3718251, issued on September 3, 1992, cites an alleged violation of 30 C.F.R. 75.518, and states as follows

At 35 Jug Pump on Main Haulage the fuse in fuse holder is TRS 20R ampere rated. The pump is new and covered with blue paint, and name plate could not be found. However, this type of pump is 1 horse power or less, requiring a 5 ampere fuse. If pump became overloaded toxic fumes could be emitted, traveling about 2 miles

to lynch air shaft. Two motormen are in this area shuttling loads and empties back and forth. A lost workdays accident involving two motormen is therefore reasonably likely. Weekly electrical examiner checklist calls for 5 ampere fuse on this pump. Operator therefore had moderate negligence in permitting violation to exist.

Section 104(a) "S&S" Citation No. 3718256, September 4, 1992, cites an alleged violation of 30 C.F.R. 75.512, and states as follows:

An inadequate examination of electrical equipment is being made at this mine. The following violations which were abundantly obvious were cited:

1. The fuse box at No. 45 pump had never had a frame grounding conductor. Box has been installed about a year - 104(a) No. 3718250.
2. The fuse protecting No. 35 pump was 10 amperes. The weekly examiner check list calls for a 5 ampere fuse for this pump - 104(a) No. 3718251.
3. The cable in the belt drive junction box at main butts drive was pulled out of the box. Condition was extremely obvious - 104(a) No. 3718253.
4. The pilot and ground conductors on the cables to the main butts drive motors were connected to one stud. Motors have been installed for about two years. Weekly examination should include check of pilot circuit - 104(a) No. 3718254.

Weekly examinations which permit these kinds of violations to go undetected is reasonably likely to result in lost workday accidents. These examinations have been made over several months with no follow up to determine adequacy. Operator therefore had moderate negligence.

#### Petitioner's Testimony and Evidence

Citation No. 3718250. Inspector Shriver stated that he issued the citation after finding that a 250 volt D.C. Square -D fuse box located along the main haulage at the location of the No. 45 pump was not properly frame grounded to hold the potential



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on the box to a low value approaching zero volts if the box became energized. The condition constituted a violation of section 75.701-3(a), because none of the grounding methods stated in the regulation were used to frame ground the box (Tr. 139-143).

Mr. Shriver described the hazards associated with the lack of proper frame grounding and the likelihood of deterioration of the grommet holding the conductor entering the box. He explained that the power conductor entering the box could become abraded over time, and if it were cut through to the insulation the fuse box could be energize and would subject someone to "a fairly severe shock" (Tr. 143-150).

Mr. Shriver stated that the grommet holding the power conductor in place was "in good shape", and that it was "a tight fit" as the conductor entered the hole in the box. The cited condition concerned the one wire that entered the hole and was not tied or grounded to the box to complete the circuit (Tr. 151-154).

Mr. Shriver identified copies of prior citations issued at the mine for missing frame grounds and fittings (Exhibits P-6 through P-10). He confirmed that the cited box in this case would be subject to vibration by a passing locomotive, and that persons conducting a weekly examination of the box could not see that the frame grounding conductor that entered the box was not connected or grounded to the frame. He was not aware of any injuries at the mine in the past five years because of failure to ground a fuse box. He further testified about his reasons for his "S&S" finding (Tr. 160-184).

Citation No. 3718251. Inspector Shriver confirmed that he issued the citation after finding that a fuse providing short circuit protection for the one horsepower D.C. pump was four times the capacity of what it should have been. The fuse that he found was a 20 ampere fuse, and it should have been one that ranged from five to six amperes to provide proper short circuit or overload protection. He stated that the cited standard section 75.518, was violated because the proper fuse type was not used and the respondent's counsel did not dispute this (Tr. 187).

Mr. Shriver described the hazards associated with the cited condition, and he stated that the oversized fuse would not deenergize the pump if it "seized up or stalled for any reason". If the pump were to overheat it would be the source of toxic fumes or smoke or it would start a fire by igniting the coal, exposing two motormen who normally shuttle through the area to these hazards (Tr. 187-188). Mr. Shriver believed that it was reasonably likely that the pump motor would seize and overheat because the bearings go bad and mud or rocks that do not go

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through the pump strainer could become wedged in the motor and cause it to stall (Tr. 188-189).

With regard to any injuries resulting from the hazards presented, Mr. Shriver stated as follows at (Tr. 189-190):

Q. What injuries could these persons be reasonably expected to suffer from the fumes and other hazards you've described?

A. Smoke inhalation, which can be lost workdays.

Q. How serious would you reasonably expect those injuries of smoke inhalation to be?

A. Lost workdays.

Q. Now, what was the likelihood that a serious injury would have resulted from the condition you found if normal mining operations had continued?

A. I think it's reasonably likely.

Mr. Shriver did not know how long the oversized fuse had been in the box, and he stated that the respondent knew the required fuse size because of a chart posted in the safety office (Tr. 191).

Citation No. 3718256. Inspector Shriver stated that when he next returned to the mine on September 4, 1992, he found two electrical violations at the connection box on the drive motor at the main butts number one belt drive. He found a cable pulled out of the box and a ground conductor and pilot conductor connected to one stud, and he issued citations for these conditions (Exhibits P-13 and P-14). These violations, coupled with the two previous fuse violations, led him to conclude that the required weekly electrical examinations were not adequate, particularly since the first three conditions were quite obvious (Tr. 195).

Mr. Shriver believed that at least three of the cited violative conditions would have been present at the last weekly electrical examination and he described the hazards associated with inadequate electrical equipment examinations, and the injuries that would reasonably likely result (Tr. 196-200).

Mr. Shriver did not know when management first knew that electrical examinations were inadequate and he stated that inadequate examinations have been "a chronic problem" at the mine for several years. He confirmed that he has issued several citations and orders in the past for the same conditions, and

also supplied the maintenance supervisor with references from the electrical inspector's manual as guidance for making the examinations (Exhibits P-15 through P-20; Tr. 201-205).

On cross-examination Mr. Shriver stated that it was his practice in most cases to cite the respondent for inadequate electrical examinations after he has issued citations for the individual electrical violations. He explained that he does this "If I find a significant number of violations and if it is spread over a large part of the mine" (Tr. 206-210).

Mr. Shriver further clarified and explained the violative condition associated with Citation No. 3718250. He explained that the failure to connect the grounding conductor did not provide for "a solid connection to the mine track" for purposes of providing proper grounding protection as required by the cited standard (Tr. 214-222). Mr. Shriver further explained that vibration caused by passing trolleys would subject the power conductor insulation to abrasion at the point where the conductor entered the No. 45 pump box (Tr. 223-226).

With regard to the inadequate fuse on the No. 35 portable "Jug pump", Mr. Shriver stated that he did not know how often the pump would clog or blow fuses (Tr. 228). Mr. Shriver could not recall if the 20 ampere fuse was put back after he found it, and he "suspected" that it was because there were none readily available and he allowed time for the respondent to obtain a new fuse. He could not recall if the No. 35 pump were tagged out of service, and he confirmed that the No. 45 pump was not taken out of service (Tr. 230). He did not believe that the two pumps were in unsafe operation condition requiring their removal from service pursuant to section 75.1725(a) (Tr. 232).

#### Respondent's Testimony and Evidence

Inspector Escort Frederick D. Morgan, Sr., confirmed that he is not an electrician. He stated that the area in question was dry, that the pumps themselves are all grounded, and that a rubber mat was provided for the No. 45 pump fuse box which was mounted securely to the wall. The power wire conductor was suspended from an insulated spad and there is very little vibration (Tr. 243-249). He conceded that the failure to connect the frame ground wire was a violation (Tr. 249).

With regard to the No. 35 jug pump, Mr. Morgan stated that the closest coal was ten feet away, and if a pump fire had occurred, he found it unlikely that it would ignite the coal. He confirmed that Mr. Shriver re-installed the oversized fuse after checking it and the pump was reenergized (Tr. 250-251).

Donald S. Buckalew, maintenance foreman for 25 years, confirmed that he was familiar with all of the citations issued

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by Mr. Shriver. Mr. Buckalew stated that the examination of electrical equipment is his responsibility. He stated that there are 80 pumps located over seventeen miles, and that each pump has 17 different permissibility items that need to be checked. He identified a check list and instructions that he gives to his personnel for checking the pumps (Exhibit R-2; Tr. 257-259).

Mr. Buckalew stated that both of the pumps in question are included on the check list and they are included as part of the required weekly electrical examinations. He believed that the pump installations in question were included as part of the weekly examinations conducted just prior to the issuance of the citations, and he identified a form that reflects that both pumps were examined by a certified electrician on August 27, 1992, and that "no dangerous conditions were found" (Exhibit R-1; Tr. 263).

Mr. Buckalew confirmed that the ungrounded No. 45 pump fuse box had been in that condition for six to eight weeks (Tr. 264). He stated that he has preventative maintenance and electrical inspection programs in place, and grommets and bushings are included. He confirmed that the pump with the 20 ampere fuse could burn up or quit functioning if it were stuck or a rock fell into the impeller, or the fuse blew (Tr. 266).

On cross-examination, Mr. Buckalew confirmed that he observed the fuse box prior to the issuance of the citation and the ground connection had not been made (Tr. 217). He agreed that the condition should have been detected during the electrical examination (Tr. 274).

#### Findings and Conclusions

Docket No. WEVA 93-100

#### Fact of Violations

This case concerns three contested section 104(d)(2) orders. The respondent admits that the two orders issued by Inspector Shriver on August 12, and September 4, 1992, citing accumulations of coal and coal dust, constituted violations of section 75.400 (Citation Nos. 3720838 and 3718252). The respondent's dispute is with the inspector's special "significant and substantial" and unwarrantable failure findings. Under the circumstances, I conclude and find that the respondent's admissions, coupled with the inspector's testimony and evidence, establish the two violations of section 75.400 and they ARE AFFIRMED.

Section 104(d)(2) non-"significant and substantial" Order  
No. 3718918, July 27, 1992, 30 C.F.R. 75.514

In this instance the respondent is charged with an alleged violation of mandatory safety standard 30 C.F.R. 75.514, a statutory provision which provides as follows:

All electrical connections or splices in conductors shall be mechanically and electrically efficient, and suitable connectors shall be used. All electrical connections or splices in insulated wire shall be reinsulated at least to the same degree of protection as the remainder of the wire.

MSHA's July 1, 1998, Program Policy Manual, Volume V, Part 75, with respect to section 75.514, states in relevant part as follows (Exhibit P-7):

This section requires that conductors be joined together with clamps, connectors, track bonds, or other suitable connectors to provide good electrical connectors. ...

Where track is used as power conductor, efficient connections require that:

1. ...
2. At least one rail on secondary track-haulage rails shall be welded or bonded at every joint, and cross bonds shall be installed at intervals of not more than 200 feet.
3. ...
4. In rooms where electric equipment is dependent upon the room track rails as a power conductor, rail joints shall be secured by means of fish plates, angle bars, or the equivalent, and at least one rail shall be bonded at each joint.

Visible arcing or heating at rail joints indicates poor connections or poor bonding.

In the case of Secretary of Labor (MSHA) v. North American Coal Company, 1 FMSHRC 1895 (November 1979), Commission Chief Judge Paul Merlin vacated fourteen (14) citations alleging violations of mandatory safety standard 30 C.F.R. 75.514, after concluding that this standard did not apply to track haulage bonds and fishplates as alleged in the citations.

Judge Merlin took note of the fact that the legislative history of section 75.514, refers to electrical connections "in wiring," and that there is no reference to track haulage or to bonding "although such references easily could have been made if this had been what Congress intended," 1 FMSHRC at 1897.

Judge Merlin also took note of the fact that bonding and track haulage are dealt with separately and specifically in a companion situation pursuant to MSHA's Part 57, safety standards for underground metal and nonmetal mines (30 C.F.R. 57.12042), and he suggested that MSHA should have undertaken rulemaking to cover the situation in coal mines pursuant to MSHA's Part 75 safety standards. Noting the absence of any evidence to establish that the cited haulage system was not "electrically efficient," and the conflicting testimony of MSHA's own experts, Judge Merlin further commented that "... MSHA itself does not really believe 75.514 applies to track haulage bonds and fishplates, but is selectively applying this mandatory standard only where it wants to," 1 FMSHRC at 1899.

In the instant case, the parties are in agreement that the critical issue is whether or not the track "bonding" or connecting devices used by the respondent at the cited secondary haulage area constituted suitable mechanically and electrically efficient connections in satisfaction of the requirements found in the cited mandatory section 75.514 (Tr. 51).

The burden of proof in this case lies with the petitioner. In order to establish a violation, the petitioner must prove by a preponderance of the credible and probative evidence that the connection devices that were being used when the inspector found them were unsuitable and did not provide the required mechanically and electrically efficient electrical connections for the cited haulage track in question.

The petitioner takes the position that the testimony of Inspector Shriver, which is based for the most part upon the observations of Inspector Huggins, the individual who issued the violation, establishes that the electrical connections between the cited supply track rails were electrically inefficient. The petitioner also take the position that in the absence of one of the connection methods outlined in MSHA's policy, the conditions of the tracks in question prevented the existence of an electrically efficient connection.

The respondent takes the position that the use of fishplates, bolts, and steel ties as connecting devices for the cited 350 feet of secondary supply track provided suitable or good electrical connections in compliance with section 75.514, and were in fact "other suitable connectors" that provided good electrical connections within the meaning of MSHA's stated policy.

Inspector Huggins, found that the devices used by the respondent to provide the track rail connections were "unusual and new" to him. He did not believe that they provided any electrical connection on the tracks, and he obviously believed that a track bonding device comprised of a copper wire rope that is pounded and welded onto the track was the "normal" bonding method for insuring an efficient bond and connection (Tr. 64-65).

Inspector Huggins, who is not an electrician, and who lacked any special electrical training other than a course for non-electrical inspectors, testified that he relied on MSHA's policy manual in issuing the violation. I am convinced by his testimony that he would accept nothing short of the "normal" copper track bonding device that he observed in his experience as an inspector as compliance with section 75.514. Indeed, the parties agreed that if Mr. Huggins had found the type of track bond that he was familiar with he would not have issued the violation.

Mr. Huggins confirmed that the tracks were grounded with a clamp, that they were connected together with fishplates and bolts, were installed on wood supports, and were tied together with steel ties (Tr. 25, 28, 45). Although he confirmed that he did not have a good view of the tracks under the supply cars that were parked on the track, he described the track as "old, rusty, and surface bent." These track conditions, coupled with the absence of the type of "track bond" that he was familiar with, led Mr. Huggins to conclude that there was "a lack of efficient return of electrical current back through the current source" (Tr. 27, 48). In short, he concluded that in the absence of the track bond that he was used to seeing, the connections provided by the fishplates, bolts, and steel ties, were not suitable to insure an efficient mechanical and electrical connection.

Mr. Huggins conceded that the steel ties holding the track rails together were properly installed. He confirmed that he saw no evidence of any track sparking or arcing, and when he rode into the area on the track jitney he noticed no change in its operation or performance, and did not notice any fading of the lights (Tr. 45, 47). Notwithstanding his testimony that the lack of track bonds and the existing track conditions would prevent efficient current return on the tracks and would render the equipment on the track inoperable, Mr. Huggins conceded that since the equipment was able to operate, current had to be moving through the track (Tr. 47-49).

Inspector Huggins candidly admitted that he conducted no tests to determine whether the use of fishplates provided an electrically efficient connection and that he simply relied on MSHA's policy which he believed mandated the use of a welded copper track bond as an acceptable method of bonding on secondary track haulage. Mr. Huggins further conceded that he made no determination as to whether the devices being used by the

respondent to connect and bond the tracks rendered them less than mechanically and electrically efficient. He admitted that he could not make such a determination without testing, but still was of the opinion that the cited connections were inefficient (Tr. 75-76). As noted earlier, Mr. Huggins has no electrical expertise, and I have given little or no weight to his opinion.

Although Mr. Huggins described the tracks as rusty and dirty and suggested that an efficient connection was impossible under those conditions, he confirmed that the steel ties that connected the rails together will conduct electricity if they are installed correctly, and he conceded that they were so installed (Tr. 47). He also conceded that there were electrical connections on the tracks and stated that "there had to be some or it wouldn't run" (Tr. 74).

Inspector Shriver, an electrical engineer, stated that the clamp and copper wire bond is the only acceptable means of insuring electrical and mechanical efficiency at all times. However, I note that under MSHA's policy, fishplates are permitted as a means of securing rail joints in rooms where electric equipment is powered by a track rail that functions as a conductor.

Mr. Shriver was of the opinion that the conditions cited by Inspector Huggins constituted a violation of 75.514, because the fishplates may be rusted or corroded, resulting in a resistance in the connection and a loss of efficiency. However, Mr. Shriver did not observe the cited supply track and he had no personal knowledge as to whether the tracks were in fact rusty or corroded. Even if he did, I give little weight to his suggestion that the electrical efficiency of a connection may be determined by simply looking at it. Indeed, Mr. Shriver testified that a voltage drop test could be conducted to determine the electrical efficiency of a conductor and he confirmed that he had conducted the tests on several occasions. He later recanted, and stated that a voltage drop test was not necessary to determine an electrically efficient connection. I find this testimony to be contradictory and rather equivocal.

Mr. Shriver conceded that he never viewed the cited connections before abatement, and even though he was not present when the violation was issued, he was of the opinion that "based on what I've been told, in my judgment, they would be electrically inefficient" (Tr. 124). I conclude and find that Mr. Shriver's opinion is highly speculative and lacking in any evidentiary support, and I have given it little weight.

As noted earlier, as a condition precedent to establishing a violation of section 75.514, the evidence must prove that the type of connections alleged to be out of compliance are in fact electrically and mechanically inefficient. Relying on, and



citing the absence of a welded bond of the kind provided for in MSHA's Policy, which does not have the force and effect of a mandatory standard that does not even mention track bonding, is insufficient "evidence" to establish a violation. In this case, I find no credible probative evidence to establish a violation. Accordingly, the contested order is VACATED.

#### Significant and Substantial Violations

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987). Further, any determination of the significant nature of a violation must be made in the context of continued normal mining operations. National Gypsum, supra, 3 FMSHRC 327, 329 (March 1985). Halfway, Incorporated, 8 FMSHRC 8, (January 1986).

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The respondent concedes that the cited coal accumulations at the transfer point where the belts came together and dumped coal constituted a violation of section 75.400. Inspector Shriver's credible and un rebutted testimony establishes that there was a substantial accumulation of coal, approximately four feet deep, or "waist high", extending over an area five to six feet wide and ten feet long. According to Mr. Shriver, the coal was piled up to the edge of the main south belt, which was at a forty-five degree angle to the other belt, and it had accumulated and backed up under the main south belt where the bottom belt turned over the tail roller, and that some of the coal had backed up on the belt chute (Tr. 188-191). Mr. Shriver stated that the accumulations were damp, but that the coal that had accumulated and backed up under the main south belt had dried out at the location where the bottom belt turned over the tail roller.

Inspector escort Andersch described the accumulations as "a considerable amount of coal spillage" (Tr. 273). Mr. Andersch and shift foreman Blue testified that the accumulations were very wet, and Mr. Blue agreed that the extent of the spillage was such that the spilled coal had covered over the wet coal to the point where the wet coal may not have been noticeable (Tr. 249).

Mr. Shriver testified that two belt rollers and the tail roller of the main south belt were turning in the coal that had accumulated and backed up under the belts, and that the main south belt "actually humped up a little bit from the coal being under it" (Tr. 192). Mr. Shriver considered the three rollers turning in coal, and the belt "massaging the coal", as ignition sources for a fire that he believed was reasonably likely to occur (Tr. 192). If a fire had occurred, Mr. Shriver believed that anyone working on the section where the air ventilation traveled from the belt transfer point in question to another belt location and regulator would be exposed to smoke inhalation, and if an explosion were to occur, serious burns could be reasonably expected (Tr. 197-199).

Mr. Andersch and Mr. Blue testified that they observed no rollers turning in the coal and no coal that was in contact with

the belt. However, Mr. Blue agreed that belt rollers turning in coal would dry out the coal if the roller was warm and caused friction (Tr. 269). Further, Mr. Blue confirmed that he arrived at the scene at approximately the same time that the men who were assigned to clean up the spill did, and he conceded that Mr. Shriver may have already ordered the belt shut down and that he (Blue) would not have seen any rollers turning in the coal (Tr. 271). All of the witnesses agreed that the belt was in operation and moving, but that no coal had been mined before the inspector observed the accumulations, and no coal was being moved on the belts at that time.

Inspector Shriver conceded that his order does not specify that any belt rollers were turning in the coal, and that his notes do not reflect that this was the case. However, considering the extent of the accumulations, the fact that they were pushed up and under the tail roller and belt rollers, and had backed up through the chute, and the fact that the belt was moving over the turning rollers, Mr. Shriver concluded that the rollers were turning in the coal. Mr. Shriver reiterated that the coal that had accumulated and was pushed back under the main south belt where the two belt rollers and tail roller were located caused the belt to be "humped up a little bit from the coal" (Tr. 230). Having viewed Mr. Shriver during his testimony, he impressed me as credible on this issue and I find his testimony regarding the rollers turning in the coal accumulations to be consistent and believable, particularly in light of the extent of the accumulations as described by Mr. Shriver, and as corroborated by the respondent's witnesses.

Mr. Shriver confirmed that he made no tests for methane, and that and the coal producing face was approximately 1,000 feet from the cited belt transfer point where he found the coal accumulations (Tr. 219, 221). Under the circumstances, and in the absence of any other evidence reflecting the existence of conditions that could present an explosion hazard, I cannot conclude that an explosion was reasonably likely to occur as a result of the cited accumulations.

I conclude and find that the cited coal accumulations presented a discrete fire hazard. Although the evidence reflects that the accumulations ranged from damp to very wet, Mr. Shriver did not believe that the dampness of the coal would have affected the likelihood of an injury because the heat from the rollers turning in the coal would dry it out rapidly, and if an ignition occurred, the coal would dry out further and burn (Tr. 193). As noted earlier, Mr. Blue agreed that a warm roller subject to friction would dry out the coal, and he confirmed that the spillage and accumulations that were present covered up the wet coal to the point where the wet coal was not readily observable, and Mr. Shriver's credible testimony that the accumulations under the main south belt had dried out is unrebutted.

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In view of the foregoing, I conclude and find that in the normal course of continued mining at the time the inspector observed the cited coal accumulations, it was reasonably likely that an ignition would have occurred as the coal continued to accumulate and turn in the rollers of the moving belts, and that a belt fire was reasonably likely to occur as a result of these accumulations and ready sources of ignition that were present. I further conclude and find that in the event of a belt fire, it would be reasonably likely that the men on the section would suffer smoke inhalation, and fire related injuries of a reasonably serious nature. Under the circumstances, I conclude and find that the violation was significant and substantial (S&S), and the inspector's finding in the regard IS AFFIRMED.

Order No. 3718252

In its posthearing brief, the respondent admits that while the violation did not result in any serious injuries or deaths, it was still significant and substantial because the spill was of major proportions, it had resulted in on electrical cable being pulled from a junction box, and it required the efforts of a number of miners to reestablish a walkway along the belt, exposing them to slip and trip hazards. Under the circumstances, and taking into account the testimony of the inspector in support of his "S&S" finding, which I find credible, I conclude and find that his finding was properly made and IT IS AFFIRMED.

#### Unwarrantable Failure Violation Issue

The governing definition of unwarrantable failure was explained in Zeigler Coal Company, 7 IBMA 280 (1977), decided under the 1969 Act, and it held in pertinent part as follows at 295-96:

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

In several recent decisions concerning the interpretation and application of the term "unwarrantable failure," the Commission further refined and explained this term, and concluded that it means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Energy Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007

(December 1987); Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988). Referring to its prior holding in the Emery Mining case, the Commission stated as follows in Youghiogeny & Ohio, at 9 FMSHRC 2010:

We stated that whereas negligence is conduct that is "inadvertent," "thoughtless" or "inattentive," unwarrantable conduct is conduct that is described as "not justifiable" or "inexcusable." Only by construing unwarrantable failure by a mine operator as aggravated conduct constituting more than ordinary negligence, do unwarrantable failure sanctions assume their intended distinct place in the Act's enforcement scheme.

In Emery Mining, the Commission explained the meaning of the phrase "unwarrantable failure" as follows at 9 FMSHRC 2001:

We first determine the ordinary meaning of the phrase "unwarrantable failure." "Unwarrantable" is defined as "not justifiable" or "inexcusable." "Failure" is defined as "neglect of an assigned, expected, or appropriate action." Webster's Third New International Dictionary (Unabridged) 2514, 814 (1971) ("Webster's"). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by "inadvertence," "thoughtlessness," and "inattention." Black's Law Dictionary 930-31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention. \* \* \*

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The petitioner argues that the recurrent nature of the accumulations, as evidenced by Mr. Shriver's multiple observations of accumulations occurring in the same location from the same cause, as well as the numerous entries in the preshift books that evidenced the recurrent problem at this location, both serve to establish Consol's indifference to this recurrent safety problem and establishes the unwarrantable nature of the violation.

The respondent asserts that coal spills and accumulations at belt transfer areas are not unusual repetitive problems in any mine using conveyor belt haulage, and acknowledging that such accumulations might be violations of section 75.400, the respondent maintains they do not constitute unwarrantable violations unless they are allowed to remain in place for extended time periods and are not taken care of within a reasonable period of time. In this case, the respondent believes

that the cited accumulations, as well as the prior accumulations relied on by the inspector, were promptly cleaned up.

In support of its position that the violation was not the result of its unwarrantable failure to comply with section 75.400, the respondent points out that the spillage cited by Mr. Shriver occurred because of a clogged belt chute which caused a backup of coal when it spilled out through the open space at the top of the chute, and not because of any "hole" deliberately cut into the chute by the respondent. The respondent acknowledged that it was aware of the spillage because it had been reported by the preshift examiner, and that the foreman had promptly assigned two miners to clean up the spillage on the very next shift.

Inspector Shriver confirmed that the prior coal accumulations that had occurred at the four right transfer point as reflected by the entries in the preshift examiner's book, "were probably cleaned up every time" (Tr. 219). He further confirmed that he considered the violation to be an unwarrantable failure because the accumulations repeatedly occurred, and not because they occurred and were not cleaned up (Tr. 219, 226). With respect to the coal spillage conditions recorded in the preshift books as early as July 12, 1992, at the four right transfer point, Mr. Shriver agreed that these conditions would have been cleaned up and that this prior spillage was not the same spillage he observed at the time of his inspection on August 12, 1992 (Tr. 225).

Mr. Shriver believed that the coal accumulation that he observed had to have occurred before 5:00 A.M. on the morning of his inspection or during the midnight shift. Considering the amount of spillage, he estimated that the accumulation had been there during half of the midnight shift because "it would take a couple of hours or more to accumulate that much coal spillage" (Tr. 238). Based on his review of the fire boss books, Mr. Shriver believed that the recurring spillage was being cleaned up on-shift, and if all of it could not be cleaned up, it would be called out as an entry in the preshift book and "the next shift would have to catch up" (Tr. 240).

Shift foreman Blue testified that under the worst case scenario, "there is no way this coal could have been present far more than two hours and ten minutes" (Tr. 250). Mr. Blue's credible and un rebutted testimony reflects that the midnight shift foreman advised him of the spillage situation and that Mr. Blue assigned two men to clean it up during the morning shift. Mr. Blue explained that the men were on their way to clean up the spillage but stopped at another area to take care of another problem, and that this delayed them (Tr. 252, 255).

I take note of the fact that Mr. Shriver's order itself makes reference to "persons shovelling accumulations". Petitioner's counsel conceded that coal accumulations were being cleaned up in another area, that the cited transfer point was scheduled to be cleaned up by the cleanup personnel dispatched by Mr. Blue, but they had not reached that location before the inspector (Tr. 254). Counsel agreed that if the cleanup crew had started cleaning up at the cited transfer point, rather than stopping along the way to address another problem, they would have arrived and started shovelling before the inspector arrived and it was possible that the violation would never have been issued (Tr. 254-255).

The petitioner's suggestion that a violation may have been avoided if the shovelling crew had been in action when the inspector arrived undercuts the petitioner's position that recurrent accumulations constitutes indifference amounting to aggravated conduct. Insofar as the recurrent nature of the accumulations is concerned, it seems clear to me that the respondent promptly addressed these conditions as they occurred, including the accumulations cited by Mr. Shriver in this instance.

Recurrent coal accumulations are inherent by-products of large scale mining operations and they are not unusual events justifying unwarrantable failure orders simply because no one is shovelling them up when an inspector happens on the scene and finds them. Each case must be decided on its own facts. Here, the evidence clearly establishes that the respondent acted with reasonable promptness to address the accumulations in question. Under the circumstances, I agree with its position and cannot conclude that the petitioner has established a case of aggravated conduct in supporting of the inspector's unwarrantable failure finding. Accordingly, that finding IS VACATED, and the contested order IS MODIFIED to a section 104(a) "S&S" citation.

Order No. 3718252

The petitioner concludes that it has clearly established the unwarrantable failure nature of the violation in that the cited accumulations had been present "for a few days in a location that is more likely than others to be involved in serious problems and fires" and that the preshift and weekly examiners "did not recognize these obvious violations". The petitioner further concludes that this amounts to aggravated conduct supporting the inspector's unwarrantable failure finding.

The respondent suggests that when the order was issued the inspector was dissatisfied with where people were working to clean up the massive spill that had occurred in that he noted in his order that nobody was working at the drive where he believed

it was most likely that a fire would occur from the accumulations. The respondent further suggests that in order to support his unwarrantable failure finding, the inspector, at the hearing, testified that the reason the respondent was highly negligent was the fact that its management knew about the accumulations for several days.

The respondent asserts that the fact that the respondent knew about the coal spill on the beltline should not be considered an aggravated situation in that mine foreman Cole had discussed the spill with the inspector and had assigned people to work on the cleanup at the time the inspector arrived on the scene. The respondent maintains that with the exception of the solidified material around the belt drive, the other accumulations cited by the inspector were materials that had resulted from the massive spill a few days earlier.

The respondent acknowledges that the material around the drive motors had apparently been there for some period of time prior to the spill, but that its combustibility was undermined, and its consistency was such as to make it unlikely that it could go into suspension. Since the combustible content of the material was not known, the respondent concludes that it would be impossible to base a violation entirely upon this accumulation alone, and that it should not be viewed as a basis for an unwarrantable failure charge based on an accumulation of inert material in proximity of a couple of electric motors. Conceding that the existence of inert materials may be a violation of section 75.1725(a), if the materials rendered the motors unsafe to operate, the respondent maintains that the material must be shown to be combustible before section 75.400, can be cited.

The respondent acknowledges that a massive spill occurred at a critical mine location, but points out that management knew about the spill and promptly began work to correct the situation. The respondent asserts that cleanup could not be accomplished in a matter of hours starting at all locations at once, and it points out that the section foreman had to first establish a walkway to facilitate the cleanup in an orderly and safe manner and he did not consider the belt drive area to be a critical problem that needed to be taken care of before anything else. The respondent concludes that the inspector decided that he would have cleaned up the spill differently by starting at the belt drive, and that since this was not done, he decided to issue the order for an unwarrantable failure to properly address the spill.

Inspector Shriver's order cited the main Butts No. 1 belt drive, and it describes fine coal and dust accumulations under the bottom belt from the tail roller to the drive roller nearest the tipple, accumulations of wet coal and dust under and around a piece of belt over the North drive motor, with dry coal and dust under the connection box and packed against the motor, fine coal



packed tightly between the two motors, and "substantial dust" accumulations inside the drive motor junction box.

The evidence reflects that for approximately two days before the September 4, 1992, inspection an accidental massive spill had occurred on the belt. Two men were assigned to clean up the spill, and Mr. Shriver did not issue any citation for that spill because mine foreman Cole was aware of it and Mr. Shriver gave him an opportunity to clean it up. Upon his return to the area on September 4, Mr. Shriver found one man shovelling and a "sizeable" portion of the spill still remained. He issued a citation for that spill and proceeded with foreman Morgan to the main butts drive where he found the accumulations cited in his order (Tr. 294-295).

Mr. Shriver estimated that the accumulations between the motors had existed for "several days" or "several shifts" (Tr. 285-286, 288). He based his "high negligence" finding on his belief that the respondent knew about the accumulations in that they had existed for several days and "he had discussed the situation there with Mr. Cole a couple of days earlier and he said that he would clean it up" (Tr. 288). He also considered the fact that the tipple operator who was with him as the miner's representative when they walked up to the drive on September 4, "said that he had worked some on it the day before. In fact, there was a guard left off where he had shoveled on it" (Tr. 288-289). Mr. Shriver later testified that the accumulations discussed with Mr. Cole were not the same ones he cited at the drive, and that he found those independent of any conversations with Mr. Cole (Tr. 293-295).

Although the order states that the preshift examination records reflected reported spillage on the belt from the tail piece to the tipple, Mr. Shriver initially could not remember whether he reviewed the preshift book (Tr. 295). When reminded of the statement in his order, Mr. Shriver repeated it on the record (Tr. 299).

Mr. Shriver confirmed that the distance from the tail roller to the drive roller, which encompasses the area described in his order, was less than 100 feet, and that the belt was shut down for approximately an hour and fifteen minutes to clean up the accumulation (Tr. 304).

Although Mr. Shriver believed that the preshift and weekly examiners should have observed the cited accumulations, there is no evidence that he spoke with these individuals, and they were not called to testify. Further, even though mine foreman Cole may have known about the spillage at the drive, Mr. Cole did not speak with him at the time the order was issued, and Mr. Cole was not called to testify (Tr. 296).

When asked to describe the "aggravated conduct" that prompted him to issue the order, Mr. Shriver replied "permitting the condition to exist for a long period of time" (Tr. 298). When asked to explain how long a period of time he had in mind, Mr. Shriver responded "probably on the order of weeks" (Tr. 298).

Dust foreman and inspector escort Morgan testified that the coal spillage from the tailpiece to the tipple had been called out and reported in the preshift book and that a foreman and two men were working on it when he and Inspector Shriver arrived at the scene (Tr. 314). Aside from the fresh spill, Mr. Morgan confirmed that the cited accumulations at the motors had been there prior to the spill that had occurred two days earlier and it had accumulated in the process of cleanup with water hoses. Mr. Morgan described the material as "a mixture of rock dust, and ground up coal" that had become wet and then dried out and had become hard (Tr. 317-318).

Mr. Morgan also acknowledged the presence of some spillage that had been dragged back from the large spill along the beltline and he indicated that the foreman decided that he first had to establish a safe walkway along the beltline and clean up the spilled coal before moving on to the belt drive area. He confirmed that foreman Mabin shut down the section in order to have enough people to address the situation and they were in the process of cleaning up the area from the tail roller to the tipple when he and Mr. Shriver arrived at the area. Mr. Morgan acknowledged that no one was working at the belt drive at that time (Tr. 319).

Mr. Morgan testified that the accumulations between the cited motors could have been part of the spillage that had been called out because the coal that spills between the belts is carried back to the drive area and is dragged off into that area (Tr. 320) Mr. Morgan stated that there was an appreciable amount of materials packed between the motors, and he conceded that if he had made the preshift examination he would have called it out as needing cleaning up (Tr. 320). Mr. Morgan was of the opinion that the material was not combustible (Tr. 321).

Mr. Morgan described the material packed between the motors as "a mixture of rock dust and coal and stuff" (Tr. 323). A pick hammer was used to break the material loose and scrape it out and he characterized the consistency of the material as "powder that had gotten wet, and packed" and that he could have dug into it with his finger (Tr. 323-324).

Section foreman Mabin confirmed that the section was idled because of the coal spill at the main South belt transfer. The spill had been reported on the preshift examination and he and two of his crew members proceeded to clean up the area from the main butts tailpiece to the tipple. Mr. Mabin testified that he

walked the entire length of the belt, and concluded that he first had to establish a walkway where the spillage was over five high before doing anything else. He conceded that there was spillage at the drive, and stated "the most important thing was to take my two men and establish a walkway. And the drive was not the problem" (Tr. 327-329).

After careful review of all of the evidence in this matter, I conclude and find that the petitioner has failed to make a case of aggravated conduct on the part of the respondent. In this regard, I find the testimony of the inspector to be rather confusing and conflicting with respect to the question of management's knowledge of the conditions and the length of time that the cited accumulations existed.

Mr. Shriver first testified that the accumulations had existed for several days or several shifts and that he had discussed them with the mine foreman. He later testified that the cited accumulations were not the same ones he discussed with the foreman, and that they had existed "for weeks".

Although Mr. Shriver stated that the respondent's allowing the cited accumulations to exist "for a long period of time" amounted to aggravated conduct, I find no evidentiary support for this conclusion. Although Mr. Shriver generally alluded to the preshift reports, which he initially could not remember reviewing, and copies of several reports covering a period from mid-July, 1992, to mid-August, 1992, were introduced as evidence (exhibit P-12), I find them of little value and weight, and none of these reports cover the immediate three week period before the issuance of the order on September 4, 1992. Further, the "spillage" reported in these reports cover a number of mine areas, and such generalized, non-specific book entries are of little or no evidentiary value, particularly when they remain unexplained.

The respondent's credible and un rebutted evidence establishes that at least two days before the inspector discovered the accumulations that he cited, a massive spill had occurred in the same general area and the respondent was addressing the spill by first establishing a walkway to allow further work to continue before doing any other work. The section had shut down for this work, and I find nothing unreasonable about the manner in which the respondent was proceeding to clean up. On the facts of this case, I believe that one could reasonably conclude that the accumulations cited by Mr. Shriver in the midst of the respondent's clean up efforts in connection with the larger spill, would have been addressed and taken care of before full coal production was again started. Under all of these circumstances, I conclude and find that the petitioner has failed to establish the unwarrantable failure

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nature of the violation, and the inspector's finding in this regard IS VACATED. The citation is modified to a section 104(a) "S&S" citation.

#### Findings and Conclusions

Docket No. WEVA 93-5

As noted earlier, the respondent has conceded that the cited coal accumulations at the tailpiece of the 3 right belt constituted a violation of 30 C.F.R. 75.400, as stated in the section 104(d)(2) "S&S" Order No. 312175, issued by Inspector Shriver on June 18, 1992. Accordingly, the violation IS AFFIRMED.

#### Significant and Substantial Violation

I conclude and find that the credible testimony of the inspector supports his "S&S" finding. The respondent has conceded the violation, and I conclude and find that the belt tail roller turning in the fine dry coal constituted a discrete fire hazard. Although the inspector did not check for, or find any methane, I find that the roller turning in the coal constituted a potential source of ignition that could have ignited a fire if normal mining operations were to continue and the roller continued to turn in the accumulations. I further conclude and find that in the event of a belt fire, it would be reasonably likely that the men on the section, including the face area approximately two to three hundred feet away, would suffer at least smoke inhalation, and fire related injuries of a reasonably serious nature. Accordingly, the inspectors "S&S" finding IS AFFIRMED.

#### Unwarrantable Failure Violation

Inspector Shriver based his unwarrantable failure finding on the length of time that he believed the accumulations had existed, his belief that the section foreman should have found and corrected the violation between his arrival on the section at 8:30 a.m. and 11:50 a.m., when the order was issued, and the fact that the assistant mine superintendent was on the section for twenty minutes he (Shriver) arrived, and knew that he was on his way to the section.

The presence of the assistant superintendent on the section, and the fact that the section foreman should have observed the conditions, is insufficient evidence of aggravated conduct, and at most may support an ordinary negligence finding. Further, Mr. Shriver conceded that there was no evidence that the superintendent or the foreman actually saw the accumulations.

Mr. Shriver estimated that the accumulations had existed for time periods ranging from "the prior midnite shift", to "several shifts", "fifteen or twenty shifts," "several days", or "six days" (Tr. 33-37). These estimates were based on the fact that as little as "two buggies" of coal had been produced on the section, and Mr. Shriver's opinion that the "red" or "brownish" color of the coal dust was the result of the belt roller turning in the coal accumulations "for some length of time".

Section foreman Lewandoski testified credibly that he worked the midnight shift on June 18, 1992, and preshifted the belt and tailpiece at 5:15 a.m., and he found no accumulations and indicated that the belt was "clean". Assistant mine superintendent Godwin conceded that the accumulations were present, but he indicated that the section had been moved two days prior to the inspection, and that the accumulations could not have existed for more than two days. He attributed the "orangish brown" coal dust color to the residue and dry deposits from a belt scraper of similar colors.

Although Inspector Shriver checked the preshift book for the shift in question, he did not check the books for the previous days (Tr. 67-68). I conclude and find that Mr. Shriver's time estimates based on the color of the coal dust that he observed are speculative and lacking in probative value. I believe that Mr. Shriver's order was prompted by his belief that the section foreman or assistant mine foreman who were on the section before he arrived for his inspection should have found them and had them cleaned up. Even if this were established, I would find no basis for concluding that this amounted to aggravated conduct warranting an unwarrantable failure order. Under these circumstances, I conclude and find that the petitioners evidence does not support the inspectors unwarrantable failure finding, and IT IS VACATED. The order IS MODIFIED to a section 104(a) "S&S" citation.

Docket No. WEVA 93-92

#### Findings and Conclusions

##### Fact of Violations

As noted earlier, section 104(a) "S&S" citation No. 3720837, August 12, 1992, citing a violation of 30 C.F.R. 75.400, was settled by the parties and the respondent agreed to pay the full amount of the proposed civil penalty assessment of \$506.

With respect to section 104(a) "S&S" Citation No. 3718250, September 3, 1992, citing a violation of 30 C.F.R. 75.701-3(a), for failure to provide frame grounding for the cited fuse box, and section 104(a) "S&S" citation No. 3718251, September 3, 1992, citing a violation of 30 C.F.R. 75.518, for having an oversized

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fuse in the fuse holder of the 35 Jug pump, the respondent does not dispute the fact that the cited conditions constituted violations. Under the circumstances, the respondent's admissions, coupled with the testimony of the inspector who issued the citations, establishes the violations as charged. Accordingly, the two citations in question ARE AFFIRMED.

Section 104(a) "S&S" Citation No. 3718256

In support of his conclusion that the examinations of electrical equipment at the mine were inadequate, Inspector Shriver relied on the two electrical violations that he found the day before on September 3, 1992, concerning the oversized fuse for the No. 35 Jug pump, and the lack of frame grounding for the No. 45 pump fuse box (Citation Nos. 3718250 and 3718251). He also considered two additional electrical violations that he issued in the course of his inspection on September 4, 1992, for a belt drive junction box cable that had been pulled out of the box, and the connection of a pilot conductor and a ground conductor of a drive motor to a single stud.

Mr. Shriver stated that it was his practice to issue a violation for inadequate electrical examinations after he has issued separate citations for the individual electrical violations. In this instance, having found four electrical violations in two successive days of inspections, he concluded that the electrical examinations that either failed to detect, or ignored, the violative conditions, were inadequate. He also believed that inadequate electrical examinations have been "a chronic problem" at the mine for several years, and he alluded to the fact that he has issued several violations in the past for the same conditions that he cited during his inspections of September 3, and 4, 1992.

Exhibits P-15 and P-17 through P-19, are copies of prior citations for violations of section 75.512, issued by Inspector Shriver in 1990 and 1991, for inadequate examination of electrical equipment. Exhibits P-6 through P-10, are copies of citations issued by Mr. Shriver on February 28, 1990, for various electrical violations of sections 75.701, and 75.515. Although the petitioner did not produce any more recent prior citations covering the period from February, 1990, and January, 1991 to September, 1992, these prior citations do lend some support to inspector Shriver's assertion that the respondent has had problems with the sufficiency and adequacy of its electrical examinations required by section 75.512.

The respondent is charged with making inadequate electrical examinations of its electrical equipment. The relevant and applicable language of section 75.512, is found in the first sentence which requires that "all electric equipment shall be

frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions".

The respondent's un rebutted evidence reflects that both of the pump locations cited by Inspector Shriver on September 3, 1993, were examined by a certified electrician on August 27, 1992, and they were included on a check list used for the required weekly electrical examinations. Although I find nothing in section 75.512, that makes reference to "adequate" or "inadequate" examinations, I believe the clear intent of the standard is to insure that the required examinations are conducted in such a manner to insure that potentially hazardous electrical conditions are timely detected, corrected, and maintained in safe operating condition.

Inspector Shriver's credible and un rebutted testimony reflects that at least three of the four electrical violations that he discovered and relied on when he issued the violation in question were quite obvious. Respondent's maintenance foreman Buckalew admitted that the ungrounded No. 45 pump fuse box had been in that condition for a long period of time, and that the ground connection had not been made. He agreed that the condition should have been detected during the electrical examination.

Although I recognize the fact that electrical equipment conditions may change between examinations, and that a violative condition, standing alone, may not reflect that the examinations are inadequate, on the facts of this case where the inspector cited three or four violations within a relatively short period of time, and had in the past cited the respondent for a number of electrical violations, as well as violations for failure to adequately examine its electrical equipment, I cannot conclude that the inspector here acted unreasonably. Considering the intent of section 75.512, and the un rebutted fact that the violative conditions had existed for some time and should have been detected and corrected by the respondent before the inspector found them, I conclude and find the required electrical examinations were inadequate, and that the petitioner has established a violation of section 75.512. Accordingly, the citation IS AFFIRMED.

#### Significant and Substantial Violations

#### Section 104(a) "S&S" Citation No. 3718250

Inspector Shriver cited the violation because the fuse box was not grounded in that the frame grounding conductor inside the box was not attached and there was no external frame ground attached to the box going back to the track.

Mr. Shriver stated that a hazard would exist if the grommet where the conductor entered the box were to pop out and

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distintergrate due to a vibration of the trolley wire from passing motor cars. If the grommet failed, the conductor would abrade against the sharp edge of the hole in the box and would cut through the insulation to the bare copper wire inside the conductor, energizing the fuse box (Tr. 143). When asked how likely it was that a grommet would come loose under normal mining operations, Mr. Shriver stated that on prior occasions at different locations on the same haulage he has found grommets that either failed or disintegrated (Tr. 144). In his opinion, once a grommet has popped out, it would take about a week before the insulation would be worn through (Tr. 146).

Inspector Shriver made reference to several prior violations that he issued in 1990 for missing or improper fittings, and he indicated that the cables or conductors would be subject to the same type of haulage vibrations as in the instant case (Exhibits P-6 through P-10; Tr. 155-160). I take note of the fact that in one instance where Inspector Shriver cited a violation of section 75.515, and noted that a sharp edge of the hole through which a conductor passed had abraded the conductor insulation, he found that the violation non-"S&S" (Exhibit P-9).

In the instant case, Inspector Shriver conceded that there was nothing wrong with the grommet or fitting through which the power conductor entered the fuse box, and that it provided a tight fit where the conductor entered the box (Tr. 151). Mr. Shriver agreed that the fact that the ground wire inside the box was not tied to the box did not, of itself, present any injury hazard (Tr. 152). He also agreed that the area was dry and did not likely present a fatal injury hazard if the box were energized, and he was aware of no accidents at the mine related to the cited condition (Tr. 162). Further, Mr. Shriver believed that the box had been without a frame grounding conductor, which was the cited condition in this case, for approximately a year and that nothing happened during all of this time (Tr. 166). Under all of these circumstances, I cannot conclude that it was reasonably likely that the grommet or fitting in question, which was in fact installed and in good condition, and which provided a good tight fit for the cable which entered the box, would disintegrate or pop out due to any vibrations from any passing haulage traffic. That event would have to occur before the completion of any "S&S" chain of events sufficient to establish an "S&S" violation. In this instance, the condition which prompted the citation had existed for a year according to the inspector, yet the grommet or fitting showed no sign of deterioration. Mr. Shriver confirmed that the fuse box was not tagged out or removed from service, and it continued in use (Tr. 230). Under all of these circumstances, I conclude and find that the inspector's "S&S" finding was speculative and unsupported, and IT IS VACATED. The citation IS MODIFIED to a non-"S&S" citation.



Section 104(a) "S&S" Citation No. 3718251

Mr. Shriver did not believe that the cited pump in question was in an unsafe condition requiring it to be immediately removed from service (Tr. 232). He believed that an "S&S" violation could range from "dangerous" (bad roof and bare, energized conductors), to "medium grade and low grade S&S violations where, for a few hours, they can remain in service" (Tr. 232). Mr. Shriver believed that the oversized fuse was replaced in its holder after the rating was checked and the pump was allowed to continue in service for nearly six hours in order to allow the respondent time to replace the fuse with one of proper size (Tr. 229). Inspector Escort Morgan confirmed that Mr. Shriver put the fuse back after checking it, and that the pump was re-energized (Tr. 251-252).

Mr. Morgan stated that the pump was installed in a pit or a hole, and that it was ten feet from the closest coal rib and approximately fifteen feet from the mine roof (Tr. 250). Mr. Morgan described the pump motor as "small" and he believed that any fire in the motor would only damage the pump itself and would not ignite the rib or roof coal (Tr. 251).

Inspector Shriver described the "jug" pump in question as a small portable pump approximately one-foot in diameter that could readily be moved by one person (Tr. 227). His principal concern was that the pump motor could "seize up" or stall, causing a fire that would ignite the rib coal and result in noxious fumes from the motor windings or smoke inhalation from the coal fire (Tr. 188). Although Mr. Shriver indicated that the motor pump bearings may go bad or that small rocks may become wedged in the motor, causing it to stall (Tr. 189), when asked how often this was likely to occur, or how often such a pump becomes clogged, stuck, or blows a fuse, Mr. Shriver responded "I don't have any specific knowledge in that area" (Tr. 228).

I find no credible evidence to establish that it was reasonably likely that the pump motor in question would seize or stall, thus causing it to burn up the motor. Even if a motor fire were to occur, given the small size of the motor and the fact that the motor was installed in a pit, some ten to fifteen feet from the coal rib and roof, I find it unlikely that any fire would ignite the rib and roof coal. Aside from the motor winding, there is no evidence that other combustible materials were near the pump. Under the circumstances, I cannot conclude that the violation was "S&S", and the inspector's finding in this regard IS VACATED. The citation IS MODIFIED to a non-"S&S" citation.

Section 104(a) "S&S" Citation No. 3718256

Inspector Shriver testified that the hazards associated with the failure to perform adequate electrical examinations "are almost without limit", and he cited several examples of missing and overlooked frame grounds, inadequate short circuit and overload protection, fine dust inside a motor box, and other undetected conditions that may develop into serious and hazardous permissibility violations, some of which could develop into situations presenting potential electrocution and shock hazards (Tr. 197-200).

I agree with the inspector's "S&S" finding in this instance. The failure to adequately examine electrical equipment to make certain that it is in safe operating condition presented a discrete safety hazard in that miners who work around the equipment might not be aware of hazards and potential hazards. Ignorance of these hazards would reasonably likely result in injuries of a reasonably serious nature. Accordingly, the inspector's "S&S" finding IS AFFIRMED.

Docket No. WEVA 93-164

This case concerns a section 104(a) "S&S" Citation No. 3716846, issued on October 21, 1992, by MSHA Inspector Robert L. Huggins, citing an alleged violation of 30 C.F.R. 75.514, and it states as follows

The supply track is not mechanically and electrically efficiently bonded for approximately 150 feet for the 3-5 section MMU 067-0. This area is from the end of the supply track to approximately 150 feet outby. There was grounding clamps connected to the end of the rail which provide grounding protection for electrical equipment which is being used to clean up and support roof around the fall area at the end of the track. A track bolter is being used to bolt top in this area along this track area.

This case was assigned to me on October 19, 1993, after the hearing in Docket No. WEVA 93-100, which also involved an alleged violation of section 75.514, issued by Inspector Huggins. The parties agreed that my decision in the prior case would apply in this case (See Chief Judge Merlin's October 19, 1993, Order of Assignment).

In the prior case I vacated the violation after finding and concluding that the petitioner failed to prove that the respondent's track bonding method was not mechanically and electrically efficient. Assuming that the evidence in this case would be the same, and in light of the agreement by the parties that my decision in Docket No. WEVA 93-100, would be dispositive

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of this case, I incorporate by reference my findings and conclusions in the prior case and conclude that the citation here should be vacated on the ground that the petitioner has failed to prove the alleged violation. Accordingly, the citation in question here IS VACATED.

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

I conclude and find that the respondent is a large mine operator and the parties have stipulated that payment of the civil penalty assessments for the violations in question will not adversely affect the respondent's ability to continue in business.

#### History of Prior Violations

The petitioner's computer print-outs for the Arkwright No. 1 Mine, reflect that for the period covering June 18, 1990, through September 3, 1992, there were seventy-nine (79) violations of section 75.400, including those contested in these proceedings. Sixty-nine of these violations were issued as section 104(a) citations. For an operation of its size, I cannot conclude that this is a particularly egregious compliance record. However, given the number of past accumulations violations, the respondent needs to continually address its cleanup practices.

The computer print-outs also reflect four (4), prior paid citations of 30 C.F.R. 75.518, and twelve (12), prior paid citations of 30 C.F.R. 75.512, all of which were issued as section 104(a) citations. I cannot conclude that this is a particularly bad compliance record.

#### Good Faith Abatement

In the absence of any evidence to the contrary, I conclude and find that the respondent timely abated the violations in good faith.

#### Gravity

Based on my "S&S" findings and conclusions, I conclude and find that those violations affirmed as "S&S" violations were serious violations, and those modified and affirmed as non-"S&S" were non-serious violations.

#### Negligence

I conclude and find that all of the section 75.400, violations that I have affirmed resulted from the respondent's failure to exercise reasonable care amounting to a moderately

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high degree of negligence, and that the remaining violations resulted from a moderate and ordinary degree of negligence.

ORDER

In view of the foregoing findings and conclusions, IT IS ORDERED AS FOLLOWS:

Docket No. WEVA 93-100

1. Section 104(d)(2) non-"S&S" Order No. 3718918, July 27, 1992, citing an alleged violation of 30 C.F.R. 75.514, IS VACATED, and the proposed civil penalty assessment IS DENIED AND DISMISSED.
2. Section 104(d)(2) "S&S" Order No. 3720838, August 12, 1992, citing a violation of 30 C.F.R. 30 C.F.R. 75.400, IS MODIFIED to a section 104(a) "S&S" citation, and the citation IS AFFIRMED.
3. Section 104(d)(2) "S&S" Order No. 3718252, September 4, 1992, citing a violation of 30 C.F.R. 75.400, IS MODIFIED to a section 104(a) "S&S" citation, and the citation IS AFFIRMED.

Taking into account the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that the following civil penalty assessments are reasonable and appropriate for the violations that have been affirmed, and the respondent IS ORDERED TO PAY THEM.

Citation No.	Date	30 C.F.R. Section	Assessment
3720838	8/12/92	75.400	\$1,200
3718252	9/4/92	75.400	\$1,500

Docket No. WEVA 93-5

Section 104(d)(2) "S&S" Order No. 312175, June 18, 1992, citing a violation of 30 C.F.R. 75.400, IS MODIFIED to a section 104(a) non-"S&S" citation, and as modified, IT IS AFFIRMED. The respondent IS ORDERED to pay a civil penalty assessment of \$1,000, for the violation.

Docket No. WEVA 93-92

1. Section 104(a) "S&S" Citation No. 3720837, August 12, 1992, citing a violation of 30 C.F.R. 75.400, has been settled. The respondent IS ORDERED to pay the agreed upon settlement amount of \$506 in settlement of the violation.
2. Section 104(a) "S&S" Citation No. 3718250, September 3, 1992, citing a violation of 30 C.F.R. 75.701-3(a), IS MODIFIED to a section 104(a) non-"S&S" citation, and as modified IT IS AFFIRMED. The respondent IS ORDERED to pay a civil penalty assessment of \$250, for the violation.
3. Section 104(a) "S&S" Citation No. 3718251, September 3, 1992, citing a violation of 30 C.F.R. 75.518, IS MODIFIED to a section 104(a) non-"S&S" citation, and as modified, IT IS AFFIRMED. The respondent IS ORDERED to pay a civil penalty assessment of \$250 for the violation.
4. Section 104(a) "S&S" Citation No. 3718256, September 4, 1992, citing a violation of 30 C.F.R. 75.512, IS AFFIRMED, and the respondent IS ORDERED to pay a civil penalty assessment of \$500, for the violation.

Docket No. WEVA 93-164

Section 104(a) "S&S" Citation No. 3716846, October 21, 1992, citing an alleged violation of 30 C.F.R. 75.514, IS VACATED, and the petitioner's proposed civil penalty assessment IS DENIED AND DISMISSED.

IT IS FURTHER ORDERED that payment of the aforementioned civil penalty assessments, including the settlement amount, shall be made to the petitioner (MSHA) within thirty (30) days of the date of these decisions and Order. Upon receipt of payment, these matters are dismissed.

George A. Koutras  
Administrative Law Judge

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