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

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 93-102
	:	A.C. 46-01455-03966
v.	:	
	:	Osage No. 3 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: Robert S. Wilson, 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 Proceeding

This proceeding concerns 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 four (4) alleged violations of certain safety standards found in Part 75, Title 30, Code of Federal Regulations. The respondent filed a timely answer and a hearing was conducted in Morgantown, West Virginia. The petitioner filed a posthearing brief, but the respondent did not. However, I have also considered the oral arguments made by both parties on the record during the hearing in this matter.

Issues

The issues presented in this case are (1) whether the conditions or practices cited by the inspectors constitute violations of the cited mandatory safety standards, (2) whether 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 in relevant part to the following (Exhibit ALJ-1; Tr. 11-12):

1. The Commission and the presiding Judge have jurisdiction to hear and decide this matter.

2. The respondent is the owner and operator of the subject mine and the operations of the mine are subject to the jurisdiction of the Mine Act.

3. The respondent is a large mine operator and payment of the maximum civil penalty assessments for the violations will not adversely affect its ability to remain in business.

4. The inspectors who issued the contested orders were acting in their official capacity.

5. True copies of the contested orders were served on the respondent or its agent as required by the Act.

6. MSHA's penalty assessment information (Exhibit G-1), and violation history reports (Exhibits G-2 and G-3), may be used in determining appropriate civil penalty assessments for the alleged violations.

7. The subject mine has received prior section 104(d)(2) orders and remains on the "d" chain.

Discussion

This case concerns four (4) section 104(d)(2) "S&S" orders issued by MSHA inspectors at the mine. One of the orders, No. 3122087, issued on August 6, 1992, by Inspector Richard E. McDorman, alleging a violation of 30 C.F.R. 75.316, was settled by the parties and the respondent agreed to pay the full amount of the proposed penalty assessment of $3,000. The settlement was approved from the bench, and my decision in this regard is herein reaffirmed (Tr. 445-446).

Section 104(d)(2) "S&S" Order No. 3122095, issued on August 31, 1992, by MSHA Inspector Richard E. McDorman, cites an alleged violation of 30 C.F.R. 75.400, and the inspector

described and cited accumulations of coal, coal dust, and float coal dust, at the following locations:

1. Butt Conveyor Belt Line take up No. 4 block. Fine coal, coal dust, & float coal dust 48" x 14" x 14" allowed to accumulate and a bottom belt roller has turned in these accumulations until it would not turn in this dry to damp coal.

2. Just inby this location, accumulations measuring 6 ft x 50" x 12 in deep are packed in under the bottom belt. These accumulations, fine coal and float coal dust, are layered, 2" to 6" of coal, with a thin layer of rock dust. This proves that the accumulations have existed for some time, they have not been removed, just hidden by thin 1/4" layers of rock dust. The bottom belt has been hitting and rubbing these accumulations turning the coal into fine coal and float coal dust, damp to dry.

3. Just inby this location fine wet coal and coal dust 6" x 3 ft x 1 ft and being rubbed by a bottom belt roller.

4. The next roller is rubbing accumulations, damp to dry, 6" x 4 ft x 1 ft.

5. The next inby roller is turning float coal dust, fine and coal that has been dried by friction, 6" x 3 ft x 1 ft.

6. The next inby roller is rubbing fine coal 48" x 3 ft x 8".

7. The next inby roller is frozen and the bottom belt is rubbing in damp to dry coal dust 4 ft x 4 ft x 8".

8. Inby 5 block dry fine coal and float coal dust under the stationary dolly measures 3 ft x 6 ft x 4 in.

9. At 7 block 3 bottom belt rollers in a row have been turning in damp fine coal, turning it into coal dust and float coal dust measuring 3 ft x 2 ft x 4, 6, 10. Approximately half of this area does not have fire suppression over the conveyor belt line. This presents a fire hazard. Air from this

> belt line travels to the 7 Butt longwall section where at least six miners are working. Persons can receive burns, smoke inhalation and/or carbon monoxide poisoning fighting fires. This condition is obvious and has been allowed to exist for some time. Mine management could not give an excuse for, or justify the existence of all the areas of the accumulations. All of these accumulations are in a distance of approximately 350 feet. Ignition sources in this area include cables, motors, frozen belt rollers, and the conveyor belt.

Petitioner's Testimony and Evidence

MSHA Inspector Richard McDorman confirmed that he issued the order after finding accumulations of fine coal, coal dust and float coal dust at the mine locations cited in the order. He stated that he made notes and a sketch detailing and describing the cited conditions, and that he measured the depth of the accumulations with a three-foot long roof sounding rod. He confirmed that he did not take samples of the coal accumulations, and he described them as "black, shiny coal dust, float coal dust" (Tr. 15-24). He also stated that the dampness of the accumulations ranged "from dry to damp, some of the area was even wet", and these areas are noted in his notes (Tr. 25).

Mr. McDorman confirmed his "S&S" finding, and he believed that the accumulations presented a fire hazard. He stated that the accumulations would contribute to the hazard because "They were the fuel. You have the air there. You have an ignition source in the area, and the loose coal, fine coal and float coal dust is the fuel for the fire" (Tr. 25).

Mr. McDorman stated that six men were working on the section and that the belt was running. If a fire were to occur, he believed the men would be exposed to smoke inhalation, carbon monoxide poisoning, possible entrapment, and possible burns fighting the fire (Tr. 26). He believed an injury was reasonably likely to occur because of the ignition sources that were present. He described these sources as the starter box, electrical motors, cables, and the fact that the belt was rubbing frozen rollers and turning in coal dust and float coal dust (Tr. 26-27). He stated that the rollers were "fouled and would not turn" because the accumulations were packed against them, and they presented a potential ignition source because the rubbing action produces heat and "fires have occurred because of a belt rubbing rollers, belt rubbing the sides of stands" (Tr. 27).

Mr. McDorman confirmed that fire suppression was available over approximately half of the areas he cited, but it would not

be available if the accumulations had caught fire at a location where there was no fire suppression (Tr. 28-33).

Mr. McDorman stated that he based his "high negligence" finding on the existence of the accumulations and the fact that they "were extensive and had been allowed to accumulate over some period of time and had not been adequately cleaned up" (Tr. 36). He considered the fact that the preshift examiner should have found the accumulations on the preceding shifts, reported it, and had them removed. He also considered the fact that he had previously put the respondent on notice about the need to address the accumulations problems and had discussed it with a company representative (Tr. 37).

Mr. McDorman stated that he also based his negligence finding on the fact that some of the accumulations were "layered," and this would indicate that they had existed for some time. However, he confirmed that he only determined the layering at one location (No. 2), and did not check for layering at the other cited locations (Tr. 38-40).

Mr. McDorman identified and explained several prior citations for violations of section 75.400, including one that he issued on August 11, 1992, three weeks prior to the contested order in this case (Exhibits G-8 through G-17; Tr. 41-43). He stated that he discussed the August 11, 1992, violation with company representative and foreman Dennis Mitchell, and advised him about the "ongoing problems" with coal accumulations (Tr. 44, 49-50).

Mr. McDorman stated that no one was cleaning up when he issued the order and that it took approximately five and one-half hours to clean up the accumulations, and he explained what was done to abate the order (Tr. 50-58). Mr. McDorman stated that assistant shift foreman Schrack, who was with him during the inspection, stated that "he does not see why some of these areas were not seen and reported. He could not justify the condition". Mr. McDorman stated that he recorded this statement in his notes (Tr. 58).

Mr. McDorman believed that the accumulations had existed for several days because of the layering and depths that he found and the fact that the accumulations consisted of fine coal and coal dust (Tr. 58-59). He confirmed that he checked the preshift and onshift books for the belt and found that accumulations had been recorded for the previous days and had been removed (Tr. 60).

On cross-examination, Mr. McDorman explained the procedures he followed for measuring the accumulations, and he confirmed that he did not know how far the face was from the accumulations, and that it was "at least thirty or forty blocks" away

(Tr. 62-67). He confirmed that the existence of any ignition sources at the face was of no consequence with respect to his "S&S" finding (Tr. 67).

Mr. McDorman stated that the accumulations occurred as a result of coal coming back on the bottom belt. He explained that "fine coal" sticks to the belt and that scraper boards are placed at the dumping points to scape the fines off the belt, but they do not always work properly. The fine coal that sticks to the belt dries out and falls off and accumulates. The accumulations that he observed were not the result of a recent spill, and there were very few lumps of coal (Tr. 68-71).

Mr. McDorman confirmed that he checked for methane and found none, and carbon monoxide sensors may have been present with the fire sensors. He confirmed that the belt was running and that the belt bottom rollers that he described were frozen and not turning and they were in contact with the coal. He did not touch the rollers to determine if they were hot because the belt was running (Tr. 73). He observed no smoke and smelled nothing burning, and he observed no red or reddish brown dust in the areas (Tr. 74-77).

Mr. McDorman stated that ten percent of the violations he issued in the past year were unwarrantable failure violations. In response to a hypothetical question, he stated that if he found coal accumulations on three successive days he would find it unwarrantable even though the accumulations had been cleaned up at the end of each day. He would consider this to be an existing problem and he would expect the operator to determine the source of the problem. He would also consider issuing a section 75.1725(a), violation because of an unsafe condition (Tr. 81, 84-89).

Respondent's Testimony and Evidence

Irving L. Schrack, assistant shift foreman, confirmed that he escorted Inspector McDorman during his inspection. He stated that the inspector first observed a small coal accumulation at the belt drive and informed him that the would issue a section 104(a) citation, but after finding heavier accumulations and rollers turning in coal, he informed him that he was issuing a section 104(d)(2) order (Tr. 92).

Mr. Schrack estimated that the belt drive was 6,500 feet from the working longwall face. He explained that as the entry is developed, the belt drive remains at one permanent location as the belt is extended, and it may remain in place for two and a half years until the longwall is completed and mined out (Tr. 94).

Mr. Schrack agreed that the accumulations were the result of materials clinging to the bottom belt and being knocked off by the belt drive, as well as by spills at the belt drive, and coal being crushed by belt takeup rollers (Tr. 95-97). He explained the cleanup process and confirmed that five men were used. He stated that it took a long time because the belt was close to the roof and presented tight clearances (Tr. 97-98).

Mr. Schrack confirmed that he observed the inspector measuring the depth of a pile of accumulations by pushing a stick into the pile, and he also observed "a couple of rollers I can recall that were frozen due to haystacks underneath of them". He could not recall that any rollers needed to be replaced, and he observed none that were worn. He confirmed that this was the first time he had escorted Mr. McDorman, and he did not view the belt during the two days prior to the inspection (Tr. 100-101).

On cross-examination, Mr. Schrack stated that he did not know how long the accumulations had existed, and he could not recall making the comment attributed to him by the inspector, but sated that it was possible that he made the statement (Tr. 102). He confirmed that he was not with the inspector all of the time because he left to make a telephone call to call people in to take corrective action (tr. 109). He estimated the total amount of accumulations as "under a ton" (Tr. 110).

William A. Kun, safety supervisor, stated that the cited belt line and belt drive areas had last been inspected by a preshift examiner that same day during the day shift between 1:00 and 4:00 p.m., and that no accumulation had been reported at that location during that shift. However, accumulations around the belt drive had been reported on the previous midnight shift and on the prior Friday shift of the weekend of August 28, and spillage was reported in different locations on the belt line. In response to these reports, four different shifts of people were sent to these particular areas to clean up the accumulations, and each day the areas were cleared in the fire boss books (Tr. 111-113).

Mr. Kun confirmed that he did not go to the cited area in this case to observe that cleanup had taken place, and he explained the different ways the accumulations may have occurred, including belt misalignment that causes the scrapers to miss the materials on the belt (Tr. 112-119). He could not state that the cited accumulations were caused by a misaligned belt, and he did not know why they occurred in this case (Tr. 120).

Mr. Kun stated that based on his review of the fire boss records for the two or three days prior to the violation, accumulations were reported at different locations, including the belt drive area, and they were cleaned up. He confirmed that he knows the individuals who made the record entries, and he did not

believe that the cited accumulations were there a week prior to the inspection by Mr. McDorman (Tr. 120-125).

On cross-examination, Mr. Kun confirmed that he did not make the book entries he referred to, did not observe the cited accumulations, or the cleanup (Tr. 125-126). He also confirmed that he did not ask anyone if the tailpiece in question was out of alignment (Tr. 128). He further explained the book entries, and confirmed that no one walked the cited areas before coal production started because they had been preshifted (Tr. 129-133).

Mr. Kun stated that it was very possible that all of the cited accumulations occurred the very same day that the inspector was there, and that four of five of the locations cited by the inspector were noted on the prior reports as being cleaned up (Tr. 141-145).

Inspector McDorman was recalled and stated that he arrived at the mine at 2:45 p.m., and that the shift started work at 5:00 p.m. He confirmed that he observed the cited conditions at 8:00 p.m. He did not believe that the accumulations occurred from 8:00 a.m. that morning, or the previous Thursday and Friday, and were cleaned up (Tr. 147). He did not speak to the mine foreman, and Mr. Schrack was his only "management" contact (Tr. 148).

Section 104(d)(2) "S&S" Order No. 3121656, issued on July 21, 1992, by MSHA Inspector Michael Kalich, cites an alleged violation of 30 C.F.R. 75.701-5, and the cited condition or practice states as follows:

> At the 8 West ITE at 5 block on 8 West Supply track the metal ITE box was not properly grounded. The frame ground and electrical return were attached to a single bond that was attached to the rail on only one end. If this single bond were broken the ITE frame would become energized to 300 volts DC and pose a shock hazard. The track cleaner or the equipment had hooked the ground feed wire at this location and pulled it apart. 100 feet of ground feed wire was rolled up into the cross cut behind the ITE box. This ground feed wire was also attached at the single bond but provided no other point of attachment to the track or ground. Area is fire bossed each shift and examined for electrical hazards weekly. Four other citations have been issued since 7-6-92 for similar conditions, No. 3121645, 3121648, 3121650, and 3121651.

> This condition shows a high degree of negligence. Condition could cause an electric shock or burn injury. Separate clamps or connections to the mine track or other grounded feed conductor are needed to provide a solid connection.

On July 22, 1992, the order was modified to include the following:

> Citation No. 3121638 was issued on 6-29-92 for a similar condition.

MSHA Electrical Inspector Michael Kalich, testified as to his mining experience, and he stated that he holds a degree in mining engineering from the West Virginia University and was enrolled in its electrical engineering program. He is a certified electrician and mine foreman, and has taught several electrical training courses, and taken correspondence courses in electrical theory and design. He has inspected the subject mine periodically for the past six and one-half years, including occasional electrical inspections (Tr. 175-176).

Mr. Kalich confirmed that he issued the order and he identified a sketch that he made depicting what he found at the time of his inspection (Exhibit P-19). He explained that an ITE box is a box approximately 42 inches high, 38 inches long, and 30 inches wide, and that it contains a circuit beaker which allows for energizing and deenergizing the trolley wire (Tr. 181). He further explained the mine power system, including the use of the box, and the trolley wire (Tr. 183-189).

Mr. Kalich explained that the cited condition that constituted a violation of section 75.701-5, was that the frame ground conductor attached to the frame of the ITE box and the No. 16 power conductor were both clamped together under a single "crosby clamp" attached to a single bond that was in turn attached to the track rail in one single spot (Exhibit P-19; Tr. 189-190). The specific violation of section 75.701-5, lies in the fact that it requires the use of separate clamps to make the connection in question, and he explained the connection options that would be in compliance (Tr. 191-198).

Referring to the demonstration model produced by the respondent, Mr. Kalich stated that even though it is not an acceptable connection method, as long as it is attached to the mine track, there is no hazard to anyone touching the ITE box frame, pump, or other piece of D.C. equipment (Tr. 199). However, he considered it to be a potential hazard, and he explained the hazard associated with the cited condition as follows at (Tr. 200-203):

Q. What is the hazard? Why is this method not allowed?

A. The hazard is that if this bond becomes severed from the mine track, the power will feed through the box, out this white wire to the bond. And now it has nowhere to go to complete a circuit, so it feeds back on the green wire and energizes the frame of the pump or frame of the I.T.E. box.

* * * * * * *

Q. Now, you have this setup here and the track bond is severed, assuming a hypothetical, and the equipment is working properly and someone goes and touches it, is there a danger?

A. Most definitely. It's three-hundred-volt D.C. and --

JUDGE KOUTRAS: And the guy would be the ground. The person touching it would be the grounding medium, correct?

THE WITNESS: Correct. The current would flow through the person that touched the frame of the pump and the person would complete the circuit.

Mr. Kalich explained the abatement method, and he confirmed that the proper method for making the connections required by section 75.701-5, are shown in a sketch (Exhibit G-21). He explained that the frame ground is connected to the ground feeder conductor and the No. 16 return power conductor is connected to the single bond, and these connections are made by separate clamps and connectors. With this method of grounding, if the single track bond is severed, the frame will not become energized (Tr. 210-211). Mr. Kalich confirmed that the abatement method depicted in the sketch is one of several ways to achieve compliance, and it is the method presently used at the mine (Tr. 213).

Mr. Kalich stated that in order for a person to receive a shock from the violative connection method used at the time of his inspection the track bond would have to be severed. The bond could be severed by a derailment, and electrical shock and burns, and a fatal shock could result. He further explained as follows at (Tr. 214):

Q. Why did you feel or why do you feel now that it's reasonably likely that this track bond could become severed?

A. I think it's reasonably likely because, as shown in my diagram, it's on a curve. The track is not in the best of condition in that area. There are kinks in the rail. You know, the track leans to one side. There is evidence of the single bond being run over, because it is frayed or was frayed.

Approximately half of these single conductors were broken in the bond in question that I cited in that violation from pieces of equipment, the track cleaner. Or derailments of supply cars or jeeps or motors that occurred in this area.

Q. Are you aware of track bonds ever being severed from the track like that?

A. Yes. In my experience in the mining industry, I've seen it myself, when I worked for U.S. Steel. And it has also been cited by other inspectors.

Mr. Kalich identified copies of two citations issued at two of the respondent's other mines for improper grounding due to the return and frame ground being connected to a single bond which had been cut loose from the track (Exhibits G-22 and G-23), and the petitioner's counsel asserted that these were offered to show that track bonds can become severed and are relevant to the "S&S" finding made by Mr. Kalich (Tr. 216).

Mr. Kalich stated that he based his "high negligence" and "unwarrantable failure" findings on other violations that he had issued two weeks prior to his inspection of July 21, 1992, for making connections on pumps and ITE boxes in the same fashion (Exhibits P-24 through P-28), and his belief that the ground feeder conductor had been clearly pulled apart and had to have been hooked or hit by a piece of equipment. It appeared that someone had rolled up the conductor and place it in the crosscut, and he concluded that someone had knowledge that the conductor had been broken (Tr. 216-218).

Mr. Kalich stated that the prior citations he relied on involved grounding methods that were not approved pursuant to section 75.701, and they "may have" involved the use of separate clamps pursuant to section 75.701-5 (Tr. 220). Petitioner's counsel conceded that the prior citations did not involve that section (Tr. 222). Mr. Kalich confirmed that the prior citations

were all section 104(a) citations, but that he relied on them in part to support the order that the issued in this case (Tr. 225).

Mr. Kalich identified two prior citations issued in 1983 and 1989, citing the same ITE box that he cited, and the petitioner's counsel stated that these further support the inspector's unwarrantable failure findings (Exhibits P-29 and P-30; Tr. 228-230).

Mr. Kalich stated that mine management knew that the cited method of grounding was not approved by MSHA, and this was known through ten years of conferences with MSHA, and the fact that after being cited, the respondent would take corrective action by installing two separate bonds and providing separate connections (Tr. 231-234).

Mr. Kalich believed that the cited condition "was obvious to anyone riding along the haulage", but it was not recorded in the preshift book. He believed the condition had existed for ten days because he was told that a track cleaner had been used in the area, and he surmized that it pulled the feed wire loose and someone simply rolled it up and placed it in the crosscut behind the ITE box. He could not determine who may have done all of this (Tr. 237-242).

On cross-examination, Mr. Kalich stated that he has cited the respondent several times for failure to use separate clamps on a grounded power conductor, and that he has used sections 75.701 and 75.701-5 interchangeably. However, he could not state that these prior violations represent citations for clamping both the frame ground and the power return in the same clamp (Tr. 252-254).

Mr. Kalich stated that when he spoke with mine management he discussed the grounding of the boxes, pumps, and other electrical equipment to railbonds, and the "tack welding" of both ends of the rail bond to the rail. He denied that he did not discuss the use of separate clamps and stated that he also discussed this. He stated that he did not know how many times he has cited the respondent for violating section 75.701-5 (Tr. 256-257). He confirmed that the broken trolley feeder wire rolled up in the crosscut is not a violation and that trolley feeder wire is not required (Tr. 260).

Carl Blaney, supply motorman, testified that he escorted Mr. Kalich during his inspection and observed the cited condition. He agreed that the condition cited is accurately depicted in the sketch admitted as Exhibit P-19, and he agreed with the inspector that the frame ground wire and return power wire going out of the ITE box were both hooked or clamped to the track bond under one "crosby" clamp (Tr. 267). He also confirmed that the ground feeder wire was rolled up behind the box, and

that the track bond "was frayed, like something had run over it, or caught in a machine or something " (Tr. 268).

Mr. Blaney stated that he has observed mine cars derail in the mine and that this occurs "maybe once a week". He has experience a derailment, and has seen track bonds severed by derailed coal cars. He has also seen track bonds torn off by a track cleaner and if a bond or wire is torn he reports it to management at the end of his shift (Tr. 268-269).

On cross-examination, Mr. Blaney confirmed that he observed the two wires with the one clamp and that Mr. Kalich explained where the wires were going or where they came from. Mr. Blaney confirmed that he has no electrical training, but was positive he saw only one clamp on the rail bond. He also confirmed that he observed the frayed conductor wires (Tr. 273-277).

Respondent's Testimony and Evidence

Ryan N. Eddy, electrical foreman, testified that the order was served on him and that he looked at the piece of track bond cited in this case. He confirmed that there was one clamp on the track bond and that the frame ground was connected to the mine feeder wire that was connected to the track through the bond. He stated that the ITE box frame ground was attached with a clamp as shown in the inspector's sketch and he believed that the other conductor was attached to a butt connector. He further confirmed that two clamps were used to connect the grounds to the track bond or the ground feeder (Tr. 279-281).

On cross-examination, Mr. Eddy stated that assuming the return wire and the frame ground had separate connections to the track bond, he would consider that to be an acceptable method of grounding. He was aware that Mr. Kalich did not consider this to be an acceptable method. He confirmed that he had received three citations on July 13, 1992, and that they were issued because equipment was grounded by attaching both the return and frame ground with track bond which was attached to the rail at one point (Tr. 283). He also confirmed that he knew it was possible that other equipment would be grounded by this method (Tr. 287).

Mr. Eddy stated that electrical equipment is checked weekly. He confirmed that the order was abated by using two separate clamps but he and his supervisors did not believe there was a violation for using the method cited by Mr. Kalich (Tr. 290).

Mr. Eddy did not dispute the fact that a track bond can be severed by derailments that do occur, and he agreed that if the track bond is severed the power will go to the frame of the equipment(Tr. 300-301). He also agreed that with the grounding method that was cited, as depicted in Exhibit G-19, where two method that was cited, as depicted in Exhibit G-19, where two wires are attached at one end to a single track bond, if the

track bond is severed, the equipment will become energized tat 300 volts (Tr. 302).

Mr. Eddy stated that he holds a degree from Fairmont State College in electrical engineering technology and that he is a certified underground and surface electrician and certified mine foreman (Tr. 303-304_. He confirmed that none of the three prior citations issued by Mr. Kalich had anything to do with section 75. 701-5, or with how many clamps were used to attach grounds to the grounded power conductor. The citations concerned the single bond. the tacking of the other end of the rail bond (Tr.309).

William J. Helfrich, was called in rebuttal by the petitioner and he was accepted as an expert witness in electrical matter (Exhibit G-31). Mr. Helfrich holds a B.S degree in electrical engineering from the Pennsylvania state University and is employed by MSHA as chief of the Mine Electrical Systems Division. His experience includes membership on committees rewriting MSHA's electrical regulations, teaching electrical courses, and publishing a number of technical reports.

Mr. Helfrich stated that he was familiar with the cited regulation and the issues presented in this case. and has over the past ten years " poured over these regulations and I've rewrote several or many times these regulations" (Tr. 312). Referring to the track bond demonstration model referred to in this case, he stated that it was not in compliance with the intent of section 75.701-5. He stated that the regulation requires that the frame grounding wire be attached to the track by a separate completely independent connection, and that in this case it was tied to a conductor. He further explained why the connection cited was a violation, and why he believed it did not constitute a grounded power conductor (Tr. 312-315).

On cross-examination, Mr. Helfrich stated that the connections shown in exhibit G-19, show only one-connection to the rail, and other wire conductors are all tied together with one clamp rather than two separate ones (Tr. 319).

Section 104 (d) n(2) "S&S" Order No. 3717744. issued on July 22. 1992. by MSHA Inspector joseph A. Migaiolo, cites an alleged violation of 30 C.F.R 75.1403. The order states that the 5,800 foot supply track on the two (2) left section was not being maintained, and the relevant cited conditions are described as follows:

> The track has deteriorated at numerous track joints due to inadequate blocking of the track. The bottom irregularities and poor to no blocking causes the rails to fan up and down. flexing at the joints. This action causes the nuts n=on the bolts to gradually loosen, fall off and the bolts to become dislodges. Several stages

> of this deterioration were observed to a point where two (2) bolts out of four had become dislodged and the remaining two (2) bolts had nuts nearly totally screwed off. This would have left the rails separated and subject to collision with oncoming traffic. This causes a sudden stop which throws persons about and sometimes out of the jitney., This action can also place pressure on the fishplates causing them to break producing derailment and sudden stops.

The inspector noted defects in ninety-one (91) track joints along the cited supply track, and he described the deterioration as follows:

> 46 had one bolt loose, 24 had two bolts loose, 3 had three bolts loose, 6 had 4 bolts loose, 3 had 1 bolt missing, 2 had 2 bolts missing, 1 bolt loose with one bolt missing, 4 with a loose bolt and 4 with a nut missing. 1 with 2 loose nuts and a nut missing.

The inspector modified the order on July 23, 1992, to include the locations of the defective track joints by references to the specific block numbers enumerated in the modified order.

Petitioner's Testimony and Evidence

MSHA Inspector Joseph A. Migaiolo, testified that he regularly inspects the mine and he confirmed that he conducted an inspection on july 22, 1992, and issued the order in question. He confirmed that the order was issued under the statutory and regulatory scheme for issuing safeguard notices. The respondent's counsel did not dispute this. and he agreed that once a safeguard notice is issued it becomes mine specific for the mine. The inspector identified a copy of the initial underlying safeguard notice number 3309734, issued by MSHA Inspector Dale R. Denning on December 7. 1989. The safeguard cited the rail alignment and loose and low joints (Exhibit G-33; Tr. 325-3290).

The inspector stated that hazards associated with the safeguard involved the derailment of mine cars, locomotives, and Jitneys caused by the joints becoming loose and the rails breaking or coming apart. A derailment can cause serious injuries to miners if the vehicles were to come to a sudden stop and they were thrown about or out of the vehicle. The safeguard maintain the track safe throughout the mine (Tr. 329-330).

The inspector stated that the 1989 safeguard was issued after a previously issued safeguard in 1972. which put the respondent on notice that it had several broken rails and loose

and unsecured joints. The 1989 safeguard further explained what needed to be done to maintain the track (Tr. 331). He believed that the safeguard he issued was still needed and that the derailment hazard still existed (Tr. 332).

The inspector described the conditions that he found during his inspection and he confirmed that he recorded them in his notes and diagrams, and he explained the use of fishplates to secure the rails (Tr. 333-337). In his opinion, the deteriorated rail joints were caused by the vibrations of the equipment passing over them. and the methods used to install the rails accelerates their deterioration. He explained that the crosscut intersections where most of the conditions existed are lower than the entryways and they are not properly blockade to keep them level with the entry track. As a result. the track "fans up and down when you begin to go across it". He further explained as follows at (Tr. 340):

> When you go down into the crosscut. the track on the other side pops up. It fans upward. And of course. when you come up out of the crosscut. the track behind you pops up behind you.
>
> The joints in these approaching areas and in these crosscuts become loose. And the bolts deteriorate, meaning they back off, they unscrew. And this is where you fishplates --then you get a loose joint.
>
> The fishplate can break or the bolts can become dislodged and the rails become dislodged from each other. This causes the rail, then, to either pop up or become misaligned and a derailment occurs.

The inspector stated that the jitneys travel at a speed of five to fifteen miles an hour (Tr. 343). He explained his "S&S" finding as follows at (Tr. 344-345):

> A. Well, with just one bolt loose, not very likely anything is going to occur. But what does occur is that when you have one bolt loose, is that it causes additional stress to the other bolts that are in the plate. And then this causes those bolts to become loose. also. This, in turn, then causes the plate to become so loose that you get a derailment.
>
> Q. Why don't you explain why you thought that it was reasonably likely that this condition would result in an injury?
>
> A. It's highly likely that the joint is going to come loose and that there is going to be a

derailment when the bolts actually come loose from the joint. The situations we have where you have one bolt missing and two loose on the other side. you're just a whisper away from the joint coming apart.

So it's highly likely that the event is going to occur. As I indicted, the type of injuries that can occur. striking various parts of the body, and even being thrown from the vehicle will occur and cause very serious bodily injury.

Q. You're saying that it's highly likely, but you checked them in the order reasonably likely.

A. It's reasonably likely that it will occur. yes. if conditions continue as they are normally, right now, with the equipment running over these type of joints. that they continually get loose. more loose and more loose.

You have all different phases of the joints being present in the area, from one bolt being loose to one bolt on each side being loose, to two bolts loose on a side, one bolt on the other side, one bolt being loose or two bolts loose and one bolt missing. You have all the phases. And the next step is for the other bolt to fall out of the joint or get loose and fall out of the joint and cause a derailment.

With regard to his "high negligence" and unwarrantable failure findings, the inspector stated as follows at (Tr. 346-34_:

A. As I indicated, the operator was placed on notice as far back as 1972, then placed back on notice --continued on notice in 1989. He knew at that time that the had a specific mine hazard that he had to watch for and take care of and that he should then take specific care when he made his examinations of the area to assure that this mine hazard didn't reexist or exist in a large volume.

The inspector stated that he had spoken to company safety supervisor William Kun over a number of year about the blocking of the track, and that Mr. Kun seldom disagreed that the track

did not need blocking because he recognized that it is a good method to maintain a level track to prevent it from fanning up and down and causing the joints to loosen. The inspector further indicated that he has spoken to the superintendent and to other safety representatives about blocking the track (Tr. 351-352).

The inspector confirmed that he has issued citations in the past at the mine for conditions similar to those cited in his order (Exhibits G-35 through G-39). He also indicated that four additional citations were issued under the same safeguard (Exhibits G-40 - G-43). All of these are section 104(a) citations, rather than (d) orders, and he explained that there conditions noted (Tr. 355-363).

The inspector believed that the cited conditions had existed for several weeks and that the area was preshifted three times a day, and that this contributed to his unwarrantable failure finding in addition to the respondent's knowledge of the conditions, the prior safeguards which put it on notice, and his prior conversations with management (Tr. 363-365).

On cross-examination, the inspector confirmed that he cited the supply track from the mouth up to the working section for a distance of approximately 58 blocks, or 5,400 feet. He read from the 1989 safeguard which states that it is notice that "all track haulage at this mine shall be will maintained where men or supplies or coal is transported" (Tr. 369). There is no limitation with respect to the amount of vertical movement that "well maintained" (Tr. 370).

The inspector explained that a "fishplate" is a securing plate that is applied to both sides of the track joint and secured by bolts inserted into the fishplate holes. He stated that all of the holes should have a secured bolt through them to hold the fishplate in place, and if any bolts are missing, he would consider this to be a violation (Tr. 376). He confirmed that missing bolts are usually initially in place but become dislodged over time, and if they are found by the track they are replaced and tightened up (Tr. 380-382). He also confirmed that the cited track was not coal haulage track, and that it is used to haul supplies and people to and from the sections (Tr. 383).

Respondent's Testimony and Evidence

William Kun, safety supervisor, testified that he traveled the two left supply track area approximately eight days prior to the issuance of the order. At the time the inspector was with him and told him that he had observed a couple of places where the track "was fanning a little bit" and he asked him to get it taken care of and did not issue a citation. MR. Kun discussed

the matter with the mine foreman and superintendent, and it was decided to establish a maintenance schedule, beginning with the ballasting of the two left supply track. Two carloads of gravel were bought in starting at the mouth of the section, and the dumping of the gravel was a slow process. The day shift was assigned to do the rehabilitation work under the supervision of shift foreman Dennis Mitchell. At the time of the inspection, the work had progressed to the number 9 or 10 block and the gravel was used to ballast and block the rails and "getting it leveled out". He believed that bolts were being replaced as the gravel work progressed, and while he examined that work he did not check each rail joint for loose or missing bolts (Tr. 391-393).

On cross-examination, Mr. Kun confirmed that the track rehabilitation work was done on only one shift. and he did not believe it was a high priority item because he saw no joints out of alignment when he traveled the area. He confirmed that he was not with the inspector when he issued the order and he was surprised that he did so. He expressed his surprise to the inspector, and the inspector commented that "they should have taken care of it" (Tr. 394-397).

Mr. Kun stated that it was possible that the loose and missing bolts were caused by the equipment fanning up and down over the tracks. It was also possible that the condition would progressively worsen, but other than movement, he did not observe the track "raise up where you could see it seven hundred feet" (Tr. 397). Since work was in progress to upgrade the track, Mr. Kun did not believe that the conditions would have deteriorated further if normal mining operations were to continue, but that it was possible that a derailment could occur (Tr.398).

Mr Kun described the abatement work and stated that it was possible that it took approximately six hours, but indicated that it took a month or more to complete the ballasting of the entire track and to complete the rest of the work (Tr. 399-400).

Dennis Mitchell, day shift foreman, confirmed that he traveled with the inspector during his inspection, Mr. Mitchell did not believe it unusual to see loose track bolts and he indicated that they are initially tight when installed but loosen up by the vibration of the traffic. He believed that the track was well maintained and he did not observe that any of the fishplates were going to come off because the nut was missing. the 85 pound rail. He agreed that some bolts were missing and that others were visibly loose because the nut was missing. However, a preshift examiner would not have otherwise detected loose bolts unless he used a wrench. The missing bolts that could be found were replaced (Tr. 402-406). Mr. Mitchell did not

believe that any of the conditions cited constituted a hazard, and he did not consider the conditions to be a violation (Tr. 407).

On cross-examination, Mr. Mitchell was of the opinion that if a bolt is holding the fishplate on it is not a hazard, but if he observed one with only one bolt, he would make an attempt to have someone install additional bolts. He confirmed that there are four bolts for each of the rail joints, and if there is only one bolt and the fishplate falls off, it was possible that the rail would come apart (Tr. 401). He stated that depending on the traffic, the amount of loose bolts at the 91 joints cited by the inspector could have taken several weeks to loosen. He could not state when the bolts were last checked prior to the reinspection (Tr. 412-413).

Mr. Mitchell was not aware of any supply track injuries occurring at the mine as a result of poor track maintenance or otherwise (Tr. 414-415). He confirmed that the track upgrading work began before the inspector issued the order (Tr. 417).

Earl Kennedy, respondent's chief safety inspector, stated that he was travelling the supply track with the superintendent the day the inspector issued his order. He stated that he checks the supply track every time rides it and he listens for rattles in the joints when he crosses them in the vehicle. A loose fishplate will rattle, and he heard none rattling on the day in question. He stated that the fishplate joints are tight and secured with a steel armored tie that holds both rails on each side of the joint. He did not discuss the order with the inspector but he did check all of the track from the No. 55 block up to the No. 21 block where he found track people working. He checked every fishplate and every bolt and joint with a pry bar and he noted seven missing bolts and four missing nuts, none of which were at the same location. He saw no fishplate that was about to separate and none that were loose (Tr. 421-425). Mr Kennedy was of the opinion that the track in question was well maintained and free of hazards (Tr. 425-426).

On cross-examination, Mr. Kennedy stated that it is common for one bolt and nut out of four to be missing from a fishplate, but if it is tight, there is no problem (Tr. 428). He agreed that loose bolts should be taken care of and this is the job of the maintenance people (Tr. 432). He confirmed that he was not with the inspector when he issued the order, but that he walked the same track less than an hour after the inspector and did not find all of the conditions that he did (Tr. 434).

Inspector Migaiolo was recalled by the presiding judge and he stated that when the miner's representative who accompanied him finds loose bolts he "finger tights" the thread so it doesn't come completely off, and when bolts and nuts were found by the

track they were replaced as they walked the track. However, the locations are still recorded and cited and abatement is not completed until a wrench is used to tighten the bolts and fish plates. He could not recall at how many locations that he cited this occurred and he believed it would account for the low number of missing bolts found by Mr. Kennedy (Tr. 445).

Findings and Conclusions

Fact of violations

Order No. 3122095, 30 C. F.R. 75.400

The credible and unrebutted testimony of the inspector establishes the existence of the cited coal and float coal accumulations that he observed in the course of his inspection on August 31, 1992. Indeed, the testimony of assistant shift foreman Screech supports the inspector's observations and I have given little weight to the testimony of safety supervisor Kun, who admitted that he did not observe the cited conditions or the abatement work, and whose knowledge of the matter was limited to his review of certain shift records. The existence of the coal accumulations in question constitutes a violation of the cited section 75.400. See: Old Ben Coal Company, 2 FMSHRC 2806 (October 1980); C.C.C.-Pompey Coal Company, Inc., 2 FMSHRC 1195 (June 1980); Utah Power & Light Company, 12 FMSHRC 965, 969 (May 1990). I conclude and find that the violation has been established, and IT IS AFFIRMED.

> The attachment of grounding wire to a mine track or other grounded power conductor will be approved if separate clamps, suitable for such purpose, are used and installed to provide a solid connection.

In the course of the hearing, the respondent's counsel asserted that the language "will be approved" found in section 75.701-5, does not impose any mandatory requirement that separate clamps be used for the grounding wires and power conductor in question (Tr. 245-246). The respondent's position is rejected. I agree with petitioner's position that section 75.701-5, must be considered in context, and in conjunction with section 75.701, requires the grounding of metallic frames by methods approved by MSHA, and section 75.701-3, which contains the approved grounding

methods. Under the circumstances, I conclude and find that section 75.701-5, does impose a mandatory requirement for the use of separate clamps pursuant to that section.

I conclude and find that the credible testimony and documentation presented by the inspector, as corroborated by inspector escort Blaney and electrical expert Helfrich, establishes that the failure to use separate clamps for attaching or connecting the return power conductor and the frame ground wire to the single piece of track bond was a violation of section 75.705-5. Although electrical foreman Eddy agreed that there was one clamp on the track bond and that the frame ground was attached with a clamp as shown in Exhibit G-19, he maintained that two clamps were used to connect the grounds to the track bond or the ground feeder. However, I find the inspector's testimony more credible than Mr. Eddy's seemingly agreed that the grounding method cited and documented by the inspector consisted of two wires attached at one end to a single track bond.

I conclude and find that the petitioner has established a violation by a preponderance of the credible evidence adduced in this matter. The failure to use separate clamps for attaching the ground wire and power conductor constituted a clear violation of section 75.701-5. See: U.S Steel Mining Company, Inc., 6 FMSHRC 1369 (May 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1510 (June 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 2058 (August 1984). Under all of these circumstances, the violation is AFFIRMED.

Order No. 3717744. 30 C.F.R. 75.1403

In this instance, the respondent is charged with a violation of the safeguard requirements found in section 75.1403, which provides as follows:

> Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men an materials shall be provided.

The general criteria for issuing safeguards provides for notification in writing by an inspector to the mine operator of the specific safeguard requirements for the specific mine to which they are addressed, and once a safeguard notice is issued, the operator is obliged to comply with the safeguards and to maintain them for the particular mine in question. The respondent agreed that once a safeguard notice is issued, it becomes mine specific for the mine, and it does not dispute the fact that the order was issued pursuant to the statutory and regulatory safeguard notice scheme.

In this case , the inspector cited a violation of section 75.1403, because of the failure by the respondent to maintain the cited supply track. The inspector's narrative description of the cited conditions, as well as his credible testimony, provided a detailed and thorough description of ninety-one haulage track joints where there were missing or loose nuts and bolts in the fishplates that held the track rails together. The inspector concluded these deteriorated track conditions covering a rather extensive distance of 5,800 feet of track established that the tracks were not being maintained as required by a previously issued safeguard notice covering the track haulage at the mine.

The safeguard notice relied on by the inspector in issuing the violation was issued at the mine on December 7,1989, (No. 3309734); and it was issued because of loose of missing track bolts along the mine track haulage. The notice specifically informed the respondent that all mine track haulage used to transport men, supplies, or coal shall be well maintained.

I conclude and find that the credible testimony of the inspector, which is supported by his detailed notes and orders, establishes the conditions that he cited and described. I further conclude and find that these conditions reasonably support the inspector's conclusions that the cited haulage tracks were not being well maintained as required by the applicable underlying safeguard notice.

Although respondent's safety inspector Kennedy testified that he found far less missing bolts and nuts, and no sighs of loose fishplates, he was not with the inspector when he made his observations and notations and he walked the track after the order was issued. I find credible the inspector's explanation that when he and the miner's representative walked the track and found nuts and bolts by the tracks, they were replaced, but that abatement would not be achieved until they were secured in place with a wrench.

Respondent's safety supervisor Kun, who was not with the inspector when he issued the order, nonetheless confirmed that it was possible that the equipment " fanning" up and down over the tracks caused the bolts to loosen and came off the fishplates. Shift foreman Mitchell, who accompanied the inspector, agreed that loose track bolts caused by traffic vibrations were not unusual, and he confirmed that some bolts were missing and others were loose because of missing bolts, and he could not state when the bolts were last checked prior to the inspection in question.

I conclude and find that the cited haulage track condition existed as initially found and observed by the inspector, and that such conditions support the inspector's conclusions that the

tracks were in a deteriorated condition and were not well maintained as required by the previous safeguard issued pursuant to section 75.1403. Under the circumstances, I further conclude and find that the petitioner has established a violation by a preponderance of the credible evidence adduced in this matter, and the violation is AFFIRMED.

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

> 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, (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 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 4988 (April 1988); youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (december 1987).

Order No. 3122095. 30 C.F.R. 75.400

The inspector's credible and unrebutted testimony establishes that several belt rollers were frozen, and turning in the coal, and rubbing against the belt that was running and turning in the accumulations of coal and coal dust. Indeed, the assistant shift foreman Screech, who was with the inspector, confirmed that belt rollers were turning in the spillage and that a couple of the rollers were frozen in the accumulated coal.

Although the evidence reflects that fire suppression devices were installed along a portion of the belt, they were not installed along all of the 350 foot area that was cited. Further, even though the accumulations were found at some distance from the working face, the inspector did not believe that this affected the fire hazard that existed in the belt areas that he cited, and he noted the fact that the air ventilation travelled from the belt line to the longwall section where at least six miners were working.

The inspector believed that the dry and black shiny coal dust and float coal dust accumulations were combustible and presented a fire hazard, particularly since the belt was running and the frozen belt rollers were turning in the coal accumulations and rubbing the belt. He considered the frozen rollers and the belt rubbing the coal as a source of heat and ignition, and he also considered the other ignition sources such as a starter box, electrical motors, and cables.

The inspector believed that the coal accumulations and ready ignition sources presented a serious fire hazard, and that in the event of a fire, the accumulations would contribute to the hazard because they would constitute the fuel for feeding the fire. He further believed that it was reasonably likely that the six men working on the section would suffer injuries ranging from smoke inhalation to entrapment and burns as a result of any fire.

I agree with the inspector's "S&S" finding. I conclude and find that the cited coal accumulations presented a discrete fire hazard on the cited beltline in question and that given the existing ready sources of ignition in those cited areas where the dry coal and coal dust were turning in the moving belt and stuck rollers, I conclude and find that it was reasonably likely that a belt five would occur if normal mining operations were continued. 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 this regard is AFFIRMED.

Order No. 3121656. 30 C.F.R. 75.701-5.

The electrical inspector,s credible and unrebutted testimony establishes that in the event of an equipment derailment, the single grounding bond to the track rail could be severed, and if this occurred the ITE box frame would be energized and present an electrical shock or electrocution hazard to anyone contacting the frame which would be energized at 300 volts D.C. Any touching of the energized frame would serve as the ground and would complete the circuit.

The inspector confirmed that he was aware of track bonds being severed by derailments, and he believed that it was reasonably likely to occur in this instance because the area where the violation occurred was on a curve and the rail tracks were not in the best condition and contained "kinks" and "leaned to one side" (Tr. 214). He also observed that the single track bond was frayed, contained broken conductors, and showed evidence of being run over.

Motorman Blaney, who also observed the cited condition, confirmed that the track bond was in poor condition. He also confirmed that derailments occurred at least once a week, and he has observed track bonds that have been severed by derailed mine cars or torn off by track cleaners.

Respondent's electrical foreman Eddy did not dispute the fact that derailments occur, and he agreed that a track bond can be severed by a derailment, and if it were severed the power will go to the frame of the equipment and will energize it at 300 volts.

I agree with the inspector's "S&S" finding. I conclude and find that the violation presented a discrete electrical shock hazard, and in the likely event that the track bond were served by being run over by a piece of track equipment, or through an equipment derailment, which I find was reasonably likely to occur in the normal course of mining operations, the ITE box frame would become energized and expose anyone touching it to 300 volts of D.C. current. If anyone were to contact the energized frame, it would be reasonably likely that they would suffer electrical shock injuries of a reasonably serious nature. Under all of these circumstances, I conclude and find that the violation was significant and substantial (S&S), and the inspector's finding in this regard is AFFIRMED.

Order No. 3717744. 30 C.F.R. 75.1403.

The inspector believed that the deteriorated track conditions,l which he documented in great detail, would result in the failure and breaking of the fishplates, which in turn would result in the separation of the track rails and a derailment. He further believed that a derailment was reasonably likely to occur if normal mining operations were to continue and the equipment continued to travel over the tracks with loosened or missing fishplate nuts and bolts. Although he did not observe any separated track joints or fishplates, given the extent of the conditions, the inspector believed that a track separation was "just a whisper away"(Tr. 345). If a derailment were to occur, the inspector believed that serious injuries to the miners riding the track haulage would result.

Respondent's safety supervisor Kun agreed that the cited track conditions would progressively worsen if not attended to. Although he believed that the conditions would have been corrected as the track upgrading work continued, and disagree that a derailment was likely to occur, he conceded that a derailment was possible (Tr. 398). Shift foreman Mitchell agreed that if a fishplate that is secured by only one bolt falls off, it was possible that the track rail would come apart (Tr. 401). He also confirmed that it was not unusual for track bolts to loosen, and he agreed that a derailment at a point where the rail joint is no longer secured could result in serious injuries (Tr. 411, 414).

I agree with the inspector's "S&S" finding. In view of the extent of the track deterioration observed by the inspector who credibly documented 46 track joints with one bolt missing, 24 joints with two loose bolts, three joints with four loose bolts, and the remaining joints with loose and missing nuts and bolts, I cannot disagree with the inspector's conclusion that track derailment was reasonably likely and "just a whisper away" if normal ming operations were to continue. In the likely event of a derailment, I believe it was reasonably likely that miners would suffer 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 this regard IS AFFIRMED.

Unwarrantable Failure Violations

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

> 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 of 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 Act." Energy Mining Corporation , 9 FMSHRC 1977 (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 Youghiogheny & 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 that 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.

Order No. 3122095. 30 C.F.R. 75.400.

The inspector testified that he based his "high negligence" order on the existence of the accumulations at all of the nine (9) locations that he described in the order, the fact that they

were extensive and had been allowed to accumulate over some period of time, his belief that they should have been discovered during the preceding shifts, and prior citations for violations of section 75.400, including a citation on August 11, 1992, three weeks prior to his order, which he had discussed with foreman Dennis Mitchell, and which put him on notice about the problem with accumulations along conveyor belt drives (Tr. 36-37).

Although the inspector conceded that his conclusion that the cited accumulations had existed "for some time" was based on his testing and observation that the 12 inches of coal accumulations at cited location No. 2, was "layered", indicating that it had been there for some time, and that he did not make an effort to determined whether "layering", existed at the other cited locations, I conclude and find that his credible and unrebutted testimony, as corroborated by his notes, establishes the locations. Given the extent of the accumulations, including the measurements detailed and recorded by the inspector, I cannot conclude that they were the result of recent spills or belt malfunctions.

The accumulations cited by the inspector covered a rather extensive area of approximately 350 feet along the cited beltline. The inspector documented mine (9) locations where he found fine coal and float coal accumulations ranging in depths of four to twelve inches. Shift foreman Shrack did not dispute the existence of the accumulations, and he estimated that they amounted to "under a ton" (Tr. 110). The inspector testified that Mr. Schrack made a statement that "he does not see why some of these areas were not seen and reported", and that he recorded this in his notes (Tr. 58). Mr Schrack could not recall making the statement, but stated that it was possible that he did (Tr. 102). I find the inspector's testimony to be credible and believable, and I conclude that Mr. Shrack made the statement.

Although the inspector confirmed that he checked the preshift and onshift books and found that coal accumulations had been reported and cleaned up for the days prior to his inspection on Monday, august 31, 1992, he did to believe that the accumulations that he found occurred on Monday, and that they had existed at least since the prior Saturday. No coal was produced on Sunday, and if any clean up was done on Saturday, the inspector believed that it was a "cosmetic job where they removed it" (Tr. 60-61).

The inspector confirmed that when he issued the order no effort was being made to clean up the accumulations, and had he found such an effort taking place he would not have issued the violation as an order and would have found moderate negligence (Tr. 50).

The inspector testified credibly that after issuing the order, he was notified later that day by the respondent that the cited accumulations had been cleaned up, and he was requested to return to the mine to terminate the order so that the belt could be placed back into operation so that coal production could continued. Upon his return to the mine, the inspector found that the cited accumulations had been cleaned up to thee extent that they were below the belt rollers and not in contact with the belt or the belt rollers, but they had not been completely removed from the mine and had only been rockdusted to address some of the hazards. He subsequently terminated the order after additional people, or a total or ten, were brought in to clean up and remove all of the accumulations (Tr. 51-54)). In explaining the respondent's abatement efforts, the inspector suggested that the cited accumulations were the result of similar cleanup efforts, and he stated as follows in his regard (Tr. 52):

> A. It's a situation where what they had done in the past -- What they had done in the past was to remove the coal down below the rollers, throw rock dust onto it and consider that to be clean. But the accumulations were not all removed. There was still accumulations there. There were several inches of coal that had not been removed.

Respondent's safety supervisor Kun confirmed that accumulations around the belt drive had been reported on the previous midnight shift, which would have been on Saturday, two days before Mr. McDorman's inspection on Monday, as well as the prior Friday. Although Mr. Kun stated that people were sent to these areas had been "cleared", Mr. Kun acknowledged that he had not visited these areas personally to confirm that they had been cleaned up and that he simply relied on his review of the mine books. Mr. Kun also acknowledged that he did not visit the area cited by Mr. McDorman to observe only clean up activity, and I find his explanations as to how the accumulations may have occurred, including a suggested belt misalignment, to be speculative, less then credible, and that they do not rebut the inspector's credible testimony in this case.

Although there is no direct evidence to establish precisely how long the cited accumulations may have existed before the inspector found them, I conclude and find that they had existed, as a minimum, as early as the previous Friday, and Saturday, August 28, and 29, 1992 and more than likely longer than that. Further, I accept as credible and probative the inspector's explanation that the "layering" that he discovered indicated that the existing coal were accumulations were simply covered over with rock dust and "cosmetically" cleaned up enough to keep them from contacting belts, but were not totally removed from the

mine. I also accept as credible and probative the inspector's explanation that this was precisely what occurred when he was called back prematurely to abate his order, and I find his suggestion that this "cleanup" practice was contributed to the respondent's accumulations problems in the mine has a credible ring of truth about it.

Based on the foregoing findings and conclusions, and considering the rather extensive accumulations in question, and my belief that they had existed over a long period of time without being completely cleaned up and totally removed from the mine, I conclude and find that the inspector's "high negligence" finding was warranted. I further conclude and find that management's failure to promptly act to insure that the accumulations were cleaned up and removed from the mine before the inspector found them constitutes aggravated conduct supporting the unwarrantable failure order in question, and IT IS AFFIRMED as issued.

Order No. 2717744. 30 C.F..R. 1403.

In support of the inspector's belief that the violation was an unwarrantable failure resulting from the respondent's aggravated conduct, the petitioner argues that the conditions had exited for several weeks and the area was subject to three daily preshift examinations, that the respondent had been put on notice by the safeguard, prior citations, and discussions with the inspector about the need to properly block and maintain the track. Under all of these circumstances, the petitioner concludes that the respondent know or should have known of the cited condition but took no action to prevent or correct it (Posthearing Brief, pg. 40).

I find no credible evidence to support a conclusion that l of the track conditions had existed for "several weeks:. The inspector confirmed that some of the conditions may have occurred over a two-day period of time. When asked how the determined that the conditions had existed "for previous days or weeks"' he responded that it was his experience from working in the mines and inspecting the respondent's mines "that these type of conditions take several weeks to develop" (Tr. 379-380). Further, I find no evidence that the inspector checked the determine whether the conditions had been reported.

Insofar as the prior safeguard notice relied on by the inspector is concerned, I find nothing particularly aggravating or unusual about the fact that it placed the respondent on notice what it needed to maintain its track system. That is precisely why a safe guard is issued. The fact that subsequently inspections reveal tracks that are not well maintained and result in citations does not, standing alone, indicate aggravated conduct,

particular on the facts of this case where the safeguard notice is framed in rather general and subjective language such as "shall be well maintained", without a specific requirement for blocking, ballasting, or levelling the tracks.

Insofar as the prior citations are concerned (Exhibits G-35 through G-43), I note that they were all issued as section 104 (a) citations, with low to medium negligence findings, and one was issued as a non-"S&S" citation. Two of the citations were abated cited improper track gauging, and six citations cited single track joints with loose or broken fishplates or bolts. Two of the citations were abated within 15 minutes, one was abated within 2 hours, and the rest were all timely abated within the time fixed by the inspector. None of these violations appear to have been issued at the same supply track locations cited by the inspector in this case.

The prior citations in question must be taken in context, and I cannot conclude that they are indicative of aggravated conduct. Considering the size and scope of the respondent's mining operation, including the extensive underground haulage system, track deterioration obviously will occur, and when it is correct the conditions. indeed, the inspector himself acknowledged that given the 55 miles of track at the mine, "sooner or later you're going to come across a condition where things are extensive" (Tr. 358).

The inspector testified that he had previously discussed the matter of track blocking with Mr. Kun, and that he seldom disagree with him and recognized the need to maintain a level track to prevent it from "fanning" and causing the joints to loosen. Mr. Kun did not dispute this, and he confirmed that eight days before issuing his order, the inspector pointed out to him a track area that need attention, asked him to take care of it, and did not issue a violation.

The inspector confirmed that the track system in the mine is rather extensive and covers an area of 55 miles (Tr. 358). It would appear to me from the record in this case that maintaining the tracks level at all times to prevent "fanning" is not an easy task. Although the inspector issued the violation for loose and missing track fishplate nuts and bolts, it seems obvious to me that his principal concern was that the irregular mine floor at the crosscut intersections caused by mining equipment during the mining and cleanup cycles presented track blocking and leveling problems, which in turn, and over time, resulted in the loosening of the nuts and bolts holding the track rails together (Tr. 338-341).

Mr. Kun's unrebutted and credible testimony reflects that as a result of his conversation with the inspector, Mr. Kun

discussed the matter with the mine superintendent and foreman, and a maintenance schedule was established to rehabilitate the tracks, beginning with the ballasting of the cited two left track. Work as begun at the mouth of the section, and it included bringing in and spreading carloads of gravel. At the time of the inspection of July 22, 1992, the work of blocking and levelling the track to address the "fanning" problem had progressed at least 9 or 10 blocks, which included some of the areas cited by the inspector (Tr. 366-367). Under the circumstances, I cannot conclude that the respondent was ignoring the problem brought to its attention by the inspector. Quite the contrary is true. The respondent had undertaken a major step in rehabilitating its track system at the problem intersections, and was engaged in this work at the time of the inspection. The fact that it may not have been working at the pace suitable to the inspector, does not in my view constitute aggravated conduct.

Based on the foregoing findings and conclusion, and after careful consideration of all of the testimony and evidence in this case, I conclude and find that the petitioner has failed to prove that the volition in question constituted an unwarrantable failure to comply with section 75.1403. Under the circumstances, the inspector's finding in this regard IS VACATED, and the section 104(d) (2) "S&S" Order IS MODIFIED to a section 104(a) "S&S" citation.

Order No. 3121656. 30 C.F.R. 75.701-5

In support of the inspector's unwarrantable failure determination, the petitioner asserts that management knew that the cited grounding method wad improper and either knew or should have known that the cited box was so grounded (Posthearing Brief, pg.30). The petitioner further relies on the fact that several prior citations had been issued at the mine for similar conditions (Exhibits G-24 through G-28), the ground feeder wire had been torn loose from the clap and rolled up and stored in the cross-cut behind the cited box for as long as ten days, the cited box had been cited on two prior occasions for improper grounding in that the return power conductor and the frame ground were attached to a single piece of track bond (Exhibits G-29 and G-30), and the fact that the inspector had discussed the practice of improperly grounding electrical equipment with mine management.

In this case, the respondent was charged with a violation of the specific requirements found in section 75.701-5, namely, the use of separate clamps for attaching grounding wires to the mines track or other grounded powers conductors. It had not been changed with a failure to connect both ends of the track bond to the track. As correctly noted by the respondent in the course of the trial, the track bonding issue has been a matter of continued litigation between the parties, and a recent settlement of that

issue in connection with a section 104(a) non-"S&S" citation with an assessment of $20, has apparently laid that matter to rest (TR. 166). The parties also confirmed that in several other track bonding cases, the inspectors have cited violations of section 75.703-1, and 75-701.3 (Tr. 167-168). In this case, the inspector confirmed that the violation concerns the specific requirements for separate clamps as stated in section 75.701, and not 75.701-5.

I take note of the fact that two prior citations issued for violations at the same 8 West ADO breaker box were issued in December, 1989, and March, 1983. Aside from the age of those violations, they would appear to concern the respondent's track bonding methods rather than the use of separate clamping devices. The 1998 citation cites a violation of Section 75.701, and not 75.701-5.

With regard to the five citations issued approximately two weeks before the contested order in this case, I note that they were all issued by Inspector Kalich and they all cited violations of section 75.701, and not 75-701-5. When asked to state the number of times he cited the respondent with violations of section 75.701-5, the inspector responded "I don't know" (Tr. 256). When asked if his prior citations concerned the lack of double clamps, the inspector responded that it was his view that section 75.701 and 705.705-5 "would be interchangeable" (Tr. 219). The petitioner's counsel conceded that none of these prior citations cited violations of section 75.701-5, for failure to use separate clamps (Tr. 222). I find the inspector's responses to be rather evasive, and based on the petitioner's admission that none of these prior citations concern section 75.701-5, I have given them little weight and find that they do not support the inspector's unwarrantable failure finding.

With regard to the petitioner's assertion that the rolled up conductor wire had been placed in the crosscut prior to the citation, the inspector's belief in this regard was based on a purported statement by the foreman that track cleaners were in the area. From this statement, the inspector assumed that the wire had been pulled loose and rolled up and left by the track cleaners. None of these individuals are identified, none were contacted by the inspector, and none testified in this case (Tr. 237-241). Under the circumstances, I find no credible or probative testimony on this point is rejected and given little weight. As a matter of fact, the inspector conceded that he rolled up feeder wire had nothing to do with the failure to use separate clamps (Tr. 260).

The inspector asserted that management knew that cited "grounding method" was not approved by MSHA because of "various discussion that we've had with mine management in the past ten

years" and that whenever it has been cited, "its always corrected by installing separate bonds and providing separate connections" (Tr. 231-232). When asked to explain why no section (d) orders have been issued over the past ten years if in fact the respondent has been in violation that long, the inspector could not answer (Tr. 232).

With regard to his asserted discussions with mine management concerning his prior citations of July 6, and 13, 1992, Inspector Kalish stated that he conducts conferences on every violation that he issues and speaks to the individual who receives the citation. He testified that he "more than likely" discussed them with the mine superintendent and with the safety director Kun (Tr. 255). When asked if he noted the discussions in his inspection notes, Mr. Kalich stated that he did not have his note with him, and when asked why, he responded that he did not believe they were relevant. (Tr. 225-226). He later contended that his discussions included the use of separate clamps (Tr. 255).

Inspector Kalich stated that his prior citations were served on foreman Eddy and Coker, and that he discussed them with these individuals (Tr. 266). Mr Coker did not testify in this case. Foreman Eddy confirmed that three of the prior citations issued by Mr. Kalich were served on him and that he was aware that Mr. Kalich did not approve of the use of a single track bond attached to the track as a suitable grounding device, but he was not asked if Mr. Kalich had ever discussed the use of separate clamps as stated in section 75.701-5 (Tr. 282-283).

Mr. Eddy took the position that the prior citations served on him had nothing to do with the number of clamps used to attach grounds to the grounded power conductor and that they all concerned the use of a single track bond and the failure to tack the other end of the bond to the track, and did not concern violations of section 75.701-5 (Tr. 309). Mr. Eddy also confirmed that although he and his supervisors disagreed that the prior cited conditions were violations, they were abated and he began checking the equipment to comply with the inspector's abatement requirements (Tr. 290-291).

The unidentified mine superintendent referred to by the inspector did not testify in this case. Although Mr. Kun testified in regard to other violations, he was not called to testify about this citation. I find no credible evidence to support the petitioner's assertion that the inspector discussed the specific requirements of section 75.701-5, with mine management prior to the insurance of his order. I also find that he did not discuss the matter with foreman Eddy either.

The petitioner's assertions that the prior citations issued by the inspector, and his asserted discussions with mine

management, clearly support a finding of aggravated conduct are rejected. I conclude and find that the prior citations concerning a different regulatory standard are irrelevant, and I have concluded that there is no credible evidence that the inspector discussed the specific requirements of section 75.701-5, with mine management.

It would appear to me from the record in his case that the issue of separate clamps found in section 75.701-5, has been clouded by the interjection of the single track bond issue raised by the prior citations, as well as the inspector's order. Adding to the confusion, in my view, is the "will be approved" language found in section 75.702-5, which suggests that some sort of alternative methods of grounding (Tr. 245-249). Counsel for the parties confirmed that prior litigation and discussions have taken place, that MSHA has "informally approved" a type of track bond not specified in the regulation, and the respondent's counsel stated that a written request made to MSHA'S district manager in this regard has not been answered (Tr. 250-251). There also appears to be a difference of opinion among the parties as to precisely what is required to maintain compliance with the cited standard.

Based on the foregoing findings and conclusions, and after careful consideration of all of the evidence in this case, I conclude and find that the petitioner has failed to prove that the violation in question was the result of the respondent's aggravated conduct amounting to an unwarrantable failure to comply with section 75.701-5. Under the circumstances, the inspector's finding in this regard IS VACATED, and the section 104 (d) (2) "S&S Order IS MODIFIED to a section 104 (a) "S&S" citation.

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 Osage No. 3 mine for the period August 1, 1990, through August 30, 1992 reflect that the respondent paid civil penalty assessments for fifty-two (52) violations of section 75.400, fifteen (15) of which were "single penalty" non-S&S citations; four (4) violations of section 75.701-5, and fifty-seven (57) violations of section 75.1403, seventeen (17) of which were non-S&S, "single

penalty" assessments. For operation of its size, I cannot conclude that this is a particularly egregious compliance record warranting additional civil penalty assessments for the violations which have been affirmed.

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 the violations affirmed as "S&S" violations were serious violations.

Negligence

I conclude and find that the violation of section 75.400, resulted form a high degree of negligence, amounting to aggravated conduct. I further conclude and find that the result of the respondent's failure to exercise reasonable care amounting to a moderate degree of negligence on the part of the respondent.

ORDER

Section 104 (d) (2) S&S" Order No. 3122087, August 6, 1992, citing a violation of 30 C>F>R> 75.316, has been settled, and the respondent has agreed to pay a civil penalty assessment of $3,000, in settlement of the violation. The respondent IS ORDERED to pay this amount to MSHA in settlement of the violation.

In view of the foregoing findings and conclusions, and taking into account the civil penalty assessment criteria found in section 110(i) of the Act, IT IS FURTHER ORDERED AS FOLLOWS:

1. Section 104(d) (2) "S&S" Order No. 3122095, August 31, 1992, 30 C.F.R. 75.400, IS AFFIRMED AS ISSUED, and the respondent shall pay a civil penalty assessment of $3,000, for the violation.

2. Section 104(d) (2) "S&S" Order No. 3717744, July 22, 1992, 30 C>F>R> 75.1403, IS MODIFIED to a section 104 (a) "S&S" citation, and modified, IT IS AFFIRMED. The respondent shall pay a civil penalty assessment of $1,000, for the violation.

3. Section 104(d) (2) "S&S" Order No. 3121656, July 21, 1992, 30 C.F.R. 75.701-5, IS MODIFIED to a section 104(a) "S&S" citation, and as modified, IT IS AFFIRMED. THE respondent shall pay a civil penalty assessment of $1,000, for the violation.

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 this decisions and Order. Upon receipt of payment, this case is dismissed.

George A. Koutras
Administrative Law Judge

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