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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
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 92-1279
Petitioner : A.C. No. 46-01453-04048
v. :
 : Mine: Humphrey No. 7
CONSOLIDATION COAL COMPANY, :
Respondent :

DECISION

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

Before: Judge Barbour

In this proceeding the Secretary of Labor (Secretary), on behalf of his Mine Safety and Health Administration (MSHA) and pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 (Mine Act or Act) seeks the assessment of civil penalties against Consolidation Coal Company (Consol) for four alleged violations of mandatory safety standards for underground coal mines found in Part 75 of Title 30, Code of Federal Regulations (C.F.R.). The Secretary also alleges that two of the violations constituted significant and substantial contributions to mine safety hazards (S&S violations) and that one of the S&S violations was caused by Consol's unwarrantable failure to comply with the cited standard. The purported violations are alleged to have occurred at Consol's Humphrey No. 7 Mine, an underground bituminous coal mine located in Monogalia County, West Virginia.

Consol denied the Secretary's allegations and a duly noticed hearing on the merits was conducted in Morgantown, West Virginia.

SETTLEMENTS

At the commencement of the hearing, counsel for the Secretary announced the parties had settled two of the alleged violations and he moved for approval of the settlement.

CITATION NO.	DATE	30 C.F.R.	ASSESSMENT	SETTLEMENT
3108480	5/26/92	75.1106-3(a)(3)	\$50.00	\$50.00

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The citation was issued when MSHA Inspector Thomas W. May, Sr., observed two compressed gas cylinders that were not protected against contact with power lines. May concluded that it was unlikely an injury would occur as a result of the condition and that the condition was due to Consol's moderate negligence. Counsel for the Secretary stated that Consol agreed to pay-in-full the proposed civil penalty. Tr. 10.

CITATION NO.	DATE	30 C.F.R.	ASSESSMENT	SETTLEMENT
3108497	5/27/92	75.1722(a)	\$189.00	\$113.00

The citation was issued when MSHA Inspector Charles J. Thomas observed a guard on a belt conveyor takeup pulley that was not placed so as to prevent a person from getting a hand caught between the pulley and the belt. Thomas concluded the violation was S&S and was due to Consol's low negligence. Counsel for the Secretary stated that while the guard was in fact not in place, an area guard at the end of the belt discouraged and perhaps even prevented persons from being in the vicinity of the inadequately guarded pulley. Tr. 10. Therefore, the Secretary requested the citation be modified to indicate an injury was unlikely and that the violation was not S&S. Tr. 11.

APPROVAL OF THE SETTLEMENTS

Based upon counsel's representations and the other applicable civil penalty criteria discussed below, I APPROVE the settlements. I will order payment of the agreed upon civil penalties, as well as modification of Citation No. 3108497, at the close of this decision.

STIPULATIONS

Prior to the taking of testimony the parties stipulated, in pertinent part, as follows:

1. Consol is the owner and operator of the Humphrey No. 7 Mine.
2. Operations of Consol are subject to the jurisdiction of the Mine Act.
3. The case is under the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated administrative law judge.

4. Individuals whose signatures appear in block 22 of the subject citations and orders at issue in this proceeding were acting in their official capacity and as authorized representatives of the Secretary when each of the subject citations and orders was issued.

5. True copies of each of the subject citations and orders were served on Consol or its agent as required by the Mine Act.

6. The total proposed penalty for the citations and orders at issue will not affect Consol's ability to continue in business.

* * *

See Tr. 7-8 (non-substantive editorial changes made).

CONTESTED VIOLATIONS

CITATION NO.	DATE	30 C.F.R.	PROPOSED PENALTY
3108488	5/18/92	75.303	\$267

The citation states:

In the 6 southwest longwall section a danger sign is not posted at the approach to a roof fall over the stage loader and headgate.

Gov. Exh. 5. In addition to finding a violation of section 75.303, the inspector found the violation to be S&S.

Effective November 16, 1992, section 75.303 was revised and replaced by 30 C.F.R. 75.360. 57 FR 20914(May 15, 1992), 34683(August 6, 1992), 53857 (November 13, 1992).

RELEVANT TESTIMONY

THE SECRETARY'S WITNESS

Charles J. Thomas

Thomas stated that on May 17, 1992, he arrived at the Humphrey No. 7 Mine at approximately 11:30 p.m. He was there to conduct an inspection. Tr. 21-22. Thomas knew there had been a roof fall at the mine and he wanted to see it. Tr. 69-70. He proceeded underground accompanied by Benny Strahin, Consol's safety escort, and Mike Plevich, the representative of miners. Tr. 22.

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Upon approaching the headgate at the 6 southwest longwall section, Thomas observed a roof fall that nearly covered the stage loader. The fall was approximately 45 feet long, 15 feet wide and at points 6 to 8 feet high. The stage loader measured approximately 50 feet long, 8 feet wide and 3 to 4 feet high. Tr. 27. There was fallen rock on both sides of the stage loader. Tr. 63. Although a person had to be careful of his or her footing, a person could travel on either side of the stage loader. Tr. 63

Thomas explained that coal from the longwall was dumped into the stage loader to be crushed and conveyed to the tailpiece of the section conveyor belt. Tr. 28. As the longwall advanced the stage loader was shoved down the headgate entry by jacks built into the base of the longwall roof support shields. Tr. 29

The roof fall had occurred 30 or 40 hours before Thomas viewed it. Tr. 30. Thomas testified he could see that Consol had removed approximately 15 feet of the fallen roof from the longwall end of the stage loader. However, much of the stage loader remained covered. Tr. 35, 72, 74.

When standing in the headgate entry facing the longwall, the controls for the stage loader were located on its left side, approximately in the middle of the equipment. Tr. 39; see Gov. Exh. 6. (Thomas could not recall if the controls were covered by rock when he saw the loader. Because of the bad roof he did not proceed inby to the controls. Tr. 75) The controls governed the power to the stage loader, the longwall shear and the longwall chain conveyor. While there were other controls for these latter pieces of equipment, power to them initially was turned on and off at the stage loader. Tr. 40. In fact, coal could not be cut without power being turned on and off at the stage loader controls and when the longwall was operating, there was always a man miner stationed at the stage loader. Tr. 41, 71.

In Thomas' opinion, despite the roof fall, mining had taken place between the time of the fall and the time he observed the area. As a consequence, the stage loader had been pushed down the tailgate entry about 15 feet. Tr. 42, 44. To have advanced the stage loader, a person would have had to travel to the controls of the equipment and turned on the power. Tr. 45.

In addition, during this time a pre-shift examination had been conducted. Tr. 82. (A pre-shift examination was carried out every eight hours. Id.) On May 18, the shift started at 12:01 a.m., Thomas cited the alleged violation at 3:20 a.m. The pre-shift examiner would have observed the roof fall area some time between 9:00 p.m. and midnight on May 17. Thomas believed it likely that the conditions observed by the pre-shift examiner

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in the headgate entry were essentially the same as those he observed. Tr. 99-100.

If the pre-shift examiner found a condition hazardous to persons who might enter or be in the area, section 75.303 required the posting of a "danger" sign at all points where persons would be required to pass. In Thomas' opinion, a sign should have been posted at the tail end of the stage loader because the area of the roof fall was hazardous and miners had to advance into the area to get to the controls of the stage loader. Tr. 47. The fall had left the roof with hanging rock that could drop at any time. Tr. 84, 85. Thomas saw no sign posted, warning of danger, in the vicinity of the stage loader. Tr. 23. Thomas told Strahin that he, Thomas, was going to issue a citation to Consol for failing to post a danger sign. Id. No explanation was offered to Thomas as to why a danger sign was not posted. Tr. 42.

Thomas acknowledged that one crosscut over from the tailgate entry and one block of coal inby, a danger sign had been posted above a check curtain, but Thomas described this as the "back side" and indicated miners no longer used the area in which the sign was placed to enter the area where the stage loader was located. Tr. 47.

Thomas believed the area was hazardous for another reason -- he speculated that miners would climb on top of the stage loader to get to the longwall face. There was 3 or 4 feet between the fallen rock on top of the stage loader and the roof and in Thomas' opinion, this was enough room for a person to travel over the stage loader to the longwall face. Tr. 54, 87.

Thomas' fear was that any miner who entered the headgate entry in the vicinity of the stage loader could be struck by rock falling from the roof cavity. Tr. 48. Thomas did not recall that any efforts had been made to support the roof in the area of the fall, but agreed that some posts or cribs might have been installed. Tr. 49, 160, 163. If so, he still regarded the area as hazardous because rock could have fallen between the cribs or posts and struck a miner. Tr. 49. Without a danger sign posted, a person who was not familiar with the longwall section could walk right into the dangerous area without knowing it. Tr. 56. Even miners, familiar with the area, needed to be reminded of the dangerous roof. Tr. 64, Tr. 44; Gov. Exh. 6.

A miner who was hit by falling rock could have been seriously injured. In addition, it was "reasonably likely," in Thomas' opinion, that a miner would suffer such an injury. Miners walk under bad top because, "[T]hey like to see what's there." Tr. 65. It does not happen frequently, but it happens. Id.

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Consol's management was negligent in not posting the danger sign. One had been posted on the backside of the fall, so management obviously knew signs were supposed to be hung. Tr. 66. The sign should have been posted when the fall was discovered. Tr. 67.

CONSOL'S WITNESS

Benjamin F. Strahin

Benjamin F. Strahin, Consol's safety escort, was with Thomas the day Citation No. 3108488 was issued. Strahin stated that when Thomas told him Consol needed to post a danger sign in the stage loader area, he responded, one was not needed because there was "no place to go." Tr. 106. According to Strahin, a crib had been build between the stage loader controls and the rib. The crib was 3 inches from the controls and its other side was flush with the rib. To get beyond the controls, a miner wold have had to tear down the crib. Id. The other side of the stage loader was set with posts. Tr. 109. In addition, a steel crossbar was installed over the stage loader and under the roof, one end of the crossbar was on the crib and the other end was on a post. Id., Tr. 109, 112-113, 157. Strahin stated that when he arrived at the stage loader, it was possible to walk up the right side of the stage loader to the longwall face. Tr. 112.

According to Strahin, when he and Thomas arrived, only about 15 to 20 feet of the fall remained to be cleaned up. He stated that the way the fall was cleared from the stage loader was to use the ramjacks to push the loader forward so that the rock fell onto the panline and passed through the crusher. Tr. 114-115. (In other words, the stage loader had to be operating to clean up the fall.)

Strahin agreed that there was rock on the stage loader and removal of the larger pieces could have required a miner to be at the controls of the stage loader. Tr. 141. Strahin confirmed that power for the longwall was turned on at the controls of the stage loader. He maintained, when he and Thomas observed the area, a miner would not have had to proceed under unsupported roof to get to the controls. Tr. 116-117. However, he stated it was possible that before they saw the area a miner would have had to go under unsupported roof to get to the controls. Tr. 156. To abate the violation, Strahin put a danger sign on the crib. Tr. 117.

The pre-shift examination book contained entries indicating the presence of the fall from 40 hours before the subject inspection until after the violation was abated. Tr. 121. In Strahin's opinion, the fall was noted in the pre-shift book so that a foreman new to the section would understand he needed to keep an eye on the area. Tr. 122. Strahin agreed that the roof

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fall was noted under a section in the book where observed violations or hazardous conditions were reported. Tr. 125-126.

Strahin maintained that although a miner could have crawled over the rock on top of the stage loader to attempt to get to the longwall face, no one would have been "dumb enough" to do it. Tr. 136. There would have been no purpose in such a venture. There were other and easier ways to reach the face. Tr. 158-159.

THE VIOLATION

Section 75.303 stated in pertinent part that if the pre-shift examiner "finds ... any condition which is hazardous to persons who may enter or be in such area, he shall indicate such hazardous place by posting a 'danger' sign conspicuously at all points which persons entering such hazardous place would be required to pass." There is no question that a danger sign was not posted at the approach to the stage loader in the headgate entry of the 6 southwest longwall section. The issue is whether conditions in the area were hazardous to a person who might enter or be in such area. I conclude, the answer is "yes" and that a violation existed.

I accept Thomas' testimony that when he observed the area, there was fallen roof from the headgate end of the longwall up to the area very near the stage loader's controls. I further accept his testimony that although cleanup was in progress at the headgate end of the longwall, the fallen roof had not been removed from the entire area and that a significant portion of the entry, including much of the stage loader, remained covered.

However, I also conclude Thomas' memory was not infallible. He could not recall if rock from the fall actually covered the controls of the stage loader or if a crib had been erected adjacent to the controls or if posts had been set between the stage loader and the solid. Strahin's testimony was much more specific with respect to the presence of the crib and posts and I find it entirely believable the crib and posts were in place. After all, the roof fall had occurred some 30 to 40 hours before Thomas arrived on the scene, some cleanup had been in progress and it makes sense that between the fall and the time Thomas saw the area, Consol would have made efforts to alleviate the danger.

Because I accept Strahin's testimony that the crib was adjacent to the stage loader's controls, I do not believe that when Thomas observed the area, miners would have had to stand under unsupported roof when at the controls of the stage loader. Further, I am not persuaded, as Thomas seemed to maintain, that miners who traveled the headgate entry between the loader and the solid were subject to danger because roof could fall from between the posts and strike them. Tr. 49. Posts are a perfectly acceptable means of roof control and there is no indication the

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roof was supported inadequately by the posts. Therefore, I am not convinced that at the time Thomas viewed the area, there was a present hazard to miners.

In addition, I find the inspector's theory that miners would climb on the top of the stage loader in order to travel toward the longwall face, too far fetched to credit. I agree with Strahin, there would have been no purpose to it. There were easier ways to get to the face. A mine operator need not anticipate and protect against totally bizarre behavior.

All of this said, I nonetheless, conclude a violation existed between the time the roof fell and the time Thomas arrived on the scene. It is important to remember, as Strahin explained, that cleanup of the fall began at the longwall end of the stage loader and that as the clean up progressed, the stage loader was shoved down the entry. Tr. 114-115. Strahin believed that 15 or 20 feet of the fall was left when the inspection party arrived on the section which means that 20 to 25 feet of the approximate 40 feet of fall had been cleaned up. Tr. 114. Thomas believed that approximately 15 feet of the fall had been cleaned. Tr. 74. Whoever is right, it is clear that to clean up the fall, the stage loader and longwall face equipment had to be energized. To energize the equipment, a person had to use the controls on the stage loader. Because the stage loader moved as the fall was cleaned up, the position of the controls would have been closer to the headgate and to the longwall than they would have when Thomas observed them. Therefore, they also would have been a similar and significant distance away from the location of the crib. In other words, during the cleanup operations that took place after the fall and before the area was first observed by Thomas, a miner or miners would have had to be in a then hazardous place, i.e., at the stage loader controls.

The area had to be pre-shift examined before the cleanup operations began. The pre-shift examiner should have noted the hazardous condition of the roof in the area of the stage loader and should have made sure a danger sign was posted.

SIGNIFICANT AND SUBSTANTIAL

The test set forth by the Commission in Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), for determining whether a violation is S&S is well known and need not be repeated here. I have concluded a violation of then mandatory safety standard section 75.303(a) existed. Moreover, I find the evidence establishes a discrete safety hazard in that by failing to post a danger sign, the pre-shift examiner did not give visual, written notice to miners traveling to the controls of the stage loader that the roof overhead was hazardous. Had a sign been posted, a miner or miners might not have worked under unsupported roof and been subjected to serious injury from roof fall. Fortunately, an

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injury did not occur, nonetheless, one was reasonably likely. Between the time the fall occurred and the area was observed by Thomas, a miner or miners had traveled to the stage loader controls and worked in an area of unstable and unsupported roof, and each minute spent in the area increased the likelihood of injury from further roof fall during the course of continuing mining operations. While it is true that the lack of a danger sign was not likely to be the immediate cause of an injury, it was an important catalyst for the prevention of such an injury and thus was a significant and substantial contribution to the hazard to which the miner or miners were subjected. Therefore, I conclude the violation was properly designated S&S.

GRAVITY

As set forth more fully below, the concept of gravity involves analysis of both the potential hazard to miners and the probability of the hazard occurring. Here, the hazard was that a miner or miners would travel under unsupported and dangerous roof and be subjected to injury because of the operator's failure to warn against the danger. A miner or miners traveling to the controls of the stage loader would be intent on the job at hand, a posted reminder of the danger overhead would have altered them to the danger and would have reminded them to stop. Rational people do not purposefully subject themselves to serious injury. I conclude this was a serious violation.

NEGLIGENCE

The condition of the roof was obvious, as was the fact the roof had to be cleaned up and a miner or miners had to travel to the controls of the stage loader. By not posting a danger sign, the pre-shift examiner failed to meet the standard of care required of him. He was negligent and his negligence is attributable to Consol.

ORDER NO.	DATE	30 C.F.R.	PROPOSED PENALTY
3108477	5/20/92	75.1104	\$900

The order states:

The underground storage area for lubricating oil and grease located at B block on the 7 North supply track is not fireproof. There is an area 31.5 ft. x 10 ft. that has exposed coal roof with wooden planks. (#1) There [are] 57 - 5 gal. containers of gear oil (285 gal.), (#2) 84 - 5 gal. containers of permissible hydraulic fluid (420 gal.), and (#3) 25 - 5 gal containers of grease, hydraulic oil and permissible hydraulic fluid

with the tops open. Under this area, the mine floor has grease and oil soaked into the pavement. This is an area that is pre-shifted and should have been reported. It appears that all the mine roof had been covered with metal at one time.

Gov. Exh. 9. The order was issued pursuant to Section 104(d)(2) of the Act. 30 U.S.C. 814 (d)(2). In addition to finding a violation of section 75.1104, the inspector also found the violation was the result of Consol's unwarrantable failure to comply with the cited standard.

RELEVANT TESTIMONY

THE SECRETARY'S WITNESS

Thomas W. May, Sr.

On May 20, 1992, May conducted an inspection at the Humphrey No. 7 Mine. Upon arriving at the mine, he went to the mine office and checked the company's pre-shift examination books. In the pre-shift book for the track haulage, May observed that pre-shift examinations had not been recorded for areas near the haulage tracks around the tipple. Tr. 171. (The tipple is the coal haulage car loading point and there are two belts that dump onto it. Tr. 273.)

After reviewing the pre-shift books, May proceeded underground accompanied by John Weber, Consol's safety escort, and Sam Woody, the miners' representative. The inspection party traveled by rail through the area of the haulage car loading point to another part of the mine. Later in the day, the inspection party returned and stopped. May began an inspection of the area adjacent to the loading point to determine whether it had been pre-shift examined, even though the examination had not been recorded. Tr. 176-177. (May found the pre-shift examiner's initials and the date and time of the examination recorded on a date board in the area. Tr. 177)

Along the way to the date board, May passed a grease and oil storage area. May entered the storage area and observed oil and grease spilled on the mine floor. In addition, containers of grease, oil and emulsion fluid were stored in the area -- 57 - 5 gallon containers of grease and oil and 84 - 5 gallon containers of permissible hydraulic fluid. Tr. 182-183, 204-205. Further, 25 - 5 gallon containers of grease, hydraulic oil and permissible hydraulic fluid were lidless. They had been used and thrown in the area. They contained residues of their original contents. Tr. 178, 183-183, 203-204. Also, a 31 1/2 feet by 10 feet area of roof in the storage room did not have metal affixed to it. The metal had been there once, but had been

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removed, exposing the coal roof. Tr. 180-181. In May's opinion, these conditions violated section 75.1104 in two ways. First, the exposed area of the roof was not of fireproof construction and, second, not all of the containers of grease, oil and emulsion fluid were closed. Tr. 182.

The hazard was one of a rapidly spreading fire that could not be contained once an ignition occurred. Tr. 183. (May testified that although metal over the roof coal would not prevent the roof from eventually catching fire, it would slow the time needed for it to ignite. Id.) Ignition sources were adjacent to the storage area, in that the area was 5 feet from a high voltage cable and 8 feet from a supply track trolley wire. Tr. 183-184. In addition, there was another trolley wire located approximately 15 feet from the area on the side opposite the supply track trolley wire. The second trolley wire ran along a track spur. Tr. 185.

If a fire started, it could have lead to injuries from smoke inhalation, as well as burns to those fighting it. Tr. 185. In addition, some of the smoke and fumes would have traveled over the coal car loading point. The person most likely to be affected was the tipple operator, who was always at the coal car loading point. It was possible also that a person traveling by rail past the area could have been affected. Tr. 188, 195. May believed, however, that such injuries was unlikely because the series of events needed for an ignition were unlikely -- events such as a short circuit of the high voltage cable in the immediate vicinity of the storage area or damage to the trolley wires. Tr. 186.

In May's opinion, because the area had to be pre-shift examined, Consol should have known of the condition of the storage area. Tr. 189. May related that Weber told him that several months before the inspection the part of the mine containing the storage area was idle. The missing metal roof covering was removed at that time in order to be used elsewhere in the mine, and it was not replaced. Tr. 190. May believed the area had been reactivated approximately 1 to 1 1/2 months before he observed the alleged violation. He based his opinion upon his recollection of seeing oil cans stored in the area at that time. Tr. 190-191. Moreover, he believed that there had been approximately one-hundred pre-shift examinations since he first noticed the oil cans. Tr. 202. Not only was the area pre-shifted examined three times a day, but a shift foreman would stop in the area on a daily basis. Tr. 192. The failure to fireproof the roof and to secure the lids to the used oil, grease and hydraulic fluid containers were unwarrantable because of the three daily visits by the pre-shift examiner and because miners who put the used containers in the area were acting on the direct orders of the shift foreman. Tr. 193.

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To abate the alleged violation, Consol put metal over the exposed roof coal, cleaned the oil cans and rockdusted the storage area floor. Tr. 195-196.

John Weber

Weber described the storage area. The walls were made of cement block. There was a doorway-type opening, approximately 6 feet wide, in the east wall parallel to the track and an opening approximately 2 feet wide, in the west wall nearest the spur and the car loading point. Part of the roof of the storage area was covered with tin. Tr. 210. The empty containers lay under this part of the roof. Weber agreed that some of the empties contained the remains of their former contents. Tr. 211. Sealed containers were located at the other end of storage area under the portion of the roof that lacked metal. Tr. 210-211.

Weber stated the area had been used to store oil for "quite some time." Tr. 213. He maintained that a person riding on the track could "look right in" through the 6 foot opening. Tr. 213. He also believed that a person looking at the roof of the storage area from the track could determine the metal was missing. Tr. 213-214. However, usually a person would not have reason to look into the storage area. Tr. 216.

When asked whether the storage area was subject to pre-shift examinations, Weber responded that if a miner was going to work in the area, the area had to be examined. Tr. 207. Weber did not believe that Consol was negligent in allowing the alleged violation. Tr. 217. He asserted that MSHA's inspectors had passed the area many times and never issued a citation. The company, like the inspectors, simply had taken the area for granted. Tr. 217-218.

THE VIOLATION

Section 75.1104 requires in pertinent part that "[u]nderground storage places for lubricating oil and grease ... be of fireproof construction" and that "lubricating oil and grease ... be in fireproof, closed metal containers." Counsel for Consol agreed at the hearing that the cited conditions constituted "a clear violation" and I find the violation existed as charged. Tr. 248.

GRAVITY

May did not find that the violation was S&S in neither the Secretary's petition for assessment of civil penalty nor his subsequent pleadings and oral argument did counsel for the Secretary make that allegation. Therefore, the seriousness of the violation is before me only with respect to gravity, that is,

with respect to one of the statutory criteria I must consider in assessing a civil penalty for the violation. 30 U.S.C. 820(i).

It has long been recognized that in the context of mine safety law, the gravity criterion requires that a violation be analyzed in terms of the potential hazard to the safety of miners and the probability of such hazard occurring. In addition, the potential adverse effects of any violation must be determined within the context of the conditions or practices existing in the mine at the time the violation was detected. Robert G. Lawson Coal Co., 1 IBMA 115, 120 (1972).

Here, the potential hazard to the safety of miners was grave indeed. If a fire had started in the storage area the residue of the lubricants in the opened containers would have fed it, as would the exposed roof coal. Obviously, miners fighting a storage area fire would have been subject to the possibility of serious burn injuries. An even greater danger to miners would have been the smoke and toxic fumes, which would have traveled to the coal car loading point and beyond.

May's testimony regarding the probability of a fire was unequivocal. He clearly stated it was unlikely and the Secretary produced no other witnesses to gainsay him in that regard. It is the Secretary's point to prove and I accept the testimony of the inspector, especially since none of the potential ignition sources mentioned by May were in the oil storage area. I agree with May that the improbability of a fire made this a non-serious violation.

UNWARRANTABLE FAILURE

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

May's finding of unwarrantable failure mainly was premised upon his belief the storage area had to be pre-shift examined and that numerous pre-shift examinations had been made while the violative conditions existed. Tr. 193, 202. Weber confirmed that if a miner is assigned to work in an area, the area must be

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pre-shift examined. Tr. 207. While not able to give a certain date regarding how long the area had been used to store lubricants, Weber stated it had been "quite some time." Tr. 213. The many stored lubricants and lidless containers corroborate his opinion and I accept it as true. In addition, the metal had been missing from the roof for "quite some time." The area was/or should have been pre-shift examined for this same time period. The record reveals no excuse for Consol's pre-shift examiners allowing the condition of the roof and that of the lidless containers to remain uncorrected. Both conditions were visually obvious. The repeated failures to correct the conditions constituted more than ordinary negligence. The violation was unwarrantable.

OTHER CIVIL PENALTY CRITERIA

The history of previous violations at the Humphrey No. 7 Mine indicates that in the 24 months prior to the May 18, 1992, 656 violations were assessed and paid by Consol and that in the 24 months prior to May 20, 1992, 663 violations were assessed and paid. Of these violations, 19 were violations of section 75.303 and 2 were violations of section 75.1104. Gov. Exh. 1. While the overall history of previous violations at the mine is large, the history of the particular violations at issue in this proceeding is not so large as to otherwise increase the penalty assessed.

Consol is a large operator and the Humphrey No. 7 Mine is a large mine. The parties have stipulated that the total penalties proposed will not affect Consol's ability to continue in business and I find the same is true for any penalty assessed. Stipulation 6. Finally, Consol exhibited good faith in attempting to achieve rapid compliance after being cited for the violations.

CIVIL PENALTIES

The Secretary has proposed a civil penalty of \$267 for the violation of section 75.303. The violation was S&S and serious. It was caused by Consol's negligence. Given the fact that Consol is a large operator with a history of previous violations, I find the Secretary's proposal inadequate. I therefore conclude a civil penalty of \$500 is appropriate for the violation.

The Secretary has proposed a civil penalty of \$900 for the violation of section 75.1104. The violation was not serious, but it was caused by Consol's unwarrantable failure to comply with the standard. Given these factors and the penalty criteria previously mentioned, I conclude a civil penalty of \$500 also is appropriate for this violation. Consol's unwarrantable failure to comply would have warranted a more substantial penalty, but it is offset by the violation's diminished gravity.

ORDER

Accordingly, Citation No. 3108488 is AFFIRMED and a civil penalty of \$500 is assessed for the violation of section 75.303. Order No. 3108477 is AFFIRMED and a civil penalty of \$500 is assessed for the violation. Consol is ORDERED to pay these civil penalties within thirty (30) days of the date of this decision.

With regard to the settled violations, Consol is furthered ORDERED to pay, within the same period, a civil penalty of \$50 for the violation of section 75.1106-3(a)(3) cited in Citation No. 3108480 and a civil penalty of \$113 for the violation of section 75.1722(a) cited in Citation No. 3108497. The Secretary is ORDERED to modify Citation No. 3108497, by deleting the S&S finding. Upon receipt of payment this matter is DISMISSED.

David F. Barbour
Administrative Law Judge

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