FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001-2021
TELEPHONE: 202-434-9987 / FAX: 202-434-9949

May 13, 2010

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: : : : :	CIVIL PENALTY PROCEEDING Docket No. PENN 2007-151 A.C. No. 36-07416-109800
v.	:	
CONSOL PENNSYLVANIA COAL COMPANY, Respondent	: : :	 Mine: Enlow Fork

DECISION

Appearances: Andrea J. Appel, Esq., U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Rodger L. Puz, Esq., Dickie, McCamey & Chilcote, P.C., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Bulluck

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor, on behalf of her Mine Safety and Health Administration ("MSHA"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 815(d), against Consol Pennsylvania Coal Company ("Consol"). The Secretary seeks civil penalties in the amount of $19,300.00 for three alleged violations of the Act and her mandatory safety standards.

A hearing was held in Pittsburgh, Pennsylvania. The issues to be resolved are: 1) whether Respondent violated 30 C.F.R. § 75.360(f), as alleged in Order No. 7073382, and 30 C.F.R. § 75.400, as alleged in Citation No. 7071787 and Order No. 7073658; 2) whether the violations were "significant and substantial" ("S&S"); and 3) whether the violations were attributable to Consol's unwarrantable failure to comply with the standards.[1] The parties' post-

[1] The S&S terminology is taken from section 104(d)(1) of the Act, which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a … mine safety or health hazard." 30 U.S.C. § 814(d)(1). The unwarrantable failure terminology is taken from the same section, and establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with …

hearing briefs are of record. For the reasons set forth below, I **AFFIRM** the citation and orders, as **AMENDED,** and assess penalties against Respondent.

I. Stipulations

The parties stipulated as follows:

1. Respondent was an "operator" as defined in section 3(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 803(d), of the Enlow Fork Mine at the time Citation/Order Nos. 7071787, 7073382 and 7073658 were issued.

2. The operations of Respondent at the aforementioned mine at the time Citation/Order Nos. 7071787, 7073382 and 7073658 were issued are subject to the jurisdiction of the Mine Act.

3. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges, pursuant to Sections 104 and 113 of the Mine Act.

4. Inspector Barry Radolec was acting in his official capacity and as an authorized representative of the Secretary of Labor when Citation No. 7071787 was issued.

5. Inspector James Kaczmark was acting in his official capacity and as an authorized representative of the Secretary of Labor when Order No. 7073382 was issued.

6. Inspector Ronald Rihaley was acting in his official capacity and as an authorized representative of the Secretary of Labor when Order No. 7073658 was issued.

7. True copies of Citation/Order Nos. 7071787, 7073382, and 7073658 were served on Respondent and/or its agents, as is required by the Mine Act.

8. Payment of the total proposed penalty for Citation/Order Nos. 7071787, 7073382, and 7073658 will not affect Respondent's ability to continue in business.

9. The citations contained in Exhibit A attached to the Secretary's petition in the case docketed as PENN 2007-151, are authentic copies of Citation/Order Nos. 7071787, 7073382, and 7073658 with all the appropriate modifications or abatements, if any.

10. At the time that Citation No. 7071787 was issued, material existed at certain points on the 3 North Number 1 Main Conveyor Belt, starting at the end of the conveyor belt take-up and continuing inby to the number 5 ½ crosscut.

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mandatory health or safety standards." *Id.*

11. At the time that Citation No. 7071787 was issued, the accumulations described in Request for Admission No. 10 measured from 6 feet wide by 25 feet long and from 1 inch to 12 inches in depth under the bottom conveyor belt and belt rollers, behind the conveyor belt take-up.

12. At the time that Citation No. 7071787 was issued, material existed at certain points on the inby side of the E-1 belt overcast to the number 5 ½ crosscut.

13. At the time that Citation No. 7071787 was issued, accumulations were in contact with 3 bottom rollers.

14. At the time that Citation No. 7071787 was issued, some of the accumulations described in the Citation were damp to wet.

15. At the time that Citation No. 7071787 was issued, accumulations existed under certain bottom rollers between the number 5 ½ crosscut and the E-1 belt overcast.

16. At the time that Citation No. 7071787 was issued, some of the accumulations described in the Citation required shoveling.

17. Coal is combustible under certain circumstances.

18. Coal fines are combustible under certain circumstances.

19. Coal dust is combustible under certain circumstances.

20. At the time that Order No. 7073382 was issued, there were 14 rib rolls on the E-14 belt, which obstructed the 24-inches required for the tight side walkway.

21. At the time that Order No. 7073382 was issued, there were two stoppings along the E-14 belt which contained combustible material.

22. At the time that Order No. 7073382 was issued, the condition described by MSHA as a roof violation on the wide side of the E-14 belt travelway was not recorded by Respondent in its pre-shift examination of the E-14 longwall belt.

23. At the time that Order No. 7073382 was issued, there were rollers turning in black coal fines.

24. At the time that Order No. 7073382 was issued, the condition described in Stipulation No. 23 was not recorded in Respondent's pre-shift examination of the E-14 longwall belt.

25. At the time that Order No. 7073382 was issued, the take-up pulley at the head of the

E-14 longwall belt was not fully guarded.

26. At the time that Order No. 7073382 was issued, the condition described in Stipulation No. 25 was not recorded in Respondent's pre-shift examination of the E-14 longwall belt.

27. At the time that Order No. 7073382 was issued, the E-14 longwall belt was pre-shifted three times per day by a certified person.

28. At the time that Order No. 7073658 was issued, accumulations of coal and/or coal fines at certain locations along the No. 1 main belt conveyor were in contact with rollers or the conveyor belt itself.

29. At the time that Order No. 7073658 was issued, in those areas along the No.1 main belt conveyor where rollers or the belt itself were in contact with coal and/or coal fines, some of those accumulations were wet and some were dry.

30. At the time that Order No. 7073658 was issued, there was coal spillage at certain locations along the E-14 longwall belt.

31. At the time that Order No. 7073658 was issued, coal dust and/or float coal dust was deposited onto previously rockdusted surfaces at certain locations along the E-14 longwall belt.

32. At the time that Citation/Order Nos. 7071787, 7073382, and 7073658 were issued, energized equipment was operating in certain discrete locations within each of the cited areas of the Enlow Fork Mine.

II. Factual Background

Consol operates the Enlow Fork mine in Washington County, Pennsylvania, which produced over 11 million tons of coal in 2007 and 2008. It is the largest bituminous coal producing deep mine in the country. Tr. 187. On August 9, 2006, MSHA sent multiple inspectors to Enlow Fork to conduct a regular quarterly safety and health inspection. Tr. 30, 192. This was a saturation type inspection, in that 10 to 12 inspectors were on-site to carry it out.

MSHA Coal Mine Inspector James Kaczmark was assigned to inspect the 1.7 mile long E-14 longwall belt. Tr. 290, 580-81. During his inspection, Kaczmark was accompanied by Enlow Fork safety inspector, Joshua Huth. Tr. 570-71. While traveling the belt, Kaczmark found nine hazardous conditions that had not been logged in Respondent's pre-shift examination book. Tr. 291-92. Specifically, Kaczmark found two stoppings with open holes, and three stoppings that had not been sealed and contained combustible materials, as well as 13 rib rolls obstructing the 24 inches required for the tight side walkway. Stip. 20, 21; Sec'y. Br. at 20 n.2. There was a crack in the roof on the wide side of the belt, which is also the travelway, three rollers were turning in loose, black coal fines, and there was damage to the guarding on the take-

up pulley at the head of the E-14 longwall belt. Stip. 22, 23, 25. There was also energized equipment operating in the cited area. Stip. 32. As a result of the conditions Kazmarck found, he issued section 104(d)(1) Order No. 7073382 for a violation of 30 C.F.R. § 75.360(f), for failure to conduct an adequate pre-shift examination. Ex. P-5. This belt was subject to three pre-shift examinations per day by a certified person. Stip. 27. Kaczmark did not interview the miner who conducted the pre-shift examination. Tr. 434-36.

During the same inspection, MSHA Inspector Barry Radolec, who was not regularly assigned to Enlow Fork, inspected the 3 North Main's number 1 conveyor belt. Tr. 30-31. Radolec was accompanied by Enlow Fork's safety supervisor, Don Overfield, and MSHA Supervisory Inspector Robert Newhouse, whose purpose was to evaluate Radolec's inspection. Tr. 32, 121. During the inspection, Radolec observed coal dust accumulations under the metal bottom rollers at the number 5 ½ crosscut, which measured 150 feet long by 12 to 18 inches wide, and up to 10 inches deep. Tr. 40. The accumulations were dry, powdery, somewhat compacted, and floated when thrown in the air. Tr. 40. The accumulated dust was also being rubbed by the bottom moving conveyor belt for a distance of about 150 feet. Tr. 41. One of the metal belt stands had been cut in half by the rubbing belt, and belt shavings were found in the immediate area. Tr. 41. There were identical coal dust accumulations under the bottom rollers at various locations between the number 5 ½ crosscut and the 1 East belt crossover. Tr. 40. In one area of the number 5 ½ crosscut, Radolec observed float coal dust being deposited on the mine roof ribs, on top of the overcast, on the metal conveyor belt structures, aluminum pipes, electrical cables along the belt, roof, roof controls, and roof support materials. Tr. 38. The consistency of these accumulations was dry to damp. Tr. 38. Overall, Radolec inspected somewhere between 550 to 600 feet of beltline over a two hour period. Tr. 80-81. Along that belt span, Radolec noted three moving rollers in contact with dust accumulations. Tr. 119. Overfield, using a heat gun, took the temperature of the three rollers and got a reading between 72 and 74 degrees.[2] Tr. 122. Radolec also noted that the belt was rubbing over three inches of the belt structure in two separate places, for a distance of about 30 feet. Tr. 122-23. Radolec took the belt out of service and issued section 104(d)(1) Order No. 7071787 for a violation of 30 C.F.R. § 75.400. Tr. 41; Ex. P-4. Consol uses fire resistant belts at Enlow Fork. Tr. 118.

MSHA Coal Mine Inspector Ronald Rihaley issued Order No. 7073658, also for violation of section 75.400, after observing coal dust accumulations at numerous locations along the No. 1 Main belt conveyor over a span of 1,500 feet. Stip. 28; Tr. 217-19. At approximately 1,500 feet long, this is the shortest main belt in the mine. Tr. 218-19. The accumulations were in contact with both the rollers and the conveyor belt; some were wet, and some were dry. Stip. 28, 29. There was also coal spillage along the E-14 longwall belt and coal dust and/or float coal dust deposited onto previously rockdusted surfaces in the same areas, and energized equipment was operating within the cited area. Stip. 30, 31, 32. At the number 4 ½ crosscut, Rihaley observed packed coal fines around the rotating bottom roller and the belt rubbing the coal fines. Tr. 219. He also saw 3 ½ feet of dry float coal dust. Tr. 220. At the number 5 crosscut, there was a stuck

[2] All references to temperature herein are according to the Fahrenheit scale.

bottom roller in contact with the belt, and dry coal fines built up around the roller. Tr. 221. There were dry coal fines on the tight side of the take-up pulley, approximately three feet long, two feet wide, and two feet high, being compressed by the large, rotating pulley. Tr. 222.

At the number 8 crosscut, Rihaley observed a bottom roller missing and the belt, which was out of alignment, rubbing the belt structure. Tr. 222-23. There were coal fines built up where the belt was rubbing and, inby, a bottom roller turning in coal fines on a two-foot section of belt that was producing dry, visible dust being suspended in air. Tr. 223. At the number 9 crosscut, there was a stuck bottom roller and three inby rollers turning in coal fines, as well as the belt rubbing these fines for at least one foot. Tr. 224. At the number 10 ½ crosscut, there were packed coal fines in contact with a bottom roller and four feet of accumulations that were dry to the touch and producing visible dust. Tr. 226. Rihaley observed a stuck roller, a broken roller, and another roller turning in packed coal at the number 13 ½ crosscut, and more bottom rollers turning in coal at the number 14 and 14 ½ crosscuts. Tr. 228. On the tight side at the number 14 crosscut, there were accumulations measuring 40 feet long, two to three feet wide, and six to sixteen inches deep. Tr. 231. Rihaley also observed a bottom roller and eight to ten feet of belt in contact with dry coal fines producing visible dust at the number 15 crosscut. Tr. 228-29. During his inspection, he did not see any Consol employees attempting to clean up the cited accumulations. Tr. 232, 269.

Supervisory Inspector Newhouse testified that MSHA has had numerous discussions with Enlow Fork management regarding preventative measures for combustible coal accumulations, including discussions during pre-inspection conferences at the beginning of every quarter, and close-out conferences at the end of each quarter. Tr. 173. In addition, Newhouse stated that he, personally, has had discussions about coal accumulations with mine management. Tr. 173.

III. Findings of Fact and Conclusions of Law

Order No. 7073382

A. Fact of Violation

Inspector Kazmark issued 104(d)(1) Order No. 7073382 for a violation of section 75.360(f). He determined that it was highly likely that the violation would result in an injury or illness involving lost work days or restricted duty, that the violation was significant and substantial, that one employee was affected, and that Consol's negligence was high and the result of its unwarrantable failure to comply with the standard. Ex. P-5, R-1B. Section 75.360, which governs pre-shift examinations, provides, in pertinent part:

> (a)(1) Except as provided in paragraph (a)(2) of this section, a certified person designated by the operator must make a pre-shift examination within 3 hours preceeding the beginning of any 8-hour

> interval during which any person is scheduled to work or travel underground.
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> (f) A record of the results of each pre-shift examination, including a record of hazardous conditions and their locations found by the examiner during each examination . . . shall be made on the surface before any persons, other than certified persons conducting examinations required by this subpart, enter any underground area of the mine.

30 C.F.R. § 75.360(a)(1), (f). The citation describes the "Condition or Practice" as follows:

> The operator failed to conduct a[n] adequate pre-shift examination of the E-14 longwall belt. The hazards and violations regarding combustible material in stopping, holes in stopping, guards of storage rollers, roof conditions where persons work and travel, rollers turning in combustible material, and locations of tight side rib rolls. [There] were 14 rib rolls not recorded in the mine examiner pre-shift book which obstructed the 24 inches required for the tight side walkway, two holes in 2 different stopping, 2 stopping with very visible combustible [material] present. [There] was one roof violation on the wide side of the belt travel way. Rollers turning in black coal fines. The take up pulleys [sic] at the head of the E-14 longwall belt was not fully guarded. This belt is pre-shifted 3 times a day by certified persons. [There] were 9 citations issued on this belt line.

Ex. R-5.

The pre-shift examination requirement "is of fundamental importance in assuring a safe working environment underground." *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995). The purpose of the pre-shift examination is to "prevent loss of life and injury," resulting from hazards at the mines. S. Rep. No. 91-411, at 71 (1969), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., Part *I Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 183 (1975). The examination is intended to prevent hazardous conditions from developing. *Enlow Fork Mine Co.*, 19 FMSHRC 5, 15 (Jan. 1997).

In the instant case, the pre-shift examination of the E-14 longwall belt occurred from 5:00 a.m. to 6:15 a.m. on August 9, 2006, and was conducted by Michael Despot, a certified pre-shift examiner. Ex. P-7. Approximately six hours after Despot pre-shifted the belt, Kaczmark issued the Order. Ex. P-5. Although there were hazards noted in the pre-shift report, Kaczmark

identified nine hazards during his inspection that were not.[3] Tr. 293. The parties have stipulated to many of the conditions, and that several were not included in the pre-shift examination report for the E-14 longwall belt. Tr. 15-17; Stip. 20-26. The issue is whether the conditions existed at the time of Despot's pre-shift examination and, if so, whether they were obvious.

Consol did not present any witnesses to testify to the conditions in the affected areas at the time of the pre-shift examination. Notably absent was Despot, who had performed the pre-shift examination, and could have testified regarding what conditions he had encountered and whether, in his opinion, they were hazardous. On the other hand, Kaczmark testified regarding each of the conditions listed, and explained why he believed that they had existed at the time of the pre-shift examination and why they were hazardous.

The first five cited conditions involve two open holes in stoppings along the E-14 longwall belt, and combustible materials in holes in three stoppings. Stoppings are designed to run dust-filled air out of escapways to the face, in order to decrease the amount of gas and dust contaminating the mine atmosphere. Tr. 299-300. Holes in stoppings are hazardous because they divert the direction of unclean air and compromise the efficiency of the ventilation system. Tr. 299-300. Kaczmark testified that the holes were visible and could be seen just by walking along the belt. Tr. 307. He believed that the holes could not have developed in the time between the pre-shift examination and the MSHA inspection because there was one hole, five inches high and three inches wide, with a hose going through it, and there "might" have been a wench cable going through the second. Tr. 302-06. In his opinion, the amount of dirt and dust that had accumulated around the hose indicated that it had been in the hole for "quite awhile." Tr. 306. This assessment is supported by the fact that mining had ceased between the number 20 and 25 crosscuts where the holes were discovered, and had progressed to the number 31 crosscut, which would have taken a long period of time. Tr. 301. Former MSHA Conference and Litigation Representative, Lynn Workley, testifying for Consol, opined that the holes would not have exposed miners to gas or dust, since the air was vented to the return, and that they "[do not] significantly reduce the strength or ability of the stopping to resist fire or to prevent the air from mixing between the belt and the next entry over." Tr. 658. In light of Workley's extensive background as a mine inspector and ventilation specialist, I credit his testimony, which was unrebutted by the Secretary.

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[3] Kazmark issued nine citations: (1) 104(a) Citation No. 7073373 for a stopping with combustible material at the number 23 crosscut; (2) 104(a) Citation No. 7073374 for a crack in the roof at the number 23 ½ crosscut; (3) 104(a) Citation No. 7073375 for combustible coal accumulations under three rollers at the number 27 ½ crosscut; (4) 104(a) Citation No. 7073376 for stopping with combustible material at the number 25 crosscut; (5) 104(a) Citation No. 7073377 for a hole in the stopping at the number 28 crosscut; (6) 104(a) Citation No. 7073378 for stopping with combustible material at the number 29 crosscut; (7) 104(a) Citation No. 7073379 for a hole in the stopping at the number 30 crosscut; (8) 104(a) Citation No. 7073380 for rib rolls on the tight side of the belt at 13 locations; and (9) 104(a) Citation No. 7073381 for rips in the guarding at the take-up pulley at the head of the E-14 belt. Ex. P-8.

The unsealed combustible materials in three locations in the stoppings included exposed paper and wood, and a lump of coal. Tr. 308. According to Kaczmark, when combustible material is in a stopping without a sealant, it compromises the integrity of the stopping and will be the first thing to catch fire, should heat make contact with it. Tr. 308. Sealant retards the fire and will prevent it from spreading rapidly for at least an hour. Tr. 308. The combustible materials appeared to have been present for over a week, because of the amount of dirt that had accumulated on them and because of the compressed indentations on the wooden wedges, which would have been installed for stability when the stoppings were put in place. Tr. 310-13. Kaczmark stated that the scoops are sometimes parked in the crosscuts, and a possible ignition source could be a battery on a scoop. Tr. 366-67. There was no scoop present in the area during Kaczmark's inspection. Tr. 367.

Consol contends that the language of section 75.360 only requires that "hazardous conditions" be recorded in the pre-shift examination report, not safety or health violations, even though an operator may choose to record them. It argues that conditions that are unlikely to cause injury or illness are not hazardous and, because Kaczmark deemed these five underlying citations as "injury or illness unlikely," the citations cannot support a violation of the standard. Resp. Br. at 21. Consol proffers Kaczmark's own testimony, in which he states that when an injury is unlikely to result, the condition is not hazardous. Resp. Br. at 21; Tr. 451-52.

I reject Consol's argument that, because a violation is unlikely to cause an injury or illness, it is not a hazard. In essence, Consol is arguing that a violation must be at least reasonably likely to result in an injury or illness in order to constitute a hazardous condition. The Commission has previously rejected this argument. While examining subpart (b) of this standard, the Commission has stated that "the plain language . . . of section 75.360(b) does not specify that hazardous conditions are only those reasonably likely to result in serious injury." *Enlow Fork Mining Co.*, 19 FMSHRC 5, 14 (Jan. 1997). Section 75.360(f) also makes no such qualification. Furthermore, although the standard does not define the term "hazardous condition," the Commission, in discussing section 75.360(b), has held:

> [B]ased on its dictionary definition, a "hazard" denotes a measure of danger to safety or health. The Commission has approved the definition of "hazard" as "a possible source of peril, danger, duress, or difficulty," or "a condition that tends to create or increase the possibility of loss."

Id. (citations omitted). Therefore, while it may not have been reasonably likely that the combustible materials in the stoppings would ignite, since there was no identifiable ignition source in the vicinity, nor that the holes in the stoppings would expose miners to gas or dust, since the air was vented to the return without significant compromise to the stoppings, there was a possibility that these incidents could occur, albeit low. Additionally, because mining had substantially advanced past the cited areas, and there had been an appreciable build-up of dust and dirt in the areas, as well as the tightness of the wedges used to secure the stoppings, I am persuaded that the holes and the unsealed combustible materials in the stoppings existed prior to

the pre-shift examination. I also find that the conditions were obvious, and that Consol has not proffered any evidence proving otherwise. Consequently, I conclude that the conditions were hazardous, obvious, and should have been recorded in the pre-shift examination report. Respecting the remaining four conditions, Consol argues that they do not support Order No. 7073382 because they, too, were not hazards. Kaczmark testified that the rib rolls obstructing the clearance on the tight side of the belt had probably existed for more than a week since lateral pressure from continued mining puts pressure on the ribs, which, over time, weakens and crushes the coal, creating a rib roll. Tr. 298. According to Kaczmark, this is not a process that could occur within a matter of hours, because it takes time for the ribs to crush the coal and roll in. He further stated that the rolls were actually "higher than the belt itself," making them very visible from the walkway side of the belt. Tr. 298-99. He described the obstructed walkway as slippery and sitting between a solid block of coal on the one side, and a fast moving belt on the other side. Tr. 295-98. This was a hazard, in his opinion, because miners have to walk on the tight side of the belt daily to install monorail and replace rollers. Tr. 294-95, 417.

Consol asserts, to the contrary, that this violation was based on a safeguard issued to the mine, and was not a hazardous condition, in and of itself. As previously stated, the tight side of the belt is only traveled when maintenance is needed, and is not a travelway. Additionally, Huth, testifying to the state of conditions at the time of Kaczmark's inspection, stated that the rib rolls were not in any areas where monorail was being installed or would be in the near future. Tr. 576. Monorail is installed a few blocks from the face, which was situated at the last crosscut, number 31 ½. Tr. 577-78. Although Kaczmark deemed this a hazardous condition, Consol points out that he gave the company one week to clean it up. Tr. 424-26. The fact that the violation may have been based on a safeguard does not make the condition any less hazardous. Consol has offered no evidence indicating that the rib rolls may have occurred after Despot's examination, nor has it argued that the rolls were somehow concealed or difficult to spot by the pre-shift examiner. In fact, Kaczmark credibly testified that the rib rolls were very visible from the wide side of the belt. I find that the condition existed at the time of the pre-shift examination, that it was obvious, and that the pre-shift examiner should have identified and recorded it.

Kaczmark also concluded that the three rollers turning in loose, black coal had not occurred after the pre-shift examination, because the belt had been running during the entire shift and there were piles of coal fines in various locations along the belt. Tr. 323, 327. The accumulation under the rollers was 12 inches long and 6-8 eight inches deep. Resp. Ex. R-2. Additionally, Kaczmark testified that the belt was rubbing the stand with such friction that it emitted a smell, which was a sign of heat. Tr. 323-24. In his opinion, continued heat would have led to a belt fire. Tr. 324. As a result of Kaczmark's observation, Consol took the belt out of operation. Tr. 324-25. After the belt was shut down, Kaczmark did not touch the rollers to feel if they were hot. Tr. 387-88.

Consol argues that this condition could have been missed by any pre-shift examiner. There are 528 rollers over the 1.5 mile stretch at issue. Out of the 528, there were only three rollers touching accumulations. Tr. 598. Moreover, the condition was present on the tight side

of the belt where workers only go to perform maintenance, and not the wide side, the travel side. Tr. 379-380. Huth testified that it is company policy that the men, including the pre-shift examiners, are not permitted to walk the tight side of the belt. Tr. 620. To see rollers on the tight side, Huth stated, one has "to get down on a knee and get low to see across," because the "belt runs pretty close to the ground." Tr. 592; see also Tr. 381-82. When miners are conducting pre-shift examinations, they periodically get down on bended knee to look at the tight side of the belt. Tr. 592-93. Kaczmark admitted that the condition was not visibly apparent and stated that he smelled the belt rubbing, which is what caused him to look down at the rollers on the tight side. Tr. 389, 391-92. He went on to opine that it is possible that the pre-shift examiner could have missed the condition because there may have been no smell several hours earlier and, thus, it would not have caught his attention. Tr. 391-93. On the other hand, Huth testified that during the inspection, he did not smell anything, nor did Kaczmark mention the smell. Tr. 590-91. As support, Consol points to Kaczmark's and Huth's notes, neither of which make mention of any smell. Tr. 388-390, 590-91. Kaczmark also acknowledged that he did not see any smoke. Tr. 388-89.

Although, it is likely that the condition existed at the time of Despot's pre-shift examination, the record does not establish that the condition was obvious. The condition was on the side of the belt that is not routinely traveled, and was positioned such that one would have to kneel down to see it. Kaczmark admitted that it was the smell that prompted his attention. Although it can be challenging for a pre-shift examiner to identify all hazards, particularly in a case such as this where the run is long and contains a high number of rollers, and where the affected ones are operating on the less visible side of the belt, this condition has such potential for harm that heightened attention must be paid to the examinations. Huth testified that, in general, pre-shift examiners usually take one to two hours of the three hours allotted to complete their examinations. Tr. 620-22. Especially in situations such as this, however, where the condition of rollers on the travel side of the belt suggest that similar conditions may exist on the tight side, examiners should be more thorough. Therefore, I find that a more thorough examination was required and, that the condition should have been identified and recorded in the pre-shift report.

Kaczmark also observed two rips in the guarding at the take-up pulley. He believed that the condition had existed for more than one shift because of the blackened rips in the plastic guard, which color would have been pure white when the ripping initially occurred. Tr. 317, 320-21. Because the miners travel over uneven, slippery bottom along the belt line, they are at risk for trips and falls into the belt, which is moving at 300-400 feet per minute. Tr. 318, 322. Consol counters that Kaczmark's contention, that discoloration of the rips is an indicator of how long the condition existed, is unfounded. The company points out that, in Kaczmark's notes on this citation, there is no notation of discoloration. Tr. 431-44. Kaczmark also failed to mention discoloration in his deposition, when discussing how long the hazard had existed. Tr. 431-44. Huth offered an alternative explanation, stating that the rips could just as well have been discolored by a detached belt flapper coated with coal, as it flapped along as the belt ran. Tr. 599-603. This could occur very quickly and could have happened at any time, including after

the pre-shift examination. Tr. 601-02. I find Huth's explanation just as plausible as Kaczmark's and, therefore, conclude that, from the evidence as a whole, there is no sure way of determining when the rips occurred. Because they could have occurred subsequent to the pre-shift examination, I conclude that this condition does not support the inadequate shift violation.

The final hazardous condition concerns a visible crack in the roof along a travelway. Tr. 314. The crack was separated from the solid coal by nine inches, and ran 14 feet back into the stopping in the number 23 ½ crosscut, a portion of which extended along the walkway. Ex. R-2; Tr. 376-77. Kaczmark testified that the supporting straps were starting to show signs of stress from the weight of the weakening roof. Tr. 373-74. He believed that the crack existed for more than one shift, because rockdust had already settled into the crack and covered rock that would have been shiny if the crack had been new. Tr. 314; Ex. R-2. This condition was hazardous, the Secretary asserts, because it could have led to a roof fall over a travelway used by mine examiners and belt shovelers. Tr. 315. Consol counters that a roof fall was not reasonably likely to occur because the support straps were still in place and the roof bolts were securely implanted. Tr. 588-89; Resp. Br. at 21. The company also argues that the existence of rockdust, alone, is not sufficient to demonstrate that the condition existed prior to the shift in question. I find that the condition was a hazard, that it was obvious, and that the presence of rockdust, coupled with visible stress on the roof straps, make it more likely than not that the condition existed at the time of the pre-shift examination.

I conclude that at the time of the pre-shift examination, there were open holes in stoppings, holes containing combustible materials in stoppings, and rib rolls on the tight side of the belt that should have been identified as hazardous conditions and recorded in the pre-shift report. Likewise, although the rollers turning in coal accumulations on the tight side of the belt may not have been obvious, and the roof supports may have been holding steady, Consol should have identified the conditions as hazards and recorded them in the pre-shift report. Therefore, I find that the Secretary has proven that Consol violated section 75.360(f).

B. Significant and Substantial

In *Mathies Coal Co.,* 6 FMSHRC 1, 3-4 (Jan. 1984), the Commission set forth four criteria that the Secretary must establish in order to prove that a violation is S&S under *National Gypsum*: 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. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

The fact of the violation has been established. The focus of the S&S analysis here is whether the violation was reasonably likely to result in an injury producing event. In *U. S. Steel Mining Company*, the Commission provided further guidance:

> We have explained 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." 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 Co., 7 FMSHRC 1125, 1129 (Aug. 1985) *(*citations omitted*)*. Openings and combustible materials in stoppings, rib rolls, combustible coal accumulations, and inadequate roof support over travelways are serious conditions that could result in injuries ranging from cuts, bruises, sprains, broken bones and contusions to fatalities. All conditions presented discrete safety hazards, e.g., slip and fall, the possibility of fire or explosion, and roof fall. If any of these events were to occur, it is reasonably likely that injuries resulting to miners would be of a reasonably serious nature.

An evaluation of the reasonable likelihood of injury should be made in the context of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.,* 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co.,* 6 FMSHRC 1573 (July 1984). Moreover, resolution of whether a violation is S&S must be based "on the particular facts surrounding the violation." *Texasgulf, Inc.,* 10 FMSHRC 498, 501 (April 1998); *Youghiogheny & Ohio Coal Co.,* 9 FMSHRC 2007 (Dec. 1987).

It has been established that injury was unlikely to result from the open holes in the two stoppings and the three stoppings filled with combustible materials. Furthermore, the three stoppings with combustible materials were also unlikely to result in injury since there was no scoop present, nor any other identifiable ignition source. With regard to the rib rolls, I credit Huth's testimony and find that a slip and fall hazard was not reasonably likely to occur because the tight side of the belt is not regularly traveled, and the rib rolls were not in any areas where monorail was being installed.

Respecting the rollers turning in coal accumulations, the Commission has established that a coal accumulation violation is S&S where potential ignition sources are posed by, among other things, frictional contact between belt rollers and accumulations, and the belt rubbing against the frame. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222 (June 1994). Understanding that there are a vast number of rollers along the E-14 longwall belt, some on the less obvious, tight side, and the challenge this presents to pre-shift examiners, I, nevertheless, cannot overlook the fact of the rollers that were turning in coal accumulations, and that this frictional contact was a possible source of ignition.[4] If this condition had been allowed to persist, it is reasonably likely

[4] On cross-examination, Kaczmark stated that there was no possibility that the coal accumulations under the rollers were wet. However, at his deposition, he admitted that he did

that it would have led to a fire or explosion. In addition, the belt rubbing the structure could also have generated a spark, thus, presenting another ignition source.

With regard to the crack in the roof, the "adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard." *Cannon Coal Co.*, 9 FMSHRC 667, 668 (April 1987). As previously indicated, the straps supporting the roof were showing signs of stress from the weight of the weakening roof. Huth conceded that the straps "were bent down some from that piece falling," but stated that "that is relatively common for the side of the strap," and that the straps were still in place, working as intended. Tr. 588-89. The bolts were also securely implanted in the roof and, according to Huth, if the supports were not working, more of the bolts would have been visible. Tr. 589. Consequently, Consol asserts that there was no reasonable likelihood of a roof fall. I am not persuaded. The extensive crack, along with the signs of stress on the straps from the weakening roof, were indicative of adverse roof conditions or, at the least, that the roof was changing, such that adjustments to the roof supports were warranted. If normal mining operations had continued, uninterrupted, I find that the condition would have been reasonably likely to result in a roof fall in an area where miners worked and traveled.

I conclude that the coal accumulations and the crack in the roof were reasonably likely to result in injury causing events, and that the resulting injuries would be serious. I find that these hazards, which Consol failed to adequately identify in its pre-shift examination, support the Secretary's allegation that Consol's violation was S&S. Accordingly, I affirm the Secretary's S&S finding.

C. Unwarrantable Failure

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp*., 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id*. at 2001-04; *Rochester & Pittsburgh Coal Co*., 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal,* 52 F.3d at 136 (approving the Commissions's unwarrantable failure test). The Commission has recognized the relevance of

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not note the moisture level of the accumulations in his notes, and that it was indeed possible that the accumulations were damp to wet. Tr. 384-85. At hearing, Kaczmark conceded that making notations of everything he observes is important, because these factors are used in determining the likelihood of a fire. Tr. 387. I do not find Kaczmark's testimony that the coal fines were dry credible, because of his conflicting statements and his admission that he did not examine them for moisture content. In any event, even if the coal had been wet, the Commission has recognized that wet coal can dry out and ignite. *See Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1121 (Aug. 1985).

several factors in determining whether conduct is "aggravated" in the context of unwarrantable failure, such as the extensiveness of the violation, the length of time that the violation has existed, the operator's efforts in eliminating the violative condition and, whether the operator has been put on notice that greater efforts are necessary for compliance. *See Consolidation Coal Co*., 22 FMSHRC 328, 331 (Mar. 2000); *Mullins & Sons Coal Co*., 16 FMSHRC 192, 195 (Feb. 1994). The Commission has also considered whether the violative condition is obvious, or poses a high degree of danger. *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999) (citing *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Warren Steen Constr., Inc.,* 14 FMSHRC 1125, 1129 (July 1992); *Quinland Coals, Inc.,* 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.,* 6 FMSHRC 1596, 1603 (July 1984)). Each case must be examined on its own facts to determine whether an actor's conduct is aggravated, or whether mitigating circumstances exist. *Eagle Energy, Inc.*, 23 FMSHRC 829, 834 (Aug. 2001) (citing *Consol*, 22 FMSHRC at 353). Negligence is the failure to meet the standard of care required by the circumstances.

The Secretary argues that the inadequate pre-shift examination was the result of Consol's unwarrantable failure because the hazards missing from the report were extensive, obvious, posed a high degree of danger, and existed long enough for miners to begin working in the hazardous areas. Resp. Br. at 10. The pre-shift examination report was signed by the foreman and mine manager, putting Consol on notice of the conditions. I find, however, that there are mitigating factors. The weight of the evidence shows that the coal accumulations on the tight side of the belt were not obvious. There was no visible smoke to speak of, and Inspector Kaczmark conceded that there may have been no smell at the time of the pre-shift examination. It is also clear that, but for the smell of the rollers, Kaczmark, too, would have missed the cited accumulations. Regarding the roof condition, although the straps were not in optimal condition, they, and the roof bolts, were securely in place.

Consequently, I find that the Secretary has not met her burden of establishing aggravated conduct, and that the violation was a result of Consol's moderate negligence, not its unwarrantable failure to comply with the standard. Accordingly, the Order shall be modified to a section 104(a) citation.

Citation No. 7071787

Order No. 7071787 was issued by MSHA Inspector Radolec for a violation of 30 C.F.R. § 75.400 for combustible coal accumulations along the 3 North Number 1 main conveyor belt. Ex. G-4; Stip.10. Section 75.400 provides:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.

30 C.F.R. § 75.400. Rodolec determined that the violation was highly likely to result in injury or illness that would be permanently disabling, that the violation was S&S, that one person was affected, and that the operator's negligence was high. Ex. P-4. The Order was issued under section 104(d)(1) of the Act, alleging Consol's unwarrantable failure; subsequently, it was modified to a 104(d)(1) citation. Rodolec described the "Condition or Practice" as follows:

> An accumulation of combustible materials consisting of coal, coal fines and coal dust exist[s] on the 3 North No. 1 Main Conveyor Belt, starting at the end of the conveyor belt take-up and continuing inby to number 5 ½ crosscut. These combustible accumulations measured from 6 feet wide by 25 feet long and from 1 inch to 12 inches in depth under the bottom conveyor belt and belt rollers, behind the conveyor belt take-up. Additional accumulations of combustible material also existed in the inby side of the E-1 belt overcast to number 5 ½ crosscut. Where the combustible accumulations contacted the bottom of moving convey[or] belt and rollers. These combustible accumulations at number 5 ½ crosscut measured 150 feet long by 12 to 18 inches wide and up to 10 inches deep.. These combustible accumulation[s] were dry powdery and somewhat compacted coal dust. Additional combustible accumulations of coal existed under bottom rollers that [sic] numerous locations between number 5 ½ crosscut to the E-1 belt overcast. These combustible accumulations under the bottom belt and conveyor belt rollers consisted of a shovel full to needing extensive shoveling to completely remove the combustible accumulations under numerous conveyor belt roller[s] and bottom conveyor belt.

Ex. P-4. Respondent challenges the S&S designation of the citation, as well as the unwarrantable failure allegation. Resp. Br. at 2-7.

A. Significant and Substantial

The fact of the violation has been established. Stip 10-16. The combustible coal accumulations presented the possibility of a fire or explosion in the cited area. If either event were to occur, it is reasonably likely that injuries resulting to miners, e.g., burns or smoke inhalation, would be of a reasonably serious nature. The focus of the S&S analysis here turns on the third element of the *Mathies* criteria, i.e., whether the violation was reasonably likely to result in an injury producing event.

The Secretary argues that several factors support a conclusion that a fire or explosion was reasonably likely to occur: that the accumulations consisted of loose, dry coal dust along a belt line with the belt running on packed and in loose coal; that the belt and rollers were in contact with the coal; that the belt was rubbing against the conveyor framework which had been cut in

two; that some of the accumulations were dry; that there were damp to wet accumulations being dried by the rubbing of the belt and; that there was a friction source present. In support of her position, the Secretary points to *Amax*, a case in which the Commission upheld the ALJ's finding that an extensive accumulation of loose, dry coal and float coal dust along a belt line, with the belt running on packed, dry coal and in loose coal, was a potential source of ignition and showed a reasonable likelihood of an injury causing event. *Amax Coal Co.*, 19 FMSHRC 846 (May 1997). As further support, the Secretary cites *Mid-Continent,* 16 FMSHRC 1218, in which the Commission vacated the ALJ's finding that 12-inch high, mostly dry coal accumulations, that were in contact with the belt and the belt rollers, as well as the conveyor framework that was being rubbed by the belt, were not reasonably likely to result in a fire because the coal was of low combustibility.

Consol argues that there was no likelihood of a fire or explosion, and if there were, it was only slight. The accumulations were identified in August, which, because of seasonal warm weather, is when moisture is prevalent in mines in that region. Resp. Br. at 13-14. The moisture in the air is absorbed by the coal and accumulations, which makes them less likely to ignite than dry coal. Resp. Br. 14. Radolec's notes, contrary to his testimony at hearing, confirmed that the first accumulation consisted of "damp, wet coal fines," and "damp coal dust." Ex. 9, p. 12; Tr. 106. Consol asserts that this accumulation was 6 ½ to 7 feet below the belt, so there was no friction to speak of or potential ignition source. Tr. 103. Additionally, with respect to the second accumulation, the company argues that only three rollers were making contact with accumulations over the entire 600 feet of inspected belt. Resp. Br. at 15; Tr. 112-13. Although bearings in rollers can wear over time and produce heat caused by friction, Radolec admitted that the rollers were not hot. Resp. Br. at 15; Tr. 112-13. The heat gun used by Overfield to gauge the temperature of the affected rollers indicated that the rollers were only 74 degrees, whereas Radolec testified that the temperature of the coal would have to be over 500 degrees to ignite; according to Workley, 300 degrees is the threshold temperature. Tr. 121-22, 650. Radolec also conceded that the area where the belt was rubbing the belt structure was not hot from friction. Tr. 123-24. There was also no possibility of ignition near the third accumulation because neither the belt nor the rollers were rubbing the accumulations and the rollers were not generating heat. Tr. 128; Resp. Br. at 16.

When examining the reasonable likelihood of a fire or explosion, the Commission considers whether a "confluence of factors" was present based on the particular facts surrounding the violation, including the extent of the accumulations and the presence of possible ignition sources. *Amax*, 19 FMSHRC at 848 (quoting *Texasgulf, Inc.,* 10 FMSHRC 498, 500-03 (Apr. 1988). The Commission also considers whether methane was present, and what type of equipment was in the area. *Enlow Fork Mining Co*., 19 FMSHRC 5, 9 (Jan. 1997) (quoting *Utah Power & Light Co*., 12 FMSHRC 965, 970-71 (May 1990)); *Texasgulf*, 10 FMSHRC at 500-03.

In a factually similar case, the Commission determined that a violation was S&S where there were "potential ignition sources such as frictional contact between the belt rollers and the accumulations, the belt rubbing against the frame, electrical cables for the shark pump, the electrical devices for the longwall and one area in the longwall that was not being maintained."

Mid-Continent Resources, *Inc.*, 16 FMSHRC at 1222. The Commission further found that it was immaterial that there was no identifiable hot spot in the accumulations because continued normal mining operations must be taken into account when evaluating the circumstances. *Id.*

I reject Consol's argument that the violation was not S&S because coal is less combustible during summer months when its moisture content is high. At best, damp to wet coal may delay combustion but, as the Commission has previously concluded, "even absent a fire, accumulations of damp or wet coal, if not cleaned up, can eventually dry out and ignite." *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1121 (Aug. 5, 1985). "A construction of the standard that excludes loose coal that is wet or that allows accumulations of loose coal mixed with noncombustible materials, defeats Congress' intent to remove fuel sources from mines and permits potentially dangerous conditions to exist." *Id.* Further, as Consol has done little more than simply state that fire resistant belts were in use at the mine on August 9, without a more detailed explanation of their retardant capabilities, I am unable to give this argument significant weight. Consol has simply failed to support its assertion that the belts were unlikely to catch fire.

I do not believe, however, that there was an ignition source near the first accumulation, which was situated 6 ½ to 7 feet below the belt. Tr. 103. Radolec conceded that there "was a slim chance" of these accumulations igniting. Tr. 103-04. The only ignition source would have been from the belt, itself, catching fire and flames falling onto the accumulations seven feet below. Tr. 103. With regard to the third accumulation, neither the belt nor the rollers were rubbing the accumulations, and the Secretary did not allude to any other source of friction that might have led to an ignition. Radolec, acknowledged that if a fire started, it was "not likely that it would start there." Tr. 129. Furthermore, the Secretary asserts that there was energized equipment in the area. However, the fact that electrical equipment could somehow result in an ignition is insufficient to establish that the violation was S&S. *See Amax Coal Co.*, 18 FMSHRC 1355, 1358-59 (Aug. 1996). Radolec failed to specifically identify any particular piece of equipment that may have been a potential source of ignition, or any identifiable defects in any equipment that may have produced a spark that would ignite these particular accumulations.

The second group of accumulations was extensive. Radolec testified that these accumulations at the number 5 ½ crosscut measured 150 feet long, between 12 and 18 inches wide, and up to 10 inches deep. Tr. 40, 111. In other locations, there were accumulations of float coal dust on the mine roof and ribs, and on top of the overcast, metal conveyor belt structures, and electrical cables along the belt. Tr. 38. There were also three rollers turning in the accumulations which were dry, powdery, and compacted, the bottom conveyor belt was rubbing the coal dust for a distance of 150 feet, and the belt had cut in half one of the metal belt stands. Tr. 40-41.

I find that the three rollers turning in the second group of accumulations, which were dry, powdery, and compacted, were a potential source of ignition. I further find that the bottom conveyor belt rubbing the coal and the conveyor belt structure was also a potential ignition source. Consol's arguments that the rollers were not hot and only measured 72 to 74 degrees, and that the belt and rollers were not rubbing the accumulations at the time of Radolec's

inspection, do not take into account the likelihood of these conditions worsening, if not corrected, as normal mining operations continued. The likelihood is further enhanced by virtue of the float coal dust at the number 5 ½ crosscut, which could propagate a mine fire or explosion. I find that the accumulations in question were reasonably likely to result in an ignition of a fire, explosion or propagation thereof. Accordingly, I find that the violation was S&S.

B. Unwarrantable Failure

The Secretary argues that the violation was the result of Consol's unwarrantable failure because the accumulations were extensive, obvious, and posed a high degree of danger. Resp. Br. at 10. Additionally, the accumulations had been recorded in the pre-shift examination report for the shift during which the MSHA inspection was conducted, as well as the report for the day before, showing that the hazardous condition had existed for sufficient time to support an unwarrantable failure finding. The pre-shift examinations were signed by the foreman and mine manager, thereby putting Consol on notice of the condition.

It has already been established that the accumulations were extensive, and that is further evidenced by the fact that it took six miners four hours to clean up the accumulations before the conveyor belt could be restarted. Tr. 62. The accumulations were obvious because Radolec spotted them on both the wide and tight sides of the belt while he was walking the belt line. Tr. 38. Even if the pre-shift examiner had only spotted the accumulations on the wide side of the belt, they were so extensive and obvious that he should have anticipated that there could be accumulations on the tight side as well, even if not readily visible to him. With regard to the length of time that the condition existed, the 7th Circuit has concluded that extensive accumulations that were present at least one shift, and not removed after one pre-shift examination, provided an adequate basis to establish an unwarrantable failure finding. *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133,136 (7th Cir. 1995); *see also Windsor Coal Co.*, 21 FMSHRC 997 (Sept. 1999) (extensive accumulations existing for more than one shift supported unwarrantable failure finding); *Mid Continent Res., Inc.*, 16 FMSHRC 1226, 1232 (June 1994) (failure to correct coal accumulations recorded in pre-shift examination reports over two days constituted unwarrantable failure). In this case, pre-shift examination reports indicate that accumulations existed for at least two shifts.

Additionally, in examining an unwarrantable failure finding related to section 75.400, the Commission has recognized that:

> [P]ast discussions with MSHA about an accumulation problem serve to put an operator on heightened scrutiny that it must increase its efforts to comply with the standard. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 11-12 (Jan. 1997). Likewise, a high number of past violations of section 75.400 serve to put an operator on notice that it has a recurring safety problem in need of correction and the violation history may be relevant in determining the operator's

degree of negligence. *Peabody*, 14 FMSHRC at 1263-64.

Consolidation Coal Co., 23 FMSHRC 588, 595 (June 2001).

Consol was on notice that greater corrective measures were required to prevent coal dust accumulations by virtue of the fact that it had engaged in numerous, regular discussions with MSHA representatives about the issue in the past, several of which Inspector Newhouse testified to having personally participated in. Furthermore, Consol had been cited for violating section 75.400 seventy-two times during the previous year. Tr. 172; *see Consolidation Coal Co.*, 23 FMSHRC at 595 (ALJ's finding of no unwarrantable failure reversed where operator received previous warning from MSHA regarding "borderline to substandard" clean-up efforts, and had received 88 citations during the previous two years for violations of section 75.400); *Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997) (ALJ's finding of unwarrantable failure affirmed where MSHA had repeated discussions with mine management regarding section 75.400 compliance, and operator received 98 citations over 10 months for violating section 75.400).

The record also supports a finding that Consol was on notice of the violative condition by virtue of the mine manager's signature on the pre-shift examination reports for August 8 and 9, in which the conditions had been recorded. Consol admitted that its efforts consisted of only attempting to clean the wide side of the belt, and not the tight side. Tr. 539, 553. It has also been established that the violation posed a significant degree of danger, in that accumulations were reasonably likely to lead to, or propagate a mine fire or explosion. Therefore, I find that sufficient evidence exists to support a conclusion that the cited conditions were the result of Consol's unwarrantable failure.

Order No. 7073658

Order No. 7073658 is factually similar to Citation No. 7071787. The Order was issued by MSHA Inspector Rihaley for a violation of section 75.400 for combustible coal accumulations and/or coal fines along the Number 1 main belt conveyor. Stip. 28. Rihaley determined that it was highly likely that the violation would result in an injury or illness involving lost work days or restricted duty, that the violation was S&S, that five employees were affected, and that the operator's negligence was high. The Order also alleges that the violation was the result of Consol's unwarrantable failure to comply with the standard. Ex. P-6. The "Condition or Practice" is described as follows:

> There was an accumulation of packed coal fines under and in contact with a bottom roller at 4 ½ crosscut on the # 1 Main belt conveyor. Also at this location the bottom of this belt was rubbing this accumulation for a distance of approximately 3 ½ feet and was dry and dusty where it was rubbing.
>
> 5 x-cut — stuck bottom roller with dry coal fines built up around the roller and in contact with the belt.

Take-up pulley — turning in coal tight side, dry, 3 feet in length, 2 feet width and height.

8 x-cut — half of bottom roller missing with belt rubbing the structure and coal fines, also the next inby bottom roller was turning in coal fines and a 2 foot section of belt. The fines were dry and producing visible dust.

9 x-cut — 1 stuck bottom roller and 3 inby rollers turning in coal fines, also the belt was rubbing these fines at each location for a distance of at least 1 foot.

10 ½ x-cut — packed coal fines in contact with a bottom roller and 4 feet of belt, dry and producing visible dust.

13 ½ x-cut — 1 stuck and broken roller and another turning in packed coal.

14 x-cut and 14 ½ crosscut — bottom rollers turning in coal.

15 x-cut — bottom roller and from 8 to 10 feet of belt in contact with dry coal fines, producing visible dust.

14 x-cut — coal spillage tight side, 40 feet in length, 2 to 3 feet width and 6 to 16 inches in depth. This condition also existed at intermittent locations to inby 16 x-cut.

There was coal dust and coal float dust intermittently deposited on the previously rockdusted surface of the #1 Main belt from the head roller to inby 16 x-cut, this was mostly under and on the tight side in the form of a film.

The operator may run this belt to remove the clean-up.

The fact of the violation has been established. Stip. 28-31. Respondent challenges the S&S designation of the Order, as well as the unwarrantable failure allegation. Resp. Br. at 2-7.

A. Significant and Substantial

The focus here is the third element of the *Mathies* test, i.e., whether the violation was reasonably likely to result in an injury producing event. Rihaley's testimony describes extensive accumulations along the Number 1 main belt conveyor and likely ignition sources. Tr. 217-31.

The rollers turning in coal accumulations at a minimum of five different locations along the belt, the belt rubbing the structure at the number 8 crosscut, and the belt rubbing coal fines at five different locations, all present potential ignition sources. There were also stuck and broken rollers which could generate sparks. I find that the accumulations were reasonably likely to result in an ignition of a fire, explosion, or propagation thereof. Accordingly, I find that the violation was S&S.

B. Unwarrantable Failure

The accumulations were extensive, and existed at numerous locations along the Number 1 main belt conveyor. Although Rihaley failed to describe the dimensions of each accumulation in question, there were several instances where the accumulations were high enough to reach the bottom rollers. The accumulations were easily seen by Rihaley as he walked along the belt line and, therefore, were obvious. Tr. 226. Much like the previous citation, several conditions were recorded in prior pre-shift examination reports, going back two shifts. For the same reasons applied to Citation No. 7071787, I find that sufficient evidence exists to support a finding that the cited conditions occurred as a result of Consol's unwarrantable failure to comply with the standard.

IV. Penalty

While the Secretary has proposed total civil penalties in the amount of $19,300.00 for these violations, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(j). *See Sellersburg Stone Co.,* 5 FMSHRC 287, 291-92 (Mar. 1993), *aff'd*, 763 F.2d 1147 (7th Cir. 1984).

Applying the penalty criteria, I find that Consol is a large operator with a one-year history of 72 violations of 30 C.F.R. § 75.400, which I find to be significant. As stipulated by the parties, the total proposed penalty will not affect Respondent's ability to continue in business. Stip. 8. I also find that Consol demonstrated good faith in achieving rapid compliance, after notice of the violations.

The remaining criteria involve consideration of the gravity of the violations and Consol's negligence in committing them. These factors have been discussed fully, respecting each citation. Therefore, having considered the six penalty criteria, the penalties are set forth below.

Order No. 7073382

The Secretary proposed a civil penalty of $5,600.00 for this violation. It has been established that this S&S violation of 30 C.F.R. § 75.360(f) was reasonably likely to cause an injury that would result in lost workdays or restricted duty, that it was due to Consol's moderate negligence. The Order shall be modified to a citation issued pursuant to section 104(a) of the Act. Applying the civil penalty criteria, I find that a penalty of $2,500.00 is appropriate.

Citation No. 7071787

The Secretary proposed a civil penalty of $6,200.00 for this violation. It has been established that this S&S violation of 30 C.F.R. § 70.400 was highly likely to cause an injury that would be permanently disabling, that it was due to Consol's high negligence and unwarrantable failure to comply with the standard, and that it was timely abated. Applying the civil penalty criteria, I find that a penalty of $6,200.00 is appropriate. ___

Order No. 7073658

The Secretary proposed a civil penalty of $7,500.00 for this violation. It has been established that this S&S violation of 30 C.F.R. § 70.400 was highly likely to cause an injury that would result in lost workdays or restricted duty, that it was due to Consol's high negligence and unwarrantable failure to comply with the standard, and that it was timely abated. Applying the six civil penalty criteria, I find that a penalty of $7,500.00 is appropriate.

ORDER

WHEREFORE, Citation No. 7071787 and Order No. 7073658 are **AFFIRMED,** as issued, Order No. 7073382 is **AFFIRMED**, as modified, **and** it is **ORDERED** that the Secretary **MODIFY** Order No. 7073382 to a citation issued pursuant to section 104(a) of the Act, 30 U.S.C. § 14(a), and reduce the degree of negligence from "high" to "moderate," and that Respondent pay a civil penalty of $16,200.00, within 30 days of this decision. Accordingly, this case is **DISMISSED**.

Jacqueline R. Bulluck
Administrative Law Judge

Distribution: (Certified Mail)

Andrea J. Appel, Esq., Office of the Solicitor, U.S. Department of Labor, The Curtis Center, Suite 630E, 170 S. Independence Mall West, Philadelphia, PA 19106-3306

Rodger L. Puz, Esq., Dickie, McCamey & Chilcote, P.C., Two PPG Place, Suite 400, Pittsburgh, PA 15222-5402

/sdb