

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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February 4, 2011

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 2007-32
Petitioner	:	A.C. No. 44-04856-112662
	:	
v.	:	
	:	
CONSOLIDATION COAL COMPANY,	:	Mine: Buchanan No. 1
Respondent	:	

**DECISION**

Appearances: Benjamin Chaykin, Esq., U.S. Department of Labor, Arlington, VA on behalf of the Secretary;  
R. Henry Moore, Esq., Jackson Kelly, PLLC, Pittsburgh, PA; on behalf of Consolidation Coal Company.

Before: Judge Bulluck

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary”) on behalf of her Mine Safety and Health Administration (“MSHA”), against Consolidation Coal Company (“Consol”), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The Secretary seeks civil penalties totaling \$1,934.00 for two alleged violations of her mandatory safety standards.

A hearing was held in Kingsport, Tennessee. The parties’ Post-hearing Briefs are of record.<sup>1</sup> For the reasons set forth below, I **VACATE** the citations and **DISMISS** the Petition.

**I. Stipulations**

At hearing, the parties stipulated to the following:

1. The Administrative Law Judge and the Federal Mine Safety and Health Review Commission have jurisdiction to hear and decide this civil penalty proceeding, pursuant to section 105 of the Federal Mine Safety and Health Act.
2. Consolidation Coal Company is the owner and operator of the Buchanan No. 1 mine.

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<sup>1</sup>The stipulations are enumerated in the Secretary’s Post-hearing Brief at pages 1-3.

3. Operations at Buchanan No. 1 mine are subject to the jurisdiction of the Act.
4. The maximum penalty which could be assessed for these violations pursuant to 30 U.S.C. § 820(a) will not affect the ability of Consol to remain in business.
5. Mine Safety and Health Administration Inspector David Fowler was acting in his official capacity and as an authorized representative of the Secretary of Labor when each of the citations involved in this proceeding was issued.
6. True copies of each of the citations that are at issue in this proceeding, along with all continuation forms and modifications, were served on Consol or its agent, as required by the Act.
7. Government Exhibit 1 is an authentic copy of Citation No. 6624105, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of the statements asserted therein.
8. Government Exhibit 2 is an authentic copy of Citation No. 6624108, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
9. The Secretary intends to offer other citations issued by the same inspector who issued Citation Nos. 6624105 and 6624108, specifically Citation Nos. 6624107, 6624106, 6624110, 6624115 and 6624111. By stipulating to the authenticity of such exhibits, Consol is not stipulating to the relevance of such exhibits or their admissibility.
10. Government Exhibit 3 is an authentic copy of Citation No. 6624107, with all modifications and abatements.
11. Government Exhibit 4 is an authentic copy of Citation No. 6624106, with all modifications and abatements.
12. Government Exhibit 5 is an authentic copy of Citation No. 6624110, with all modifications and abatements.
13. Government Exhibit 6 is an authentic copy of Citation No. 6624115, with all modifications and abatements.
14. Government Exhibit 7 is an authentic copy of Citation No. 6624111, with all modifications and abatements.
15. Each of the violations involved in this matter was abated in good faith.
16. Government Exhibit 8, the Violator Data Sheet, may be admitted into evidence, and accurately sets forth the size of Buchanan No. 1 mine in production tons and hours worked per year.

17. Government Exhibit 9, MSHA's Assessed Violation History Report, R-17 Report, accurately sets forth the history of the violations at the Buchanan No. 1 mine for the period specified, and may be admitted into evidence and used in determining civil penalty assessments for the alleged violations in this case.

18. Consol may be considered a large mine operator for purposes of 30 U.S.C. § 821(i), and Buchanan No. 1 can be considered a large mine.

## **II. Factual Background**

Consol owns and operates Buchanan No. 1, an underground coal mine in Buchanan County, Virginia. Richard Perkins, a float foreman, was acting as the section foreman for the "O" panel longwall development section of Buchanan No. 1 on the midnight ("owl") shift beginning at 11:30 p.m. on November 1, 2006, and ending on the morning of November 2.

Tr. 134. He provided an unrefuted account of the crew's activities during the first half of the shift. The "O" panel had two roof bolting machines and a continuous miner operating on the working section, and was accessed by four entries. Tr. 138, 140; Ex. G-10. Early in the shift, Perkins completed an on-shift examination of the "O" panel section. Tr. 144; Ex. R-1. The left side roof bolter, parked in the number 2 entry, was down for maintenance during the entire shift. Tr. 138. During Perkins' on-shift, he identified as a hazardous condition a wide place in the 2 left break, and corrected it by having a crib built and three timbers set. Tr. 144-46; Ex. R-1, R-2 at I. No other hazardous conditions were identified during Perkins' on-shift examination. During the first four hours of the shift, the crew performed maintenance tasks of cleaning coal accumulations from areas on the section, washing equipment, and completing permissibility and dust parameter checks on the continuous miner. Tr. 134-35. They rock dusted in the number 3 belt entry. Tr. 164; Ex. R-1.

The crew began producing coal at 4:05 a.m. Tr. 135. First, they mined in the crosscut between the number 2 and number 3 entries, and then they advanced in the face of the number 4 entry. Tr. 152-53. Perkins conducted a pre-shift examination of the "O" panel section from 4:30 to 5:15. Tr. 148. No hazardous conditions were identified or corrected as a result of his examination. Tr. 147-49; Ex. R-1. At some point after completion of Perkins' pre-shift exam, near the end of the shift, a roof fall occurred in the number 4 entry where the continuous miner was being operated. A conveyor lead was severed, a methane monitor was dislodged, and a methane sensor was damaged on the miner, resulting in a mining shutdown on the section.

Tr. 25-27, 157-58. There were at least 16 inches of fallen rock covering the miner's monitor and sensors. Tr. 27. The crew's electrician temporarily spliced the damaged cable, in order to back the miner out of its location to a safer place where it could be repaired. Tr. 157-59; see Tr. 103.

Supervisory MSHA Inspector David Fowler was assigned to conduct a regular inspection of Buchanan No. 1 in the latter hours of the shift, the morning of November 2. He had been conducting inspections of the mine since September 2000. Tr. 22-24. Fowler's employment at MSHA spans over 25 years, and has included experience as an accident investigator. Tr. 24. Subsequent to the subject November 2 inspection, he became the supervisor of the MSHA Field Office in Princeton, West Virginia. Tr. 22-24. Fowler was accompanied by MSHA inspector trainee, Garnee Deel, and Consol's then chief ventilation supervisor, Archie Ruble. Tr. 84-85, 201-

02. The inspection team entered the mine at approximately 6:45, reached the “O” panel section at about 7:50, and remained on the section for roughly one hour. Tr. 25, 85. When they arrived on the section, the owl crew was in the process of rock dusting in the number 3 entry to the face in number 4, and the continuous miner was being repaired in the number 4 entry. Tr. 86-88, 185-86, 211-14.

As a result of his observations, in addition to the two citations at issue in this proceeding, Fowler issued several citations for hazardous conditions on the section: (1) Citation No. 6624107 for loose and hanging ribs on four inby corners located in the number 2 entry (Ex. G-3); (2) Citation No. 6624106 for inadequate air circulation (Ex. G-4); (3) Citation No. 6624110 for a loose light and improper splice of the conveyor cable on the continuous miner (Ex. G-5); (4) Citation No. 6624115 for a non-functioning methane monitor on the continuous miner (Ex. G-6); and Citation No. 6624111 for loose coal and hydraulic oil accumulations in and on areas of the continuous miner (Ex. G-7).<sup>2</sup>

### **III. Findings of Fact and Conclusions of Law**

#### **A. Citation No. 6624105**

Inspector David Fowler issued Citation No. 6624105, alleging a significant and substantial (“S&S”) violation of section 75.400, after observing two locations of allegedly hazardous accumulations on the section. The first accumulation was spotted in the number 3 entry under the shuttle cars, along the ribs, and around the feeder, and the second in the crosscut between the number 3 and 4 entries and further inby the number 4 entry.<sup>3</sup> The Citation further alleges that the condition was “reasonably likely” to cause an injury that could reasonably be expected to result in “lost workdays or restricted duty,” and was caused by Consol’s “high negligence.” The “Condition or Practice” is described as follows:

Loose coal and float coal dust with hydraulic oil leaked from the feeder was present beginning at the “O” panel tailpiece and extended inby approximately 150'. Loose coal was also present in the last open crosscut from No. 3 entry to No. 4 entry extending into the No. 4 entry intersection where survey station No. 24537 was installed. The accumulations were from 2" to 16" in depth. The accumulations were present in the first crosscut where the shuttle cars park to change out during transportation of coal to the feeder during production. The accumulations were present from rib to rib in some areas.

Ex. G-1.

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<sup>2</sup>The penalties in Citation Nos. 6624107, 6624106, 6624110, 6624115, and 6624111, uncontested by Consol, were paid and became Final Orders of the Commission.

<sup>3</sup>30 C.F.R. § 75.400 requires that “[c]oal 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 non-diesel-powered and electric equipment therein.”

## **1. Testimony**

### **a. David Fowler**

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At hearing, using a diagram of the “O” panel section drawn by Perkins, Fowler identified the locations of equipment and energized cable, including a continuous miner, feeder, power center, roof bolting machine, and two shuttle cars. Ex. G-10; Tr. 26-32. He also identified the first of the two broad areas that he had cited, i.e., the intersection near the feeder in the number 3 entry, and opined why the accumulation existed:

The accumulations -- in this area right here's where the shuttle cars travel through during production, and they have a tendency to spill because they overload shuttle cars. Over along the rib line right here is where the shuttle cars trade out. I mean, they park and let the other one go and get loaded and then they'll go and empty and then they'll switch out. This particular corner right here -- like this corner over here -- is a problem area because it breaks off a lot. And instead of cleaning as they were operating, the third shift had continuously just run through the dust.

Tr. 61; Ex. G-10 at A, H. He stated that in some places the loose coal, float coal dust, and hydraulic oil accumulations were entry width (22 feet), while in others they were crosscut wide from rib to rib (20 feet), and inconsistently deep. Tr. 66; see Tr. 56-57. He estimated the depth of the accumulation at the feeder to be 16 inches, running a distance of 150 feet, and rock dusted. Tr. 66-67. According to Fowler, there was also an accumulation along the ribs in number 3 and under the shuttle cars. Tr. 59-60. Explaining the circumstances under which he cited the hydraulic oil leak, Fowler's testimony continued:

I saw the accumulations of hydraulic oil because, on previous days, I had discussed the machine leaking. The feeder was leaking. And maintenance told me they couldn't get it fixed because they couldn't get the part. So when we came back, I seen [sic] they still hadn't had the part, still hadn't repaired it. So, when I wrote the spillage of the coal, I included the hydraulic oil in order to get the part on the feeder fixed.

Tr. 63. Additionally, he described the hydraulic oil accumulation as “right there along the area that was from rib to the feeder and around toward the belt tailpiece.” Tr. 59-60; Ex. G-10 at A. He also testified that a skiff of rock dust covered the roadways and section. Tr. 67-68. In response to being asked whether, from his observation, the hydraulic oil had been cleaned up, Fowler testified, “I can't answer.” Tr. 63. He further discussed his observation of the accumulated float coal dust in the area of the hydraulic oil leakage by explaining that, because the tailpiece of the conveyor belt is situated under the feeder, that area tends to accumulate float coal dust. Tr. 64. Also, he testified, float coal dust is generated as equipment runs through the loose coal and pulverizes it. Tr. 68-69. In his opinion, the violation was reasonably likely to cause an injury resulting in “lost workdays or restricted duty” due to the presence of ignition sources, including cables and the feeder -- hot equipment that had operated during the night shift. Tr. 69-70.

The second area that Fowler identified in Citation No. 6624105, the last open crosscut between the number 3 and 4 entries and further in by the number 4 entry, he described in the following testimony:

This area from the crosscut over to the number 4 entry is an area where you have common spillage. And I have asked them and they have, in the past, cleaned this up during the shift so it wouldn't accumulate and be too deep. And just the way they load the shuttle cars and the way the design of the section is, it requires more maintenance than normal just to keep it clean.

Tr. 64-65; Ex G-10 at F. He approximated the upper accumulation of loose coal and float coal dust in the crosscut between the number 3 and 4 entries and near the continuous miner as crosscut width (20 feet), by 60 feet long. Tr. 68.

On cross-examination, Fowler testified that only Garnee Deel took inspection notes and that he, Fowler, initialed them as his own. Tr. 84. However, he acknowledged that he did not review Deel's notes in preparation for his testimony. Tr. 84-85. Fowler also testified that he took no measurements of the coal accumulations that he observed on the section, but "made measurements of approximation" based on "the habit of using my boots and heel height and stuff like that, you know, to tell me what I have when it's loose." Tr. 65.

Fowler also testified to having been concerned that other hazardous conditions that he observed on the section and cited, i.e., the loose light fixture, dislodged methane monitor and spliced cable on the continuous miner, inadequate air circulation in the number 4 entry face, and loose coal and hydraulic oil accumulations in and on electrical components of the continuous miner, increased the risk of ignition near the miner. Tr. 33, 36-39, 72-73, 76. He explained that he designated the violation S&S because, "accidents and injuries related to the fire can be very damaging in getting burned or possibly cause explosions and kill people." Tr. 72. When asked how long the accumulations had been present on the continuous miner, Fowler opined that they had existed for "at least, two or three days, four." Tr. 44-45. He testified that in the number 4 entry face area, he discussed with Perkins a ventilation issue, the condition of the continuous miner, and the float coal dust issue. Tr. 37, 121. Finally, Fowler stated that Consol has a history of the type of violations that he cited on November 2, and that he had been involved in numerous on-site safety talks with mine management about keeping the section free of accumulations. Tr. 58, 64-65, 73.

#### **b. Richard Perkins**

Section foreman Richard Perkins testified that, at the beginning of the shift before coal production had started, the crew had performed maintenance and cleaning of the section. A crib had been built and some timbers set to correct a wide open crosscut between the number 1 and 2 entries on the left side of the section. Tr. 137, 145-46. Additional block had been laid on a partially constructed brattice, also on the left side. Tr. 137. On the right side, the crew had cleaned all the way to the face. Tr. 185. They had washed the feeder in the number 3 entry early in the shift around 2:00, and the surrounding area had been shoveled and scooped. Tr. 191-92. Also in the

number 3 entry, they had shoveled and scooped ribs, shoveled the ribs behind the cables where the scoop could not reach, then rock dusted. Tr. 137, 141-42, 164; see Ex. R-1. The continuous miner operator had cleaned the ladder, washed the miner, and performed his dust parameters. Tr. 137, 140-41. Perkins explained that Consol's policy requires washing equipment in the first two hours of a shift and, again, in the last two hours. Tr. 146. According to Perkins, the feeder had not been running while the crew was not producing coal, except for the limited purpose of dumping the rock that had come off the right-side continuous miner and any coal that had been cleaned up from the haulageways. Tr. 154, 192.

Perkins testified that, during his pre-shift examination, he did not notice any accumulation of hydraulic oil at the feeder or any coal accumulation along the rib line. Tr. 154-55, 176-77. He acknowledged that he had not been made aware of the oil leak or that a part had been ordered for the feeder, attributing the oversight to "bad communication" due to the fact that he is a float foreman. Tr. 153-54, 173-76. He testified that the shuttle cars were not parked in the number 3 entry, he described the mine floor as "real soft bottom," rutted by the back and forth operation of heavy shuttle cars, and opined that the ruts can be mistaken for coal accumulations. Tr. 155. He explained that the continuous miner was situated in the number 3 break (Ex. G-10 at D) and, thereafter, the roof was bolted where mining had taken place in the number 3 entry. The continuous miner was then moved, and mining had commenced in the number 4 entry after he had examined the area. Tr. 153. According to Perkins, the miner had been washed again before cutting had begun in the number 4 entry. Tr. 181-83. Perkins denied having observed any loose coal or float coal dust accumulations between the number 3 and 4 entries. Tr. 153. When asked to account for accumulations that may have been present behind the continuous miner, Perkins opined that they would have been caused by the "[n]ormal routine of mining. Could fall off shuttle cars. Off the ends, sides." Tr. 166-67.

Finally, contrary to Fowler's testimony, Perkins maintained that, while he had observed Fowler twice before he, Perkins, had left the section, he had had no conversation whatsoever with the inspector. Tr. 160-62. He testified that being cited for an inadequate pre-shift exam, the first time in five years of mining, "really bothered" him and that, consequently, three days after the inspection, on November 5, he had made the diagram and narrative of the section's activities, in order to address his disagreement with Fowler and Deel. Tr. 133-34; see Ex. G-10, R-2.

### **c. Archie Ruble**

General mine foreman Archie Ruble, a Consol employee at Buchanan No. 1 for approximately 21 years, with 31 years of experience in the mining industry, was the chief ventilation supervisor in November 2006, and had conducted many pre-shift examinations at Buchanan No. 1. Tr. 205. He traveled with Fowler during his inspection on November 2. Tr. 198-201. Ruble testified that, two days earlier on October 31, he had also accompanied Fowler on an inspection of the "O" panel section, and that Fowler had not issued any citations. Tr. 201. In Ruble's opinion, Fowler's placement of equipment and identification of locations on Perkins' diagram, except for the dinner hole, was inaccurate, i.e., advanced by one crosscut or 150 feet. Tr. 202-03, 252-53. Ruble testified that what he observed at the feeder was a combination of oil and water that measured about 8 to 10 feet long. Tr. 217, 225-26, 234. He gave a description of the

cited area at the feeder:

The shuttle cars come through this area and dump. When they're dumping coal -- that's what it's made for. It's made to dump coal into. You're going to have spillage . . . . You heard in previous testimony from the guys. They talk about cleaning the feeder and cleaning the loading point. They'll come in -- say from this point inby and push up -- push this up -- even though they may have cleaned. All these roadways here may be good and may stay good for days on end, you're still going to end up cleaning this dumping point during the course of your day.

Tr. 219. In acknowledging that he observed coal accumulation at the feeder dumping point, Ruble was emphatic that it amounted to normal spillage, and estimated the dimensions at 10 feet wide, by roughly 20 feet long, by 0 to 6 inches deep -- an amount, he opined, equal to two shuttle cars worth of dumping; the problems arise, he concluded, "if you let it go for a shift or two . . . ." Tr. 220-21, 236. He placed the inspection team at the feeder around 7:55, after the section had been cleaned at the end of the shift, explaining that rock dusting forced the team to leave the number 3 entry and travel over to the dinner hole in the number 2 entry. Tr. 221-22, 240-42. Ruble was able to recall one of two shuttle cars parked in the intersection by the feeder, but was unable to speak to whether there was coal accumulated underneath. Tr. 224. He also testified that he did not recall observing a fallen rib at the right corner inby the feeder, and noted that no citation was issued. Tr. 225. When questioned generally about coal accumulations on cables and equipment, Ruble reported that what he observed was incidental to normal mining, pointing out that the crew had been cleaning for 4 ½ hours; "[t]hey hadn't been running coal that long."

Tr. 225-26. Ruble also maintained that moisture in the number 3 entry and adequate rock dusting had controlled the float coal dust in the area. Tr. 227. Ruble's testimony was consistent with Fowler's testimony that the number 3 entry at the feeder was rutted:

This area was relatively damp also. This bottom conditions in these areas -- and I think that's some of the confusion with the accumulations -- it's very soft bottom in this high top area. It does squish out, and it looks black. But it's slate and shale. You know what I'm saying? And this type of bottom, typically, is very damp.

Tr. 227-28; see 234-35, 261-62. He further testified that the rutted bottom, caused by shuttle cars traveling with loads weighing 8 to 10 tons, can easily be mistaken for accumulated coal.

Tr. 228, 261-62. On cross-examination, Ruble narrowed down the high-traffic rutted area to the intersection near the feeder where the shuttle cars change out. Tr. 235-36. He further testified that, directly behind the feeder and extending inby for the remainder of the 150 foot run, the accumulation had the appearance of "fresh run coal," and the span was damp, but not highly rutted. Tr. 237-38.

When questioned about his observation of the loose coal accumulation in the second area cited, the crosscut between the number 3 and 4 entries, Ruble noted that a "run through" check curtain was located there, which "drags" some coal off the shuttle cars coming from the face as they pass under the hanging curtain. Tr. 214-15. He reiterated the company's cleaning policy of mining coal, backing the miner out of the area, bolting top, then cleaning toward the face.



Tr. 215, 240-241. In his opinion, the accumulation that he observed was not hazardous and amounted to “normal spillage you get by getting a cut of coal.” Tr. 215. When asked to approximate the dimensions of the accumulation, he responded that “pull-off, or drag-off of the buggy” will typically stay within the confines of the car, about 8 to 10 feet wide, and that what he observed probably spanned a distance of 15 to 20 feet, and ranged from 0 to 6 inches in depth. Tr. 214-16. Ruble emphasized that there is no way to avoid drag-off when loaded shuttle cars pass under the check curtain, especially in “lower coal.” Tr. 216-17.

## **2. Fact of Violation**

In order to establish a violation of one of her safety standards, the Secretary must prove that the violation occurred “by a preponderance of the credible evidence.” *Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1998) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)).

While the Commission has held that a violation of section 75.400 occurs when an accumulation of combustible materials exists, it has recognized that “some spillage of combustible materials may be inevitable in mining operations” and that “[w]hether a spillage constitutes an accumulation under the standard is a question, at least in part, of size and amount.” *Old Ben Coal Co.*, 1 FMSHRC 1954, 1958 (Dec. 1979) (“Old Ben I”). The Commission has also rejected the rule that evidence of depth and extent is a necessary prerequisite to establishing a violation of 30 C.F.R. § 75.400, holding that, subject to challenge before an administrative law judge, “an accumulation exists where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary, it likely could cause or propagate a fire or explosion if an ignition source were present.” *Old Ben Coal Co.*, 2 FMSHRC 2806, 2807-08 (Oct. 1980) (“Old Ben II”). In pointing out the obviousness of the prohibition against permitting loose coal to accumulate, the Tenth Circuit has interpreted the mandate to require reasonably prompt clean up, “with all convenient speed.” *Utah Power & Light Co. v. Sec’y of Labor*, 951 F.2d 292, 295, n. 11 (10th Cir. 1991). The judgment of an MSHA inspector as to whether a violation existed is subject to review under “an objective test of whether a reasonably prudent person, familiar with the mining industry and the protective purposes of the standard, would have recognized the hazardous condition that the regulation seeks to prevent.” *Utah Power & Light Co.*, 12 FMSHRC 965, 968 (May 1990), *aff’d*, 951 F.2d 292 (10th Cir. 1991) (citation omitted).

Inspector Fowler’s account of what he observed on the section is at odds with Ruble and Perkins’ observations, as well as Perkins’ account of the crew’s activities on the night owl shift. As a threshold matter, Consol challenges Fowler’s placement of equipment and locations of alleged violations on the diagram of the section, asserting that the inspector was off by one crosscut. Ruble corroborated Perkins’ layout of the section, diagramed by Perkins within a few days of the inspection. Moreover, Fowler had no recollection of having inspected the “O” panel section on October 31, contrary to the evidence. Because Fowler had not reviewed Deel’s notes prior to testifying and failed to recall the prior inspection just two days before, and because there is no other evidence of his version, I credit Consol’s account of the section layout. See Tr. 85-86, 201, 229. Applying the same reasoning to the discrepancy in the testimonies of Fowler and Perkins, that they discussed the alleged violations before Perkins and the owl crew left the section, I am not persuaded

that any conversation took place based on Fowler's recollection alone and, therefore, credit Consol's account. I note that these findings, rather than dispositive of whether the accumulations were impermissible, go to the credibility of the inspector's overall testimony, in light of the absence of notes to refresh his recollection or corroboration by other testimony.<sup>4</sup>

Going back to Fowler's earlier October 31 inspection, during which Ruble also traveled with him, it can reasonably be inferred that the accumulations cited on November 2 had not been present because Fowler had not issued any citations. Perkins' testimony that the crew cleaned the section and its equipment, including the feeder and continuous miner, during the first half of midnight shift in the early hours of November 2 is credible and, indeed, essentially unchallenged by the Secretary. Likewise, the Secretary has not refuted that, while the crew was cleaning and performing maintenance on the equipment, the feeder had only been run long enough to dump the coal and rock that had been cleaned off the section and machinery. When the inspection team arrived on the "O" panel section at about 7:50, the crew had been mining for less than four hours, and the rock fall that caused the continuous miner to be shut down prematurely further minimized the active mining on the owl shift. I find, based on credible testimony of the crew's maintenance and cleaning activities, and Consol's policy of washing equipment in the first two hours and, again, in the last two hours of a shift, that when the owl crew began cutting coal at 4:05, the section and equipment were clean of coal and oil accumulations. Therefore, I further find that the accumulations at issue on the haulageways and equipment occurred between 4:05 and sometime prior to 7:50, rather than two, three, or four days earlier, as the Secretary suggests.

Fowler and Ruble both attested to having observed coal and oil accumulations in the cited areas, but gave significantly conflicting accounts of the nature of the accumulations. The Secretary holds the view that Fowler cited impermissible accumulations that had existed for several days, whereas Consol challenges Fowler's assessment of the extensiveness and duration, contending that the accumulations constituted permissible spillage incidental to the normal mining cycle on the midnight shift. Recognizing that the Secretary bears the ultimate burden of proof, and that the resolution of the issue in controversy involves a question of degree, the Secretary's evidence falls short of establishing that the accumulations were in violation of section 75.400.

Fowler took no measurements of the coal accumulations in any of the areas that he cited on the section, but made rough estimates. He was asked to describe in great detail, from sheer memory alone, except for review of the citation, itself, events that took place a year earlier.

When Perkins conducted his pre-shift examination of the section between 4:30 and 5:15, the crew had only been actively mining since 4:05. Given my finding that mining commenced on a clean section, Perkins' testimony, that he observed no coal or oil accumulations at the feeder or coal accumulated along the ribs or adjacent intersection, is reasonable and wholly credible. I also fully

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<sup>4</sup>Consol points to several instances in which Fowler acknowledged that his memory was not clear (see Tr. 85-86, 90-91, 97-98, 109). Resp. Br. at 24. I agree, as Consol points out, that given the absence of inspection notes and the Secretary's election not to call inspector trainee Garnee Deel as a witness, Fowler's testimony should be viewed with a critical eye. Resp. Br. at 15.

credit his testimony that the continuous miner had been washed a second time before being operated in the number 4 entry, that active mining did not commence in that entry until after his pre-shift exam had been completed, and that he observed no coal accumulations in the crosscut between the number 3 and 4 entries.

Perkins and Ruble's testimony establish that the section was damp from washing equipment during the owl shift, especially at the feeder where water tended to collect due to a slight grade in the number 3 entry. The shuttle cars tracked the water back and forth throughout the entry and, at least some of this very soft, rutted, black bottom could have been mistaken for coal accumulations, most notably at the feeder and the adjacent intersection where the shuttle cars change out. See Tr. 145, 155, 194-97, 227-28, 234-36. Even Fowler acknowledged that the soft bottom on the section can become rutted, and did not deny that it was comprised of dirt or rock, rather than coal. Tr. 92. He also acknowledged that shuttle cars traveling through the section during production tend to be overloaded and spill. Tr. 61. He also stated that feeders and miners "most always" have coal on them. Tr. 118. Furthermore, Fowler, himself, minimized the nature of the hydraulic oil accumulation, by admitting that he had included it in the citation in order to light a fire under Consol to get a previously ordered part that would fix the problem.

Tr. 63. Again, given the limited amount of mining that occurred that night, the fact that the Secretary has not refuted that a second cleaning and rock dusting occurred before the end of the shift, and because the area cited at the feeder -- soft, damp and rutted -- was the dumping point and change-out area for the overloaded shuttle cars coming from the face, I conclude that the coal accumulations in the number 3 entry amounted to permissible spillage incidental to the normal mining. Therefore, the Secretary has not established that an impermissible accumulation of coal and float coal dust was present on the section.

Likewise, Ruble's testimony respecting the crosscut between the number 3 and 4 entries and the loading point in the vicinity of where the continuous miner had been operating in the number 4 entry before the rock fall, and the drag-off caused by the loaded shuttle cars passing under the check curtain, was compelling and un rebutted. Fowler, himself, even testified that some of what he observed was spillage from loading the shuttle cars. Tr. 91. The owl crew had been producing coal immediately prior to the inspector's arrival on the section until the rock fall on the continuous miner. Tr. 111-12. The miner had been removed from the hazardous area and was in the process of being repaired. The evidence supports a conclusion that the coal was incidental to the normal mining cycle on the shift that night. Accordingly, I conclude that the Secretary has failed to prove by a preponderance of the evidence that an impermissible accumulation of combustible materials existed on the section at the time of inspection and, therefore, no violation of section 75.400 has been established.

#### **B. Citation No. 6624108**

Inspector Fowler issued Citation No. 6624108, charging an S&S violation of section 75.360, after observing several allegedly hazardous conditions on the section which had not been

reported in the pre-shift exam book for correction.<sup>5</sup> The citation further charges that the condition was “reasonably likely” to cause an injury that could reasonably be expected to result in “lost workdays or restricted duty,” and was caused by Consol’s “high negligence.” The “Condition or Practice” is described as follows:

An adequate preshift examination was not conducted on the “O” Panel section for the day shift on this date. The following conditions were observed on the working section with no corrective action being taken: [t]he coal ribs present in the No. 2 entry were not being adequately controlled or supported to prevent persons from hazards related to falls of rib in four different locations. The inby corners located in areas where battery charging stations were installed and where a stopping was being installed were loose and hanging. Persons were observed working in the vicinity of the loose coal ribs and no corrective action was being taken. In one area a temporary support that had been previously installed had been removed and was lying next to the loose and hanging rib. Dates, times, and initials were present in all areas to indicate a preshift examination of the areas had been conducted.

Accumulations of combustible material such as loose coal and float coal dust and hydraulic oil were present in areas cited on citation 6624105.

No record of the hazardous conditions was recorded in the preshift examination record book.

Ex. G-2; see Ex. G-3.

**1. Testimony**  
**a. David Fowler**

Fowler issued Citation No. 6624108 based on Perkins’ failure to report in the pre-shift examination record the coal, float coal dust, and hydraulic oil accumulations Fowler cited in

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<sup>5</sup>Notwithstanding Inspector Fowler’s specification of section 75.360(f) as the subsection violated, the Secretary alleges a violation of 30 C.F.R. § 75.360(a)(1), which requires, in pertinent part, the following:

[A] certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground. No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval. The operator must establish 8-hour intervals of time subject to the required preshift examinations.

Sec’y Br. at 14; see Tr. 121.

Citation No. 6624105, and the adverse rib conditions for which he issued Citation No. 6624107. See Tr. 77-79. He testified about his observations and conditions he considered to be hazardous in the number 2 entry:

I observed loose ribs, a cracked rib. A lot of it had fallen off the areas that weren't supported within the required plan, but I didn't cite the plan. I cited not controlling the roof in these specific locations.

These locations are typical locations that I have discussed with mine management several times. There were problem areas.

The design of the pillar created a point on the pillar -- due to the massive weight and everything in the mine of -- these corners had a tendency to break and roll off. And it's a common place to look for areas where the ribs could be rolling off, or fractured, broken ribs.

Tr. 45-46. He further testified that four crosscuts were involved, that a miner was performing maintenance on the left roof bolter in one area where temporary supports had fallen out and were laying on the mine floor, and that in the last crosscut, where the owl crew was in the process of constructing a stopping, one of the corners had a broken rib and the roof was sagging. Tr. 47-48. In his opinion, the adverse rib conditions had existed over an extended period of time because of tools, toolboxes and other items sitting atop the fallen material, old rock dust, and footprints that he attested to having observed in it. Tr. 47-49. According to Fowler, although the miner performing maintenance was unable to explain what had happened to the temporary supports, he told Fowler that they had been there most of the shift. Tr. 50-51. Fowler also stated that he thought that he may have asked Ruble why miners would be assigned to install the stopping under bad rib conditions. Tr. 51-52. Finally, Fowler explained that failure to report these conditions, with miners working in the area, amounted to an inadequate pre-shift examination, that the mine had a history of these violations, and that Consol had given additional training to its foremen in order to terminate several of them. Tr. 54-56. As to the coal and hydraulic oil accumulations Fowler attested to having observed in the number 3 and 4 entries, Fowler opined that they had been present at the time Perkins conducted his pre-shift exam, "[d]ue to the area involved and the quantity that was laying on the mine floor." Tr. 79. He explained that he had designated the violation S&S because roof, rib, and fire hazards could reasonably be expected to cause severe injuries, i.e., "a broken bone, bruises, or whatever," even death. Tr. 80. Fowler also testified that failure to at least alert the oncoming crew of the hazardous conditions was highly negligent. Tr. 81.

#### **b. Richard Perkins**

Perkins conducted his pre-shift examination between 4:30 and 5:15 on the morning of November 2. He testified that he started in the number 1 return entry, examined all four entries and crosscuts, and that he checked for "ventilation, good ventilation; CH<sub>4</sub>, which is methane; and CO; and oxygen. And also . . . for hazards -- rough bolts that might be shot off, wide in places; bad ribs; bras-a-hanging." Tr. 147-49. He stated that he did not observe any bad rib conditions on the section, particularly at the crosscuts where the crew was building a partial stopping, the dinner hole, or at the battery charger. Tr. 147, 149; Ex. R-2 at J, K, L. He further testified that he did not

observe any timbers that had been knocked out. Tr. 150, 168; Ex. R-2. He explained that the owl maintenance crew was working on the left-side roof bolter, had removed three covers and propped them up against a rib, and that each cover measured 5 feet long, by 2 feet wide. Tr. 150-51. He acknowledged that he was unable to see the rib behind the roof bolter covers. Tr. 180-81.

Perkins' description of his observations on the right side of the section, entries number 3 and 4, has been fully set forth respecting Citation No. 6624105. He asserted that he did not see loose coal, float coal dust, or hydraulic oil accumulations at the feeder and the adjacent ribs and intersection, or coal accumulations in the crosscut between entries number 3 and 4. Tr. 153-55, 184-85. He noted that no shuttle cars were parked in the number 3 entry while he was examining the entry. Tr. 155. The continuous miner was parked in the number 3 break when he passed through the number 3 entry, and mining had not yet begun in number 4. Tr. 153. He opined that rib conditions on the section "could change in one minute." Tr. 156; see Tr. 178-79, 194.

### **c. Archie Ruble**

Ruble acknowledged that he observed the areas of bad ribs in the number 2 entry, as well as a fallen timber cited by Fowler in the area where the roof bolter was being repaired, although he could not say when the conditions had occurred. Tr. 203-05, 209. He stated that the covers had been put back on the roof bolter and that the crew was beginning to clean the area. Tr. 205, 248-51; Ex. G-10 at J. Ruble stated that no one was at the partial stopping when the inspection team came through the entry. Tr. 206, 251-52; Ex. G-10 at L. According to him, another corner cited, outby the block across from the battery charger, was wide from a permanent support and not very noticeable. Tr. 206-08, 247; Ex. G-10 at J. When asked whether he saw any bad ribs in the fourth location cited, a corner by the dinner hole, Ruble responded that he did not. Tr. 208; Ex. G-10 at B. He opined that normal air current in the entries can cause corner deterioration, as well as water pressure, contact from equipment, and roof pressure. Tr. 209-10. Ruble also explained that in high rib areas, such as where the partial stopping was located, rib conditions can change drastically and very quickly from one examination to the next. Tr. 210-11. Overall, he expressed his view that the rib conditions may not have existed during Perkins' pre-shift examination, but if they were present, they were insignificant and not readily noticeable, especially in areas where men were working. Tr. 210-11, 231.

## **2. Fact of Violation**

As previously stated, the Secretary must prove by a preponderance of the evidence that the operator violated one of her safety standards. *Keystone*, 17 FMSHRC at 1838.

A violation of section 75.360 occurs when hazardous conditions are not recorded in the pre-shift record book. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 14 (Jan. 1997) (stating that section 75.360 "requires that a preshift examiner 'examine for hazardous conditions.'"); *see also generally Nat'l Mining Ass'n v. MSHA*, 116 F.3d 520, 539-40 (D.C. Cir. 1997) (upholding the validity of 30 C.F.R. 75.360 and discussing the regulation's emphasis on identifying current hazardous conditions). However, there is no violation where the hazardous condition did not exist at the time of the pre-shift examination. *Jim Walter Res., Inc.*, 29 FMSHRC 212, 226 (Mar. 2007) (ALJ).

The purpose of the pre-shift examination is to “prevent loss of life and injury” resulting from hazards at 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 Commission has long recognized that “[t]he preshift examination requirement ‘is of fundamental importance in assuring a safe working environment underground.’” *Enlow Fork*, 19 FMSHRC at 15 (quoting *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995)).

I have credited Consol’s account of the “O” Panel section layout, and made findings that the section was clean of accumulations when active mining began at 4:05, and that any accumulations found on the section occurred between 4:05 and sometime prior to the inspection team’s 7:50 arrival on the section.

The Secretary alleges that the hazardous rib conditions in the number 2 entry and coal and oil accumulations on the right side of the section were present during Perkins’ pre-shift examination because of evidence that the conditions had existed prior to the midnight shift. Fowler’s account of what he observed, however, without corroboration, is particularly suspect, because of inconsistencies in his ability to recall some important details of his inspection. His accounts of how long the accumulations had existed at the feeder and on the continuous miner were vague. Tr. 44-45. He could not remember the location of the water sprays on the feeder. Tr. 108-09. He was unclear as to whether the miner was energized while it was being repaired. Tr. 87-88. He was unable to recall where he took the air reading behind the line curtain in the vicinity of the continuous miner. Tr. 90. He had a problem remembering the location where the miner cable ran from the power center up the number 3 entry and into the crosscut between entries 3 and 4. Tr. 97-98. Even more troubling is his inability to recall having inspected the same section just two days prior, especially in light of his opinion that some of the alleged hazards pre-dated that prior inspection. Tr. 85-86. As was discussed fully above, Fowler did not have the benefit of actual measurements or his own inspection notes, and did not review Deel’s inspection notes prior to testifying. Tr. 84-85. Also, as has been previously emphasized, Deel’s notes and/or his testimony would have been helpful in establishing the circumstances surrounding the allegations.

The evidence establishes that the active working section had been cleaned extensively prior to active mining, which had only begun 25 minutes prior to when Perkins began his pre-shift exam at 4:30. Perkins testified credibly that he examined the areas cited, and did not observe any bad ribs or fallen timber. This testimony is bolstered by Perkins’ handling of a hazard that he had encountered during his earlier on-shift exam -- the wide place in the number 2 break -- for which he had a crib built and timbers set. It is reasonable to assume that he would have acted similarly had he encountered the rib conditions that he has been charged with overlooking. The Secretary has not rebutted that rib conditions can change suddenly and drastically, especially in very deep mines such as Buchanan No. 1. The evidence in its entirety only establishes that the rib conditions observed by Fowler and Ruble, some not readily apparent in Consol’s view, existed at the time of inspection -- some three hours after Perkins’ had completed his pre-shift examination -- but not that they were present when Perkins examined the number 2 entry. I am unwilling to conclude, without more, based on Perkins’ failure to examine behind the roof bolter covers, that the ribs had rolled at that time, or that Perkins’ overall pre-shift examination was lacking. The Secretary’s account of events has simply not been supported by the evidence in its entirety.

The Secretary has also failed to prove that Perkins neglected to report coal, float coal dust, or hydraulic oil accumulations on the right side of the section or on its equipment as a result of his pre-shift examination. Perkins gave credible testimony that he did not observe the alleged accumulations while he was conducting his pre-shift exam, and I credit Ruble's testimony that the accumulations observed during Fowler's inspection were fresh and appreciably less extensive than alleged by the Secretary. This conclusion is consistent with my finding that mining began at 4:05 on a clean section, as well as credible evidence that mining in number 4 did not commence until after Perkins had already examined the entry. Therefore, I find that coal and oil accumulations were not present during Perkins' pre-shift examination, and it must be concluded that no violation of section 75.360 occurred.

**ORDER**

Accordingly, it is **ORDERED** that Citation Nos. 6624105 and 6624108 are **VACATED**, and this case is **DISMISSED**.

Jacqueline R. Bulluck  
Administrative Law Judge

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