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January 25, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 2008-751
Petitioner	:	A.C. No. 46-01433-143260
	:	
v.	:	
	:	
	:	
CONSOLIDATION COAL COMPANY,	:	Loveridge No. 22
Respondent	:	

DECISION

Appearances: John Strawn, Esq. and Jennifer Klimowicz Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, on behalf of the Petitioner; Todd C. Myers, Esq. and Rebecca J. Oblak, Esq., Bowles Rice McDavid Graff & Love LLP, Lexington, Kentucky and Morgantown, West Virginia, respectively, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon the petition for a civil penalty filed by the Secretary of Labor ("Secretary") pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301 et seq. (the "Act") charging Consolidation Coal Company ("Consol") with seven violations of mandatory standards and seeking civil penalties of $49,600.00 for those violations. The general issue before me is whether Consol violated the cited standards as charged and, if so, what is the appropriate civil penalty to be assessed for those violations. Additional specific issues are addressed as noted below.

Order Number 7099399

This order, issued pursuant to section 104(d)(2) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R §75.400 and charges as follows[1]:

[1] Section 104 (d) of the Act provides as follows:

(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such

> Combustible materials in the form of loose coal, coal fines and coal dust is allowed to accumulate on the mine floor and along the coal ribs of the 9-South, 058-0 MMU section from SS# 3/115 to SS# 3/116. The combustible materials are powder dry. The combustible materials measured as follows: (1) The accumulations along the right rib of the #3 entry measured 6 to 12 inches deep by 18 to 24 inches wide by 165 feet in length. (2) The accumulations along the left rib of the #3 entry measured 6 to 14 inches deep by 23 to 44 inches wide by 165 feet in length. (3) The accumulations along in the haulroad from SS# 3/115 to SS# 3/116, located in the #3 entry, measured 1 to 6 inches deep by 165 feet in length. This condition is obvious, extensive and the preshift examiner should have known of this condition. The mine operator was previously put on notice for the same type of condition. The mine operator has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard.

The cited standard provides 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 diesel-powered and electric equipment therein."

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violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1) a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

On October 24th, 2006, Inspector Ronald Postalwait of the Department of Labor's Mine Safety and Health Administration ("MSHA") inspected Respondent's Loveridge No. 22 Mine as part of a five day spot inspection for methane pursuant to section 103(i) of the Act. The mine is a large underground coal mine and, at the time of inspection, released in excess of one million cubic feet of methane each day. Upon arrival, Postalwait reviewed the preshift examination book to ascertain the conditions recorded by the examiners. He then entered the mine at approximately 8:00 a.m. and traveled to the 9 South Mains section accompanied by United Mine Workers of America ("UMWA") Safety Committee representative Tanya James and by Respondent's safety representative Wayne Conaway.

Once on the section, Postalwait proceeded to the faces to conduct spot checks for methane. While traveling between the No. 1 and No. 3 entries, he observed what he considered to be an accumulation of coal in the No. 3 entry. The No. 3 entry was used as a haul road by shuttle cars transporting coal mined at the face by the continuous miner to the permanent belt. The material had not been recorded in the preshift book. Postalwait determined that the accumulation against the ribs had been created by the initial mining process rather than by rib sloughage or spillage from shuttle cars. The coal had not been cleaned up and was left stacked against the ribs.

According to Postalwait, the accumulation consisted of loose coal, coal fines, and coal dust and was dry and black. Along the right rib he found the accumulation measured 6 to 14 inches deep, 23 to 44 inches wide, and 165 feet in length. In the center of the entry in the haul road, he found the accumulation to be from 1 to 6 inches deep for 165 feet. James assisted Postalwait in measuring the accumulation. I find that these observations by Inspector Postalwait to be fully corroborated by James, and that this has established by a preponderance of evidence that a substantial coal accumulation existed in the No. 3 entry and that the Secretary has sustained her burden of proving the violation as charged.

In reaching this conclusion, I have not disregarded Respondent's claim that the accumulation was not as large as the inspector described. However, neither the section foreman, Brandon Simpson, nor Conaway protested to Inspector Postalwait at the time he issued the order that they disagreed with his observations. Indeed, when Postalwait showed Simpson the accumulation, and stated that he was issuing an order, Simpson did not dispute the existence of the accumulation or that it was a violation. Simpson said only that he would have the accumulation cleaned up. Moreover, both Respondent's witnesses conceded at trial that in fact there was an accumulation in the area cited and Conaway admitted that he could not dispute the inspector's measurement of the length of the accumulation.

The Secretary argues that the violation was also "significant and substantial." A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), the Commission

explained:

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

See also Austin Power Co. v. Sec'y, of Labor 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury. *U.S. Steel Mining Co.,* 6 FMSHRC 1834, 1836 (Aug. 1984), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. *U.S. Steel Mining Co., Inc.,* 6 FMSHRC 1573, 1574 (July 1984); *see also Halfway, Inc.,* 8 FMSHRC 8, 12 (Jan. 1986); *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-917 (June 1991).

The credible testimony establishes a reasonable likelihood of a fire occurring because the coal accumulation was extensive and ignition sources were present. As previously noted, an accumulation of coal extended 165 feet in the No. 3 entry along both ribs and in the haul road in the center of the entry. The ignition sources present in the accumulation were the trailing cables of the electric face equipment and the electric and battery powered shuttle cars operating in the haul road.

Damage to the electrical components of the cables or the shuttle cars could cause them to ignite the coal. The 995 volt trailing cable for the continuous miner was laying in the accumulation and was covered by the coal for approximately half its length. The 600 volt trailing cable for the loading machine was also laying in the accumulation and was covered by the coal for approximately half its length as well. Shuttle cars on the roadway traveled directly through the accumulation. They could create sparks either from their own trailing cables, if AC powered, or from their batteries if DC powered.

As noted, the evidence shows that damage to the electrical components could occur in several ways. The trailing cables could be damaged by being pulled tightly around corners or by being run over by mobile equipment such as shuttle cars. The ensuing damage to the internal conductors is not always apparent from looking at the external cable jacket. Damaged internal conductors can cause an arc which creates sparks and heat sufficient to ignite coal accumulations. Indeed, Postalwait had seen coal ignited by arcs created by trailing cables. Batteries in DC powered shuttle cars can also be damaged or simply have a component fail and create sparks which can ignite coal.

The characteristics of the coal in the accumulation also heightened the risk of a fire. Postalwait took samples of the material in the accumulation which were analyzed and found to have a very high combustible content, *i.e.* only 22% to 25% incombustible content. Moreover, the accumulation was composed largely of dry fine coal, which the record shows is easier to ignite.

The likelihood of a fire occurring was also increased because of the time the condition was allowed to exist. According to the credible testimony of Postalwait and James, the accumulation existed for more than one shift and had not been reported in the preshift examination. No one was attempting to clean up the coal when it was discovered by the inspector. In the course of continuing mining operations it may reasonably be inferred that the accumulation would have remained in place with the ignition sources present and that a fire was therefore reasonably likely to occur. *See Enlow Fork Mining Co.*, 19 FMSHRC 5, 9 (Jan. 1997); *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988).

The fourth prong of the *Mathies* test requires the Secretary to establish that the injury from an occurrence will be of a reasonably serious nature. The extensive accumulation of coal cited herein presents a significant amount of fuel for a fire. The Loveridge No. 22 Mine is a gassy mine and a fire could result in an explosion. It may therefore be inferred that serious injuries such as from smoke inhalation would be reasonably likely to occur. The record shows that during normal mining, 10 miners would be exposed to serious injuries including two roof bolters, the miner operator, ventilation tube man, loader operator, shuttle car operators, and others who worked inby the accumulation and would be forced to evacuate in the event of a fire. It may reasonably be inferred that miners attempting to fight a fire would also be exposed to serious injuries.

In reaching these conclusions, I have not disregarded Respondent's argument that a fire was less likely to occur because its ventilation plan provides for watering roadways as they are used by mobile equipment and that its preshift/onshift reports show watering was performed in Entry No. 3. However, Respondent was apparently not following its plan in Entry No. 3 because records show that it was dry when Postalwait and James first observed it. They both also testified that the accumulation was dry throughout its entire depth. Furthermore, Respondent's preshift/onshift reports do not specify where the Respondent watered in the Entry No. 3 or even how close they came to the accumulation. Finally, Respondent has demonstrated a pattern of failing to water its haul roads in that it had been previously cited for failing to water its haul roads. James also testified credibly that the union had previously reported to management to complain that the haul roads were not being watered down.

The Secretary further maintains that Respondent's negligence was high and its violation was an "unwarrantable" failure to comply with the regulation. Unwarrantable failure involves aggravated conduct constituting more than ordinary negligence. *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (quoting *Emery Mining Corp.*, 9 FMSHRC 1997, 2001, 2004 (Dec. 1987)). This Commission has held that an unwarrantable failure may be established by showing that a violative condition or practice was not corrected prior to the issuance of a citation or order because of "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Buck Creek*, 52 F.3d at 136; *Emery Mining*, 9 FMSHRC at 2003-04. In analyzing an unwarrantable failure

violation, the Commission looks at all the facts and circumstances to see if any aggravating factors exist. The Commission has held that the length of time that the violation existed, the extent of the violative condition, whether the operator was placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation are all relevant to an operator's aggravated conduct. *IO Coal Company, Inc.,* 31 FMSHRC 1346, 1351 (Dec. 2009); *Lopke Quarries, Inc*., 23 FMSHRC 705, 711 (July 2001).

I find that the credible evidence in this case demonstrates that Respondent in fact engaged in aggravated conduct and high negligence. The credible evidence shows that the coal accumulation was obvious, extensive, and posed a high degree of danger to miners. It had also existed for a significant length of time and despite being on notice to prevent such violations from occurring, Respondent took no step to address the accumulation.

The testimony at trial established that the coal accumulation was obvious and extensive. Postalwait and James could see the accumulation before they reached it. The accumulation was black and stood out from the white rock dusted ribs. The loose coal, coal fines, and coal dust also extended over 165 feet along both ribs in Entry No. 3 and in the center of the roadway.

The inspector also determined that the accumulation had existed for some duration. When coal is initially mined it is wet or damp. The accumulation, however, was dry throughout to the mine floor. According to the inspector, it would have taken at least two shifts to have dried out to that extent. James corroborated Postalwait's determination and stated further that the accumulation could not have formed in one shift.

Respondent had also been placed on notice that greater efforts were required to comply with the regulation. Postalwait had previously cited Respondent for violations of 30 C.F.R. § 75.400 in the same section and had also admonished Respondent's management about the need to make greater efforts to comply with the regulation. The record shows that Respondent had 108 violations of the cited regulation which became final orders in the 12 months prior to the issuance of the subject order.

The accumulation also posed a high degree of danger to miners because of the threat of a mine fire. Despite that danger, no one was cleaning the accumulation when Postalwait first observed it and the condition had not even been reported in the preshift examination. *See Consolidation Coal Co., 23 FMSHRC 588, 594 (June 2001); Windsor Coal Co.*, 21 FMSHRC 997, 1001-04 (Sept. 1999).

Within the above framework of credible evidence, I find that the Secretary has met her burden of proving that the violation was the result of Respondent's unwarrantable failure and high negligence.

Order Number 7099401

This order, also issued pursuant to section 104(d)(2) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R §75.360(a)(1) and charges as follows:

> The pre-shift examination for methane and hazardous conditions that was conducted on October 24th, 2006, for the day shift crew on the 9-South, 058-0 MMU is inadequate in that the following conditions were observed by this inspector. Refer to the following violations for the conditions found: (1) Violation number # 7099399 issued on October 24th, 2006. (2) Violation# 7099400 issued on October 24th, 2006. The listed conditions would be obvious to any prudent person especially an examiner charged with the responsibility of conducting an examination of the mine. The mine operator has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard. Eleven violations have been issued under section 75.360(a)(1) of the 30 CFR at this mine since July 10th, 2006.

The cited standard, 30 C.F.R § 75.360(a)(1), provides as follows:

> Except as provided in paragraph (a)(2) of this section, a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8 hours 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.

Inspector Postalwait opined that the preshift examination for the day shift on October 24th, 2006, was inadequate because it failed to record hazardous conditions *i.e.* a large accumulation of coal of over 165 feet in the roadway and along both ribs of the No. 3 Entry in the 9 South Mains section of the mine. As previously discussed in connection with Order No. 7099399, the incombustible content of the accumulation was also low and there were potential ignition sources present.

The preshift examination for this area was performed between 5:00 and 7:00 a.m. on October 24th, 2006, by Rod Cummings, the section foreman on the preceding midnight shift. Cummings had called out his report to the surface at 7:20 a.m. before he exited the mine. Simpson, as the oncoming shift foreman, received the call. The day shift began at 8:00 a.m. and there was no production on that shift prior to the order being issued. The preshift report does not list any of the hazardous conditions described in the order.

It may reasonably be inferred that the accumulation existed at the time of the preshift examination based on Inspector Postalwait's observations during his inspection and the admissions by Respondent's witnesses. Postalwait found that the coal was dry throughout the accumulation to the mine floor and, based on his experience, opined that it would have taken at least two shifts to have dried to that extent from its initial mining. He further opined that the accumulation was created in the initial mining process and not by spillage from shuttle cars or rib sloughage. Union Representative James agreed with Postalwait that the accumulation had existed for more than one shift and added that an

accumulation of that magnitude could not have been formed in one shift.

The testimony of Respondent's witnesses at trial also establishes that the accumulation was present during the preshift examination. Company representative Conaway testified that Foreman Simpson told him that he was aware of the accumulation when he informed Simpson of the order. In addition, Simpson himself testified that the miner could advance 25 feet in a shift. Based on that distance, it would have taken several shifts for the miner to create the cited 165 feet of accumulation. Under the circumstances, I find that the violation has been proven as charged.

In reaching this conclusion, I have not disregarded Respondent's argument that since there is no dispute that a preshift examination was conducted for the day shift on October 24th, 2006, there was no violation as charged. It is arguing, in effect, that a preshift examination meets the requirements of the cited standard even if the examiner overlooks or ignores extant hazardous conditions. Such an "examination" would, of course, be useless or worse than useless because it would create a false sense of safety.

Indeed, the Commission has determined that preshift examinations are fundamental in assuring a safe work environment for the miners. *Enlow Fork Mining Co.,* 19 FMSHRC 5, 15 (Jan. 1997); *Buck Creek Coal Co.,* 17 FMSHRC 8, 15 (Jan. 1995). " The preshift examination is intended to prevent hazardous conditions from developing." *Id*. The preshift examiner must look for all conditions that present a hazard. *Id*. at 14. Given the obvious nature of the violation herein, I find that a reasonably prudent person, familiar with the mining industry and the protective purpose of the safety standard herein, would have recognized that this hazard needed to be recorded in the preshift examination book. *Utah Power & Light Co.,* 12 FMSHRC 965, 968 (May 1990) *aff'd* 951 F.2d 292 (10th Cir. 1991). Accordingly, I find Respondent's argument herein to be without merit.

The Secretary maintains that the violation was also "significant and substantial." I find that the miners were exposed to a serious hazard due to Respondent's failure to record the accumulation in the preshift examination. The miners on the oncoming day shift were not alerted to the presence of the dangerous accumulation. As previously discussed, the coal accumulation was located in the roadway and along the ribs with several ignition sources present, *i.e*. the trailing cables of the electric face equipment and the electric and battery powered shuttle cars operating in the haul road.

The risk of a mine fire was also heightened because of the high combustible content of the accumulation, the small coal particle size, and its dryness. The likelihood of a fire occurring was further increased due to the length of the time the condition was allowed to exist. If mining operations were allowed to continue, the accumulation would have remained in place unreported with the ignition sources present. A fire was reasonably likely to occur under the circumstances with the reasonable likelihood of serious injuries. The violation was therefore "significant and substantial" and of high gravity.

The Secretary also argues that the Respondent's failure to record the hazards constituted an unwarrantable failure to comply with the regulation, noting that Respondent's examiners are its agents and their failure to report the accumulation is properly imputed to Respondent. The accumulation was certainly obvious because of its size. It also presented a high degree of danger to miners because of the

threat of a mine fire. Most significantly, Conaway testified that foreman Simpson admitted to him that he was aware of the accumulation when he informed him that the order had been issued.

I find that Respondent was also on notice that it had to improve on its preshift examinations. Respondent was cited for 11 violations of 30 C.F.R. 75.360(a)(1) in the three months before the issuance of the subject order. In addition, eight violations of the regulation became final orders in the 12 months prior to the order being issued. Further, I find that Respondent's examiners should have exercised a heightened vigilance to find and report accumulations based on the number of prior 30 C.F.R. § 75.400 violations. Respondent had 108 violations of 30 C.F.R. § 75.400 which became final orders in the 12 months prior to the issuance of the subject order. Significantly, Inspector Postalwait had previously cited Respondent for 30 C.F.R § 75.400 violations in the same section and had also admonished Respondent's management about the need to make greater efforts to comply with the regulation and that they might be subject to "section 104(d)(2)" orders for future violations. Under the circumstances, I agree that the violation was the result of Respondent's unwarrantable failure and high negligence.

Order Number 7100170

This order, also issued pursuant to section 104(d)(2) of the Act, as amended, alleges a violation of the standard at 30 C.F.R §75.400 and charges as follows:

> An investigation was conducted on November 20, 2006 pertaining to a 103(g) complaint filed by miners. The allegation is that the 14CM12 miner, approval #2G-3737A, operating on the 058-0 MMU, 9 South Mains Section has the oil tank leaking and was placed back into service prior to the leak being repaired. An inspection of the miner reveals that hydraulic oil is leaking from the hydraulic oil tank compartment on the inside of the conveyor. Four holes in the right side wall of the conveyor decking indicate that oil is leaking from the hydraulic oil tank into the conveyor. Oil was also flowing in a steady steam from the hydraulic manifolds for the satellite frame on both sides of the miner. The vertical 3/8" covers on the right side near the hydraulic pump motor are hot to the touch. Hydraulic oil is also leaking from the hydraulic cross-over hose from the valve bank in the operator's compartment to the opposite side of the machine. These conditions have created an accumulation of combustible material in the form of hydraulic oil covering areas beneath the covers on both sides of the machine, and along the cat frame and vertical covers along both sides of the machine and in the operator's compartment. These conditions were brought to the management's attention and management stated that the leak would be repaired before the miner is put back into service. The miner was returned to service on the Day Shift on Thursday November 26, 2006. Maintenance records indicate that repairs have been made to

> correct hydraulic leaks, but efforts have not been effective. This is an unwarrantable failure to comply with a mandatory standard, and constitutes more than ordinary negligence, by placing the miner into service prior to repairing the leaking oil tank.

On November 9th, 2006, MSHA Inspector Jeremy Ross inspected the left side of the 9 South Mains section of the subject mine, as part of a regular quarterly inspection. UMWA walkaround representative Timothy Cox and Respondent's representative Wayne Conaway accompanied Ross on the inspection. The continuous miner for the left side of the section was tagged out of service for oil leaks and repairs on the left side cutter drum. Ross saw that oil had leaked down both sides of the continuous miner, around the bolters, inside the operator's compartment, and on the deck. The continuous miner operator on the section, Richard Barnhart, told Ross that the miner had been "leaking oil pretty bad." Barnhart also stated that Respondent would put the miner back into service without correcting the leaks because there was a hole in the hydraulic tank which was a difficult repair. Conaway and Nathan Pratt, chief of maintenance and a second-level supervisor, assured Ross that Respondent would repair the leaks before putting the continuous miner back into service.

On November 17th, 2006, a "section103(g)" anonymous complaint was called in to MSHA's hotline. The caller reported that the left side continuous miner's oil tank was leaking and that it had been put back into service "last night" without being repaired. The complaint also stated that "maintenance told Ross it would be fixed before they put it back into service." Ross testified that the allegations in the hotline complaint were consistent with the statements made by Barnhart on November 9th.

On November 20th, 2006, MSHA Inspector Maxwell traveled to the mine to investigate the condition reported in the hotline complaint and to continue the mine's quarterly inspection. Robert Smith, who was an inspector trainee at the time, UMWA walkaround representative Timothy Cox, and Respondent's representative Wayne Conaway accompanied Maxwell on the inspection.

Maxwell and Smith testified that, as they arrived at the 9 South Mains working section, they immediately saw that the continuous miner was leaking a large amount of hydraulic oil. A steady stream of oil approximately a foot wide and 1/8 of an inch deep was cascading down each side of the continuous miner and had collected into a large pool on the mine floor. According to Maxwell, the oil flowing down the sides of the continuous miner was clear, indicating it had been in the system only briefly before leaking out. Oil was also leaking directly into the operator's compartment and had formed a pool on the compartment floor. Maxwell opined that the oil that had accumulated inside of the operator's compartment had been there for more than one shift as it had begun to coagulate into a thick sludge. In addition to the three obvious leaks on the outside of the continuous miner, oil was leaking from four holes in the hydraulic tank into the conveyor. According to Maxwell, the hydraulic oil used in the continuous miner is combustible but the temperature at which it is combustible was not known. He described potential ignition sources as the electric cables and components on the continuous miner.

When the inspection party arrived at the 9 South Mains working section, the continuous miner was in operation at the face and had already mined approximately four feet of coal. No one was working to correct the leaks . When the inspectors asked the operator to back the continuous miner into the entry so they could inspect it, it ran out of oil before they could get it out of the face.

Within the above framework of evidence, I find that the violation at issue has been proven as charged. However, the level of gravity has not been established by the Secretary. She conceded that injuries were "unlikely" and, since the evidence shows that the hydraulic oil at issue was of a slight flammability class, I can find but little gravity.

The Secretary maintains that the violation was the result of Respondent's high negligence. Based on the credible evidence that Respondent allowed obvious and extensive leaks on the continuous miner to go uncorrected for an extended period of time and allowed large amounts of hydraulic oil to accumulate, I must agree. Indeed the credible evidence shows that Respondent was aware that this continuous miner had multiple extensive leaks, yet failed to make reasonable efforts to correct the condition until after the current order was issued. Indeed there is no dispute that a large amount of oil was "pouring" out of both sides of the continuous miner and into the operator's compartment.

Credible evidence also shows that the leakage had continued through at least one onshift and preshift examination after it had been returned to service on Friday, November 17. Statements made to the inspectors by several miners working at the face during the November 20th inspection confirm that the continuous miner had been in service for several days prior to the inspection, despite the extensive leaks. The miners also told the inspection party that the continuous miner had been using an unusually high quantity of oil since being returned to service.

More particularly, Joe Jimmie reported to the inspection party that he operated the continuous miner on Friday, November 17th, 2006, the day it was put back into service. He stated that he put six to eight cans of hydraulic oil into the continuous miner, but was only able to mine 40 feet before it ran out of oil. Jimmie also stated on November 20th, that the continuous miner was "pretty much the same as it was last week" when he ran out of oil. Chuck Haught, section mechanic, also stated to Inspector Maxwell that they had been replacing hoses periodically, but there were two major leaks that they had not repaired before returning the miner into service - one in the hydraulic tank, and one in the operator's compartment. These statements at the time of the November 20th inspection are consistent with the allegation in the "section 103(g)" complaint, made at midnight on Friday, November 17th, that the continuous miner had been put back into service without being repaired. Both inspectors and Cox testified that the employees also stated they had reported the ongoing oil leaks to mine management. Nathan Pratt, Respondent's chief of maintenance, also testified that the continuous miner had been using more oil than normal and had leaks for a little more than a month prior to the issuance of the order at bar. Based on this credible evidence, it is clear that mine management therefore knew that the left side continuous miner had been leaking large amounts of oil for an extended period of time but failed to correct the leaks.

This evidence of Respondent's repeated failure to correct an obvious and extensive condition of which it was aware clearly justifies unwarrantable failure and high negligence findings. In reaching these conclusions, I have not disregarded Respondent's argument that reliance on the hearsay statements of miners is misplaced. However, I find that the alleged hearsay testimony in this case to have been reliable and probative. *See Mid-Continent Resources*, 6 FMSHRC 1132 at 1136 (May 1984). In this case, the statements made by the various miners during both the November 9th and November 20th, inspections and the "section 103(g)" complaint are consistent. They were also based upon each miner's personal knowledge of the condition of the continuous miner. The miners are also not parties to this litigation and it has not been shown that they have a direct stake in the outcome. Furthermore, the miners' statements were made in front of management witnesses. Respondent had every reason to challenge an inaccurate statement by the miners at the time but did not do so. Finally, the number of witnesses who heard the out- of -court statements and the fact that some had notes recording the statements, further adds to the accuracy of the statements.

Respondent also argues that this violation should not be designated as an unwarrantable failure because it engaged in a good faith effort to fix the continuous miner when it took it out of service prior to November 9th. However, even assuming, *arguendo*, that Respondent made a good faith effort to repair the continuous miner between November 9th and November 17th, this would not excuse running the miner for six shifts between November 17th and November 20th when it was leaking large quantities of oil without repairing it. Moreover, the evidence shows that Respondent did not make a good faith effort to fix the continuous miner prior to putting it back into service.

Respondent claims it knew the miner was leaking, but did not know where the leaks were coming from, despite their best efforts. However, Barnhart told Ross on November 9th, there was a leak in the hydraulic tank. The "section 103(g)" complaint called in on November 17th, also stated there was a leak in the hydraulic tank. Haught also stated to Maxwell that they were aware there was a hole in the hydraulic tank that they had not repaired when they returned the miner to service. In addition, when Inspector Maxwell terminated the order on November 22nd, it was after Respondent finally welded the hydraulic tank.

Order Number 7100364

This order, also issued pursuant to section 104(d)(2) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R § 75.400 and charges as follows:

> Combustible materials in the form of loose coal, coal fines and coal dust is allowed to accumulate along and under the 7-D longwall conveyor belt take-up roller at the inby end of the take-up storage unit to approximately 180 feet outby. The following conditions were found by this inspector: (1) Combustible materials along both sides of the inby end stationary take-up roller measured 20 to 22 inches deep by 3 feet wide by 6 feet in length . (2) Thirteen out of 18 bottom conveyor belt rollers are turning in

> combustible materials. The listed combustible materials range from 3 feet to 6 feet in width by 15 to 20 inches deep by 2.5 to 6 feet in length, these rollers are located in an area 180 feet in length. (3) The bottom conveyor belt is also turning in the listed accumulations. The listed combustible materials range from damp to powder dry, and the accumulations around the belt rollers are powder dry. This condition is obvious from the travelway along each side of the listed conveyor belt take-up storage unit. The mine operator has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard.

On December 3rd, 2006, Inspector Postalwait returned to the subject mine as part of the regular quarterly inspection. He was accompanied by Respondent's representative Eric Ernest, the oncoming foreman for the December 3rd, 2006, midnight shift, and by UMWA Safety Committee representative Karen Hooper. Postalwait testified that as soon as he entered the area of the conveyor belt drive, he immediately saw accumulations of combustible materials along 180 feet of the belt from the take-up storage unit outby. According to Postalwait the accumulations could be seen easily from both sides of the belt. He testified that he touched the coal and found it to be dry where it was packed around the bottom rollers and where the belt had been running in the accumulation. Postalwait initially observed the condition from the "tight side" or the "off side" of the belt, the side closest to the rib. After walking back along the walkway he found the accumulations to be even more obvious.

According to Postalwait, there were 19 separate piles of coal, around the takeup unit and 18 bottom belt rollers over the 180 feet of belt. He testified moreover, that the stationary takeup roller had up to 22 inches of coal accumulations around it and on either side of the storage takeup unit. He testified that of the 18 conveyor belt rollers along the 180 feet of belt, all had accumulations of coal underneath them. The coal measuring from three to six feet wide, two and one half to six feet in length, and 15 to 20 inches deep, some of which was packed around 13 of the bottom rollers. The 13 rollers had been turning in the coal and the bottom belt conveyor had also been running in the accumulations. Postalwait thought the scraper had not been working properly and allowed small particles of coal residue to remain on the bottom of the belt. The coal particles were being knocked off the belt where they contacted the bottom rollers and they had accumulated over an extended period of time. I find Postalwait's testimony credible and that his observations clearly support a violation as charged.

Respondent has argued that the only accumulation underneath the longwall conveyor belt was mud and water. With Postalwait's 19 years of underground mining experience and his additional experience with MSHA, I am satisfied that he has the expertise to know the difference between coal and non-coal material. I therefore give his testimony the greater weight and find that Respondent, indeed violated 30 C.F.R. § 75.400 by allowing combustible materials to accumulate under the longwall conveyor belt.

The Secretary maintains that the cited accumulations of coal along and underneath 180 feet of the 7-D longwall belt constituted a "significant and substantial" violation of the cited standard. I find that the first and second prongs of the *Mathies* test are both easily met. As noted, the extensive

accumulations cited by Postalwait were a violation of the cited standard. I further find that the credible evidence demonstrates that this condition contributed to a discrete safety hazard in the form of a belt fire hazard on the 7-D longwall belt. I find that the Secretary has also established that there was a reasonable likelihood that the hazard contributed to would result in an injury of a reasonably serious nature under continued normal mining operations. As previously noted, I have found that there were extensive accumulations of combustible materials at 19 separate points along 180 feet of the 7-D longwall belt. Moreover, I find that these accumulations were in direct contact with multiple ignition sources. The bottom conveyor belt was running in the accumulations and 13 out of the 18 bottom rollers had accumulations packed around them. Friction between these potential ignition sources and the accumulations had already heated and dried out several inches of the coal fines and coal dust in contact with them. Respondent does not dispute that rollers turning in accumulations are a hazard, and should be corrected immediately. Indeed, its expert witness, Dr. Pramod Thakur, testified that a defective roller or misaligned belt could cause an ignition of a coal accumulation.

The expert deposition testimony of Michael Hockenberry also fully corroborates the testimony of Inspector Postalwait that there had been enough frictional heating between the coal accumulations and the rollers and belt to dry out the contacted accumulations. Hockenberry further opined that the longer the frictional heating continued, the greater the likelihood of a fire. Hockenberry also agreed that accumulations composed of fine particles of coal also increased the likelihood of a fire because small particles are easier to ignite.

Within this framework of credible evidence, including the extent of the accumulations, the numerous ignition sources from the 13 encased rollers, the belt running in coal and frictional heating by drying out the accumulations nearest to the rollers and belt, it is clear that a belt fire was reasonably likely to occur. See *Mid-Continent Resources*, 16 FMSHRC 1218, 1222 **(**June 1994).

The fourth prong of the *Mathies* test requires that the Secretary show that the injuries expected to result from the hazard will be of a reasonably serious nature. *U.S. Steel*, 6 FMSHRC at 1574. In this regard, there can be little dispute that a belt fire would expose miners to serious injuries, including burns and smoke inhalation. Emergency responders and the miner stationed at the take-up would also be exposed to such injuries. I find that the violation herein was therefore clearly "significant and substantial" and of high gravity.

The Secretary also maintains that Respondent's negligence was high and the violation was the result of its unwarrantable failure to comply with the cited regulation. First, I credit the testimony of Postalwait that the cited accumulations in the 7-D longwall conveyor belt entry were obvious and in plain view. He observed the accumulations from both the "tight side" of the belt and the walkway and they were obvious from both vantage points. He was even able to see from the walkway that the accumulations were tightly packed around the rollers. As the inspector noted, the accumulations were obvious because they were so extensive. The accumulations were present under every bottom roller along 180 feet of belt and around the belt takeup storage unit. Moreover, 13 of the rollers were packed in coal and the bottom belt was riding in coal. Indeed, to abate the order, Respondent had multiple

miners working three hours to clean the belt and the takeup storage unit. I also accept the credible testimony of Postalwait that Respondent allowed the accumulations to exist for a substantial amount of time without ever correcting or even reporting the hazard. Indeed Postalwait credibly opined that the accumulations had existed for a minimum of six shifts. The accumulations also posed a high degree of danger to miners. As previously noted, the coal was packed around thirteen rollers and the belt was riding in it.

Finally, Respondent was on notice that it needed to make greater efforts to prevent combustible materials from accumulating. Respondent had received 100 citations and orders for violations of the standard at issue which became final orders in the twelve months prior to the issuance of the order at bar. Indeed, Postalwait himself had previously cited Respondent for such violations on belts, including the belt here at issue. Within the above framework of evidence, I find that the Secretary has met her burden of proving that the violation herein was the result of Respondent's unwarrantable failure and high negligence.

Order Number 7100365

This order, also issued pursuant to section 104(d)(2) of the Act, also alleges a "significant and substantial" violation of the standard at 30 C.F.R § 75.360(a)(1) and charges as follows:

> The pre-shift examination for methane and hazardous conditions that was conducted on December 3rd, 2006, for the midnight shift crew on the 7-D longwall 062-0 MMU section is inadequate in that the following conditions were observed by this inspector. Refer to the following violations for the conditions found: (1) violations# 7100364. The listed conditions would be obvious to any prudent person especially an examiner charged with the responsibility of conducting an examination of the mine. The mine operator has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard.

The order was subsequently modified on May 31st, 2007, to read as follows:

> It is not reasonably likely that all of the conditions would occur, such as a fire, reversal of air on the belt, and injuries to all of the men on the section. It is reasonable to expect injuries of some of the men on the section and the belt involved in fighting the possible fire. As a result of this conference, the gravity in item 10(d) is changed to four men affected (Order Number 7100364 was similarly modified).

Postalwait determined that Respondent violated the cited standard regarding the preshift

examination performed between 9:00 p.m. and 10:00 p.m. on December 3rd, 2006, for the oncoming midnight shift. The inspector found that the preshift was inadequate because it failed to report the accumulation described in Order No. 7100364.

Respondent's mine examiner, Anderson, was the section foreman for the afternoon shift on December 3rd, 2006. He performed the preshift for the oncoming midnight shift between 9:00 p.m. and 10:00 p.m. and called it out before the inspection party went underground at approximately 10:00 p.m. Postalwait reviewed the preshift book before going underground and recorded the conditions Anderson reported. There is no dispute that the coal accumulations that were the basis for Order No. 7100364 were not listed in the preshift record. While the inspection party was underground, Anderson traveled to the surface and added "mud + water" at the "take-up" as a "violation." This belated addition to the preshift report would not in any event have helped the oncoming shift foreman, Eric Ernest. When Anderson had earlier called out the preshift results, they were received by Ernest who then proceeded underground with Postalwait and the inspection party.

I find from the credible evidence that the coal accumulations cited by Postalwait were present at the time of the preshift examination. Indeed, the belt had been idle for the three preceding shifts while Respondent was preparing to resume production and activate the belt and there had been no production since the belt had been last shut down. Since there was no production to add to the accumulations and since Respondent did not assert that it had performed any cleaning while the belt was idle, it is clear that what Postalwait observed and what the examiner saw should have been reported. The failure to have reported the conditions in the preshift report was therefore a violation as charged. I note that Respondent again argues herein that since it is undisputed that a preshift examination was in fact conducted (on the afternoon shift of December 3rd 2006) there was no violation as charged. For the reasons previously articulated under the discussion regarding Order Number 7099401, I likewise find this argument to be without merit.

The Secretary maintains that the violation was also "significant and substantial." As a result of the violation, the oncoming shift would have been ignorant of the hazardous conditions that existed along the 7-D longwall belt. No one was working to clean the accumulation when it was cited and it may therefore reasonably be inferred that it would not have been cleaned before the belt was restarted. As previously discussed, thirteen rollers and the bottom belt was running in coal and the coal was made up of fine particles. The coal in contact with the rollers and belt had already dried out, indicating that frictional heating had been ongoing. In the course of normal mining operations fire and smoke were therefore reasonably likely. Accordingly, miners working on the belt, inby toward the face, or attempting to extinguish the fire, risked serious injuries from burns and smoke inhalation. Within this framework of credible evidence, I must agree that the violation was "significant and substantial" and of high gravity.

The Secretary further maintains that the violation was the result of Respondent's high negligence and unwarrantable failure to comply with a mandatory safety regulation. In this regard, I find that Respondent was on notice that greater efforts were necessary to ensure adequate preshifts were being

performed. Respondent had received nine citations and orders for violations of the cited standard in the twelve months preceding the issuance of order at bar. Moreover, Respondent had received 100 violations of 30 C.F.R. § 75.400 which became final orders in the 12 months prior to Order Nos. 7100364 and 7100365 being issued. Under the circumstances, Respondent's examiners should therefore have had a heightened vigilance for belt accumulations. As previously noted, I have also found that the accumulations were obvious and had existed over several shifts.

Under all the circumstances, it is clear that Respondent engaged in aggravated conduct beyond ordinary negligence in failing to report the belt accumulations. The violation was therefore the result of its unwarrantable failure and high negligence.

Order Number 7100380

This order, also issued pursuant to section 104(d)(2) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R §75.403 and charges as follows:

> The incombustible content does not appear to be maintained to at least 65 per centum in the #2 intake entry on the 7-D longwall panel, 062-0 MMU section from #19 1/4 block to #20 block including connecting crosscuts at #20 block. The mine floor in the listed area is powder dry and (Black in color). The listed area also in the main intake (primary escape way). The miners travel through this area to reach the long wall face in that #20 block is the last line of open crosscuts. This condition is obvious in that dust is suspended into the mine air as miners travel through the effected area by foot travel. Three spot samples were collected by this inspector to support this violation. (1) Sample 1-A-1 was collected at 28 feet outby SS24+79 located in #2 entry at Sample 1-C-1 was collected approximately 60 feet in the #1 to #2 crosscut from the #2 entry at #20 block. The mine operator was previously put on notice. The mine operator has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard.

The cited standard, 30 C.F.R § 75.403, provides as follows:

> Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than 65 per centum, but the incombustible content in the return air courses shall be no less than 80 per centum. Where methane is present in any ventilating current, the per centum of incombustible content of such combined dust shall be increased 1.0 and 0.4 per centum for each 0.1 per centum of methane where 65 and 80 per centum, respectively of incombustibles are required.

On December 19th, 2006, Postalwait returned to the subject mine as part of the regular quarterly inspection. He was accompanied by then MSHA trainee Aaron Wilson, UMWA walkaround representative Richard Harrison, and Respondent's representative Jeffrey Taylor. Postalwait reviewed the preshift examination book to note the conditions recorded by the mine examiners before proceeding underground. While heading toward the 7-D longwall face, Postalwait observed that the entry was black from coal dust between the No. 19 and No. 20 Blocks in the No. 2 Entry and the No. 1 to No. 2 Crosscut. He testified that the coal dust covered the mine floor from rib to rib in both the entry and the crosscut . The coal dust was dry, black, and powdery. It was three to nine inches thick with the deepest portion in the center of the entries and in the ruts left by scoop tires. In walking through the coal dust on the mine floor, the inspection party placed coal dust into suspension. The mine floor was covered with coal dust for a distance of approximately 137 to 150 feet between the No. 19 and No. 20 Blocks and for approximately 100 to 150 feet in the No. 1 to No. 2 Crosscut. Indeed, Respondent's representative, Mr. Taylor, agreed at trial with the inspectors and UMWA representative Harrison that there were accumulations present and that the mine floor was black and the coal dust dry.

Postalwait also took three "representative" samples of the coal dust to test for incombustible content. The laboratory analysis showed that the coal dust samples had 19.5%, 30.6% and 36.8% incombustible content- well below the regulation's requirement of 65% incombustible content for intake entries. Respondent stipulated to the accuracy of the laboratory analysis. The violation is therefore proven as charged.

The Secretary also maintains that the violation was "significant and substantial". The credible testimony establishes that there was an extensive accumulation of combustible coal dust in the cited area that presented a fire or explosion hazard. It is clear that the coal dust was highly combustible because it was dry, made up of very fine particles of coal and lab testing showed it had a high combustibility content. Ignition sources were also present from scoops, face ignitions, the coal conveyor belt the scoop battery charging stations, sump pumps and the power center. According to Postalwait, scoop batteries arc, have the battery posts blown off, and have the battery leads blown off, each of which can ignite a coal dust fire. The credible evidence shows that scoops traveling through the cited area would likely send coal dust from the mine floor into suspension as they traveled through the area. Coal dust in suspension in the ventilation air current would travel inby to the longwall face creating another potential ignition source. An ignition of methane at the longwall face could propagate back to the cited area and become a larger explosion due to the coal dust in suspension. Face ignitions of methane can occur when the longwall shear strikes hard rock intrusions in the coal seam called "sulfur balls" which cause sparks that can ignite a pocket of methane. The subject mine has also had face ignitions in the past.

I also find that the injuries expected to result from the hazard would be of a reasonably serious nature. A fire or explosion in the cited area in the No. 2 Entry and the No. 1 to No. 2 Crosscut would be critical because the area includes portions of the primary and secondary escapeways. The ventilation air current would carry smoke from a fire in the cited area to the face. Miners also use the cited area to get to and from their work station at the longwall face every shift. Miners therefore are exposed while working at the face and while walking through the cited area. The likely injuries would be serious and include burns and smoke inhalation. Under the circumstances, I find that the Secretary has met her

burden of proving the violation was "significant and substantial" and of high gravity.

The Secretary also argues that Respondent was highly negligent and that the violation was the result of its unwarrantable failure to comply with a mandatory safety regulation. The Secretary maintains that Respondent allowed an obvious and hazardous accumulation of coal dust to exist and failed to correct it, danger it off, or even report it, despite being on notice that it had to exert greater efforts to comply with the regulation.

As previously found, the credible evidence shows that, the coal dust accumulation in the cited area was indeed obvious. The ribs and floor were black, the material was extensive and it could be seen 1½ blocks away. Indeed, that evidence showed that in Entry No. 2 between No. 19 and No. 20 blocks the accumulation was approximately 137 to 150 feet long and in the No. 1 to No. 2 Crosscut was approximately 100 to 150 feet long. Moreover, the evidence shows that Respondent brought all 10 miners on the face crew to water and rock dust the cited area and it apparently took about four hours to abate the cited condition.

In addition, the credible evidence shows that the accumulation had existed for at least several shifts. The inspectors and Harrison corroborated each other's testimony in agreeing that the coal dust had been produced by rib sloughage and would have taken several shifts to reach the state that they observed. According to these experts, the coal ribs had to slough; then the pieces of coal rib had to dry out; then the scoops traveling in the area had to pass over the sloughage to grind it into powder; and, finally, the coal dust had to build up to the depth they observed.

It is clear that Respondent was also on notice that it had to make greater efforts to comply with the cited standard. Ten violations of the that standard became final orders in the 12 months prior to the subject order. In addition, according to the credible testimony of Postalwait, he had discussed with Respondent the need to comply with that standard and to deal with problems in rock dusting the mine floor and ribs on several occasions, and as recently as a week before the subject order was issued. Harrison also confirmed that these discussions with mine management did occur.

Finally, there is credible evidence that Respondent had actual knowledge of the extensive coal dust accumulation. Two foremen for each shift had to walk through the coal dust in the cited area to reach the longwall face and to leave at the end of their shift. Respondent's longwall coordinator, Brian Delloma, was at the face when the subject order was issued, saw the condition and admitted to Inspector Postalwait that it was a violation and should have been remedied earlier. Under all the circumstances, I find that the Secretary has met her burden of proving that the violation herein was the result of Respondent's unwarrantable failure and high negligence.

Order Number 7100381

This order, also issued pursuant to section 104(d)(2) of the Act, also alleges a "significant and substantial" violation of the standard at 30 C.F.R §75.360(a)(1) and charges as follows:

> The pre-shift examination for methane and hazardous conditions that was conducted on December 19th, 2006, for the day shift crew on the 7-D longwall 062-0 MMU section is inadequate in that the following conditions were observed by this inspector. Refer to the following violations for the conditions found: (1) Violations # 7100380. The listed conditions would be obvious to any prudent person especially an examiner charged with the responsibility of conducting an examination of the mine. The mine operator was previously put on notice for the same type of conditions. The mine operator has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard.

The Secretary maintains that this order was issued because the preshift report for the day shift on December 19th, 2006, did not include the hazardous coal dust cited in the No. 2 Entry and the No. 1 to No. 2 Crosscut cited in Order No. 7100380 issued above. Respondent lost the preshift examination book prior to trial and the only record of its contents is from the notes of Inspector Postalwait.

There is no dispute that the preshift examination for the cited area was performed between 5:00 a.m. and 7:00 a.m. Postalwait issued the first of the subject orders at 9:25 a.m. and miners were then already working at the face. It may reasonably be inferred that the accumulation was present during the preshift examination performed 2 ½ to 4 ½ hours earlier because the credible evidence shows that it took several shifts to develop. As previously noted, the coal ribs had to slough, dry out, and be ground into powder before they were in the state observed by the inspection party. Both Wilson and UMWA representative Harrison agreed with Postalwait's conclusions in this regard. Accordingly, since the accumulation had not been reported, I find that the Secretary has met her burden of proving the violation as charged. I note that Respondent again argues herein that since it is undisputed that a preshift examination was in fact conducted there was no violation as charged. For the reasons previously articulated under the discussion regarding Order Number 7099401, I likewise find this argument to be without merit.

The Secretary also maintains that the violation was "significant and substantial" because of a reasonable likelihood of lost work days or restricted duty. She notes that 10 miners were exposed to the hazard of a mine fire or explosion because they were not alerted to the cited coal dust accumulation. The first and second prongs of the *Mathies* test have already been established. Respondent's failure to record the hazardous condition cited by Postalwait in Order No. 7100380 was a violation of 30 C.F.R. § 75.360(a)(1). This condition contributed to a discrete safety hazard in the form of a fire or explosion hazard in the No. 2 Entry and the No. 1 to No. 2 Crosscut. As discussed above, the third prong of the *Mathies* test is also satisfied. No one was working on the accumulation when it was cited and it is reasonable to infer that it would not have been corrected considering continued normal mining operations. I find it unlikely that Respondent would have cleaned, watered, rock dusted or dangered-

off the accumulation, since a number of examiners had already failed to report it and Respondent continued to ignore the condition. Finally, the evidence establishes that miners working at the face risked serious injuries such as burns and smoke inhalation from the failure to have reported the hazardous condition. I find therefore, that the Secretary has met her burden of proving that the violation was "significant and substantial" and of high gravity.

The Secretary further maintains that Respondent's negligence was high and that the violation was the result of its unwarrantable failure to comply with the cited standard. As previously noted, it may reasonably be inferred from the credible evidence that several examiners failed to report the hazardous coal dust in the cited area based on the length of time it had existed. Since the mine floor and ribs were black and the accumulation extended for well over 200 feet in the No. 2 Entry between No. 19 and No. 20 blocks and in the No. 1 to No. 2 Crosscut, it could hardly be missed. Since the hazardous conditions had existed for several shifts but were not reported, miners were thereby exposed over these shifts to a fire or explosion.

In addition, Respondent had been placed on notice having been cited for similar violations of the cited standard. Respondent had received nine violations of the cited standard which became final orders in the 12 months prior to the subject order. Accordingly, Respondent's examiners should have had a heightened awareness for coal dust accumulations. Respondent had also been cited previously for violations of the standard at 30 C.F.R. § 75.403 and admonished to improve its rock dusting of the mine floor and ribs . Indeed, Mr. Harrison was present for Postalwait's most recent discussion with management a week before the subject orders. Respondent was issued 10 violations of 30 C.F.R. § 75.403 which became final orders in the 12 months prior to the subject order.

Finally, the credible evidence shows that Respondent's managers had actual knowledge of the coal dust accumulation. Two foremen on each shift had to walk through the cited area with their crews and Respondent's longwall coordinator was at the face when the orders at bar were issued. Indeed the longwall coordinator admitted that it was a violation and that they should have taken care of it sooner. Under all the circumstances, it is clear that Respondent engaged in aggravated conduct beyond ordinary negligence in failing to report the coal dust accumulation.

Civil Penalties

Under section 110(i) of the Act, in assessing civil monetary penalties, the Commission and its judges must consider the operator's history of previous violations, the appropriateness of the penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation and the demonstrated good-faith of the person charged in attempting to achieve rapid compliance after notification of the violation. In addition, under section 110 (a)(3)(B) of the Act a minimum penalty of $4,000.00 is mandated for orders issued under section 104(d)(2) of the Act.

In this regard, the parties stipulated to four of the six penalty criteria as follows: (1) the size of

Respondent's business should be considered as large based on the fact that Respondent produced 45,599,304 tons of coal in 2005, including 6,359,281 tons at the subject mine; (2) Respondent's violation history should be based on the fact that, in the 24 months immediately presiding the issuance of the orders in this case, it was assessed a total of 966 citations based on 768 inspection days prior to Order Numbers 7100364, 7100365, 7100380 and 7100381; 927 citations based on 751 inspection days prior to Order Numbers 7099399 and 7099401; and 940 citations based on 753 inspection days prior to Order Number 7100170; (3) Respondent demonstrated good-faith in attaining compliance after the issuance of the orders at issue herein and (4) payment of the total proposed penalty of $49,600.00 would not affect Respondent's ability to continue in business. The two remaining penalty criteria, gravity and negligence, have previously been evaluated within the discussion of each order.

ORDER

Orders Number 7099399, 7099401, 7100170, 7100364, 7100365, 7100380 and 7100381 are hereby affirmed. The Consolidation Coal Company is hereby directed to pay the following civil penalties (totaling $48,800.00) within forty (40) days of the date of this decision: Orders Number 7099399-$7,500.00, 7099401-$7,500.00, 7100170-$4,000.00, 7100364-$6,300.00, 7100365-$6,300.00, 7100380-$9,700.00, 7100381-$7,500.00.

Gary Melick
Administrative Law Judge
202-434-9977

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