

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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October 27, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 97-95
Petitioner	:	A.C. No. 46-01286-03985
v.	:	
	:	
WINDSOR COAL COMPANY,	:	
Respondent	:	Windsor Mine

DECISION

Appearances: Alan G. Paez, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, and Lynn Workley, Conference and Litigation Officer, for the Petitioner;
David A. Laing, Esq., Porter, Wright, Morris and Arthur, Columbus, Ohio, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 820(a), seeking civil penalty assessments for alleged violations of mandatory safety standards 30 C.F.R. ' 75.364(b)(2) and 75.400. The respondent filed an answer contesting the alleged violations, and a hearing was held in Wheeling, West Virginia. One of the violations (75.364(b)(2)) was settled, and testimony and evidence was received with respect to the remaining violation. The parties filed posthearing briefs, and I have considered their respective arguments in my adjudication of this matter.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. ' 820(i) et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. ' 820(i).
3. 30 C.F.R. ' 75.364(b)(2) and 75.400.

4. Commission Rules, 29 C.F.R. ' 2700.1 et seq.

Issues

The issues presented in this proceeding are (1) whether or not the respondent violated the cited mandatory safety standard; (2) whether the violation was significant and substantial (S&S); (3) whether the violation was the result of the respondent's unwarrantable failure to comply with the cited safety standard; and (4) the civil penalty to be assessed for the violation taking into account the civil penalty assessment criteria found in section 110(i) of the Act.

Stipulations

The parties stipulated to the following (Exhibit ALJ-1):

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 of 1977.
2. Windsor Coal Company is the owner and operator of the Windsor Mine.
3. Operations of the Windsor Mine are subject to the jurisdiction of the Act.
4. Windsor Coal Company may be considered a large mine operator for purposes of 30 U.S.C. ' 820(i).
5. The maximum penalty which could be assessed for this violation pursuant to 30 U.S.C. ' 820(a) will not affect the ability of Windsor Coal Company to remain in business.
6. MSHA Inspector Lyle R. Tipton was acting in his official capacity as an authorized representative of the Secretary of Labor when he issued Order No. 3501233.
7. A true copy of the Order listed in paragraph 6 was served on Windsor Coal Company or its agent as required by the Act.
8. The Order listed in Paragraph 6 is authentic 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 order listed in Paragraph 6 has not been the subject of previous review

proceedings.

10. MSHA's Proposed Assessment (Form 1000-179 (MSHA)) contained in Exhibit A attached to the Secretary's petition accurately sets forth:

- (a) The size of American Electric Power Company in production tons or hours worked per year.
- (b) The size, in production tons or hours worked per year, of the coal or other mine at which the citations and/or orders at issue in this proceeding were issued.
- (c) The total number of assessed violations for the twenty-four (24) months preceding the month of the referenced citation and/or order.
- (d) The total number of inspection days for the twenty-four (24) months preceding the month of the referenced citation and/or order.

Discussion

Section 104(d)(1) non-§&S@Order No. 3723270, 1:15 p.m., September 19, 1996, cites an alleged violation of 30 C.F.R. ' 75.364(b)(2), and the condition or practice states as follows:

The 101(c) petition for modification which was granted on 10-26-94, in lieu of the required examination of the North Mains right side return was not being complied with. The record books required by the petition shows that the daily examinations were not being conducted on Saturdays and Sundays when persons, other than certified examiners, are working in the part of the mine ventilated by the 44 Hollow fan, or the shift prior to persons working in the part of the mine ventilated by the 44 Hollow fan. These required daily examinations are supposed to be conducted by a certified person as required by 101(c) petition No. M-93-279-C.

By motion filed pursuant to Commission Rule 31, 29 C.F.R. ' 2700.31, immediately prior to the hearing , the parties proposed to settle this violation. The initial proposed penalty assessment was \$1,000.00, and the respondent agreed to pay a penalty assessment of \$500.00, in settlement of the violation.

In support of the proposed penalty reduction, the petitioner's counsel submitted a full discussion and disclosure as to the facts and circumstances surrounding the issuance of the order in question. Counsel stated that he obtained additional information concerning the factual circumstances surrounding this violation as they relate to the operator's negligence. Specifically, counsel stated that he learned that during MSHA's investigation before the granting of Petition

M-93-279-C, as well as after it was granted, the respondent and MSHA had expressed their beliefs as to what circumstances would require daily examinations to take place and what would trigger an examination of the South Seals area, based on the location of miners in the other parts of the Windsor Mine ventilated by the 44 Hollow fan. These expressed beliefs were not clearly delineated so as to eliminate any misunderstandings by the parties. Accordingly, counsel asserted that the parties agree that the respondent's negligence is mitigated and that the proposed penalty assessment reduction is warranted. Under the circumstances, the petitioner requested that the order be modified to a section 104(a) citation, with a "moderate" degree of negligence.

After careful consideration of the arguments in support of the motion to approve the proposed settlement, I conclude and find that the proposed settlement disposition is reasonable and in the public interest. Accordingly, pursuant to 29 C.F.R. ' 2700.31, the motion IS GRANTED, and the settlement IS APPROVED.

Section 104(d)(1) AS&S@Order No. 3501233, 11:30 a.m., September 19, 1996, cites an alleged violation of 30 C.F.R. ' 75.400, and the condition or practice is described as follows:

An accumulation of combustible material consisting of float coal dust, very dark black in color, loose coal spillage, spillage of fine dry loose coal and coal dust in contact with the conveyor belt and bottom structure rollers along the mains 10 mother belt entry on the structure, rockdusted surfaces of the mine floor, roof and ribs, and connecting crosscuts left and right of the entry. The total distance of this 6,000 foot long entry containing float coal dust was 3,600 feet. The float coal dust started at the belt drive and extending inby to 260 stopping. Spillage of loose coal and fine dry loose coal was present under the majority of the bottom belt and in contact with the bottom rollers.

At 254 stopping one conveyor belt bottom structure roller had bearings clear out of the roller, visual signs of heating up and was in contact with spillage with heavy accumulations of float coal dust present.

At 268 stopping spillage of loose coal was present along the left walkway for a distance of 50 feet in length, one foot deep and one foot wide.

At 275 stopping spillage 20 feet long, 3 feet wide, and 2 feet deep in contact with rollers.

At 276 stopping spillage was 10 feet long, 3 feet wide and 2 feet deep.

248 stopping, spillage 1 foot deep, 1 foot wide and 80 feet long.

These conditions for the most part were being carried as reported in the mine record books and would have taken days to accumulate to the degree described in

this action.

Petitioner's Testimony and Evidence

MSHA Inspector Lyle R. Tipton, testified as to his experience and training and confirmed that he inspected the mine on September 19, 1996, and issued the disputed order. He stated that company representative Jim Fodor and UMWA safety committeeman Bill Cox accompanied him during his inspection. He explained that he reviewed the September 16 to 19, 1996, preshift and onshift reports for the number 10 belt prior to his inspection, and noticed a large number of entries made for conditions that were noted as reported and uncorrected (Tr. 19-25; Exhibit P-1).

Mr. Tipton stated that he began his inspection at the number 10 conveyor belt drive and then walking toward the number 11 belt. He immediately observed accumulations of float coal dust, *Avery dark black in color* at the belt drive and other locations along the belt as described in his order, including heavy coal spillage ranging from 20 to 80 feet in length at various belt locations, and some of the spillage was in contact with the bottom belt structure roller or conveyor. He also observed accumulated coal *A fines* deposited under the belt, and they were in contact with the bottom belt. He estimated that 50 percent of the length of the belt line, or approximately 3,000 feet, was covered with float coal dust and spillage ranging from *A inches* upwards to an average of two feet. The coal *A fines* under the belt ranged from 4 to 6 inches. He stated that he and Mr. Fodor agreed to the depth of the accumulations and counted the bed rails for the length (Tr. 26-29).

Mr. Tipton confirmed that he collected one sample of the fine dry coal dust at a defective bottom roller location to substantiate that it was coal dust, but he either *A misplaced* the sample or the lab never sent me the results back (Tr. 29). He determined that the accumulations were dry by sweeping the float coal dust that was present on the belt structure with his hand causing it to fly in suspension, and kicking the bottom accumulations. He stated that the coal fines under the belt were in contact with the bottom belt and rollers, and that the spillage along the belt would be in contact with the ends of the bottom rollers (Tr. 30).

Mr. Tipton stated that the belt was equipped with a point type fire sensor system, backed up by a water deluge system at the belt drive. He believed this was the least effective *A old type A* system for extinguishing a fire, and it did not include CO monitors. He observed no rock dust on top of any of the accumulations, but did see rock dust under the accumulations at some locations. He confirmed that he walked the entire length of the number 10 belt and issued a violation for obstructed walkways or travelways at numerous conveyor locations and a violation for unsupported roof in several conveyor locations. He further stated that a mine examiner is required to travel the belt areas each shift, and that he observed four persons working along the belt during the inspection (Tr. 30-35).

Mr. Tipton stated that he based his *A significant and substantial* finding on the fact that the combustible coal accumulations were present near a very likely frictional ignition source, namely,

a deteriorated bottom belt roller with the bearings blown out of it. The roller was in direct contact with fine dry coal dust and float coal dust. He believed the coal dust accumulations created a hazard of a possible fire and/or ignition, and he explained that the belt was dragging on coal fines that were dry and located in the majority of that 3,000 foot area, creating a source of friction. He also believed it was obvious from his observation that the deteriorated roller bearing was heating under load (Tr. 35-37). He further stated as follows at (Tr. 111):

A. I specifically addressed that roller because it was pointed out to mine management as a highly likely or reasonably likely ignition source due to the fact that the bearings were failed and visible signs of heating were present on that particular roller, and it was in direct contact with fine, dry coal and coal dust.

Mr. Tipton was of the opinion that there was far in excess of enough accumulations of very dark black and thick coal dust and float coal dust present along the belt to cause and propagate a fire. In view of the deteriorated roller that he observed, he believed it was reasonably likely that a belt fire would have occurred if normal mining had continued (Tr. 39). If this were to occur, he further believed that the four miners he observed working along the belt would have to escape using their rescue apparatus because there was no primary adjacent escapeway along the belt. They would also be exposed to the effects of any smoke, and would have to travel to the track or adjacent entry using their personal protective devices in order to obtain their breathing apparatus to escape from the mine (Tr. 40-42).

Mr. Tipton explained his high negligence and unwarrantable failure findings as follows at (Tr. 43-44):

A. My initial observations from the preshift mine records book which indicated that a large number of conditions were present along this conveyor and there's no reported corrections in this book.

My inspection immediately following that, I found larger accumulations of combustible material which had obviously taken some time to accumulate to that degree, placing both of the preshift record books and my personal observations, I determined that it caused an unwarrantable failure and the mine operator to comply with Title 30, CFR 75.400.

* * * *

A. As the coal is transported out of the conveyor belt it's wet. The fine particles that exist in that coal will stick to the conveyor belt. As that conveyor belt travels back or on its return trip of the

bottom of the belt, the normal air currents of the mine dry these fine particles out. As the bottom rollers and/or vibrations strikes the bottom belt, it causes these particles to drop to the mine floor under the mine belt.

Q. And it takes a great deal of time for those accumulations to build up then?

A. Yes, sir. You've got a belt there that's 6,000 feet in length, so it has a 6,000-foot return belt also. That's a long area for these fines to travel and become deposited.

Now, once they have reached as I observed four to six inches in depth, several days and/or shifts have went by to accumulate to that degree.

Q. Is it possible that the accumulations you observed along the Number 10 belt could have accumulated in one shift?

A. No, it's impossible.

Mr. Tipton believed the coal spillage was caused by a misalignment of the belt and stated that it takes time to build up the accumulations under the belt. He further believed that the accumulations resulted from a lack of regular maintenance. He stated that the violation was entered in the preshift book for September 19, 1996, and also believed that the same conditions were noted as early as September 16 (Tr. 46). He identified Exhibits P-4 through P-9 as copies of prior coal accumulations violations of section 75.400, from June to September 3, 1996 (Tr. 47-48). He confirmed that he has inspected the mine since 1978, and has cited the belt many times for violations of section 75.400, and he was of the opinion that this constituted a poor compliance record. He stated that he and Mr. Fedor discussed the coal accumulations as they traveled, and Mr. Fedor offered no explanations. The order was terminated on the next shift by Inspector James Jeffers (Tr. 50-51).

On cross-examination, Mr. Tipton reiterated his reasons for issuing the order as follows at (Tr. 52):

A. The conditions were C the determination for the issuance of the (d) action was determined first by the examination of the pre-shift mine record book which indicated that a large number of conditions were present along the Number 10 conveyor belt.

A follow-up personal inspection of that area and observing conditions identical to or very closely to identical to the same conditions listed in the book were present along the conveyor belt.

These conditions, based on my experience, they appeared to have existed for a large number of days or time; and, therefore, I determined that to be an unwarrantable failure to permit these conditions to exist for that length of time.

Mr. Tipton confirmed that he arrived at the belt drive area sometime between 8:00 and 9:00 a.m., and made his unwarrantable failure decision to shut the belt down at 11:30 a.m. (Tr. 53). The belt was not running when he arrived at the area, but four men were working spreading rock dust (Tr. 55).

Mr. Tipton stated that he was not aware that a bulk duster had been assigned to the Number 10 belt for the shift in question, and before deciding to issue the order he did not check to ascertain the work assignments for that belt on the September 19, day shift. However, when he arrived on the surface the safety committee gave him a copy of the safety run, and Mike Roxby discussed with him the work that had been done on the belt the previous day, and mentioned that four men were working on the belt (Tr. 57). He confirmed that he did not ask to review the work assignments for the September 19, day shift (Tr. 59). He was not aware that a rock duster had flipped a rail and had not yet arrived at the belt area when he inspected it (Tr. 62).

Mr. Tipton stated that during the course of the AAA inspection, he and Inspector Jeffers had inspected 11 of the 14 main mine belts. During the three days prior to September 19, they inspected the number 8, 9, 10, and 4B belts, for a distance of 14 miles. During this four-day inspection period, only one violation was issued for a violation of section 75.400 (Tr. 66). Mr. Tipton confirmed that during this time the mine experienced an area of unstable roof at the number 10 belt which they managed to control to some degree and remain in production (Tr. 67). He described the event as follows at (Tr. 67-68):

A. It was rails loading up, blowing down. A portion of the area had failed. The remainder of the belt sticking through was, oh, I'm going to guess, ten feet that was unstable or dangered off roof immediately inby that area. There was roof material down, and it was fairly extensive. They opened the breakthrough and brought a scoop car in and cut the belt and scooped the majority of that out after the stopper bolting.

Mr. Tipton confirmed that he would have reviewed the preshift and onshift books for the number 10 belt prior to entering the mine on September 19, but he could not state with certainty if he reviewed the entries further back than one day prior to that date. He further explained some notations that he made on his notes from his review of the examination books, including his notations concerning the cited accumulations (Tr. 70-74). He further explained as follows at (Tr. 74-76):

If I find accumulations of float coal dust over a large or extensive area and these accumulations have built up to a significant magnitude to where there are heavy accumulations of float coal dust neglected by mine management, yes, it would be a contributing factor in my determining that it was an unwarrantable failure.

Q. In this particular case, was it?

A. Yes, it was.

Q. Where on the preshift report for the day shift of the Nineteenth is that specific condition?

A. Needs cleaned, needs dusted, needs cleaned and coal spillage, these are all mine examiner terms indicating that we have accumulations of combustible materials along the conveyor.

Q. So, basically, you looked at every entry on the preshift and determined that each one of those was a reference to the float dust that you cited?

A. Each one of them indicates specifically needs cleaned, needs dusted. Like, for instance, in here if you see needs bolts spotted and you see parenthesis below needs bolts spotted, all the numbers to the left of that are the locations that bolts need spotted.

Now, when you see needs cleaned, needs dusted, needs cleaned, parenthesis below that, all the numbers to the left of it, AOW or WW mean opposite walk or walk side, these are the areas that are needing cleaned or needing dusted.

Q. So your conclusion was that the conditions that you've cited in your order are contained - - every one of those is contained on the day shift preshift examiner's report for the Nineteenth?

A. I'm convinced that they are very similar if not identical in nature, yes.

Mr. Tipton confirmed that there is no methane at the cited belt location (Tr. 113). He also confirmed that the belt was idle and that the cited roller at stopping number 254 was not hot at the time of his inspection. However, he observed that the roller showed evidence that it was hot at one point in time, and he explained as follows at (Tr. 114):

A. Yes, you could see where the metal began to melt from the field bearing and under continued normal mining operations, that thing would have definitely heated up and been a potential ignition source.

Mr. Tipton confirmed that the walkway obstruction and roof support violations that he issued during his September 19, inspection were section 104(a) citations. Although the conditions were noted in the preshift books, he did not consider them to be unwarrantable for the following reasons (Tr. 125):

A. Areas like that are frequently marked or dangered off. Obstructions to the walkway, although they may be present, don't necessarily constitute an unwarrantable failure. It depends on the magnitude of these obstructions, whether there's been any evidence of persons trying to correct.

I think you'll find here in one area of my notes where it says some visible evidence of cleaning or shoveling in this area. I believe that was in reference to a walkway obstruction cleaning, if I'm not mistaken. Like I say, it goes back some time.

Mr. Tipton stated that the respondent has a poor compliance history compared to other mines in his inspection area. He stated that violations of section 75.400 are commonplace at that mine, and they're commonplace on the conveyor belts at that mine in particular, and have been that way for years and years and years (Tr. 126). He acknowledged that the respondent received a reclamation award but he was not familiar with its MSHA safety ranking (Tr. 127).

William R. Cox, testified that he is employed by the respondent and serves as a union safety committeeman. He participated in a union safety run on September 3, 1996, on the number 8, 9, 10 belts, and he was accompanied by union president and safety committeeman Roger Sparks, and respondent's safety director Chuck Kellman. He identified Exhibit P-1, as a list of safety hazards observed at that time that was typed up from a rough draft of the items noted. He stated that the entire number 10 belt needed cleaning and dusting on September 3, and there were some bad rollers and stands. A bottom roller in one area that had caused a fire was removed during that run. The roller at the 252 crosscut had a missing bearing and the fine coal in the area ignited due to the friction (Tr. 137-141). He stated that there was a lot of fine coal that had accumulated under the belt in several areas over a period of shifts (Tr. 141).

Mr. Cox stated that he accompanied Inspector Tipton during his September 19, 1996, inspection of the number 10 belt, and it was running when the inspection started but was shut down because of a problem on another belt. He described what he observed as follows at (Tr. 142-143):

A. We observed the belt from the discharge area to 260 crosscut, it was blackened in color and had float dust along it and we had bottom rollers that were frozen from fine coal being packed around them, and we had some rollers bad, some stands that were cut in two, and we had some areas that needed bolted or posted.

We had some men working on the belt, and the condition was - - like I said, the 260 crosscut, 227 needed dusted but inby was dusted and clean.

Mr. Cox stated that the accumulations under the belt did not result form a recent coal spill because they were under the bottom rollers extending the width of the belt, and spillage would occur only at the belt edges. He observed the presence of ignition sources, and described them as dry coal fines under the bottom belt, and broken or stuck rollers consisting of dry fine coal that had ~~Acaked~~ around the roller. He believed the accumulations could have created a mine fire or an explosion (Tr. 145).

Mr. Cox was of the opinion that the conditions of the number 10 belt on September 3, and 19, ~~Awere equal.~~ He stated that ~~Athere~~ had been work done but it really - - the overall maintenance was basically the same~~(Tr.145)~~. He described the work that had been done as rock dusting from crosscut 260 toward crosscut 289, which was the area from the middle of the belt towards the tail, and some repair work that was done in other areas (Tr. 146).

On cross-examination, Mr. Cox stated that other safety committee members made a safety run on the number 7 belt on September 3, and all of these inspections were in response to the safety committee's raising the issue of the condition of the belts with management. He confirmed that the notation ~~Aarea between discharge and take-up needs cleaned~~ on Exhibit P-10, refers to an area of approximately 100 feet, and it is the only notation on the list referring to areas that needed to be cleaned on the number 10 belt (Tr. 150).

Mr. Cox confirmed that he discussed the results of his belt and haulage inspections with mine superintendent Joseph Matkovitch. He also reviewed the actions taken by management to address the items that needed attention, and confirmed that his notes reflect the corrective actions that were taken. He could not recall telling Mr. Matkovitch that he was pleased with the progress of the corrective actions taken by management (Tr. 151-153).

Mr. Cox stated that he provided Mr. Tipton with a copy of his inspection list (Exhibit P-10) on the mine surface on September 19, after his inspection. Mr. Cox discussed some of his notations indicating some of the work that was done to address the items on his list (Tr. 155-157). He confirmed that just prior to the inspection on September 19, by Mr. Tipton, he recalled that Inspector Jeffers complimented safety manager Roxby about the conditions of the mine belts (Tr. 159). He confirmed that on September 19, the area from crosscut 260 to the tail had been

rock dusted (Tr. 159).

Mr. Cox stated that there are a significant number of weekends devoted to belt work on overtime, and that 25 miners have been recalled in 1997, and some in 1996, and a lot of these men were assigned to the belts (Tr. 160). He confirmed that the respondent annually receives one of the best safety rankings of the major national coal producers (Tr. 161).

In response to further questions, Mr. Cox stated that the overall condition of the number 8 and 9 belts on September 3, were the same as the number 10 belt that day. After reviewing Exhibit P-10, he stated that other than cleaning the walk side at stoppings 273 to 278 on September 18, and danging off and roof bolting a fall at stopping 274, there is no indication of any other work on the number 10 belt between September 14 and 18, 1996 (Tr. 162). He stated that management never indicated to him that any other work had been done on the number 10 belt between September 14 and 18, 1996, to address the items listed on Exhibit P-10 (Tr. 163).

Mr. Cox stated that the notations regarding the items listed are confined to work done on those items, and it was possible that other work was being done on the number 7, 8, and 9 belts during this same time frame (Tr. 165). Mr. Cox commented on several additional notations made on the list, and he agreed that some of the conditions noted were addressed at some time or other (Tr. 167-173). Mr. Cox was not aware of any injuries or fatalities associated with coal accumulations at the mine (Tr. 173).

Mr. Cox acknowledged that coal spillage does occur along the sides of the belt when the belt is running, but that coal accumulations over a period of time would be located under the middle of the belt, and will accumulate to the point where they will be in contact with the bottom belt or packed around the rollers and sometimes freeze or prevent the rollers from turning. The spillage noted by Inspector Tipton at the 248, 254, 268, 275, and 276 stoppings could have occurred days or shifts earlier, or the last time coal was run on the belt (Tr. 176). Coal spillage is normally hand shoveled while the belt is running during production or idle shifts (Tr. 177).

Jimmy W. Welch, employed by the respondent as a longwall shield man for eight years, testified that he was familiar with the mine belts, including the number 10 belt, and that he maintained them when he worked as a beltman and shuttle car operator. He stated that he worked on the number 10 belt on September 19, 1996, on the afternoon shift when the order was issued, and he was assigned to help clean it up. He stated that six union and two management people were cleaning belt rollers and under the belt take-up unit. He described the coal accumulations as dry on top and wet further down. In his opinion, the coal that he cleaned up consisted of accumulations and not spillage. In response for an opinion as to how long it would take for the accumulations to occur, he stated just coming back on the take-up; coming back on the bottom rollers (Tr. 184). Mr. Welch stated that he worked one and half to two hours cleaning and rock dusting, and that 15 to 18 other miners were also cleaning the number 10 belt by shoveling the bottom roller stands and the accumulations (Tr. 185-186).

Mr. Welch stated that when he arrived at crosscuts 247 to 249, he observed some accumulation but it wasn't bad. He also observed a few bottom rollers in contact with the accumulations, but most of them were clear. He considered the coal under the belt to be accumulations rather than spillage, and speculated that it may have taken a few shifts to occur. He also observed float dust on the belt rails and in the breakthroughs, and stated that the area needed to be rock dusted. He observed some black places, and described the area as dull, grayish color. It wasn't real white like it had been rock dusted (Tr. 188). In his opinion, the conditions were the result of a lack of maintenance often enough to stop the accumulations.

In response to several bench questions, Mr. Welch stated that he had never previously worked the number 10 belt area and that he was assigned to clean the belt as part of the abatement crew after the section was shut down by Mr. Tipton's order (Tr. 189). He finished his work cleaning and shoveling three to four breaks at 11:30 p.m., and that he observed miners on three other sections were also shoveling (Tr. 191-192).

Roger E. Sparks, employed by the respondent as an electrician for 14 to 15 years, testified that he is president of the UMWA local union, and serves on the grievance and safety committees. He stated that he initially observed the condition of the number 10 belt when he arrived there at approximately 10:00 p.m. on September 19, 1996, to accompany inspector James Jeffers who was there to inspect the belt and abate the order. He stated that 20 to 30 people were working and shoveling the belt, and that the order was terminated shortly after 11:00 p.m., after a lot of work was done cleaning and dusting the belt, and after Mr. Jeffers examined the belt and found it in order (Tr. 193-196).

On cross-examination, Mr. Sparks stated that he was not present when Mr. Tipton inspected the belt and issued the order on September 19, 1996. He confirmed that he was present when the union safety committee inspections were made on the number 8, 9, and 10 belts on September 3, 1996. He explained that the belts were examined at that time in response to a letter sent to MSHA by a union member who described the conditions of the belts as bad and horrible. However, the letter was rescinded after the inspections revealed that many of the conditions were not as bad as we was led to believe (Tr. 199).

Mr. Sparks identified Exhibit R-21, as the notes made by safety committeeman Cox during the September 3, 1996, belt inspection, and Exhibit R-22 as the notes he made during that inspection. He confirmed that he walked one side of the number 10 belt, and Mr. Cox walked the other side. He stated that the condition of the mine top was the biggest problem noted during that inspection. He reiterated that he had no knowledge of the number 10 belt conditions observed by Inspector Tipton on September 19, 1996, and only observed them when he was with Mr. Jeffers during his abatement inspection (Tr. 201-205)

MSHA Special Investigator James L. Jeffers, testified that he inspected the number 10 belt line on September 19, 1996, after mine superintendent Matkovitch summoned him to the mine to abate the order issued by inspector Tipton. He observed 15 to 20 people shoveling, cleaning, and rock dusting the belt, and confirmed that he terminated the order at 11:30 p.m., after the work on

the belt was completed. He was of the opinion that the number of people working to abate the conditions indicated that there were a lot of coal accumulations. The number of people could also indicate that the respondent wanted the conditions corrected in a hurry. He confirmed that he did not see the belt conditions when Mr. Tipton initially inspected the belt and issued his order. He confirmed that the order was issued at 11:30 a.m., and he terminated it at 11:30 p.m. (Tr. 206-213).

On cross-examination, Mr. Jeffers stated that if the number 10 belt is shut down there is no way to transport coal out of the mine from the other sections. He confirmed that there was a shift change between the time the order was issued and his arrival at 8:30 or 9:00 p.m. (Tr. 214-215). He assumed that he had inspected other belts at the A44 hollow@mine area a day or two prior to September 19, and could not recall issuing any accumulations violations on those belts. He did recall that the belts Awere in pretty good condition@ (Tr. 216).

Inspector Tipton was recalled, and distinguished coal A spillage@ and coal A accumulations@ as follows (Tr. 219-220):

THE WITNESS: Spillage that's been left over a long period of time would then be classified as accumulation. Spillage that just occurs is something that could normally happen. Along the belt drive of whatever and you would have spillage which is a natural occurrence or something that you deal with routinely and on the spot.

JUDGE KOUTRAS: Like at 276 stopping, spillage was ten feet long, three feet wide and two feet deep. Now, is that spillage?

THE WITNESS: That would be spillage that was left instead of being cleaned up. That's normally evidenced when you can see that spillage is - - that accumulation of float coal dust on top of it or if you can see evidence where they've rock dusted over the top of the spillage, then you know that it's been at that time allowed to accumulate and it's not just spillage.

Respondent's Testimony and Evidence

Charles R. Kellam, respondent's Director of Human Resources, testified that he has been so employed for 15 years and is a certified miner and mine supervisor. He is responsible for safety, training, and labor relations and supervises two people in mine safety and training matters. He stated that the respondent received a 1996 State of West Virginia safety recognition for an outstanding safety record for mining over 30 million tons of coal with no fatalities, and a company safety award for conducting the safest mining operation. In 1996, the parent company was ranked number three in safety nationwide, and the last fatality at the Windsor mine occurred in 1957 (Tr. 221-223).

Mr. Kellam stated that the mine employs 140 hourly miners in its underground operations, and has 45 surface employees. He stated that the safety committee has four miner members and that he interacts on a regular basis with that committee. He stated that the mine has 12 belt lines that are used to transport coal out of the mine, and that the number 10 belt line extends from crosscut number s 227 to 289 as shown on the mine map (Exhibit R-1) (Tr. 228).

Mr. Kellam stated that in September 1996, he discussed the condition of the number 10 belt with union representatives Cox and Sparks. They decided to examine the mine belts after a letter was written to MSHA critical of the mine belt systems. The inspection took place on September 3, 1996, and they examined the number 8, 9, and 10 belts. He identified Exhibit R-3, as his notes of the inspection, and he recalled that Mr. Sparks commented that he was impressed that the belt systems were as good as they were compared to what he had been led to believe by other people (Tr. 231).

Mr. Kellam stated that there were no problems with coal spillage or float coal dust on the number 10 belt on September 3, 1996 (Tr. 232). He identified Exhibit R-4, as a summary of the work done on the number 10 belt from September 10 through 19, and Exhibit R-5, as a roof fall report prepared by Mr. Roxby on September 12, concerning a fall on the number 10 belt (Tr. 235). He stated that the fall had an impact on the day-to-day work on the number 10 belt (Tr. 236).

Mr. Kellam stated that in May 1994, the mine had a major reduction in force of one-third of its employees due to the loss of a production contract, and approximately 75 miners were laid off. However, 40 to 45 were called back when another contract was received, and he identified Exhibit R-6 as a list of eight miners recalled on August 13, 1996, who were assigned primarily to work on the belt systems (Tr. 236-237). Mr. Kellam stated that three days prior to the September 19, 1996, order issued by Mr. Tipton, major belt inspections were conducted by Mr. Tipton and Mr. Jeffers, and no violations of section 75.400 were issued (Tr. 238).

On cross-examination, Mr. Kellam was of the opinion that the number 8, 9, and 10 belts were in good condition when the September 3, 1996, belt inspections were conducted. One hot roller was discovered, but the belt was shut down immediately and the roller was changed out (Tr. 239). He stated that the roof fall in question occurred at 6:38 a.m., on September 12, 1996, over an area 25 feet by 17 feet by 6 feet thick, and was cleaned up several days later (Tr. 241). He explained the work that is reflected on Exhibit R-4, as follows at (Tr. 243-245):

Q. So if someone gets a work assignment sheet, and they say they've completed work along, say, the 257 crosscut and the 240 crosscut, how would you know that work has been done in that particular shift to record in the on-shift book?

A. Well, the foreman that had it done, it would be his responsibility to put it in the on-shift book; what work he completed.

BY MR. PAEZ:

Q. So, Mr. Kellam, if I could direct your attention, then, to Exhibit R-4, it appears to me that a lot of the work that's listed here is what would be considered normal maintenance; is that correct?

A. A lot of it is normal maintenance. That's what we normally do; maintain our belt systems, yes.

Q. So is there anything in particular here that you can pick out that you were taking extra efforts to deal with the items that you found on the safety run of September 3, 1996?

A. Not that I can see right offhand, no.

Mine Superintendent Joseph B. Matkovich, testified that he has served in that capacity for 12 years, has 31 years of mining experience, and has West Virginia and Ohio mine foreman certificates. He disagreed with the unwarrantable failure order issued by Mr. Tipton for the following reasons (Tr. 249-250):

A. First of all, I felt that we were not unwarrantable on this violation of Number 10 belt being that we had people working there. We had people prior to the Nineteenth working there.

We had our safety runs that were brought up in here previously on 5, 6, 7, 8, 9 and 10 belts. All the haulage along those belts, we were working on all of those subjects at the same time. We had a fall at 209 on a haulage, the fall on 274 on the 10 belt, and we were covering everything that we could cover to the best of our ability at the time all of this occurred.

Q. Was there anything else going on with the other belts that impacted your --

A. Yes. At the same time the three days previous to the Nineteenth, nine of our belt lines were walked by Mr. Tipton and Mr. Jeffers, and any of the items that they found along those belt lines, we had to direct people in those directions and follow up on everything that was pointed out to us there.

Mr. Matkovich stated that after the September 3, 1996, belt safety inspections, he was given a list of items that needed attention (Exhibit P-10) and he compiled work lists for his supervisors to take care of the items. He met daily with safety committeeman Cox to discuss the work that needed to be finished on all of the belts and haulage area. He confirmed that additional work may have been done on the number 10 belt that may not have been reflected on the work list. Additional work lists were compiled for the number 5 through 9 belts and haulage areas which he reviewed with Mr. Cox every day. Mr. Matkovich was under the impression that Mr. Cox seemed pleased with the safety run work that was being accomplished (Tr. 250-254).

Mr. Matkovich stated that work on the number 10 belt started on September 4 and 5, to address the items noted during the safety run of September 3. A roof fall area was dangered off at crosscut 274, and on September 12, a second fall occurred outby that area in an intersection and that fall Asettled down onto the belt@ (Tr. 256). Prior to this, the belt area from the tail to the 282 crosscut was rock dusted. On September 6 or 7, another fall occurred on the number 9 belt haulage at the 209 crosscut which prevented access to the mine supplies. No supplies could be transported to the number 10 belt area until the haulage area was cleaned up and bolted, and the trolley wire repaired (Tr. 257). Mr. Matkovich stated that the number 10 belt roof fall on September 12, was significant and unusual, and he described the work that was done to clean up that area during the week-end on six shifts until it was completed by the day shift on September 16. At that time, the stopping was still being repaired and materials were being brought in to start cleaning the area (Tr. 259-261).

Mr. Matkovich stated that the roof fall prevented access to the number 10 belt areas outby crosscut 274 and the bulk rock dusters could not reach those areas. Further, miners were working in the belt entry on the same ventilation split and any rock dusting outby would have exposed those miners to the dust (Tr. 261). He further stated that work continued on the number 9 belt to abate two violations, and on the 3-B and 5 North belt abating other violations issued by Mr. Tipton. None of these violations were section 75.400 violations (Tr. 262).

Mr. Matkovich stated that he spoke with Mr. Tipton on September 19, before he went into the mine and informed him that work was in progress on the number 8, 9, and 10 belts and commented that AIn about halfway down those belt lines on things I want to do, and we're not completely done down there on the 10 belt@ (Tr. 263). He further explained as follows at (Tr. 263-264):

Q. Did you have any discussion with him after he wrote the order?

A. Well, we had some discussion outside about all the work and things that we had been doing, but Mr. Tipton just felt that the things he saw there was unwarrantable on our part in not assigning people to those areas. I tried to explain that we were working everywhere in the coal mine, trying to keep everything going. It was not just that belt was our only object that needed taken care of.

Mr. Matkovich reviewed the number 10 belt preshift and on-shift fire boss book pages for September 16 to 19, 1996, and confirmed that he reviews and countersigns the books every morning and discusses the work that needs to be done with his mine and shift foreman. He stated that he reviews A13 books on our side of the mine and 11 books on the other side of the mine@ (Tr. 268). He explained some of the entries made in the books and the work assignment lists that he prepared for his foreman and belt coordinator Porter (Tr. 266-275). The work assignments for Mr. Porter were for the afternoon shift on September 16, and midnight shift of September 17, (Exhibit R-11; Tr. 275-277).

Mr. Matkotvich identified Exhibits R-12 through R-19, as work assignments made to correct conditions that were noted during the belt safety run inspections, and Exhibit R-20 as the manpower roster for the day shift. He explained the work assignments shown. He stated that the September 12, roof fall caused the number 10 belt to run off and resulted in coal spillage along the belt line. He confirmed that spillage can occur along the entire belt in one hour (Tr. 281).

In response to a question as to whether the number 10 belt conditions cited by Mr. Tipton on September 19, 1996, are reflected in the preshift and on-shift reports, Mr. Matkovich stated as follows (Tr. 283):

A. There's general things in there that would be similar to what Mr. Tipton had written. Back on these things here, on the R-17 it show work done on the midnight shift prior to the Nineteenth, a whole list of things that were reported corrected on that belt, on the Number 10 belt; things being worked on all through the period that we discussed from 9/3 clear to 9/19 on all our belt lines and following the inspector's violations. And we continually around the clock worked on and corrected things that needed taken care of. And there was items on there that was corrected, items that reappeared because something else happened. So, we continually worked on everything that occurred.

Mr. Matkovich further explained the work performed on the number 10 belt as reflected by the September 19, midnight on-shift report (Tr. 285-286; Exhibit R-17).

On cross-examination, Mr. Matkovich explained that the AC and AI notations on the work assignment reports reflect corrected and incompleted work performed, and the fact that these notations are not made at all does not mean that no work was performed (Tr. 288). He stated that he did not see the number 10 belt after Mr. Tipton issued his order on September 19, and that he last walked the belt the last week of August (Tr. 289).

Mr. Matkovich stated that the roof fall conditions that prevented the rock dusting machine from coming to the number 10 belt were taken care of and supplies could get through after September 11. However, when the fall occurred on September 12, the machine rock duster could not be used because the dust would affect the miners working in the area (Tr. 300). He reviewed some of the preshift book entries for September 16 through 18, and explained the notations made (Tr. 302-307). He stated that miners were assigned to the entire number 10 belt line in order to abate the order, and that we did underneath and both sides dusted the entire area to make sure that the belt line was in perfect shape. So we did about twice as much as what was mentioned on the order (Tr. 312).

Wayne G. Porter testified that he is employed by the respondent as a belt coordinator and was so employed in September, 1996. He has 24 years of mining experience and supervises the miners working on the belt lines, and personally takes care of the day and afternoon shifts. The midnight shift is taken care of by one of his foremen with whom he leaves a list of work that may be needed (Tr. 313-315).

Mr. Porter disagreed with the issuance of the order because he had preshifted the number 10 belt prior to Mr. Tipton's inspection, people were working on the belt when the order was issued, and he had people working on the belt during the prior shift (Tr. 316-317). He explained some of the work assignments reflected in Exhibits R-18 and R-19, and stated that he would have made the assignments for September 19, sometime prior to 8:00 a.m., for the miners starting the morning shift. He recalled that the rock duster never reached the number 10 belt that day (Tr. 319).

Mr. Porter confirmed that Exhibit R-16, reflects the work assignments that he made for the afternoon shift on September 18, and each of the six people assigned to work would have worked on the number 10 belt. The work assignments would have been based on the entries made in the fire boss books (Tr. 321-323).

Mr. Porter stated that in preshifting the belts, the notation "no hazardous conditions observed" means that "you found nothing hazardous to the people working underground along that belt line in that area" (tr. 325). He stated that he does not expect items listed in a preshift report to be totally corrected by the next shift and that this would be impossible. However, if he were to encounter coal dust or spillage in contact with a roller he would clean it up right away (Tr. 326).

Mr. Porter stated that his work assignments for the number 10 belt prior to September 19, were affected by the roof falls on that belt as well as the number 9 haulage belt. Further, the No. 274 fall area on the number 10 belt was dangered off and the bulk rock duster could not be used because it would expose the miners working on the belt to the dust because the air would travel in the direction of their work area. He explained that extra people were assigned to correct violations issued by Mr. Jeffers and Mr. Tipton on other belts prior to the order issued on the number 10 belt (Tr. 328-331).

Mr. Porter stated that the conditions noted in Mr. Tipton's order were not present when he examined the belt on September 18. He did not believe that any hazardous conditions existed on the number 10 belt when he examined it on September 18, and he disagreed with Mr. Tipton's statement that it would have taken days for the conditions that he cited to accumulate. He confirmed that he found the roller that Mr. Tipton said was hot, and he picked it up and found that it was not hot. In his judgment, the roller looked rusty (Tr. 332).

In commenting on the notations on the preshift examiner's report for September 16 through 18 (Exhibit R-7), that certain itemized conditions had been "reported" several times with no corrections shown, Mr. Porter explained that "by law you either have to show a correction to it or carry it over" (Tr. 334). He further stated as follows at (Tr. 335).

JUDGE KOUTRAS: For the Eighteenth, the same thing. So, am I to assume that for all of these days that same condition was being noted in the on-shift - - I mean in the preshift book and just noted as reported, so that means that nothing was done to take care of those, is that correct, those particular conditions?

THE WITNESS: That's what - - when it says "reported," that's telling you it's been reported. The on-shift sheets shows no corrections being done.

JUDGE KOUTRAS: And that the condition still existed?

THE WITNESS: That's correct.

On cross-examination, Mr. Porter stated that it was possible to hand dust the number 10 belt line that could not be dusted by the machine duster (Tr. 337). He confirmed that the belt was not running when he viewed it at 1:30 p.m., after Mr. Tipton issued his order at 11:30 a.m., and that it was possible that the hot roller in question may have cooled off during that time (Tr. 338).

In response to further questions, Mr. Porter stated that he observed no belt rollers turning in coal when he preshifted the number 10 belt on September 18, and could not recall any missing rollers without referring to the roller book. If he had observed a roller with a missing bearing, he would have left it alone if it was not hot, but would have removed it immediately if it was hot. He observed no significant differences between the conditions he observed on September 18 and September 19 (Tr. 340).

Mr. Porter stated that he observed no roller with the bearing completely out at the 254 stopping as noted in the order, and he observed none of the coal dust, float coal dust, or dry loose spillage and accumulations in contact with any rollers as noted in the order. He stated that he did observe some belt spillage but didn't note it because it was already noted in the preshift book (Tr. 342). He believed that a significant accumulation can occur under a belt in a short period of time and that you can get a belt to run off instantaneously and spill the whole length of the belt line in whatever time it takes that belt to travel that length (Tr. 346).

Findings and Conclusions

Fact of Violation

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. § 75.400, for failing to clean up the cited coal accumulations. Section 75.400, provides as follows:

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

The respondent does not challenge the fact that the cited conditions constitute a violation of section 75.400 (Tr. 12-15, 102, 354; post-hearing brief, pg. 2). The respondent's dispute

concerns Inspector Tipton's unwarrantable failure finding. Under the circumstances, I conclude and find that the evidence presented by the petitioner, coupled with the respondent's tacit admission, establish a violation of section 75.400, and the violation is AFFIRMED.

Significant and Substantial Violation

A "significant and substantial" (S&S) violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. ' 814(d)(1). A violation is properly designated S&S "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." @ Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co. 6 FMSHRC 3-4 (January 1984), the Commission explained its interpretation of the term "S&S" as follows:

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

See also Austin Power, Inc. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff-g 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria).

The question of whether any particular violation is S&S must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghioghney & Ohio Coal Company, 9 FMSHRC 2007 (December 1987). Further, any determination of the significant nature of a violation must be made in the context of continued normal mining operations. National Gypsum, supra, 3 FMSHRC 327, 329 (March 1985). Halfway, Incorporated, 8 FMSHRC 8 (January 1986),

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, (August 1985), the Commission stated further as follows:

We have explained further that the third element of the Mathies formula 'requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.' U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984).

The Commission reasserted its prior determinations that as part of any AS&S finding, the Secretary must prove the reasonable likelihood of an injury occurring as a result of the hazard contributed to by the cited violative condition or practice. Peabody Coal Company, 17 FMSHRC 508 (April 1995); Jim Walter Resources, Inc., 18 FMSHRC 508 (April 1996).

The respondent's brief does not address the AS&S issue. After careful consideration of all of the evidence presented with respect to this citation, and for the reasons which follow, I conclude and find that the petitioner has established by a preponderance of the credible evidence that the violation of section 75.400 was significant and substantial (S&S).

The Commission has held that coal is, by its nature, combustible. Mid-Continent Resources, Inc., 16 FMSHRC 1218, 1222 (June 1994). The credible testimony of Inspector Tipton and safety committeeman Cox establishes that the cited accumulations were rather extensive, dry, black in color, and inadequately rock dusted. Although the cited belt may not have been running during the course of the inspection, Mr. Tipton observed a deteriorated bottom belt roller with a blown bearing that he believed was hot at one time. The roller was in direct contact with dry coal and dry float coal dust. He also observed coal spillage and accumulated coal fines deposited under the belt that were in contact with the bottom belt roller structure, and he indicated that the belt was dragging on the dry coal fines. He concluded that the defective roller and dragging belt were potential frictional ignition sources that presented a possible fire and/or ignition hazard, and that it was reasonably likely that a belt fire would have occurred if normal mining operations had continued. He further believed that four miners working on the belt line would be exposed to hazardous smoke from the fire.

Although the cited belt was equipped with a water deluge system at the belt drive, Mr. Tipton stated that a belt fire would have to be addressed by the use of water hoses hooked up at 500 foot intervals along the belt line. Given the fact that the inspector found float coal dust along 3,600 feet of the 6,000 foot belt line, I cannot conclude that water hoses hooked up at 500 foot intervals would effectively extinguish any extensive belt fire or adequately deal with any explosion resulting from float coal dust and frictional belt and roller ignition sources. Further, even though there is no evidence of any methane at the location of the belt, the fact remains that the presence of float coal dust on a running belt with potential ignition sources such as hot defective rollers, rollers turning in loose dry coal accumulations, and a belt dragging and/or in contact with loose dry coal accumulations and/or spillage, presented serious potential fire and explosion hazards.

Mr. Cox testified that during a number 10 belt safety run on September 3, 1996, a bottom belt roller with a missing bearing ignited some coal fines causing a fire. On September 19, 1996, he observed black dry float coal dust on the belt, frozen bottom rollers with dry fine coal packed around them, and some bad rollers and stands. He confirmed that men were working on the belt, and he believed that the dry coal fines and defective rollers were ignition sources and that the coal accumulations could have resulted in a mine fire or explosion.

Mr. Welch, who was assigned to clean up the belt to abate the order, testified that he

observed some belt rollers in contact with the coal accumulations and described some of the coal as black in some places, and dull, grayish in others, rather than white, and it did not appear to be rock dusted.

Although mine superintendent Matkovich and belt coordinator Porter disagreed with Inspector Tipton's order and unwarrantable failure finding, I find no credible testimony on their part rebutting the credible testimony of Mr. Tipton and Mr. Cox, which I conclude support Mr. Tipton's AS&S finding.

I have found that a violation of section 75.400, has been established. I further conclude and find that the existence of loose, dry, black coal, coal dust, and float coal dust accumulations and spillage at the number 10 belt line on September 19, 1996, some of which were in contact or close proximity to the aforementioned ignition sources, presented a discrete fire and explosion hazard, and that it was reasonably likely that in the course of continued normal mining operations, a serious potential for a fire or explosion was present along the belt line.

I further conclude and find that in the event of a fire or explosion at the cited belt line, it would be reasonably likely that anyone working at, or in the proximity of the belt, would be at risk and exposed to injuries of a reasonably serious nature or death. Under all of these circumstances, I conclude and find that the inspector's AS&S finding was reasonable, and IT IS AFFIRMED.

Unwarrantable Failure Violation

The governing definition of unwarrantable failure was explained in Zeigler Coal Company, 7 IBMA 280 (1977), decided under the 1969 Act, and it held in pertinent part as follows at 295-96:

In light of the foregoing, we hold that an inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care.

In several decisions following Zeigler Coal Company concerning the interpretation and application of the term "unwarrantable failure," the Commission further refined and explained this term, and concluded that it means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Energy Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987); Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988). Referring to its prior holding in the Emery Mining case, the Commission stated as follows in Youghiogheny & Ohio, at 9 FMSHRC 2010:

We stated that whereas negligence is conduct that is "inadvertent," "thoughtless" or "inattentive," unwarrantable conduct is conduct that is described as "not justifiable" or "inexcusable." Only by construing unwarrantable failure by a mine operator as aggravated conduct constituting more than ordinary negligence, do unwarrantable failure sanctions assume their intended distinct place in the Act's enforcement scheme.

In Emery Mining, the Commission explained the meaning of the phrase "unwarrantable failure" as follows at 9 FMSHRC 2001:

We first determine the ordinary meaning of the phrase "unwarrantable failure." "Unwarrantable" is defined as "not justifiable" or "inexcusable." "Failure" is defined as "neglect of an assigned, expected, or appropriate action." Webster's Third New International Dictionary (Unabridged) 2514, 814 (1971) ("Webster's"). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by "inadvertence," "thoughtlessness," and "inattention." Black's Law Dictionary 930-31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention. * * *

In New Warwick Mining Company, 18 FMSHRC 1568, 1573 (September 1996), the Commission affirmed an unwarrantable failure violation of section 75.400, and reiterated that it has recognized that a number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure, such as the extensiveness of the violation, the length of time that the violative condition has existed, the operator's efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance.

The Commission further held that repeated similar violations may be relevant to an unwarrantable failure determination to the extent that they place an operator on notice that greater efforts are necessary for compliance with a standard, citing Peabody Coal Co., 14 FMSHRC 1258, 1261 (August 1991); and Drummond Co., 13 FMSHRC 1362, 1368 (September 1991).

In the New Warwick Mining Company case, the record reflected that during the immediate preceding inspection before the issuance of the violation, MSHA found 16 violations of the same standard, and that twice during the two days preceding the issuance of the violation the inspector informed the mine operator that similar accumulations were not permitted and received assurances from the operator that preventive measure would be taken to avoid unwarrantable failure violations. In the Peabody Coal Co., case, at 14 FMSHRC 1263, the Commission took note of the fact that in finding an unwarrantable failure violation of section 75.400, the judge properly considered the fact that Peabody had been cited 17 times over the preceding six and a half months for similar violations, and that the cited conditions had been noted in approximately seven of the preceding pre-shift reports, and were obvious and extensive requiring significant abatement efforts.

In affirming an unwarrantable failure order for a violation of section 75.400, the Commission in Enlow Fork Mining Company, 19 FMSHRC 517 (January 1997), noted the undisputed fact that no one was cleaning the cited accumulation when the inspector arrived on the section. Regarding the operator's abatement efforts, the Commission held that where an operator has been placed on notice of an accumulation problem, the priority level that it places on abating the problem is a factor properly considered in the unwarrantable failure analysis, citing Peabody, 14 FMSHRC at 1263-64; U.S. Steel Corp., 6 FMSHRC at 1263 1423, 1437 (June 1984) (unwarrantable failure may be proved by a showing that the violative condition was not corrected or remedied prior to issuance of a citation or order). In the Enlow Fork case, the Commission rejected the operator's assertion that its prompt post-citation abatement efforts militate against an unwarrantable failure determination, and held that such efforts are not relevant in any determination of whether the operator has engaged in aggravated conduct in allowing the violative condition to occur, 19 FMSHRC 17.

In Jim Walters Resources, Inc., 19 FMSHRC 480 (March 1997), the Commission reversed a judge's determinations that three violations of section 75.400, noted in three section 104(d)(2) orders were not the result of unwarrantable failures by the operator, and reinstated each of the orders. The Commission cited its prior holdings in New Warwick Mining Company and Peabody Coal Company, and reiterated that any analysis as to whether a violation of section 75.400, constitutes an unwarrantable failure to comply must take into consideration such relevant factors as the obvious and extensive nature of the accumulations; the duration of the accumulations, and whether they were recorded in the preshift examination books; prior citations for identical accumulations conditions; a prior history of section 75.400, violations putting the operator on notice of a problem requiring heightened scrutiny to prevent such conditions; and the efforts made by the operator to abate, or otherwise take corrective or remedial actions prior to an inspector's arrival and issuance of a violation. In Amax Coal Company, 19 FMSHRC 846, 851 (May 1997), the Commission affirmed an unwarrantable failure violation of section 75.400, and citing Enlow Fork Mining Co., *supra*, held that repeated similar violations may be relevant to an unwarrantable failure finding to the extent that they serve to put an operator on notice that greater efforts were necessary for compliance.

Petitioner's Arguments

In its post-hearing brief, the petitioner asserts that beginning on September 16, 1996, the preshift reports revealed accumulations along the length of the No. 10 belt, and they were noted in the preshift books from September 16 until September 19, 1996, the day Inspector Tipton issued his Order. Petitioner points out that Inspector Tipton noted that the preshift records revealed that these areas had not been cleaned, and upon visual inspection of the belt line, he found significant accumulations varying from a couple of inches in depth to as much as two feet in depth, as well as float coal dust along 3,600 feet of the 6,000-foot long belt. Based on the preshift and on-shift reports, as well as his visual observations, Inspector Tipton determined that respondent's failure to clean up or prevent these accumulations was due to its unwarrantable

failure. Petitioner maintains that while the preshift reports showed extensive accumulations reported along the No. 10 Belt as far back as September 16, 1996, the on-shift reports demonstrate that the respondent took inadequate measures to ensure that the accumulations reported in the preshift examinations were entirely cleaned up between September 16 and September 19, 1996. Under these circumstances, and citing Drummond Co. Inc., 13 FMSHRC 1362, 1368 (Sept. 1991), and New Warwick Mining Co., 16 FMSHRC 2451, 2455 (Dec. 1994), the petitioner concludes that the violative conditions existed, in whole or in part, for a significant amount of time even though the respondent conducted a regular preshift examination of the belt.

Acknowledging that the respondent submitted work sheets showing that it made some effort to clean up the accumulations along sections of the cited belt, the petitioner asserts that the work sheets are somewhat duplicative of the work reflected in the on-shift reports, and help to confirm that areas were never cleaned underneath the belt during the period from September 16 to September 19, 1996. Further, relying on the on-shift reports, the testimony of longwall employee Jimmie Welch, and the conditions observed by both Inspector Tipton and Safety Committeeman Cox when the order was issued, petitioner concludes that the respondent's efforts were woefully incomplete and ineffective, as is evidenced by both the extent of the accumulations and the amount of time it took to abate the citation. Petitioner points out that it took 20-30 miners from approximately 11:30 a.m. until 11:30 p.m., to completely clean up the accumulations and rock dust the areas covered by the order and that this lengthy period of abatement covering two shifts demonstrates the extent of the accumulations.

Citing the testimony of union president and safety committeeman Sparks at (Tr. 202-208), the petitioner maintains that mine management was well aware of the problems along the belt prior to the issuance of the order, and that even after admitting that it was aware of the problems after the September 3, 1996, safety run, the respondent failed to take the necessary measure to clean up the violative accumulations.

Citing Peabody Coal Co., 14 FMSHRC 1258, 1262-63 (August 1992), and Jim Walter Resources, Inc., 19 FMSHRC 480 (March 1997), the petitioner argues that the respondent's failure to immediately clean up the accumulations, especially after they had been reported in the preshift reports for several days, constitutes a high level of negligence. The petitioner further believes that the detailed description of the amount of coal dust and loose coal accumulations described in both the body of the order and in Inspector Tipton's notes establishes that these were extensive accumulations.

The petitioner asserts that the respondent failed to completely clean up the accumulations and/or ensure that the accumulations due to this spillage were being adequately cleaned while production was taking place. Even though Inspector Tipton was later told that work had been done on the belt and that four miners were assigned to rock dust, the petitioner maintains that the efforts of these four persons were clearly inadequate, especially in light of the number of man-hours it required for respondent to clean up the violative accumulations. The petitioner points out that even in the face of the safety run and the preshift reports that showed a problem with the belt, the respondent continued to run coal.

The petitioner cites the fact that from June to September 3, 1996, six prior section 75.400, citations were issued by Inspector Tipton and others, and that Mr. Tipton had issued a section 104(d)(1) order for a violation of section 75.400, just two weeks earlier than the order in this case for accumulations along another belt line. The petitioner concludes that these violations signaled to mine management that accumulations along the belt lines were a problem that needed to be addressed and that the conveyor belts needed to be kept in better shape. However, petitioner concludes that even after these numerous warnings, respondent failed to take the proper corrective action and allowed accumulations to get out of hand, forcing Inspector Tipton to issue another section 104(d)(1) order.

In response to the respondent's reliance on its overall safety record, the petitioner asserts that the mine compliance record (Exhibit P-12), shows that there was a special problem with section 75.400 violations, which totaled 99 paid violations in the 24 months prior to and including the issuance of the order on September 19, 1996. The petitioner submits that all of these factors establish unwarrantable failure on the part of the respondent.

In response to the respondent's production of UMWA work assignment sheets showing some additional work done on the belt which was not reflected in the on-shift records, the petitioner points out that no credible reason was given for why these work records were not noted in the on-shift reports, and that Safety Director Kellam admitted that the work done was nothing more than ordinary maintenance and not the extra work that needed to be done to take care of the belt, as noted in the safety run notes. Petitioner concludes that these work records still fail to establish that all the accumulations along the cited belt had been completely cleaned up prior to the inspection and that the work sheets and on-shift records reveal that respondent focused its efforts on normal maintenance and toward the area of the tailpiece, not along the length of the belt towards the head from the belt drive to the center of the belt line where Inspector Tipton noted most of the accumulations.

In conclusion, the petitioner asserts that the testimony of Inspector Tipton, Mr. Cox, and Mr. Welch establish that the accumulations were extensive and obvious. Further, the preshift reports that noted accumulations reported along the length of the belt in conjunction with the on-shift reports that showed piecemeal work done to clean up or cover up the accumulations with hand dust establish that the respondent knew of the problems along the belt, yet failed to take adequate measures to ensure proper clean up of the violative conditions. Petitioner concludes that this indifference to obvious mine hazards and a disregard for the safety of miners by mine management constituted aggravated conduct by the respondent and supports Inspector Tipton's unwarrantable failure finding.

Respondent's Arguments

The respondent asserts that Inspector Tipton's unwarrantable failure allegation is premised on his belief that the conditions he encountered were identical or very close to the conditions existing for a significant amount of time in the most recent preshift examination book, and on the fact that there were no reported corrections in those books. The respondent contends that the inspector is wrong on each count. As part of its post-hearing brief, the respondent has included

a summary of the conditions cited at the six specific belt locations noted in the order, a reference to when these conditions appeared in the preshift examination book, and the corrective responses made by the respondent to those conditions.

The respondent notes that although Inspector Tipton could not recall how far back he went in the most recent preshift examination book, that book commenced on the afternoon shift of September 16, 1996 (Exhibit P-1). Respondent finds it significant that Mr. Tipton's notes made following his review of that book, prior to his physical inspection of the belt, references only roof bolts and does not mention areas needing cleaning or dusting (Exhibit P-2, pg. 1). Further, even though the notes make reference to the union safety run on September 3, 1996, Mr. Tipton stated that his unwarrantable failure finding was not based in any part on that safety run (Exhibit P-2, pg. 5, Tr. 117).

With regard to the cited float coal dust starting at the belt drive (crosscut 227) to crosscut 260, the respondent points out that these conditions did not appear in the preshift book until the following preshift examination for the midnight shift on September 19, 1996, approximately eight hours before Inspector Tipton arrived at the No. 10 belt. Respondent maintains that miners on the midnight shift were assigned to dust that area, that this assignment was repeated for the day shift, and that two track men were assigned on the day shift to take a bulk duster to complete the rock dusting. (R-19). However, that bulk duster derailed and did not make it to the No. 10 belt prior to Mr. Tipton's inspection that morning, and when he issued his order, Mr. Tipton was unaware that two men had been assigned that shift to bring the duster to the belt (R-19), Tr. 54-56-7).

With respect to the alleged spillages noted in the order, the respondent asserts that the reported spillage at cross-cut 248 did not appear, if at all, until a preshift examination for the day shift on September 19, 1996; that there is no indication until that same preshift examination on September 19 that a roller was in contact with spillage at cross-cut 254; that there was no reference at all to spillage at cross-cut 254 until the preshift for the midnight shift on September 19 (at which time assignments were made to clean this area); that there is no reference in the preshift examination for the day shift on September 19 pertaining to spillage at cross-cut 268; and that spillage in the left walkway (opposite walkway side) at cross-cuts 275 and 276 appeared in the preshift examination report for the midnight shift on September 19, and was the subject of work orders for the midnight shift and for the day shift on September 19. Further, respondent points out that there is no reference prior to the preshift examination for the midnight shift on September 19 of the need to clean under the rollers at these locations.

Citing my decision in Consolidation Coal, 16 FMSHRC 54, 91 (January 1994), where I noted that recurrent coal accumulations are inherent by-products of large scale mining operations and are not unusual events justifying an unwarrantable failure order simply because no one is cleaning them up when an inspector happens on the scene and finds them, the respondent concludes that the existence of any coal accumulations on September 19, does not support any inference that like conditions existed for prior significant periods of time. The respondent asserts that the absence of the cited conditions from the preshift examination books prior to the midnight shift on September 19, 1996, was confirmed by the testimony of belt coordinator Wayne Porter,

the only witness to have observed the condition of the cited belt in the several days prior to the issuance of the order. Respondent points out that Mr. Porter conducted preshift examinations of the belt on September 17, and September 18, 1996, and noted that there were no hazardous conditions observed. He also testified at the hearing that the conditions he observed on September 19, 1996 following the issuance of the order were not present during his preshift examinations.

The respondent asserts that not all of the conditions noted by a preshift examiner in a report are in fact violations, and as an example, points out that several areas noted on September 19, 1996, as needing cleaning were not cited by Inspector Tipton (such as cross-cuts 260-264, 272-274, 277-278, 243-246, Exhibit P-1, pg. 7).

The respondent maintains that Inspector Tipton's contention that the conditions he cited existed in the preshift books for a long period of time without correction is simply wrong because most of the conditions cited appeared for the first time in the preshift examiner's report for the midnight shift on September 19, 1996, or in the preshift examiner's report for the day shift on September 19. In each instance, the respondent contends that work assignments were given, and work was commenced to address those conditions. The respondent concludes that it must be afforded a reasonable period of time to correct conditions observed during a preshift examination before the requisite inexcusable or unjustifiable conduct necessary to sustain an unwarrantable failure allegation is found, citing Consolidation Coal, 17 FMSHRC 1068, 1070 (June 1995) (ALJ Feldman). Accordingly, the respondent believes that whether by reference to the preshift examiner's reports, or the testimony of the only witness on the cited belt in the days prior to September 19, 1996, the inspector's conclusions that the cited conditions had existed for a significant period of time and were the result of high negligence and an unwarrantable failure are unsupported.

The respondent asserts that Inspector Tipton's contention that there were "no reported corrections" of the reported conditions is in error in that the on-shift report for the afternoon shift of September 18 (Exhibit P-1, p. 14) reflects the following work performed on the cited belt;

1. dusting from the head to the drive;
2. cleaning under the drive;
3. rehangng the guard protecting the drive and take up;
4. cleaning from cross-cut 269 to cross-cut 272, both sides;
5. sweeping from cross-cut 262 to cross-cut 270, both sides;
6. cleaning from cross-cut 238 to cross-cut 241, both sides;
7. cleaning the tail area, opposite walkway side; and
8. replacing a bed rail at the cross-cut 272.

Likewise, the respondent asserts that on the midnight shift on September 19, 1996, the on-shift report (Exhibit P-1, p. 16), reflects the following work:

1. cleaning from cross-cut 282 to cross-cut 260, walkway side;
2. cleaning at cross-cuts 276 and 278, walkway side.

The respondent points out that it would be virtually impossible to have corrected any conditions that appeared for the first time in the preshift examination book for the day shift on September 19, 1996, because the report was brought out at 8:00 a.m., and Inspector Tipton arrived at the belt between 8:00 a.m. and 9:00 a.m., that day (Tr. 54).

Finally, the respondent points out that the September 18, afternoon shift and September 19, midnight shift show additional work on the belt, including the changing of a total of 70 rollers and changing bad belt stands. (R-16, R-17). Further, though not in the on-shift reports, additional significant ongoing work on the belt is reflected in the safety run (P-10) and in the records detailing the five continuous days of clean-up and restoration of the roof fall area. (R-4, R-8 through R-12). Under the circumstances, the respondent concludes that the alleged absence of any corrections to the reported belt conditions is unsupported. The respondent further concludes that the record does not support the inspector's contention that the cited conditions existed for a significant period of time without correction, but to the contrary, reflects that the respondent was devoting considerable attention to the cited No. 10 belt, as well as the other belts. Accordingly, the respondent maintains that the violation was not the result of aggravated conduct, and that the petitioner has failed to establish that the conditions cited were inexcusable, unjustifiable, or the result of willful misconduct or a serious lack of reasonable care amounting to an unwarrantable failure to comply with the requirements of section 75.400. Respondent requests that the order be modified to a Section 104(a) citation, and that the proposed penalty assessment of \$2,500.00, be significantly reduced.

The Extensive Nature of the Accumulations

The respondent does not deny that the cited coal accumulations constituted a violation of section 75.400. The testimony and evidence adduced by the petitioner established that the cited loose coal and coal dust accumulations covered a rather extensive area along the cited 6,000 foot belt in question, including float coal dust along a 3,600 foot area of the belt. Although the sum total of the loose coal spillage at the stopping locations noted in the order is 160 feet, a relatively short distance along the 3,600 foot belt line, the float coal dust that reportedly existed was extensive.

Further, the un rebutted evidence presented by the petitioner establishes that abatement of the order was achieved after approximately 15 to 20 miners were put to work over a two-shift period correcting the conditions. While it may be true that the post-order abatement efforts included belt conditions other than coal accumulations, the fact remains that the bulk of the work was devoted to abating and terminating the order citing the coal accumulations. Under the circumstances, I conclude and find that the cited coal accumulations that constituted a significant

and substantial (S&S) violation of section 75.400, covered a rather extensive area of the No. 10 belt line.

Notice of the Respondent's Alleged Coal Accumulations "Special Problems."

In Consolidation Coal, 16 FMSHRC 54, 91 (January 1994), I noted that recurrent coal accumulations are inherent by-products of large scale mining operations and are not unusual events justifying an unwarrantable failure order simply because no one is cleaning them up when the inspector happens on the scene and finds them.

In the instant case, the credible and un rebutted evidence establishes that the respondent's mine has 15 belts constituting approximately 14 miles of belt lines that are used to transport over one-million tons of coal out of the mine yearly. Given the large scope of this mining operation, I cannot conclude that the respondent's compliance record of ninety-eight section 75. 400, violations over a previous 24-month period, is indicative of a "special accumulations problem."

The respondent's compliance record (Exhibit P-12), reflects that ninety-six of the prior violations were issued as section 104(a) citations, and eleven of these were issued as non-"S&S" violations, including a citation issued on July 1, 1996 (No. 4180027), on the Number 10 belt (Exhibit P-6). Only two prior section 104(d)(1) unwarrantable failure citations were issued during the 24-month period in question, one on December 7, 1995, and one on May 17, 1995, and there is no evidence that they were issued on the No. 10 belt. Indeed, with the exception of the July 1, 1996, non-"S&S" No. 10 belt citation, I find no evidence that any of the other prior violations were issued on that belt. With regard to the July 1, 1996, citation, I note that the inspector found that the belt "was being cleaned up with the roof fall at the time that citation was issued."

The only prior section 104(d)(1) order citing a violation of section 75.400, was issued by Inspector Tipton, on the No. 5 belt on September 3, 1996 (Exhibit P-4). That violation was settled by the parties, and the respondent paid the full civil penalty assessment. Indeed, the respondent has paid the full amount of the proposed civil penalty assessments for all of the prior section 75.400, violations noted as part of its compliance record, fifty of which were assessed at \$204.00, each, and the remaining assessments ranging from \$147.00 to \$267.00.

Respondent's belt coordinator, Wayne Porter, testified that a belt line can change its characteristics with every revolution. He further stated that a belt can "run off instantaneously" and cause significant accumulations under the belt in a very short period of time, as well as instantaneous spillage along the entire length of the belt (Tr. 346). Inspector Tipton attributed the coal spillage to a belt misalignment, as well as lack of regular maintenance, and longwall helper, Welch, believed the accumulations could have occurred over a few shifts or by the coal "just coming back on the take-up; coming back on the bottom rollers" (Tr. 184).

I am not totally convinced that Inspector Tipton actually knew how long the cited coal spillage conditions had existed. He admitted that he was uncertain as to whether he reviewed the

preshift reports covering the days earlier than September 18, one day prior to the issuance of the September 19, 1996, order (Tr. 70). Nor am I convinced that he knew with any degree or reasonable certainty that the preshift entries that he reviewed prior to his inspection described the same spillage conditions at the same location that he observed during his inspection. Indeed, Mr. Tipton's order, on its face, states "that these conditions for the most part were being carried as reported in the mine books and would have taken days to accumulate to the degree described in this action." Further, when asked in the course of the hearing whether each of the conditions described in his order are noted in the September 19, preshift book, he responded "I'm convinced that they are very similar if not identical in nature" (Tr. 76).

More significantly, Inspector Tipton testified that during a three-to-four day period immediately preceding the issuance of his order on September 19, 1996, he and Inspector Jeffers inspected 11 additional belts, as well as the cited number 10 belt, covering a distance of some 14 miles, and although some violations were noted and issued, no violations of section 75.400, were issued for coal accumulations. Indeed, Inspector Tipton confirmed that his September 19, order citing a violation of section 75.400, was the only violation issued during this three or four day period (Tr. 64 - 66). I have difficulty reconciling this testimony with the petitioner's suggestion that the respondent had a serious on-going "problem" with coal accumulations that were ignored and uncorrected for unreasonably long periods of time.

With respect to the cited float coal dust conditions cited by the inspector in the order starting at the belt drive (crosscut 227), and extending inby to the No. 260 crosscut, I take note of the fact that these conditions and crosscut locations do not appear in the preshift and inshift reports for September 16, through September 18, 1996. As correctly noted by the respondent, this condition was first noted for the midnight preshift examination on September 19, 1996, and was brought out at 8:00 a.m., immediately prior to the issuance of the order at 11:30 a.m.

Further, the day shift work assignments for September 19, 1996, included the belt drive areas as places that needed corrective action.

The Respondent's Efforts to Address and Correct the Cited Conditions

The petitioner's suggestion that the respondent failed to take any corrective action after being made aware of the number 10 belt conditions as early as September 3, 1996, is not well taken. Local union and safety committee president, Roger Sparks, testified that in response to a union letter to MSHA regarding the conditions on the No. 8, 9 and 10 belts, a joint union-management "safety run" examination of those belts was initiated on September 3, 1996. Although some belt conditions needed to be corrected, Mr. Sparks confirmed that "it wasn't as bad as we were led to believe," and that the letter was rescinded (Tr. 199).

Mr. Sparks confirmed that following the September 3, union safety run, safety committeeman, Cox, and mine superintendent Matkovich continued to meet and monitor the work that was being done to correct the conditions noted during the safety run (Tr. 203-204). Safety committeeman Cox confirmed that this was the case, and that his meetings with Mr. Matkovich, continued to the day the order was issued on September 19. Mr. Cox explained

that the meetings specifically addressed the number 10 belt, and he referred to several corrective actions, including cleaning and dusting, that was done, beginning on September 4, and continuing to September 18, 1996 (Tr. 151-152; Exhibit P-10).

Mine Superintendent Matkovich testified that the items noted by Mr. Cox were immediately addressed, and he confirmed that he met daily with Mr. Cox while the work to correct the conditions was in progress. Mr. Matkovich testified that he made notations concerning the work that was performed, and the notations reflect that cleaning the area between the belt discharge and take-up was done on September 9, 1996, and that one-half of the area was cleaned. Additional notations reflect that cross-cut areas 24 to 249, which included the area where rollers were turning in coal was addressed on September 13, 1996, and that other crosscuts not included on Mr. Cox's list were cleaned on September 9, and 18, 1996, (crosscuts 257-275 and 273-278). Further, notations reflect that two belt areas were dusted on September 4 - 5, 1996 (Exhibit P-10; Tr. 252 - 253).

The onshift report for the September 17, 1996, day shift reflects that the cleaning required at crosscut locations 274 to 287, was "worked on," and the afternoon shift report for that day reflects that the spillage at the belt head was "corrected," and that work was being done to clean the belt drive. The onshift report for the September 18, 1996, day shift reflects the same "corrected" and "Being worked on" notations, as well as a notation that the required cleaning at crosscut locations 274 -287, and 287-278 were corrected. The September 18, 4:00 p.m., on-shift report reflects that the cleaning and sweeping at the belt side locations at crosscuts 269-272, 262-270, 238-271, and outer tail walkway was completed and the conditions were all corrected.

Inspector Tipton himself testified that four men were working spreading rock dust when he arrived at the No. 10 belt area on September 19, 1996. Although the men were spreading rock dust by hand, the respondent's credible evidence reflects that a bulk rock duster usually available could not be brought to the area because of a roof fall on the belt line.

Although Mr. Tipton testified that he did not check the work assignments scheduled for the belt on September 19, he confirmed that respondent's safety manager, Mike Roxby discussed the belt work that had taken place the previous day, and the fact that four men were working on the belt when the order was issued (Tr. 57).

Safety Committeeman, Cox, confirmed that when he walked the No. 10 belt with the inspector on September 19, prior to the issuance of the order, men were working on the belt, and the area from crosscut 260 toward the 289 crosscut to the tail had been cleaned and rock dusted (Tr. 142-146; 159).

Human Resources Manager Charles Kellam confirmed that all of the belts were inspected during the September 3, safety run, and he accompanied Mr. Sparks and Mr. Cox on the inspection of the No. 8, 9 and 10 belts, and prepared a report (Exhibits R-3); Tr. 229-234). He confirmed that work was performed on the belts to correct the conditions noted during the safety run, and that work was performed on the number 10 belt from September 10, to the midnight shift on September 19, 1996, and is recorded in a work report prepared at his direction

(Exhibit R-4). This report reflects intermittent cleaning and dusting a number of areas along the number 10 belt line during these time periods.

The preshift report for September 16, 1996, reflects that crosscut locations 274 to 287, needed cleaning and that the conditions were reported. Although the same notations appear on the preshift report for September 17, 1996, the onshift report for the day shift on that day reflects that the conditions were "worked on." Mr. Tipton's order states that spillage was present at stopping 275 for a distance of 20 feet, and at stopping 276 for a distance of 10 feet. The remaining crosscut locations noted in the preshift (274, and 277-287) were not cited in the order, and Inspector Tipton agreed that it was possible that these areas could have been cleaned up when the order was issued (Tr. 83). Under the circumstances, since these crosscut locations are not included in the order, I can only conclude that the conditions were either cleaned up or overlooked by the inspector.

In Utah Power and Light Co., 11 FMSHRC 1926, 1933 (October 1989), the Commission held that the operator did not demonstrate unwarrantable failure because before and during the inspection, miners were shoveling the accumulations and attempting to abate the condition. On the facts of the case at hand, while it may be true that all of the cited coal accumulations may not have been cleaned up at the time of the September 19, 1996, inspection, the respondent's credible evidence establishes that the belt conditions were not ignored and that men were assigned to take corrective action, men were working rock-dusting the belt, some of the conditions were corrected, and work was in progress to correct the remaining conditions. Under all of these circumstances, I agree with the respondent's position in this case and cannot conclude that the petitioner has established a case of aggravated conduct supporting the inspector's unwarrantable failure finding. Accordingly, that finding IS VACATED, and the contested order IS MODIFIED to a section 104(a) "S&S" citation.

Size of Business and Effect of Civil Penalty Assessment on the Respondent's Ability to Continue in Business

The parties have stipulated that the respondent is a large mine operator and that payment of the proposed civil penalty assessment for the violation of section 75.400, will not adversely affect its ability to continue in business.

History of Prior Violations

Respondent's overall compliance history (Exhibit P-12), for the period September 24, 1994, to September 19, 1996, reflects that it fully paid civil penalty assessments totaling \$120,970.00, for 715 violations, 235 of which were "single penalty" non-"S&S" violations. With the exception of one section 104(d)(1) citation issued on November 29, 1995, and one issued on May 17, 1995, all of the remaining listed violations were issued as section 104(a) citations.

Although I cannot conclude that the respondent's overall history of prior violations is

particularly good, for an operation of its size, I cannot conclude that it warrants any increases in the civil penalty assessment that I have made for the violation that has been affirmed.

Good Faith Abatement

The record reflects that the order was terminated at 11:30 p.m., on September 19, 1996, after the accumulations were removed and rock dust was applied where needed. I conclude and find that the respondent timely abated the violation in good faith after the order was issued.

Gravity

Based on any "S&S" findings and conclusions, I conclude and find that the violation of section 75.400, was a serious violation.

Negligence

Taking into account the fact that miners were assigned to correct the conditions, and that work was done by the respondent on the cited belt prior to the issuance of the order, the fact that men were rock dusting the belt the day the order was issued, and the fact that the mechanical rock dusting machine could not reach the affected belt area due to a roof fall on the belt, I conclude and find that the violation was a result of the respondent's failure to take reasonable care, and that this constitutes a moderately ordinary level of negligence.

Civil Penalty Assessment

Based on the foregoing findings and conclusions, and my de novo consideration of the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that a civil penalty assessment of \$1,000.00, is reasonable and appropriate for the violation of section 75.400, that has been affirmed.

ORDER

IT IS ORDERED as follows:

- 1.) Section 104(d)(1) non-"S&S" Order No. 3723270, September 19, 1996, 30 C.F.R. 75.364(b)(2), IS MODIFIED to a section 104(a) non-"S&S" citation, with a moderate level of negligence. A civil penalty assessment of \$500.00, is imposed as part of the settlement that has been approved for this violation.
- 2.) Section 104(d)(1) "S&S" Order No. 3501233, September 19, 1996, 30 C.F.R. 75.400, IS MODIFIED to a section 104(a) "S&S" citation, with a moderate level of negligence. A civil penalty assessment of \$1,000.00, is imposed for the violation.

3.) Payment of the aforesaid civil penalty assessments shall be made to MSHA within thirty (30) days of the date of this decision and order, and upon receipt of payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge

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