

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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December 12, 2000

CONSOLIDATION COAL COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. WEVA 93-77-R
	:	Citation No. 3109521; 11/09/92
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 93-78-R
ADMINISTRATION, (MSHA),	:	Order No. 3109522; 11/09/92
Respondent	:	
and	:	Docket No. WEVA 93-79-R
	:	Order No. 3109523; 11/09/92
UNITED MINE WORKERS OF	:	
AMERICA (UMWA),	:	Docket No. WEVA 93-80-R
Intervenor	:	Order No. 3109524; 11/09/92
	:	
	:	Blacksville No. 1 Mine
	:	Mine ID No. 46-01867
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 93-146-B
Petitioner	:	A. C. No. 46-01867-03938
and	:	
	:	Docket No. WEVA 93-146-C
UNITED MINE WORKERS OF	:	A. C. No. 46-01867-03938
AMERICA (UMWA),	:	
Intervenor	:	
v.	:	
	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	Blacksville No. 1 Mine

DECISION

Before: Judge Melick

These consolidated Contest and Civil Penalty Proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et. seq.*, the “Act,” are before me upon remand by the Commission. The cases involve a citation and three orders issued by the Department of

Labor's Mine Safety and Health Administration (MSHA), following its investigation of a methane explosion on March 19, 1992, at the Consolidation Coal Company (Consol), Blacksville No. 1 Mine. The explosion resulted in the deaths of four miners and injuries to two others.

Background

Consol's Blacksville No. 1 Mine liberated over 1 million cubic feet of methane during a 24-hour period and, therefore, was liberating "excessive quantities of methane," within the meaning of Section 103(i) of the Act. Donzel Ammons was a Consol vice-president who was in charge of several mines, including Blacksville No. 1. Among those working under Ammons were Daniel Quesenberry, Ammons' assistant; Robert Levo, superintendent of Blacksville No. 1; and Jack Lowe, foreman of Blacksville No. 1.

Consol ceased production at the mine in June 1991 and by 1992 began closing down the mine. The primary activities during January to March 1992 were maintenance, withdrawal of supplies and equipment, and removal of above-ground stockpiles of coal. By letter dated February 3, 1992, Consol's regional manager for safety, Charles Bane, notified MSHA that Consol was in the process of withdrawing production equipment from the mine. The letter further stated that Consol would shut down all fans and simultaneously cap all shifts when the underground areas had been vacated.

Later in February, Consol decided to install an 800-foot dewatering pipe in the production shaft to prevent water from accumulating in the mine and seeping into adjacent Consol mines. Consol's regional engineering office, headed by Van Pitman, was responsible for installing the dewatering pipe. Pitman directed Ed Moore, supervisor of environmental quality control, to arrange for the installation. Moore, in turn, retained an independent contractor, M.A. Heston, Inc. (Heston), to do the work. Heston had worked for Consol on many other jobs.

In order to install the dewatering pipe, it was necessary to build a work platform over the production shaft. Ammons assigned the project to his assistant, Quesenberry, who contracted with Forest Construction to construct a platform, sufficiently open to facilitate the work, but which later could be sealed to form a permanent cap over the shaft.

Officials from Consol, Forest Construction, and Heston conferred on methods to construct a cap over the shaft that would allow work to be performed on the dewatering pipe and also would support the weight of the pipe. Initially, Consol's regional engineering office had recommended the use of only a partial or "half" cap, so as to allow ventilation to enter the shaft, with a fireproof partition as a means to prevent sparks from entering the shaft.

Ammons told Quesenberry that he wanted threaded pipe to be used for the dewatering project, so that pipe segments would not have to be welded together over the production shaft. Ammons was concerned with igniting grease in the production shaft, although he was also aware of the potential for methane occurring in the shaft. In a meeting with Consol's regional

engineering department, Quesenberry relayed the request for threaded pipe and left the meeting with the understanding that it would be used. Subsequently, when the pipe was delivered to the mine, Quesenberry learned for the first time that engineering department personnel had decided to use non-threaded pipe that would have to be welded. Ammons then telephoned Pittman, who explained that threaded pipe would not hold the weight of the casing. Without consulting with the engineering office, Ammons decided to construct a “full” cap over the shaft, to ensure that sparks from welding would not enter the shaft.

The plan for construction of the cap over the shaft was based on a standard design used previously by Consol (though not as a platform for installing dewatering pipe). The base of the cap was to be constructed of 1/4-inch steel plate welded to 6-inch I-beams across the shaft opening. A 6-inch concrete deck would then be poured over the top of the steel plate. The plan included a 22-inch square opening in the center of the cap to allow entry of the 16-inch dewatering pipe, with additional I-beam support to bear the weight of the pipe. At least until the shaft was permanently capped, air would still be able to enter the shaft around the dewatering pipe. For ventilation, Ammons added two smaller steel pipes to the plant, each 6 inches in diameter, penetrating through the cap, welded to the steel plate below and extending 3 feet above the concrete deck where they would be capped by a valve connected to additional lengths of PVC pipe. The 6-inch pipes were incorporated into the plan, at least in part, to provide the ventilation necessary to dilute methane in the shaft.

Ammons’ decision to add the additional pipes for ventilation of the shaft was based on his background and experience. It was standard procedure to cap a production shaft in this manner when sealing a mine, and Ammons determined that the pipes would provide adequate ventilation. He did not consult with any of Consol’s engineers or conduct any simulations or tests to determine if the pipes would provide adequate ventilation while the work of installing the dewatering pipe was completed. He was unfamiliar with the methane liberation rate at the mine, the volume of air movement the two 6-inch pipes were capable of providing, or the velocity of the airflow. He assumed that the air intake through one of the ventilation pipes would have been sufficient to ventilate the production shaft. However, he had never been involved in a project similar to this where welded pipe segments (for the dewatering pipe) were installed through a modified cap.

Since Consol’s regional safety office generally communicated with MSHA on ventilation plans, John Yerkovich, Consol’s regional safety inspector (and Charles Banes’ assistant), verbally informed Terry Palmer, an MSHA safety inspector specializing in ventilation, of Consol’s plans to undertake what they characterized as capping the production shaft before capping the other shafts and vacating the mine. Following the conversations, by letter dated March 3, 1992, Yerkovich wrote to MSHA concerning the project. The letter did not indicate, however, that a dewatering pipe would be installed through the cap and into the shaft. Palmer drafted a response to the letter, dated March 16, for the signature of MSHA district manager Ronald Keaton. Palmer recommended to Keaton that MSHA seek additional information from Consol because it was unclear why Consol was deviating from its original plan of capping all the shafts in the mine at

one time. Palmer believed that since the production shaft was intaking 187,800 cfm of air, capping the shaft required agency approval under MSHA regulations because it involved a change in the ventilation plan. The plan stated that “all changes or revisions to the ventilation plan” must be approved before being implemented. Palmer’s letter was not mailed to Consol until after the March 19 explosion.

Construction of the production shaft cap took place during the week of March 9, 1992, with the concrete deck being poured on Friday, March 13. Once the concrete was in place, airflow decreased from around 187,000 cfm to around 7,350 cfm. On March 13, Consol stopped its morning shift of underground personnel from entering the mine while portions of the cap were put in place. After Consol personnel evaluated the effects of the ventilation change, they determined that the mine was safe to enter, and the miners continued the removal of underground equipment. In evaluating the effect of the cap, Consol utilized the same procedures as a preshift examination that took approximately 30 minutes to complete. Consol also checked charts for the measured pressure differences. However, the charts on the fans would not show the impact of capping on airflow within the shaft itself. Around 11:00 a.m. on March 13, mine foreman Jack Lowe traveled underground to the bottom of the production shaft to release smoke from a smoke tube and ascertained that there was a drift of airflow down the shaft. He did not, however, measure the velocity of the airflow. Nor was the impact of the cap on airflow in the production shaft evaluated.

On Monday, March 16, Heston employees arrived at the Blacksville Mine to organize materials and begin preparations for fabricating the dewatering pipe. Consol environmental engineer Rodney Baird and Consol environmental technician Russell DeBlossio were assigned to oversee installation of the dewatering pipe, although each assisted in the manual labor of installing the pipe. Baird was certified to make methane examinations and had a working methane detector in his vehicle at the mine. Neither Baird nor DeBlossio had any experience in underground ventilation.

On Wednesday, March 18, Heston employees began installing the 16-inch dewatering pipe into the production shaft. The dewatering pipe was constructed by welding each 20-foot long section to the one below it. The first section of pipe was plugged to prevent welding sparks from entering the shaft through the pipe. As each new length of pipe was lifted in place, the 22-inch opening in the cap, through which the lengthening column of pipe extended into the shaft, was sealed with Thermoglass cloth and two steel plates cut to fit around the pipe. The pipe sections were then welded together several feet above the 22-inch opening by miners standing on the cap. With the plugged 16-inch pipe in place and steel plates and Thermoglass cloth surrounding the pipe, airflow into the production shaft was again reduced, this time from 7,350 to 790 cfm.

Consol environmental engineer Baird and Heston employees found that the 6-inch ventilation pipe closest to the 22-inch opening interfered with installation of the dewatering pipe. Blacksville Superintendent Robert Levo received a request from the production shaft site for a

saw to cut off the PVC pipe extension of one of the 6-inch ventilation pipes. A ball of burlap or Thermoglass cloth was put inside the shortened pipe, and a second piece of the material was wired over the top. The elimination of one of the two 6-inch pipes as a source of ventilation further reduced airflow to 400 cfm. Levo visited the job site after the pipe was plugged. He could not recall whether he told Baird the importance of leaving the pipe open, but assumed Baird knew enough to reopen the pipe. Ed Moore, in charge of environmental quality control in Consol's regional engineering office and Baird's boss, was also aware that one of the ventilation pipes had been cut and covered or plugged.

Throughout the first day of installation, one welder was used, and approximately 12 sections of dewatering pipe were installed. Installation resumed at 7:30 a.m. the following day, Thursday, March 19, with Baird and DeBlossio again assisting. On this occasion, Heston utilized two welders instead of one, reducing by half the time it took to weld sections of pipe together. At approximately 10:18 a.m., a methane explosion occurred in the production shaft that completely destroyed the cap. Consol engineer Baird and three Heston employees were killed in the explosion; two other Heston employees were injured. In addition, underground stoppings, cribs, and overcasts within 100 feet of the production shaft were damaged.

Disposition on Remand

Citation No. 3109521

On review, the Commission found that Consol violated 30 C.F.R. § 75. 301 (1991) when it allowed methane to accumulate in the production shaft which it found to be an "active working" of the mine. It concluded that the methane was ignited on March 19, 1992, when Heston employees were welding during the installation of the 16-inch dewatering pipe. The Commission further held that the production shaft continued to be an "active working" even after it was capped on March 13, 1992, because miners continued to work above the cap during installation of the dewatering pipe. The Commission held that the fact that miners continued to conduct methane and airflow tests below the shaft on a daily basis was sufficient to establish that the entire shaft remained an "active working" up to the time of the explosion. The Commission further found that the ventilation in the production shaft was insufficient to dilute and render harmless methane in the shaft. It noted in this regard that both the Secretary's expert, John Urosek and Consol's expert, Donald Mitchell, concluded that airflow in the production shaft had been reduced to no more than 400 cfm. and agreed that the airflow was insufficient to render harmless the methane in the shaft.

While the Commission found that the evidence supported a violation of the cited standard the matter was remanded for consideration of whether the violation was "significant and substantial," whether it was a result of "unwarrantable failure," and for imposition of an appropriate penalty. A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement*

Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1,3-4 (January 1984), the Commission explained:

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

Within this framework of law the violation found by the Commission herein was clearly "significant and substantial" and of high gravity. It is essentially undisputed that the failure to adequately ventilate the production shaft led to the accumulation and ignition of methane therein resulting in serious injuries and fatalities.

The Secretary also alleges that the violation was the result of Consol's "unwarrantable failure" to comply with the cited standard. In *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987), the Commission held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. This determination was derived, in part, from the plain meaning of "unwarrantable" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" (the failure to use such care as a reasonably prudent and careful person would use, and is characterized by "inadvertence," "thoughtlessness," and "inattention"). 9 FMSHRC at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." 9 FMSHRC at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 189, 193-94 (February 1991). The thrust of *Emery* was that unwarrantable failure results from aggravated conduct, constituting more than ordinary negligence. *Secretary v. Virginia Crews Coal Co.*, 15 FMSHRC 2103, 2107 (October 1993).

In addition, in *Mullins and Son Coal Co.*, 16 FMSHRC 192, 195 (February 1994), the Commission set forth a number of factors indicative of unwarrantability, including the extent of the violative condition, the length of time that it existed, whether the violation was obvious or posed a high degree of danger, whether the operator had been placed on notice that greater efforts were necessary for compliance and the operator's efforts in abating the violative condition made prior to the issuance of the citation or order.

In the initial decision in this case it was found that Consol intentionally violated the standard at 30 C.F.R. § 75.316 (1991) as charged in Order No. 3109523 because Consol failed to revise its mine ventilation plan to reflect the major ventilation changes that would result from capping the production shaft and therefore also necessarily failed to obtain prior approval of the

MSHA district manager for such plan revisions (20 FMSHRC at 1348). Consol was indeed, specifically notified of the need to comply with those regulatory requirements before it began capping the production shaft. The Commission has affirmed those findings and the violation as well as the associated unwarrantable failure findings based on Consol's intentional misconduct in this regard.

In connection with such a ventilation plan revision and MSHA approval process, it may reasonably be inferred that Consol would have had to demonstrate the adequacy of the volume and velocity of air that would be entering and ventilating the production shaft during the capping process and to establish that such volume and velocity would have been sufficient to continue to render harmless explosive gasses in that shaft during and after the capping process. By willfully failing to provide a plan revision setting forth the measures to be taken to maintain adequate ventilation of the production shaft and have such plan revision approved by MSHA before undertaking the capping project, I find that Consol's failure to subsequently maintain the volume and velocity of air sufficient to render harmless explosive gasses in the production shaft was inexcusable and such an aggravated omission and serious lack of reasonable care as to constitute unwarrantable failure and high negligence. Moreover, in light of Consol's willful failure to have prepared a revised plan and have that plan approved, Consol cannot, for purposes of defending against unwarrantable failure findings, claim that it acted in a good faith or reasonable belief that it was in compliance with the cited standard.

Order No. 3109522

This order alleges, and it has been found, that Consol, violated 30 C.F.R. § 77.1112(b) when it failed to conduct methane tests at the production shaft where independent contractor Heston was performing welding operations. The cited standard provides as follows:

Before welding, cutting, or soldering is performed in areas likely to contain methane, an examination for methane shall be made by a qualified person with a device approved by the Secretary for detecting methane. Examinations for methane shall be made immediately before and periodically during welding, cutting, or soldering, and such work shall not be permitted to commence or continue in air which contains 1.0 volume percentum or more of methane.

In its remand decision the Commission referenced certain testimony to be considered in determining "unwarrantable failure." That testimony is set forth in the appendix hereto. That and other record evidence establishes several important facts: that the subject mine was known by Consol officials to have been a "gassy mine liberating over 1 million cubic feet of methane per 24 hours; that there was a possibility that methane would be liberated in the shaft, that methane in the presence of an ignition source such as arcing from welding is an extreme danger; that the production shaft was to be capped with concrete and would have only two 6 inch pipes to provide a ventilation of the shaft while the dewatering pipe and the surrounding gap were sealed during installation; that no studies or tests were performed to determine the amount of methane present

under the cap or the sufficiency of the ventilation at that location where welding was taking place; and that at least one Consol official was aware that during the installation of the dewatering pipe both that pipe and the surrounding gap as well as one of the 6 inch ventilation pipes were closed thereby limiting ventilation of the production shaft to one 6 inch pipe. Within this framework of evidence Consol cannot reasonably and in good faith claim that the cited area was not likely to contain methane. Consol's failure to perform methane testing in accordance with the cited standard may accordingly be characterized as "reckless disregard" and a "serious lack of reasonable care." The violation was accordingly the result of unwarrantable failure and high negligence.

In its remand decision the Commission also made independent findings sufficient to support unwarrantable failure. It stated in this regard as follows:

However, corporate balkanization at Consol apparently led to a situation where officials in one division did not know what those in another division were doing. Thus, Blacksville Mine vice-president Ammons was not consulted on the decision by Consol's regional engineering department to switch from threaded pipe to welded pipe. 20 FMSHRC at 1340. Ammons, without consulting anyone in Consol's environmental quality control department or its regional safety office, determined to utilize two six-inch ventilation pipes to ventilate the production shaft, even though he did not know the methane liberation rate or how much air would come in through the ventilation pipes. *Id.* At 1339. When Consol regional safety inspector Yerkovich notified MSHA of the proposal to cap the production shaft, he did not notify MSHA of when the proposed capping was to occur or that welded dewatering pipe would be installed in the shaft. *Id.* At 1338. Nor did Yerkovich alert anyone in the Consol hierarchy that MSHA had not responded to his notification of the early capping. Accordingly, Consol proceeded to construct the cap without hearing back from MSHA. *Id.* Finally, Consol regional engineering employees DeBlossio and Baird, who were assigned to the project, had no experience in underground mine ventilation. *Id.* at 1341. Indeed, DeBlossio was not even aware that the Blacksville Mine liberated large quantities of methane. *Id.*

The confusion resulting from this inadequate communication and coordination was itself a contributing cause of the explosion. There was a serious lapse of judgment among Consol personnel in not ordering or ensuring that methane checks were made underneath the production shaft cap. *See Rock of Ages Corp.*, 20 FMSHRC 106, 115 (February 1998) (a foreman's failure to search for undetonated explosives when such explosives had been uncovered in the past evinced a reckless disregard for the hazards associated with misfires), *aff'd in pertinent part*, 170 F.3d 148 (2nd Cir. 1999).

22 FMSHRC at 354-355.

I also now find, for the following additional reason, that the instant violation was the result of Consol's unwarrantable failure and high negligence. As previously noted, In the initial decision in this case it was found that Consol intentionally violated the standard at 30 C.F.R. § 75.316 (1991) as charged in Order No. 3109523, because Consol failed to revise its mine ventilation plan to reflect the major ventilation changes that would result from capping the production shaft and failed to obtain prior approval of the MSHA district manager for such revisions (20 FMSHRC at 1348). As also previously noted, Consol was specifically told of the necessity to comply with those regulatory requirements before it began capping the production shaft. The Commission has affirmed those findings and the associated unwarrantable failure findings based on Consol's intentional misconduct in this regard.

In connection with such a plan revision and MSHA approval process and as previously noted, it may reasonably be inferred that Consol would have had to demonstrate the adequacy of the ventilation of the production shaft during and after the capping and dewatering pipe installation process and establish that such ventilation would have been sufficient to render harmless explosive gasses in the shaft. It may also reasonably be inferred that Consol would have had to set forth the manner and location of methane testing to be performed during the capping project in light of the proposed ventilation changes and, in particular, before and during exposure to the potential ignition source from welding over the shaft. By willfully failing to provide such a plan and have such plan approved by MSHA before undertaking the capping project, I find that Consol's failure to have conducted such methane testing at times and locations relevant to the cited standard was inexcusable and such an aggravated omission and lack of reasonable care as to constitute unwarrantable failure and high negligence. Moreover, in light of Consol's willful failure to have submitted a revised plan and have that plan approved, Consol cannot, for purposes of defending against unwarrantable failure findings, claim that it acted in a good faith or reasonable belief that it was in compliance with the cited standard.

Order No. 3109524

This order charges that Consol, during the capping of the production shaft and installation of the dewatering pipe, violated 30 C.F.R. § 75.322 (1991) and that the violation was "significant and substantial" and the result of Consol's "unwarrantable failure." The cited standard provided as follows:

Changes in ventilation which materially affect the main air current or any split thereof and which may affect the safety of persons in the coal mine shall be made only when the mine is idle. Only those persons engaged in making such changes shall be permitted in the mine during the change. Power shall be removed from the areas affected by the change before work starts to make the change and shall not be restored until the effect of the change has been ascertained and the affected areas determined to be safe by a certified person.

On review the Commission found that the Secretary charged two separate violations in this order and that, in the decision below, only one violation was considered. On remand the Commission directed that the trial judge also determine whether there was a second violation, i.e., whether on March 13, after Consol had properly withdrawn its personnel from the mine to evaluate changes in ventilation caused by the construction of the cap, Consol violated the regulation by permitting miners to return underground without evaluating ventilation changes within the production shaft.

The Commission has affirmed the findings below that the production shaft intake can be properly characterized as a “split of air” to which the requirements of Section 75.322 apply. As the Secretary also notes, the cited standard is applicable if both parts of the first sentence of the standard are met, i.e., the change must be material and it must affect the safety of workers. It is undisputed that the reduction of airflow within the production shaft affected the safety of persons in the mine. The first issue before me then is whether the change in ventilation on Friday, March 13, when the cap was placed over the production shaft, materially affected the main air current or any split thereof. The Commission has interpreted Section 75.322 as being triggered by any ventilation change that would “materially affect” any split of a mine’s main air current.

On March 13, when the cap was placed over the production shaft it is undisputed that the airflow in the shaft was reduced from approximately 187,000 cfm. to approximately 7,350 cfm. The Commission has already affirmed the finding below that a reduction from 7,350 cfm to 400 cfm, a reduction of more than 94%, was a material reduction. It is clear, and I also find, that a reduction in air flow from 187,000 cfm. to approximately 7,350 cfm., a reduction of more than 96%, would likewise materially affect the airflow in the production shaft. Within this framework it is clear that Consol was therefore required to follow the procedures set forth in cited standard after the reduction in airflow on March 13, 1992. Indeed, Consol appeared to handle the initial ventilation change on March 13, as a major ventilation change. The order itself states that mine officials removed all electric power from the affected area during the capping operation and that Consol evaluated the ventilation changes underground but then failed to evaluate the change to the air ventilation in the production shaft itself before allowing miners to return to work. The evidence in fact shows that the changes in ventilation following the March 13, capping were evaluated only by making air readings underground and checking the surface fan charts. These readings did not however show the effect on the airflow within the shaft itself. Accordingly there was also a violation on March 13, when the production shaft was capped and the changes in the ventilation within the production shaft were not adequately evaluated. It is also clear that the violation was “significant and substantial” and of high gravity. It may reasonably be inferred that Consol’s failure to ascertain the effect that capping the shaft had on the ventilation within the shaft contributed to the accumulation of methane and the fatal explosion.

The violation was also the result of Consol’s unwarrantable failure. As already noted in the initial decision in this case it was found that Consol intentionally violated the standard at 30 C.F.R. § 75.316 (1991) as charged in Order No. 3109523 because Consol failed to revise its mine ventilation plan to reflect the major ventilation changes resulting from capping the production

shaft and failed to obtain prior approval of the MSHA district manager for such plan revisions before capping the production shaft. (20 FMSHRC at 1348). As previously noted Consol was specifically notified of the necessity to comply with those regulatory requirements. The Commission has affirmed those findings as well as the associated unwarrantable failure findings based on Consol's intentional misconduct in this regard.

In connection with such a plan revision and MSHA approval it may reasonably be inferred that Consol would necessarily have had to evaluate the changes in ventilation caused by capping the production shaft (including the effect of inserting the dewatering pipe and the use of ventilation pipes in the cap) before allowing work to continue. By willfully failing to provide a plan revision and have such plan revision approved by MSHA as required by Section 75.316, I find that Consol's failure to subsequently perform an evaluation to determine the effect of the changes in ventilation in the production shaft after its capping, was inexcusable and such an aggravated omission and serious lack of reasonable care as to constitute unwarrantable failure and high negligence. Moreover, in light of Consol's willful failure to have prepared a revised plan and have that plan approved, Consol cannot, for purposes of defending against unwarrantable failure findings regarding the instant violation, claim that it acted in a good faith or reasonable belief that it was in compliance with the cited standard.

As noted in the Commission's remand decision since a second violation has been found to have been committed on March 13th, and that violation was found to have resulted from Consol's unwarrantable failure there is no need to revisit the issue as to the violation on March 17th.

Civil Penalties

Operator's History of Previous Violations:

The record evidence shows that Consol had a significant history of prior violations.

Appropriateness of the Penalties the Size of the Business of the Operator

Consol is a large size operator.

The Demonstrated Good Faith in Attempting to Achieve Rapid Compliance:

The Secretary does not maintain that the charging documents were not satisfactorily abated.

The Effect on the Operator's Ability to Continue in Business:

There is no evidence that Consol's ability to continue in business would be affected by penalties as high as those assessed herein. In the absence of such evidence there is a presumption that the penalties would have no such adverse effect. See *Sellersburg Stone Co.*, 5 FMSHRC 287

(March 1983) *aff'd*, 736 F.2d 1147 (7th Cir. 1984).

Whether the Operator was Negligent:

As noted, each of the violations herein was the result of high operator negligence.

The Gravity of the Violations:

As noted, each of the violations was of high gravity.

ORDER

Citation No. 3109521 is affirmed with “significant and substantial” and “unwarrantable failure” findings. Order No. 3109522 is affirmed with “significant and substantial” and “unwarrantable failure” findings. Order No. 3109524 is affirmed with “significant and substantial” and “unwarrantable failure” findings. Consolidation Coal Company is hereby directed to pay civil penalties of \$50,000 for each of the violations charged herein, for a total civil penalty of \$150,000, within 40 days of the date of this decision. Consolidation Coal Company is further directed to pay, if it has not already done so, a civil penalty of \$50,000, for the violation charged in Order No. 3109523, within 40 days of the date of this decision .

Gary Melick
Administrative Law Judge
703-756-6261

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APPENDIX

In its remand decision, the Commission specifically referred to the testimony at transcript pages 555, 562, 580-81, 616, 624, 686, 691, 958, 1202, 1243-46, 1288 and 1693, as evidence of unwarrantable failure. An examination and evaluation of the referenced testimony accordingly follows. As noted, the difficulty in establishing unwarrantable failure based on the cited evidence

is the requirement in the standard at issue, i.e., 30 C.F.R. § 77.1112(b) to prove that the cited area must be an area “likely” to contain methane. As noted herein, the witnesses have generally claimed that so long as the vent pipes were open methane was not likely to be present below the cap over the production shaft.

Tr. 555 cited by the Commission as evidence of unwarrantable failure for the violation of 30 C.F.R. § 77.1112(b), a violation that requires a finding that the cited area was “likely to contain methane,” is the testimony of Consol Supervisor of Environmental Quality Control, Edward Moore. In relevant part the following colloquy occurred:

Judge Melick: If the shaft is lined in concrete, is there any likelihood - - what source of methane would there be in that shaft other than from the mine itself?

The Witness: If the lining is intact within the shaft, there should be no other source.

Judge Melick: All right.

The Witness: If it is cracked or whatever, sure, it could seep in.

(Tr. 555).

Moore had testified earlier however that with a concrete - lined shaft he would not have expected there to be any methane in the shaft itself (Tr. 485). He had also testified that the likelihood of there being methane in the shaft was “pretty remote.” Moore also later testified as follows:

I wouldn’t expect there to be methane in the shaft period. It is a concrete - lined shaft. It is more or less like a piece of concrete pipe only it is several hundred feet long.” (Tr. 492).

With respect to the proper location for methane tests if such tests were performed Moore testified “[a]t the bottom of the shaft I would think. The shaft is pulling air in . . . if there were anything in the shaft, it should be swept to the bottom (Tr. 513-514). See also Tr. 527-528. While Moore also acknowledged that he had no expertise in mine ventilation he nevertheless believed that there was no problem with the ventilation as long as one of the vent pipes in the completed cap was intaking fresh air (Tr. 533-534).

The Commission next cites Moore’s testimony at Tr. 562 as supporting a finding of unwarrantability. The colloquy actually begins on Tr. 561 and is quoted below:

Further ReDirect-Examination by Mr. Wilson:

Q. The shaft was intaking, as I understand it, because there are other fans drawing air out of the mine, right?

A. That's correct.

Q. That creates negative pressure within the shaft?

A. Yes.

Q. So, if there was methane being liberated around the water rings and you had negative pressure within the shaft, couldn't that tend to pull the methane into the shaft?

A. If there was an opening to pull it through, yes.

Q. Such as a crack in the lining?

A. Yes.

Q. It is possible that methane could seep into the production shaft from those water rings?

A. I would say yes it is possible.

(Tr. 561-562).

This testimony, based on a speculative hypothetical question, does not however alter Moore's belief that the presence of methane in the shaft was unlikely. Within this framework of evidence, it is apparent that Moore did not believe methane was likely to have been present in the subject shaft and that even if methane testing were performed it should properly have been performed at the bottom of shaft as was done in this case. The cited testimony of Edward Moore does not therefore necessarily support a finding of unwarrantability for a violation of Section 77.1112(b) which requires a finding that the cited area was "likely to contain methane."

The Commission next cites the testimony of Consol Assistant Vice President for Blacksville Operations, Daniel Quesenberry at Tr. 580-581 as evidence of unwarrantable failure for the violation of Section 77.1112(b). The relevant portions of those pages are set forth below:

Q. Were you familiar with the water rings in the shaft?

A. Yes.

Q. Did you know if it was possible for the water rings to liberate methane?

A. I have been in the water rings before. I had never known of any methane coming out of the water rings while I was at Blacksville.

Q. I will repeat the question. Do you know if it was possible for the water rings to liberate methane?

A. It could be possible, yes.

Q. The shaft lining was made of concrete; is that right?

A. That's correct.

Q. Do you know is it possible for shaft linings to have cracks?

A. Sure. Yes.

Q. When such cracks are present, is it possible for methane to liberate through those cracks into the shaft?

A. Could be possible, yes.

Q. Were you involved at all in the development or the approval of the ventilation plans for the Blacksville Number 1 mine?

A. I reviewed them.

Q. Were you aware that the Blacksville Number 1 mine was considered a gassy mine?

A. Yes.

Q. You knew that it was on a 103(i) spot inspection cycle?

A. Yes.

(Tr. 580-581).

The cited testimony thus establishes (1) that Quesenberry had never known of any methane emanating from the water rings at the Blacksville mine but that it “could be possible” for water rings to liberate methane, (2) that it is possible for concrete shaft linings to have cracks and liberate methane and (3) that the subject mine was considered a “gassy” mine. Quesenberry also testified however that “[t]here was never any concern of us for methane in the shaft due to the two pipes and the proximity of the service shaft” (Tr. 606), and that “we didn’t consider it

likely” for methane to have been liberated from “coal seams water rings” (Tr. 652).

The Commission next cites Quesenberry’s testimony at Tr. 616 as evidence of unwarrantable failure:

A. No. I agree with the statement that the pipes were put in there for ventilation. Can you ask the first question again?

Q. My first question was: Do you think that any Consol official appreciated the possibility of methane being liberated in the shaft?

A. Being liberated, yes. Accumulating under the cap, no.

Q. Would the reason for not appreciating that possibility be because those ventilation pipes were there?

A. That was one reason they were put in. In addition, to my knowledge, there was never methane detected in that shaft in the 20 years it was there.

Q. You don’t discount the possibility that there could be methane in that shaft?

A. No. Any time there is a coal seam there is a possibility. I will agree with that.

Q. That was a high methane mine, correct, high methane liberation?

A. You will have to define “high.” We had some much higher.

Q. Would you consider a million cubic feet of methane in a 24-hour period to be high?

(Tr. 616).

Quesenberry testified that “to my knowledge there was never any methane detected in that shaft in the 20 years it was there” (Tr. 616). Quesenberry also testified that if he had seen one or both of the ventilation pipes shut off he would have “stopped it” (Tr. 622-623). He was “shocked” to learn after the explosion that one of the vent pipes had been closed off (Tr. 623). He also testified however that “with the pipes we did not expect any methane building up under the cap.” (Tr. 629).

The Commission also cites Quesenberry at Tr. 624:

Q. Now, assuming that methane were to accumulate in the shaft, where would you expect it to accumulate?

A. Excuse me. Did you say where or weren't?

Q. Where. Where within the shaft if it were to accumulate?

A. At the top.

Q. Beneath the cap?

A. Yes.

Q. You have already testified that there was a possibility for methane to be present in the shaft. What was your understanding of the requirements for testing for methane when welding around a shaft?

A. If methane was suspected, you would test for methane.

Q. What do you base that on?

A. You did say around a shaft?

Q. Yes.

A. Yes. Where methane is likely to accumulate and welding and cutting operations are being performed, methane tests will be made.

Q. You understand that that was the requirement of the law; is that right?

(Tr. 624).

Quesenberry also testified that MSHA inspector Dinning was present at the time the shaft was capped and accompanied Consol personnel who checked the fan charts to see if there had been a change in mine ventilation. Dinning later told Quesenberry there was no "appreciable change." (Tr. 634-636).

The Commission next cites the testimony of Consol's Vice President of Blacksville operations, Donzel Ammons at Tr. 686 as evidence of unwarrantable failure. That testimony is reproduced below:

. . . exactly who all Danny told. I would assume he told regional engineering people too.

Q. Why would you assume that regional engineering would know that those pipes were supposed to be kept open?

A. They knew about ventilation.

Q. How do you know they knew about ventilation?

A. Well, everybody knows you have to ventilate a coal mine.

Q. It would be fair to say that it was your decision to ventilate that shaft using the two, 6-inch pipes?

A. That's right.

Q. And was part of the purpose for ventilating that shaft to prevent any accumulation of methane?

A. That's right.

Q. So you were aware of the potential for methane to be present in the shafts at the Blacksville 1 mine; is that right?

A. There is potential for methane anywhere in any shaft in the Pittsburgh seam of coal.

Q. The Blacksville mine was in the Pittsburgh seam right?

A. It is no different.

(Tr. 686).

The Commission also cites Ammons at Tr. 691, the subject of which actually begins on Tr. 690, as evidence of unwarrantable failure. This testimony is as follows:

Q. What did you base your decision on to go with two, 6-inch pipes?

A. Well, I figured one pipe would probably ventilate it but I just put another one in for good measure because I felt certain two would.

The air goes down the shaft okay, going down the pipes and down the shaft. You took a reading every

- - you made a check there every day.

If there was any methane in the shaft, that air would bring it right down

where the guy could read it at the bottom of the shaft.

Q. You did understand at the time that methane was lighter than air, correct?

A. I have always know that.

Q. You said that you felt that one six-inch pipe would have been adequate?

A. Yes.

Q. What did you base that on?

A. Experience. The shaft would have made very little methane. I mean, it wouldn't take much air to keep it clean.

Q. You were aware of the presence of water rings in the shaft, correct?

A. Yes.

Q. Were you aware that there were other coal seams above the Pittsburgh seam that that shaft intersected?

A. There was a Sewickley seam.

Q. Was that shaft there since the mine opened in the late 60's?

A. It was one of the first shafts they put in

(Tr. 691).

I do not find that the above testimony in itself supports a finding of unwarrantability for a violation that requires a finding that the cited area was "likely to contain methane." 30 C.F.R. § 1112(b). Rather it shows that although Ammons did not believe there was a likelihood of methane emanating from the shaft, he took the precaution of installing two pipes for ventilation to make sure there would be no methane accumulating in the shaft. He based these determinations on his 42 years experience in the mining industry. Ammons testified that he told his assistant Quesenberry "to make sure he put the two [vent] pipes in [the cap] and make sure everybody knew after he put the pipes in that they were to be left wide open for ventilation. (Tr. 684).

The Commission next cites the testimony of Robert Levo, former superintendent of the Blacksville No. 1 Mine at Tr. 958 as evidence of unwarrantable failure. The referenced testimony

is as follows:

. . . drawing methane out of the mines, yes, sir.

Q. I am talking specifically in the production shaft, wasn't it possible - - well, after the fact obviously?

A. After the fact obviously it is possible.

Q. You knew at the time of the possibility for methane to be present in shafts?

A. I cannot say that I honestly knew that, that it was ever thought of as a concern in the shaft.

Q. You knew that concrete shaft linings could crack, correct?

A. They do crack, yes, sir.

Q. You knew that methane is liberated not only from coal seams but surrounding strata, correct?

A. Yes, sir.

Q. And you knew that shafts have water rings in them, correct?

A. Yes.

Q. Now, did you know what Mr. Moore's experience with mine ventilation issues was?

A. I do not know his background. I assumed he had no ventilation experience. He never worked underground to my knowledge.

Q. Did you know at the time that Mr. Moore . . .

(Tr. 958).

This testimony shows that Levo believed there was a possibility for methane to be present in shafts.

The Commission next cites the testimony of John Yerkovich, former Regional Safety Inspector for Consol, at Tr. 1202 as evidence of unwarrantable failure. That testimony is as

follows:

A. They had some problems with methane, yes.

Q. You understood prior to March 19th of 1992 that there was a potential for methane to be in shafts; did you not?

A. Well, I knew that there was a feeder at Humphrey.

Q. Did you know that water rings in shafts could liberate methane?

A. Yes.

Q. Do you know if the other mines under your safety department in the -- well, you were in the North West Virginia region, correct?

A. That's correct.

Q. Do you know if the other mines in that region were also considered gassy mines?

A. I think just about every mine in the Pittsburgh seam would have been probably considered gassy mines or a gassy mine.

Q. Now, did you have any dealings with the regional engineering department?

A. No, sir. Prior to the explosion you mean?

Q. Yes.

A. That's correct I had no dealing with them, no.

(Tr. 1202).

This testimony supports a finding that Yerkovich was aware of the potential for methane in shafts and that the subject mine, as a whole, was considered to be a "gassy mine."

The Commission next cites Yerkovich at Tr. 1243 through 1246:

. . . pull that air, whether it be through leakage around the cap, through vent pipes, whatever was there, that air would ultimately end up at the bottom of the shaft coming out of the bottom of the shaft.

Q. If there was no ventilation in that shaft, where would you expect methane? If there was any methane in the shaft, where would you expect it to go?

A. Methane should go to the top.

Q. And as you increase ventilation, the more ventilation, the more it is going to flush the methane down to the bottom of the shaft, correct?

A. That's correct.

Q. Without making any methane examinations under the cap, how can you know whether or not the ventilation was adequate to flush it out?

A. You don't know. Obviously it wasn't.

Q. You said you talked to Mr. Levo about methane examinations a day or two before the explosion. Did you also talk to him about that the morning of the explosion?

A. I may have. I don't remember talking to him that morning. I know I dropped off safety awards and I was in a hurry to get to Blacksville 2. I don't know if I talked to him. I thought I talked to John . . . that morning and not to Bob Morrison.

Q. John Morrison?

A. Yes.

Q. What time would that have been, do you know?

A. Probably 7:00, quarter after seven.

Q. When you gave a deposition on March 11, 1994 at the offices of Steptoe and Johnson, at Page 115 of that deposition, do you recall being asked the question:

“The morning before - - of the explosion - - before the explosion, you asked Mr. Levo if the checks were being made; is that correct?”

Answer: “To the best of my recollection that's correct.”

Again if you would like to, you can review your testimony here.

A. Well, no. I just can't remember if it was that morning or the morning before. I knew I talked to him and John on a couple of occasions.

Q. You talked to either Mr. Levo or Mr. Morrison about methane checks on a couple of occasions; is that right?

A. Yes.

Q. Mr. Levo, when you were talking with him about making methane checks, did he express any reservations to you about that?

A. Yes.

Q. Could you explain what that was?

A. He didn't have the people to make the checks continuously while welding and cutting was going on.

Q. As I understand it, at this time they had laid off the entire safety department at the mine other than Mr. Morrison; is that correct?

A. I think that's correct, yes.

Q. Would it have normally been someone from the safety department that would have made those types of methane tests?

A. No. Not normally. It could be. It wouldn't have to have been. It could have been anybody certified to make those exams.

Q. Would you agree that whenever you are welding around a mine there is a potential for a fire or an ignition?

Mr. Hardy: Objection to the term "around a mine." That could be 100 yards from a mine or inside a mine. Object to the form of the question.

Mr. Wilson: I will rephrase the question.

By Mr. Wilson:

Q. Would you agree that any time you are welding over shafts there is a potential for starting a fire or igniting methane?

A. That was my primary concern on that shaft was starting a fire, yes.

Q. There is also the potential - - you knew of the potential for igniting methane; isn't that right? Isn't that why you talked with Mr. Levo about making methane tests?

A. Yes. That and compliance. I mean, we had welding and cutting guidelines that required someone to be making examinations at the bottom of that shaft any time welding or cutting was taking place on top of it.

But again, primarily that person was to look for hot spots, material that got to the bottom of that shaft and could potentially start something smouldering down there and no one would know about it.

(Tr. 1243-46).

From this testimony it is apparent that the discussion related to methane testing at the bottom of the shaft - - something that was in fact being performed. The answer to the hypothetical general question that if there was no ventilation in the shaft methane would be expected to go to the top is not relevant because Yerkovich believed that the shaft was in fact being ventilated by the two vent pipes. Based on Yerkovich's belief that both vent pipes were open it cannot therefore be concluded that he also believed methane was likely to accumulate at the top of the shaft. Unwarrantability cannot therefore be inferred from this testimony.

The Commission next cites the testimony of Yerkovich at Tr. 1288. That testimony is set forth below:

. . . operating fans in the mines, the service shaft is 3 or 400 feet away, it is all providing pressure on this cap.

In my opinion, I would have thought that everything would have been pulled down the shaft, yes.

Q. Without adequate ventilation in that shaft, don't you agree that the methane is likely to rise?

A. Without any ventilation or adequate ventilation, methane will rise, yes. It rises without the ventilation. That doesn't make any difference. It is still lighter than air.

Q. Yes. Well, then you agree that not only did you need ventilation in that shaft but you needed a certain degree of ventilation, a certain velocity of air to move that methane down, correct?

A. Now yes. I agree with you. Then I didn't see any reason or any problem that would have caused methane to accumulate into the shaft.

Judge Melick: Let me ask you something. There has been testimony in this case that at the bottom of the shaft on the morning of the 19th that someone expressed the opinion that there was not . . .

(Tr. 1288).

This testimony confirms Yerkovich's belief that the ventilation that was provided was adequate and that methane would not accumulate in the shaft.

The Commission next cites the testimony of Consol's former Regional Manager for Safety, Charles Bane at Tr. 1693. That testimony is set forth below:

Q. In general, as of March 1992, you did know for the potential for methane to be present in shafts; is that correct?

A. Well, I knew that we had methane in the Bower's shaft. As far as the Hagan's shaft, that had no relevance whatsoever to what was going on at Blacksville. That scenario never even entered my mind as far as the Hagan's goes.

Q. My question is as of March of '92 you knew of the potential for methane to be present in shafts?

A. If I am ventilating , yes. I guess it could be, yes.

Q. Now, let's talk about the Loveridge incident which we were just talking about, Respondent's Exhibit 54. Do you recall how much air was intaking into the intake portion of this shaft prior to it being capped? Not capped but prior to the air change being made?

A. I feel very safe to say in excess of 100,000.

Q. You don't know how much in excess?

A. No, sir.

Q. You didn't review the ventilation plan in preparation for your testimony here today, did you?

This testimony establishes that Baines agreed that, in general, there is a potential for methane in mine shafts.

The Commission next cites Moore's testimony at Tr. 481-485; Yerkovich's testimony at Tr. 1309 and Jack Lowe's testimony at Tr. 1436 for the general proposition that Consol officials were well aware, as a general scientific principle, of the hazards associated with methane accumulations and welding.

Yerkovich's testimony is set forth below:

Q. So, would it be fair to say that after that meeting it was your understanding that there would be a partial covering of the production shaft?

A. Yes.

Q. Had you and Mr. Baird made that suggestion?

A. Yes. I am sure it was a suggestion, yes.

Q. Was that based upon the prior experience that you had with previous jobs?

A. Yes.

Q. How many times had you been involved with this type of project before?

A. I believe three other times.

Q. Could you name what those jobs were?

A. Blacks Run Shaft for Humphrey Mine, the Core Shaft for Pursglove and the Stewart's Run Shaft at Arc Right.

Q. The Blacks Run at Humphrey, do you recall when that was?

A. No. It was probably at least two or three years prior to Blacksville.

Q. Was there a contractor working on that job?

A. Yes, there was.

Q. Who was the contractor?

A. Fourquer Contracting.

Q. Mr. DeBlossio had stated that he believed that M.A. Heston was involved in that project. Are you certain it was Fourquer?

A. I am certain it was Fourquer, yes.

Q. Was Pursglove one of the jobs that you had mentioned?

A. Yes.

Q. Could you describe what that job entailed?

A. It was the same thing. We were preparing to abandon the mine or at that time abandon Pursglove. We needed to a watering pump for that location. We were installing the pipe or conduit, if you will, to set the pump in.

Q. What size pipe were you installing?

A. I believe in that case it was 22-inch diameter.

Q. Was that even large than the Blacksville job?

A. Yes.

Q. Did that job involve welding over the shaft?

A. Yes, it did.

Q. Could you describe the working platform that was used on the Pursglove job?

A. It was a temporary decking of plate, steel plate.

Q. Was this a partial covering of the shaft?

A. Yes, I believe it was. That was a three compartment shaft. I think maybe only one compartment was covered. I can't remember exactly.

Q. The Pursglove job, was that job contracted out?

A. Yes, it was.

Q. Who did that job?

A. Fourquer Contracting again.

Q. Was there any type of support structure to support the weight of the casing used in that job?

A. Yes. Again, it was a beam structure.

Q. I-beams?

A. I-beams, yes.

Q. Similar to what was done at Blacksville?

A. Yes, I believe maybe a little larger but similar.

Q. Because the casing was larger?

A. Yes.

Q. It would have to - -

A. Support more weight.

Q. What about the two other jobs, Stewart's Run and Blacks Run, did those jobs also involve welding over shafts?

A. Yes, they did.

Q. What type of working surface was used in those jobs.

A. Again temporary decking.

Q. Partial covering?

A. Partial covering, yes.

Q. Do you know why on those jobs part of the shaft was left uncovered?

A. To facilitate ventilation.

Q. To provide ventilation into the shaft?

A. Yes.

Q. Was there any provision on these prior jobs for preventing sparks from going into the shaft?

A. Yes. There were precautions taken especially, as I recall, in the case of Core and Blacks Run. I don't remember Stewart's Run. It was much earlier.

In the case of Core it was steel decking, solid decking, with a fireproof cloth around the pipe to prevent anything from being pulled down along the pipe and also a plug installed in the pipe to prevent air from being pulled down the pipe itself.

Q. Again similar to what was done at Blacksville?

A. Very similar, yes.

Q. Would it be fair to say that the reason for taking these precautions on these prior jobs was that you didn't want any potential ignition sources entering the shaft?

A. Yes.

Q. On those prior jobs did you have any problems with ignition sources entering the shaft?

A. No, we did not. Not that I recall.

Q. What type of shaft was Stewart's Run?

A. Intake shaft.

Q. Was igniting methane a potential concern on that job?

A. Not in the shaft itself, no.

Q. What do you mean by "not in the shaft itself"?

A. Being an intake shaft it would pull air through the mine. If you would pull an ignition source, I guess, through the mine, then you might ignite something elsewhere.

If it is a concrete-lined shaft, I wouldn't expect there to be any methane in the shaft itself.

Q. Being that that was an intake shaft, it was

(Tr. 481-485).

Yerkovich further testified Tr. 1309 as follows:

A. No, sir, I have no knowledge of that.

Q. Do you know why there were no inspections done at that work site?

A. No, sir.

Q. Would it have been consistent with the policy we referred to before, the

memo not to make inspections of the work site?

A. No, sir.

Q. Would it have been consistent with the policy we referred to before, the memo not to make inspections of the work site?

A. I don't know that.

Q. Mr. Yekovich, your conversations with Mr. Levo about methane tests being made at the bottom of the production shaft, did you discuss with him when such exams would be required to be made?

A. When? Any time the welding and cutting was being done above the shaft.

Q. So, methane examinations being done at the beginning of each shift, would that be sufficient in your opinion?

A. That wasn't the way the policy was intended, no.

Q. What policy?

A. On the welding and cutting procedures.

Q. Are you talking about the regulation which requires methane tests when welding and cutting?

A. No, Northern West Virginia Region.

(Tr. 1309).

Finally the Commission cites the testimony of Jack Lowe, former Mine Foreman at the Blacksville No. 1 Mine at Tr. 1436 as evidence of unwarrantable failure. That testimony is as follows:

A. I didn't know, sir. I didn't know.

Q. Had you ever been involved or seen a job like this where a shaft had been capped and they were installing a pipe through that cap and welding on the pipe?

A. No, sir.

Q. In general, what was your understanding of the time of the

requirements to make methane checks when welding was being done?

A. On the inside? Underground?

Q. Well, let's start with that, underground. What was your understanding?

A. You would make an examination every 20 minutes or thereof.

Q. Most of your work was underground; is that correct?

A. It was all underground.

Q. Did you know what the requirements were when welding on the surface?

A. No, sir.

Q. You were involved in making methane tests at the bottom of the production shaft; is that correct?

A. Yes, sir.

Q. Can you testify as to when you made those.

(Tr. 1436).

This evidence shows Lowe's general knowledge of the need to conduct methane tests underground under certain circumstances where welding is performed.

The Commission again cites the testimony of Mr. Quesenberry at Tr. 624-625 for the proposition that he "understood the need to test for methane underneath the cap." The testimony at the cited pages is as follows:

A. [By Mr. Quesenberry] Extent, no.

Q. [By Mr. Wilson] Now, assuming that methane worked to accumulate in the shaft, where would you expect it to accumulate?

A. Excuse me. Did you say where or weren't.

Q. Where. Where within the shaft if it were to accumulate?

A. At the top.

Q. Beneath the cap?

A. Yes.

Q. You have already testified that there was a possibility for methane to be present in the shaft. What was your understanding of the requirements for testing for methane when welding around a shaft?

A. If methane was suspected, you would test for methane.

Q. What do you based that on?

A. You did say around a shaft?

Q. Yes.

A. Yes. Where methane is likely to accumulate and welding and cutting operations are being performed, methane tests will be made.

Q. You understand that that was the requirement of the law; is that right?

A. Yes.

Q. Would it be fair to say that if you were making methane tests that you would make tests in the areas where methane was likely to be?

A. Yes.

Q. So, in this case that would have been beneath the cap at the top of the shaft, right?

A. Beneath the cap at the top of the shaft? With the pipes plugged off, yes.

Q. Had you worked with M.A. Heston people on projects prior to this one?

A. They had done work for us before. Me personally working with them, no.

Q. Now, had you worked with other independent contractors while you were the assistant vice president or assistant to the vice president?

A. In what capacity?

Q. In any capacity did you work with contractors?

A. I guess Forest Construction was considered a contractor. We actually considered them part of our work force. They did a lot for us as far as construction, yes.

Q. Do you agree M.A. Heston worked for Consol on . . .

(Tr. 624-625).

As Quesenberry explained, the need for testing for methane underneath the cap would have arisen in this case only “[w]ith the pipes plugged off - - a situation that was not anticipated.”