

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 31, 2000

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 98-148
Petitioner : A. C. No. 46-01433-04274
v. :
 : Loveridge No. 22
CONSOLIDATION COAL COMPANY, :
Respondent :

DECISION

Appearances: Melonie J. McCall, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
Elizabeth S. Chamberlin, Esq., Consolidation Coal Company,
Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Feldman

This proceeding concerns a petition for assessment of civil penalty filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 820(a), by the Secretary of Labor (the Secretary) against the respondent, Consolidation Coal Company (Consol). The petition sought to impose a total civil penalty of \$54,000 for six 104(d)(2) Orders.

This matter was heard on November 16 and November 17, 1999, in Morgantown, West Virginia, at which time the respondent stipulated that it is a mine operator subject to the jurisdiction of the Act. At the hearing the parties proposed a settlement of three of the orders in issue that resulted in vacating one order and modifying one order to a 104(a) citation. The parties' settlement motion was granted on the record and the terms of their agreement are discussed below.

I. Findings of Fact

The three contested 104(d) orders in this matter are: Order No. 4889944 issued for alleged combustible coal dust accumulations in the 9 South Mains section, also called the Leo section, of Consol's Loveridge No. 22 Mine during the day shift on May 20, 1998, in violation of the mandatory safety standard in 30 C.F.R. § 75.400; Order No. 4889945 issued for Consol's

alleged failure to maintain incombustible content of at least 65 per cent of the combined coal dust, rock dust and other dust in the 9 South section in violation of 30 C.F.R. § 75.403; and Order No. 4889946 issued for Consol's alleged failure to perform an adequate preshift examination in violation of 30 C.F.R. § 75.360(a)(1) because the cited accumulations were not noted in the preshift examination book. All of the cited conditions were designated as significant and substantial (S&S) and attributed to Consol's unwarrantable failure.

Generally speaking, the normal mining cycle involves extracting coal by driving entries forward with a continuous miner one entry at a time. The entry is then roof bolted. Once the newly driven entry is under supported roof, loose coal is then swept from the mine floor with scoops that travel across the section to shuttle cars or the section dumping point. At that point, rock dust is applied to the entries. In order to determine whether the Secretary has satisfied her burden of proof with respect to each of the elements of the 104(d) orders in issue, it is necessary to first consider the activities occurring in the Leo section at the time of the subject May 20, 1998, inspection.

The 9 South section has three working shifts: the day shift (8:00 a.m. to 4:00 p.m.); the afternoon shift (4:00 p.m. to 12:00 a.m.); and the midnight shift (12:00 a.m. to 8:00 a.m.). The 9 South section was idle on the midnight shift of May 20, 1998, just before the subject inspection on the following day shift of May 20. However, miners were present in the section on that midnight shift to grade the track heading. The 9 South section mined only 47 feet during the afternoon shift on May 19, 1998. Only 38 feet was mined during the preceding day shift on May 19, 1998.

On May 20, 1998, coal production in the Leo section had been suspended for several shifts in order to complete several construction projects including trenching, installation of overcasts, grading of the mine floor for what was to become a new belt entry, and cutting or "bumping" the corners of coal pillars to widen new haulage roadways for use. These construction projects were in preparation for the start-up of the new 1D section, a section that branched off from the 9 South entries at 90 degrees. Resumption of production mining in the Leo section was not scheduled to begin until completion of the construction activities and rock dusting of the section. At the time of the inspection, the 9 South section equipment had been moved outby the area of construction activity. In addition to the mining equipment used in the 9 South section, the mining equipment to be used in the new 1D section was being stored in the 9 South section inby the tailpiece. This equipment included three continuous miners with 1000 feet of trailing cable and two sets of mining equipment, a loading machine with 800 to 900 feet of trailing cable, shuttle cars and a roof drill. The equipment's trailing cables were placed along the ribs to keep the cables clear of the haulage roads. Rib sloughage is common in the Loveridge Mine and some of the cables had sloughage on them. Although rib sloughage is common, MSHA does not require the sloughage to be cleaned because cleaning may destabilize the rib. Consequently, the issuing inspector in this case did not include rib sloughage in his measurements of the depth of the cited accumulations. (Tr. 65, 67).

The installation of overcasts and the construction of trenching required extensive cutting into mine roof material that mainly consists of dark gray rock with little or no coal. Overcasts are designed to allow two air currents to cross in situations where converging mine sections are driven in different directions. To install overcasts for the new ventilation controls, the roof area removed by Consol to create the overcast was approximately 10 feet above the roof line (10 feet deep) in an area 16 feet wide by 60 feet long.

Trenching is the method used to create the necessary clearance (or height) from the mine floor to the roof to install the belt drive and belt take-up unit for the new 1D section. To cut the trench for clearance of the belt drive, the area of rock removed from the roof was 15 feet above the roof line (15 feet deep) in an area 16 feet wide by 220 feet long.

To cut the overcasts and trench Consol used the common industry method of allowing the rock cut from the roof to remain on the mine floor in order to create a "ramp" that was used by the continuous miner for elevation to access deeper into the mine roof, and, later, was used by the roof bolting machine to install permanent roof support. Cutting the trenches and overcasts generated large quantities of dark gray rock dust. This rock dust was ventilated inby the construction work area, away from mine personnel. The dark color of the rock dust ruined the appearance of the section in that it covered previous inert rock dusting.

In January 1998, jurisdiction over Consol's Loveridge Mine was transferred from MSHA's Fairmont, West Virginia field office to MSHA's Bridgeport, West Virginia field office. Shortly thereafter, personnel from MSHA's Bridgeport office, including MSHA Inspector Kenneth W. Tenney, inspected the Loveridge mine to evaluate mine conditions. As a result of the Bridgeport field office's initial inspection, Consol officials were informed that Consol's cleanup and rock dusting efforts were "borderline" and that they must be improved. (Tr. 300-01). Therefore Consol was told that the Bridgeport office would "place emphasis" on such things as cleanup and rock dusting. (Tr. 133).

At approximately 10:00 a.m. on May 20, 1998, Tenney arrived at the 9 South Mains section of the Loveridge No. 22 Mine for the purpose of continuing an ongoing triple A inspection that had begun in April 1998. At that time, no mining was occurring, the section having been idle since the previous midnight shift. However, Tenney testified that crew members on the section had been instructed to adjust the ventilation system in order to begin the cleanup of material removed from the roof during the cutting of the overcast.

Tenney was accompanied by Danny Kuhn, Consol's safety escort, and Mike Renick, a UMW union escort. Tenney was familiar with the 9 South section because he had been at the Loveridge Mine every week since January 1998, when the previous triple A quarterly inspection had begun. Tenney testified that mining in 9 South mains was "periodic" and that the tailpiece, or "dumping point" had not advanced and that it had remained in the "same place for an "extended period of time . . . for up to a week or maybe even longer. " (Tr. 45-6). Tenney explained advancement was "very slow" because Consol was cutting overcasts and went days without actually cutting the face. (*Id.*) The overcasts were necessary before mining of the

1D panel could begin. The haul roads were used to transport overcast and trench debris to the tailpiece for removal to the surface.

Upon arriving on the 9 South section, Tenney observed excessive spillage and rib sloughage. Tenney testified haulage equipment had run over the spillage and pulverized it into dust. The shuttle cars are equipped with drags that spread the spillage over the entries as they go back and forth through the entries. The drags smooth the roadway by filling potholes in the roadway with loose material. (Tr. 61).

Specifically, Tenney observed the conditions in the number 3 through number 7 entry from the first crosscut in by the section tailpiece to the last open crosscut at the number 8 block, an area of approximately 600 feet in length. Tenney initially estimated the section had areas of "six, eight, ten, twelve inches, it depended on where you measured it at." (Tr. 47). However, when asked to quantify the areas of 8 to 10 inch accumulations, Tenney explained:

Q: Was it mostly eight inches throughout this area? Was it eight inches in only a few places? . . . And the question is how extensive . . . an area?

A: If you're asking me to characterize the whole thing, I would say that 99 percent of it had more than one inch. And from all the holes that was . . . the drags [on the shuttle cars] had drug it around could have six, eight, 12 inches, I didn't measure all the depths . . .

Q: So if there was a [pot]hole it could accumulate six to eight inches or more in the hole?

A: Right.

Q: But where the mine floor was essentially level without potholes it was in the area of one to two inches; is that what you're saying?

A: Yes sir, that would be a good surmise.

(Tr.389-92).

As a result of his observations, Tenney issued Order No. 4889944 citing an S&S violation of the mandatory standard in section 75.400. The specific areas of excessive accumulations cited in Order No. 4889944 were (1) coal spillage that was 20 inches deep, 8 inches wide and 12 feet long from a bulldozed corner in the number 7 crosscut between the number 6 and number 7 entries; (2) coal accumulations 10 inches deep in the center of the mine floor in the number 5 crosscut between the number 2 and number 3 entries; and (3) ground up coal from sloughage that was run over by mobile equipment 10-14 inches deep and 36 inches wide running along the full length of the number 4 crosscut between the number 3 and number 4 entries. The Order also cited coal wind rowed along the sides of the entries up to 12 inches

deep. In summary, the Order noted, "section shows signs of general lack of clean up and house keeping. Conditions are obvious to even the most casual observer."

Section 75.400 provides:

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

Consol's production reports reflect in the two days preceding the inspection, beginning 12:01 a.m. on May 18, 1998, through 12:01 a.m. on May 20, 1998, 1,128 tons were mined and transferred by shuttle cars in the 9 South section. (Tr. 141-42). Tenney opined that it was inconceivable that mining this relatively small amount of coal could have resulted in the extensive accumulations and spillage that he had observed. (*Id.*) Tenney speculated, based on the extent of the accumulations and spillage, and the small amount of coal mined in the preceding shifts, that the cited accumulations had existed for approximately 12 shifts. (Tr. 381-82, 385-88). In this regard Tenney testified:

Sir, I believe that the accumulations are from two things. Number one, part of it was from the fact that the ribs had sloughed and shuttle cars had run over it repeatedly. And number two, that the time frame that they were using the travelway, that it had not been cleaned up for an extended period of time. And that it was from the spoonful or shovelful of the coal, each facet of the shuttle car and day after day being drug around by the bar on it [the drags]. (Tr. 387-88).

Tenney noted that the No. 1, No. 2 and No. 3 entries in the 9 South Leo section had been recently cleaned and rock dusted. At the time of Tenney's inspection, the Number 1, 2 and 3 entries were not being used as haul roads to remove the overcast and trench material that had been removed from the mine roof.

Tenney recalled the No. 7 entry was fairly damp from the last open crosscut outby a couple of blocks up to a water hole in front of the feeder. In entry Nos. 4 through 8, with the exception of rock dust on the mine roof and ribs up to a level of approximately one foot where sloughage from the ribs to the mine floor had begun, Tenney observed no visible rock dust at the base of the ribs or on the mine floor.

The procedure for rock dust collection of "samples to substantiate the violation when citing inadequate rock dust" is set forth in MSHA's Coal General Inspection Handbook at Chapter 4 in Section III (A). (Resp. Ex. 2). This section requires collection of mixed dust obtained from the floor, ribs and roof by the band or perimeter method. The sample should be thoroughly mixed, coned and quartered to cut the bulk of the sample to the desired amount. Section III(A) also permits collection of separate "supplies of dust from either the roof, ribs, or floor when deemed necessary." For example, when it is "impractical and unsafe" to collect full

band or perimeter samples, floor samples may be collected separately. (*Id.*).

Tenney testified that a band sample "takes an extreme amount of time, it takes several minutes [to collect]. Its not something we do in a few seconds." (Tr.353). Instead of using the band method of collection, Tenney stated he collected five dust samples simply by sweeping loose material from the mine floor into a pan and then transferring the material into a bag. To determine the locations where dust samples would be collected, Tenney testified, ". . . they were just random. Take one here, take one there, and we were walking throughout the area, **and when I got to an area where I thought it was really bad**, I just took a sample." (Tr. 361) (Emphasis added).

Tenney was asked whether he should have taken the time to obtain band samples, particularly in this case where the samples would be used to support an alleged unwarrantable failure. "Perhaps I should have taken the method and the time involved in it. In this instance, the severity was so clear to me that it was not an area of concern." (Tr. 357). Nonetheless, Tenney admitted that band samples would have contained a higher percentage of incombustible content than the incombustible content contained in his mine floor samples. (Tr. 362-64).

Based on his conclusion that there was no visible rock dust on the mine floor in entry Nos. 4 through 8, Tenney issued 104(d)(2) Order No. 4889945 citing an alleged violation of the mandatory safety standard in section 75.403. This mandatory standard states in pertinent part:

Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than 65 per centum

104(d)(2) Order No. 4889945 states:

The incombustible content of the combined coal dust, rock dust and other dust of the St. Leo-9 South (058) section does not appear to be properly maintained. The mine floor and ribs of the #3 thru #7 entries from the 1st crosscut inby the section loading point (#4 crosscut), inby to the last open crosscut (#8 crosscut), have been poorly rock dusted at best during development. Many areas are black and the roadways are dry with coal having been ground to dust and coal fines by mobile equipment. The #7 entry from the last open crosscut outby for 400 feet shows no evidence of rock dust on the floor. Condition is obvious to the most casual observer. The following spot samples were collected to support this order:
(1) #7 entry 40 ft. outby #8 crosscut (2) #7 entry 30 ft. outby #7 crosscut
(3) crosscut 3 to 4 #4 crosscut (4) crosscut 3 to 4 #5 crosscut (5) #6 entry midway between 7 & 8 crosscut. These samples are representative of entire area.

(Gov. Ex. 2).

Laboratory analysis of the rock dust sample obtained by Tenney reflected incombustible contents ranging from 23.6% to 36.9%, below the required 65% incombustible content required by section 75.403. (Gov. Ex. 3).

Inspector Tenney reviewed the preshift and onshift books for the 9 South section. No references to spillage or accumulations of coal were noted in the preshift examination report for the day shift of May 20, 1998. Because the accumulations of coal and the need for additional rock dust for the section were not listed in the preshift book, Tenney issued 104(d)(2) Order No. 4889946 alleging a violation of 30 C.F.R. § 75.360(a)(1). This mandatory safety standard provides, in pertinent part, ". . . a certified person designated by the operator shall make a preshift examination [for hazardous conditions] within 3 hours preceding the beginning of any shift . . ."

As previously noted, Danny Kuhn accompanied Tenney on his May 20, 1998, inspection. Kuhn, now retired, worked for Consol for 32 years. In the 15 years preceding his retirement, Kuhn was a safety inspector in Consol's safety department. Kuhn had been in the 9 South section on the day shift of May 19, 1998, to check on the abatement of a citation that inspector Tenney had issued on May 18, 1998. At that time, the construction work in the No. 1, 2, and 3 entries had been completed and the entries were being rock dusted with hoses that are connected to a track mounted bulk duster.

During the midnight shift beginning at 12:01 a.m. on May 20, 1998, corners were cut from coal pillars at the No. 6 entry at the No. 7 crosscut, and at the inby end of the belt trench in the No. 5 entry at the No. 7 crosscut, to widen these areas to enable equipment to negotiate turns. Additional cutting of the pillar in the No. 6 entry had been done at the time of Tenney's inspection. Consol's production foreman Thomas Zapach stated material cut from pillars during the bumping process was cleaned as soon as practicable, after the continuous miner and other equipment were moved so that the area could be cleaned.

Kuhn recalled the belt trench and overcasts were substantially completed during the day and afternoon shifts of May 19, 1998. However, Zapach testified additional trench cutting occurred on the day shift of May 20, 1998.

On the day of the inspection, Kuhn testified the bulk dusting hose was extended from the bulk duster in the track entry into the No. 3 crosscut between No. 3 and No. 6 entries. Kuhn testified that bulk rock dusting could not be accomplished until construction was complete. For example, Kuhn explained the trench was being cut in the roof of the No. 5 entry, the full length from the No. 4 crosscut through to the No. 7 crosscut. To ventilate the roof dust away from the continuous miner operator and roof bolters who were cutting the trench, the dislodged gray roof dust was blown inby the No. 5 entry along the No. 4, 5, 6, and 7 crosscuts obscuring previous inert rock dust that had been applied during the mining process. Kuhn explained that the mine floor could not be rock dusted until the trench and overcast debris was scooped and cleaned from the floor because the scoop would remove rock dust that was applied to the mine prior to the cleanup process.

In addition, equipment and trailing cables that were stored in the section during the construction phase had to be removed from the section so that the roads could be cleaned. With the exception of the two areas of accumulations resulting from the recent bumping of the pillars, both Kuhn and Zapach attributed the coal dust accumulations observed by Tenney to rib sloughage that was run over by mine equipment and distributed by shuttle car drags, rather than spillage from shuttle cars. Zapach stated that sloughage has inert rock dust content from the previously rock dusted ribs, although he conceded there may be instances where additional rock dusting is needed.

In summary, both Kuhn and Zapach testified that, like the No. 1 through No. 3 entries that had been thoroughly rock dusted immediately after construction work was completed, the No. 4 through 8 entries were to be bulk rock dusted as soon as construction was completed, the trench and overcast debris was cleaned from the mine floor, and the stored equipment with its trailing cables were moved out of the roadways.

II. Further Findings and Conclusions

In January 1998, jurisdiction over Consol's Loveridge No. 22 mine was transferred from MSHA's Fairmont West Virginia field office to MSHA's Bridgeport, West Virginia field office. After initially inspecting the mine, inspector Tenney and his supervisor in the Bridgeport office met with Consol's management personnel and informed them that their "rock dusting procedures and their clean-up was borderline to substandard." (Tr. 47-49). The company was told to "step up, to come forward, to increase their compliance level." (*Id.*). Having concluded Consol's past emphasis on cleanup and rock dusting under the jurisdiction of the Fairmont field office was inadequate, Tenney entered the 9 South Leo section, where construction rather than active mining, was occurring.

The three alleged violative conditions in issue concern impermissible coal dust accumulations, the failure to adequately rock dust, and the failure to note the cited conditions in the preshift examination book. In order to evaluate whether the Secretary has established, by a preponderance of the evidence, that the cited S&S violations occurred, and, if so, whether they are attributable to Consol's unwarrantable failure, the cited violations must be viewed in the context of the construction that was occurring in the 9 South Leo section on May 20, 1998.

A. Order No. 4889944 - Accumulations

i. Fact of Occurrence

Section 75.400, the cited mandatory standard, requires that coal dust and other combustible materials shall "not be permitted to accumulate in active workings." Since coal dust is a natural consequence of mining, the question is whether Consol "permitted" the accumulations to occur without making any effort to remove them. In applying section 75.400, the Tenth Circuit Court of Appeals has stated section 75.400 "prohibits permitting [coal dust] to

accumulate; hence it must be cleaned up with reasonable promptness, with all convenient speed." *Utah Power & Light v Secretary of Labor*, 951 F.2d 292, 295 n.11, (10th Cir. 1991). Thus, resolution of whether Consol's actions constitute a violation of section 75.400 is dependent on the amount of time Consol allowed the accumulations to remain on the mine floor. Since the Mine Act is a strict liability statute, Consol may be held liable for violation of this mandatory safety standard without regard to fault. *Wyoming Fuel Co.*, 16 FMSHRC 19, 21 (January 1994).

The accumulations in the 9 South section that serve as the basis for the cited section 75.400 violation are coal accumulations from a bulldozed corner in the No. 6 entry at the No. 7 crosscut measuring 20 inches deep, by 12 feet long, by 8 feet wide, as well coal and roof rock dust accumulations, from one to two inches in depth, with deeper accumulations filling irregularities in the mine floor (potholes), in the No. 4 through No. 8 entries and crosscuts. The origin of the mine floor accumulations primarily was from coal rib sloughage that had been run over and ground into dust by battery operated scoops transporting blocks and overcasts. The ground sloughage material was combined with dark gray roof dust by shuttle car drags.

Consol admits the "bumping" residuals were allowed to remain on the mine floor from some time during the midnight shift beginning at 12:01 on May 20, 1998, when two pillars were bumped, until they were observed by inspector Tenney at approximately 10:00 a.m. the following morning. Tenney's speculation that the conditions he observed existed for approximately 12 shifts is difficult to reconcile with his testimony that mining in the 9 South section was "periodic" with very slow face advancement. However, since construction had occurred in the subject entries since at least May 18, 1998, it is reasonable to conclude the widespread accumulations from ground sloughage that was spread by shuttle cars existed for a minimum of several shifts.

As a general proposition, in defining a prohibited "accumulation" for section 75.400, the Commission has recognized that "some spillage of combustible materials may be inevitable in mining operations. However it is clear that those masses of combustible materials which could cause or propagate a fire or explosion are what Congress intended to proscribe." *Old Ben Coal Co.*, 2 FMSHRC 2806, 2808 (October 1980) (*Old Ben II*). Whether conditions constitute a violation of section 75.400 should be committed to the broad discretion of the mine inspector. *Id.*

Here, the cited accumulations, consisting of sloughage that had been run over and dragged into the haul roads, were extensive. The combustible content of the ground up sloughage varied with the concentration of roof rock dust and other inert material mixed together by the shuttle car drags. Consol, by subordinating its cleanup responsibility to its desire to complete construction allowed these conditions to exist for several shifts. Accordingly, the Secretary has demonstrated the elements of a section 75.400 violation.

ii. Significant and Substantial

A violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (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 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 [by the violation] will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC at 3-4.

Id. at 3-4 (footnote omitted). See also *Austin Power Co. v. Secretary*, 861 F.2d 99, 104-05 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

In determining if it is reasonably likely that a cited condition will result in serious injury, it is not necessary to show that miners were exposed directly to the resultant hazard at the time of the inspection. Rather, the Commission has stated an evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *Halfway Incorporated*, 8 FMSHRC 8, 12 (January 1986); *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (August 1985).

Applying the *Mathies* criteria, having concluded Consol violated section 75.400, the first element is satisfied. Because coal dust accumulations are potentially combustible, and, if combustion, *i.e.*, fire or explosion, were to occur, there is a reasonable likelihood that miners would sustain serious injury, the second and fourth elements of the *Mathies* test are met. The remaining criterion, a reasonable likelihood that the combustion hazard caused by the violation will result in injury, requires examining whether there was a "confluence of factors" present based on the particular facts surrounding the violation that would make a fire, ignition, or explosion reasonably likely. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988). Some of these factors include the extent of the accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 9 (January 1997) *citing Utah Power & Light Co.*, 12 FMSHRC 965, 970-71 (May 1990); *Texasgulf*, 10 FMSHRC at 500-03.

As a threshold matter, although minimal concentrations of .1% to .2% methane were present in the 9 South section on May 20, 1998, Consol's Loveridge No. 22 Mine liberates more than 1,000,000 cubic feet of methane in a 24 hour period subjecting the mine to spot inspections under section 103(i) of the Mine Act, 30 U.S.C. § 813(i). Thus, the cited extensive accumulations, that could be put in suspension by the drags on the shuttle cars, was a source of propagation in the event of a methane fire or explosion in any part of the mine.

In addition to the general methane explosion hazard originating in other areas of the mine, inspector Tenney testified about several potential ignition sources in the 9 South section. For example, Tenney noted continuous miner bits hitting sulfur balls, acetylene torches used for welding, and electrical trailing cables that were subject to damage as mining equipment drove over them, as potential ignition sources.

Accordingly, the evidence amply reflects a reasonable likelihood, given continued mining operations, that the hazard contributed to by the cited combustible accumulations will result in an event (a fire or explosion) causing injury of a reasonably serious nature. Consequently, the S&S nature of the subject section 75.400 violation shall be affirmed.

B. Order No. 4889945

Section 75.403, the cited mandatory standard, requires rock dust to be applied to the roof, ribs and floor of all underground mine areas so as to maintain "incombustible content of the **combined coal dust, [white, applied] rock dust, and other dust**" of less than 65 per centum. (Emphasis added). Upon his arrival on the 9 South section on May 20, 1998, Tenney's observations led him to believe the incombustible content of the combined dust found on the section was less than the 65 percent standard. (Tr. 171). I emphasize "combined dust," because violative samples taken from isolated coal spills, residuals of coal cut from coal pillars, and areas of coal sloughage, alone, are not evidence of inadequate rock dusting.

Sometime prior to beginning construction in the 9 South section, Tenney concedes the section had been rock dusted during the course of the normal mining cycle when the entries were advanced. In fact, Tenney observed rock dust on the roof and halfway up the ribs. Kuhn, the company representative who accompanied Tenney during his inspection admits the section looked "bad" on May 20, 1998, because of the dark gray roof material that had been blown in by throughout the section to ventilate the construction roof dust away from the miner and roof bolter operators. Spillage of the roof debris in the haul roads was also likely. The shuttle car drags would mix the roof rock material that had fallen on the mine floor with the cited coal dust sources, such as sloughage that was run over by mine equipment.

Thus, the fact that the conditions of the mine floor and lower ribs looked black in color on May 20, 1998, is not in dispute. The issue is whether the general conditions in the 9 South section at that time constituted a violation of Section 75.403 because there was less than 65 percent incombustible content. Five rock dust samples obtained by Tenney, taken by sweeping samples from the mine floor into a pan, revealed incombustible contents ranging from 23.6% to 36.9%, below the required 65% incombustible content. However, Consol argues the samples taken by Tenney are not representative samples because Tenney did not use the band collection method that involves mixing roof, rib and mine floor dust.

Provisions in MSHA's policy manuals, such as the band sample procedures for dust sample collection in MSHA's Coal General Inspection Handbook, are not officially promulgated and they are not binding on the Commission. *Utah Power*, 12 FMSHRC at 969 *citing King Kob*

Coal Co., 3 FMSHRC 1417, 1420 (June 1981). Moreover, the question of whether a band sample is required to support a rock dust violation is not a matter of first impression. Rather, the Interior Board of Mine Operations Appeals, the predecessor of this Commission, addressing Section 304(d) of the 1969 Coal Act that contains the identical language in section 75.403, has held that laboratory results of floor samples alone may be the basis for establishing a violation of an incombustible content standard. *North American Coal Corporation*, 1 MSHC 1130, 1134 (1974).

While floor samples alone may be adequate to support a section 75.403 violation, the analysis does not stop there. The floor samples must be taken from representative areas of the mine floor, rather than from areas where discrete coal accumulations are located. Although Tenney testified that he took the floor samples randomly, he stated that he took the samples from areas that he thought "[were] really bad." (Tr. 361). When asked to clarify the apparent contradiction between his "random" sampling and his selection of "bad areas," Tenney responded, "I would say that I picked out the areas that I was confident the rock dust content was the lowest." (Tr. 367).

When an MSHA inspector departs from recommended procedure by collecting floor samples instead of band samples as representative of mine conditions, the Secretary must bear the burden of demonstrating the samples are representative. Here, Tenney's selection of areas where he believed rock dust content was the lowest renders the samples unrepresentative, thus voiding the laboratory findings.

Hence, the Secretary is left solely with Tenney's observations. Observations alone, particularly in this case where there were significant quantities of dark gray roof dust throughout the 9 South section, are inadequate to support a section 75.403 violation. Accordingly, 104(d) Order No. 4889945 shall be vacated.

C. Order No. 4889946

Order No. 4889946 cites an alleged violation of section 75.360 that requires "a certified person designated by the operator shall make a preshift examination within 3 hours preceding the beginning of any shift during which any person is scheduled to work or travel underground." Thus, the operative time frame for determining the period during which conditions should have been noted in the preshift book is the three hour period before the beginning of the 8:00 a.m. day shift on May 20, 1998, or from 5:00 a.m. to 8:00 a.m.

Consol admits that bumping material that occurred during the midnight shift immediately preceding the May 20, 1998, day shift had not been cleaned from the mine floor. The evidence also reflects areas of sloughage that had been run over by mine equipment and pushed into the haul entries were also present at least 3 hours before the beginning of the May 20, 1998, day shift. As discussed above, these conditions constituted hazardous conditions. Such hazards must be noted in the preshift book. Even though it was noted that the mine section was idle, construction personnel were present on the section. Accordingly, Consol's failure to note

these hazardous accumulations in the preshift examination book constitutes a violation of section 75.360.

With regard to the S&S issue, the Commission has stated that thorough preshift examinations are fundamental to coal mine safety. *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (January 1995). The failure to note existing coal dust accumulations in the preshift examination book contributes to the continuing presence of a hazardous condition. As a consequence, given the above discussion about the likelihood of serious injury occurring as a result of the combustion hazard, it is reasonable to conclude that the cited violation of section 4889946 was properly designated as S&S in nature.

D. The Unwarrantable Failure Issue

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. A finding of unwarrantable failure requires evidence of unjustifiable or aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (December 1987). Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* At 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission’s unwarrantable failure test).

Ordinarily, allowing accumulations to exist for several shifts clearly would constitute a very serious breach of the duty to clean combustible accumulations with all deliberate speed that section 75.400 imposes on operators. Thus, it is easy to dismiss the respondent’s construction defense and consider this matter as a routine coal dust accumulation case attributable to an unwarrantable failure. However, to do so would ignore the mining cycle by superimposing the routine standards for cleanup that apply after an entry has been driven and roof bolted to a construction area where active mining is not in progress.

The degree of negligence associated with violative coal dust accumulations must be evaluated on a case-by-case basis. The Commission has noted that the totality of circumstances are relevant in determining whether a violation is the result of an operator’s unwarrantable failure, such as the extensiveness of the accumulations, the length of time the violation was permitted to exist, the operator’s efforts to eliminate the condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance. *Windsor Coal Company*, 21 FMSHRC 997 (September 1999).

That accumulations existed for several shifts is not in dispute. The central issue is whether Consol’s failure to remove the cited accumulations is unjustifiable and inexcusable given the facts of this case. The Secretary has confronted Consol with a dilemma. The Secretary insists that it is inexcusable for Consol to have proceeded with construction activities without first cleaning and rock dusting the 9 South section. However, the evidence reflects that Consol’s ability to clean and rock dust the section prior to completion of construction was

greatly impaired.

There were numerous pieces of mining equipment for the new 1D section, as well as for the 9 South section, that had been stored inby and outby the tailpiece. These pieces of machinery were equipped with lengthy trailing cables that were stored along the base of the ribs. During construction it was difficult to maneuver this equipment until pillars were bumped where necessary. While this equipment was stored, trenches and overcasts were cut in the mine roof that generated large quantities of mine roof rock dust. This mine roof dust was ventilated away from the continuous miner and roof bolt operators by directing the roof dust inby in the Number 4 through 7 entries. At what point during the construction process was it appropriate for Consol to withdraw all of this equipment to make the entries and crosscuts accessible for cleaning? If it had done so, at what point would Consol have to again withdraw all of the equipment to scoop and rock dust after construction activities had resumed?

Clearing the section for cleaning during construction was difficult. In this regard, it took several shifts to remove the equipment, scoop the area, and bulk rock dust in order to abate Order No. 4889944. From the time the 104(d) order was written at 10:30 a.m., Consol worked all of its crews and all of the equipment around the clock to abate the order. To correct the cited conditions Consol had to move two continuous miners, two loading machines and two roof bolters. The continuous miner and loading machine cables, that were stored along the ribs, also had to be removed. Both the continuous miner cables and the loading machine cables are approximately 1,000 feet long. Consol was not finished cleaning the section when Tenney arrived at the mine at 5:00 a.m. the following day. The order was terminated at 7:00 a.m. on May 21, 1998. Thus, it took approximately 20 hours to clean and rock dust the section. When viewed in this context, the question is whether Consol's decision to briefly delay cleanup and bulk dusting in the 9 South section until it had completed construction, like it had done for the No. 1 through No. 3 entries, constitutes aggravated conduct.

In recognizing Consol's difficulty in cleaning the section under these circumstances, I am not trivializing the significance of hazardous accumulations, or, ignoring Consol's responsibility to remove the accumulations. However, an operator's continuing obligation to remove coal accumulations must be distinguished from whether its failure to do so is egregious behavior properly characterized as aggravated, unjustifiable, or inexcusable conduct. As discussed below, Consol's history of section 75.400 violations demonstrates that accumulation violations are most often not attributable to unwarrantable conduct. Of necessity, accumulations are permitted during certain stages of the mining cycle. For example, accumulations remain on the mine floor during the continuous mining and roof bolting process because it is not practicable to remove the accumulations until the continuous miner can be backed out of the entry. *Utah Power*, 12 FMSHRC at 967.

While not dispositive of the unwarrantable failure issue, it is noteworthy that MSHA investigated this matter and decided not to pursue an action under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that requires a showing that mine management "knowingly" violated the subject mandatory standards. (Resp. Ex. 3). Such a showing requires demonstrating

aggravated conduct on management's part constituting more than ordinary negligence. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (August 1992).

Finally, the concepts of "notice" and "a history of repeated similar violations" must be distinguished. A history of numerous repeated similar violations is not necessary to establish that an operator was on notice. Notice may be established based on a history of only one similar violation where an operator claims, for mitigation purposes, that it was not aware of a particular safety hazard, or, that it did not understand a particular safety standard.

In the present case, the Secretary asserts Consol's conduct constitutes unwarrantable failure because it was on notice as a consequence of its history of section 75.400 coal dust accumulations violations. However, in the current case, notice is not in issue, in that Consol does not assert that it was unaware of its responsibility to promptly remove coal dust accumulations. Rather, the mitigating circumstances relied on by Consol concern issues concerning section construction. Thus, Consol's conduct must be evaluated on the basis of its behavior during construction, without regard to Consol's obvious awareness, as well as the awareness of all other operators, that operators are responsible for promptly cleaning coal dust accumulations.

During the two year period preceding the issuance of the orders in issue, from May 20, 1996, through May 19, 1998, Consol was cited for 88 violations of section 75.400. Of these 88 violations, two were attributable to Consol's unwarrantable failure. Of the 88 violations, 44 violations were assessed \$50 penalties and characterized as non-S&S. The majority of the civil penalties assessed for the S&S violations ranged between \$267 and \$595.

Although Consol's history of numerous section 75.400 violations is a relevant consideration under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), and warrants increasing the civil penalty to encourage deterrence, I am not persuaded, as the Secretary suggests, that Consol's history of violations elevates its behavior to aggravated conduct. Such an approach is inconsistent with the statutory language of section 104(d) that sets forth the circumstances for the Mine Act's graduated enforcement scheme. In *Greenwich Collieries*, 12 FMSHRC 940 (May 1990) the Commission noted:

The focus of section 104(d) is upon the operator's unwarrantable conduct. Section 104(d) seeks to discourage repetition of such conduct by placing the operator on a probationary "chain." This probationary period, backed up by the threat of a withdrawal order, is "among the Secretary's most powerful instruments for enforcing mine safety." *UMWA v. FMSHRC*, supra, 768 F.2d at 1479.

12 FMSHRC at 945. (Emphasis added). Using repeated similar violations to establish that an operator has unwarrantable character shifts the statutory focus by imposing withdrawal sanctions on operators with a history of repetitious violations rather than a history of repetitious

unwarrantable conduct. While this powerful enforcement procedure may be desirable, it is not authorized by the plain language of the statute.

I am not suggesting that prior similar violations are always immaterial. There may be situations where repeated violative conduct is important in demonstrating an unwarrantable failure because the violative conduct is specific, such as a repeated failure to trim hazardous stockpiles. However, here, a history of a generic failure to clean coal dust accumulations, that may have occurred because of an unknown myriad of circumstances, may not be used to establish that an operator's current violative conduct is habitual. Consequently, in this case, where notice is not in issue, and specific habitual violative conduct has not been shown, Consol's history of violations does not provide an adequate basis for elevating its moderate negligence on May 20, 1998, to unjustifiable or inexcusable conduct.

Accordingly, I conclude Consol's failure to clean the cited accumulations, and its failure to note the conditions in the preshift examination book because construction on the section was not yet complete, were not attributable to its unwarrantable failure. Thus, 104(d) Order Nos. 4889944 and 4889946 shall be modified to 104(a) citations.

III. Civil Penalty

Section 110(i) of the Act provides the statutory criteria for determining the appropriate civil penalty to be assessed. Section 110(i) provides, in pertinent part, in assessing civil penalties:

the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

The parties have stipulated that Consol is a large mine operator and that the civil penalties initially proposed by the Secretary in this matter will not affect Consol's ability to continue in business. As discussed above, the violations are of serious gravity and are attributable to no more than Consol's moderate negligence. Consol's immediate suspension of construction activities and its concerted efforts to achieve compliance are not viewed as a mitigating circumstance since Consol was obliged to rapidly abate the cited conditions. Finally, although Consol's history of numerous similar 75.400 violations does not provide an adequate basis for elevating its conduct to an unwarrantable failure, its significant violation history is a basis for increasing the civil penalty for Citation No. 4889944 to encourage greater efforts of

future compliance.¹

Accordingly, consistent with the statutory penalty criteria, a civil penalty of \$3,500.00 shall be assessed for the violation of section 75.400 cited in modified Citation No. 4889944, and a civil penalty of \$1,500.00 shall be assessed for the violation of section 75.360 cited in modified Citation No. 4889946.

IV. The Settlement Agreement

The parties' settlement agreement with respect to remaining 104(d)(2) Order Nos. 4703193, 4703221 and 4703222 was granted on the record. (Tr. 696). Consol agreed to a reduction in civil penalty from \$27,000.00 to \$4,500.00. The settlement terms included vacating Order No. 4703222, and modifying 104(d)(2) Order No. 4703221 to a 104(a) citation and imposing a \$1,500.00 civil penalty. 104(d)(2) Order No. 4703193 remained unchanged although the civil penalty was reduced from \$9,000.00 to \$3,000.00.

ORDER

ACCORDINGLY, IT IS ORDERED that 104(d)(2) Order No. 4889945 **IS VACATED**.

IT IS FURTHER ORDERED that 104(d)(2) Order Nos. 4889944 and 4889946 **ARE MODIFIED** to a 104 citations to reflect that the cited violations of sections 75.400 and 75.360 were not attributable to Consolidation Coal Company's unwarrantable failure.

IT IS FURTHER ORDERED that Consolidation Coal Company shall pay a \$3,500.00 civil penalty for modified Citation No. 4889944, and a civil penalty of 1,500.00 for modified Citation No. 4889946.

IT IS FURTHER ORDERED, consistent with the parties' settlement agreement reached at trial, that 104(d)(2) Order No. 4703222 **IS VACATED**, and, Consolidation Coal Company shall pay civil penalties of \$1,500.00 for modified 104(a) Citation No. 4703221, and \$3,000.00 for 104(d)(2) Order No. 4703193.

IT IS FURTHER ORDERED that Consolidation Coal Company pay a total civil penalty of \$9,500.00 in satisfaction of the subject orders and citations. Payment shall be made within 40 days of the date of this decision. Upon timely payment of the total \$9,500.00 civil penalty, this matter **IS DISMISSED**.

¹ The \$3,500 civil penalty imposed herein for Consol's section 75.400 violation is significantly higher than the penalties proposed by the Secretary for Consol's prior section 75.400 violations.

Jerold Feldman
Administrative Law Judge

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