CCASE:
SOL (MSHA) V. CONSOLIDATION COAL
DDATE:
19930916
TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 92-1012
Petitioner	:	A.C. No. 46-01455-03895
	:	
v.	:	Osage No. 3 Mine
	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Charles M. Jackson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for Petitioner;
Daniel E. Rogers, Esq., Consol Incorporated, Pittsburgh, Pennsylvania for Respondent.

Before: Judge Barbour

STATEMENT OF THE CASE

This case is before me upon the petition for assessment of civil penalties filed by the Secretary of Labor ("Secretary") against Consolidation Coal Company ("Consol") pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 (the "Mine Act" or "Act"). 30 U.S.C. 815 and 820. The petition alleges two violations of certain mandatory safety standards for underground coal mines found in Part 75 of Volume 30 of the Code of Federal Regulations ("C.F.R."). The alleged violations are set forth in orders of withdrawal issued pursuant to section 104(d)(2) of the Act. 30 U.S.C. 814(d)(2). In addition to the allegations of violation, the orders assert the violations each constituted significant and substantial contributions to mine safety hazards ("S&S" violations) resulting from Consol's unwarrantable failure to comply with the cited standards. Consol answered, denying the Secretary's allegations, and hearings were held in Morgantown, West Virginia.(Footnote 1)

The issues for decision are whether the violations existed as charged and, if so, whether they were S&S in nature and the result of Consol's unwarrantable failure to comply. In addition,

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1Because the case could not be heard in full during the time available, the initial hearing was adjourned short of completion. It was reconvened about one month later. Citations to the transcript of the first hearing are signaled "Tr. I". Citations to the transcript of the second are signaled "Tr. II".

if violations are found, appropriate civil penalties must be assessed.

At the close of the hearing counsels presented oral summaries of their positions.

STIPULATIONS

Pertinent to this decision, the parties agreed as follows:

l. Consol is the owner and operator of the Osage No. 3 Mine.

2. Operations of Consol are subject to the jurisdiction of Act.

3. This proceeding is under the jurisdiction of the Federal Mine Safety and Health Review Commission ("Commission") and its designated Administrative Law Judge.

4. Mine Safety and Health Administration ("MSHA") Inspector Lynn Workley was acting in his official capacity and as an authorized representative of the Secretary when the orders at issue were served.

5. True copies of each of the orders were served on Consol or its agent as required by the Act.

6. The total proposed penalty for the orders contested by Consol in this proceeding will not affect Consol's ability to continue in business.

See Tr. I 8.

ORDER NO.	DATE	30 C.F.R.
3718491	2/10/92	75.323

The order states:

> The 7 butt intake escapeway was examined by Ron Wyatt (certified foreman) on 1/23/92 and he entered in the approved book that added roof support is needed at 55 block from the intake door to the return door. The report was countersigned by Joe Statler[,] mine foreman[,] and by Aaron Cage[,] assistant super[intendent]; however no action has been taken to correct this hazard.

Gov. Exh. 4.

THE EVIDENCE

THE SECRETARY'S WITNESS

LYNN WORKLEY

MSHA Inspector Workley testified that on January 23, l992, during the course of an inspection of the Osage No. 3 Mine, he traveled the 7 butt intake escapeway with Consol inspection escort, Norman Hill, and UMWA representative, Ronald Schriver. At No. 55 break (a crosscut) Workley saw that the roof was sagging. In the crosscut Workley observed a diagonal crack from the outby right hand rib of the escapeway to the inby left hand rib. (In other words, the crack extended across the entire intersection of the escapeway entry and the crosscut. See Exh. Gov. 7.) The crack was opened about a 1/2 inch. According to Workley, the mine roof was deteriorating in the right and left crosscut and coal had fallen from the roof at the corner where the rib and roof met. Tr. I 22. Workley testified that he believed the roof could have fallen at any time. Tr. I 45.

There were stoppings in the right and left crosscut and the distance between the stoppings was approximately 100 feet. Id.; Gov. Exh. 7. The intake entry and crosscut were each 15 feet wide. Tr. I 52.(Footnote 2) Workley believed that the condition of the roof at the intersection was such that the miner who weekly examined for hazardous conditions should have observed and reported it. Workley stated that at the time he saw the condition he was not aware if the condition had been reported and, at the suggestion of Hill, he decided to wait until he got to the surface in order to check the weekly examination book (the book wherein hazardous conditions noted during the weekly examination are recorded). Tr. I 23.

Upon checking, Workley found an entry in the book regarding the condition had been made that day by Ronald Wyatt, the midnight shift foreman who had examined the escapeway. Wyatt had indicated that additional roof support was needed between the stoppings in the No. 55 break. Tr. I 24.

Workley identified a copy of a page from the book. The page is titled Emergency Escape Facilities and Escapeways Examined (Weekly) and it states in pertinent part "1-23-93[,] 7 Butt Face to 6 Butt Split[,] 55 Block From Track Door to Return Door Needs

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2Although Workley's sketch of the area shows the crosscut as intersecting the entry at a 90 degree angle, Workley acknowledged that the crosscut actually intersects at a 60 degree angle. When asked whether cutting crosscuts on a 60 degree angle can reduce the danger of roof fall, he replied, "It can." Tr. I 56; see also Gov. Exh. 7.

Additional Support[,] R. Wyatt [signature]" Gov. Exh. 6 at 2. The page was countersigned by Joseph Statler, the mine foreman, and by Aaron Gage, the assistant mine superintendent.

Workley testified that when he viewed the intersection he noticed that two posts had been set at its outby right corner, one on either side of the crack. Tr. I 25, 52. (The posts are depicted by small circles on Gov. Exh. 7.) Workley believed the posts were insufficient to properly support the roof. However, he did not issue a citation at that time because Consol was following the "correct procedure" in that Wyatt had traveled the area as required, had noted the hazardous condition and had recorded the condition in the book. Tr. I 24-25. Further, Workley stated that when additional roof support is needed it normally takes at least one shift to transport roof support materials such as cribs and posts to an area and to arrange for miners to come to the area and do the work. Tr. I 26. Workley testified that after he reviewed the "Weekly Examination" book he explained to Hill and Schriver his reasons for not writing a citation and he left the mine.

Workley returned to the mine during the afternoon shift of February 10 to conduct another inspection. This time Workley was accompanied during his inspection by Consol representative Art Jordan and miners' representative Eddie Cheslik. Workley returned to the No. 55 break of the No. 7 butt intake escapeway. Workley stated that he found conditions to be "almost exactly the same" as they had been on January 23. Tr. I 27. Workley told Jordan and Cheslik that he was issuing a section 104(a) citation requiring installation of additional roof support and a section 104(d)(2) order of withdrawal for an unwarrantable failure to correct the hazardous condition that had been recorded in the weekly examination book on January 23. Id.

After issuing the order, Workley checked the weekly examination book and found an entry for January 30, 1991, indicating that additional roof support was needed in the area of the intersection. Workley identified a copy of the page bearing the entry. Gov. Exh. 6 at 4. (Workley read it into the record, "1/30/92, seven butt face to Moorsville, 55 block, track door to return, needs added support." Tr. I 29.) Workley believed the entry indicated that between January 23 and 30 Consol had done essentially nothing to correct the condition, even though Statler had told him that a miner had been assigned to take corrective action and that a couple of posts had been set at No. 55 block. Tr. I 29, 43.

Workley acknowledged there were still two posts present on February 10, one set on each side of the crack at the outby right corner. In addition, he acknowledged that there may have been some posts in the crosscut on both January 23 and February 10. Tr.I 30, 54. He indicated, however, that even if some posts had

been set between January 23 and February 10, they did not correct the hazardous condition, for he noted that to abate the condition Consol had to install six cribs and twenty seven additional posts in addition to whatever posts may have been there. Tr. I 31; Gov. Exh. 6 at 5. In Workley's opinion the failure to correct the condition of the roof in the intersection between January 23 and February 10 violated section 75. 323 because that standard required reported hazardous conditions be corrected promptly. Tr. I 32.

Workley believed failure to install the required roof support had subjected persons traveling through the intersection to the danger of injuries from roof fall and that such injuries could range from quite serious to fatal. Tr. I 33. He also believed it reasonably likely that a reasonably serious injury would have occurred had mining continued. He noted some blocks of head coal adjacent to the crack and measuring approximately 6 to 8 inches wide had fallen from the roof and that he had asked Jordan and Cheslik not to go under the area. Workley stated, "I felt extremely uncomfortable getting under far enough to see the crack and what more deterioration had taken place . . . " Tr. I 41. Because of the sag in the roof, the amount of loose rock and coal adjacent to the crack and the sloughage from the top part of the ribs in the crosscuts, Workley believed parts of the roof could have fallen at any time. Tr. I 42.

According to Workley, those miners likely to have been injured were the miner who was required to travel the entry weekly to examine the escapeway, the one or more section workers who usually accompanied the examiner and persons using the crosscut to travel from the return entry to the track entry.

Tr. I 43. Moreover, if a section crew had to use the escapeway to evacuate the mine, the entire crew of up to six or seven miners would have been subject to injury because they would have had to pass under the defective roof on their way out of the mine. Tr. I 35.

With regard to Consol's negligence in failing to correct the condition, Workley believed that because the mine foreman, Statler, and the assistant superintendent, Gage, had countersigned the page containing the report of the condition, they were aware of it. Tr. I 35. Moreover, because the condition was the same or worse on February 10 than it had been on January 23, Workley believed that mine management had taken no apparent action to correct the condition. This belief was confirmed by the fact that there were no entries in the book to show that any action had been taken, only an entry on January 30, to indicate that the same condition still existed. Tr. I 37. Mining had been taking place while the condition existed and Workley concluded Consol had given priority to production, not to maintenance of the roof in the escapeway. Tr. I 37-38.

When asked whether he would have considered it a violation if eight posts had been set in the area of the crack, Workley replied that Consol would still have been in violation because it took more than eight posts to eliminate the hazard. (He specifically noted six cribs had been build for abatement purposes and stated that the roof support given by one crib is equal to that of a dozen posts. Tr. I 39.)

The condition was abated by the midnight crew on February 11. Workley described the abatement as timely. Tr.I 40.

CONSOL'S WITNESS

JOSEPH STATLER

Statler is the general mine foreman at the Osage No. 3 Mine and he held that position during Workley's inspections of January and February 1992. Statler was asked what was done in response to Wyatt's entry of January 23, 1992, in the preshift examination book -- the entry that indicated the subject area needed roof support? He responded that immediately after the inspection on January 23, Hill had told him that posts would have to be set in the area. Statler stated that he then told the foreman of the next shift, the afternoon shift, to send people into the area, to see what needed to be done and to do it. Tr. I 59-60. Statler also stated that "as a backup" he left a note for the foreman of the midnight shift -- the shift following the afternoon shift -- to "make sure that . . . area was taken care of." Tr. I 60. According to Statler, the midnight shift foreman found that no work had been done in the area during the afternoon shift, and he therefore took two men into the area and the crew set eight posts. Tr. I 60-61.

Statler identified a copy of a page from the mine work book -- a book that is kept at the mine and referred to by Statler to determine what work has been done. Op. Exh. 1, Tr. I 61-62. Statler identified an entry for the midnight shift on January 24, 1992. The entry states that miners Nabors and Coburn had "picked up empty flat put in 6 Butt spur. Went to 8 west tailpiece replaced skirts. Changed rollers on 8 west belt. Set 8 posts 7 Butt intake 55 block." Op. Exh. 1 (emphasis added); see Tr. I 62. Statler also stated that he never went to the 55 block to see the posts the work book indicated had been set. Tr. I 63.

Statler was then referred to the entry of January 30, 1992, in the book used to record the results of the weekly examination of escapeways. Gov. Exh. 6 at 4. The entry contains two illegible, marked through words. Statler was of the opinion that the weekly examiner, Parker, had written the words "none found" in the column titled "Hazards Noted" and that these words had

been scratched out subsequently. Statler noted that above the scratched out words examiner William Varner had written the phrase "55 block track door to Ret needs add support," which Statler deciphered as "55 block track door to return needs additional support." Gov. Exh 6 at 4; Tr. I 67. In Statler's opinion, Varner had walked the entry with Parker, they had not noticed the area as having been in need of any support but when they came out of the mine and reviewed the book and saw that a week earlier the area had been indicate as being in need of support, they could not recall if roof supports had been installed or not. Therefore, they erred on the side of safety and marked out "none found" in the hazards column and added the entry indicating additional support was needed. Statler was candid that this was only speculation on his part. He had not discussed the situation with either man. Tr. I 68-69.

Continuing his testimony regarding the weekly examination book, Statler noted that on February 6, 1992, Lee Wolf had examined the 7 Butt face to the 6 Butt split -- an examination that would have required him to walk through the subject intersection -- and that he had indicated no hazards had been found. Tr. I 70; Gov. Exh 6 at 3.

THE VIOLATION

Section 75.323 stated in part:

> The mine foreman shall read and countersign promptly . . . the weekly report covering the examinations for hazardous conditions. Where such reports disclose hazardous conditions, they shall be corrected promptly.[(Footnote 3)]

Counsel for the Secretary argues the evidence establishes the condition of the crosscut was hazardous, that it was observed by Wyatt on January 23 and was recorded as a hazardous condition, that it was not corrected until February 10, 1992, and that the fifteen day delay in correcting the condition violated the standard's mandate that reported hazardous conditions be corrected "promptly." Counsel further asserts that even if eight posts were placed in the crosscut, as Consol alleges, the eight posts did not abate the condition and constitute prompt correction. Tr. I 76-79.

Counsel for Consol argues that within a day after the crack in the roof was noted additional roof support (i.e., the eight

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3Section 75.323 was one of the ventilation regulations revised effective August 15, 1992. 57 FR 20914 (March 15,1992). The requirements of section 75.323 now are subsumed in section 75.364.

posts) had been set and that this roof support was sufficient to take care of the situation as it existed at the time, even though it may have deteriorated subsequently and have required additional work at a later date. Tr. I 84.

I conclude the violation existed as charged. I am persuaded of this by the testimony as well as the fact that Consol chose not to call witnesses whose testimony would have presumably supported -- and strongly supported -- its argument.

There is no dispute about the condition found by Workley on January 23. The roof in the intersection of the escapeway and the crosscut was sagging and a 1/2 inch wide crack in the roof ran diagonally across the intersection. In addition, the roof in the crosscuts had deteriorated and coal had fallen at corners of the intersection. There were two posts set at the outby corner of the intersection of the escapeway and the crosscut, but they were totally inadequate to support the roof. I credit Workley's opinion that the condition of the roof was such that it could it presented a danger of falling, and I conclude therefore that the condition in the escapeway was hazardous.

There is likewise no dispute that the condition was observed and recorded and that the weekly report was read and countersigned by mine foreman Statler, as was then required by section 75.323. Statler 's signature appears on the page bearing Wyatt's January 23, 1992 report of the condition. Gov. Exh 6
at 2. Up to this point, Consol complied with section 75.323.

The problem, of course, is that the section also required the hazardous condition to be "correctly promptly." I agree with the Secretary that this was not done. In my view, prompt correction means that the hazardous condition must be corrected as quickly as is reasonably possible under all of the relevant circumstances. Here, as Statler recognized, that would have required the foreman on the shift after the hazardous condition was reported on January 23 -- the afternoon shift -- to make certain the roof was adequately supported. I credit Statler's testimony that he told the afternoon shift foreman to take care of the situation. I also credit his testimony that the foreman did nothing, and I conclude from this that the hazardous condition was not corrected promptly and that the standard was violated.

In addition, I conclude the violation was ongoing. Even if, as Consol maintains, eight posts were set on the midnight shift, the preponderance of the evidence is that they did not adequately correct the condition. I am persuaded the entry in the weekly examination book for January 30 that additional roof support was needed accurately reflects that fact, and I do not believe that the roof was deteriorating fast enough that whatever support was installed on the midnight shift of January 23-24 was made

obsolete. Rather, it seems clear to me that the condition of the roof as it existed on January 23 was never fully corrected until the violation was abated on February 11. I especially note that Consol did not call either Parker or Varner as witnesses, although both had observed the condition of the roof on January 30. Rather Consol relied solely upon the testimony of Statler, a witness who never saw the condition at issue.

In reaching the conclusion the violation was continuing, I discount the February 6 entry of mine examiner Wolf to the effect that no hazards were found in the subject intersection. Without actual testimony from Wolf, I cannot find that his written comment outweighs the opinion of Workley, that Consol never corrected the ongoing problem with the roof. Afterall, Workley twice viewed the area. Moreover, the significant amount of roof support that was necessary to eliminate the hazard adds credence to Workley's opinion that the hazardous roof existed from
January 23 until February 11. I believe it extremely unlikely that the roof would have been adequately supported and then rapidly deteriorated to the point where such massive additional roof support was needed.

S&S AND GRAVITY

The Commission has held that a violation is "significant and substantial" if, based on the particular facts surrounding the violation, there exists a "reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). Further, the Commission has offered guidance upon the interpretation of its National Gypsum definition by explaining four factors the Secretary must prove in order to establish that a violation is S&S.(Footnote 4)

Here, I have found a violation of the cited safety standard. Further, the violation posed a discrete safety hazard in that failure to promptly correct the condition of the roof subjected miners passing beneath it to the danger of injuries due to a roof

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4In Mathies Coal Co. 6 FMSHRC l, 3-4 (January 1984), the Commission stated:

> [T]o establish that a violation of a mandatory standard is significant and substantial under National Gypsum the Secretary . . . must prove: (l) the violation of a mandatory safety standard; (2) a discrete safety hazard 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.

fall. If such an accident had happened, the resulting injuries were reasonably likely to be serious or even fatal. Roof fall is, afterall, a leading cause of serious injury and death in the nation's underground coal mines.

As is frequently the case when the alleged S&S nature of a violation is challenged, the question is whether the Secretary has established a reasonable likelihood that the hazard contributed to will result in an injury? Or, as the Commission has put it, whether the Secretary has established that "the hazard contributed to will result in an event in which there is an injury?" U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984); see also Halfway, Inc. 8 FMSHRC 12 (January 1984). The relevant time frame for determining whether a reasonable likelihood of injury existed includes both the time that the violative condition existed prior to citation and the time that it would have existed if normal mining operations had continued. Halfway, 8 FMSHRC at 12; U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985).

Counsel for the Secretary maintains the testimony establishes the area in which the violation existed was traveled regularly by the weekly examiner and by other miners as well.
He argues that the area was not adequately supported from
January 23 through February 10 and that the condition was not focused upon and corrected and thus would have been a continuing, ongoing hazard had Workley not forced the issue. Therefore, he views it as highly likely that the roof would have fallen and injured someone had normal mining operations continued. Tr. I 79-80.

Counsel for Consol argues that miners "very, very rare[ly]" passed under the affected roof and therefore that it was not reasonably likely that someone would have been injured.
Tr. I 85. Moreover, he observes that between January 23 and February 10 nothing serious happened and that this speaks for itself in establishing that the probability of something occurring was "nill." Tr. I 86.

I reject Consol's arguments and conclude that Workley properly found the violation was S&S. The Secretary is right in asserting the area in which the bad roof occurred was regularly traveled and it was traveled not only by the weekly examiner and whomever accompanied him but by other miners as well. The examiner, passed under the roof on a regular basis in compliance with the requirement that the area be examined for hazardous conditions. He was accompanied usually by at least one other miner. Moreover, as Workley noted, miners used the area to travel between the track and return entries, as attested by the man doors in the stoppings at both ends of the crosscut. Further, if the escapeway ever had to be used for its intended

purpose, an entire section crew would have had to pass under the area.

I have already found that the inadequately supported roof existed between January 23 and February 10. Workley was uncertain whether, as Statler maintained, up to eight posts had been installed to support the roof, but I have agreed with Workley that whether or not they were installed the hazard was not alleviated. I further conclude that the unsupported roof would have continued to exist had normal mining operations continued. I accept counsel for the Secretary's argument that the testimony fully supports the conclusion the condition was only corrected because Workley cited the violation. Workley, the only witness to testify who had first hand knowledge of the condition, stated that on February 10 the cited area was about the same as it had been on January 23. It was clear to Workley, and it is clear to me, that Consol's correctional efforts were at most woefully inadequate. In this regard, Statler's testimony and Consol's own records afford a compelling basis from which to infer its indifference to the situation. The first foreman sent by Statler to correct the condition did nothing, and Consol's record of the weekly examination for hazardous conditions that was conducted after the January 23 examination (the January 30 examination) indicates that additional support was still needed. The implication Consol was indifferent to the condition is inescapable. Given these factors, I fully agree with counsel for the Secretary it was reasonably likely that "someone would have gotten struck by rock from a roof fall." Tr. I 80. The violation was S&S.

In determining the gravity of the violation I must consider both the potential hazard to the safety of the miners and the likelihood of the hazard occurring. As has been noted, the violation subjected miners to serious injury or death from a fall of the roof. In addition, given the extensive roof support that had to be installed to correct the condition and the fact that miners unquestionable traveled under the inadequately supported roof, it was likely that a miner would have been involved in a roof fall accident. Therefore, I conclude the violation was serious.

UNWARRANTABLE FAILURE AND NEGLIGENCE

The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987); Youghiogheny & Ohio Coal Corp., 9 FMSRHC 2007, 2010 (December 1987). The Commission has explained that this determination is derived, in part, from the ordinary 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, characterized by "inadvertence," "thoughtlessness," and "inattention"). Emery, 9 FMSHRC at 2001.

Counsel for the Secretary argues that Statler's failure to go to the affected area and make certain the condition of the roof was corrected was aggravated conduct on Consol's part.
Tr. I 81. Counsel for Consol counters that within a day after the condition was first noted by Workley, the eight posts were set and that this was sufficient to take care of the situation as it existed at the time, even though it may have deteriorated later. By promptly attending to the situation, Consol did not exhibit the kind of aggravated conduct that constitutes unwarrantable failure. Tr. I 84-85.

In my view, Counsel for Consol is wrong. As I have found, even if the eight posts were set, they did not correct the hazard. The roof in the area continued to be inadequately supported until the violation was corrected, and Consol was well aware of this in that the report of the January 30 examination for hazardous conditions specifically called for more roof support. Still, nothing was done and ten days later, when Workley again viewed the area it was in no better condition than it had been on January 23. In knowing that the area had poor roof and that its examiner had called for additional support, not once but twice within a period of slightly more than two weeks, and in failing to ensure the support was present even after it had received a second "wakeup call," Consol exhibited the type of heightened and inexcusable neglect that constitutes unwarrantable failure.

It is likewise clear to me that Consol's failure to adequately support the roof by February 10 was the result of its failure to meet the standard of care required of it under the circumstances and that its failure represented a high degree of negligence.

ORDER NO.	DATE	30 C.F.R.
3717961	2/20/92	75.301-4(a)

The order states:

> The mean entry air velocity was calculated to be 41.6 feet per minute in the crosscut 3 to 2 where the 7 butt continuous mining machine was operated. A mean entry air velocity of 60 feet per minute is the minimum required to dilute -- render harmless --and carry away methane and respirable dust.

Gov. Exh. 9.

THE EVIDENCE

THE SECRETARY'S WITNESSES

LYNN WORKLEY

Workley stated that he conducted another inspection at the mine on February 20, 1992. During this inspection he was accompanied by Bill Kun, a Consol safety escort and head of the mine's safety department and by miners' representative, Larry Numeric. Tr. II 9-10. Workley arrived at the mine at approximately 7:45 a.m. Before proceeding underground he met a roof bolting machine operator who asked Workley to go the 7 butt section and check the ventilation tubes because there was no ventilation on the section. The miner's face was black with coal dust. Tr. II l0.

Workley went to the 7 butt section, a section where mining was performed by a continuous mining machine ("continuous miner"). Tr. II 11. Workley arrived on the section at approximately 9:00 a.m. Tr. II 42. Mining was not taking place when Workley arrived and none took place while he was there. Tr. II 11, 39, 42. Some miners were moving supplies and some were in the process of completing a belt move that had been started the previous shift. Tr. II 11, 51. Workley stated he walked to the face of the section and had a conversation with the section foreman, Louis Parker, and the continuous miner operator, Joseph Jimmy. Workley asked Parker if he was ready to being mining coal, and, according to Workley, Parker said, "yes." Tr. II 11.(Footnote 5) Workley stated that he then took an air reading in the last ventilation tube in place in the face area. Workley described the type of air reading he conducted as one as one in which he used a magnehelic and Pitot tube. Id. (Footnote 6)

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5Later, Workley changed and supplemented his testimony regarding the place where the conversation occurred. He stated that he and Parker spoke in the intersection of the crosscut and the entry leading to the face ("E" on Gov. Exh. 10). Because this area was near the auxiliary fan, most in the area, himself included, were wearing ear protection at the time. Nonetheless, Workley maintained that he and Parker were near enough easily to hear one another. Tr. II 129-130.

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6A "Pitot tube" is defined as a device that:

> [C]onsists of two concentric tubes bent in an L shape. In operation, the instrument is pointed in the direction of air flow: the inner tube, open at the end directed upstream, measures total head, and the outer tube, perforated with small openings transverse to the air flow, records static head. Each tube is connected to a leg of a manometer, when reading velocity head.

As a result of the air reading Workley determined the velocity of air in the last tube was far less than required. Workley testified his test established a velocity of 3,574 cubic feet per minute ("cfm"). Since the area of the entry was 86 square feet, Workley calculated the mean entry air velocity of the entry to be 41.6 feet per minute.(Footnote 7) According to Workley,
section 75.301-4(a) of the regulations, which was in effect at that time, required a mean entry air velocity of at least 60 feet per minute. Tr. II 12, 14.

Workley decided to issue an order of withdrawal after Parker told him he was ready to mine coal. Had Parker stated that he was not ready to mine, Workley would have issued a citation for a violation of section 75.301-4(a) on the previous shift, the midnight shift, because in his opinion the mean entry air velocity was no more than 41 feet per minute toward the end of the midnight shift. Tr. II 145. Workley issued the subject section 104(d)(2) order of withdrawal to Kun at approximately 9:40 a.m.. Tr. II 13, 42; Gov. Exh. 9.

Workley identified a drawing he had made depicting the subject area as it had existed on February 20, 1992.
Gov. Exh. 10. Workley explained that the section was ventilated by an exhaust system, in that air ventilating the face was sucked by an auxiliary fan through tubing and away from the face. In other words, air coursed up the entry into the face area, crossed the face and was exhausted out of the face area and through the tubing. Tr. II 16. Workley testified that the tubing was extensively damaged and Workley was of the opinion that the damage caused the insufficient ventilation. Tr. II 15.

The tubing, which was hung from the miner roof with steel wire and spads, was made of fiberglass and was assembled in a total of nine regular sections. Each section was 10 feet long. Tr. II 17, 70. The regular sections of tubing were approximately 22 inches high by 11 inches wide. The section nearest the face

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6(...continued)
U.S. Department of the Interior, A Dictionary of Mining, Mineral, and Related Terms (1968) at 828. Workley explained that because there was low air velocity on the section a magnehelic and Pitot tube reading was the only way he alone could determine the quantity of air drawn to the working face and using that figure could calculate the mean entry air velocity coming up into the working place. Tr. II 12. If the velocity of air on the working face had been higher he could have used an anemometer. Tr. II 40. Or, if another person had been present to help conduct the inspection, he could have used a smoke cloud. Id.

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7Workley described the "mean entry air velocity" as "[t]he average velocity across the entire cross-sectional area of the entry." Workley took only one reading with the Pitot tubes and he maintained that it was not necessary to take more than one reading to calculate the mean entry air velocity.
Tr. II 40-41.

was called the "peewee section" because it's height and width were smaller than the regular tubing. The peewee section was 17 1/2 inches high by 9 inches wide. It slid into and out of the larger tubing, making its length easily adjustable. Tr. II 17.

An auxiliary fan was located in a crosscut outby the face. Tubing extended from the fan up the entry leading to the face and into the face area. At the corner of the crosscut in which the fan was located and at the corner of the entry leading to the face area the tubing made approximately 90 degree turns.

Workley measured the air volume by inserting the Pitot tube into the peewee tube about five feet back from the end of the peewee tube and about 14 feet outby the face. Tr. II 19, 65; "B" on Gov. Exh. 10. Workley stated that he measured at this point rather than at the end of the peewee tube because it was as close as he could get to the end of the tube and still get an accurate air reading. Tr. II 63-65.

In Workley's opinion, because the peewee tube slid into the angle tube it was not possible for the peewee tube to be adjusted as it normally would have been. Tr. II 18. Consequently, there was a gap between the peewee tube and the regular size angle tube and Workley maintained that there was loss of air where the peewee tube slid into the angle tube and the loss diminished the velocity of air that he measured, as did every other damaged place in the tubing were air leaked into the tubing. As Workley stated, "Each leak between the fan and [the] point [where he measured the air] reduces the amount of air that's shown in the reading that's being provided at the end of the ventilation tube." Tr. II 19. In Workley's opinion, he obtained an accurate reading of the air at the end of the tube because there were no leak between where he took the reading and the end of the peewee tube. Tr. II 19-20.

Workley was asked about notations he had made on Gov. Exh. 10, notations that indicated places where the tubing was "mashed" or had "holes." He stated that they depicted places where his notes indicated the tubing had been "busted" during frequent use and also where it had small, multiple holes. At the joint between the peewee tube and the angle tube Workley found a gap at the top of the peewee tube that measured approximately 6 inches high by 2 inches wide. Workley believed air that was being sucked into the gap would have gotten no further than the gap. In other words, that air would not first have swept the face as it was supposed to do. Tr. II 134-138, 140. At other places Workley found a hole 3 inches high by 9 inches wide, as well as two other holes large enough to stick a hand into. Tr. II 21-22.

Workley stated that Parker told him mining had been done during the midnight shift. Tr. II 68. Because, as the tubing

was extended the velocity of air at the end of the tubing dropped, Workley concluded that on some part of the midnight shift, possibly the last hour and a half, the mean entry air velocity dropped to the level he found it. Tr. II 22. However, given the amount of coal dust he had seen on the miner's face, the velocity may have been below 60 cfm for a longer period because "short duration exposition would not cause that quantity of float coal dust to stick to you." Tr. II 26.(Footnote 8)

Workley believed that due to the lack of a sufficient mean entry air velocity excessive quantities of float coal dust were likely to be generated in the face area, especially in the working environment of the roof bolting machine and continuous miner operators. Workley stated that breathing excessive quantities of such dust can lead to pneumoconiosis, a potentially fatal disease. Tr. II 26. (Workley checked the continuous miner and found the spray system was operational. He could not think of any other cause for excessive coal dust in the face area beside inadequate ventilation. Tr. II 80.) Moreover, if mining continued with an insufficient velocity of air, the contraction of pneumoconiosis by such miners was reasonably likely.
Tr. II 27.

Further, Parker had told Workley he had been trying to get mine management to furnish better tubing for two weeks. Workley therefore believed it reasonably likely the condition would have continued and that repeated shifts would have had to mine without adequate ventilation. Tr. II 59-60.

In addition to the health hazard created by the violation Workley feared the lack of adequate ventilation could result in a fire or explosion. Because excessive quantities of float coal dust were likely in the face area and because such dust could be ignited, it was Workley's opinion that miners in the face area were exposed to the danger of burns and possible concussions, especially miners roof bolting or operating the continuous miner. Tr. II 27. An ignition source could have been the bits of the continuous miner striking stone or hard rock at the face and producing sparks. Tr. II 60. If such ignitions occurred, injuries could have ranged from minor (burned eyebrows and facial hair) to fatal, but under the conditions he observed, Workley believed the ignitions would have caused sever burns.
Tr. II 27-28.

He based his opinion on the fact that the auxiliary fan and tubing had been left exactly as it been on the midnight shift,

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8On cross examination Workley admitted he did not know how the miner had gotten so dirty. He stated the miner might have been elsewhere on the section than the face area. Tr. II 43.

and the roof bolting machine operator's face indicated the operator had been working in excessive quantities of float coal dust for most of the midnight shift, and mining was about to continue with no change in the ventilation system. Tr. II 29. Moreover, Workley was of the view that an ignition was reasonably likely because he had investigated such ignitions in face areas at other mines in the area. Id. Further, although Workley only found .4 percent methane at the end of the tubing, if mining had continued at some point it would have been reasonably likely for methane to have reached the minimum explosive level of 5 percent. Tr. II 60, 73-74.

Turning to his belief the lack of adequate air velocity was the result of unwarrantable failure on Consol's part, Workley again noted that after the violation was cited Parker stated he had been trying to get better tubing for two weeks. Tr. II 30-31, 78-79. (Workley maintained that Jimmy was present when Parker told him this. Tr. II 52, 78. Workley could not recall if Kun or Numeric were also present. Tr. II 52.) Further, the miner with the black face told Workley he had complained to people in mine management that the crew could not maintain adequate ventilation. Tr. II 31. Moreover, Workley thought that a person actually could feel the difference between a mean entry air velocity of 60 cfm and one of 41 cfm. Finally, Workley maintained that when mining was in process the foreman would have seen "dust rolling back over the roof bolters and to the [continuous] miner operator," and this should have alerted the foreman to the inadequate air velocity. Tr. II 32.

Workley was also of the opinion that Parker was negligent in that he was going to begin mining and he was going to do so in a situation where he clearly knew or should have known that the ventilation was inadequate. Tr. II 61.

In order to abate the cited violation the foreman and continuous miner operator cut up brattice cloth and wrapped the cloth around the tubing to cover the leaks. Tr. II 33-35. Workley could not recall where they had obtained the cloth, and Workley did not see the cloth in the vicinity of the face prior to citing the violation. Tr. II 33. This indicated to Workley that the tubing would not have been wrapped before mining started and that the tubing had not been wrapped on the midnight shift. Tr. II 34.

Section 75.301-4(a) provided an exception from the 60 cfm requirement for working places where a blowing system was the primary means of face ventilation or where a lower mean entry air velocity had been determined by the MSHA district manager to have been adequate. Workley stated that neither exception applied in this instance. Tr. II 36.

The question of whether a check curtain had been hung in the crosscut immediately inby the auxiliary fan was raised on cross examination by Consol's counsel. Workley maintained that although he was not certain, he did not believe that such a curtain was in place. However, if it had been so hung, it would not have increased ventilation at the face. This was because the air in the crosscut where the fan was located was 26,500 cfm, which would have blown out the bottom of any curtain.
Tr. II 54-55.

CONSOL'S WITNESSES

DANNY SERGE

Consol inspection escort Danny Serge was Consol's initial witness. He was not with Workley during the inspection of February 20.

Serge testified that he is in charge of control of respirable dust at the mine. Tr. II 83. According to Serge, when mining is in progress a check curtain normally is in place immediately inby the auxiliary fan. With the curtain in place all air in the crosscut where the fan is located is directed up the entry to the face. Tr. II 85-56.

Serge, who testified he regularly took Pitot tube readings to determine air velocity, stated that he normally took them not in the peewee tube but in the tube next to it. Serge maintained that until the reading taken by Workley he had never heard of any person from either MSHA or Consol taking a Pitot tube reading in the peewee tube. Tr. II 97. Readings taken in the peewee tube could result in significantly different results than those taken in regular tubing further away from the face. A reading taken in the tube next to the peewee tube would have been higher than the peewee tube result because of the gain of air through the joint where the peewee tube fit into the next tube. Tr. II 89-91. Serge speculated that the air reading would have been increased by as much as 50 percent if it had been taken further back from where Workley took it. Tr. II 93.

Serge believed that the air going up the entry swept the face before being sucked into the gap between the peewee tube and the regular tube and thus that a reading taken in the regular tube would represent the air present at the face.
Tr. II 101-104.

WILLIAM KUN

William Kun, safety supervisor at the Osage No. 3 mine, was Consol's last witness. Kun accompanied Workley and was served Order No. 3717961. Kun stated that at the commencement of the inspection he and Workley went directly to the 7 butt section.

(Kun was unaware at the time of any prior conversation Workley may have had with a miner.) They arrived on the section around 8:40 a.m. They observed three or four miners at the tailpiece who were installing rollers on the tailpiece. Coal was not being mined and it could not be mined until the tailpiece was completed. Kun had "no knowledge" of how long it would have been before work at the tail piece was finished. Tr. II 107-108.

The inspection party proceeded up the entry toward the face area. Along the way Kun recalled Workley looking "at a couple of tubes." Tr. II 125. At the face area, the continuous miner was located adjacent to the peewee tube. Tr. II 109. Kun was not certain whether or not Jimmy was present at the continuous miner. Tr. II 122.

With regard to the condition of the tubing, Kun agreed that there were some holes in it. Tr. II 112. Kun also believed that Serge was correct to believe that taking a reading in the next tube back from the peewee tube would have given a true representation of the air passing the face. He stated, "[Y]ou're finally getting all the air that swept the face because the air that goes through the end of the slider tube, which is closest to the face, plus what goes in at that joint is now giving you a true representation of what is being passed by the face."
Tr. II 112-113.

After the face area had been inspected the inspection party moved down the entry and met Parker at the intersection of the crosscut and the entry. Prior to that, Parker had been working with the miners who were moving the belt and he had completed checking for methane at three idle faces on the section. Tr. II 115. It was at this point that Parker and Workley had a conversation, but Kun maintained that he did not hear Parker mention anything about the tubing to Workley. Tr. II 110, 114.(Footnote 9) However, Kun did hear Workley ask Parker if Parker was ready to start mining and, according to Kun, Parker replied, "I'm about ready." Tr. II 116. Kun believed that Parker could not have meant mining was going to start immediately because only the continuous miner operator was at the face and various checks would have had to be made by other miners before mining could commence. Tr. II 117. In addition, the roof bolter operator and the loader operator were at the tailpiece and they would have had to be in the face area for mining to begin.

Tr. II 119.

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9In fact, Kun was standing several feet away from the two men.
Tr. II 116. In addition, as previously mentioned, the auxiliary fan was running and Kun believed the inspection party was wearing ear protection.
Tr. II 127.

THE VIOLATION

Section 75.301-4(a) stated in pertinent part:

> [E]xcept in working places using a blowing system as a primary means of face ventilation or in working places where a lower mean entry air velocity has been determined to be adequate to render harmless and carry away methane and to reduce the level of respirable dust to the lowest attainable level by the . . . [MSHA] District Manager, the minimum mean entry air velocity shall be 60 feet a minute in (1) all working places where coal is being cut, mined or loaded from the working face with mechanical mining equipment . . . [(Footnote 10)]

Counsel for the Secretary argues that Workley's air measurement, by which he determined the air quantity (volume), was validly taken and produced a true result. Consequently, Workley's calculation of the mean entry air velocity was likewise accurate. Counsel terms as "irrelevant" the fact that no mining was taking place because Parker told Workley he was going to start. Moreover, Consol was mining on the midnight shift and by inference the violation occurred on that shift as well.
Tr. II 150-152.

Counsel for Consol notes the regulation applies where coal is being "cut, mined or loaded" and argues that coal was not being cut, mined or loaded when the alleged violation occurred. Tr. II 157-158. In the alternative, Counsel argues that if the standard is applicable despite the lack of actual mining, Workley's air reading cannot establish the violation because by taking the reading as he did, Workley missed a "significant quantity of air." Tr. II 158.

I conclude that on the morning of February 20, 1993, the violation existed as charged.(Footnote 11) Consol's argument that the standard should be interpreted to mean what it saids -- that is,

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10Like section 75.323, section 75.301-4(a) was revised effective August 15, 1992. 57 F.R. 20914 (May 15, 1992). Its requirements now are included in section 75.326.

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11Because I conclude a violation of section 75.301-4(a) existed when cited by Workley, I need not decide whether such a violation also existed on the midnight shift. I note, however, that although Workley stated he believed a violation of section 75.301-4(a) had taken place on the midnight shift, it is clear that he chose not to cite Consol for such a violation and the Secretary's attempt to belatedly bring that "violation" within the parameters of Order No. 3717961 is dubious at best.

it should be applied in all working places where coal is being cut mined or loaded -- usually would carry the day, for regulatory interpretation would normally stop where the wording is clear. However, a reading of the entire standard convinces me it presented one of the rare instances where seemingly unambiguous language must be subjected to further interpretation. I reach this conclusion because of the directive of section 75.301-4(c) that "[t]he determination of mean entry air velocity may be made either immediately before mining equipment enters a working place or during its presence in such working place." Obviously, if the determination upon which a violation of the standard hinges could have been made "immediately before mining equipment enters a working place," then an operator could have been in violation of the standard even before coal actually was cut, mined or loaded. In my view, the standard thus contemplated the presence of the required mean entry air velocity beginning at a point "immediately prior" to actual cutting, mining or loading.

Moreover, it is perhaps obvious, but nonetheless worth observing, that when regulatory interpretation is undertaken the law prefers reasonable consequences. Given the purpose of the standard to have protected miners from the hazards of methane and respirable dust, it was reasonable and furthered that purpose to have allowed an inspector to take preemptive action when the catalyst for such hazards -- the actual mining of coal -- was immediately at hand. In sum, I agree with counsel for the Secretary that the inspector "should not [have] be[en] required to permit [an unsafe condition] . . . to go on . . . when he had been given every . . . indication from the operator . . . that such activity [was] imminent." Tr. 152.

Here, I fully credit Workley's testimony that Parker stated coal was ready to be mined. Kun testified that Parker said he was "about ready", but Kun was not standing with Workley and given the noise from the auxiliary fan, Kun agreed he, Kun, might have been wearing ear muffs. On the other hand, Workley, was certain he and Parker could hear one another and certain about what had been said. More telling yet, is the fact that Consol did not call Parker as a witness. This speaks almost as loudly as Workley and Parker must have been.

Workley knew the continuous miner was in the face area. Having been told by the foreman that the foreman was ready to mine, I believe Workley was justified in taking Parker at his word. In my view it would be unreasonable to hold that Workley should have questioned Parker further about the "readiness" of the roof bolters or loader operator. An inspector may assume a foreman knows whereof he speaks.

Further, it was reasonable for Workley to conclude that mining would have been conducted under the circumstances he had observed on the section. There was, as Workley testified, no

visual indicated that efforts had been made to patch or repair the tubing nor any evidence that such repair work was planned.

I realize that Workley took the air reading upon which the violation is based prior to his discussion with Parker. Nonetheless, nothing had occurred between the taking of the reading and the discussion to change the result Workley obtained, and I therefore hold that Workley properly understood the mining of coal was immediately at hand in a working place with a mean entry air velocity of less than 60 cfm.

This conclusion is also based upon the fact that I reject Consol's challenge to the manner in which Workley measured the mean entry air velocity. In particular, I am not persuaded by Consol's contention that the air entering the gap between the peewee tube and the main tube (the angle tube) would of necessity have ventilated the face area and thus that Workley failed to measure a "significant" amount of air. Rather, I credit the essence of Workley's testimony in this regard -- that much of the air entering the gap would have been sucked directly into it rather than going to the face first. This represents an elementary principle of physics and thus, while it is true that had he taken a reading outby the gap Workley would probably have obtained a higher reading, it would not have been a reading relevant to determine the quantity of air necessary for calculation of the mean entry air velocity.(Footnote 12) I therefore conclude the Secretary has established a violation on section 75.301-4(a).

S&S AND GRAVITY

Counsel for the Secretary argues that the S&S nature of the violation is fully established by Workley's testimony. He states that if normal mining operations had continued, excessive accumulations of methane and respirable coal dust could have been expected in the face area. He further argues that Workley persuasively testified the cutter heads on the continuous miner presented an ignition source and that if mining had continued the deterioration of the ventilation would have been reasonably likely to result in an ignition. Further, according to counsel,

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12I further find on the face of this record that Workley correctly determined the mean entry air velocity based on one measurement of the quantity of air. Although Consol challenged the point at which Workley made his measurement, it did not offered any testimony to refute Workley's assertion that he had calculated the mean entry air velocity properly based upon the result of his single measurement. Nor did Consol point to any regulations or MSHA guidelines that prohibited such a practice. Nevertheless, it seems incongruous indeed to find the "mean" on the basis of one measurement, and the issue might well have been decided differently had other evidence been offered.

Workley credibly testified pneumoconiosis was reasonably likely given the coal dust. Tr. II 153-154.

Counsel for Consol argues that at the time Workley inspected the section no respirable coal dust was present, methane was low and there was no ignition source. Further, if mining had continued there was no reasonable likelihood of injury because adequate air was moving up the entry to remove the methane and coal dust, and the fact that Workley saw one miner with a dirty face was no indication pneumoconiosis was reasonably likely.
Tr. II 159-161.

I conclude the testimony supports Workley's S&S finding. A violation of the cited standard existed. In the context of continued normal mining operations the violation posed the safety hazard of an explosion and fire due to methane or coal dust and the health hazard of pneumoconiosis due to excessive concentrations of respirable dust. These hazards could have resulted in serious, even fatal, consequences to miners.

Moreover, I conclude there was a reasonable likelihood the hazards would have resulted in injury or illness. There is no indication Consol was going to repair the tubing, thus there is no indication the inadequate ventilation would have improved. Methane is liberated at the mine and it is common knowledge that methane liberation increases during mining. Without the required mean entry air velocity liberated methane was less likely to have been swept from the face area. Further, Consol does not dispute Workley's testimony that the bits of the continuous miner could cause sparks, thus providing an ignition source for accumulated methane. Given these factors and in the context of ongoing mining operations an ignition was reasonably likely.

In addition, I conclude the contraction of pneumoconiosis in the context of normal continued mining operations was reasonably likely given the fact that the continuous miner creates respirable dust when mining is taking place and the violation made adequate removal of that dust unlikely. While I agree with Consol that the miner with the dirty face does not prove reasonable likelihood (afterall, Workley admitted he did not know for certain where the miner had been working or what he had been doing on the midnight shift), I do not believe a physical indicia of the presence of coal dust is necessary to uphold an S&S finding. Pneumoconiosis is a cumulative disease. Illness results from repeated exposure. It is not possible to state that any one exposure is more "likely" to bring on the disease than any other and I therefore believe all to be equally hazardous. Thus, in my view, a condition such as this violation, that is reasonably likely to lead to exposure to excessive respirable coal dust is reasonably likely to result in an illness.

As I have noted, the violation subjected miners in the face area to serious or even fatal injury and illness. Further, as mining continued it was likely miners would have been injured or been made ill by the conditions created by the violation. Therefore, I also conclude the violation was serious.

UNWARRANTABLE FAILURE AND NEGLIGENCE

The issue of unwarrantable failure can be decided by answering the question of whether the violation of section 75.301-4(a) was due to Consol's aggravated conduct constituting more than ordinary negligence? The Secretary's counsel emphasizes Workley's testimony that the problem with the tubing was ongoing, that Parker told him he had been unable to secure replacement tubing and that there was nothing noticeably present on the section with which to make on-the-site repairs of the tubing (e.g., materials to wrap the tubing). Further, counsel points to the miner with the black face and asserts the inadequate ventilation had to be apparent to management.
Tr. II 154-155.

Counsel for Consol counters that although the tubing was in "rather dilapidated condition" this does not establish unwarrantable failure to comply with the cited ventilation standard. Tr. II 162. Section 75.301-4(a) requires a specified amount of ventilation, not maintenance of the ventilation system. Tr. II 160-161.

I find for the Secretary. The condition of the tubing was visually obvious. As even Consol's counsel admits, the tubing was badly damaged. The damage was so extensive I conclude it must have occurred over several shifts, and this conclusion is supported by Workley's entirely credible account of the conversation in which Parker told Workley he had been trying for two weeks to get mine management to provide better tubing. (As I have previously noted, Consol did not call Parker as a witness.) The unexplained, long term failure of mine management to have provided its foreman with the means to comply with something so elementary to safety as the cited ventilation standard was indeed inexcusable.

Nor does the inexcusable fault rest solely with nameless management officials. Parker also must share in the blame. He knew the tubing was damaged and he must have known the consequences of that damage upon the ability of the tubing to maintain adequate ventilation at the face. Yet, on February 20, he was ready to begin mining without making repairs to the tubing -- repairs that would have permitted compliance with the standard, as the abatement of the order shows. While he may not have been able to obtain better tubing, it is not too much to expect he could have obtained brattice cloth or other materials

to wrap the tubing, and I conclude that his failure to do so was inexcusable.

Finally, Consol's failure to adequately maintain the mean entry air velocity of February 20 was the result of management's and the foreman's failure to meet the standard of care required of them under the circumstances and their failure represents a high degree of negligence.

OTHER CIVIL PENALTY CRITERIA

Gov. Exh. 1 is a computer print-out listing assessed and paid violations at the Osage No. 3 Mine in the twenty four months preceding the first violation alleged in this case. The print-out lists a total of 1,180 paid violations. Of these, there was one violation of section 75.323 and no violations of section 75.301-4(a). Counsel for the Secretary argues that this is an "average history" of previous violations. I find the history is large and while there is no evidence of a pattern of noncompliance with the standards at issue, the total history warrants commensurately large civil penalties.

In addition, I find the mine is large in size and Consol is a large company. The parties have agreed that any penalties assessed will not affect Consol's ability to continue in business.

Finally, I find that once the violations were cited, Consol exhibited good faith in rapidly abating them.

CIVIL PENALTY ASSESSMENTS

The Secretary has proposed a civil penalty of $900 for the violation of section 75.323 and a civil penalty of $1300 for the violation of section 75.301-4(a). With regard to the violation of section 75.323, given its S&S nature, the unwarrantable failure of Consol in allowing it to exist, the mine's large history of previous violations and Consol's status as a large operator, I find an increase in the proposed amount to be appropriate, and I assess a civil penalty of $1200.

With regard to the violation of section 75.301-4(a), considering the same factors, and noting especially what I believe to have been the particularly egregious lack of care of Consol in allowing the violation to exist, I find an increase in the proposed amount to $1800 to be appropriate.

ORDER

Section 104(d)(2) Order No. 3718491 is AFFIRMED and Consol IS ORDERED to pay a civil penalty in the amount of twelve hundred dollars ($1200) for the violation of section 75.323 alleged therein.

Section 104(d)(2) ORDER No. 3717961 is AFFIRMED and Consol is ORDERED to pay a civil penalty in the amount of eighteen hundred dollars ($1800) for the violation of section 75.301-4(a) alleged therein.

Payment is to be made to MSHA within thirty (30) days of the date of this decision.

This proceeding is DISMISSED.

David F. Barbour
Administrative Law Judge

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