



Consolidation Coal Company (Consol) violated the mandatory standard at 30 C.F.R. § 77.201-1, presumably on March 18 and 19, 1992 and is seeking a civil penalty of \$12,000 for the alleged violation. The general issue is whether Consol violated the cited standard as charged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act.

The order at issue charges as follows:

Methane tests were not being conducted in the 6,000-ton capacity raw coal silo prior to or during a silo cleaning operation. The cleaning operation was being performed on March 18 and 19, 1992 by employees of Mole Master Services Corporation, an independent contractor, I.D. No. V2T. The coal stored in the silo had evidence of heating and this condition was observed by Consolidation Coal Company (Consol) mine management. Mole Master was contracted to clean the coal from inside of the silo. Prior

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If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or

Footnote 1 Continued

safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection(c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

to commencing the cleaning operation, Mole Master employees were advised of the conditions in the silo. An open flame kerosene-fired area heater was operated on top of the silo by the Mole Master employees during their work activities. The cleaning activities were conducted without examinations for methane having been made at any time. The Mole Master employees were not qualified to perform methane examinations nor did the independent contractor have methane gas detection equipment.

Failure to conduct the tests or ensure that the tests were being conducted placed the Mole Master employees in jeopardy. The failure of Consol to perform or require methane tests at the raw coal silo is consistent with Consol's written and stated policy not to provide safety and health assistance to independent contractors working on mine property. Failure to conduct the tests or ensure that the test were being conducted also placed Consol employees on or near the silo in jeopardy. This violation was determined from information gathered during the investigation of the explosion at the Production shaft of the Blacksville No. 1 Mine that occurred on March 19, 1992, which resulted in four fatalities.

The cited standard requires that "tests for methane in structures, enclosures, or other facilities, in which coal is handled or stored shall be conducted by a qualified person with a device approved by the Secretary at least once during each operating shift and immediately prior to any repair work in which welding or an open flame is used, or a spark may be produced."

There is no dispute that the cited coal silo was within the category of "structures, enclosures or other facilities, in which coal is handled or stored" within the meaning of the cited standard. Consol maintains, however, that the standard is inapplicable because the shifts in question were not "operating shift[s]" within the meaning of the standard nor was "repair work" being performed within the meaning of the standard. Even assuming, *arguendo*, that repair work was being performed, Consol argues that the repair work did not involve "welding or an open flame" or a situation where "a spark may be produced." Finally, Consol argues that, in any event, the order should be dismissed because the Secretary has not met his burden of proving that Consol did not, in fact, take methane readings in the subject silo as required. Since I agree that the Secretary has indeed failed to meet his burden of proving Consol did not take the

required methane readings, it is not necessary to reach the other issues.

The record shows that Mole Master Services Corporation (Mole Masters) contracted with Consol to clean the subject coal silo at the Blacksville No.1 Mine using a process not involving welding or an open flame nor from which a spark may be produced. According to Mole Masters Job Superintendent Phillip Proctor, Mole Masters moved all of their equipment to the top of the subject silo on March 17 and began working on the cleaning process that night.

Consol's preparation plant superintendent, B.C. Hall, had provided the required hazard training for the Mole Masters workers. Proctor advised Hall that his employees had no training in taking methane tests and that, if there were to be a methane problem, Consol would have to perform the testing. Proctor testified that none of his employees had methane detectors and that he did not see anyone conduct methane tests during the three days he was at the site. Proctor acknowledged, however, that he did not work with the cleaning crew on the silo roof. Mole Masters employees Randy Sturm and Steve Oldaker worked the day shift and three others worked the night shift. These were 12 hour shifts.

The silo has a capacity of 6,000 tons and Proctor was told at the beginning of the cleaning process that about 2,000 tons of coal then remained. By 10:15 a.m. on March 19 they had cleaned and removed approximately 1,500 tons so that accordingly only about 500 tons remained. Proctor noted that there were hot spots of coal in the silo with some of the coal clinging to the sides. He could see steam emanating from the coal as it dropped onto the belt below and was cooled with water.

Consol employee James Carper testified that he was maintaining the belts beneath the subject silo on March 18 and 19, 1992. Although qualified to take methane tests he was not asked and did not perform any such tests during this time. Further, he did not see anyone taking methane readings at his work location. Carper noted, however, that his supervisor, Preparation Plant Superintendent, B.C. Hall, "regularly checked on things" while Carper was working there. Indeed, according to Carper, Hall made regular checks at his worksite "fairly often" and showed concern for Carper's well-being.

John Morrison, the safety supervisor at the Blacksville No. 1 Mine during relevant times, testified that, although he was periodically in the vicinity of the subject silos, he personally did not perform any inspections of the cleaning work. Morrison

did, however, take methane examinations beneath the silo around the feeder pockets near the belts. His methane tests on March 18 and 19, 1992, at around 6:00 a.m. showed no methane. He did not test for methane inside the silo or from the top of the silo.

Morrison testified that since the air flowed downward toward the basement of the silo 90 to 95 percent of the time it would, in any event, make no sense to test for methane at the top of the silo. You would be testing only fresh incoming air. He also noted that his primary concern was for methane near potential ignition sources at the electric motors on the belt line. He admitted, however, that hot coals in the silo could also become an ignition source.

Within this framework of largely undisputed evidence it may reasonably be inferred that none of the contractor (Mole Masters) employees were conducting methane tests in the subject silo on March 18 and March 19, 1992. On the other hand Safety Supervisor John Morrison was, according to the undisputed evidence, performing methane tests below the silo in the basement area where, because of the direction of air flow, any methane produced in the silo would ordinarily be detected.

Significantly, however, there is evidence that Preparation Plant Superintendent B.C. Hall was regularly present in the vicinity of the subject silo on March 18 and March 19 and that he could very well have been performing the requisite methane tests in the silo.

It is also undisputed that doors on the sides of the silo permitted access for methane tests as well as openings on the roof. Indeed, Mole Masters superintendent Proctor stated that he specifically told Hall that any required methane tests would have to be made by Consol. Such tests can also be made in only 15 seconds. Accordingly, even if the Mole Masters employees did not observe Hall taking methane readings on the roof, he could very well have taken them at other locations in the silo. It is noted that Hall died prior to the hearings in this case and that no statements had been obtained from him regarding this matter.<sup>2</sup>

In addition, the Secretary did not call any of the Mole Masters employees who were actually performing the cleaning work from the silo roof. These witnesses were possibly in the best

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<sup>2</sup> According to the Secretary, Hall declined to provide a statement, citing his Fifth Amendment protections against self incrimination. No inferences can properly be drawn from Hall's exercise of this Constitutional privilege.

position to have observed whether Consol had been taking methane readings within the silo. The recorded statement of one of these witnesses, Randy Sturm, was introduced at trial. Sturm maintains therein that he did not see anyone taking methane readings while he was working. While this statement in itself is insufficient to prove that Consol was not performing the requisite methane tests, the statement is, in any event, entitled to but little weight. The inability of Consol to have confronted and cross examined this witness, either in his statement or at hearing and to thereby test his recollection and the accuracy of his statement and explore possible motives, is reason alone for allocating such little weight.

Under the circumstances I find that, while the Secretary has certainly raised suspicions, he has not sustained his burden of proving the violation as charged. Indeed, the Secretary in his post hearing brief acknowledges the difficulties of proving a violation of the cited standard which requires no recordation of the required methane readings. He states "[i]t is impossible to conclusively prove a negative" and "[i]t would be virtually impossible for the Secretary to prove that at no time someone may have made a methane test". Without any regulatory requirement for the recordation of such tests it may indeed be a difficult violation to prove. This case has proven to be illustrative of that difficulty.

#### ORDER

Order No. 3109526 is hereby vacated, Contest Proceeding Docket No. WEVA 93-82-R is granted and Civil Penalty Proceeding Docket No. WEVA 93-146 is dismissed.

Gary Melick  
Administrative Law Judge  
703-756-6261

Distribution:

Robert M. Vukas, Esq., Consol, Inc., 1800 Washington Road,  
Pittsburgh, PA 15241 (Certified Mail)

David J. Hardy, Esq., Jackson and Kelly, P.O. Box 553,  
Charleston, WV 25322 (Certified Mail)

Robert S. Wilson, Esq., Office of the Solicitor, U.S. Dept. of  
Labor, 4015 Wilson Blvd., Room 516, Arlington, VA 22203  
(Certified Mail)

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