

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 25 April 2005

Case No.: 2005-MSA-00001

In the Matter of

EASTERN ASSOCIATED COAL CORPORATION
(Matewan Tunnel Mine),
Petitioner,

v.

MINE SAFETY AND HEALTH ADMINISTRATION
Party Opposing Motion,

Appearances:

R. Henry Moore, Esq.,
For the Petitioner

Robert Cohen, Esq.,
Jennifer Marion, Esq.
For the Administrator

BEFORE: RICHARD K. MALAMPHY
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a petition for modification under Section 101 (c) of the Federal Mine Safety Act of 1977 (“the Act”), 30 U.S.C. §811 *et. seq.*, and its implementing regulations at 30 C.F.R. Part 44, Rules of Practice for Petitions for Modification of Mandatory Safety Standards. In order to effectuate its purpose, the Act requires the Secretary of Labor to develop detailed mandatory health standards to govern the operation of the Nation’s mines. 30 U.S.C. §811. Eastern Associated Coal Corporation has filed a petition for modification of the application of one of those standards, 30 C.F.R. §75.1108, which requires the company to use an approved, fire-resistant conveyor belt at its Matewan Tunnel Mine, a non-producing underground coal mine located in Boone County, West Virginia.

Eastern seeks modification because 18,000 feet of conveyor belt in its Matewan Tunnel Mine was damaged and rendered unusable on July 23, 2003. It subsequently replaced that damaged, approved Scandura belt with 10,000 feet of Goodyear non-approved belt.

A formal hearing was held in Charleston, West Virginia on December 8, 2004, at which time all parties were afforded full opportunity to present evidence and argument as provided in the Act and the applicable regulations.

The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

I. Preliminary Matters¹

At the hearing, Joint Stipulations one through 33 and Joint Exhibits one and two were entered into the record. Tr. 6. Petitioner's Exhibits 1 – 7, 10, 16 – 17, 19 – 20, 22, 24 – 26, 29 – 33, 35 – 38, 41 – 46, 49, and 51 were entered into the record. Tr. 42, 44, 46, 48, 50, 51, 55, 61, 65, 69, 71, 73 – 74, 237, 209, 97, 76, 217, 132. MSHA Exhibits 1 – 11 were entered into the record as well. Tr. 370, 582.

II. Stipulations

The parties have stipulated to and I find the following facts:

1. This case involves the Matewan Tunnel, a non-producing underground coal mine, located at Wharton, Boone County, West Virginia 25208, MSHA ID No. 46-08610.
2. The purpose of the Matewan Tunnel is to provide a means for a coal-carrying conveyor belt system to operate between Harris No. 1 Mine and the Rocklick Preparation Plant.
3. The tunnel consists of three entries developed on a straight course over 10,500 feet from outcrop to outcrop. The entries are interconnected with crosscuts. Each entry comes to the surface at both ends of the tunnel. A map of the tunnel is attached hereto as Joint Exhibit 1 and is offered into evidence.
4. The tunnel's belt is used to transfer raw coal from the Harris Preparation Plant to the Rocklick Preparation Plant, and clean coal from Rocklick to Harris No. 1.
5. The conveyor belt has a "carrying" side and a non-carrying side. The belt is used to carry material in both directions. The mine belt's carrying side always faces upward because coal is being transported in both directions.

¹ The following abbreviations will be used as citations to the record:

<i>JS</i>	-	<i>Joint Stipulations;</i>
<i>JX</i>	-	<i>Joint Exhibits</i>
<i>TR</i>	-	<i>Transcript of the Hearing</i>
<i>PX</i>	-	<i>Petitioner's Exhibits; and</i>
<i>GX</i>	-	<i>MSHA Exhibits.</i>

6. The entries in the tunnel are numbered 1-3 left to right from the Rocklick side.
7. The middle or No. 2 entry contains the conveyor belt and all electrical lighting, water pumps, battery chargers, power centers.
8. Raw coal is transported on the topside of the conveyor belt, and after being cleaned is transported back on the bottom belt to the Harris Preparation Plant. The belt travels at approximately 680 feet per minute.
9. The 42-inch conveyor is approximately 11,800 feet long and is powered by two separate drive installations located outside at each end of the underground excavation (500 HP at Rocklick and 1,000 HP at Harris.) These drives are located on the surface outside of the tunnel at either end. The drive at the Harris end of the tunnel is located approximately 500 feet from the entrance to the tunnel. The drive on the Rocklick side of the tunnel is located approximately 100 feet from the entrance to the tunnel.
10. The conveyor is designed to turn over on each end to maintain the material handling surface up and both top and bottom structure are troughed 35 degrees to provide simultaneous transportation capacity on the top and return portions of the belt.
11. The roof in the belt entry (center entry) is supported with six foot fully grouted bolts with T5 steel channels in every row. The ribs were supported with steel straps and four foot conventional bolts.
12. The conveyor was offset in the entry to provide access along its entire length so that battery powered vehicles can travel beside the conveyor belt.
13. The belt entry is provided with graveled roadway along the beltline. The entry cavity height is six feet with approximately thirty inches of the total height being a coal seam known as the Matewan seam.
14. Approximately nine labor and three supervisory employees work at the Matewan Tunnel. Other mine personnel are used in some situations.
15. The belt is 42 inches wide and the belt entry is reinforced by steel cables molded into the belt material.
16. The Matewan Tunnel ventilation system is a blowing ventilation system that is provided by a mine fan into the No.3 entry on the Rocklick side. Positive pressure is maintained from the No.3 entry to the No. 2 entry, and No. 1 entries at all times when the fan is running. That means that air will tend to travel from the No.3 to the No.2 and No.1 entries by regulators.
17. The intake air travels into the mine from the Rocklick side in the No. 3

entry and then is split at crosscuts Nos. 31 and 32 with some of the air continuing in the No. 3 entry and some of the air traveling through regulators between the crosscuts between the Nos. 3 and 2 entries. A regulator, in this instance, is a sliding door installed in a concrete block stopping. The regulator can be adjusted by opening or closing the doors.

18. In a mine ventilation system air flows from an area of higher pressure to an area of lower pressure.

19. The mine ventilation fan is located 500 feet from the nearest belt drive. As required, the fan is equipped with a signal that will indicate if it ceases to operate.

20. The designated intake escapeway is in the No. 3 entry. This entry is separated from the No. 2 entry by stoppings constructed of concrete blocks in the crosscuts between the No. 3 and No. 2 entries. There are doors in the stoppings to provide access between the entries. The doors are spaced no more than 300 feet apart. There is no MSHA requirement that an escapeway be maintained in the tunnel.

21. There are stoppings in some of the crosscuts between the No. 2 and No. 1 entries but not all of them.

22. Also, the belt is provided with alignment rollers and is hung the entire length, approximately one foot above the floor at its lowest point.

23. The total methane liberation for this tunnel, as collected in bottle samples, is 0.018 cubic feet in 24 hours. This liberation is most likely from the coal being transported from the Harris Mine, which liberates methane, rather than being liberated from the Matewan seam, which the tunnel is driven through.

24. The communication system is installed in the belt entry and is provided with a radio coupler that permits mine pager transmissions to be heard over portable radios carried by the employees underground. The radio, fan signals, fire sensor, etc. are also broadcast over the communication system. The base station for this communication system is located in the Rocklick control room.

25. The communication system is required to be manned 24 hours a day each production shift from the control room at the Rocklick Preparation Plant.

26. Point-type heat sensors are provided every 125 feet along the belt conveyor as a fire detection system.

27. Fire valves are provided every 300 feet in the belt entry, which are marked by reflective material.

28. The conveyor belt system is provided with two water systems, one at each tunnel drift and two firefighting cars are located inside the tunnel.

29. The tunnel is lighted throughout the entire length of the beltline. The

tunnel is lit at every crosscut, with permanent explosion-proof lighting fixtures for its entire length.

30. Eastern is seeking the subject Petition for Modification of 30 C.F.R. Section 75.1108.

31. 30 C.F.R. § 75.1108 provides: “On and after March 30, 1970, all conveyor belts acquired for use underground shall meet the requirements to be established by the Secretary for flame-resistant conveyor belts.”

32. On November 6, 2003, and January 26, 2004, MSHA conducted an investigation of the subject petition. A copy of the investigation report is attached as Joint Exhibit 2.

33. The conveyor belt consists of 26,000 feet of belting. Ten thousand feet of the flame-resistant belting originally installed on the conveyor system was damaged and Eastern had installed 10,000 feet of belt that is not rated as flame-resistant as required by 30 C.F.R. § 75.1108. As of the date of this Stipulation, approximately 4,000 feet of this non-complying belt has been replaced by the original belt, which has been repaired.

III. Issues

1. Whether Eastern’s proposed modification promotes the same safety goals as 30 C.F.R. § 75.1108 and 30 U.S.C. § 871 (h), thereby guaranteeing the same level of protection to the miners as provided by the mandatory safety standard detailed in those provisions.
2. Whether Eastern’s proposed modification will achieve a net gain, or at least equivalence, in overall mine safety as compared to the statutory safety standard Section 311 (h) of the Mine Safety and Health Act, 30 U.S.C. § 871 (h).

IV. Contentions

Petitioner’s Contentions

Petitioner argues that its proposed modifications both guarantee the same level of protection to the miners as provided by the statute, and that the proposed modification will achieve a net gain, or at least equivalence, in overall mine safety as compared to the statutory safety standard.

Petitioner contends that the nature of the conveyor belt in this mine and mine’s safety policies as described in the proposed modification combine to reduce the risk of fire in the mine, thus promoting the same safety concerns as the mandatory safety standard. Petitioner also argues that its replacement, non-approved belt is flame resistant.

Administrator's Contentions

The Administrator for Coal Mine Safety and Health, however, argues that Petitioner has not carried its burden under § 101 (c).

The Administrator contends that Petitioner's proposed modification does not promote the same safety goals as 30 C.F.R. § 75.1108, since the proposal has nothing to do with reducing the flammability of the non-approved conveyor belt. Furthermore, the Administrator asserts that the proposed modification does not increase, or at least maintain, the overall level of safety in the mine since a non-flame resistant belt burns more easily, and more stubbornly, than a flame-resistant belt, thus increasing the dangers associated with a coal mine fire. Finally, the Administrator argues that the flammability tests Eastern had conducted on the non-approved replacement belt should not be given any weight in this proceeding.

V. Summary of Evidence

Although I have read and considered all the evidence presented, I will only summarize below the information I found relevant in addressing the issues in this case.

Petition for Modification

On August 22, 2003, Eastern filed its Petition for Modification with the Mine Safety and Health Administration. See GX 1. In its modification petition, Eastern proposed to "upgrade" its safety level by providing an isolated intake escapeway, providing carbon monoxide detectors to those working in the mine, and patrolling the belt at four-hour intervals. GX 1 at 3. Eastern also argued that non-compliant conveyor belt would not decrease overall mine safety since it already had a ventilation system designed to facilitate escape from the tunnel in the event of a fire; furthermore, the drive system for the belt is located on the surface, thus eliminating fire risk inside the tunnel due to a mechanical problem with the drive system and the conveyor belt itself is designed in such a way as to reduce friction. Eastern also pointed out that the tunnel does not liberate methane and there have been no coal accumulation citations at the site; the mine's communication system allows fire warnings and other communications to be broadcast over portable radios carried by mine employees underground, and the tunnel has a well-lit, graveled roadway along the beltline. Id. at 2-3.

Investigation Report

The MSHA conducted an investigation into the Petition for Modification; the report on that investigation was prepared by Henry Verakis and Michael Hockenberry. See GX 5. The report concluded:

The use of nonfire-resistant conveyor belt in the Matewan Tunnel is a step backward in regard to fire protection. Nonfire-resistant conveyor belt can easily be ignited by a small flame, propagate fire readily and grow rapidly into a conflagration. A fire involving nonfire-resistant conveyor belt produces a large quantity of smoke and toxic combustion products. Such

a fire is difficult to approach and can overwhelm a person or persons trying to extinguish the fire. The intense heat created by a fire involving nonfire-resistant conveyor belt can reverse the ventilating air flow and create complex conditions in attempting to extinguish the fire. Major mining countries have recognized the serious fire hazard of nonfire-resistant conveyor belt and have incorporated requirements for the use of fire-resistant conveyor belt. The use of fire-resistance [*sic*] conveyor belt is the initial step in reducing the potential fire hazard. Since there are persons working and traveling in the Matewan Tunnel, life safety is of paramount importance and using fire-resistant conveyor belt reduces the fire risk over having to contend with fighting a fire involving nonfire-resistant conveyor belt.

In the Petition for Modification, Docket No. M-2003-064-C filed by Eastern Associated Coal Corporation pertaining to the use of nonfire-resistant belt in the Matewan Tunnel, an analysis of the fire hazards and supportive data to indicate that the fire safety protection proposed is equal to or better than using fire-resistant conveyor belt as specified by 75.1108 was not provided. **The measures indicated in the reference petition appeared to be addressing detection and fire discovery, rather than reducing the flammability of the conveyor belt by using MSHA approved fire resistant conveyor belt.**

Id. at 10 (emphasis added).

Phillip Worley

Phillip G. Worley is the manager of engineering for the Harris Mine Complex; he is responsible for roof plans, ventilation plans, mine projections and mine planning. Tr. 29 – 30. Mr. Worley testified as to the layout and operations of the Matewan Tunnel as it is depicted in Joint Exhibit 1, the various photographs that were submitted as evidence, and in the joint stipulations incorporated into this Decision and Order. Tr. 35 - 74.

Mr. Worley also testified that the mine was unable to purchase MSHA-approved fire resistant replacement belt after the July 2003 incident. Tr. 77, 101 - 109. The mine chose to use the non-complying belt in order to avoid shutting down the mine, as the tunnel and the conveyor belt are necessary to the mine's function. Tr. 79; 108-109. He also gave his opinion that the Petition provides an equal measure of protection to that in 30 CFR §75.1108. Tr. 84.

Jerome Cook

Mr. Cook is manager of electrical engineering for Eastern Associated Coal. Tr. 141. He is responsible for the heat sensor, ventilation, fire monitoring systems in the Matewan Tunnel. Mr. Cook described the alarm system at the Tunnel. Tr. 143. Mr. Cook stated that any alarm would alert the Rocklick Plant's control room, which is staffed twenty-four hours a day, seven days a week. Id. Mr. Cook also described the other monitoring systems on the belt:

The law requires belt slip and the stop buttons, pull cords on the outside, we have misalignment, head and tail every two thousand foot thereafter. We also have misalignment switches where the belt rolls over and there's . . . a speed measuring system using attack sensor to monitor the speeds at both ends of the belt. In addition to that, there's video cameras at key points along the beltline.

Tr. 143-44. He explained how each safety system operated, giving an over-view of the mine's safety operations, and explaining how those systems monitor, among other things, friction and electrical problems that could lead to a fire. Tr. 144 – 162.

Danny Sprat

Danny Sprat is the manager of safety and training for Eastern Associated Coal. Tr. 163. Mr. Sprat described the use of hand-held carbon monoxide detectors by tunnel employees, as well as the use of methane and oxygen deficiency testers and the procedures followed when patrolling the conveyor belt. Tr. 163 – 164; 174. Mr. Sprat also discussed other safety precautions taken in the tunnel, including the mine rescue team and the firefighting team located at the Harris plant, stating that in the event of a fire that was not immediately extinguished by the fire response systems in the tunnel, both the firefighting team and the rescue team would respond. Tr. 168. Furthermore, the local volunteer fire departments could respond within thirty minutes of a fire alarm. Tr. 170.

Mr. Sprat opined that the petition should be granted because the intake escape way, the patrols on the belt, the personal carbon monoxide monitors, and the lack of coal spillage along the conveyor belt make the chance of a belt fire “remote.” Tr. 175, 177-78.

Noah L. Rider

Noah Rider is an engineer for Packer Engineering, specializing in fire hazard analysis. Tr. 185 – 190. The Petitioner hired Mr. Rider's firm to test the replacement conveyor belt in this case for fire-resistance, using the testing technique set forth in 30 C.F.R. § 18.65, as well as a heat flux test. Tr. 201, 203. Mr. Rider had never before performed the § 18.65 test, but testified that he had studied the test in school and it was similar to other tests that he had performed. Tr. 202 – 203. While Mr. Rider has never done an underground carbon monoxide fire investigation or been inside an underground coal mine, he testified that that would not affect his ability to perform the safety tests necessary in this case. Tr. 204. Mr. Rider did not prepare a written report on the test. Tr. 206.

30 C.F.R. §18.65 Test

Mr. Rider first constructed the apparatus needed to construct the test, as described in the Regulation. Tr. 210; PX 43, 44, 29. Mr. Rider testified that he materially complied with all aspects of the test as described in the Regulation. Tr. 210 – 216. Mr. Rider conducted the test on two belt samples: a Goodyear sample (the replacement belt) and a Scandura sample (the original belt). Tr. 218.

Mr. Rider subjected the Scandura belt sample to four tests. Tr. 220. Each of the Scandura samples passed the test. Tr. 223. Mr. Rider subjected the Goodyear samples to the same test. Tr. 223. Those samples also passed. Tr. 225. The repaired belt also passed Mr. Rider's test. Tr. 225.

Heat Flux Test

Mr. Rider also testified regarding the results of the heat flux test that he performed on the Goodyear and Scandura belt samples. Tr. 229. The heat flux test measures “the amount of energy that is required to ignite a material.” Tr. 232. To conduct the test, Mr. Rider followed the American Society of Testing Material's guidelines, including construction of the testing apparatus. Tr. 232; PX 45, 46. Each belt sample ignited at a relatively similar temperature. Tr. 235-36. Mr. Rider stated that, since each belt sample ignited at a similar temperature, the results of the MSHA's fire-resistance test should be similar as well. Tr. 236.

On cross-examination, Mr. Rider testified that his laboratory was not authorized by the MSHA to give a fire-resistant approval to any belt. Tr. 243 – 244. Mr. Rider could not state whether he or another technician actually conducted each specific test, the test results were not dated, and there was no indication on the test results, nor could Mr. Rider state who actually prepared the test results by inputting information into the laboratory's computer. Tr. 247 – 248. Furthermore, Mr. Rider testified that he was not familiar with ignition sources in a coal mine. Tr. 250.

Robert Derek

Robert Derek is a technical safety manager for Twenty Mile Coal Company, an affiliate of Eastern Associated Coal Company that is located in Oak Creek, Colorado. Tr. 259. Mr. Derek is also on the national executive committee for the national mine rescue team contest, has published regarding mine fires and mine safety, and has investigated a number of mine fires. Tr. 260; 262 - 271; PX 30.

Mr. Derek visited the tunnel to evaluate its safety standards. Tr. 272. Mr. Derek's testimony was consistent with Petitioner's characterization of the tunnel and the conveyor belt in its Petition for Modification. Tr. 272 – 286. Mr. Derek testified that, in his opinion, the nature of the conveyor belt, the existence of a well-ventilated escapeway, and the other safety measures taken by the mine combine to provide an equal measure of protection to that of the standard. Tr. 287.

On cross-examination, Mr. Derek testified that a large mine fire could compromise the intake escapeway in the tunnel. Tr. 299. Furthermore, Mr. Derek testified that a non-flame resistant belt would burn at a faster rate than a flame resistant belt, and that even a short amount of time can contribute to an out-of-control fire. Tr. 302; 313. Mr. Derek stated in his experience coal mines frequently exceed the minimum standards provided for in the regulations, and that in his opinion, the intake escapeway was a more valuable feature from the safety standpoint than a compliant conveyor belt. Tr. 316; 318.

When asked whether the remaining thirty inches of coal seam still present in the Matewan Tunnel would be likely to catch fire in the event of a belt fire, Mr. Derek stated, “Since it’s the lower thirty inches and the tunnel is approximately six and a half feet high, I don’t think it would, even if it caught fire, I don’t believe it would even spread. I think that heat would want to go up and then it would be into the rock.” Tr. 335. As to the nature of the belt itself, Mr. Derek stated that a cable belt is a higher quality, stronger belt than a non-cable belt, but does not necessarily meet any kind of fire safety standard just by virtue of being a cable belt. Tr. 336.

Michael Phipps

Mr. Phipps is the operations manager for the Harris Mine, owned by Eastern Associated Coal. Tr. 339. He is responsible for the overall administration of the mine, including the Matewan Tunnel. Tr. 341. Mr. Phipps testified that transporting coal through the tunnel is necessary to the mine’s operations – without the tunnel and conveyor belt, the Mine would have to truck coal from the mining operation to the processing plant, leading to increased safety concerns and inefficient mine operations. Tr. 344. Mr. Phipps also testified that the mine had to purchase non-complying replacement belt because repairing the complying, damaged belt would take so long that the mine would have had to be completely shut down. Tr. 345. Subsequent to the decision to use the non-flame resistant belt, Mr. Phipps met with representatives from MSHA who advised him to file a petition for modification and continue to use the non-compliant belt. Tr. 346.

Mr. Phipps testified that the proposed modification provides an equal measure of protection as the mandatory standard,

[b]ecause we filled in an intake escape way. We did not have an intake escape way prior to this. We supplied all of our individuals with the clip on CO detectors . . . we doubled the exam time. And quite frankly, the installation itself, there are no, any fire I’ve been at, any fire I’ve ever seen has been at the head or the tail. Those are outside. There’s nothing underground to start this. I feel very safe in there. I feel my men are very safe.

Tr. 350.

Mr. Phipps also testified that he does not believe that a fire at the outside drives would spread into the mine, and that the onboard chargers and battery powered vehicles in the mine were not potential sources of ignition. Tr. 350 – 351. Mr. Phipps stated that the rollers and

bearings in the belt had been recently upgraded as well. Tr. 352. Although Mr. Phipps admitted that the rip detectors obviously did not work on the belt when it ripped in July, 2003, he testified that the rip detection system had been upgraded since that time as well. Tr. 353.

On cross-examination, Mr. Phipps testified that there is no permanent carbon monoxide detection system in the mine. Tr. 356. Mr. Phipps also testified that MSHA issued a citation for use of noncompliant belt in August, 2003. Tr. 357. The citation has been extended nine times, to enable the Mine to come into compliance or to allow time for the Mine's proposed modification to be approved. Tr. 357. At the time of the hearing, Mr. Phipps testified that the Mine was actually working on complying with the standard, by replacing the noncompliant belt with the compliant belt as the compliant belt was being repaired – a process that will likely be completed by March, 2005. Tr. 358; 364. Even though the citation will be abated once the repairs are complete, Mr. Phipps testified that Eastern is seeking the modification so it could use noncompliant belt in the future if the compliant belt were again damaged. Tr. 358. Purchasing replacement belting in the event of another accident would not be economically feasible, since “the cost of replacement belting would not [be] worth the value of the property.” Tr. 359. Mr. Phipps also stated that he was led to believe that MSHA would grant the petition for modification as a matter of course. Tr. 359 – 360.

Robert Phillips

Mr. Phillips works for the Mine Safety and Health Administration. Tr. 370. In addition to his other extensive experience, Mr. Phillips has also investigated a number of conveyor belt fires. Tr. 375 - 381. He is currently the coordinator of the petition for modification process at MSHA. Tr. 381.

Mr. Phillips testified that the instant case is the only modification request for 30 C.F.R. §1108 he has ever seen. Tr. 387. He testified that this is a difficult section to modify because it specifically requires fire-resistant belt that has been approved pursuant to 30 C.F.R. § 18.65. Tr. 388. Mr. Phillips testified that the flame-resistant belt standard is important and was included in the Act by Congress because of the long-standing, severe problems caused by belt fires. Tr. 388.

While flame resistant belt will burn, according to Mr. Phillips, it will not continue to burn after the heat source is removed. Tr. 389. On the other hand, a non-fire resistant belt will continue to burn, generating thick black smoke and intense heat, causing reversal of ventilation. Tr. 399 – 400. While Mr. Phillips stated that the Matewan Tunnel “looked good” he pointed out that there are numerous sources of ignition in the tunnel, including electrical pumps, battery charges, and lubricant. Tr. 390-91; 394.

Mr. Phillips testified that the proposed modification does not address the safety standard in Section 1108. Rather than addressing the flame-resistant belt standard, it only addresses fire detection – a different safety concern. Tr. 405.

Harry Verakis

Mr. Verakis is a general engineer physical scientist with the Mine Safety and Health Administration; he provides technical support at the approval and certification center. Tr. 469. Mr. Verakis has extensive experience in testing conveyor belt for flame resistance, and has published papers on fire hazards. Tr. 476 – 77, 484; GX 6, 7. He is a certified fire and explosion investigator as well. Tr. 483.

After a detailed explanation of his qualifications and work history and a discussion of his findings at the Matewan Tunnel, Mr. Verakis testified as to the flammability test that the Center ran on the Goodyear replacement belting at issue in this case on August 1, 2003. Tr. 528. Mr. Verakis described the methodology used to conduct the test, which was in compliance with 30 C.F.R. § 18.65, and reported that the Goodyear belt did not pass the test: “it exceed[ed] by far the sixty second requirement for flaming.” The test was performed on four different pieces of the Goodyear belt. Tr. 530 – 531. Mr. Verakis did not personally perform the test, but it was performed at his laboratory. Tr. 534 – 35.

Mr. Verakis also testified as to the results of tests that his laboratory ran on belt samples from the Matewan Tunnel in November 2004. Tr. 538. Those tests results are also contained in GX 10, Flame Test Report on Conveyor Belt Samples in Regard to the Matewan Mine Tunnel.

Mr. Verakis was present for each of the tests performed in November 2004. Again, the Scandura belt passed the flame test, as did the repaired, spliced belt. Tr. 540. The Goodyear belt, on the other hand, again failed the test. Tr. 542.

Mr. Verakis also reviewed PX 29, the records of the flame test performed by Noah Rider at Packer Engineering. Tr. 543. While Mr. Verakis stated that there was no date on the records to indicate when the testing was done, no indication of the person who actually performed the testing, no summary page, no indication of the velocity at which the samples were tested, and very little information regarding the testing procedures. Tr. 543; see also PX 29. Mr. Verakis concluded that he would not be able to certify Packer Engineering’s test results indicating the Goodyear belt passed, because the MSHA laboratory is “the only laboratory . . . that can make tests.” Tr. 545. Mr. Verakis further explained, “I know it . . . may be an unfair system – but MSHA and the Approval Certification Lab is the only organization authorized to make those tests” according to the applicable regulations. Tr. 545.

Mr. Verakis discussed the July 29, 2003, memorandum from Jeff Steigleman at Goodyear. Tr. 640; PX 49. The memorandum indicates that the steel cord belt, presumably the Goodyear replacement belt, passed an MSHA flame test. Id. There is very little other information in the exhibit. Petitioner’s counsel indicated at the hearing that he “was not relying on this particular test, because I [can’t] produce the people who were going to testify.” Tr. 636-37.

Mr. Verakis also testified as to the contents of GX 5, the investigative report on the Petition for Modification. Tr. 552. Mr. Verakis co-authored the report. Tr. 552. Mr. Verakis concluded that, while the mine has a good fire suppression system, an escapeway, and is well-maintained, the proposed modification does not constitute equal protection with the standard because of the

danger posed by non-flame resistant belt. Tr. 579 – 581. While the proposed modification emphasizes fire detection, the standard requiring flame-resistant belting promotes fire prevention. Id.

VI. Discussion

The Federal Mine Health and Safety Act of 1977 (the Act), 30 U.S.C. §§ 801 et seq. establishes detailed, mandatory health and safety standards for the underground coal mining industry. See 30 U.S.C. §§ 841 – 878. Among those standards is 30 U.S.C. § 871 (h) (Section 311 (h) of the Act), as implemented by 30 C.F.R. § 75.1108, requiring that “all conveyor belts acquired for use in underground mines shall meet the approval requirements established by the Secretary for flame-resistant belts.” Id. The test for flame-resistant conveyor belts is detailed in 30 C.F.R. § 18.65, which describes the size of the samples to be tested, the specifications of the apparatus used in testing, the testing procedures and the results required to gain MSHA approval.

Under § 101 (c) of the Act, the Secretary may modify the application of any mandatory safety requirement to an individual mine if the Secretary “determines that an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard.” 30 U.S.C. § 811 (c).

Courts have interpreted Section 101 (c) using a two-part test. UMWA v. MSHA (Utah Power & Light), 823 F.2d 608, 610 (D.C. Cir. 1998). The party seeking the modification must show: 1) the proposed modification promotes the same safety goals as the mandatory standard, thereby guaranteeing the same level of protection to the miners as provided by the statute, and 2) the proposed modification, considered in light of overall safety in the mine, will achieve a net gain, or at least equivalence, in mine safety as compared to the statutory safety standard. Id.

1. Same Level of Protection

First, the proposed modification does not promote the same safety goals as the mandatory standard, and thus cannot guarantee the same level of protection provided to the miners by the statute.

While the mine asserts that the proposed modification will fulfill this prong of the standard, I find that the proposal focuses on fire detection rather than fire prevention. There was ample expert testimony at the hearing, as summarized above, indicating that the non-flame-resistant conveyor belt would not only burn more easily during a fire, but would burn longer, more stubbornly, and would create high heat and thick, black smoke.

The mine argues that the Goodyear replacement belt is flame-resistant within the meaning of 30 C.F.R. § 18.65 based on the tests performed by Packer Engineering. However, I find that the tests performed by MSHA were of greater weight, as the tests performed by Packer Engineering were not well-documented and the witness testifying regarding the tests, Noah Rider, had limited experience regarding this test and could not state whether he or another technician actually conducted the tests. On the other hand, the MSHA tests were well-documented and were

performed by recognized experts in the field of mine fire safety. Furthermore, the regulations state that MSHA is the only entity that can issue approvals. See 30 C.F.R. 18.1; 18.2. Thus, I find that the two well documented tests performed by recognized experts in the field of mine safety outweigh the Packer Engineering test. Regardless of whether the MSHA has the only laboratory that can certify test results, reports from Packer are flawed and the statement from Goodyear is not accompanied by supporting documentation.

Although the proposed modification's safety provisions are admirable and the testimony at the hearing consistently revealed that the mine is clean and very well maintained, 30 C.F.R. § 1108 does not promote fire detection; rather, it promotes fire prevention. Thus, the proposed modification does not meet the first prong of the test.

2. Overall Safety

Second, the proposed modification does not achieve a net gain or at least equivalence in the overall safety of the mine. As noted above, the Goodyear belt is not flame resistant. Since non-flame resistant belts increase the dangers associated with coal mine fires, the overall safety of the mine is decreased by the proposed modification; thus, the proposed modification does not meet the second prong of the test.

No one involved in this case desires to see this mine closed. Testimony at trial indicated that all of the original belt that had been ripped would have been repaired and returned to use in the tunnel by the date of this decision.

VII. Order

The Petitioner, Eastern Associated Coal Corporation (Matewan Tunnel Mine)'s Petition for Modification is DENIED.

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RICHARD K. MALAMPHY
Administrative Law Judge

RKM/vlj
Newport News, Virginia

Notice of appeal. Any party may appeal from the initial decision of the administrative law judge by filing with the Assistant Secretary a notice of appeal within 30 days after service of the initial decision. The Assistant Secretary may consolidate related appeals. Copies of a notice of appeal shall be served on all parties to the proceeding in accordance with [§44.6](#) of this part.