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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

CONSOLIDATION COAL COMPANY, CONTESTANT	Contest of Orders and Citation
	Docket No. WEVA 80-116-R
v.	Order No. 808596; 10/29/79
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Docket No. WEVA 80-117-R Citation No. 808599; 10/30/79
	Docket No. WEVA 80-118-R Order No. 808606; 11/5/79
	Shoemaker Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. WEVA 80-659
v.	Shoemaker Mine
CONSOLIDATION COAL COMPANY, RESPONDENT	

DECISION

Appearances: Anthony J. Polito, Esquire, Pittsburgh, Pennsylvania, for contestant-respondent Consolidation Coal Company; David Street, Attorney, U.S. Department of Labor, Philadelphia, Pennsylvania, for respondent-petitioner MSHA

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern three contests filed Consolidation Coal Company (hereinafter Consol) challenging the validity of the captioned orders and citation issued pursuant to the Federal Mine Safety and Health Act of 1977. The civil penalty proceeding concerns a proposal for assessment of civil penalty filed by MSHA seeking a civil penalty assessment for the citation issued in Docket WEVA 80-117-R. The three contests were originally adjudicated by former Commission Judge James A. Laurenson, and he issued

his decision in those cases on October 7, 1980. Consol's petition for discretionary review by the Commission was denied, and Judge Laurenson's decision became the final Commission decision in this matter. Subsequently, on December 11, 1980, Consol filed a petition for review in the United States Court of Appeals for the Fourth Circuit, Consolidation Coal Company v. Secretary of Labor, No. 80-1862. The civil penalty case was stayed pending court review. On October 13, 1981, the Court vacated the decision and remanded the matter for further proceedings consistent with its opinion. The cases were subsequently assigned to me for further consideration and adjudication.

Applicable Statutory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., and in particular sections 104(a) and (b), and 104(d)(1).

2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i), which requires consideration of the following criteria before a civil penalty may be assessed for a proven violation: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

3. Commission Rules, 29 C.F.R. 2700.1 et seq.

Issues

Counsel for the parties are in agreement that the following issues remain to be decided on remand:

1. In light of all the evidence of record, including but not limited to all hearsay testimony excluded or not considered by the trier of fact, was Order No. 0808596 properly issued on October 29, 1979.

2. In light of the recent decision by the Commission in Cement Division, National Gypsum Co., 3 FMSHRC 822 (1981), was the violation described in Citation No. 0808599 (issued on October 30, 1979) of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard within the meaning of Section 104(d)(1) of the Federal Mine Safety and Health Act of 1977.

3. The appropriate penalty, if any, to be assessed.

Discussion

Docket No. WEVA 80-116-R

On October 26, 1979, at approximately 6:15 p.m., a section 104(a) citation no. 0808594, was served on Consol charging a violation of mandatory safety standard 30 CFR 75.200. The "condition or practice"cited by the inspector is described on the face of the citation as follows:

> The approved mine roof control plan was not being followed in 4 Right, 5 North (087) section in that roof bolts were spaced 4 feet 7 inches to 6 feet 2 inches apart and from the coal rib in approximately 150 different locations in the coal conveyor belt entry from the tailpiece to 18á00 SS and from the belt entry to the face of No. 30 room for a total of approximately 300 feet in length. C. Causey and T. Thomas, Section Foremen. 4 feet 6 inch centers are maximum required in flat face mining in the plan.

The inspector who issued the citation made a finding that the alleged violation of section 75.200, was "significant and substantial", and he directed that the cited conditions be abated by 8:00 a.m., Monday, October 29, 1979. Thereafter, at approximately 8:55 a.m., October 29, 1979 the inspector refused to extend the time for abatement and issued a section 104(b) withdrawal order no. 0808596 covering the same area of the mine covered by the underlying citation, namely, the belt entry from the tailpiece to 18á00 SS and from the belt entry to the face of No. 30 room in the 5 North, 4 Right section of the Shoemaker Mine. The order stated as follows:

> Little effort had been made to abate Citation 0808594 in that only approximately 15 roof bolts had been installed to support the roof in the area that was cited. The condition was reported six straight shifts and worked on only on 10/29/79, 12:00 to 8:00 a.m. shift according to the preshift record book.

WEVA 80-117-R and WEVA 80-659

These consolidated proceedings concern a section 104(d)(1) "unwarrantable failure" citation issued to Consolidation Coal Company (hereinafter Consol) by an MSHA inspector on October 30, 1979, during the course of his mine inspection. Docket WEVA 80-117-R is a contest proceeding filed by Consol challenging the legality and propriety of the citation. In his decision of October 7, 1980, Judge Laurenson held that the citation was properly issued and denied Consol's contest. Docket WEVA 80-659, concerns a civil penalty proposal filed by MSHA on October 1, 1980, seeking a civil penalty assessment for the alleged violation set out in the citation, and both dockets have been consolidated for adjudication.

The section 104(d)(1) unwarrantable failure citation no. 0808599, was issued at approximately 11:55 a.m., on October 30, 1979. The citation alleged a violation of 30 CFR 75.200, and the "condition or practice" described by the inspector on the face of the citation is as follows:

> The approved mine roof control plan was not being followed in 4 Right, 5 North section (087) and on the section supply track in that roof bolts were spaced from 4 feet 7 inches to 7 feet 6 inches apart and from bolt to coal rib in approximately 350 different locations that were measured in the (intake air) No. 1 entry from 30 to 33 room and from 31, 32 and 33 rooms, and in the track from 6 to 18 stopping for a total of approximately 1500 feet in length and more bolts may be spaced wide. 4 feet 6 inches maximum in plan. William Zamski Mine Foreman.

In addition to his "unwarrantable failure" finding, the inspector determined that the cited violation of section 75.200 was a "significant and substantial" violation, and he fixed the abatement time as 8:00 a.m., Friday, November 2, 1979. On Monday, November 5, 1979, the inspector refused to extend the time for abatement and at approximately 9:45 a.m. that same day issued a section 104(b) withdrawal order no. 0808606.

Findings and Conclusions

Docket No. WEVA 80-116-R

The record adduced in this case reflects that at approximately 6:15 p.m. on Friday, October 26, 1979, MSHA Inspector Charles Coffield issued a section 104(a) citation no. 0808594 for a condition he observed in the 5 North, 4 Right section of the mine. The citation indicated that the approved roof control plan was not being followed at approximately 150 different locations in that approximately 150 roof bolts were spaced from four feet-seven inches to six feet-two inches apart. The approved plan required the bolts to be on four feet-six inch centers. Inspector Coffield fixed the abatement time as 8:00 a.m., Monday, October 29, 1979.

On Monday morning, October 29, 1979, shortly before 8:00 a.m., Inspector Coffield went back into the 5 North, 4 Right section, and after refusing to extend the time for abatement of the citation issued the section 104(b) withdrawal order no. 0808596. Contestant contends that Inspector Coffield unreasonably exercised his power and that he acted arbitrarily and capriciously in failing to extend the time for abatement and in issuing the withdrawal order.

Contestant does not challenge the validity of the underlying section 104(a) citation no. 0808594, charging a violation of mandatory safety standard 30 CFR 75.200, for a violation of the approved roof control plan dealing with the proper spacing of roof bolts. Contestant's challenge in this proceeding concerns

the inspector's decision to refuse an extension of the abatement time and his decision to issue a section 104(b) withdrawal order on October 29, 1979. In this regard, section 104(b) of the Act provides as follows:

> If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons 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.

Respondent MSHA's Arguments

In support of its argument that order of Withdrawal No. 0808596 was properly issued, respondent MSHA relies on the previous decision issued by Judge Laurenson as well as its post-trial brief filed with him. Respondent takes the position that even if I were to conclude from the record that supply and mechanical problems during the midnight shift of October 29, 1979, prevented the timely abatement of citation 0808596, the order should still stand. In support of this position respondent relies on Judge Laurenson's conclusion that Inspector Coffield was not advised of any such difficulties, and at 8:00 a.m., October 29, 1979, was confronted with the fact that --

> "only 15 roof bolts had been installed to correct 150 wide spaced bolts and that abatement work had only been performed during one shift after issuance of the citation."

In its brief filed with Judge Laurenson, MSHA points to the fact that Inspector Coffield discussed the abatement time with company walk-around representative Peter J. Domenick, but that Mr. Domenick could not provide an estimate of how long the job would take. Further, MSHA states that at the hearing it made an offer of proof that one of the roof bolters in the area told Mr. Coffield that he would be able to bolt the cited room on the evening of October 30, but that Judge Laurenson ruled that this was hearsay. Further, MSHA argues that in fixing the abatement time, Mr. Coffield took into account his own experience as a roof bolter which he had obtained at the Shoemaker mine (Tr. 300), and that he felt that the company could well have corrected the conditions within two shifts. In establishing his abatement date, he did not count on the operator calling in roof bolters to work on the weekend, although he knew it was possible for it to do so (Tr. 301, 399). At the time the citation was issued, Mr. Domenick did not ask for more time for abatement (Tr. 43), and mine foreman William Zamski and General Superintendent Ronald Stovash believed that the entire bolting job could have been performed during the midnight shift on October 29 (Tr. 62).

MSHA argues that when Mr. Coffield returned to the mine on the morning of October 29, Inspector Coffield found that only 15 bolts had been installed in the cited area in a very small section near the tail piece (Tr. 302). He also noted that the violation had been reported by preshift examiners on six shifts and had been worked on only on the 29th (Tr. 302). Although he remembered that the company pulled the roof bolters out of the section after he issued the citation on the 26th, he still believed that the company could have left bolters in the section on that shift and accomplished a great deal towards abating the violation (Tr. 302-303). Another factor which weighed in his decision was that management personnel did not seem to know on the 29th what work had been done to abate (Tr. 66, 302-303, 308). In sum, he found that the company had not made an honest, all out effort to correct the violation (Tr. 433-434).

Citing the applicable case law, MSHA asserts that the two general criteria addressed by the Commission's Judges in dealing with cases of this kind are the reasonableness of the original abatement period and the reasonableness of the inspector's decision not to extend that period. Itmann Coal Company v. Secretary of Labor, 1 BNA MSHC 2350 (FMSHRC Docket No. HOPE 79-307, February 26, 1980), U.S. Steel Corporation v. Secretary of Labor, 1 BNA MSHC 2407 (FMSHRC Docket Nos. WEVA 80-54-R and 80-55-R, April 8, 1980). The latter criteria depends on the facts confronting the inspector when he wrote his section 104(b) order. U.S. Steel Corporation v. Secretary of Labor, FMSHRC Docket No. WEVA 79-172-R (June 19, 1980), citing U.S. Steel Corporation v. Secretary of Interior, 7 IBMA 109, 116 (1976). Facts to be considered include the diligence of the operator's effort to abate, the extent of mechanical or other difficulties encountered in abatement, and the seriousness of the unabated hazard.

MSHA argues that on the facts presented in this case Inspector Coffield acted reasonably when he initially fixed the abatement time as 8:00 a.m., Monday, October 29, 1979. Given the fact that he received no answer from walkaround representative Dominick to his inquiry as to how long abatement would take, taking into account his own experience and information he received from roof bolters in the area, and taking into account the fact that mine foreman Zamski testified that he hoped to fully accomplish abatement on the first (midnight) shift early in the morning of October 29, MSHA concludes that the initial abatement deadline was clearly a realistic one.

With regard to the events which transpired over the intervening weekend, MSHA argues that contestant made practically no effort to abate the violation until the early morning of October 29th in spite of the fact that about one-third of the violation could have been abated by mechanical bolters on October 26th, without resort to transferring any resin bolters to the cited section. Failing progress on Friday night, MSHA suggests that contestant could have called in extra bolters for Saturday work and for at least one shift of work on Sunday. Likewise, it could have asked bolters to double over into Saturday morning.

Nevertheless, applicant waited until

the early hours of Monday, October 29, to begin work, and MSHA dsmisses as hearsay Mr. Zamski's testimony that problems with power and supplies, as well as a malfunctioning bolting machine, impeded the contestant's abatement progress. Further, MSHA contends that no information was provided as to how long it took to correct those problems, and Inspector Coffield was not advised as to the problems on October 29, nor did contestant demonstrate that the problems were sufficient to excuse its failure to install more than 15 roof bolts.

Finally, MSHA argues that contestant's failure to mount a diligent effort to abate the citation was aggravated by the serious nature of the violation cited and that taken as a whole the situation which confronted Inspector Coffield on Monday morning, October 29, 1979, was a half-hearted effort by the contestant to correct a serious violation, which by the admission of its own mine foreman, could have been abated in the time allowed. Conceding that contestant voluntarily closed the section down, MSHA still argues that mechanics were in the area and were exposed to the hazards there, and points to the fact that Inspector Coffield had no guarantee that contestant would not reactivate the section as soon as he had granted an extension. In the circumstances, MSHA concludes that Mr. Coffield had no viable option other than to issue the section 104(b) withdrawal order.

Contestant Consolidation Coal Company Arguments

Contestant argues that in concluding that it had failed to establish that the period of time for abatement should have been extended, Judge Laurenson relied upon several facts which were not only not supported by substantial evidence but which were in some instances contrary to the undisputed evidence introduced at the hearing in this case. Moreover, contestant states that Judge Laurenson rejected as hearsay certain of its evidence and concluded that contestant had failed to prove that supply and mechanical problems prevented its abatement efforts during the midnight shift on Monday, October 29, 1979.

Contestant asserts that when Inspector Coffield informed Mr. Dominick on the evening of October 26 that there were roof bolt spacing violations in the area covered by the citation, Mr. Dominick suspected that similar violations might also exist in other areas of the section (Tr. p. 18, 20). Thus, after consulting by phone with Ron Stovash, the General Superintendent, and Bill Zamski, the General Mine Foreman, Mr. Dominick decided to shut the section down so that it could be checked out further (Tr. p. 20-21). Originally, Mr. Dominick had told section foreman causey to leave the center bolters in the 5 North, 4 Right section and to take the rest of his crew to another section (Tr. p. 18). However, when Mr. Dominick learned that resin bolts were needed in the conveyor belt entry and that no resin bolts were available in the section at the time, he than told Mr. Causey to take his bolters out of the section with the rest of the crew (Tr. p. 18-19). The entire section had been shut down and all the employees had left when Mr. Dominick and Inspector

Coffield left the section (Tr. p. 20).

Contestant takes issue with Judge Laurenson's previous finding that it offered no explanation or justification for its actions in sending the mechanical roof bolting crew out of the section after the citation was issued on Friday evening, October 26, 1979. Contestant states that General Mine Foreman Bill Zamski who participated in the decision to close the section offered the following explanation:

> Q. Why was no bolting done in the 30 room or in any part of the area covered by the citation during that evening shift [October 26], during the balance of that shift?
>
> A. I didn't want to start up in the rooms. What I wanted to do was start the center bolting from the tailpiece in and correct the violation as we were coming in, make sure that we had all the bolts on our four and a half foot centers from the tailpiece in on our haul roads and in the cross cuts that lead into the rooms instead of going up in the room leaving the violation back behind us.
>
> Q. Why did you not start in the tailpiece [that evening]?
>
> A. Because we didn't have the resin bolt materials to do this. (Tr. 58-9.)

Contestant asserts that it is clear from the undisputed testimony of Mr. Zamski that he felt that it was safer to abate the roof bolt spacing violations in the cross cut and the conveyor belt entry before employees were asked to do abatement work inby in the rooms. The evidence was that all the entries in this section had been bolted with resin bolts (Tr. 19; GX-1). However, because the resin bolts were not available in the section at that particular time, no abatement work could be started that shift (Tr. 19).

On the basis of the foregoing, contestant argues that it did offer a reasonable explanation for its decision not to perform any abatement work during the balance of the afternoon shift on Friday, October 26. The entries needed resin bolts, which were not available in the section at that time, and mine management determined that it was safer to work inby and do the entries before the rooms. Since this explanation was not contradicted, and there is nothing in the record which would justify rejecting it, contestant submits that a full and complete explanation was offered with respect to its activities during the remainder of the period prior to the issuance of the withdrawal order on Monday, October 29.

Contestant points out further that other necessary work had already been scheduled for Saturday and the bolters were unable to do any bolting that day in the 5 North, 4 Right section of the mine (Tr. p. 59-61). Moreover, an equipment move had been scheduled for Sunday and since no employees can be inby equipment that is being moved, no bolters were scheduled to work in the 5 North, 4 Right section on Sunday (Tr. p. 62). In addition, both Mr. Zamski and Mr. Stovash explained that they had decided on Friday evening that the entire section was going to remain idle until the roof bolt spacings in the entire section could be checked out and, where necessary, corrected (Tr. p. 61-62, 151-52). Mr. Stovash further explained that his decision to close the section and to check it our further was based on Inspector Coffield's statement to him, on the evening of the 26th, that the same problem (i.e., roof bolt spacings) existed in the supply track entry (Tr. p. 151). Under these circumstances, mine management felt it would be sufficient and reasonable to try to have some bolting done in the section on Staurday and then to schedule bolters to work in the area covered by the citation during the midnight shift on October 29 and to continue bolting in that area while the section remained idle and was being checked (Tr. pp. 59-62).

With regard to Judge Laurenson's previous finding that contestant could have called in additional roof bolters to abate the citation on Saturday, October 27, or Sunday, October 28, but elected not to do so because management determined that the citation could be abated during the midnight to 8:00 a.m. shift on Monday, October 29, contestant submits that this conclusion is contrary to the evidence adduced in this case.

With respect to Sunday, October 28, contestant argues that the undisputed evidence was that an equipment move had been scheduled for that day and since no employees can be inby equipment that is being moved, no bolters were scheduled to do abatement work in the 5 North, 4 Right section on Sunday (Tr. p. 62). Agreeing with Judge Laurenson's finding that roof bolters were scheduled to work and did work at the mine on Saturday, October 27, contestant points out that those roof bolters had been instructed to begin abatement of the citation upon completion of their other bolting work. The bolters were required to bolt the areas that had been mined on Friday or contestant would have been in violation of the law. However, they were unable to complete their other work in time and did not therefore perform any abatement work in the 5 North, 4 Right section on Saturday, October 27 (Tr. p. 59-61). Although contestant agrees with Judge Laurenson's finding that some bolters were scheduled to work on Saturday, it disagrees with his additional finding that mine management could or should have called in additional roof bolters to abate the citation on Saturday, October 27, and contends that Judge Laurenson ignored the undisputed evidence that Saturday work schedules are made up on Wednesday of each week and posted on Thursday, advising the men who are to work and what their work assignments will be (Tr. p. 60). Thus, contestant asserts that it is difficult, if not impossible, to schedule on Friday evening additional men to work

on a Saturday (Tr. p. 76-77). Further, contestant argues that Judge Laurenson's finding also ignores and is inconsistent with Inspector Coffield's statement that he really was not considering that period of time (i.e., Saturday and Sunday) for abatement but instead felt that the citation could have been abated during

the midnight shift on the 29th. It was impossible to abate the violation in one or one and one-half shifts. Instead, contestant closed down the section as soon as the citation was issued, tried to abate what it could on Saturday and also during the midnight shift on the 29th and felt that under all the circumstances (including particularly the fact that the entire section was closed and being checked), the inspector would surely extend the time for abatement. In that regard, both Mr. Stovash and Mr. Zamski reasonably believed that the citation would be extended if the section was voluntarily closed because other inspectors had done so (Tr. p. 81-82, 155-6). However, Inspector Coffield refused to do so.

Conceding the evidence that only 14 bolts were installed on the midnight shift on Monday, October 29, contestant nonetheless argues that power problems made it difficult to get the bolting supplies into the section and the bolting machine then had mechanical problems. These problems were testified to be General Foreman Bill Zamski, General Superintendent Ron Stovash, and underground Superintendent Matt Matkovich. Although this evidence was rejected as hearsay by Judge Laurenson, contestant notes that that Court of Appeals has indicated that such evidence was probative and should be considered, and when so considered, submits that it offers a reasonable explanation for contestant's failure to do additional abatement work during the midnight shift on Monday, October 29.

Regarding Judge Laurenson's finding that mine management did not inform Inspector Coffield of any alleged problems with supplies or equipment on Monday, October 29, contestant asserts that the uncontradicted testimony is that Mr. Matkovich talked to Inspector Coffield on the morning of October 29, asked him for an extension of time to abate the citation and also explained to him the problems the Company had encountered, including the problem "we had getting supplies in there" (Tr. p. 131). However, as Mr. Matkovich further testified, Inspector Coffield nevertheless refused to extend the time for abatement (Tr. p. 131-2). Further, contestant maintains that in considering the request for an extension of the time for abatement, the inspector and Judge Laurenson should have but did not give any consideration to the fact that mine management had voluntarily closed the 5 North, 4 Right section prior to issuance of the withdrawal order on October 29. In support of this contention, contestant states that it is undisputed that immediately after issuance of Citation No. 0808594 on Friday evening, October 26, mine management closed the 5 North, 4 Right section of the mine and that section was still closed on Monday morning, October 29, when Inspector Coffield issued his withdrawal order in that section (Tr. pp. 18, 353).

Contestant submits that Inspector Coffield failed to give any weight to its voluntary closure of the section and instead issued a withdrawal order on October 29 simply to penalize it for not having done exactly what he ordered them to do, i.e., install approximately 150 new bolts in the area covered by the citation, regardless of the reason or explanation for their failure to do

so. Contestant submits that voluntarily closing the entire section for the purpose of determining and correcting all

possible roof spacing violations in the entire section was more than the Company was required to do in response to the original citation and that Mr. Coffield's refusal to give that fact due consideration in determining whether to extend the time for abatement or issue a withdrawal order on Monday, October 29, was completely unreasonable and arbitrary on his part.

Conceding that it did not insert 150 new bolts by 8:00 a.m. on Monday, October 29, contestant points to the fact that neither did it ignore the citation. Instead, it made a good faith effort to comply by inserting as many new bolts as possible under the circumstances, and by closing down the section and committing itself to a plan which would determine the extent of violations in the entire section, contestant states it had volunatrily given up its right to produce coal during the balance of the afternoon shift on the 26th, the mindight shift on the 29th and thereafter, and maintains that such action on the part of mine management expressed and evidenced a sincere concern for the safety of the employees and its obligations under the 1977 Act and warranted an extension of the time for abatement by the inspector.

Contestant notes that the voluntary closure of a section eliminates exposure to possible health and safety hazards, and maintains that it is equally clear that its voluntary closure of the section under the circumstances of this case was for the purpose of determining and correcting roof bolt spacing violations in the entire section, rather than delaying abatement in any particular area of the section (Tr. p. 61-62, 151-152). Under these circumstances, contestant maintains that considerable weight should have been given to its voluntary closure of the section. Further, contestant points to the fact that in this case, there were no observed roof or rib falls in the 5 North, 4 Right section and no history of roof falls in the section. Also, all of the management witnesses who testified on the matter described the roof conditions in the section as being excellent (Tr. p. 26, 55-56, 110-11, 133-34, 165). Mr. Blevins, the Union Safety Committeeman who testified for the Secretary, as well as Inspector Coffield, described the roof conditions as being good (Tr. pp.202-3, 227, 374). Mr. Coffield also acknowledged that he saw no condition with respect to the roof or ribs on October 29 that was different from the conditions that he had observed on October 26 (Tr. p. 357). If anything, contestant maintains the section was safer inasmuch as 15 new bolts had been added since the afternoon shift on the 26th and the production crew had not been working since the citation was issued (Tr. p. 357). Finally, contestant emphasizes that Judge Laurenson himself found that the condition of the roof was good when he stated as follows:

> At all times and places relevant herein, the condition of the roof was good in that there was no evidence of recent falls of supported roof and no evidence of cracks, splits, or loose bolts. At all times and places relevant herein, there was only minimal sloughage of the ribs. (D. 3.)

At pages six and seven of his decision, Judge Laurenson comments that "Consol failed to establish that supply and mechanical problems prevents its timely abatement because it presented only hearsay evidence of such purported problems without documentation" (emphasis added).

In its remand of these proceedings, the Court made the following observation:

> In his opinion, the administrative law judge excluded, as hearsay, testimony of Consolidation's general mine foreman, superintendent, and underground superintendent that supply and mechanical problems prevented timely abatement. We conclude that this evidentiary ruling was erroneous. The testimony was niether irrelevant nor repetitious, and in every respect it satisfied the requirements for admission of hearsay evidence in an administrative hearing. 5 U.S.C. 556(d); Carter-Wallace, Inc. v. Gardner, 417 F.2d 1086, 1095-96 (4th Cir. 1969). Forther, no objection was made to its introduction. Fair appraisal of Consolidation's defense required the administrative law judge to consider this probative evidence.

In support of its assertion that the bolting machine had mechanical problems, contestant cites pgs. 62, 131, and 154-155 of the trial transcript. The only reference that I can find to any inoperative bolting machine is at pg. 155 where mine superintendent Stovash alludes to "problems with the bolting machine breaking down", and "power problems which prevented supplies from being transported to the section." Mr. Stovash further testified that he was first made aware of these problems on Monday morning. In view of the fact that the section was closed down, a reasonable effort was made to start bolting on the afternoon of the 26th, and some bolting was in fact accomplished on the midnight shift on October 29th, and he fully expected Inspector Coffield to extend the abatement time.

General mine foreman Zamski testified that 13 or 14 bolts were installed during the midnight shift on October 29th, and when asked why additional bolts were not installed, he replied as follows (Tr. 63):

> A. Well, we had power trouble and we had trouble getting the DC power. We had supply men bring the resin bolting material into the section. They got there late with it. Also, the center bolter, after they got it there, the center bolter was malfunctioning. It was down. It took them a while to get that fixed.
>
> Q. I am not sure what effect the power has on the roof bolting. Coule you explain that, please?
>
> A. Yes. Motors run on DC power. Jeeps, porter buses, and that is how we transported the resin material into

the section.

As for the trial testimony of underground foreman Matkovich, aside from an off-hand remark at pg. 131 dealing with some unspecified "problems we had getting supplies in there", Mr. Matkovich's testimony makes no reference to any mechanical problems. In addition, Mr. Matkovich testified that when he spoke with Inspector Coffield over the telephone, he specifically explained to him the problems with abating a citation received at the end of the last shift on a Friday and the problems with getting necessary supplies on the section. Mr. Matkovich also testified that he specifically told Mr. Coffield that he needed "a little more time" for abatement, and that since mine management had voluntarily shut the section down a little more time would not matter. However, Inspector Coffield simply indicated that he could not do it (Tr. 131-132). Further, it is clear that this conversation took place after Mr. Coffield issued his closure order (Tr. 131).

Inspector Coffield testified that when he initially established the abatement time as 8:00 a.m., Monday, October 29, 1979, Mr. Dominick did not protest (Tr. 301). When asked why he issued the order and refused to extend the abatement time, Mr. Coffield respondent as follows (Tr. 302-303):

> Q. Why did you issue the withdrawal order on the 29th?
>
> A. I found that little effort had been made to abate the conditions cited. Only 15 roof bolts had been installed to support the roof in these areas. Before going underground I checked the record books of the mine and the particular record book of this section. The conditions had been reported six shifts, and according to the books it was booked only on 10/29/79, 12:00 to 8:00 a.m. shifts. Also, I asked mine management at the mine what work had been done. They didn't seem to know what work had been done. Also, something, the fact that they pulled the roof bolters out of the section when I was there on 10/26 after I issued the citation -- did not care to leave roof bolters in there to abate the citation or didn't do it -- and they could have started work on it and put in a lot of bolts or do whatever they wanted to do -- there was no reason given that they couldn't. I had reason to believe they could. I weighed heavily on it. Therefore, seeing in that period of time that only 15 roof bolts had been installed in a very small area near the tail piece, I would say that little effort to correct the citation had been made.

Inspector Coffield also testified that while in the section each day after he issued the citation he observed mechanics and roof bolters there and assumed they were working on the abatement or to check out the section (Tr. 303). He also testified that on the morning of October 29, no one advised him of any equipment breakdowns that may have occurred on the

midnight shift, nor did anyone advise him of any problems that may have existed concerning the supply of resin bolt materials (Tr. 306). He confirmed that he had a telephone conversation with Mr. Matkovich that morning, and when Mr. Matkovich advised him that the section was closed so that the roof bolts could be installed, Mr. Coffield responded "Okay." Mr. Coffield confirmed that Mr. Matkovich wanted an extension of time but could not recall that he gave any reasons for this request (Tr. 306).

With regard to his inquiry of mine management as to what work had been done on the abatement when he arrived at the mine on October 29, Inspector Coffield stated that he spoke to a Mr. Behrens when he entered the damp house to change his clothes, but that Mr. Behrens indicated that he was not there and did not know (Tr. 308). Mr. Coffield also testified that he was "fairly certain" that he asked mine foreman Zamski about the abatement work but that "he really didn't know how much was done either" (Tr. 308).

Mr. Coffield conceded that Mr. Dominick did make a statement to him that he needed "as much time as possible" to abate the citation (Tr. 346). He also conceded that in determining that the conditions cited could have been abated by 8:00 p.m., October 29, on two working shifts, what he had in mind was the balance of the afternoon shift on Friday, October 26, and then the midnight shift on Monday, October 29 (Tr. 347). He also confirmed that resin bolts had to be added to the entries that were included in his citation, but he did not know whether they were available on the section on the afternoon of October 26 (Tr. 347), nor was he aware of any inoperative bolting machine on the October 29 midnight shift (Tr. 354). He also alluded to the fact that he observed at least four individuals from mine management on the section on the morning of October 29, including an engineer who was measuring bolts (Tr. 353-354), and he confirmed that Mr. Behrens did state that the section was down and would remain down for production until further work was done (Tr. 365).

Mr. Dominick testified that when Inspector Coffield asked him how much abatement time would be required to correct the roof spacing problems, he replied "all the time I can get" (Tr. 17). Mr. Dominick also testified that the roof bolters were removed from the area because of the lack of resin bolts, and that the section was closed down after the citation issued because he suspected that other areas also needed attention and that mine management wanted to check the area to ascertain the extent of the abatement work which had to be performed (Tr. 20). Mr. Dominick also confirmed that upon Mr. Stovash's instructions he returned to the mine on Monday, October 29, at the day shift which began at 8:00 a.m., and was accompanied by two company mining engineers and a safety inspector. The purpose of the visit was to check out the section to determine the spacing of the roof bolts and he prepared a report which he submitted to Mr. Stovash (Exhibit A-3; Tr. 23-34).

In the prior adjudication of these proceedings Judge Laurenson granted contestant's contest concerning Inspector

Coffield's refusal to extend the abatement time when he issued section 104(b) Order No. 0808606 on November 5, 1979. In vacating that order Judge Laurenson found that

while contestant failed to totally abate the violation noted in the underlying section 104(a) citation No. 0808599, issued on October 30, 1979, contestant established that the period of time for abatement should have been further extended by the inspector. Judge Laurenson's rationale in this regard appears at pg. 10 of his decision of October 7, 1980, and he concluded that the inspector failed to give the contestant proper credit for its abatement activities. Judge Laurenson found credible contestant's assertions that work was performed every shift between the time the citation issued and the time the order issued, except for three shifts on Sunday, November 4, 1979, and he took particular note that contestant had installed more than 400 roof bolts, that contestant was obligated to abate more than the 350 widely spaced roof bolt violations noted by the inspector, added a total of 1,000 roof bolts before the citation was terminated, and otherwise established that it was making a diligent and bona fide effort to abate the citation in a timely manner. It seems obvious to me that Judge Laurenson was particularly impressed by the extensive efforts made by the contestant to abate a citation which required a great deal of work and effort by the contestant, and this is the reason why he vacated the withdrawal order and found that the abatement time should have been extended further by the inspector.

In the instant case, Judge Laurenson gave contestant no credit for voluntarily closing the section down and ceasing production after the citation issued on Friday, October 26. Further, although he found that part of the cited area required resin bolts and there were no such supply of bolts available on the section, he also found that contestant ordered the roof bolting crew out of the section because of a management determination that the resin bolts should be installed first but found that contestant offered no explanation for this action. Judge Laurenson also concluded that contestant could have called in additional roof bolters during the intervening Saturday and Sunday but opted not to do so because of a management determination that abatement could be achieved on the Monday, October 29th midnight shift. He also found that contestant did not inform Inspector Coffield of any mechanical or supply problems prior to the issuance of the order, that such information was hearsay, and that on Monday only 15 roof bolts out of more than the required 100 had been installed.

After careful review and consideration of the entire record in this case, including the testimony which has been characterized as "hearsay" I conclude and find the that the initial period of abatement fixed by Inspector Coffield on Friday, October 26th when he issued the citation was not unreasonable or arbitrary. As a matter of fact, the record reasonably supports a conclusion that at that time mine management had no reason to believe that abatement could not be achieved during the subsequent afternoon shift and the midnight shift on Monday, October 29. As a matter of fact, Inspector Coffield testified that while he believed abatement could be achieved in two shifts, what he had in mind was the remainder of the Friday shift and the Monday midnight shift and not Saturday

or Sunday shifts. However, I further find and conclude that the inspector acted unreasonably in failing to extend the abatement time on Monday, October 29, and my reasons for this follow.

Contrary to MSHA's arguments that the walkaround representative said nothing to the inspector when he issued the citation and fixed the abatement time, Mr. Domenick testified that he advised Mr. Coffield that he could use all the time that he could get. Further, I find credible Mr. Domenick's testimony that he closed the section down because he suspected other areas in the section may have needed roof bolt attention, and this is further substantiated by the fact that Mr. Domenick, a company safety representative, and two mining engineers returned to the section on Monday, October 29, for the purpose of surveying and measuring the roof bolt spacing, and Mr. Domenick reported his findings to the mine superintendent. Mr. Coffield confirmed that these individuals were there.

With regard to the excluded hearsay, I take note of the fact that when contestant's witnesses testified as to certain mechanical and supply problems, MSHA's counsel interposed no objections, nor did he pursue the matter further on cross examination. Judge Laurenson found that contestant had not "documented" these asserted "problems" and failed to communicate them to the inspector. Mr. Zamski's direct testimony makes specific references to a malfunctioning roof bolter which was subsequently repaired, and problems with the DC power required to power the equipment bringing supplies into the section, and the testiomny still remains unrebutted. While it is true that the supply and mechanical problems were not directly communicated to Mr. Coffield before he decided to issue a withdrawal order and hung up the closure sign, Mr. Matkovich testified that he spoke with Mr. Coffield that very same morning over the telephone after Mr. Behrens notified him of Mr. Coffield's decision to issue a closure order, that he specifically asked the inspector for an extension of time, and advised him that the section had been closed down since Friday for the specific purpose of bolting. Mr. Coffield responded "okay". Mr. Coffield confirmed that Mr. Matkovich asked for an extension but he could not recall whether the had given him any reasons for this request.

With regard to Judge Laurenson's finding that contestant failed to offer any explanation as to why the roof bolters were taken off the section after the citation issued any why resin bolts had to installed first, Mr. Domenick's testimony which appears at pages 19-20, 37-38, and 45-46, explains the differences between the use of mechanical and resin roof bolts, and Mr. Domenick specifically indicated that the two can not be mixed, that some of the areas cited by Mr. Coffield required resin bolts, and in response to a specific question asked by Judge Laurenson, Mr. Domenick detailed why resin bolts are required in a certain area and not in others (Tr. 45-46). Further, the record reflects that Mr. Coffield confirmed that he was aware of the fact that resin bolts had to be added in the entries that were included in his October 26th citation (Tr. 347).

I cannot conclude that the fact that contestant failed to bring in additional bolters during Saturday and Sunday supports a conclusion that contestant was indifferent or otherwise unmindful

of the fact that it had to abate the citation. It seems obvious to me from the testimony presented in this case that neither Inspector Coffield nor mine management

initially believed that this was required to abate the conditions cited. Mr. Coffield believed that abatement could have been achieved during two subsequent shifts, namely on Friday and Monday midnight, and so to did mine management. The fact that mine management's belief that Mr. Coffield would somehow automatically extend the time for abatement proved to be wrong has to be considered in light of all of the circumstances and subsequent events which transpired after the citation issued.

On the facts presented in this case, I find contestant's explanations as to why additional bolters were not brought in Saturday and Sunday to be credible and I accept them. The citation was issued Friday afternoon, regular work schedules had already been established, and mine management voluntarily shut the section down and ceased production. It then made a complete assessment of the prevailing conditions which existed in the section; and while it may be argued that part of its motivation for doing so was to "cover all bets" and to insure that additional citations would not be issued, I do not believe that it should be unduly penalized for this. The section was down, production had ceased, and I believe that contestant was making a diligent attempt to achieve abatement. Simply because only 15 bolts had been installed cannot, in my view, serve as a basis for any conclusion that nothing was being done.

In view of the foregoing findings and conclusions, I find that the record before me supports a conclusion that the contestant made a good faith effort at timely abating the citation in question, established valid reasons warranting an extension of time to totally abate the citation, and that the time should have been extended by the inspector. Accordingly, the section 104(b) Order No. 0808596, issued on October 29, 1979 IS VACATED.

Findings and Conclusions

Docket Nos. WEVA 80-117-R and WEVA 80-659

These consolidated dockets concern the question as to whether a section 104(d)(1) "unwarrantable failure" citation (no. 0808599) issued by Inspector Coffield to the contestant on October 30, 1979, was properly issued, and if so, the appropriate civil penalty which should be assessed for the violation, taking into account the six statutory criteria found in section 110(i) of the Act.

In the prior adjudication of contest Docket No. WEVA 80-117-R, Judge Laurenson found that MSHA had established the required findings of unwarrantability at the time the citation issued, rejected contestant's defense in this regard, and found that the contestant had failed to exercise due diligence and reasonable care to correct the conditions cited by the inspector prior to the issuance of the citation for a violation of mandatory safety standard 30 CFR 75.200. He concluded that the violation was the result of an unwarrantable failure by contestant and affirmed the inspector's finding in this regard.

With regard to the inspector's further findings that the citation constituted a "significant and substantial" violation, Judge Laurenson found that the violation could significantly and substantially contribute to the cause and effect of a coal mine safety hazard, and in so doing he relied on the then applicable case precedent in Alabama By-Products, 7 IBMA 85 (1976).

As noted earlier in this case, following an appeal to the Fourth Circuit, the Court vacated and remanded Judge Laurenson's decision because Commission precedent on the element of "significant and substantial" had changed during the time the case was before the Court. The recent decision of the Commission which changed the required burden of proof on the "significant and substantial" issue is Cement Division, National Gypsum Company v. Secretary, 2 BNA MSHRC 1201 (1981), 3 FMSHRC 822 (1981). In that case, the Commission outlined the new definition of the term "significant and substantial" as follows:

> . . . we hold that a violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. (Emphasis added.)

The Commission also made the following pertinent comment in National Gypsum:

> Although the Act does not define the key terms "hazard' or "significantly and substantially', in this context we understand the word "hazard' to denote a measure of danger to safety or health, and that a violation "significantly and substantially' contributes to the cause and effect of a hazard if the violation could be a major cause of a danger to safety or health. In other words, the contribution to cause and effect must be significant and substantial."

In support of their respective arguments applying the National Gypsum "significant and substantial" standard, the parties have submitted the arguments which follow below.

MSHA's arguments

MSHA asserts that the record in this case reflects that in the subject four right five north section of contestant's Shoemaker Mine, MSHA Inspector Charles Coffield found approximately 350 widely spaced bolts in the intake escape entry, three adjoining rooms (numbers 31, 32 and 33) adjacent to that entry, and in the supply track entry (Tr. 308-309, 311).

In the intake escape entry and adjoining rooms, Mr. Coffield found that the range of spacing for the bolts were from four feet seven inches to five feet eleven inches (Tr. 310). In the supply track entry the range was from four feet seven inches to seven feet six inches (Tr. 311). Union walkaround representative Charles Pyle testified that some of the bolts were spaced six feet wide and he remembers one in the vicinity of seven feet (Tr. 267, 274). Generally the spacing between bolts was wider in the supply track entry than in the other cited areas (Tr. 313). The applicable roof control plan required roof bolt spacing of four feet six inches.

Conceding that the roof was basically sound, MSHA argues that there were three different locations in the aforementioned areas where Mr. Coffield observed that the roof was loose or unsupported between the bolts and could have fallen at any time (Tr. 373, 405, 407). There were a number of miners in the section who were potentially exposed to the hazards. At least two mechanics were in the section on October 30 (Tr. 119, 124, 167). Although contestant's superintendent Ronald Stovash testified that the mechanics were in the section simply to wait for maintenance problems to arise on the roof bolter, MSHA points out that miner Charles Pyle testified that the mechanics were working on a feeder and on a shuttle car (Tr. 265-266). Normally seven to eight people work in a mine section (Tr. 444). All members of the crew could be expected to pass under the seven foot six inch spacing, which was in the vicinity of the dinner hole (Tr. 267, 312-313).

In analyzing the test enunciated in the National Gypsum decision, MSHA suggests that the following questions need to be addressed in this case:

1. What is the hazard contributed to by the violation?

2. Is there a reasonable likelihood that the hazard contributed to will result in an injury or illness?

3. Would that injury or illness be of a reasonably serious nature?

In its arguments in support of the first two questions, MSHA asserts that the hazard contributed to by the violation in this case is the increased possibility of a roof fall, either or a major portion of the roof or of a small fall of roof material from between the bolts. In answer to the second question, MSHA argues that given the facts in this case, there was a reasonable likelihood that the hazard contributed to would result in an injury, and in support of this conclusion advances six reasons why a roof fall was reasonably likely to occur and lead to injury and these are as follows:

1. In three different locations in the cited area roof was loose or unsupported between the bolts and could have fallen at anytime.

2. The widest spacing documented by Mr. Coffield, seven feet six inches, was in the vicinity of the dinner hole. During normal operations, every person on the section could be expected to pass in the vicinity of that violative condition.

3. As the roof control plan itself specifies, it is a minimum plan. Even when roof control plans are followed to the letter, falls occur on occasion. Noncompliance with a roof control plan certainly increases the likelihood of a fall.

4. The area with the greatest concentration of wide spacing was the supply track entry. The vibration caused there by the operation of supply motors increases the possibility of a roof fall even under situations where the plan is followed.

5. The supply entry was frequently traveled.

6. As contestant's witness Peter J. Dominick testified, "pretty nice sized" pieces of roof, measuring up to two feet by three feet, had fallen to the floor in the four right, five north section. (Tr. 36).

Regarding the final question posed in its analysis, MSHA argues that if a roof fall had occurred and included a major portion of the roof (e.g., above the anchorages of the roof bolts), crippling or fatal injuries would afflict anyone in the vicinity not fortunate enough to be protected by a cab or canopy. Further, MSHA suggests that even small falls from between the bolts likely would cause anyone contacted by the roof material to suffer serious injuries, and points to miner Charles Pyle's testimony that a piece of roof material the size of a brief case which fell from the foor of the Shoemaker Mine could break a man's back (Tr. 276-277).

Contestant's arguments

Contestant submits that taking into account the definition of "significant and substantial" as set forth in the National Gypsum case, there did not exist, on October 30, 1979, any reasonable likelihood that the hazard contributed to would result in an injury or illness of a reasonable serious nature. Conceding that the citation alleges many roof bolt spacing violations in approximately 350 different locations, contestant notes that Inspector Coffield acknowledged that he only measured approximately 200 different locations and that he "eyeballed" the rest (approximately 150) of the alleged violations (Tr. pp. 358-59). Moreover,

contestant asserts that Mr. Coffield did not recall and had no notes to indicate how many of the alleged violations were in excess of five feet (Tr. p. 359), and therefore maintains that it is difficult to determine the actual extent of roof bolt spacing violations that existed on October 30, 1979. Although contestant does not dispute the fact that some violations were present on the day in question, it makes the latter points only to show that the extent of the violation was definitely not as serious as Inspector Coffield made it appear in his citation. Citing Mr. Coffield's testimony at pages 313-314 and 370-376 of the transcript, contestant maintains that it becomes clear that his only basis for finding a "significant and substantial" violation was his generalized belief or assumption that any roof bolt spacings that are not in complete compliance with the roof support plan can cause a significant and substantial hazard of a roof fall. Contestant submits that a generalized assumption of this nature, without specific factual findings, is inadequate to support a conclusion that a particular condition can significantly and substantially contribute to a mine safety hazard so as to justify a section 104(d)(1) citation.

Contestant points to the fact that in National Gypsum, the Commission made it clear that in a 104(d) citation there must be something more than just a violation, which itself presupposes at least a remote possibility of an injury. Instead, the inspector "is to make significant and substantial findings in addition to a finding of violation." Contestant asserts that it is apparent that Inspector Coffield did not make such findings and that he improperly assumed that all roof bolt spacing violations were significant and substantial since there is a possibility that the roof could fall between the bolts. Contestant maintains that this theoretical possibility is not sufficient to sustain a 104(d) citation, and that the evidence simply does not support a finding that there existed a reasonable likelihood that the alleged hazard contributed to would result in an injury or illness of a reasonably serious nature.

In support of its argument, contestant notes that every witness who testified on the matter acknowledged that roof conditions in the 5 North, 4 Right section of the Shoemaker Mine were good, and that most of the witnesses described the roof conditions as being very good or excellent (Tr. pp. 26, 55-56, 110-11, 133-34, 165), and Inspector Coffield himself acknowledged that the roof conditions in the 4 Right section were "basically sound" in October of 1979 (Tr. p. 374). Moreover, contestant asserts that except for one fall which had occurred due to a clay vein in the area of the juncture of 5 North, 4 Right when the section was initially being advanced in September of 1978, there had been no roof falls in the 4 Right section up to and including the time of the hearing (Tr. pp. 26, 56-57, 110-11, 133-34, 165). Thus, contestant concludes it is clear that we are dealing with a situation wherein the alleged hazard of a roof fall cannot be presumed, as Inspector Coffield obviously did, and that some specific facts must exist to justify a finding of a substantial and significant risk of a hazard on October 30, 1979.

Contestant points to the fact that Inspector Coffield acknowledged that he issued a section 104(a) citation on October 26 with respect to roof support spacing violations in the same section of the mine where

he subsequently issued the section 104(d)(1) citation. Recognizing the fact that an inspector has sole discretion in determining when and what citations he will issue, contestant nonetheless asserts that an inspector cannot examine a section, find roof support violations in large areas of that section, select only a small area of the section for a Section 104(a) citation one day and then several days later come back and issue section 104(d)(1) unwarrantable failure citation for the larger area. Contestant maintains that Inspector Coffield's waiting until Tuesday, October 30, to issue the unwarrantable citation for the larger area of the section simply does not justify a finding that the condition could substantially and significantly contribute to a mine safety hazard.

Contestant submits that no hazard existed in the 5 North, 4 Right section of the mine on October 30, 1979, and points to the fact that no coal was being produced in the section on Tuesday morning, October 30, when the unwarrantable failure citation was issued. Further, contestant argues that since the only employees in the section were the roof bolters and mechanics who were required to be there for the purpose of abating the previous citation and order issued by Inspector Coffield, there was only a limited and necessary exposure of employees. In addition, contestant maintains that there had been no roof falls in the section since it had been developed in September of 1978, that Inspector Coffield acknowledged there had been no fatalities or injuries related to roof falls in the section, that Judge Laurenson concluded that the roof conditions were good and that there was no evidence of recent roof falls or any cracks, splits or loose bolts, and that employees had been working in and walking through the same area of the section for at least six months before October 1979 without any incident and there is no evidence that anything usual or different existed on that day with respect to the conditions of the roof.

Finally, contestant maintains that Judge Laurenson sustained the section 104(d) citation because he felt that the evidence established that the "possibility of a roof fall injury in the cited area was neither remote nor speculative", citing Alabama By-Products. However, since the Alabama By-Products test has been overruled by the Commission, contestant submits that Judge Laurenson himself would not have sustained the citation if he had been using the standard later adopted by the Commission in the National Gypsum case. Further, contestant observes that in National Gypsum the Commission noted that the violation of any health or safety standard presupposes the possibility of it contributing to an injury or illness. However, since the language in section 104(d) of the 1977 Act makes it clear that a significant and substantial finding it to be made in addition to a finding of a violation, contestant asserts something more than the possibility of an injury or illness must exist; there must be a "reasonable likelihood that the hazard contributed to will result in injury or illness of a reasonably serious nature." Contestant concludes that there simply were no facts to justify such a finding in this case and the 104(d) citation should therefore be vacated.

After careful consideration of the entire record adduced in this proceeding, including the arguments presented by the parties in support of their respective positions, I conclude and find that MSHA has the better part of the argument in support of its conclusion that the citation issued by Inspector Coffield on October 30, 1979, was in fact "significant and substantial", even under the test enunciated by the National Gypsum decision. Although it may be true that employees had been working and walking through the section for at least six months prior to October 1979 without incident, the fact is that on October 30, the roof conditions were different. At least 140 additional roof bolts had been added in the section since the first citation issued on October 26, and mechanics and roof bolters were in the section performing abatement work. Further, at pg. 23 of its brief, contestant concedes that on October 30 the risk of hazard on the section was less than it had previously been since the section was closed down and fewer workers were exposed and mine management was in the process of checking out the section and doing abatement work. Therefore, contrary to its earlier argument that no hazards existed on October 30, from the record and arguments presented in this case I conclude that a hazard did exist on the section and that is precisely why the inspector issued the citation citing a violation of section 75.200, and that is precisely why the abatement work was going on. I also take note of contestant's admission at pg. 23 of its brief that there was in fact a "limited and necessary exposure of employees". In summary, contrary to contestant's suggestions that no hazards existed and that no employees were exposed to a potential roof fall injury because the section had been shut down, I conclude and find that employees were in fact working in the section and that a hazard did exist. The crucial question is whether or not the prevailing hazards on the section on October 30 were "significant and substantial".

Contrary to contestant's assertion that there had been no roof falls in the section since it was developed, Judge Laurenson specifically noted at page 9 of his decision of October 7, 1980, that "there was evidence of at least one prior fall of supported roof in this section". As a matter of fact, Judge Laurenson took particular note of the fact that contestant's own mine foreman Zamski conceded that wide spaced roof bolts increased the possibility of roof falls. Further, in finding No. 18, at page 5 of his decision, Judge Laurenson specifically found that in the supply track entry cited by Inspector Coffield "all persons who walked under the wide spaced roof bolts were exposed to the danger of a roof fall". Although Judge Laurenson observed that the roof in question was generally acknowledged to be in good condition, contestant's assertion that he made a finding that there was no evidence of roof cracks, splits, or loose bolts is taken our of context. Judge Laurenson's sequential finding No. 4 which appears at page 3 of his decision appears to be related to citation no. 0808594, which does not include the track entry area which is the subject of the instant "significant and substantial" citation. In addition, the official transcript of the hearings contains testimony by the inspector that in at least three different locations in the section the roof was loose, cracked,

or unsupported between the bolts and could fall at any time (Tr. 406-407). There is also testimony by Mr. Coffield that his determination that the roof was basically sound was made by "observation and sounding the roof", but that this does not guarantee

that there will be no falls of roof material from between the bolts (Tr. 409). Further, as noted by Judge Laurenson at pg. 9 of his decision at some locations the roof bolts were seven feet apart. This is two and one-half feet further apart than required by the approved control plan.

In view of the foregoing, I conclude and find that the roof conditions cited by Inspector Coffield which resulted in the issuance of the citation in question presented a reasonable likelihood that the hazards presented by the widely spaced roof bolts, as well as the areas described by the inspector as being loose between the bolts at several locations, constituted a significant and substantial hazard to those miners working and traveling through the cited areas. The danger presented was a roof fall, particularly in the track entry where the roof bolt spacing was the widest, and the real potential for a fall in any of these locations was the direct result of the violation.

Contestant's suggestion that Inspector Coffield somehow acted arbitrarily by including an additional area of the mine as part of the section 104(d)(1) citation which he had not included in his previous section 104(a) citation, is rejected. As correctly pointed out by Judge Laurenson at pg. 8 of his decision, the validity of a citation must stand or fall on its own merits. Having considered the instant citation on its own merits, and taking into account the aforesaid findings and conclusions made by me in this case, the section 104(d)(1) Citation No. 0808599, issued by Inspector Coffield on October 30, 1979, IS AFFIRMED and the contest is DISMISSED. I also reaffirm Judge Laurenson's prior finding of a violation of section 75.200, as well as finding that the citation resulted from the contestant's unwarrantable failure to comply with the cited mandatory safety standard.

Civil Penalty Assessment - WEVA 80-659

In determining the amount of civil penalty assessments, section 110(i) of the 1977 Act requires consideration of the following criteria: (1) the operator's history of previous violations; (2) the appropriateness of such penalty to the size of the business of the operator charged; (3) whether the operator was negligent; (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation; and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

With respect to item 2, the parties have stipulated that Consol is a large operator. With respect to item 4, the parties have stipulated that the assessment of an appropriate civil penalty will not affect Consol's ability to remain in business. With respect to item 1, concerning the respondent's history of prior violations, although the parties advised me that MSHA would submit a computer print-out reflecting prior assessed violations levied against the respondent's Shoemaker Mine for the 24-month period preceding the issuance of the citation in question, no such

information has been filed with me, nor does MSHA address this issue in its brief. Accordingly, I have no basis for making any finding in this regard.

Good faith abatement

The inspector fixed the abatement time for citation 0808599 as Friday, November 2, 1979, at 8:00 a.m. Judge Laurenson found that Consol protested the termination due date at the time the citation issued, and that the inspector did not return to the mine on November 2, 1979. When he returned the following Monday, November 5, 1979, he found that only 155 new roof bolts had been installed, and refused to extend the abatement time further. He then issued a section 104(b) withdrawal order for failure to abate the conditions (Order No. 0808606).

Consol successfully challenged Order No. 0808606, and Judge Laurenson vacated the order after finding that the inspector failed to give proper credit to Consol for its abatement activities and erred in refusing to extend the time for abatement of this violation (Docket WEVA 80-118-R). Judge Laurenson found that Consol made a bona fide effort to abate the citation in a timely manner, and that 1,000 roof bolts were added to the section before the citation was terminated. Although the inspector cited 350 roof bolts in violation of the roof plan on October 30, 1979, Judge Laurenson took note of the fact that Consol had installed more than 400 roof bolts by November 5, 1979, and that except for Sunday, November 4, 1979, roof bolters worked every shift between the time the citation issued and the time the order was issued November 5, 1979.

In view of the foregoing, I conclude and find that respondent exhibited good faith compliance in correcting the conditions cited and this fact is reflected in the civil penalty assessment made by me in this matter.

Gravity

I conclude and find that the violation concerning the widely-spaced roof bolts in the areas cited by the inspector in the citation presented a potential hazard for a roof fall which could have resulted in injuries to miners and that this violation was serious.

Negligence

I conclude and find that the record supports a conclusion that the widely-spaced bolts were inserted some time prior to the day the citation in question issued. Even considering the fact that the record in these consolidated proceedings contains information concerning an MSHA "guideline" dealing with a so-called "spacing tolerance", this issue is not further addressed by the parties and I consider it irrelevant. On the facts and record here presented, particularly the fact that a mine operator is

expected to know the requirements of his own approved roof control plan, I conclude that the violation resulted from the respondent's failure to exercise reasonable care to prevent the cited conditions or practices which caused the violation, and that this amounts to ordinary negligence.

Penalty Assessment

I take note of the fact that MSHA's proposal for assessment of civil penalty in this civil penalty docket seeks an assessment of $1,000 for the violation in question. Taking into account the aforementioned findings and conclusions, and the requirements of seciton 110(i) of the Act, I find that this proposed assessment is reasonable and I adopt it as my penalty assessment in this case.

ORDERS

Docket No. WEVA 80-116-R

Section 104(b) Order No. 0808596, October 29, 1979, IS VACATED.

Docket No. WEVA 80-117-R

Section 104(d)(1) Citation No. 0808599, October 30, 1979, IS AFFIRMED.

Docket No. WEVA 80-659

Respondent Consolidation Coal Company IS ORDERED to pay the civil penalty assessed by me in this case, in the amount of $1,000, within thirty (30) days of the date of this decision and order, and upon receipt of same by MSHA, this matter is DISMISSED.

Docket No. WEVA 80-118-R

By agreement and consent of the parties, this case is DISMISSED.

George A. Koutras
Administrative Law Judge