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

CLINCHFIELD COAL COMPANY, CONTESTANT	CONTEST PROCEEDING
v.	Docket No. VA 82-51-R Order and Citation No. 2038802 6/18/82
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Hurricane Creek Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. VA 83-24 A. C. No. 44-01773-03509
v.	Hurricane Creek Mine
CLINCHFIELD COAL COMPANY, RESPONDENT	

DECISION

Appearances: Fletcher A. Cooke, Esq., Clinchfield Coal Company, Lebanon, Virginia, for Contestant/Respondent
Paul Thompson, General Counsel, Pittston Coal Group, Lebanon, Virginia, for Contestant/Respondent
David E. Street, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for Respondent/Petitioner

Before: Judge Steffey

A hearing was held on April 27 and 28, 1983, in Abingdon, Virginia, in the above-entitled proceeding pursuant to sections 105(d) and 107(e), 30 U.S.C. 815(d) and 817(e), of the Federal Mine Safety and Health Act of 1977. The parties indicated at the conclusion of the hearing that they wished to file post-hearing briefs. Counsel for both parties filed simultaneous initial posthearing briefs on August 17, 1983, and counsel for Clinchfield Coal Company filed a reply brief on September 9, 1983.

Issues

The subject of the hearing was the issuance by MSHA on June 18, 1982, of Order and Citation No. 2038802, pursuant to sections 107(a) and 104(a) of the Act, requiring all persons to be withdrawn from a roof-fall area in the 2 Left Section of Clinchfield's Hurricane Creek Mine and alleging that a violation

of 30 C.F.R. 75.200 had occurred. Clinchfield claims in its application for review filed on July 19, 1982, in Docket No. VA 82-51-R, that no imminent danger existed and that no violation of section 75.200 occurred. The Secretary of Labor filed on April 6, 1983, in Docket No. VA 83-24, a petition for assessment of civil penalty seeking to have a civil penalty assessed for the alleged violation of section 75.200 alleged in Order and Citation No. 2038802.

The three basic issues raised by the parties are: (1) whether a violation of section 75.200 occurred; (2) whether an imminent danger existed on June 18, 1982, when Order No. 2038802 was issued, and (3) what civil penalty should be assessed under section 110(i) of the Act if a violation of section 75.200 is found to have occurred.

Summary of the Evidence

Counsel for the Secretary of Labor and counsel for Clinchfield Coal Company entered into the following stipulations (Tr. 7-8): (1) Clinchfield is the owner and operator of the Hurricane Creek Mine involved in this proceeding. (2) Clinchfield and the Hurricane Creek Mine are subject to the Act. (3) The administrative law judge has jurisdiction to hear and decide the case. (4) The inspector who issued Order No. 2038802 on June 18, 1982, under sections 107(a) and 104(a) of the Act is a duly authorized representative of the Secretary of Labor. (5) A true and correct copy of Order No. 2038802 was properly served upon Clinchfield. (6) All witnesses are accepted generally as experts in coal mine health and safety. (7) Imposition of civil penalties will not affect the operator's ability to continue in business. (8) Clinchfield is a medium-sized coal company which produces about 3,000,000 tons of coal annually. (9) The Hurricane Creek Mine is a medium-sized mine. (10) The Mine Safety and Health Administration and the Virginia Division of Mines conducted a joint investigation on June 4, 1982, of an accident which occurred at the Hurricane Creek Mine on June 2, 1982, and also conducted on June 18, 1982, a reinvestigation of the accident, but the MSHA and Virginia personnel who participated in the reinvestigation on June 18, 1982, were not involved in the issuance of Order No. 2038802 (Tr. 328).

The issues in this proceeding must be resolved in light of the witnesses' testimony which is summarized in the following paragraphs:

1. Nickie Brewer, a coal-mine inspector from MSHA's Norton, Virginia, Office conducted a spot inspection at Clinchfield's Hurricane Creek Mine on June 18, 1982. He was accompanied into the mine by Supervisory Inspector E. C. Rines, and by Denver Meade, a member of the United Mine Workers of America and chairman of the safety committee at the Hurricane Creek Mine (Tr. 10-12; 78; 130).

2. The three men started their inspection in the No. 1 entry of the 2 Left Section and when they reached the last open crosscut between the Nos. 5 and 6 entries, they encountered some extensive overhanging brows which Brewer found to be an imminent danger. Therefore, at 12:00 noon he issued Order No. 2038802 dated June 18, 1982, under section 107(a) of the Act. Order No. 2038802 also cited a violation of 30 C.F.R. 75.200 under section 104(a) of the Act (Tr. 12; 20; 73). The condition or practice given in the order reads as follows (Exh. 1, p. 1):

> An unsupported, overhanging, arching rock brow that showed separation (cracked and broken) was present along the left rib of the No. 5 entry, right crosscut of the 2 Left (005) Working Section where a roof fall had occurred and a continuous-mining machine had been recovered from under fallen roof material. This brow began approximately 57 feet inby the centerline off the No. 5 entry and extended inby approximately 20 feet. The brow arched toward the center of the entry approximately 9 feet and was 2 feet thick.
> Another unsupported rock brow was present along the right rib of the same entry crosscut, beginning approximately 54 feet inby the same centerline and extending inby approximately 18 feet. The brow overhung from 22 inches to approximately 9 feet out over the entry. Unsupported, fractured roof was also present immediately inby the fall area in the No. 6 entry measuring 9 feet by 9 feet extending inby to the face and right rib of the No. 6 entry.
> At the time of this inspection there was no activity in this vicinity and the area was dangered off. However, a continuous-mining machine had been recovered in this area prior to this inspection.

3. Order No. 2038802 was terminated on December 6, 1982, and the reason given for terminating the order was that (Exh. 1, p. 2):

> The safe procedure for recovering mine machinery from area where roof falls have occurred has been discussed with the workmen on all shifts. Also the area where the roof fall had occurred had been dangered and barricaded off. The company also has no intention of mining in the area of the roof fall.

4. Brewer testified that on June 18 he found no danger sign of any kind to warn persons of the hazards of going into the crosscut in which the unsupported brows existed (Tr. 46; 318-319). In his order, however, Brewer had stated that "* * * there was no activity in this vicinity and the area was dangered

off." Brewer said that the area was not dangered off until after he had hung red tags in the fall area to warn persons of the existence of the imminent danger (Tr. 46). Brewer's supervisor suggested that since Brewer, rather than Clinchfield, had posted danger signs, Brewer should modify his order to remove the ambiguous reference to the area's having been dangered off (Tr. 56). Therefore, on January 18, 1983, Brewer issued a modification of the order reading as follows:

> Order No. 2038802 issued June 18, 1982, is hereby modified to include the following statement:
>
> The approaches to this area of violation prior to the issuance of the order of withdrawal were not dangered off.

5. In support of his finding of the existence of an imminent danger, Brewer introduced as Exhibit 2 a diagram of the way the overhanging brows appeared to him when he examined them by going into the crosscut from the No. 5 entry. Brewer wrote the letter "A" on Exhibit 2 to show the location of the right rib of No. 6 entry inby the brows (Tr. 22). The letter "B" on Exhibit 2 shows the location of the left brow which was 20 feet long, was arched out over the center of the crosscut for a distance of 9 feet, and was about 2 feet thick. Brewer was especially concerned about a crack at the place where the left brow began (Tr. 13). He interpreted the existence of the crack as an indication that the brow was just hanging there "waiting to fall" (Tr. 22; 32). Brewer wrote the letter "C" on Exhibit 2 to show the location of the right brow which was 18 feet long, arched out over the crosscut a distance of from 22 inches to 9 feet, and was 1-1/2 to 2 feet thick. Brewer placed the letter "D" on Exhibit 2 to mark the 9-foot square area in the roof of the No. 6 entry where the roof was unsupported, cracked, and broken (Tr. 24).

6. Brewer stated that the brows described in summary paragraph No. 5 were the remaining edges of a roof fall which had occurred in the crosscut on June 2, killing two miners and covering up Clinchfield's continuous-mining machine (Tr. 33). Brewer said that a motor and a control bank had to be replaced on the continuous-mining machine before it could be extricated from the roof fall and it was his belief that the miners were exposed to unsupported roof while they were in the process of replacing the parts. Brewer introduced as Exhibit 4 a diagram showing that the overhanging brows would have been over the head of anyone replacing parts on the continuous-mining machine or working the controls to extricate the continuous-mining machine from the crosscut (Tr. 34-39).

7. Although no coal was being produced in 2 Left Section at the time Brewer wrote the order citing an imminent danger, he said that the continuous-mining machine recovered from the roof-fall area was about 120 feet away from the fall area and that if

Clinchfield had succeeded in getting the miner repaired by that evening, active production of coal would have been resumed (Tr. 48-50; 64). Brewer also claimed that the crosscut had to be considered a place where miners were regularly required to work because preshift examinations of the area would have had to have been made in order for repairmen to work on the disabled continuous-mining machine (Tr. 18-19). Since he had found no danger sign or breaker posts when approaching the crosscut from the No. 5 entry, he said that it was quite likely to assume that the preshift examiner would go into the crosscut to the No. 6 entry to take an air reading and be killed by one of the unsupported brows (Tr. 19-20). Brewer also believed that Clinchfield's failure to support the brows was associated with a high degree of negligence because supervisory personnel were in the crosscut at the time the continuous-mining machine was recovered and yet they had taken no action to correct the hazardous conditions which existed when he inspected the crosscut on June 18 (Tr. 41).

8. Brewer's supervisor, E. C. Rines, supported Brewer's exhibits and his belief that an imminent danger existed. Rines emphasized the height of the brows where they terminated against the roof cavity, their 9-foot extension from the ribs toward the center of the crosscut (Tr. 91), and the fact that there were no bolts in the brows and that the only bolts they saw were in the center of the crosscut (Tr. 93), except for a single bolt near the rib in the right brow close to the point where the crosscut intersected with the No. 6 entry (Tr. 92; Exh. 3, p. 1). Rines believed that single bolt had failed to pull out when the roof fall occurred. Rines said that even if Clinchfield had erected a danger sign at the intersection of the No. 5 entry and the crosscut cited in the order, the existence of a danger sign would not be a reason to prevent an inspector from issuing an imminent-danger order (Tr. 310-311).

9. Larry Coeburn was the MSHA inspector normally assigned to perform inspections at the Hurricane Creek Mine (Tr. 126). He was not with Brewer and Rines when the imminent-danger order was issued, but he accompanied Clinchfield's personnel when they went to examine the crosscut on June 22 and he concurred with Brewer's and Rines' belief that the unsupported brows in the crosscut constituted a very hazardous condition. He believed that if the brows had fallen, they would necessarily have fallen across the middle of the crosscut. He said that when he went to the roof-fall area on June 22, there was still no physical obstruction to prevent a miner from entering the hazardous crosscut from the No. 5 entry. Therefore, he participated in cutting timbers and boards so that they could erect actual barricades at each end of the roof-fall area to preclude persons from entering the area unless they removed the barriers (Tr. 125). At the time they erected the barricades, actual production of coal was being conducted in the 2 Left Section just two crosscuts inby

the crosscut in which the imminent danger had been cited and still existed (Tr. 128).

10. Denver Meade, the safety committeeman who accompanied Brewer on his inspection of the 2 Left Section, stated that the likelihood of the brows' falling was "[j]ust about as great a chance as it could get. I made the statement up there it was like working close to a cocked gun, working up there" (Tr. 130-131). Meade participated in installing roof bolts and in erecting crossbars outby the area of the roof fall. He said that he saw no supports whatsoever under the brows cited in the imminent-danger order and that he was just about as confident as one can get in stating that there were no roof bolts in the brows (Tr. 131). Meade also testified that a company official, Gail Kizer, went out from under both permanent and temporary supports to attach ropes to rocks so that the rocks could be pulled off of the continuous-mining machine which had been covered up in the roof fall (Tr. 132). Meade placed an "X" on page 1 of Exhibit 3 to show the location of one of the rocks which were pulled out before the continuous-mining machine could be removed (Tr. 137).

11. A preshift examiner, Robert Vickers, testified that he preshifted the 2 Left Section between 9 p.m. and midnight on June 17, 1982, and he introduced as Exhibit A a preshift examiner's report showing that he wrote the words "Danger off at fall" on the line for noting hazards in the No. 6 entry. Vickers said that the notation was made because he saw a Pepsi or Coke can with illuminated tape on it hanging from a roof bolt about eye level in the No. 5 entry near the crosscut leading to the roof-fall area. Vickers claimed that a reflectorized can was used in the Hurricane Creek Mine as a danger sign and that miners know to examine the area inby such cans for hazardous conditions before entering such areas. Vickers said his notation was intended to mean that the entire fall area and both the approaches from entries Nos. 5 and 6 had been "dangered off" (Tr. 149-150). Vickers stated that he did not go inby the reflectorized can and that he inspected the No. 6 entry by going through the crosscut outby the roof-fall area to examine the No. 6 entry. Vickers could not recall when the can first appeared in the No. 5 entry, but he made another preshift examination between 9 and midnight on June 18 and the can was still hanging in the No. 5 entry where he had observed it on June 17 (Tr. 155). Vickers also believed that there was a reflectorized can in the No. 6 entry (Tr. 156). Vickers went so far as to assure the Secretary's counsel that he was as certain that there was a can in both the No. 5 and No. 6 entries as he was that he was sitting in the courtroom (Tr. 157).

12. Logan Busch, a Clinchfield miner with 13 years of experience, including 8 years of operating a continuous-mining machine, participated in the removal of the continuous miner which had been covered up by the roof fall in the crosscut between Nos. 5 and 6 entries (Tr. 179-180). He and another miner

worked for an entire shift bolting the cavity left in the roof which fell on the continuous miner (Tr. 191). They stood on top of the continuous miner and worked their way around cribs built on top of the miner (Tr. 184). The stoper, or pneumatic drill, they were using weighs about 200 pounds and is very difficult to use in the cramped conditions they encountered on top of the miner and on the side of the miner (Tr. 191-195; 201-203). Busch said that they installed roof bolts every place they could reach with the stoper. Some of the area on the right side of the miner was too high to reach with the steel they were using (Tr. 185) and they could not bolt the roof over and immediately outby the ripper head because the ripper was cutting coal at the time the roof fell and the rock at the top of the head and immediately behind the head was still lying on top of the miner and there was no room at all to use the stoper in that area (Tr. 183).

13. Busch, who has assisted in recovering about seven or eight continuous miners from roof falls (Tr. 181), and some other Clinchfield employees went to the 2 Left Section on Sunday, June 13, 1982, to remove the continuous-mining machine after the roof had been bolted and most of the rocks had been removed from the sides of the continuous miner. Busch and his supervisor, Don Cross, removed some remaining rock from behind the boom of the miner while a repairman, Roy Sauls, installed a pump and a valve block on the right side of the miner (Tr. 180). Busch then positioned himself at the continuous miner's controls, but the miner was not yet free enough to be trammed from the area until a rope was attached to the miner and hooked to a scoop (Tr. 185). By using the ripper head to dislodge rocks near the front of the miner and by relying upon the scoop's assistance, Busch was able to back the miner out of the crosscut (Tr. 186). Busch stated that there were bolts over the deck of the miner which made him believe it was safe for him to operate the controls (Tr. 182). He was, nevertheless, aware of the crack in the left brow, but he concluded that the left brow was caught against firm rock in the center of the bolted roof-fall cavity. He further believed that if the left brow had fallen, it would have fallen on the continuous miner at a point inby the operator's controls where he was situated (Tr. 203-204).

14. After Busch and the other members of the recovery team had added oil to the miner's hydraulic system, they succeeded in tramming it outby the crosscut for about a break and a half and they left it there for evaluation as to the need for further repairs (Tr. 190). Busch says that the reflectorized can, described in summary paragraph No. 11 above, was "still" in the No. 5 entry on June 13, but he thinks or is "pretty sure" that they also erected a single timber in the intersection of the No. 5 entry with the crosscut and that they wrote the word "Danger" on that single timber (Tr. 190). After Busch had trammed the miner out of the crosscut, no supports at all were left in the roof-fall

area other than those which had been installed with the stoper prior to removal of the miner. Since Busch had been unable to install any bolts near the front of the continuous miner, there was naturally no support of any kind at the far end of the roof fall where the crosscut intersected the No. 6 entry (Tr. 189).

15. Roy Sauls, a repairman with 13 years of experience, including 12-1/2 years of experience in the Hurricane Creek Mine, has assisted in recovery of continuous-mining machines from seven or eight roof falls (Tr. 205; 212). He replaced the "C" pump and valve block on the right side of the miner on Sunday, June 13, just before the miner was trammed from the crosscut. He worked at the edge of the right brow in doing so and the brow had neither roof bolts nor temporary supports under it at the time he did the work (Tr. 207-208). He examined the brow and felt that the fall area had been made as safe as a fall area can be made. While he considered it safe for him to do the repair work, he also expressed the opinion that "[t]here's a possibility there could have been another fall in there anywhere" (Tr. 209). Sauls stayed around on June 13 until his supervisors and he had examined the continuous-mining machine and it was the consensus that the miner would have to be disassembled and taken to the central shop to be rebuilt because the damage done to it by the roof fall was too extensive to be repaired underground (Tr. 211).

16. Don Cross has worked for Clinchfield for 18 years and he was the supervisor in charge of recovery of the continuous-mining machine on June 13, 1982 (Tr. 213). His account of the recovery of the continuous miner does not differ from Busch's explanation which has been summarized in paragraph Nos. 12, 13, and 14 above. There was likewise little difference in the testimony of Busch and Cross as to the setting of a timber outby the crosscut with the word "Danger" written on it after removal of the continuous miner from the crosscut. Just as Busch had stated that he "was not for sure" and "believed" that they had erected such a timber (Tr. 190), so did Cross qualify the setting of the timber "to the best of [his] knowledge" (Tr. 215). Cross, like Busch, also stated that the reflectorized warning can was "still" hanging in the No. 5 entry at the approach into the crosscut (Tr. 215). Cross' credibility also suffers somewhat from his inconsistent statement on cross-examination that he had only worked 1 day in the fall area (Tr. 216) as compared with his statement during direct examination that "* * * we had worked on the area the shift previous" (Tr. 214).

17. Monroe West has been Clinchfield's safety director since September 1, 1977. Prior to that, he served for 18 years in various positions with the Bureau of Mines and MSHA, including several years as subdistrict manager of MSHA's Norton, Virginia, Office (Tr. 217). He was in the No. 5 entry and crosscut on June 18 when the imminent-danger order was issued, but he

did not see the reflectorized can allegedly observed by other Clinchfield witnesses (Tr. 223; 227). West introduced as Exhibit C a copy of the Hurricane Creek Mine's roof-control plan which was in effect on June 18. West stated that paragraph 3(a) of the roof-control plan provides as follows (Tr. 223):

> (a) Upon completion of the loading cycle, a reflectorized warning device, such as a "stop" sign, shall be conspicuously placed to warn persons approaching any area that is not permanently supported. It is to be emphasized that the warning device has been placed to cause the person to stop, examine, and evaluate the roof and rib conditions prior to entering the area--even after temporary supports have been installed.

West said that a reflectorized can was used at the Hurricane Creek and other mines to warn miners of hazardous conditions and that miners will not enter the area beyond such a warning device even if no physical barrier is erected to prevent them from going into the area beyond such a can (Tr. 223-225).

18. West was asked to examine the preshift report made by an examiner for the oncoming 8-a.m.-to-4-p.m. shift on June 18 and that report has no notation at all to show that the reflectorized can did or did not exist in the No. 5 entry of the 2 Left Section (Tr. 230). West stated that it is not necessary to preshift a section which is idle if there is no activity in the section (Tr. 228), but he said that preshifts were required when miners were working in the 2 Left Section to determine the exact locations of roof bolts or to perform repairs on the continuous-mining machine (Tr. 228).

19. Ronald Hamrick, an employee of the Virginia Division of Mines with 30 years of coal-mining experience, testified that he was in the 2 Left Section on June 2, 4, and 18, 1982, as a participant in the original investigation and reinvestigation of the roof fall which occurred on June 2 (Tr. 249-250). On June 18, he was in the No. 6 and No. 5 entries and he recalls seeing a reflectorized can hanging in the No. 5 entry. He looked beyond the can into the crosscut and saw roof bolts and believed that they had forgotten to remove the can because it appeared that the crosscut had already been permanently supported. He did not go more than 10 or 15 feet into the crosscut because his supervisor called him about the time he saw the can and they went inby the crosscut and examined the face areas and torqued roof bolts (Tr. 251-252). Hamrick did not see the reflectorized can on June 4 and does not think one existed at that time (Tr. 258). Hamrick said that he probably made some notes about the investigation but that he did not have the notes with him and that he doubts if he would have made a notation about observing the reflectorized can because that is a common occurrence (Tr. 258).

Hamrick also stated that Clinchfield's attorney had referred to the can in a telephone conversation prior to the time he appeared as a witness in this proceeding (Tr. 259). Hamrick did not see a reflectorized can in the No. 6 entry (Tr. 261).

20. Earl Hess has worked for Clinchfield for 25 years and is superintendent of the Hurricane Creek Mine (Tr. 262). He testified that the roof fall occurred on Wednesday, June 2, 1982, that the first investigation occurred on Friday, June 4. The mine was idle for the miners' vacation from June 2 to June 10, 1982 (Tr. 227; 238). They began the work preparatory to recovering the continuous-mining machine on Monday, June 7, by having miners bolt the roof outby the fall area. That work continued, including the installation of crossbars from the No. 5 entry on into the crosscut up to the boom of the continuous miner, and the stopering or bolting of the roof-fall cavity above the continuous miner. The miner was recovered on Sunday, June 13, and was taken to the end of the track "about" Wednesday, June 16, so that it could be disassembled and transported to the central shop for rebuilding. Normal or routine production in the 2 Left Section did not resume until July 12, 1982, according to Hess (Tr. 262-267).

21. Hess testified that they mined the crosscut inby the one in which the roof fall occurred and that they went inby the roof fall by proceeding inby in the No. 6 entry. They never did connect up the No. 6 entry with the area where the roof fall occurred and where Inspector Brewer had found the 9-foot square area of unsupported and cracked roof (Tr. 265; 268). The decision not to proceed with normal mining from the face side of the No. 6 entry was made, however, after Brewer issued the imminent-danger order on June 18, 1982 (Tr. 266). Hess stated that the Hurricane Creek Mine had only three continuous-mining machines at the time the roof fall occurred. After the continuous miner damaged in the roof fall had been removed for repair to the central shop, another one had to be brought into the mine in order for them to continue mining activities in the 2 Left Section. On June 18, 1982, when the imminent-danger order was issued, the closest active mining then in progress was about 2,000 feet away in the 2 Right Section (Tr. 264-265).

22. Paul Guill is Clinchfield's chief engineer (Tr. 158). He presented as Exhibit B a diagram of the roof-fall area showing the continuous-mining machine's location in the crosscut and the number of roof bolts he and his surveyors found in the crosscut (Tr. 160). Guill testified that he and his assistants set up transits at points marked with the numbers "1691" and "1692" on Exhibit B. From those points they "shot" the roof bolts and plotted each of the roof-bolt locations on Exhibit B (Tr. 161-162). Guill shows dotted lines and solid lines to mark the beginning and ending edges of the brows cited in Inspector Brewer's imminent-danger order. Guill explained that his Exhibit B

depicts the brows in more than one plane with the dotted lines showing where the brows begin at the normal roof line, or 6-1/2 feet above the mine floor. The solid lines on Exhibit B show the places where the roof fall ended (Tr. 166). Although an examination of Inspector Brewer's Exhibit 3, page 1, appears to show more roof bolts in the center of the crosscut than Guill depicts in his Exhibit B, that is not really the case because Guill's "modes of representation are different" from Brewer's as a result of the three-dimensional aspects of Guill's roof-bolt exhibit (Tr. 169). On Exhibit 3, page 1, Inspector Brewer shows 13 roof bolts in the immediate roof-fall area if one counts the single roof bolt near the rib where the word "roof bolt" appears. Examination of Guill's Exhibit B shows 20 roof bolts in the roof-fall area, but page 2 of Exhibit 3 shows roof bolts only inby the point where the brows begin and that commencement point is at the junction of the boom with the frame of the continuous-mining machine (Tr. 283; 295; Exh. 3, p. 2). Since Guill's Exhibit B shows at least 7 bolts outby the place where Brewer's Exhibit 3 begins to show the locations of roof bolts in the fall area, Guill's and Brewer's exhibits both reflect the existence of 13 roof bolts in the fall area. The letter "D" was placed on Guill's Exhibit B to denote the fact that Guill agreed with MSHA that no roof bolts had been installed in the mine roof above the ripper head and for several feet outby the ripper head (Tr. 176).

23. In rebuttal of Clinchfield's case, the Secretary's counsel recalled all of his witnesses. Rines, Brewer, and Meade each testified unequivocally that they were in both the No. 5 and No. 6 entries on June 18 from five to seven different times at the place where Clinchfield's witnesses claimed they saw the reflectorized can. They stated that the centerline from which they made their measurements as to the extent of the brows and the location of roof bolts was established very close to the place where the reflectorized can had allegedly been hung and that they did not see such a can on any of their numerous trips in and out of the entries (Tr. 280; 318; 322). They all stated that they are familiar with the use of reflectorized cans as danger signs and that they would have seen it if it had existed in either the No. 5 or No. 6 entry (Tr. 280; 318; 322). Coeburn was not in the crosscut on June 18, but was there on June 22 when Guill and the surveyors took sightings to spot the roof bolts in the crosscut and he stated that no reflectorized can was hanging in the No. 5 entry on that day (Tr. 325).

24. Rines also testified on rebuttal that the timber with the word "Danger" written on it, described by Clinchfield's witnesses Busch and Cross did not exist on June 18 (Tr. 281). Moreover, Rines stated that he was in the crosscut before the miners' bodies were recovered from the roof fall and that he knows that he could have taken a stoper and could have bolted the left and right brows either by resting the stoper on the

continuous-miner or by standing on the mine floor and using an extended piece of steel for drilling into the roof cavity at its highest point of about 14 feet. He said that the installation of roof bolts in the scattered bolting pattern used by Clinchfield's witness Busch was unacceptable (Tr. 304). Rines stated that he could have bolted the roof-fall area with a proper number of bolts and would still have been protected by the temporary supports which he himself had helped to install (Tr. 287-288). Rines admitted during cross-examination, however, that the roof under the roof fall just immediately outby the head of the ripper did not have sufficient clearance on top of the continuous-mining machine for Busch or anyone else to install roof bolts (Tr. 305).

25. Rines also insisted during his rebuttal testimony that the miners exposed themselves to the unsupported left and right brows during the time they were recovering the continuous miner from the roof-fall area (Tr. 306), although he had stated previously during direct examination that he could not say that anyone was exposed to the unsupported brows during removal of rock because he did not see Clinchfield's employees remove the rocks (Tr. 90). Rines admitted that he was not a geologist (Tr. 296), but he stated that the Jawbone coal seam being mined in the Hurricane Creek Mine contains "slips" which result in roof falls like the one which happened on June 2 and that it is easy to "misjudge the way the planes lie in a slippery roof" (Tr. 286).

Consideration of Parties' Arguments

Docket No. VA 82-51-R

The Issue of Whether a Violation of Section 75.200 Occurred

The Portion of Section 75.200 Violated

Pages 4 through 14 of Clinchfield's initial brief are devoted to arguing that no violation of section 75.200 was proven by MSHA. Clinchfield's brief (p. 5) begins its argument by claiming that the inspector failed to specify what portion of section 75.200 had been violated. At transcript page 20 his counsel asked him "[w]hy do you say that there was a violation of 75.200". His reply was that section 75.200 "requires that the roof and that the ribs be adequately supported. And the ribs were not adequately supported, or brows."

At transcript page 73, Clinchfield's counsel asked the inspector:

> Q Mr. Brewer, in the order you cited, 30 CFR Section 75.200, which refers to the roof-control plan, just for purposes of clarity, what was the specific violation of roof-control plan?

~1836

A I didn't write the roof-control plan. I wrote 200, but everything that's under 200 is not the roof-control plan. I wrote failure to adequately support the roof and ribs. 75.202, it could have been written there, too.

The second sentence of section 75.200 reads as follows:

> * * * The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. * * *

Based on the testimony quoted above, I find that the inspector clearly explained the portion of section 75.200 which he believed had been violated.

Exposure of Miners to Hazardous Brows on June 13, 1982

Clinchfield's brief (p. 6) alleges that Brewer thought that the miners who recovered the continuous-mining machine from the roof-fall area were exposed to unsupported roof, but Clinchfield claims that none of the inspectors were present when the continuous miner was recovered and do not know whether any miners were exposed to unsupported roof or brows. Clinchfield also cites the testimony of Busch and Sauls, who assisted in recovery of the continuous miner, in support of its claim that no one was exposed to unsupported roof or ribs when the miner was recovered.

As summary paragraph No. 6, supra, shows, Brewer introduced Exhibit 4 for the sole purpose of showing that Sauls would have been exposed to the unsupported right brow when he replaced a pump and a valve block on the continuous miner before it was recovered from the fall area. Sauls' own testimony supports Brewer's belief. During his direct testimony, Sauls first said he wasn't exposed to the unsupported brows and then reversed himself and stated that "I won't say I wasn't, but the mine top was bolted over top of where we was working" (Tr. 207). Sauls also agreed that there were no bolts in the brows and that they did not have any temporary supports under them (Tr. 208). Also as I have noted in summary paragraph No. 15, supra, Sauls stated that there was a possibility that a fall could have occurred at any time. Additionally, as indicated in summary paragraph No. 13, supra, Busch was concerned sufficiently about the crack in the left brow, that he gave consideration to the question of whether it would fall while he was tramming the continuous miner from the fall area.

If one examines the fall area as depicted in Exhibits B and C, page 2, showing the location of the continuous miner in the crosscut, and if one takes into consideration that the continuous

miner is from 10 to 11 feet wide (Exh. C, p. 12) and was situated in a crosscut 20 feet wide with 9-foot brows overhanging the crosscut, it would not have been possible for the miners to have worked on the continuous miner without having been exposed to injury or death by the falling of the unsupported brows. As explained in summary paragraph No. 22, supra, Clinchfield's Exhibit B, when properly evaluated, fails to controvert the fact that the brows were unsupported by roof bolts. Moreover, as noted in summary paragraph No. 10, supra, Meade was present when rocks were being removed from the top of the continuous miner and Meade stated unequivocally that he had seen one of Clinchfield's company officials go completely out from under supported roof in order to attach ropes to rocks being pulled from the fall area.

It should be noted that Brewer alleged a violation of section 75.200 under section 104(a) of the Act which provides that an inspector may issue a citation for a violation of the Act or a mandatory safety standard if he is engaged in an inspection or an investigation and that he may issue the citation if he "believes" that a violation occurred. I find that the preponderance of the evidence in this proceeding shows that the inspector had ample grounds for believing that the miners were exposed to the hazards of the unsupported brows when they were engaged in removing the continuous miner from the roof-fall area.

Hazards Existing on June 13 versus Hazards Existing on June 18

Clinchfield's brief (pp. 6-7) argues that the crosscut was much more safely supported on June 13 when the continuous miner was recovered than it was on June 18 when the inspector wrote his order. The testimony of Clinchfield's witnesses does not support those claims. Busch stated that he had installed roof bolts where possible and the exhibits show that he had installed 13 roof bolts along the middle of the crosscut's roof (Exh. 3, p. 1; Summary paragraph No. 22). Sauls testified that there were no bolts in the brows or temporary supports under the brows before the continuous miner was removed (Tr. 208). Busch stated that he could not get any bolts in the roof on the right side of the crosscut because the roof was too high to reach with the stoper and that he had not placed any bolts near the ripper head or for several feet outby the ripper head because there was not enough clearance between the roof and the top of the continuous miner (Tr. 192-194). Busch does not even claim to have put more than one bolt in either brow (Tr. 193). Finally, Busch said that he kicked the last rocks off the continuous miner by starting the ripper head (Tr. 186). Therefore, Busch was just as vulnerable to a probable fall of the brows at the time the continuous miner was being removed as the other operator was when he was killed by the previous roof fall which occurred in that identical place on June 2. The preponderance of the evidence shows that there were two unsupported brows at the time the

continuous miner was removed on June 13 and there were still two unsupported brows when the inspectors examined the fall area on June 18 and issued the imminent-danger order. No significance at all can be placed on Clinchfield's emphasis on the collars or crossbars which had been set in the No. 5 entry outby the roof-fall area because those collars were set before the miner was removed and they continued to exist after the miner was removed (Tr. 186; 195).

The Alleged Timber Inscribed With Word "Danger"

Clinchfield's brief (p. 7) concedes that the roof-fall area was hazardous after the continuous miner was removed, but claims that the area was "dangered off" by a timber set in the middle of the entry by Busch and Cross who allegedly wrote the word "Danger" on that timber. Clinchfield's brief quotes the testimony of both Busch and Cross in support of its claim that a timber was set in the entry after the continuous miner was removed, but the setting of the timber is not corroborated by any other witness. The preshift examiner, who claims to have seen a reflectorized can hanging in the No. 5 entry, did not mention seeing the timber. The Virginia mine inspector, who allegedly saw the can, did not mention the timber. None of the three inspectors who were in the fall area saw the timber. Clinchfield's safety director, who was in the fall area, did not mention the timber.

Clinchfield's brief (pp. 7-8) quotes from the testimony of both Busch and Cross in supporting its claim that a breaker bearing the word "Danger" had been set outby the fall area, but Clinchfield's brief (p. 7) drops a very significant sentence from the beginning of Busch's statement and indents the quotation to make it appear that the quotation is the complete answer given by Busch. That omitted sentence reads "I'm not for sure." In the remaining part of Busch's statement about the setting of the timber he uses the word "believe" and the phrase "pretty sure".

Cross is not very positive in asserting that he set a timber with the word "Danger" written on it. Clinchfield's brief (p. 7) also quotes from Cross' testimony with an indentation which makes it appear that the entire statement is given. Significantly, however, before Cross made the portion of his statement quoted on page 7 of Clinchfield's brief, he testified as follows (Tr. 215):

> A Charlie and his men wanted to check how much damage was done [to] it. So Logan [Busch] and I went back to -- of course, we helped them move it down some first -- we went back up to the crosscut. And, to the best of my knowledge, we set one timber in front of the place. We were going to breaker it off. But we was running close on time, and we were

> getting paid double-time. [Clinchfield's quotation begins at this point.] So we set one timber. And I had a piece of chalk, railroad chalk, in my pocket that we use and I wrote "Danger" on it from top to bottom.

Over the years, I have found that when witnesses are making statements of doubtful certainty, they qualify the statements with the phrase "to the best of my knowledge". Busch was more forthright than Cross about the setting of the timber in that he just made a flat announcement at the beginning of his statement that he was "not for sure". The purpose of a timber with the word "Danger" written on it is to warn persons of a hazard. That timber would accomplish no purpose if no one is able to find it. Yet, as indicated above, at least three of Clinchfield's witnesses and all four of the Secretary's witnesses were in the crosscut where the alleged timber was supposed to have been set and not one of them ever saw the timber. Therefore, i find that the preponderance of the evidence fails to support a conclusion that a timber with the word "Danger" on it was ever set in the crosscut.

One further point needs to be made with respect to the alleged timber with the word "Danger" on it. Paragraph 19(b) of Clinchfield's roof-control plan provides as follows (Exh. C, p. 9):

> (b) All roof falls and other areas in the active workings where the mine roof material has been removed from its natural location by any means and is not being cleaned up shall be posted off at each entrance to the area by at least two rows of posts (or the equivalent) installed on not more than 5-foot centers across the opening. [Emphasis supplied.]

In the quotation of Cross' testimony above, he stated that "* * * [w]e were going to breaker it off" but that since they were running close on time, he thought they might have set one timber with the word "Danger" written on it. Cross was a supervisor with 18 years of experience and his testimony shows that he knew he should have set at least two rows of posts in conformance with the roof-control plan to "breaker off" the crosscut, but he let the fact that he was running close on time cause him to omit taking the safety precaution required by the roof-control plan. One of the reasons that the inspectors issued the imminent-danger order was the fact that they could find no indication that Clinchfield had erected any danger signs to warn miners either to stay out of the hazardous crosscut or to approach it only with great caution.

The Alleged Reflectorized Can

Clinchfield's brief (pp. 8-9) makes the argument that it had properly hung a "warning device", or reflectorized can, in the No. 5 entry as required by paragraph 3(a) of its roof-control plan (Summary paragraph No. 17, supra). Clinchfield argues that since it is only required to hang such a warning device outby each place after a cut of coal is removed by the continuous miner before permanent supports are installed, that it was in compliance with its roof-control plan with respect to the unsupported brows observed by the inspectors on June 18. Although I shall hereinafter find that the reflectorized can had not been hung in this instance, Clinchfield would not have been in compliance with its roof-control plan even if the alleged reflectorized can had been hung. That argument must be rejected for at least two reasons. First, Clinchfield's roof-control plan does not envision that Clinchfield will simply hang a reflectorized can outby each working place when the continuous miner is withdrawn and leave the place unsupported for weeks at a time. On the contrary, the roof-control plan provides that temporary supports will be erected within 5 minutes after the miner has finished cutting a place, unless Clinchfield is using a roof-bolting machine equipped with an automated temporary roof-support system (ATRS). If the roof-bolting machine is so equipped, it is still expected that permanent roof bolts will be installed within a short period of time after a place has been cut. Moreover, if the ATRS bar cannot be positioned firmly against the roof, Clinchfield is then required to install temporary supports within 5 minutes after the continuous miner has completed the taking of a cut of coal (Exh. 3, pp. 5; 13-15). Since the roof in the crosscut where the roof fall had occurred formed a slant from 6-1/2 feet at the rib to 13 or 14 feet in the center of the entry, Clinchfield's ATRS bar could not have been positioned flat against the roof and Clinchfield's roof-control plan required it to install temporary supports under the brows in the crosscut, but none had been set.

The second reason for rejecting Clinchfield's claim that it had done all it was required to do under its roof-control plan to warn persons about the hazard of the unsupported brows is that paragraph 19 of its roof-control plan specifies the procedures which will be followed where a roof fall has occurred and, as indicated on page 16, supra, paragraph 19(b) required Clinchfield to install "at least two rows of posts" across both approaches to the crosscut, that is, across both the Nos. 5 and 6 entries. Clinchfield had installed such breakers across the No. 6 entry, but had done nothing to warn persons approaching the crosscut from the No. 5 entry other than to hang an alleged reflectorized can in the No. 5 entry.

Clinchfield's brief (p. 9) attempts to justify its failure to set breakers in the No. 5 entry before June 18, or to take

any more safety precautions than it did before June 18, by arguing that it had decided not to continue mining in the roof-fall area and that nothing more than the hanging of a reflectorized can needed to be done because no miners would ever have had to work in the immediate vicinity of the hazardous brows. Inspector Brewer thought on June 18, at the time he wrote his order, that Clinchfield was planning to continue developing the No. 6 entry from the face side of the roof fall (Tr. 63). Supervisory Inspector Rines said that Clinchfield had not abandoned its intention of continued development from the face side of the roof-fall area until after the imminent-danger order was written on June 18 (Tr. 83; 85-86). Clinchfield does not deny that it abandoned its intention of development from the face side of the roof-fall area after the order was issued on June 18, but claims that, until its decision to bypass the fall area was made, "* * * it was safe and reasonable to danger the area off with the reflectorized sign in the same manner miners are warned against going inby the face area where there is unsupported roof" (Br., p. 9).

In addition to the reasons I have already given for rejecting Clinchfield's claim that it was reasonable, or even in compliance with its roof-control plan, to leave the No. 5 entry outby the crosscut marked only with an alleged reflectorized can, I find, as the following discussion shows, that Clinchfield failed even to hang the alleged reflectorized can.

There are a number of doubtful aspects to Vickers' testimony concerning the reflectorized can which he claims to have seen in the No. 5 entry. First, his notation, "Danger off at fall" (Exh. A), was made in the preshift book with respect to the No. 6 entry, not the No. 5 entry, where he and three other witnesses claim to have seen the can (Vickers, Tr. 151; Busch, Tr. 190; Cross, Tr. 213; Hamrick, Tr. 251). Since Vickers first approached the fall area from the No. 5 entry and claims to have seen the can in the No. 5 entry, there is no obvious reason for him to have failed to make the notation about dangering off the area on the line for noting hazardous conditions in the No. 5 entry, especially since he stated on direct examination that hanging the can was a sufficient warning to danger off the entire fall area regardless of whether one approached it from the No. 5 or the No. 6 entry (Tr. 150). Vickers did not even mention that he had also seen a reflectorized can in the No. 6 entry until I asked that question after he had failed to state that fact during both direct and cross examination (Tr. 156).

Second, Vickers took an air reading in the No. 6 entry for determining air velocity for the return entry (Tr. 151). There is no reason for him to have failed to see about eight breaker posts which were erected across the No. 6 entry because those breaker posts were observed by three of MSHA's witnesses and one Clinchfield witness and were considered to be an indication that

hazardous conditions existed beyond the breakers (Coeburn, Tr. 125; Hamrick, Tr. 251; Rines, Tr. 281; Brewer, Tr. 319). Therefore, it is more likely than not that Vickers made the notation of "Danger off at fall" because he had seen the breakers in the No. 6 entry and later decided that a can he had seen at some other place in the mine was actually observed in the No. 5 entry.

Third, Vickers is the only witness who claims to have seen a reflectorized can in the No. 6 entry (Tr. 151; 156-157). No other witness corroborated his claim that a can had been placed in both the No. 5 and No. 6 entries (Tr. 251; 280; 318-319). Another reason to doubt Vickers' claim that he saw a can suspended from a roof bolt in the No. 6 entry is that bottom materials had been removed from the floor in the No. 6 entry which made the height from the floor to the mine roof 8 feet in the No. 6 entry, as opposed to the roof's normal height of 6-1/2 feet (Tr. 280). Vickers stated that the cans are suspended by a wire from a roof bolt and that they hang down about a foot from the roof so as to be about eye level. In describing the cans, he made no distinction about the height of the roof in the No. 6 entry as compared with the No. 5 entry (Tr. 156).

Fourth, Vickers allegedly saw the reflectorized can during his 9 p.m.-to-midnight preshift examination on June 17, but the preshift examiner who checked the 2 Left Section at 6 a.m. on June 18, or less than 8 hours later, did not indicate that he had or had not seen a danger sign in either the No. 5 or No. 6 entry. Although three MSHA witnesses testified with great certainty that the can did not exist in the No. 5 or the No. 6 entry during the day shift on June 18 when the imminent-danger order was issued, and although Clinchfield's safety director did not see the can during the day shift on June 18 (Tr. 224; 227), Vickers testified that the can was still hanging in the No. 5 entry when he made another preshift examination about 9 p.m. on June 18 (Tr. 155).

Fifth, Clinchfield's other witnesses, who heard Vickers testify that the can was hanging in the No. 5 entry on June 17 and 18, testified that the can was "still" hanging there on June 13 when they recovered the continuous-mining machine (Tr. 190; 215). Since Vickers had testified that he did not know when the can first appeared in the No. 5 entry (Tr. 155), a witness with an independent recollection of having seen the can would not be likely to refer to the can as "still" hanging there on June 13 when no one had claimed to have seen it before June 17.

The only witness called by Clinchfield's attorney who appeared to have an independent recollection of having seen the reflectorized can in the No. 5 entry was the Virginia mine inspector, Hamrick, who said that he saw the can about 10 a.m. on June 18, but Hamrick also inspected the area of the 2 Left Section inby the crosscut where the roof fall occurred and since Clinch

field's roof-control plan requires that such a "reflectorized warning device" be hung outby any place from which coal has been removed by the continuous-mining machine prior to installation of permanent roof bolts (Exh. C, par. 3(a)), Hamrick could just as easily have seen a reflectorized can outby one of the other face areas, rather than in the No. 5 entry outby the roof-fall area. That is especially probable in view of Hamrick's testimony that he had been asked by Clinchfield's counsel about the can a considerable period of time after he had been in the mine on June 18. Moreover, Hamrick said that it would not have occurred to him to make a notation of having seen the can in his notes which he probably took because seeing the cans is such a common occurrence (Summary paragraph No. 19, supra). If they are such a common occurrence and make such a slight impression on Hamrick's mind as not to be noteworthy, it is just as likely that he saw the can some other place in the mine during the day shift on June 18 as it is that he saw it in the No. 5 entry where three other witnesses failed to see the can during the day shift on June 18 even though they entered the No. 5 entry just as Hamrick was leaving it (Tr. 293).

On the basis of the above discussion, I find that the preponderance of the evidence fails to support Clinchfield's claim that a "reflectorized warning device" had been hung in the No. 5 entry prior to the time that the inspector issued imminent-danger Order No. 2038802 on June 18, 1982.

Clinchfield's brief (pp. 9-11) argues at some length that Supervisory Inspector Rines cannot support the Secretary's claim that miners were exposed to the hazards of the unsupported brows when the continuous-mining machine was being removed from the roof-fall area. My discussion above has already shown that Sauls was unwilling to state for certain that he was not exposed to a possible fall of the unsupported brows when he replaced the pump and valve on the continuous miner on June 13 (Summary paragraph No. 15, supra). The union committeeman, Meade, stated unequivocally that a company official went out from under supported roof when he was tying ropes to rocks to pull them out of the fall area (Summary paragraph No. 10, supra).

Clinchfield is correct in saying that no MSHA personnel were present when the continuous miner was removed from the roof-fall area on June 13 and it is true that the inspectors can only speculate about their belief that miners were exposed to the hazards of the unsupported brows when they were recovering the continuous miner, but the testimony of witnesses Sauls and Meade support a finding that the brows were unsupported at the time the miner was recovered and that Clinchfield employees were exposed to those hazards at the time the miner was recovered.

Judge Koutras' decision, Mathies Coal Co., 4 FMSHRC 1121 (1982), relied upon by Clinchfield on pages 11 and 12 of its brief is not applicable to the facts in this case because Judge Koutras did not have witnesses in that case who supported the inspector's belief that a violation of section 75.200 had occurred, whereas in this proceeding, there is testimony by at least two eyewitnesses who support the inspectors' belief that miners were exposed to the hazards of the unsupported brows when the continuous miner was being recovered from the crosscut.

Interpretation of Portion of Section 75.200

The final argument made in Clinchfield's brief (pp. 12-14) is that the violation of section 75.200 alleged by MSHA cannot be proven because the unsupported brows described in the inspector's order and citation were not in an active working place and therefore their existence in the mine cannot be considered a violation of the portion of section 75.200 relied on by the inspector. As previously indicated, the portion of section 75.200 relied upon by the inspector reads as follows:

> * * * The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. * * *

Clinchfield states that the definition of "active workings" is "* * * any place in a coal mine where miners are normally required to work or travel." Clinchfield argues that no miners were "required to work or travel" anywhere in the vicinity of the roof-fall area after June 13, 1982, when the continuous miner was removed from the crosscut. Clinchfield contends that after the miner was removed on June 13, 1982, the only work done in 2 Left Section where the roof fall occurred was the moving of the continuous miner to the end of the track where it was disassembled and taken out of the mine. Clinchfield argues that the nearest active working section on June 18 when the order was issued consisted of the 1 and 2 Right Sections which were 2,000 feet away from the 2 Left Section. Clinchfield also argues that the mere fact that a preshift examiner came to the No. 5 entry outby the crosscut on June 17 and 18, 1982, cannot be considered sufficient activity to make the roof-fall area an active working place because the preshift examiner observed the reflectorized can in the No. 5 entry and the breaker posts in the No. 6 entry and did not enter the crosscut, so that it cannot be said that a miner was required to travel in the crosscut on June 18 when the order was issued.

There is conflicting testimony as to how much activity was in progress on June 18, 1982, when the order was issued. Clinchfield's Superintendent Hess stated that the continuous miner was

moved to the end of the track on June 16, 1982, and was disassembled and removed from the mine for rebuilding at some point after June 16 and that active mining did not occur again in that 1 Left Section until July 17, 1982 (Tr. 263; 267). The inspector and the union safety committeeman, on the other hand, stated that the continuous miner removed from the fall area was only one or two breaks, or 120 feet, away from the fall area on June 18 (Summary paragraph No. 7; Tr. 136). Moreover, Inspector Coeburn was in the fall area on June 22 and he testified that active mining was in progress only two crosscuts inby the roof-fall area on June 22 (Tr. 128).

Even if one disregards all the conflicting evidence as to the extent of the activity in 1 Left Section on June 18, 1982, there is no dispute by anyone as to Vickers' contention that he performed a preshift examination in the crosscut on both June 17 and 18 and there is no dispute that another person made a preshift examination on June 18 (Summary paragraph Nos. 11 and 18, supra). Both preshift examiners took an air reading in the No. 6 entry for the purpose of determining the velocity of the air in the return entry (Tr. 151; 232). The Commission found in Old Ben Coal Co., 3 FMSHRC 608, 609 (1981), that an accumulation of loose coal existed in "active workings" in circumstances where the cited area was required to be inspected at least once a week, was traveled as an escape route, and was rock-dusted periodically. In its Old Ben decision, the Commission cited two cases in which the former Board of Mine Operations Appeals had made rulings about the circumstances which constitute active workings. In one of those cases (Mid-Continent Coal and Coke Co., 1 IBMA 250 (1972)), the former Board stated that if only one miner passes through an area to make an inspection, an accumulation of float coal dust would be a hazard to him.

Clinchfield argues that the preshift examiners saw the reflectorized can and did not enter the crosscut and that they were, therefore, not required to travel in the roof-fall area within the meaning of the definition of "active workings".

Clinchfield's safety director stated that a possible travelway for the taking of an air reading would have been through the crosscut in which the roof fall had occurred although he believed that was not the "easiest legitimate route" (Tr. 232). Inspector Brewer thought that the preshift examiner would just about have to have traveled through the crosscut to examine the return entry (Tr. 19). The preshift examiner who checked the 1 Left Section on the morning of June 18, 1982, did not make an entry about any danger he may have seen in the roof-fall area and, in the absence of his testimony, no one knows whether he traveled through the crosscut or not (Tr. 232). In any event, the continuous miner was actively engaged in cutting coal on June 2 when the roof fall occurred and no decision to bypass the roof fall was made until

after the order was issued on June 18 (Tr. 84-86). Therefore, at the time the preshift examinations were made, the area where the roof fall occurred was within the definition of "active workings" because, as I have shown above, no reflectorized can existed to warn the preshift examiners that the roof-fall area was to be avoided and, even if the reflectorized can did exist, the roof-fall area had not been cleaned up or bolted, and Clinchfield was obligated under paragraph 19(b) of its roof-control plan to install two rows of posts across the crosscut at the No. 5 entry. As the Commission stated in El Paso Rock Quarries, Inc., 3 FMSHRC 35, 40 (1981):

> * * * The 1977 Mine Act imposes a duty upon operators to comply with all mandatory safety and health standards. It does not permit an operator to shield itself from liability for a violation of a mandatory standard simply because the operator violated a different, but related, mandatory standard. * * *

The Commission also held in Penn Allegh Coal Company, Inc., 4 FMSHRC 1224, 1227 (1982) that a judge is not bound by the opinions of any single witness, but should base his legal conclusions "* * * upon the evidence of record considered as a whole." I have hereinbefore thoroughly reviewed all of the evidence presented by both Clinchfield and the Secretary and conclude that Clinchfield did violate section 75.200 because it had left hazardous unsupported brows in the crosscut between the Nos. 5 and 6 entries on the 2 Left Section without supporting them or otherwise controlling them adequately to protect persons from falls of the roof or ribs as required by section 75.200 of the Act. The area was within an active working place and miners were traveling in the area to make preshift examinations.

The Issue of Whether an Imminent Danger Existed

Alleged Dangering Off

Clinchfield's brief (pp. 15-20) argues that the unsupported brows observed by Inspector Brewer did not constitute an imminent danger because the crosscut where the brows existed had been dangered off and no mining activity was in progress on the 2 Left Section. As to Clinchfield's claim that the area had been dangered off, I incorporate in this portion of my decision the discussions on pages 15-16 and 18-20, supra, in which I found that neither the reflectorized can nor the timber with the word "Danger" written on it ever existed at the intersection of the No. 5 entry and the crosscut in which the unsupported brows were observed by the inspector.

Assuming, arguendo, that the reflectorized can and timber had been erected by someone at sometime, the fact remains that

they could not be found by MSHA's three witnesses or Clinchfield's own safety director on June 18, 1982, when the imminent-danger order was issued. A warning device which cannot be found by four people serves no purpose and cannot be used in support of a claim that the unsupported brows had been dangered off to prevent persons from going into the crosscut where the brows could fall upon them. Also, as I have previously explained on pages 16-17, supra, Clinchfield was required by paragraph 19(b) of its roof-control plan to install two rows of posts across the entrance to the roof-fall area at the No. 5 entry approach and it had failed to do so. Moreover, even if a reflectorized can and a "Danger" timber had been placed at the intersection of the No. 5 entry and the hazardous crosscut, it was Clinchfield's responsibility to assure that those warning devices continued to remain in a conspicuous place where they could be seen by persons who might have gone into the crosscut.

The excerpt on page 18 of Clinchfield's brief to the testimony of its witness Vickers who testified that a reflectorized can is "* * * just like a stop sign is to a driver out on the highway" has no force and effect because a stop sign on the highway, which a motorist cannot find, does not warn a motorist of a dangerous intersection any more than a can, which a miner cannot find, warns a miner of a hazard in a coal mine. For the reasons given above, I must reject Clinchfield's defense to the issuance of the imminent-danger order to the extent that its defense is based on the claim that it had properly dangered off the roof-fall area where the imminent danger existed.

Removal or Nonexistence of Persons Did Not Eliminate Imminent Danger

The remaining arguments raised in Clinchfield's brief (pp. 19-20) in support of its claim that no imminent danger existed in the roof-fall area reveal a basic misunderstanding on Clinchfield's part as to what constitutes an imminent danger under the Act. That misunderstanding is most clearly expressed on page 20 of Clinchfield's brief where it is contended that there was "* * * no activity present in the area which could constitute an imminent danger at the time the 107(a) order was issued". It is clear from the foregoing quotation that Clinchfield believes that no imminent danger can be found to exist unless at least one person is actually engaged in some type of work so close to the imminent danger that he will probably be killed before the imminent danger can be abated. Clinchfield is confusing the nonexistence of persons in the vicinity of the imminent danger with the nonexistence of the hazard which produces the imminent danger.

Clinchfield's confusion is obvious from the facts in the cases which it cites in support of its argument that the removal of persons from the imminent danger abates the imminent danger. On page 19 of its brief, e.g., Clinchfield cites Old Ben Coal Co.,

6 IBMA 256 (1976), in which the former Board of Mine Operations Appeals upheld a judge's decision finding that no imminent danger existed in a situation in which an inspector had issued an imminent-danger order because he had seen a miner, before the order was issued, riding on top of a locomotive with his legs hanging over the side of the locomotive. The Board agreed with the judge that the imminent danger no longer existed at the time the order was written because the miner had jumped off the locomotive.

Clinchfield claims that the Board's rationale in the Old Ben case applies to the facts in this case because no actual coal production was in progress and no one had any reason to be in the crosscut where the unsupported brows existed. The fallacy in Clinchfield's argument is that when the miner jumped off the locomotive in the Old Ben case, he eliminated the existence of the imminent danger at the time he jumped off the locomotive because the imminent danger was coexistensive with the miner's presence on the locomotive, whereas in this proceeding, the imminent danger continued to exist after the inspector wrote his order, regardless of the fact that no person was observed by the inspectors to be standing under the unsupported brows. Thus, nonexistence of persons in the roof-fall area did not automatically abate or terminate the existence of the imminent danger.

Another case which Clinchfield mistakenly cites in support of its claim that no imminent danger existed is Judge Boltz's decision in C F & I Steel Corp., 3 FMSHRC 99 (1981), in which Clinchfield states that the judge vacated an imminent-danger order "* * * because prior to its issuance the operator had removed miners from the area, ceased production work in the affected section and no power was energized in that section" (Brief, p. 20). Judge Boltz himself explained the difference between abating an imminent danger and removal of persons from the proximity of the imminent danger in his decision in another C F & I case, 3 FMSHRC 2819 (1981) as follows (at p. 2823):

> I would characterize the holding of the first cited case somewhat differently. Pittsburgh Coal Company, supra, [2 IBMA 277 (1973)] stands for the proposition that the presence of 1.5 volume per centum or more of methane will support the issuance of an imminent danger withdrawal order. Id. at 277, 279. The Valley Camp Coal Company, supra, [1 IBMA 243 (1972)] stands for the proposition that an order of withdrawal can properly be issued if no miners are in the mine because an order of withdrawal not only takes the miners out of the mine, but also keeps them out until the danger has been eliminated. Id. at 248. In Secretary of Labor, Mine Safety and Health Administration (MSHA) v. C F & I Steel Corporation, supra, [3 FMSHRC 99 (1981)] I concluded that

> the danger presented by the accumulation of methane had been eliminated. That is not the case with the matter at hand. The accumulation of methane existed on May 8, 1980, having been only recently discovered, could reasonably be expected to cause death or serious physical harm before the danger posed had been eliminated. No abatement was in progress. Therefore, I find that the order of withdrawal is valid and should be affirmed.

Clinchfield also mistakenly cites Judge Koutras' decision in Climax Molybdenum Co., 2 FMSHRC 2976 (1980), in support of its claim that removal of miners from a hazardous area eliminates or abates an imminent danger. It is true that Judge Koutras vacated an imminent-danger order in the Climax case but he vacated the order primarily because the inspector was not sure that the exposed electrical connections cited in the order would have shocked or killed any person who might have touched them--not because the miners closest to the wires were 500 to 600 feet from the alleged imminent danger (2 FMSHRC at 2980).

In its reply brief (pp. 2-11), Clinchfield cites additional cases in support of the same arguments which I have rejected above. For example, on page 7 of its reply brief, Clinchfield quotes from the former Board's decision in Eastern Associated Coal Corp., 2 IBMA 128 (1973), in which the Board stated at page 137, "* * * a condition or practice cannot be imminently dangerous if the specific and usual mining activity can safely continue in the area during (or prior to) the abatement process". Clinchfield then argues as follows (Brief, p. 7):

> * * * In the present case, the condition was abated through the dangering off of the area in question, but it could also have been abated through the resumption of the normal mining operations. Either way, miners were protected against any reasonable expectation that the condition could cause death or physical harm to a miner."

Neither of the conclusions made by Clinchfield in the above quotation is correct. The hazardous condition created by the existence of the unsupported brows was not eliminated by Clinchfield's alleged dangering off of the roof-fall area. Again, assuming arguendo, that the roof-fall area had been dangered off by the erection of a warning device, that action had no salutary effect whatsoever on the hazardous nature of the unsupported brows. They would have remained just as likely to fall on any person entering the area after the alleged warning device was erected as they would before the warning device was erected.

In fact, Clinchfield never did take any action whatsoever to abate the imminent danger by installing supports in or under the brows. Supervisory Inspector Rines testified that MSHA normally follows the provisions of section 107(a) which states that an imminent-danger order is to remain in effect "* * * until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist." Rines said that Clinchfield never did abate the imminent danger cited in the order, but they terminated it at Clinchfield's request after the inspectors had personally participated in erecting posts and nailing boards on the posts to make certain that no miners could enter the roof-fall area.

As for Clinchfield's claim that the roof-fall area would have been supported if a decision had been made to continue mining in that area, it is obvious that no one could have started cutting coal under the brow in the No. 6 entry without first installing permanent roof supports to assure that the brows would not fall. Since the roof and brows were too hazardous for normal mining operations to begin before the brows and roof had been supported, the former Board's statement in the Eastern Associated case, supra, does not apply to the facts in this case because the "usual mining activity" could not have been carried on while the mine roof and brows were being restored to an acceptable condition of safety.

Another case which Clinchfield cites in its reply brief (P. 9) is Judge Carlson's decision in Western Slope Carbon, Inc., 5 FMSHRC 795 (1983), in which Clinchfield claims that Judge Carlson held that before an accumulation of float coal dust can be considered to be an imminent danger, the coal dust must be in suspension. Judge Carlson merely noted that both suspension of the dust and a spark would all have to be present before an explosion could occur. The primary reason that the judge failed to find occurrence of an imminent danger was MSHA's lack of proof as to the existence of an ignition source (5 FMSHRC at 799). Additionally, it should be noted that the court in Freeman Coal Mining Co. v. Interior Bd. of Mine Op. App., 504 F.2d 741 (7th Cir. 1974), specifically rejected the operator's argument in that case that a finding of imminent danger could not properly be made in the absence of a suspension of float coal dust in the air, an ignition source, and a concentration of methane.

Section 3(j) Definition and "Probable As Not" Gloss

Clinchfield's initial brief (p. 15) does correctly quote the definition of an imminent danger given in section 3(j) of the Act, i.e., ""imminent danger' means the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before

such condition or practice can be abated." The facts given in summary paragraph Nos. 2, 4-8, and 10, supra, support my conclusion that an imminent danger existed in the roof-fall area between Nos. 5 and 6 entries on June 18, 1982, when imminent-danger Order No. 2038802 was issued. The unsupported brows could reasonably have been expected to cause death or serious physical harm before such brows could be adequately supported.

The former Board augmented the definition of section 3(j) in its decision in Freeman Coal Mining Co., 2 IBMA 197 (1973), as follows (at p. 212):

> [w]ould a reasonable man, given a qualified inspector's education and experience, conclude that the facts indicate an impending accident or disaster, threatening to kill or to cause serious physical harm, likely to occur at any moment, but not necessarily immediately? The uncertainty must be of a nature that would induce a reasonable man to estimate that, if normal operations designed to extract coal in the disputed area proceeded, it is at least just as probable as not that the feared accident or disaster would occur before elimination of the danger. * * *

The Seventh Circuit affirmed the Board's definition and finding of an imminent danger in the Freeman case previously discussed above. Therefore, the Board's expanded definition of imminent danger is a part of the present law pertaining to imminent danger. In Pittsburg & Midway Coal Mining Co., 2 FMSHRC 787 (1980), the Commission affirmed a judge's decision finding existence of an imminent danger. In doing so, however, the Commission made the following observation (at p. 788):

> * * * In this regard, we note that whether the question of imminent danger is decided with the "as probable as not" gloss upon the language of section 3(j), or with the language of section 3(j) alone, the outcome here would be the same. We therefore need not, and do not, adopt or in any way approve the "as probable as not" standard that the judge applied. With respect to cases that arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., we will examine anew the question of what conditions or practices constitute an imminent danger. * * *

I am not aware of any case in which the Commission has expressed a further opinion as to the definition of imminent danger, but I believe that my findings of an imminent danger in this proceeding would be supported by the preponderance of the evidence regardless of whether the original language of section 3(j) is used or the "as probable as not" standard is applied. Inspector

Brewer specifically applied his education and experience as a coal miner and as an inspector in making his determination that an imminent danger existed. He began his discussion by noting that the area had not been dangered off, that he had to consider the area as an active working place because the miners were still working on the continuous miner which had been removed from the roof-fall area in order for the miners to work on the section for any purpose, that he felt the brows posed an imminent hazard to anyone who might go into the roof-fall area (Tr. 17), that he knew there had been three unintentional roof falls in the Hurricane Creek Mine in the last year which had covered up continuous miners, and that with that background of knowledge, the existence of unsupported, overhanging, arching brows triggers the feeling, "if you're a coal miner", that an imminent danger exists (Tr. 18). The inspector further testified that he issued the imminent-danger order to assure that the only miners who would be sent into the roof-fall area would be going there solely to correct the hazards associated with the existence of the unsupported brows (Tr. 20).

On cross-examination the inspector stated that if normal mining operations had resumed, a section foreman, a continuous-miner operator, a helper, and a shuttle-car operator, would be exposed to the hazards caused by the unsupported brows (Tr. 49). Although the inspector agreed that no actual mining operations were in progress in the 2 Left Section on the day the order was issued, he said that there was no mining activity at that time because the continuous miner was torn up and the miners were waiting to get an operative machine on the section. He further stated that his concern was that the continuous miner might be repaired and that active mining would occur by that evening (Tr. 50).

As a matter of fact, when Inspector Coeburn was in the roof-fall area on June 22, he stated that active mining was in progress only two crosscuts inby the roof-fall area and Mine Superintendent Hess agreed that the 2 Left Section had been developed inby the roof-fall area and that the decision to bypass the roof-fall area had been made only after the imminent-danger order was issued (Tr. 128; 266; 268).

The preponderance of the evidence, therefore, shows that it was just as probable as not that the unsupported brows would have fallen on one or more miners and would have injured or killed them if normal mining activities had been resumed before the brows were properly supported. Although Clinchfield argues in its reply brief (p. 10) that the first action that would have been taken if normal mining activities had been resumed in the roof-fall area would have been to support the roof properly, that is not an eventuality which the inspectors could leave to doubt. It is a fact that the two rows of posts required by

paragraph 19(b) had not been installed and the inspectors could find no warning device required by paragraph 3(a) of the plan. As the court stated in Old Ben Coal Corp. v. Interior Bd. of Mine Op. App., 523 F.2d 25 (7th Cir. 1975), the inspector cannot wait until the danger is immediate because then no one could stay in the mine to correct the hazardous conditions which he has found (523 F.2d at 34).

For the reasons hereinbefore given, I find that imminent-danger Order No. 2038802 was properly issued on June 18, 1982, under section 107(a) of the Act and it will hereinafter be affirmed.

Docket No. VA 83-24

The Issue of What Civil Penalty Should Be Assessed

Penalty Proceedings Before Commission and Judges Are De Novo

Since I have already found in the preceding portion of this decision that a violation of section 75.200 occurred because Clinchfield had failed to support the brows in the crosscut between the Nos. 5 and 6 entries in the 2 Left Section after the continuous-mining machine was recovered from the roof-fall area on June 13, 1982, it is necessary that I assess a civil penalty pursuant to the six criteria which are listed in section 110(i) of the Act (Tazco, Inc., 3 FMSHRC 1895 (1981)). The parties entered into stipulations which govern two of the criteria. First, it was stipulated that imposition of a civil penalty would not affect Clinchfield's ability to continue in business. Second, it was stipulated that Clinchfield is a medium-sized company and that the Hurricane Creek Mine here involved is a medium-sized mine.

Respondent's initial brief (pp. 21-23) requests that the Secretary's special assessment proposed under 30 C.F.R. 100.5 be vacated if I should find that there is any merit to the Secretary's allegation that a violation of section 75.200 occurred. When an operator requests a hearing before one of the Commission's administrative law judges in a civil penalty proceeding, the proceeding is de novo and the judge is required to assess a penalty under the six criteria listed in section 110(i) of the Act without giving any consideration to the Secretary's proposed penalty or the procedures utilized by the Secretary to arrive at his proposed penalty (Rushton Mining Co., 1 FMSHRC 794 (1979); Shamrock Coal Co., 1 FMSHRC 799 (1979); Kaiser Steel Corp., 1 FMSHRC 984 (1979); U. S. Steel Corp., 1 FMSHRC 1306 (1979); Pittsburgh Coal Co., 1 FMSHRC 1468 (1979); Peabody Coal Co., 1 FMSHRC 1494 (1979); Co-Op Mining Co., 2 FMSHRC 784 (1980); and Sellersburg Stone Co., 5 FMSHRC 287 (1983)).

Inasmuch as it is necessary for me to make findings concerning the four criteria as to which the parties entered into no stipulations, I shall consider the merits of Clinchfield's arguments pertaining to those four criteria without expressing any opinion as to the merits of the findings made by the Secretary in reaching his proposed penalty.

The Secretary's brief requests that I assess the civil penalty of $3,000 proposed by the Secretary in Docket No. VA 83-24, but the Secretary supports the proposed penalty by relying upon the evidence introduced in this proceeding. Therefore, it is appropriate to consider the Secretary's arguments also, but those arguments will likewise be evaluated without giving any opinion as to whether I agree or disagree with the findings made by the Secretary in arriving at his special assessment of $3,000.

History of Previous Violations

Neither Clinchfield's initial brief (pp. 21-23) nor its reply brief (p. 12) specifically discusses the criterion of Clinchfield's history of previous violations. The Secretary's brief (p. 16) asserts that the criterion of history of previous violations was a matter of stipulation, but the only transcript reference the Secretary makes in support of that assertion is to page 140 of the transcript where Clinchfield's counsel did not object to the introduction of Exhibit 5 which is a computer printout listing prior violations at the Hurricane Creek Mine. Exhibit 5 shows that Clinchfield has previously violated section 75.200 on five occasions prior to June 18, 1982, when the violation here involved was cited. One of those prior violations was assessed under MSHA's single penalty assessment procedure and the penalty paid was, therefore, only $20. Section 100.3(c) states that previous violations assessed under the single penalty provisions of the regulations will not be used in evaluating the criterion of history of previous violations, but as I indicated above, penalty assessments in cases before the judges are de novo and I am not bound by the Secretary's penalty procedures described in section 100.3 of the regulations. Moreover, it should be noted that section 110(i) of the Act appears to give the Secretary a considerable amount of flexibility in proposing penalties, whereas section 110(i) specifically provides that the Commission "shall" consider all six criteria in determining civil penalties.

I consider violations of section 75.200 to be among the most serious violations which can occur in coal mines because roof falls still account for a large number of deaths in coal mines every year. An operator should conscientiously follow its roof-control plan and all other provisions of section 75.200 at all times. Clinchfield's history of five violations of section 75.200 may not be passed over lightly. Therefore, I find

that any penalty assessed under the other five criteria should be increased by $400 under Clinchfield's history of previous violations.

Negligence

As to the criterion of negligence, the Secretary's brief (p. 16) claims that Clinchfield showed a high degree of negligence in failing to support the brows. The Secretary argues that Clinchfield could have bolted the unsupported brows prior to removal of the continuous miner and notes that 5 days after the removal of the miner, the brows were still unsupported when the roof-fall area was examined by MSHA's inspectors and no danger signs could be found. Clinchfield's reply brief (p. 12) argues that the miners were not exposed to the unsupported brows when they recovered the continuous miner.

In its initial brief (pp. 21-22), Clinchfield argues that it was not negligent because it had posted a warning device (reflectorized can) in accordance with its roof-control plan. Clinchfield cites the testimony of Busch, Cross, Vickers, and Hamrick in support of its contention that the reflectorized can had been hung at the intersection of the No. 5 entry and the crosscut in which the unsupported brows existed, but I have heretofore given on pages 15-16 and 18-20, supra, my reasons for finding that the reflectorized can and timber with the word "Danger" written on it did not exist. Clinchfield additionally argues that if I should find that the designated area was not properly dangered off, I should take into consideration that such failure to danger properly was the result of a misinterpretation of the regulations, rather than an indication of negligence for which Clinchfield should be severely penalized.

It is difficult to understand why Clinchfield was as little concerned about supporting the brows as the evidence in this case indicates. I have already alluded to the fact that even if a reflectorized can had been hung at the intersection of the No. 5 entry and the crosscut containing the unsupported brows, it was incumbent upon Clinchfield's management to assure itself that the "warning device" continued to remain situated where it could be seen by anyone coming into the roof-fall area to make a preshift examination. The evidence clearly shows that only one preshift examiner made any notation about the dangering off of the roof-fall area and he did not make that notation until June 17, 1982, or 4 days after the continuous miner was removed from the crosscut. The next morning, June 18, three MSHA witnesses and Clinchfield's safety director could not find that "warning device" even though MSHA's witnesses specifically looked for some sort of warning to advise miners as to the hazardous nature of the unsupported brows.

The record does not contain any explanation to show why Clinchfield's mine foreman or mine superintendent would have

been unaware of the hazardous nature of the roof-fall area in view of the fact that two employees had been killed there by the roof fall on June 2. Brows which were still unsupported on June 18, or 16 days after the roof fall, cannot be considered to be of no consequence, particularly since Clinchfield did not decide to bypass the hazardous roof-fall area until June 18 after the imminent-danger order had been issued (Tr. 266). Also, as I have previously noted on pages 16-18, supra, Clinchfield's roof-control plan required it to install two rows of posts outby the roof-fall area since it had not gone in and cleaned up the crosscut. Even if one accepts Clinchfield's argument that management had not decided whether to bypass the roof-fall area entirely or to go in and support the area and continue mining there, that is still no reason for Clinchfield to leave the area without at least installing the two rows of posts which are required to be installed outby a roof-fall area if the area has not been cleaned up (Exh. C, par. 19(b)).

In light of the above discussion, I can find no mitigating circumstances to soften a conclusion as to Clinchfield's negligence in failing to support the hazardous brows or, in the alternative, at least making certain that the area was continually marked by a highly visible warning device or two rows of posts. The preponderance of the evidence supports a finding that Clinchfield was grossly negligent in allowing the violation of section 75.200 to occur. Therefore, I find that $2,000 of the penalty should be assessed under the criterion of negligence.

Gravity

The Secretary's brief (pp. 15-16) argues, as to the criterion of gravity, that the violation was very serious. The Secretary states that the miners doing recovery work on the continuous miner were exposed to the unsupported brows, that one of Clinchfield's division superintendents went out from under supported roof when he was wrapping a rope around rocks to drag them from the roof-fall area, and that the brows were left unsupported on June 13 after the continuous miner was recovered, thereby exposing any miner who might pass through the crosscut to the immediate hazard of the unsupported brows.

Clinchfield's reply brief (p. 12) claims that the miners were not exposed to the unsupported brows when they were recovering the continuous miner on June 13 and that the Secretary has improperly alleged that the violation existed on June 13 because the inspectors were not present when the continuous miner was being recovered and therefore can only speculate as to what occurred on June 13. It must be borne in mind that the violation of section 75.200 is for not supporting the brows or otherwise controlling them adequately to protect persons from falls of the roof or ribs. The violation began to exist on

June 13 when the continuous miner was recovered and continued to exist until June 22 when the roof-fall area was physically barricaded to prevent anyone from entering the area. I am, of course, interpreting section 75.200 to mean that the physical barricades were sufficient to control the area so as to protect persons from a fall of the unsupported ribs.

The evidence conclusively shows beyond any doubt that the brows began to be unsupported on June 13 because Clinchfield's witnesses stated that no bolting was done in the roof-fall area except with the stoper, that all bolting was done before the continuous miner was recovered, and that no bolting was done after the miner was removed from the crosscut (Tr. 189; 191; 209). Since no witness has been able to refute the inspector's finding that the brows were unsupported, the violation of section 75.200 existed on June 13 and continued to exist up to June 22 when the inspectors and Clinchfield's employees barricaded the area to prevent persons from entering the area.

I have already discussed the fact that the crosscut was 20 feet wide and that the overhanging brows extended out from the ribs toward the center of the crosscut for a distance of up to 9 feet from both the right and left sides of the crosscut. In such circumstances, anyone installing parts on the side of the continuous miner, which was from 10 to 11 feet wide, was necessarily exposed to the hazard of having the unsupported brows fall on him (Tr. 208). Sauls' testimony shows that he was not positive but that he was exposed to the hazards of the unsupported brows (Tr. 207). Busch stated that he considered the fact that the left brow might fall at the very moment he was tramming the continuous miner from the roof-fall area (Tr. 203-204). Finally, Meade testified that he saw one of Clinchfield's officials go inby all supports to attach ropes to rocks so that they could be pulled from the roof-fall area (Tr. 132).

The hazards associated with the unsupported brows cannot be divorced from a realization that they were the remaining portion of roof surrounding an area of roof which had fallen so suddenly on June 2 that two miners were killed before they could escape the falling rock. There was still a crack on the left rib which was sufficiently obvious to be of concern to the miner who was tramming the machine out of the fall area on June 13. The evidence, therefore, supports a finding that the unsupported brows continued to pose a threat to anyone who might pass through the crosscut.

Clinchfield argues in its initial brief (p. 22) that even if I find that the brows constituted a hazard, that it would be improper to accept Inspector Brewer's evaluation to the effect that four miners (operator and helper on continuous miner, shuttle car operator, and section foreman) would have been exposed to injury or death if the brows had fallen. Clinchfield

claims that no miners would have gone into the roof-fall area for any purpose other than to support the brows properly if Clinchfield had decided to continue mining from the face side of the roof-fall area and that if normal mining activities had been resumed, the number of people exposed would have been only the number of miners required to support the roof in accordance with Clinchfield's roof-control plan.

It is possible, of course, that the number of miners who would have been required to support the roof properly would involve more than the operator and helper on the roof-bolting machine, but that is a matter which was not discussed during the hearing. Consequently, there is no evidence to show that the inspector properly concluded that if Clinchfield had succeeded in repairing the continuous miner by the evening shift on June 18, its employees would have trammed the continuous miner back into the crosscut and resumed cutting coal without giving any consideration at all to the fact that the area of the crosscut nearest to the No. 6 entry was completely unsupported and the fact that a 9-foot square area of roof immediately outby the face of the No. 6 entry was not bolted or otherwise supported.

It is a fact that the continuous miner was so badly damaged by the roof fall that it had to be entirely removed from the mine for rebuilding in Clinchfield's central shop. Therefore, the most likely injury or death which would have occurred on June 18, if the brows had fallen, would have been to cause injury to a preshift examiner who might have passed through the crosscut for the purpose of taking an air reading to compute air velocity in the No. 6 return entry. When the continuous miner was recovered on June 13, only Sauls was exposed while the pump and valve were replaced, and when the actual tramming of the miner began, only Busch was operating the controls. When the rope was being tied to rocks inby any roof supports, only Clinchfield's mine official was exposed. The preponderance of the evidence, therefore, supports a finding that any fall of the brows on June 13, or thereafter, up to and including the time the violation was cited on June 18 would have been one person. Nevertheless, if the brows had fallen, they would have been likely to kill anyone on whom they might have fallen. In such circumstances, the violation must necessarily be considered to be very serious and I find that $1,000 of the penalty should be assessed under the criterion of gravity.

Good-Faith Abatement

The sixth and final criterion remaining to be considered is whether Clinchfield made a good-faith effort to achieve rapid compliance after the citation was written. The Secretary's brief (p. 16) alleges that "[n]o good faith was shown concerning

abatement of the violation." Clinchfield's reply brief does not discuss good-faith abatement, but in its initial brief (p. 23), Clinchfield argues that it did demonstrate good faith in abating the violation because it actively participated in physically constructing a barricade on each side of the roof-fall area consisting of both timbers and boards, together with erecting "Danger" signs, to make certain that no person would go into the roof-fall area. Clinchfield also states that it made the decision on June 18, after the order was written to abandon the affected portion of the No. 6 entry. Clinchfield contends that the aforesaid actions should be given consideration because, although the order was not terminated until December 6, 1982, Supervisory Inspector Rines agreed that all the actions summarized in the order of termination as reasons for terminating it had been taken by June 22, 1982 (Tr. 104-105).

When inspectors issue orders, they normally withdraw personnel from the area of danger and the orders do not specify a time within which the hazards have to be corrected because it is assumed that the operator's having to withdraw personnel from the area of danger will be a sufficient incentive to cause the operator to take immediate corrective action. Since the violation here involved was written as part of an imminent-danger order, the inspector did not insert any time in his order to show when the violation of section 75.200 was required to be abated (Exh. 1, p. 1). Consequently, even though Clinchfield did nothing to barricade the roof-fall area between June 18 and June 22 when the barricades were constructed, it must be borne in mind that the order was written on a Friday and the barricades were constructed on a Tuesday. In the interim between Friday and Tuesday, the area was dangered off by the tags hung outby the fall area by Inspector Brewer. In such circumstances, it can hardly be found that Clinchfield showed a lack of good faith in abating the violation because there may have been some understandable confusion in the minds of Clinchfield's management as to what action it needed to take after the area had been dangered off by the inspector's imminent-danger order.

For the foregoing reasons, I find that Clinchfield showed good faith in abating the violation by agreeing with MSHA's personnel that physical barricades should be constructed despite the fact that Clinchfield's roof-control plan required the construction of only two rows of timbers outby the roof-fall area. The fact that Clinchfield's management had decided to bypass the No. 6 entry, rather than continue mining from the face side where the roof-fall had occurred, is another reason to accept Clinchfield's argument that it was not required to take any action toward abating the violation other than agreeing to construct the physical barricades on each side of the roof-fall area on June 22.

It has always been my practice neither to increase nor decrease a penalty otherwise assessable under the other criteria when I find that an operator has demonstrated a good-faith effort to achieve rapid compliance. A penalty is increased if the operator fails to show good-faith abatement and is decreased if the operator is able to demonstrate that he took some extraordinary action in achieving rapid compliance. Since I have found that Clinchfield made a good-faith effort to achieve rapid compliance, the penalty otherwise assessable in this proceeding will not be increased or decreased under the criterion of good-faith abatement.

Total Assessment

By way of summary, a medium-sized operator is involved, payment of penalties will not cause it to discontinue in business, there was a somewhat adverse history of previous violations of section 75.200, the violation was associated with gross negligence, the violation was very serious, and there was a good-faith effort to achieve rapid compliance. The operator's size was taken into consideration in indicating that a penalty of $400 would be assessed under the criterion of history of previous violations, that $2,000 would be assessed under the criterion of negligence, and that $1,000 would be assessed under the criterion of gravity. Therefore, a total penalty of $3,400 will hereinafter be assessed for the violation of section 75.200 alleged in Order and Citation No. 2038802 dated June 18, 1982.

WHEREFORE, it is ordered:

(A) Clinchfield Coal Company's application for review of Order No. 2038802 filed on July 19, 1982, in Docket No. VA 82-51-R is dismissed and Order No. 2038802 dated June 18, 1982, is affirmed.

(B) Clinchfield Coal Company shall, within 30 days from the date of this decision, pay a civil penalty of $3,400 for the violation of section 75.200 alleged in Order and Citation No. 2038802 dated June 18, 1982.

Richard C. Steffey
Administrative Law Judge