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SOL (MSHA) V. PYRO MINING COMPANY
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDINGS Docket No. KENT 84-156 A.C. No. 15-13920-03516
v.	Docket No. KENT 84-168 A.C. No. 15-13920-03518
PYRO MINING COMPANY, RESPONDENT	Pyro No. 9 Wheatcroft Mine

DECISIONS

Appearances: Carole Fernandez, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
William Craft, Assistant Safety Director, Pyro Mining Company, Sturgis, Kentucky, for Respondent.

Before: Judge Koutras

Statement of the Proceedings

These civil penalty proceedings were initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a). Petitioner seeks civil penalty assessments against the respondent for eight alleged violations of certain mandatory safety standards set forth in Title 30, Code of Federal Regulations.

Respondent filed timely answers contesting the alleged violations, and hearings were held in Evansville, Indiana on the merits of the citations. The parties were afforded an opportunity to file post-hearing written findings and conclusions, and while none were filed, all oral arguments made on the record during the hearings have been considered by me in the course of these decisions.

Issues

The issues presented in these proceedings concern the question of whether or not the cited conditions or practices

constitute violations of the cited mandatory safety standards, and whether or not the violations were significant and substantial ("S & S"). Additional issues raised by the parties are discussed in the course of these decisions.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub.L. 95-164, 30 U.S.C. 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).

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

Discussion

The citations and violations which are in issue in these proceedings are as follows:

Docket No. KENT 84-156

Section 104(a) "S & S" Citation No. 2338191, was issued on February 21, 1984, and the condition or practice cited as a violation of 30 C.F.R. 75.200, is described as follows:

> The approved roof control plan (approved 9/16/83) and the tentative approved supplement (dated 12/19/84, see page 2), was not being followed in the No. 4 entry north-east mains in that at least one row of timbers on 5 foot centers was not maintained to the last open crosscuts in the north-east mains, mines an area of approximately 70 feet in which timbers had been spotted. Also timbers were not installed on 5 foot centers one crosscut inby the north-east mains belt drive for a distance of approximately 100 feet.

Section 104(a) "S & S" Citation No. 2338192, was issued on February 21, 1984, and the condition or practice cited as a violation of 30 C.F.R. 75.202, is described as follows:

> Approximately 100 timbers had been dislodged along the supply road, No. 3 entry in the north-east mains, and the main north, and had not been replaced.

Section 104(a) "S & S" Citation No. 2338193, was issued on March 6, 1984, and the condition or practice cited as a violation of 30 C.F.R. 75.200, is described as follows:

> The approved roof control plan (approved 9/6/83, see page 15, see sketch for entries) was not being followed on the No. 3 unit, I.D. No. 003 in that the width of the No. 1 and 3 entries was in excess of 20 feet (25 feet wide) for a distance of approximately 10 feet in one location in each entry. These wide places were located just inby location no. 9á80 which is inby the last open crosscuts.

Section 104(a) "S & S" Citation No. 2338194, was issued on March 6, 1984, and the condition or practice cited as a violation of 30 C.F.R. 75.400, is described as follows:

> Accumulations of loose coal and coal dust (4 to 12 inches deep) was present along the ribs and mine floor of the nos. 1 through 6 entries and the last open connecting crosscut, beginning at location no. 9á80 and extending inby approximately 60 feet. No. 3 unit, I.D. No. 003, north-east parallels.

Docket No. KENT 84-168

Section 104(a) "S & S" Citation No. 2338198, was issued on March 8, 1984, and the condition or practice cited as violation of 30 C.F.R. 75.200, is described as follows:

> The approved roof control plan (dated 9/6/83, see page 14, figures B or C and D) was not being followed on the No. 1 unit, I.D. No. 001 1st North panel in that the timbers had not been installed to within 240 feet of the tailpiece of the belt in at least one return entry and the supply entry, in that the timbering in the return (No. 6 entry) terminated 720 feet outby the tail of the belt minus 240 feet that had been timbered in the middle of this 720 feet distance. The timbering in the supply road terminated 660 feet outby the tail of the belt minus 180 feet that had been timbered in the middle of the 660 feet distance.

Section 104(a) "S & S" Citation No. 2338768, was issued on March 9, 1984, and the condition or practice cited as a violation of 30 C.F.R. 75.400, is described as follows:

> Loose coal and coal dust has been allowed to accumulate along the No. 2 long belt and along the No. 2 unit belt at numerous locations. This from 2" to 4" in depth.

Section 104(a) "S & S" Citation No. 2338769, was issued on March 9, 1984, and the condition or practice cited as a violation of 30 C.F.R. 75.1725, is described as follows:

> There are 33 bad rollers in the No. 2 long belt and the No. 2 unit belt. This is from the No. 55 crosscut in the long belt to the No. 15 crosscut in the No. 2 unit belt. These rollers were not turning in coal or coal dust.

Section 104(a) "S & S" Citation No. 2338770, was issued on March 9, 1984, and the condition or practice cited as a violation of 30 C.F.R. 75.1722, is described as follows:

> The No. 2 unit's belt head is not adequately guarded in that no guards were up on back side for take-up roller or drive rollers. Also, the guards on the starting box side are not installed so as to prevent a person from being caught in the roller.

Stipulations

Respondent stipulated that the No. 9 mine is subject to the Act, and that I have jurisdiction to hear and decide these cases (Tr. 4). Respondent also agreed that the inspectors who issued the citations are authorized and qualified inspectors, and that they did in fact issue the citations.

The parties agreed that at the time the citations were issued, the subject mine had an annual production of 379,316 tons, and that the parent corporation had an annual production of approximately three million tons (Tr. 4). The parties agreed that as to all of the citations in issue, the negligence level was moderate, and that the respondent exercised good faith in abating all of the citations within the time fixed by the inspectors (Tr. 4-5).

Petitioner's Testimony and Evidence

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The four citations at issue in this docket were all issued by MSHA Inspector James E. Franks during the course of his inspections of the mine on the days in question. With regard to Citation No. 2338191, Mr. Franks confirmed that he issued it after finding that certain roof support timbers had not been installed in accordance with the requirements of a supplemental roof control plan (exhibits P-2 and P-3). Mr. Franks stated that he relied on page two of the supplement, December 9, 1983 (Tr. 12).

Mr. Franks conceded that on the face of the citation form, he did indicate that the supplemental plan was approved on December 19, 1984. However, he explained that this was an error on his part, and that the plan supplement was approved in 1983 (Tr. 13).

Inspector Franks stated that he issued the citation because of the failure by the respondent to install timbers on five-foot centers from the last installed "I" beam to the last open crosscut (Tr. 31), and he maintained that the timbers should be installed before the "I" beams, and he gave his opinion as to how the timbers could be transported into the area for installation (Tr. 31-33). He confirmed that provision number three of the supplemental roof control plan was violated, and that the violation occurred at the number four entry (Tr. 36-39). He located the area by referring to a mine map provided by the respondent's representative (Tr. 41).

Mr. Franks testified that he considered the violation to be "significant and substantial" because of the fact that the number 9 coal seam in Kentucky has historically had bad roof conditions, and the fact that in the particular entry in question there had been a previous roof fall, and the rib and top had some broken places. He also relied on the fact that during the year 1984, there were 28 miners killed in roof falls nationwide (Tr. 11). He indicated that the cited area was an area where a belt examiner or timbering people would travel, and he confirmed that he observed two people working in the area at the time the citation issued (Tr. 11-12).

Mr. Franks confirmed that he relied on the National Gypsum decision guidelines for his "S & S" findings in this matter, and he also confirmed that he was aware of a May 1981 MSHA

memorandum issued by Acting Administrator Joseph La Monica concerning the application of the guidelines (Tr. 16, 19). Mr. Franks denied that his supervisor ever advised him to mark any citations "S & S," or that he was influenced by any statistics indicating the number of "S & S" citations issued in his district as compared to others (Tr. 20).

Mr. Franks stated that part of the area he cited was a belt and track entry where people would be traveling, and he considered the fact that the mine roof had some broken areas and that a roof fall had occurred in the past. Although there have been no fatal roof falls in the mine in question, he was aware of the fact that some 28 miners wre killed during the year in roof falls nationwide (Tr. 22).

Mr. Franks conceded that the cited roof area was supported with roof bolts, and that he issued the citation because of the lack of the required additional roof support timbers (Tr. 24). The miners in the area were those who were doing the installation work on the roof support "I" beams (Tr. 27), and Mr. Franks believed there were three miners doing this work (Tr. 28-29). He also indicated that he has seen roof and rib cracks in the belt and supply entries, and that is why additional support is required. He characterized the roof as "uncertain," and indicated that a fall had previously occurred next to a belt drive (Tr. 57, 59).

Inspector Franks confirmed that he issued Citation No. 2338192, after traveling the supply road in the number three entry and observing approximately 100 roof support timbers knocked out along the roadway (Tr. 62). He confirmed that the dislodged timbers were at two supply road locations (Tr. 66), and he pointed them out on the mine map (Tr. 69-70). He also confirmed that the dislodged timbers were present in an area of some 2,000 feet along both supply road locations (Tr. 71-72).

Mr. Franks confirmed that the roof control plan required the timbers to be installed and maintained in an upright position to support the roof. Although the respondent could have used cross bars or truss bolts to support the roof at the cited locations, the respondent opted to use timbers (Tr. 80). Mr. Franks explained why he relied on section 75.202 (Tr. 80-82).

Mr. Franks believed that the majority of the dislodged timbers had at one time been set, but were subsequently dislodged. Since the cited working areas were not places where recovery work was being done, the respondent was required to reset the dislodged timbers (Tr. 75-76).

With regard to his "S & S" findings, Mr. Franks confirmed that he again relied on the National Gypsum guidelines. In his opinion, the conditions along the cited supply road were typical of conditions which have resulted in roof falls in other similar mine areas (Tr. 64). He testified that mantrips travel the area, and the roof in several places was broken (Tr. 67), and other roof areas had been truss bolted and timbered (Tr. 77). All of these factors, including the fact that people have been hurt in roof falls in the No. 9 mine, influenced his decision that the violation was "S & S" (Tr. 63-64).

Although the respondent disputed Inspector Franks' "S & S" finding with respect to Citation No. 2338193, it did not dispute the fact that the conditions described by Mr. Franks with regard to the wide entries constituted a violation of the mine roof control plan and mandatory safety standard section 75.200 (Tr. 83-84).

With regard to his "S & S" finding, Mr. Franks testified that the cited area was in a coal producing section where miners had to travel to cut and load out coal, or to drill and pin the roof (Tr. 86). He believed that by driving the entries wider than allowed by the roof control plan, a wider area of unsupported roof is exposed, thereby creating a hazard which could reasonably likely cause an accident (Tr. 85, 105-107).

Mr. Franks conceded that he was not aware of any roof falls in the mine caused by wide entries, but he indicated that the mine has had quite a few violations of the roof control plan, and that he believed there were 23 roof plan violations issued over a 17 month period (Tr. 87). He also alluded to an accident report which indicated that two people had been injured by a reported roof fall at the mine (Tr. 88). Mr. Franks indicated that from March 11, 1983 to September 30, 1984, 23 roof control violations were issued, and 12 were "of a serious nature, S & S" (Tr. 96).

Mr. Franks confirmed MSHA's policy guidelines concerning the application of section 75.201, with regard to the definition of the term "excessive width" (Tr. 92-93). He conceded that excessive widths are not prevalent on the cited section or in the mine, and he did not believe that this was a common practice (Tr. 93). Abatement was achieved by installing additional timbers to reduce the widths of the cited entries (Tr. 95).

Inspector Franks confirmed that he issued Citation No. 2338194, citing a violation of section 75.400, after observing accumulations of loose coal and coal dust along the ribs and floor of the number three coal producing unit (Tr. 114). He was unaware of any cleanup program in use by the respondent, and stated that he did not issue the citation for a violation of any such program (Tr. 113-117).

Mr. Franks testified that the cited accumulations extended "more or less continuous" for a distance of some 700 feet along the six entries in question, and for a distance of approximately 60 feet at the other cited location, at depths ranging from 4 to 12 inches (Tr. 128-132; 144). He had no reason to believe that the cited areas were not rock dusted, and he was of the opinion that the accumulations had been permitted to exist for some unspecified hours, but not days (Tr. 135).

Mr. Franks agreed that the roof must first be pinned before any work can take place in the cited entries. He testified that he observed no cutting machine cutting off any areas in order to facilitate pinning, and he believed that the crosscuts in the cited six entries had been traveled through. The lack of any pinning had nothing to do with the failure to cleanup the cited accumulations, and he indicated that the entries had already been pinned (Tr. 119-120).

Inspector Franks stated that he was not present when the conditions were abated, but when he returned to the section the next day, the accumulations had been cleaned up, and he did not know how much material was loaded out (Tr. 133).

Inspector Franks believed that the cited accumulations constituted an "S & S" violation because people were on the unit, the intent of section 75.400 is to prevent the accumulation of combustibles, and that it is common knowledge that there have been three or four fires and explosions in mines in West Kentucky, and that they are caused by accumulations of combustibles (Tr. 114). He also relied on the fact that the mine liberates methane, and that the loaders, roof bolters, and shuttle cars operating in the section do have electrical trailing cables (Tr. 115).

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With regard to Citation No. 2338198, the respondent conceded that the conditions cited by Inspector Franks regarding the lack of roof support timbers constitutes a violation of its approved roof control plan and mandatory safety standard

section 75.200 (Tr. 145). Respondent asserted that it is only contesting the inspector's "S & S" finding, and that in the absence of any loose or dangerous roof conditions, respondent does not believe that the violation is "S & S" (Tr. 145).

Mr. Franks stated that there were a total of 200 required timbers which were not installed in all of the areas which he cited, and he believed it would take approximately one day to install 100 timbers (Tr. 154).

Mr. Franks confirmed that the roof areas where the violations occurred had been roof bolted, and he conceded that he observed no "abnormal" roof conditions or "anything that I thought was about ready to fall and kill anybody," although he did see some roof cracks (Tr. 150). When asked whether the cited conditions would result in an injury, he replied as follows (Tr. 150):

> A. I felt like the supply road is a--or an area that a lot of people's wide open into, and I--there's no problem with me saying to you that the supply--I felt more strongly about the supply road than I did the return, because I felt like that's where the people are exposed. The--so I believe that it's a--could be a very serious injury, and I also believe that a injury could occur from there, especially the supply road.

With regard to his "S & S" finding, Mr. Franks testified that while some areas along the supply road and belt tail had been timbered, the areas which he cited had been skipped and were not timbered. He indicated that belt workers and rock dusters had to travel the supply road, and that several areas along the supply road had been supported with roof cribs or truss bolts. Roof falls have occurred along the supply road, and he roof had some cavities in it (Tr. 146). However, the cited returns would not have as much traffic, but rock dusting and belt examinations have to be made in those areas, and an examiner would have to travel those areas at least once a week (Tr. 147). There were ten people working on the unit at the time the citation was issued (Tr. 149).

Inspector Franks conceded that he gave the respondent from March 8, 1984, to March 12, 1984, to abate the conditions, and in response to a question as to whether he was concerned that this was a long time to correct conditions which he

believed could result in injuries, Mr. Franks stated that he is required to fix a reasonable time for abatement, and that this had no bearing on any "S & S" finding (Tr. 151). Mr. Franks also confirmed that he did not stop normal mining operations, and that his definition of "S & S" is "whether an injury is reasonably likely to occur if the violation were not corrected" (Tr. 151).

Inspector Franks testified that it appeared to him that the respondent started timbering in the middle of the supply road, hoping that an inspector would not walk back and look at the areas which were not timbered. He admitted that this was speculation on his part, and since he could not prove that it was true, he could not cite an unwarrantable violation (Tr. 152-153).

MSHA Inspector George W. Siria confirmed that he issued Citations 2338768 and 2338769 on March 9, 1984, on the No. 2 long belt. Citation 2338768 was issued after he observed accumulations of loose coal and coal dust approximately two to four inches deep at "numerous locations" along the belt. He indicated that the belt is approximately 70 crosscuts long, but that he did not count the exact number of locations where he found the accumulations (Tr. 221).

Mr. Siria confirmed that his supervisor, Inspector Hill, accompanied him during his inspection and that Mr. Hill was "evaluating him." Mr. Siria indicated that he started on one end of the belt, and was accompanied by mine superintendent David Steele, and that Mr. Hill started at the other end, accompanied by respondent's safety director, Donald Lamb. The two inspection "teams" met "at some location making these two belts" (Tr. 221).

Mr. Siria stated that 33 "bad rollers" were found along the same belt, and that is why Citation No. 2338769 was issued. He defined "bad rollers" as "either they're worn in two or they're frozen rollers, which create a friction on a belt that could cause a fire" (Tr. 222).

Mr. Siria stated that he considered both citations together in making his findings that they were both "S & S" violations, and he stated that "if this had been allowed to continue this way and not be corrected, the loose coal and coal dust would build up to the rollers, if it wasn't corrected, and this would cause a--could very easily cause a mine fire" (Tr. 222). He confirmed that during a subsequent conference on the citations, he modified the citations to reflect that six persons, rather than 13, would be affected by the cited conditions (Tr. 223). He also indicated that the mine has a high velocity of air on the belt, and that in the event of a fire, it would be beyond control in a very short time (Tr. 225).

Mr. Siria testified that when he issued the citation, no one from mine management disputed his "S & S" finding. Although someone "probably" said something that the belt cleaner was supposed to clean the belt, he observed no one cleaning up any accumulations at the time of his inspection (Tr. 224), and no one advised him that anyone was in fact cleaning the belt (Tr. 226). Mr. Siria indicated that the accumulations were not "fresh," and he was of the opinion that they were present for more than two days (Tr. 230).

Mr. Siria conceded that he only walked 40 crosscuts along the belt which he cited, and that his supervisor, Mr. Hill, told him that he had observed accumulations of loose coal and coal dust along the remaining portion of the belt which he walked. Since the cited belts were two distinct belts, he and Mr. Hill discussed the possibility of issuing two separate citations, but since the belts "were in continuation," Mr. Hill believed that one citation would suffice (Tr. 226). The conditions that they both observed were incorporated in the one citation which Mr. Siria issued (Tr. 227). However, even if he were to disregard Mr. Hill's observations, Mr. Siria indicated that he would have still issued a citation for the accumulations which he personally observed (Tr. 230).

Mr. Siria conceded that he observed no belt rollers turning in coal dust at the time of his inspection. However, because of the high air velocity, had mining been allowed to continue, the accumulations would have reached the belt rollers because they are close to the mine floor (Tr. 228).

Mr. Siria stated that he is sure that someone was assigned to clean the belts, and he indicated that in a recent inspection of the belt "they're making a vast improvement on the belts, since the new superintendent took over" (Tr. 228).

Mr. Siria could not state how many belt rollers were stuck, or how many of them were worn (Tr. 229). He confirmed that he only observed 19 bad rollers, and that Mr. Hill observed the rest. He again explained that it was decided to incorporate their separate observations into the one citation which Mr. Siria issued (Tr. 236). Mr. Siria confirmed that Mr. Hill simply told him that "bad rollers" were present, but he could not recall the precise number given (Tr. 238).

Respondent's Safety Director, Donald Lamb, was called as a witness by the petitioner, and he testified as to the

events concerning Citation Nos. 2338768 and 2338769. Mr. Lamb confirmed that he was with supervisory Inspector Hill when he inspected one of the belts referred to in the citations issued by Mr. Siria. Mr. Lamb also confirmed that he observed the accumulations of coal and coal dust that Mr. Hill told Mr. Siria about, and while he did not know the number of bad rollers that Mr. Hill saw, Mr. Lamb did confirm that Mr. Hill brought these rollers to his attention (Tr. 286). In response to further questions, Mr. Lamb testified as follows (Tr. 287-288):

> Q. Would you agree that there was an accumulation of two to four inches in depth along--
>
> A. Yes.
>
> Q. Would you agree that there were some bad rollers?
>
> A. Yes.
>
> Q. Okay. Mr. Lamb, would you agree that there was a violation, in this case, along the number two unit belt?
>
> A. As a violation of loose coal or rollers?
>
> Q. A violation of loose coal and a violation with regard to 75.1725, the rollers?
>
> A. Yes.
>
> Q. Do you agree, that in both cases, a violation existed?
>
> A. I agree that there was loose coal, and I agree that there was stuck or bad rollers.

And, at (Tr. 289-291):

> JUDGE KOUTRAS: Did Mr. Hill discuss anything with you about the rollers or the accumulations? Did he bring them to your attention while you were walking along?
>
> THE WITNESS: Right.
>
> JUDGE KOUTRAS: And this didn't come as a complete surprise to you, did it, that Mr. Hill had made these observations?

THE WITNESS: No.

JUDGE KOUTRAS: He was--did he point out some rollers to you?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: Did he point out some accumulations to you?

THE WITNESS: Yes.

JUDGE KOUTRAS: And he'd point out these things to you. "There's a roller there. There's a roller there. And there's some accumulations." He told you that, did he not?

THE WITNESS: That's right.

JUDGE KOUTRAS: Did he tell you he was going to issue a citation?

THE WITNESS: No.

JUDGE KOUTRAS: Or that these conditions violated anything?

THE WITNESS: Yes.

JUDGE KOUTRAS: What did he tell you?

THE WITNESS: He said that he would--you know, that this was not right, and that it's going to have to be corrected.

JUDGE KOUTRAS: Okay. And then were you present when he met with Inspector Siria?

THE WITNESS: Right. We--we--

JUDGE KOUTRAS: You all met together. Right?

THE WITNESS: --came together. Right.

JUDGE KOUTRAS: And when you--you were present when the two of them decided that--that a citation should issue?

THE WITNESS: Yes.

JUDGE KOUTRAS: For both the rollers and the accumulations?

THE WITNESS: Right.

JUDGE KOUTRAS: You were there, right?

THE WITNESS: Right.

JUDGE KOUTRAS: And then Mr. Siria wrote both of these up and handed you a copy. Isn't that true? Your name's on the both of these. Did he serve these to you?

THE WITNESS: Yes.

JUDGE KOUTRAS: One each?

THE WITNESS: Right.

JUDGE KOUTRAS: Were you confused that--that these citations were issued to you? I mean, was there--let me back up a minute. Was there any question in your mind that the reason the citations were issued was because Mr. Siria and Mr. Hill, in combination, found similar conditions in the two areas that they had walked?

THE WITNESS: No. There was no confusion.

JUDGE KOUTRAS: No--there's no confusion, is there?

THE WITNESS: No, there wasn't.

Mr. Siria confirmed that he issued Citation No. 2338770 after finding that the number 2 unit belt head had no guards on the back side at the pickup and drive roller locations, and that the guards on the starting box side were not installed so as to prevent a person from being caught in the roller. Mr. Siria observed no one at the cited belt locations, but since the belt head was not dirty, he assumed that someone had been there to clean up (Tr. 253).

Mr. Siria explained that the guards which were installed on the starting box side of the belt head "wasn't up good enough and close enough, evidently, to prevent a person from reaching into it and being caught in the rollers" (Tr. 253). He indicated that there "were spaces where a person could reach in," but he could not state how much an opening was

present. Since the back side of the belt head was not guarded at all, and since he believed that someone would have access to the location from both sides, he did not believe that the size of any opening on the guarded portion of the belt head is significant (Tr. 254).

Mr. Siria explained how the belt head functions, and he believed that someone could become entangled in the takeup or tandem rollers, and that "a person could easily fall into it while they're shoveling" (Tr. 261). He was aware that persons have been injured in the past in such incidents (Tr. 261). He reiterated that he observed no one cleaning the belt head while it was moving (Tr. 262).

Mr. Siria stated that even if he had observed someone cleaning up while the belt was stopped, he would have still issued a citation. He conceded that it was possible that clean up could have been conducted while the belt was shut down and that no one would have been exposed to moving belt parts (Tr. 262). With regard to the back side of the belt which was not guarded at all, he conceded that the only person who would be there would be someone who was cleaning or greasing the belt head. In the event of any greasing, the belt should be shut down, or guarded and provided with a grease hose so that no one could come in contact with moving parts (Tr. 263).

Mr. Siria believed that the violation was "S & S" because "this was a dangerous situation, when the drive rollers are exposed to anyone doing anything" (Tr. 265). He confirmed that he recently investigated a fatality involving an individual who was killed while greasing a belt which had not been locked. The belt started up and it "run him off the belt, and killed him" (Tr. 265).

Mr. Siria stated that there was a walkway on both sides of the belt head, that the area has to be cleaned up, and that the respondent's cleanup program requires that this be done. Under these circumstances, he was of the opinion that the backside of the belt head was a location which was required to be guarded (Tr. 272-273). Mr. Siria believed that the walkway or travelway was approximately four feet from the unguarded belt head, but he could not state how much room a person would have to travel between the area from the rib to the belt head, and he indicated that "It really didn't matter how much space was there. What mattered to me was it wasn't guarded" (Tr. 276).

Respondent's Testimony and Evidence

Cheryl McMackin, Safety Manager, confirmed that she accompanied Inspector Franks when he issued Citations 2338191

and 2338192, concerning the missing and dislodged timbers. She described the work being done in the area, and she indicated that coal was not being produced at the time of the inspection. She was not aware of any "reportable" roof falls in the area on the day of the inspection, and she described the roof conditions as "average." She did not consider the roof to be "bad top," and in her opinion, the fact that some roof support timbers were missing along the cited locations was not serious and could not cause an accident (Tr. 156-158).

Ms. McMackin confirmed that people were working in the cited locations "setting steel beams and hauling timbers." She asserted that the timbers are difficult to maintain, particularly when the unit is active, and she speculated that the timbers were probably knocked out by scoops. She also indicated that respondent prefers to wait until the unit is idle before "catching up" and installing roof timbers (Tr. 160).

Ms. McMackin interpreted "reportable roof fall" to mean falls which block a miner's passage, impede ventilation, those which occur above the anchorage zone of the roof bolts, or those which cause injuries (Tr. 161). She conceded that one cannot totally predict when a roof fall will occur, and she observed nothing to indicate that a roof fall was about to occur.

Ms. McMackin insisted that the cited areas were not ignored, and she believed that since the area was on the main entrance to the mine, the required timbering would have been done as work progressed further in the area (Tr. 164). She later stated that while timbering was not taking place at the specific locations cited by Inspector Franks, timbers would have been installed on the unit in general. She also alluded to the fact that other entries had to be timbered, and that preparations were being made to "set steel" in the cited entry (Tr. 165).

With regard to Citation No. 2338192, concerning the 100 dislodged timbers in the No. 3 north-east mains entry, Ms. McMackin confirmed that she was with Inspector Franks when he served the citation. She indicated that the dislodged timbers were not in any one concentrated area, but were "here and there" along the 2,000 distance in question. She indicated that the timbers were dislodged by equipment traveling through the area, and she observed that "It's easier for them to knock them to get to do the job they do, rather than to go around them" (Tr. 167).

Ms. McMackin confirmed that the roof areas along the cited supply road and entries were roof bolted in accordance with the roof control plan, and she did not believe that the

violation was significant and substantial (Tr. 167). She also confirmed that people are specifically hired and assigned to reset dislodged timbers, and that this is done on each shift on a daily basis (Tr. 168).

Although she reiterated that she saw no roof falls along the cited supply road, Ms. McMackin stated that she did observe several locations where roof materials had fallen down, but she would not classify these as "roof falls" (Tr. 168). She also observed evidence of roof "sloughing, or small pieces of dry rock" (Tr. 168). Although she estimated that the dislodgement of the estimated 100 timbers may have occurred over a period of two to three days, it was possible that an estimated 200 timbers may have been dislodged had the work continued for four days, but she did not believe this was likely (Tr. 169).

Rodney Head, training instructor, testified that he has mine foreman's papers issued by the State of Kentucky. He confirmed that he was with Inspector Franks when he issued Citation No. 2338193, concerning the wide entries on the No. 3 unit. Mr. Head estimated that 40 cuts of coal would be taken on an average production day, and that each cut is about ten feet. He believed that the 25-foot entries which were driven 5 feet wider than permitted constituted one cut of coal in each location, but he did not believe that driving the entries an additional width of five feet would cause any injuries. He described the roof conditions in both entries as "average to good," and he saw no evidence of any roof failure, cracks, or fissures (Tr. 173, 175).

With regard to Citation No. 2338194, Mr. Head confirmed that he was with Inspector Franks during his inspection, and he described the area where they traveled (Tr. 177-178). Mr. Head testified that the area had been "flagged" or dangered off because the line of crosscuts had not been timbered off all the way across the entries, and that "flagging" was required until the area was supported (Tr. 179).

Mr. Head stated that the cutting machine had "technically" cut through the line of crosscuts, and that coal would be naturally be scattered across the ribs. When asked whether these were in fact the conditions which prevailed at the time the citation issued, he relied "That's part of it" (Tr. 180). He stated that the ventilation on the section was excellent, that no methane was found at the faces, and that no ignition sources were present (Tr. 180).

Mr. Head conceded that methane is liberated in all mines, and he confirmed that equipment had been operating and traveling through the areas where the accumulations were found. He

estimated that the accumulations were the result of four hours of coal cutting time, and he explained that they resulted from trimming the crosscuts as they are driven. He confirmed that his understanding of the citation indicated that the accumulations existed for a distance of 360 feet along the six cited entries, but in his opinion they were the result of the normal mining cycle (Tr. 186). He estimated that it would have taken about five hours to complete all six entries, and in response to further questions stated as follows (Tr. 188):

> JUDGE KOUTRAS: Now, let me understand again, Mr. Head, your contention is that these accumulations that the inspector cited resulted from the normal mining cycle, and that they had existed for approximately the number of--the amount of time it would have taken to punch through that, you said five hours, possibly less, and in the normal course of business, all these accumulations would have been cleaned up?
>
> THE WITNESS: Yes, sir.
>
> JUDGE KOUTRAS: Was all this explained to the inspector?
>
> THE WITNESS: I can't say that it was. No, sir. Because I don't remember having the conversation.
>
> JUDGE KOUTRAS: Do you recall him giving you the citation?
>
> THE WITNESS: Yes, sir.
>
> JUDGE KOUTRAS: But you don't recall any conversation that you may have had with him?
>
> THE WITNESS: No, sir, not at the time he issued me the citation.

Inspector Franks was called in rebuttal with respect to Citation No. 2338194, and he indicated that the cited entries had been "supported" by roof bolts, but not timbered, and the roof control plan only requires that roof bolts be maintained within three feet of the rib. In his view, at this stage of the mining cycle, the cited accumulations should have been cleaned up, and as far as he is concerned

the law does not permit accumulations of loose coal and coal dust to remain in the mine for any amount of time (Tr. 200-201). Mr. Franks indicated that his practice is to look at the last open crosscut to determine how deep the entries have been driven, and if he finds that they have gone 35 to 40 feet, he does not take any action. However, if he finds that the last line of crosscuts are dirty, and the face is 60 feet inby, and there is no indication that any attempt has been made to clean up "I begin to get a little bit disturbed" (Tr. 202). In the instant case, he believed that no one attempted to clean the last line of crosscuts, and he did not expect the respondent to clean "right up to the face" (Tr. 203).

In response to respondent's questions, Mr. Franks stated that he did not know where the loader was located, and he reiterated that he issued the citation because two 30-foot mining cycles had been completed 60 feet into the face without any cleaning up (Tr. 204).

Donald Lamb, Director of Safety and Training, confirmed that he accompanied Inspector Franks during his inspection of March 8, 1984, when he issued Citation No. 2338198, for failure to install roof support timbers at the cited locations. Mr. Lamb agreed with Mr. Franks' contention that the roof control plan required that the timbers be installed. Mr. Lamb could recall no roof falls in the supply road, and he did not believe that the cited conditions would have resulted in serious injuries if normal mining operations were to continue (Tr. 192). He confirmed that rock falls have occurred at some of the respondent's mines, but that none of them could be considered as massive roof falls (Tr. 192).

Mr. Lamb agreed that Inspector Franks' assertion that there were about 100 timbers missing in the supply road, and 100 in the return "would be about right" (Tr. 196). He also agreed that Mr. Franks was probably concerned over the fact that with the number of missing timbers which were not installed, the stability of the roof would be compromised (Tr. 197), and in response to further questions, indicated as follows (Tr. 197-198):

> JUDGE KOUTRAS: Do you agree with that's--that's, probably, why he found--found this one in particular to be S & S.
>
> THE WITNESS: Yes, sir.
>
> JUDGE KOUTRAS: Well, do you agree with his thinking on that, as the Safety Director or the Safety Manager, or--

THE WITNESS: Well--
JUDGE KOUTRAS: I mean, would you--put yourself in his shoes. Would you put up with a mine operator having 100 timbers missing here and 100 over there and 50 dislodged here and--notwithstanding the fact that the roof was bolted, there's absolutely no dribbling, and that it's as flat as this--the roof is in--in this hearing room we're having today. Would that be of some concern to you?

THE WITNESS: Yes, sir, it was.

JUDGE KOUTRAS: And--but yet you say that's not S & S.

THE WITNESS: Well, could I--

JUDGE KOUTRAS: Yes. Oh, sure.

THE WITNESS: The timbers weren't going to be left at that position, you know, laying down or dislodged. And in the return, room necks were going to be driven, and, you know, places back in that position or in that spot could have been left there in order to go back and drive in that entry instead of putting timbers in, you know. There's sometimes situations which, you know, at that time the timbers were going to be put in or room necks were going to be driven in that area.

JUDGE KOUTRAS: Well, what about this particular citation, where what he, apparently, found was that there'd been certain areas that had been skipped. I mean, if people are traveling in these areas that have been skipped, if I could use that term, doesn't the absence of the roof timbers there, necessarily affect the stability of the roof? In other words, you don't have additional support in these areas.

THE WITNESS: Right. Now the areas which he was saying was skipped, was in the return, and that would have been traveled, probably, by one person--

JUDGE KOUTRAS: Once a week.

THE WITNESS: --once a week.

JUDGE KOUTRAS: Okay. But even so, as to that one person, that could, possibly, cause a problem, couldn't it?

THE WITNESS: Yes.

All of the citations at issue in these proceedings were issued by the inspectors pursuant to section 104(a) of the Act, and in each instance the inspector made special findings that the cited conditions or practices constituted "significant and substantial" ("S & S") violations of the cited mandatory safety standards. Although the respondent has disputed some of the alleged fact of violations, and conceded others, it has contested and challenged all of the "S & S" findings made by the inspectors.

In support of the "S & S" findings, the inspectors relied on the guidelines established by the Commission's decision in Cement Division, National Gypsum Co., 3 FMSHRC 822, decided on April 7, 1981. One inspector also alluded to an MSHA memorandum issued by Acting Administrator Joseph A. Lamonica, issued shortly after the National Gypsum decision. Although the memorandum was not produced, and is not part of the record here, I believe the parties are aware of it, and that I may take official notice of its publication. It was issued on May 6, 1981, as CMS & H Memo No. 81-32-A (6033), and was directed to all MSHA Coal Mine Safety and Health District Managers, and it provides "guidelines" for determining whether a violation is "significant and substantial." I have included a copy in the case files for reference only, and have not relied on it to support any of my findings or conclusions with regard to the merits of the inspectors' "S & S" findings. My findings and conclusion in this regard are based on the evidence and testimony of record in these proceedings, as well as the precedent cases decided by the Commission, a discussion of which follow below.

The Commission first interpreted the statutory language "significant and substantial" in section 104(d)(1) of the Act in Cement Division, National Gypsum Co., 3 FMSHRC 822 (April 1981), where it held as follows at 3 FMSHRC 825:

> . . . [A] violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based on the

> particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.

In a subsequent decision issued on January 6, 1984, Mathies Coal Company, 6 FMSHRC 1 (January 1984), the Commission reaffirmed the analytical approach set forth in National Gypsum, and stated as follows at 6 FMSHRC at 3-4:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In U.S. Steel Mining Co., Inc., 6 FMSHRC 1573 (July 11, 1984), the Commission rejected the argument that any determination as to whether a significant and substantial violation exists should be limited solely to a consideration of the conditions as they existed at the precise moment of an inspection, and it reemphasized its holding in National Gypsym that the contribution of the violation to the cause and effect of a mine safety hazard is what must be significant and substantial.

In U.S. Steel Mining Company, Inc., 8 FMSHRC 1834 (August 1984), a case involving the failure by a mine operator to properly tag or otherwise identify certain trailing cable disconnecting devices, and the failure to properly secure an oxygen and acetylene cylinder, the Commission upheld Judge Broderick's findings that an accident or "incident" involving these cited conditions, as well as the resulting injury, was reasonably likely to occur. U.S. Steel did not contend that any injury occurring as a result of a trailing cable accident or the unsecured gas cylinders would not be of a reasonably serious nature. It's arguments centered on an assertion that the record before the Judge did not support his implicit findings that there was a reasonable likelihood that an accident and injuries would occur. At 8 FMSHRC 1836, the Commission noted in pertinent part as follows:

> As to the four elements set forth in Mathies, we note that the reference to "hazard' in the second element is simply a recognition that the violation must be more than a mere technical violation--i.e., that the violation present a measure of danger. See National Gypsum, supra, 3 FMSHRC at 827. We also note that our reference to hazard in the third element in Mathies contemplates the possibility of a subsequent event. This requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury. The fourth element in Mathies requires that the potential injury be of a reasonably serious nature.

Findings and Conclusions

Docket No. KENT 84-156--Fact of Violations

Citation Nos. 2338191 and 2338192

The evidence and testimony in this case supports the inspector's findings concerning the missing and dislodged timbers. Failure by the respondent to adhere to its roof control plan, including the supplement thereto, constitutes a violation of section 75.200. Further the failure by the respondent to replace the dislodged timbers in question constitutes a violation of section 75.202. Accordingly, I conclude and find that the petitioner has established both of these violations by a preponderance of the evidence, and both citations ARE AFFIRMED.

The respondent's arguments in defense of Citation No. 2338191, concerning the erroneous date reference made by Inspector Franks with regard to the supplemental roof control plan IS REJECTED. The inspector explained that his reference to the year as 1984, rather than 1983, was a mistake, and the fact that he did not modify or correct his citation in advance of the hearing is not critical and has not prejudiced the respondent. Respondent's representative Craft had an ample opportunity to cross-examine the inspector, and Mr. Craft candidly conceded that he had no reason to believe that the inspector relied on an erroneous supplemental plan (Tr. 151).

I conclude and find that both of these violations were significant and substantial. While it is true that the roof was bolted, the failure to maintain and install the additional

roof support timbers required by the roof plan impacts on the stability of the roof. The evidence establishes that miners were required to travel and work in the affected areas, and since respondent's witness McMackin indicated that the cited areas were on the main entrance to the mine, this would increase the exposure hazard and potential for injury in the event of a roof fall. While there was no evidence of any massive roof falls in the cited areas, the inspector described the roof as "uncertain" and testified as to a past roof fall next to a belt drive. He also alluded to several places where he observed broken roof and ribs in the belt and supply entries. Ms. McMackin described the roof conditions as "average," and conceded that roof falls are unpredictable.

Inspector Franks observed no timbering work being done at the time of his inspection, and Ms. McMackin conceded that the dislodged timbers were apparently caused by equipment running into the timbers and that "this was easier" than going around them. She also alluded to the fact that respondent prefers to wait for an idle shift before "catching up" on its timbering work. In these circumstances, it seems obvious to me that the respondent failed to pay closer attention to its roof support plan when it initially failed to install the required timbers, and when it failed to reinstall the 100 or so timbers which had been dislodged. Given the roof conditions, and the fact that timbers were missing and dislodged, there existed a hazard of a possible roof fall in the cited locations. Further, given the fact that mantrips and miners traveled and worked in the cited areas, there is a reasonable likelihood that any fall of roof or rock would have inflicted injuries of a reasonably serious nature to the miners required to travel and work in the areas where the additional required roof support was lacking. Accordingly, the inspector's "S & S" findings as to both citations ARE AFFIRMED.
Citation No. 2338194

In defense of this citation, Mr. Craft argued that the respondent was following an MSHA approved cleanup program (Tr. 113, 116; exhibits R-1 and R-2). In support of this argument, Mr. Craft asserted that because of the amount of impurities in the coal, management would prefer to leave the coal along the ribs until the end of the 24-hour production shift, and then cleanup and load it out at the end of the shift (Tr. 121-122).

Mr. Craft acknowledged the fact that MSHA had advised the respondent that it does not approve mine cleanup programs of this kind, and that once the exchange of correspondence had taken place, the respondent simply filed the letters. He also acknowledged the fact that once this was done, the accumulations were allowed to exist until the end of the shift, and that the respondent made no attempts to hide anything (Tr. 123). In defense of this action, Mr. Craft asserted that since section 75.400-2, provides for cleanup programs, and since MSHA did not specifically approve or disapprove of the cleanup program in question, MSHA's silence could be relied on by the respondent as "implied consent" or approval of the plan (Tr. 124).

Mr. Craft argued further that the respondent should have been allowed 24 hours to cleanup the accumulations, and that since there is no evidence that the accumulations were not present for more than this period, the respondent was in compliance with its own cleanup program (Tr. 135). He also asserted that the cleanup program was "kept available" at the mine, but he did not know whether it was shown to Inspector Franks, or whether he asked for it (Tr. 136).

Inspector Franks testified that he did not cite the respondent for a violation of any cleanup program, and he confirmed that when he issued the citation he was not aware of the existence of any such program (Tr. 117).

The inspector's testimony with respect to the cited accumulations has not been rebutted by the respondent. As a matter of fact, respondent's witness Rodney Head agreed that the accumulations existed for a distance of 360 feet across the six entries in question, and he estimated that they remained there for approximately five hours. He considered the accumulations to be the result of the normal mining cycle, and he indicated that they would have been cleaned up in the normal course of business. He confirmed that he did not discuss the citation with Inspector Franks, and did not explain the circumstances concerning the accumulations (Tr. 188).

The respondent's reliance on the location of the loader and the existence of a mine cleanup program as a defense to the citation ARE REJECTED. Respondent has not established the significance or relevance of the location of the loader. As for the cleanup program, I believe it is clear that MSHA did not approve any plan that permitted the respondent to cleanup at any 24-hour intervals. Although section 75.400-2,

requires an operator to establish and maintain a program for regular cleanup and removal of coal accumulations and other combustibles, it does not require that any plan formulated by the operator be reviewed in advance and approved by MSHA. The regulation only requires that the plan be "made available" to MSHA or one of its inspectors. From an enforcement view, while I believe it makes little sense to require an operator to formulate a plan, with no MSHA oversight for its review and approval prior to adoption, I am constrained to follow the regulation as promulgated.

Section 75.400, requires that loose coal and coal dust be cleaned up and not permitted to accumulate. On the facts of this citation, the petitioner has established by a preponderance of the evidence that the cited accumulations existed for at least two mining cuts over a period of four or five hours, and that there was no evidence of any cleanup efforts being made by the respondent. Under the circumstances, I find that a violation has been established and the citation IS AFFIRMED.

I cannot conclude that the petitioner has established by any credible evidence that this violation was significant and substantial. Inspector Franks testified that in making his "S & S" finding he relied on the fact that the intent of section 75.400 is to prevent the accumulations of combustibles, that people were on the unit, that such accumulations cause mine fires and explosions, and that it is common knowledge that such incidents have occurred in mines in West Kentucky. He also alluded to the fact that the mine liberates methane, and that mine equipment with trailing cables would have been operating on the unit. In my view, such generalized statements may be made of any mine, and any such cited accumulations violation would automatically result in an "S & S" finding by the inspector.

On the facts here presented, Inspector Franks had no reason to believe that the area was not adequately rock dusted, and he saw no equipment in operation in the area. Further, while it may be true that coal accumulations present a potential for a fire if not removed or cleaned up while in the presence of, or exposed to potential ready sources of ignition, there is no evidence that such ignition sources were present. Although the inspector alluded to the fact that the area had been traveled through, and that loaders, bolters, and shuttle cars are equipped with electrical trailing cables, there is no evidence to support a conclusion that this equipment was not in compliance with any applicable

permissibility standards, or that there was anything wrong with the trailing cables or other electrical components. Further, there is no evidence concerning the lack of appropriate fire suppression devices, or the presence of any ready ignition sources. In addition, the petitioner has not rebutted the testimony by respondent's witness Head that the cited areas had been "flagged," that no methane was detected at the faces, and that the ventilation was excellent.

Inspector Franks candidly admitted that he was disturbed over the fact that the accumulations had not been cleaned up, and he apparently believed that section 75.400 requires that accumulations be removed from the mine immediately as they accumulate and the regulation does not allow them to remain for any amount of time. Although I have sustained that fact of violation on the ground that the accumulations existed as described by the inspector, and that they were allowed to accumulate for at least two cuts without any cleanup efforts, I cannot conclude that the inspector's "S & S" finding is supportable. In short, I cannot conclude that the petitioner has established that there were any ignition sources present which presented a reasonable likelihood of a hazard. Accordingly, the inspector's "S & S" finding IS REJECTED.

Citation No. 2338193

The cited conditions concerning the wide entries in question are supported by the testimony of Inspector Franks. Further, although the respondent disputed the inspector's "S & S" finding, it conceded that the wide entries constituted a violation of the roof control plan and section 75.200 (Tr. 83-84).

During the course of the hearing, Mr. Craft alluded to an MSHA policy interpretation and application of the term "excessive widths" as found in section 75.201. He quoted a portion of the policy indicating some 12 inch "tolerance" allowance for wide entries, and pointed out that the reference to "excessive widths" refers to those which are "prevalent or caused by poor mining practices." Mr. Craft implied that these policy interpretations afford him a defense to the citation (Tr. 92-93).

The respondent's arguments in defense to the citation ARE REJECTED. The respondent is charged with a violation of section 75.200, which requires that it follow its approved roof control plan. The applicable plan provision provided for entries to be driven no wider than 20 feet. The cited entries here were driven for widths of 25 feet. Under the circumstances, I conclude and find that the violation has been clearly established, and the citation IS AFFIRMED.

Inspector Franks conceded that he had no reason to believe that cutting the entries wider than permitted by the roof control plan was a common practice, or that the existence of such wide entries was prevalent on the section where the violation occurred. Further, the record reflects that abatement was achieved immediately by installing additional timbers to narrow the entries to the required widths. Inspector Franks issued the citation at 10:45 a.m., and abatement was achieved by 11:30 a.m. that same day. Given these circumstances, driving the two entries for an additional width of five feet at the two cited locations for a distance of some ten feet was not extensive, and it does not appear that many additional timbers had to be installed to reduce the otherwise supported entries to the required roof control plan widths. There is no evidence as to how long the condition existed, and the inspector was unaware of any roof falls in the mine caused by cutting wide entries. Further, there is no evidence as to the condition of the roof areas at the cited locations, nor is there any evidence that those locations were not roof bolted or otherwise supported.

In support of his "S & S" finding, Inspector Franks alluded to an accident report concerning a past roof fall, and he also mentioned some past violations of the roof control plan. However, there is nothing of record detailing all of these events, nor has any connection been established between those past events and the conditions cited by the inspector in this case. The inspector's reference to a prior roof fall accident is contrary to his testimony that any such falls have been caused by cutting wide entries. Absent any credible information as to all of these past events, I conclude and find that they are too speculative and general to support any "S & S" finding. Accordingly, I cannot conclude that the petitioner has established that this violation is significant and substantial, and the inspector's finding IS REJECTED.

Docket No. KENT 84-168

Fact of Violation--Citation No. 2338198

Although the respondent contested the inspector's "S & S" finding, it conceded that the lack of roof support timbers constituted a violation of the roof control plan and section 75.200 (Tr. 145), and it has not rebutted the inspector's testimony in this regard. Accordingly, the citation IS AFFIRMED.

The record establishes that while the roof was bolted, there were about 200 roof support timbers which had not been installed in accordance with the roof control plan at the

cited entries along a supply road. Although the missing timbers were not concentrated in one particular area and were at intermittent locations along the supply road at the locations described by the inspector, the missing timbers were at places where belt examiners and rock dusters had to travel and work. Further, while the inspector did not believe that the roof conditions were "abnormal," and saw no signs of any immediate roof falls, he did testify that there had been some roof falls along the supply road in question and that he observed some roof cracks and cavities in the roof areas which he cited.

The respondent's safety director Lamb did not disagree that the Inspector was concerned that the 200 missing roof support timbers compromised the stability of the roof along the roadway He also agreed with the inspector's assessment that at least one person would be exposed to a hazard of a roof fall in one of the cited areas which were "skipped" and not supported by the required additional roof support timbers, and that this would pose a "problem."

Given the fact that some 200 roof support timbers were not installed along a supply road where miners were expected to travel and work, I conclude and find that roof fall hazard existed along the cited supply road in question, and that in the event of such a fall it was reasonably likely that the miners who traveled that road would suffer injuries of a reasonably serious nature. Accordingly, the inspector's "S & S" finding IS AFFIRMED. Citation Nos. 2338768 and 2338769

In defense of these citations, Mr. Craft asserted that some of the conditions described by Inspector Siria on the face of the citation forms with respect to the cited coal accumulations and "bad rollers" were not in fact observed by Mr. Siria, but were purportedly observed by Mr. Siria, but were purportedly observed by his supervisor, Inspector Hill. Mr. Craft stated that Mr. Siria relied on what Mr. Hill told him, and simply incorporated these purported observations as part of the citations which he issued (Tr. 232-233). Mr. Craft pointed out that Inspector Hill did not testify, and that he did not co-sign the citation forms (Tr. 234).

Mr. Craft's assertions regarding Inspector Hill's involvement with the citations are correct. I believe that any inspector, supervisor or not, should sign any citation which is jointly issued, and he should be prepared to support his conclusions that a violation has occurred. However, on the facts of this case, I cannot conclude that Mr. Hill's failure to sign the citation forms renders them procedurally defective. Further, I cannot conclude that Mr. Hill's failure to testify has prejudiced the respondent, and my reasons in this regard follow.

Respondent's safety director Lamb confirmed that he accompanied Inspector Hill during his inspection of the belt, and observed the same cited accumulations and bad rollers that Mr. Hill observed. Mr. Lamb candidly conceded that these conditions constituted violations of section 75.400 and 75.1725, and he agreed that the rollers were "stuck or bad," and that he was not surprised or confused by the citations (Tr. 287-288; 291).

Mr. Craft conceded that even if I were to strike down the portions of the citations attributable to Mr. Hill, the remaining conditions described by Mr. Siria support the violations (Tr. 244-245). He also commented that "if George (Siria) said it was there, it was there," and "I'm not questioning George" (Tr. 244-245).

With regard to the belt rollers citation, Mr. Craft pointed out that section 75.1725, requires an inspector to immediately remove unsafe equipment from service. He also pointed out that Inspector Siria gave the respondent three days to abate the cited conditions, and eventually terminated the citation a week later. Since the inspector did not immediately shut down the belt, and permitted the conditions to exist for about a week before terminating the citation, Mr. Craft implied that a violation has not been established, and that the inspector's "S & S" finding is not supportable.

The respondent's arguments in defense of the roller citation are rejected. The standard requires that stationary machinery and equipment such as belts and its component parts be maintained in safe operating condition. While it is true that the inspector did not order that the belt be taken out of service, it apparently was not running when he viewed it, and he saw none of the rollers turning in the coal accumulations. I take note of the fact that the citation was issued on a Friday, and the inspector fixed the abatement time as 8:00 a.m., the next Monday. Assuming the mine did not operate over the weekend, I find nothing to suggest that the inspector acted unreasonably, and the fact that he terminated the citation a week later tells me absolutely nothing. There is nothing of record to establish precisely when the belt rollers were replaced, and it is altogether possible that this work was done on the day fixed for abatement.

Although it is true that the inspector simply described the rollers as being "bad," and speculated that they were either "worn" or "frozen," respondent's safety director (Lamb), conceded the violation, and he confirmed that Inspector Siria's supervisor (Hill), pointed out the bad roller conditions to him. Although Mr. Lamb did not know

precisely how many rollers were bad, he did not seriously dispute Mr. Siria's guess that there were a total of 33 bad rollers. Mr. Lamb agreed that the cited rollers were "stuck or bad" (Tr. 288), and the rollers were replaced. Under the circumstances, I conclude and find that "bad," "worn," "stuck," or "frozen" rollers affect the safe operation of a belt, particularly where the belt rollers are in close proximity to accumulations of coal or coal dust, and failure to replace the defective rollers supports a conclusion that the belt was not maintained in a safe operating condition as required by section 75.1725.

In view of the foregoing, I conclude and find that the petitioner has established that the coal accumulation and bad roller conditions described on the face of the citations, including those attributable to Inspector Hill, did in fact exist, and that the violations occurred. Accordingly, both citations ARE AFFIRMED.

Although the inspector observed none of the stuck or bad rollers turning in the accumulated coal and coal dust under the belt, these rollers were a potential ignition source. The inspector's testimony that had the belt continued to be operated, the accumulations would have become worse and would have reached the rollers which were in close proximity to the mine floor remains unrebutted. His testimony that the high veolcity of air on the belt line would "fan" a fire if one broke out, also remains unrebutted. The combination of bad rollers and coal accumulations along a belt line where the present air velocity is high presents a serious potential for a mine fire. Under the circumstances, I conclude and find that there was a reasonable likelihood of a fire hazard caused by defective rollers turning in coal accumulations, and that a fire would have endangered at least six miners who were on the section. Although the inspector should have detailed or noted how many defective rollers existed along the portions of the belt which he examined, and how many were present along the portion inspected by his supervisor, the fact is that the accumulations and bad rollers existed along both belt portions which were combined into two citations, and I conclude and find that the hazards were equally present along the continuous belt locations which were cited. Accordingly, the inspector's "S & S" findings as to both citations ARE AFFIRMED.

Citation No. 2338770

Mandatory safety standard section 75.1722(a), requires that all belt heads, including similar exposed moving machine

parts, which may be contacted by persons, and which may cause injury, be guarded. Subsection (b) requires that any guards which are in place at such a location shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley. Subsection (c) rquires that the guards are securely in place while the machinery is being operated, except in those instances where testing is being performed.

The respondent has not rebutted Inspector Siria's assertions that the number 2 unit belt head was unguarded at one location, and that the guard at the second cited location was inadequate in that it was not installed so as to prevent a person from being caught in the roller. Mr. Siria testified that the belt head was readily accessible to any belt shoveller or greaser, and that there was a travelway on both sides which provided access to the cited locations.

Mr. Siria's undisputed testimony is that the existing guard had some spaces or openings which would not prevent anyone from reaching in any getting caught in the belt rollers. Although he could not document the precise measurements of these openings, he believed that anyone could easily become entangled in the takeup rollers while cleaning or greasing the belt head. Although he conceded that he observed no one cleaning or greasing the belt head while it was moving, and that he did not know that the belt is in fact shut down when this work is done, he believed that someone was at the cited location because the belt head area had been cleaned up in accordance with the respondent's cleanup program, and there was no grease fitting or hose to facilitate greasing the belt head from a safe distance. All of these factors led him to conclude that someone had been the area doing this work, and that they were exposed to a potential injury near the unguarded and inadequately guarded locations.

During the course of the hearing, Mr. Craft argued that at the time the inspector viewed the cited conditions no one was exposed to any moving machine parts, and there is no evidence that the belt was running. Conceding the fact that a belt which is running necessarily involves "moving machine parts," and that a violation would occur if a guard is missing or inadequate, Mr. Craft suggested that a belt which is not running, and therefore has no "moving parts," does not expose anyone to any hazard (Tr. 267-269). Mr. Craft took the position that the cited belt head location would be required to be guarded "If there was anybody exposed to moving parts" (Tr. 269).

In a case involving the guarding requirements of section 77.400(a), a surface mining standard containing language identical to section 75.1722(a), the Commission affirmed a Judge's finding of a violation, and stated as follows in Secretary v. Thompson Brothers, 5 FMSHRC ---- (September 24, 1984), slip op. pg. 4:

> The standard requires the guarding of machine parts only when they "may be contacted' and "may cause injury.' Use of the word "may' in these key phrases introduces considerations of the likelihood of the contact and injury, and requires us to give meaning to the nature of the possibility intended. We find that the most logical construction of the standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. In related contexts, we have emphasized that the constructions of mandatory safety standards involving miners' behavior cannot ignore the vagaries of human conduct. See, e.g., Great Western Electric, 5 FMSHRC 840, 842 (May 1983); Lone Star Industries, Inc., 3 FMSHRC 2526, 2531 (November 1981). Applying this test requires taking into consideration all relevant exposure and injury variables, e.g., accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct. Under this approach, citations for inadequate guarding will be resolved on a case-by-basis.

Mr. Craft's arguments in defense of the citation are rejected. While the fact that the belt was not operating at the time the inspector observed the condition, and he observed no one in the area, may mitigate the gravity of the violation, I reject any notion that the inspector must first observe the belt in operation before he can cite a violation of section 75.1722. On the facts of this case, the inspector's testimony supports a strong inference that someone had been in the cited locations, and that in the normal course of mining, the belt would be running. While it is true that the inspector had no way of knowing whether any cleaning or greasing had in fact taken place while the belt was locked out or running, the respondent in this case offered no testimony or evidence on this citation and has not rebutted the inspector's testimony. I conclude and find that the petitioner has established a violation of section 75.1722, and the citation IS AFFIRMED.

The inspector's testimony concerning the inadequate guarding at one belt head location, and the total lack of guarding at the second location remains unrebutted. Given the proximity of the exposed unguarded belt head machine parts and rollers, and the fact that they were apparently readily accessible to anyone who may have been in the area, I conclude and find that petitioner has established that a hazard was present and that someone cleaning or servicing the belt could have become entangled in the unguarded rollers. In this event, I further conclude and find that it was reasonably likely that a person contacting these unguarded parts could suffer serious injuries. As the Commission stated in Secretary v. Thompson, supra, the guarding standard "imports the concepts of reasonable possibility of contact and injury; including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." Accordingly, the inspector's "S & S" finding IS AFFIRMED.

Additional Findings and Conclusions. Dockets KENT 84-156 and KENT 84-168.

Negligence

I conclude and find that the respondent in both of these proceedings knew or should have known of the violative conditions cited by the inspectors, and that its failure to take corrective action before the inspectors found the conditions is the result of its failure to exercise reasonable care.

Gravity

All of the conditions and practices cited in these proceedings concern violations of mandatory safety standards dealing with roof control, accumulations of combustible coal and coal dust, and equipment guarding. I conclude and find that they are all serious violations, including the ones which were found to be non-"S & S".

Good Faith Abatement

The parties stipulated that all of the conditions and practices cited as violations were corrected by the respondent within the time fixed by the inspectors. I agree, and I conclude that the respondent exercised good faith in abating the violations.

Size of Business and Effect of Civil Penalties on the Respondent's Ability to Continue in business.

The parties are in agreement that at the time the citations were issued, the mine in question had an annual production of 379,316 tons, and that Pyro Mining Company had an overall coal production of approximately three million tons. I conclude that the civil penalties assessed by me in these proceedings will not adversely affect the respondent's ability to continue in business.

History of Prior Violations

Exhibit P-1, is a computer print-out summarizing the mine compliance record for the period January 1, 1983 through February 20, 1984. That record reflects that the respondent paid civil penalty assessments totalling $1,874 for 53 section 104(a) citations issued at the mine. Nine of the prior citations were for violations of the roof control requirements of section 75.200 and section 75.202; 16 were for violations of the clean up requirements of section 75.400; and one was for a violation of the guarding requirements of section 75.1722. I take particular note of the fact that with the exception of four of the section 75.400, citations, the remaining 22 citations were all "single penalty" violations for which the respondent paid penalties of $20 each.

For an operation of its size, I do not consider the prior history of violations to be particularly bad. However, since most of the prior citations for the year or so in question deal with roof control and clean up, it seems obvious to me that the respondent needs to pay closer attention to these conditions.

MSHA's civil penalty criteria found in 30 C.F.R. 100.3(c), states that "violations which receive a single penalty assessment under 100.4 and are paid in a timely manner" will not be included as part of its computation of the mine operator's history of prior violations. Since I am not bound by these regulations, I have considered all of the citations shown on the computer print-out as part of the respondent's history of compliance, and I reject any notion that they may be ignored.
Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, the following civil penalties are assessed by me for the citations which have been affirmed:

Docket No. KENT 84-156

Citation No.	Date	30 C.F.R. Section	Assessment
2338191	2/21/84	75.200	$ 100
2338192	2/21/84	75.202	125
2338193	3/6/84	75.200	50
2338194	3/6/84	75.400	85
			$ 360 Total

Docket No. KENT 84-168

Citation No.	Date	30 C.F.R. Section	Assessment
2338198	3/8/84	75.200	$ 200
2338768	3/9/84	75.400	175
2338769	3/9/84	75.1725	175
2338770	3/9/84	75.1722	75
			$ 625 Total

ORDER

The respondent IS ORDERED to pay the civil penalties assessed by me in these proceedings within thirty (30) days of the date of these decisions. Payment is to be made to MSHA, and upon receipt of same, these proceedings are dismissed.

George A. Koutras
Administrative Law Judge